No. _____

OCTOBER TERM 2019

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD KNIGHT,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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April 20, 2020

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ATTACHMENT A

936 F.3d 1322
United States Court of Appeals, Eleventh Circuit.

Richard KNIGHT, Petitioner-Appellant,
v.
FLORIDA DEPARTMENT OF CORRECTIONS, Respondent-Appellee.

No. 18-13390
|
(August 30, 2019)

Synopsis
Background: Following affirmance of conviction and death sentence for first degree murder of his cousin's girlfriend and her daughter, and denial of state habeas claims, defendant petitioned for federal habeas relief. The United States District Court for the Southern District of Florida, No. 0:17-cv-61921-RNS, Robert N. Scola, J., denied petition. Defendant appealed.

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

as a matter of first impression, Supreme Court's decision that Florida's death penalty sentencing scheme violated the Sixth Amendment announced a new constitutional rule, as would support finding that decision did not apply retroactively;

Supreme Court's decision that Florida's death penalty sentencing scheme violated the Sixth Amendment announced a procedural rule, and not a substantive one, such that exception to nonretroactivity for holdings that create substantive rules did not apply;

state court's factual determination that trial counsel's decision not to call DNA expert was a matter of trial strategy could not support ineffective assistance of counsel claim;

state court reasonably applied *Strickland* in concluding that trial counsel's decision not to call equivocal DNA expert was well within the wide range of reasonably competent performance; and

state court's conclusion that defendant failed to establish prejudice was not an unreasonable application of *Strickland*.

Affirmed.

Attorneys and Law Firms

***1328** Todd Gerald Scher, Law Office of Todd G. Scher, PL, DANIA BEACH, FL, for Petitioner - Appellant.

Lisa-Marie Lerner, Attorney General's Office, WEST PALM BEACH, FL, Pam Bondi, Attorney General's Office, TALLAHASSEE, FL, for Respondent - Appellee.

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 0:17-cv-61921-RNS

Before TJOFLAT, JORDAN, and GRANT, Circuit Judges.

Opinion

GRANT, Circuit Judge:

Richard Knight, a Florida prisoner sentenced to death for the murders of Odessia Stephens and her daughter, Hanessia Mullings, appeals the district court's denial of his federal habeas corpus petition. At this stage—almost 20 years after the crimes were committed and more than a decade after a Florida jury found **Knight** guilty of the murders and recommended a death sentence—**Knight**'s claims have been winnowed down to two: first, that his death sentence is invalid under *Hurst v. Florida*, ––– U.S. ––––, 136 S. Ct. 616, 193 L.Ed.2d 504 (2016), and second, that he received ineffective assistance of counsel at trial. Because *Hurst* does not apply retroactively to **Knight**, any challenge to his death sentence on that basis is beyond our reach on federal habeas review. Nor can **Knight** find success in his other challenge; the Florida Supreme Court's rejection of his ineffective-assistance claim was not an unreasonable application of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). We therefore affirm.

I.

A.

According to evidence introduced at his murder trial, Knight lived in an apartment with his cousin, Hans Mullings, and Hans's girlfriend, Odessia. Hans and Odessia's four-year-old daughter, Hanessia, also lived with them in the apartment.

Odessia was tired of supporting Knight and one evening while Hans was out she argued with Knight, insisting that he move out the next day. After the argument got heated, Knight left the house to walk around. But as he later confessed to another inmate, instead of getting less angry with Odessia ***1329** once he got some air, Knight became increasingly irate. He returned to the apartment and after exchanging more words with Odessia, he got a knife from the kitchen. When he went back to the master bedroom, he found Odessia and her little girl in the bed. He began stabbing Odessia and continued his attack until she stopped resisting and curled up on the bedroom floor. He then moved on to little Hanessia, stabbing her until his knife broke and cutting his hand in the process. As he was leaving the bedroom, he heard "popping noises" from where Hanessia lay on the floor, and he thought that the little girl was "drowning in her own blood." Apparently not considering his revenge complete, he retrieved a second knife from the kitchen and returned to continue his attack on Odessia. In the meantime, Odessia had crawled from the bedroom to the living room, where she had collapsed. Knight turned her over, saw that she was still alive, and started stabbing her again.

Both Odessia and Hanessia died that night. In total, Odessia had 21 stab wounds, including 14 in the neck, 24 puncture or scratch wounds, bruising and ligature marks consistent with having been hit and strangled with a belt, defensive wounds, and bruises from being hit or punched in the mouth and head. Little Hanessia had four stab wounds in her upper body and neck, a deep defensive wound on her hand, bruises on her neck consistent with manual strangulation, and bruises on her arms consistent with having been grabbed.

Knight showered and changed after completing his brutal acts, then headed to the living room with a rag to wipe off the knives. Interrupted by a knock on the front door—it was police responding to a neighbor's 911 call—Knight ran to his room and climbed out the window.

Shortly after they arrived, police encountered Knight near the apartment. He told them that he lived there, but that he did not have a key. This was odd; the officers had already found that all the doors to the apartment were locked. Knight was also visibly wet—but it was not raining. Knight explained to police that he had been jogging, a remarkable contention from a person who was wearing long pants and dress shoes. He did not appear to be sweating, in any event. And Knight's personal appearance subsequently revealed even more clues—he had blood on the back of his shirt, scratches on his chest and midsection, a scrape on his shoulder, and fresh cuts on his hand.

Knight was arrested and indicted for two counts of first-degree murder. A Florida jury found him guilty as charged. That same jury heard evidence and argument at the penalty phase and unanimously recommended two death sentences—one for each murder. Consistent with Florida's then-current death penalty sentencing procedure, the judge held an additional hearing, made his own findings regarding aggravating and mitigating circumstances, and sentenced Knight to death. The Florida Supreme Court affirmed Knight's convictions and sentences on direct appeal. *Knight v. State*, 76 So. 3d 879, 890 (Fla. 2011). The United States Supreme Court denied his petition for certiorari. *Knight v. Florida*, 566 U.S. 998, 998, 132 S.Ct. 2398, 182 L.Ed.2d 1038 (2012).

B.

Knight filed motions for state collateral relief raising the two claims at issue here, as well as others that have already been resolved. Specifically, he argued that the state court should vacate his death sentence in light of *Hurst v. Florida*, in which the Supreme Court held—four years after Knight's conviction was final—that Florida's death penalty sentencing scheme violated the Sixth Amendment. ***1330** 136 S. Ct. at 622. The problem identified by the Supreme Court in *Hurst*, and argued by Knight in his post-conviction pleadings, was that the jury's role in sentencing was to make a non-binding recommendation; the judge alone made the ultimate findings of fact necessary to impose the death penalty. *Id.* at 619, 621–22. Knight also argued that his guilt-phase counsel was constitutionally ineffective for failing to call an available DNA expert.

The Florida Supreme Court rejected his postconviction claims on the merits. *Knight v. State*, 225 So. 3d 661, 668 (Fla. 2017) (per curiam). A plurality of the court agreed with Knight that the sentencing procedure used in his case violated the Sixth Amendment under *Hurst*, but also concluded that the *Hurst* error was harmless. *Id.* at 682. The plurality explained that under the facts of Knight's case the penalty-phase jury had necessarily made the factual findings necessary to impose the death penalty—that "sufficient aggravators existed" and that "the aggravation outweighed the mitigation"—when it returned a unanimous vote recommending death. [1] *Id.* at 682–83 (citation omitted). As for his ineffective-assistance claim, the court held that Knight had failed to meet his burden under *Strickland* because he had not shown that his attorney's decision not to call his DNA expert constituted deficient performance, or that there was any reasonable probability that that decision negatively affected the outcome of his trial. *Id.* at 673–74.

1 Three out of seven justices joined the opinion on Knight's *Hurst* claim. Two additional justices concurred in the result only. *Knight*, 225 So. 3d at 684.

C.

Knight filed a petition for federal habeas review in the Southern District of Florida, pursuant to 28 U.S.C. § 2254. The district court denied relief but granted a certificate of appealability on the two claims now before us.

II.

A.

Federal courts may grant habeas corpus relief to prisoners who are being detained "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §§ 2241(c)(3); 2254(a). But our authority to award this kind of relief to state prisoners is limited—by both statute and Supreme Court precedent.

First, the Antiterrorism and Effective Death Penalty Act (AEDPA) limits our authority to award habeas relief. A federal court may not grant a state prisoner's habeas petition on any issue that was decided on the merits by the state court unless the state court's ruling "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). And as the Supreme Court has explained, "clearly established" federal law means "the holdings, as opposed to the dicta" from its controlling precedents at the time of the relevant state court decision. *Lockyer v. Andrade*, 538 U.S. 63, 71, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)).

A decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable ***1331** facts." *Williams*, 529 U.S. at 413, 120 S.Ct. 1495. A state court decision involves an unreasonable application of federal law "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* To justify issuance of the writ under the "unreasonable application" clause, the state court's application of Supreme Court precedent must be more than just wrong in the eyes of the federal court; it "must be 'objectively unreasonable.' " *Virginia v. LeBlanc*, ––– U.S. ––––, 137 S. Ct. 1726, 1728, 198 L.Ed.2d 186 (2017) (quoting *Woods v. Donald*, ––– U.S. ––––, 135 S. Ct. 1372, 1376, 191 L.Ed.2d 464 (2015)); *see also Bell v. Cone*, 535 U.S. 685, 694, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002) (explaining that "an unreasonable application is different from an incorrect one.").

Second, Supreme Court precedent demands that in any federal habeas proceeding—including collateral proceedings in capital cases—where the petitioner seeks the benefit of a "new" rule of constitutional law, we must first determine whether the rule actually qualifies as new, and then whether that rule applies retroactively to the case. *See Teague v. Lane*, 489 U.S. 288, 300–01, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion); *Penry v. Lynaugh*, 492 U.S. 302, 313–14, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (stating that the retroactivity approach from *Teague* applies in capital cases), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304, 312–16, 321, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). In most cases, we cannot disturb a state conviction based on a constitutional rule announced after a conviction became final. *Teague*, 489 U.S. at 310, 109 S.Ct. 1060. Only two narrow exceptions pierce this general principle of nonretroactivity: new rules that are "substantive rather than procedural," and "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Schriro v. Summerlin*, 542 U.S. 348, 352–53, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004) (internal quotation marks and citations omitted). In all other cases the rule applies only prospectively.

What this means in plain English is that, in the vast majority of cases, prisoners will not be able to secure federal habeas relief based on a new constitutional rule—even when that rule runs in their favor. "This is but a recognition that the purpose of federal habeas corpus is to ensure that state convictions comply with the federal law in existence at the time the conviction became final, and not to provide a mechanism for the continuing reexamination of final judgments based upon later emerging legal doctrine." *Sawyer v. Smith*, 497 U.S. 227, 234, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990).

Though these two constraints—the rule of nonretroactivity set out in *Teague* and the deference to state court decisions mandated by AEDPA—are similar in some respects, they are nonetheless "quite separate" in their operation, and a state prisoner seeking federal habeas relief must clear both hurdles to succeed. *Greene v. Fisher*, 565 U.S. 34, 39, 132 S.Ct. 38, 181 L.Ed.2d 336 (2011). Accordingly—and the Supreme Court has made this clear—"in addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state." *Horn v. Banks* (*Banks I*), 536 U.S. 266, 272, 122 S.Ct. 2147, 153 L.Ed.2d 301 (2002) (per curiam).

B.

Before conducting that analysis here, we pause to explain why we cannot simply accept the Florida Supreme Court's decision to apply *Hurst* retroactively to ***1332** Knight and review only its harmless-error analysis, as Knight urges us to do. Because the Florida Supreme Court had already decided to give him the benefit of *Hurst*, Knight says, the *Teague* retroactivity analysis no longer has any bearing in his case. He is wrong. While states may fashion their own retroactivity doctrines as a matter of state law, those doctrines cannot displace *Teague* on the federal stage. Our ability to consider whether Florida applied *Hurst* correctly depends entirely on whether we can apply *Hurst* ourselves. So far, neither the Supreme Court nor this Circuit has answered that question by analyzing *Hurst*'s retroactivity under *Teague*.[2]

2 We have noted in passing that *Hurst* would not apply retroactively to a petitioner whose convictions became final long before the Supreme Court decided *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), on which *Hurst* relied, and even before *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), which formed the basis for *Ring*. *See Lambrix v. Sec'y, Fla. Dep't of Corr.*, 851 F.3d 1158, 1165 n.2 (11th Cir. 2017). And we have concluded in the context of an improvidently granted certificate of appealability that the Florida Supreme Court's decision not to apply *Hurst* retroactively to the same petitioner as a matter of state law was not contrary to or an unreasonable application of existing Supreme Court precedents. *See Lambrix v. Sec'y, Dep't of Corr.*, 872 F.3d 1170, 1182 (11th Cir. 2017) (per curiam). But the question of *Hurst*'s retroactivity under *Teague* to a petitioner like Knight—whose convictions became final after *Ring* but before *Hurst*—was not squarely presented in either case, so we did not conduct that analysis.

Florida, on the other hand, has its own retroactivity standard—and is free to give broader retroactive effect to new constitutional rules in state court proceedings than *Teague* allows in federal cases. *See Danforth v. Minnesota*, 552 U.S. 264, 282, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008). That is because the *Teague* bar "was intended to limit the authority of federal courts to overturn state convictions—not to limit a state court's authority to grant relief for violations of new rules of constitutional law when reviewing its own State's convictions." *Id.* at 280–81, 128 S.Ct. 1029. So when states choose to apply new rules of constitutional procedure that are not retroactive under *Teague* in federal courts, they "do not do so by misconstruing the federal *Teague* standard. Rather, they have developed *state* law to govern retroactivity in state postconviction proceedings." *Id.* at 288–89, 128 S.Ct. 1029 (emphasis in original).

In deciding to apply *Hurst* retroactively to certain state habeas cases, the Florida Supreme Court did just that. *See Mosley v. State*, 209 So. 3d 1248, 1274–83 (Fla. 2016) (per curiam). Florida's retroactivity doctrine is unique to Florida—it applies to a limited class of constitutional decisions that announce changes "of fundamental significance," which for procedural rules requires consideration of three factors: "(a) the purpose to be served by the rule, (b) the extent of reliance on the prior rule, and (c) the effect that retroactive application of the new rule would have on the administration of justice." *Asay v. State*, 210 So. 3d 1, 16–17 (Fla. 2016) (per curiam) (citation omitted). For new constitutional rules involving the death penalty, Florida courts also consider on a case-by-case basis whether fundamental fairness requires retroactive application of the rule. *Mosley*, 209 So. 3d at 1274 (citing *James v. State*, 615 So. 2d 668, 668 (Fla. 1993)).[3] If ***1333** that sounds broader than *Teague*, it is for good reason—the Florida Supreme Court has itself acknowledged that this retroactivity standard is "more expansive" than the federal rule. *Johnson v. State*, 904 So. 2d 400, 409 (Fla. 2005) (per curiam), *abrogated on unrelated grounds by Asay*, 210 So. 3d at 15–16.

3 The Florida Supreme Court is now considering whether it should recede from the retroactivity analysis employed in *Asay*, *Mosley*, and *James*. *See Owen v. State*, No. SC18-810, April 24, 2019 order (directing parties to brief the issue). The uncertain fate of Florida's current retroactivity doctrine offers another reason that we cannot simply rely on a state retroactivity decision as a basis for federal habeas relief. If the state doctrine were to change during our review, would we then be faced with the question of whether to apply the state's new retroactivity doctrine—retroactively?

All that to say, Florida may make its own choice about the retroactivity of a given case as a matter of state law. And for *Hurst*, it has done so. Using its own standard, the Florida Supreme Court decided that *Hurst* would apply retroactively in state collateral review proceedings for petitioners whose convictions had not yet become final when the U.S. Supreme Court decided *Ring v. Arizona*; *Ring* held in 2002 that the Sixth Amendment requires a jury (rather than a judge) to find the aggravating factors necessary to impose the death penalty. *See Mosley*, 209 So. 3d at 1283 (citing *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)). The Florida Supreme Court reasoned that because *Hurst* struck down Florida's capital sentencing scheme based on *Ring*, prisoners whose cases were still pending on direct appeal when *Ring* was decided "should not suffer due to the United States Supreme Court's fourteen-year delay in applying *Ring* to Florida." *Id.* Following that rule, because Knight's conviction became final ten years after *Ring* was decided, the Florida Supreme Court applied *Hurst* retroactively in his postconviction proceeding. *Knight*, 225 So. 3d at 682.

But that state-law retroactivity determination has no significance in federal court. Unlike state courts, lower federal courts are not free to create our own rules of retroactivity —if the government raises the issue, a *Teague* analysis is mandatory. *Banks I*, 536 U.S. at 271–72, 122 S.Ct. 2147. As we have said, "States may exercise their collateral review power without regard to the *Teague* doctrine. Their doing so has no effect on later federal review." *Glock v. Singletary*, 65 F.3d 878, 890–91 (11th Cir. 1995) (en banc). So we are bound to follow *Teague*'s retroactivity principles whether or not the state court chose to apply the new rule in its own collateral proceeding. *See, e.g., Banks I*, 536 U.S. at 271–72, 122 S.Ct. 2147.

Here, then, we must conduct our own retroactivity analysis, using the standards articulated in *Teague.* And to repeat: *Teague* retroactivity is a "threshold question in every habeas case." *Caspari v. Bohlen*, 510 U.S. 383, 389, 114 S.Ct. 948, 127 L.Ed.2d 236 (1994). When "issues of both retroactivity and application of constitutional doctrine are raised," we must decide the retroactivity issue first. *Bowen v. United States*, 422 U.S. 916, 920, 95 S.Ct. 2569, 45 L.Ed.2d 641 (1975). Where the State raises the issue, therefore, "federal habeas corpus courts *must* apply *Teague* before considering the merits" of the petitioner's claims. *Beard v. Banks* (*Banks II*), 542 U.S. 406, 412, 124 S.Ct. 2504, 159 L.Ed.2d 494 (2004) (emphasis in original) (internal quotation marks and citation omitted).

What's more, if a constitutional claim is *Teague*-barred, we do not reach its merits. *See, e.g., id.* at 410 n.2, 124 S.Ct. 2504. That is because the Supreme Court's "jurisprudence concerning the 'retroactivity' of 'new rules' of constitutional law is primarily concerned, not with the question whether a constitutional violation occurred, but with the availability or nonavailability of remedies." *Danforth*, 552 U.S. at 290–91, 128 S.Ct. 1029. If the holding relied on qualifies as a new rule and does not meet *Teague*'s strict requirements for retroactivity, ***1334** then the claim is not redressable here— the "nonretroactivity principle *prevents* a federal court from granting habeas corpus relief to a state prisoner based on a rule announced after his conviction and sentence became final." *Caspari*, 510 U.S. at 389, 114 S.Ct. 948 (emphasis in original). And as we have said before, if "the court cannot relieve the harm of which a plaintiff complains, the court should not take the case; in the absence of an effective remedy its decision can amount to nothing more than an advisory opinion." *Wymbs v. Republican State Exec. Comm.*, 719 F.2d 1072, 1085 (11th Cir. 1983).

Our authority to overturn state convictions is limited, and the retroactivity principles articulated in *Teague* are tailored to those limitations. *See Danforth*, 552 U.S. at 277, 128 S.Ct. 1029. The fact that state courts do not face the same constraints on collateral review of their *own* criminal proceedings as we do does not relieve us of the obligation to apply federal retroactivity standards. *See id.* at 280–81, 128 S.Ct. 1029; *Banks I*, 536 U.S. at 271, 122 S.Ct. 2147. In fact, our narrow authority as federal courts to disrupt final state-court convictions reflects our recognition of the states' own sovereignty. So Florida may design and apply its retroactivity principles as generously as it wishes. But notwithstanding Florida's decision to apply *Hurst*—or any future decision— retroactively as a matter of state law, as a federal court we are required to perform the *Teague* analysis to determine whether prisoners can receive retroactive relief under federal law.

In sum, if *Hurst* announced a new rule of constitutional law, but one that does not fall into one of the exceptions to *Teague*'s bar on retroactivity, Knight cannot obtain federal habeas relief for any *Hurst* error in his sentence—regardless of what Florida may choose to do under state law. And if Knight cannot obtain federal habeas relief for his *Hurst* claim in any event, we may not offer an advisory opinion on whether the claim could have merit.

III.

A.

Turning to *Teague*, our analysis has three steps. *First*, we determine the date when the petitioner's conviction became final. *Banks II*, 542 U.S. at 411, 124 S.Ct. 2504. This happens when the United States Supreme Court "affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires." *Clay v. United States*, 537 U.S. 522, 527, 123 S.Ct. 1072, 155 L.Ed.2d 88 (2003). Here, the Court denied Knight's petition for a writ of certiorari on May 14, 2012—more than three years before *Hurst* was decided. *Knight*, 566 U.S. at 998, 132 S.Ct. 2398.

Second, if the rule that the petitioner wants to apply had not been announced by that final-conviction date, we "assay the legal landscape" as it existed at the time and determine whether existing precedent compelled the rule—that is, whether the case announced a new rule or applied an old one. *Banks II*, 542 U.S. at 413, 124 S.Ct. 2504. If—and only if—the holding was "*dictated* by precedent existing at the time the defendant's conviction became final," then the rule is not new and may be applied retroactively on federal habeas review (indeed, it must be). *Caspari*, 510 U.S. at 390, 114 S.Ct. 948 (emphasis in original) (quoting *Teague*, 489 U.S. at 301, 109 S.Ct. 1060). And that is not a light test—a rule is not dictated by prior precedent "unless it would have been 'apparent to all reasonable jurists.' " *Chaidez v. United States*, 568 U.S. 342, 347, 133 S.Ct. 1103, 185 L.Ed.2d 149 (2013) (quoting ***1335** *Lambrix v. Singletary*, 520 U.S. 518, 528, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997)). The fact that a decision is "within the logical compass of" or even "controlled by" prior precedent is not conclusive in the *Teague* analysis. *Butler v. McKellar*, 494 U.S. 407, 415, 110 S.Ct. 1212, 108 L.Ed.2d 347 (1990) (internal quotation marks and citation omitted). To " 'dictate' a result, prior precedent must be specific; it is not enough that it name the general principle from which the assertedly new rule sprang." *Glock*, 65 F.3d at 884.

Knight argues that *Ring v. Arizona* dictated the rule in *Hurst*. In *Ring*, the Supreme Court held that Arizona's capital sentencing scheme, which required judges alone to hear penalty-phase evidence and make factual findings relevant to the imposition of the death penalty, violated the defendant's Sixth Amendment right to a jury trial. 536 U.S. at 588–89, 122 S.Ct. 2428. In doing so, the Court explicitly overruled its precedent upholding Arizona's death penalty sentencing scheme, "to the extent that it allows a sentencing judge, *sitting without a jury*, to find an aggravating circumstance necessary for imposition of the death penalty." *Id.* at 609, 122 S.Ct. 2428 (emphasis added) (overruling *Walton v. Arizona*, 497 U.S. 639, 647–49, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990)).

Knight wants us to find that the new *Hurst* rule is actually the old *Ring* rule for an obvious reason—if the rule is not new, and instead was binding on lower courts at the time of Knight's conviction, then he is entitled to the benefit of the rule on federal habeas review. *See Yates v. Aiken*, 484 U.S. 211, 216–17 & n.3, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988). But *Ring* did not dictate the Supreme Court's later invalidation of Florida's death penalty sentencing scheme in *Hurst*. In fact, the *Ring* Court specifically acknowledged that Florida's capital sentencing procedure differed from the Arizona scheme that it rejected. *See Ring*, 536 U.S. at 607–08 & n.6, 122 S.Ct. 2428 (categorizing state capital sentencing schemes according to jury involvement in sentencing). In Arizona, the judge alone made the factual findings necessary to impose the death penalty and imposed that penalty entirely apart from the jury. *See id.* at 588, 122 S.Ct. 2428. Florida's scheme, in contrast, incorporated an advisory jury that considered penalty-phase evidence and recommended a sentence of life or death to the court. Only after the jury's recommendation did the judge impose a sentence. *See id.* at 608 n.6, 122 S.Ct. 2428; Fla. Stat. Ann. § 921.141 (2001).

Hurst's conclusion that Florida's "hybrid" death penalty sentencing system violated the Sixth Amendment was not "apparent to all reasonable jurists" when Knight's convictions became final in 2012. We venture to count ourselves and our colleagues on this Court as members of that distinguished group. And in *Evans v. Secretary, Florida Department of Corrections*, we held that *Ring* did not invalidate Florida's capital sentencing scheme. 699 F.3d 1249, 1264–65 (11th Cir. 2012). We found it significant that Florida's statute—unlike the Arizona law at issue in *Ring*—required the penalty phase jury to find that sufficient aggravating circumstances existed before it could recommend a death sentence, and directed the sentencing court to give "great weight" to the jury's advisory verdict. *Id.* at 1261 (citation omitted). We also noted that the Supreme Court had taken obvious pains in *Ring* to distinguish hybrid systems like Florida's from the "judge-only" sentencing scheme in Arizona and concluded that such distinctions would not have been necessary if the Court had intended to strike down both systems. *Id.* at 1262.

And we were not the only ones. In fact, Justice Alito wrote along those same lines in his dissenting opinion in *Hurst*: "Although ***1336** the Court suggests that today's holding follows ineluctably from *Ring*, the Arizona sentencing scheme at issue in that case was much different from the Florida procedure now before us." 136 S. Ct. at 625 (Alito, J., dissenting). After describing the "critically important role" of the advisory jury in Florida's death penalty sentencing scheme, Justice Alito concluded that the "decision in *Ring* did not decide whether this procedure violates the Sixth Amendment, and I would not extend *Ring* to cover the Florida system." *Id.* at 626. Clearly, reasonable jurists could—and did—disagree that *Ring* compelled the outcome in *Hurst*. The Alito dissent and this Court's pre-*Hurst* holding strongly indicate that *Hurst* announced a new constitutional rule rather than applying an old one. *See Banks II*, 542 U.S. at 415, 124 S.Ct. 2504.

That conclusion is only strengthened by the fact that *Ring* did not specifically address the continued validity of the Supreme Court's precedents *upholding* Florida's death-penalty sentencing system—*Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), and *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989) (per curiam). And the Court has repeatedly instructed us to follow its precedents, even if later decisions appear to undermine them, unless and until the Court itself sets them aside. *See, e.g., Bosse v. Oklahoma*, ––– U.S. ––––, 137 S. Ct. 1, 2, 196 L.Ed.2d 1 (2016) (per curiam) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." (citation omitted)); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). So *Spaziano* and *Hildwin* remained good law until the Court explicitly overruled them in *Hurst*. *See Saffle v. Parks*, 494 U.S. 484, 488, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990) (explaining that the "explicit overruling of an earlier holding no doubt creates a new rule"); *see also Hurst*, 136 S. Ct. at 623. It is hard to imagine that the Supreme Court overruled those cases in *Ring* but forgot to say so until *Hurst*.

Because all these factors show that *Hurst* was not dictated by prior precedent—and in fact explicitly overruled existing precedent upholding Florida's death penalty sentencing scheme—we can see that the rule in *Hurst*, which led to a conclusion that the Florida scheme was unconstitutional, was new.

Having determined that *Hurst* announced a new rule of constitutional law, we proceed to the final step in the *Teague* analysis—whether *Hurst* "falls within either of the two exceptions to nonretroactivity." *Banks II*, 542 U.S. at 411, 124 S.Ct. 2504. Those exceptions, again, include (1) holdings that create substantive (not procedural) rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," and (2) holdings that constitute "watershed rules of criminal procedure." *Teague*, 489 U.S. at 311–13, 109 S.Ct. 1060 (citation omitted).

The *Hurst* rule does not fit within either exception. To begin, substantive rules include decisions that change "the range of conduct or the class of persons that the law punishes." *Schriro*, 542 U.S. at 353, 124 S.Ct. 2519. Procedural rules, on the other hand, "regulate only the *manner of determining* the defendant's culpability." *Id.* (emphasis in original). In considering which category the *Hurst* rule falls into, we have a head start because the Supreme Court has already held that *Ring* represented a "prototypical procedural rule[ ]." *Id.* And that makes sense: *Ring* changed the permissible *procedure* for sentencing in a capital case when it required "that a jury rather than a ***1337** judge find the essential facts" necessary to impose the death penalty. *See id.* Because *Hurst*'s holding—that an advisory "jury's mere recommendation is not enough" to satisfy this procedural requirement—is an extension of the rule from *Ring*, we have no trouble concluding that *Hurst* also announced a procedural rule, and not a substantive one. *Hurst*, 136 S. Ct. at 619.

The second exception is for "watershed rules of criminal procedure." *Banks II*, 542 U.S. at 417, 124 S.Ct. 2504. This exception is extremely limited in scope—it applies "only to a small core of rules" so fundamental to our criminal process that it is "unlikely that many such components of basic due process have yet to emerge." *Id.* (citations omitted). Indeed, the watershed exception remains somewhat theoretical at this point; in the years following *Teague*, the Supreme Court has never found a rule that fits. *See id.* And in "providing guidance as to what might fall within this exception," the Court has "repeatedly referred to the rule of *Gideon v. Wainwright*, 372 U. S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (right to counsel), and only to this rule." *Id.* Knight does not contend that *Hurst* announced a new watershed rule that compares to *Gideon*, and we do not see how it could have either. In short, *Hurst* meets neither exception, and therefore is not retroactive.

B.

Because the *Hurst* rule is not retroactive, Knight cannot receive federal habeas relief on his *Hurst* claim. That is as it must be—we are conscientious about the fact that "*Teague*'s nonretroactivity principle acts as a limitation on the power of federal courts to grant habeas corpus relief." *Id.* at 412, 124 S.Ct. 2504 (internal quotation marks and citation omitted). And because we would have no lawful remedy to offer even if we could identify an error, we must decline to consider whether any *Hurst* error exists. That means, of course, that we also do not consider whether the un-found and un-remediable error could be harmless.

Knight disputes this path. He argues that, even conceding the lack of an available remedy for any *Hurst* error, whether that un-remediable error was harmless is itself a separate question of federal law under *Brecht v. Abrahamson*, 507 U.S. 619, 637–38, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). He thus urges us to review the state court's harmless-error analysis, regardless of whether we reach the merits of his *Hurst* claim. We will not. It strains the imagination—as well as our constitutional and institutional respect for state courts —to suppose that we *cannot* remedy an error, but that we *can* somehow remedy an erroneous state-court conclusion that the error was harmless.

And *Brecht* does not stand for the proposition that Knight asserts in any event. While *Brecht* established the harmless-error standard for collateral review of constitutional trial errors, it did not create a stand-alone federal claim severable from the question of whether remediable error existed in the first place.[4] *See Williams v. Singletary*, 114 F.3d 177, 180 (11th Cir. 1997) (per curiam), *as amended on denial of reh'g* (July 29, 1997). Some underlying violation of federal law that we can address is a necessary predicate to federal ***1338** habeas relief—unless we agree that an error has occurred, it makes no difference whether the purported error was harmless. "We have consistently applied the *Brecht* harmless error standard only after determining that there was an error." *Id.*; *cf. Wilson v. Corcoran*, 562 U.S. 1, 6, 131 S.Ct. 13, 178 L.Ed.2d 276 (2010) (per curiam) ("It is not enough to note that a habeas petitioner *asserts* the existence of a constitutional violation; unless the federal court agrees with that assertion, it may not grant relief." (emphasis in original)). There is no free-floating federal constitutional right to infallible application of harmless-error principles.

4 As an aside, what *Brecht* really decided was that federal courts evaluating constitutional trial error on collateral review would apply a more relaxed harmless-error standard—whether the error "had substantial and injurious effect or influence in determining the jury's verdict"—rather than the harmless-beyond-a-reasonable-doubt standard used on direct review. *Brecht*, 507 U.S. at 638, 113 S.Ct. 1710 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)).

And again, where our retroactivity doctrine forecloses the possibility of federal habeas relief for a constitutional error, we are constrained to stop looking. *See Bowen*, 422 U.S. at 920, 95 S.Ct. 2569. The Supreme Court "consistently has declined to address unsettled questions regarding the scope of decisions establishing new constitutional doctrine in cases in which it holds those decisions nonretroactive," and has instructed us to do the same. *Id.* at 920–21, 95 S.Ct. 2569. This directive carries constitutional weight; as an Article III court, we are "without power to decide questions that cannot affect the rights of litigants in the case" at hand. *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971) (per curiam). So even if we found *Hurst* error in Knight's sentencing, we would still be prohibited from issuing a writ of habeas corpus on that ground because *Hurst* is not retroactively applicable to Knight under *Teague*. After all, *Teague*'s nonretroactivity command is a limitation on our power, not a polite suggestion. *Banks II*, 542 U.S. at 412, 124 S.Ct. 2504. So our opinion—whatever it might be—on Knight's *Hurst* claim would be purely advisory. "And it is quite clear that the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." *Flast v. Cohen*, 392 U.S. 83, 96, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968) (internal quotation marks and citation omitted).

Where, as here, *Teague* bars relief before we reach the preliminary question of whether constitutional error occurred at all, consideration of the secondary question of whether any such error was harmless would be a prohibited and pointless exercise for both the petitioner and this Court. We therefore cannot grant Knight relief on his *Hurst* claim, whether or not it is cloaked in the garb of harmless error.

IV.

We now turn to Knight's other claim. The State presented extensive DNA evidence against him during the guilt phase of his trial. Kevin Noppinger, a serologist with the Broward County Sheriff's Office crime lab, testified that Knight had Odessia's blood on his hand and her DNA on his shirt when he was arrested. Fingernail scrapings from Odessia's body showed that she, in turn, had Knight's DNA under her fingernails. Noppinger also tested samples from the bloody clothes (boxer shorts, a shirt, and jean shorts) found under the bathroom sink. He found Knight's blood mixed with Hanessia's blood on the boxer shorts, Odessia's and Hanessia's blood elsewhere on the boxer shorts and on the jean shorts, and Odessia's blood on the shirt.

One of the State's other experts was Kevin McElfresh of Bode Technology Group, whose DNA analysts had conducted additional testing on different samples from the same items of clothing. In particular, McElfresh's group analyzed DNA samples from an unstained area of the waistband of the boxer shorts in an attempt to determine who owned them. Although Bode's initial report stated that Knight's DNA was not on the waistband ***1339** sample, McElfresh testified at trial that he had conducted some additional analysis and determined that some of the DNA on the waistband *could* have been Knight's.

Knight's guilt-phase counsel consulted with DNA expert Dr. Norah Rudin, who was listed as a potential trial witness by the defense. Dr. Rudin informed counsel that, although some of Noppinger's sample labeling practices were sloppy, she generally agreed with his conclusions about the sources of the DNA samples he analyzed. She was much more critical of McElfresh's analysis: she called his methods "fundamentally incorrect and inherently biased" and his testimony "incomplete and misleading." In her opinion, the DNA test results for the waistband samples were "inconclusive." But Dr. Rudin did not stop there —she also considered McElfresh's testimony "relatively inconsequential when viewed in the context of the biological evidence as a whole." She told Knight's counsel that she did not believe that she could help his case, and that she would not call herself as an expert if she were in his shoes. Counsel, it appears, agreed with her perspective and did not call her at trial.

Testimony indicates that one additional fact persuaded counsel that calling Dr. Rubin to quibble with McElfresh's methods would not be good trial strategy. At the time of Knight's trial, Florida permitted a defendant who did not put up any evidence at trial to give both initial and rebuttal closing arguments—an advantage ordinarily offered to the prosecution. Dr. Rudin would have been Knight's only witness, so calling her to testify would have meant giving up the opportunity to have the first word and the last at closing. Given that fact, she would have largely corroborated Noppinger's testimony while also costing Knight an advantage at closing arguments.

Nonetheless, on state collateral review, Knight contended that his counsel provided constitutionally ineffective assistance by failing to call Dr. Rudin as an expert. He argued that Dr. Rudin's criticisms of McElfresh's methods and the crime lab's labeling practices would have cast doubt on all of the State's DNA evidence and significantly damaged the State's case. The Florida Supreme Court disagreed, finding that Knight had not met his burden on either prong of the two-part test for ineffective assistance of counsel claims set out in *Strickland*. *See Knight*, 225 So. 3d at 672–74. Knight, however, argues that the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

To begin, the Florida Supreme Court correctly identified the governing standard. *Strickland* is the relevant "clearly established" Supreme Court precedent for purposes of an ineffective-assistance claim. *See Premo v. Moore*, 562 U.S. 115, 118, 131 S.Ct. 733, 178 L.Ed.2d 649 (2011). Under *Strickland*, to succeed on a claim of ineffective assistance of counsel, a defendant must show both that his attorney's performance was deficient—that is, "that counsel's representation fell below an objective standard of reasonableness"—and that he was prejudiced by the inadequate performance. *Strickland*, 466 U.S. at 687–88, 104 S.Ct. 2052. In applying the first prong, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689, 104 S.Ct. 2052. And to show prejudice, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052.

***1340** The *Strickland* standard is "highly deferential," as is the review of a state-court decision under AEDPA; "when the two apply in tandem, review is 'doubly' so." *Harrington v. Richter*, 562 U.S. 86, 105, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) (citations omitted). In reviewing a state court's application of *Strickland*, therefore, a federal habeas court cannot conduct a de novo review and reverse simply because it strongly disagrees with the state court's conclusion. *Id.* at 102, 131 S.Ct. 770. Instead, for Knight to succeed on his ineffective-assistance claim, we must conclude that the Florida Supreme Court's decision "was an objectively unreasonable application of the *Strickland* standard." *Allen v. Sec'y, Fla. Dep't of Corr.*, 611 F.3d 740, 751 (11th Cir. 2010).

The Florida Supreme Court determined that counsel's decision not to call Dr. Rudin at trial was reasonable trial strategy. *Knight*, 225 So. 3d at 674. Whether the decision was actually a matter of strategy is a question of fact; thus, the state court's finding on that issue is presumed to be correct. *Provenzano v. Singletary*, 148 F.3d 1327, 1330 (11th Cir. 1998). We must accept all factual findings made by the state court unless the petitioner rebuts the presumption of correctness "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see also Wood v. Allen*, 542 F.3d 1281, 1285 (11th Cir. 2008). Knight has not presented any evidence to suggest that counsel's decision was anything other than a matter of strategy, and we accept the state court's finding on that point.

Whether counsel's strategic decision not to call Dr. Rudin was reasonable is a question of law, which we review through the lens of AEDPA deference. *See Ferrell v. Hall*, 640 F.3d 1199, 1223–24 (11th Cir. 2011). In assessing an attorney's performance under *Strickland*, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052. "Which witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess." *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995) (en banc). We have no reason to doubt the Florida Supreme Court's conclusion that counsel's decision not to call an equivocal expert, in part to preserve an advantage at closing, was well within the wide range of reasonably competent performance.

The Florida Supreme Court also determined that Knight had not met his burden of showing prejudice under *Strickland* because there was no reasonable probability that Dr. Rudin's testimony would have made a difference in the outcome of the trial, given the weight of the evidence against him. *See Knight*, 225 So. 3d at 674. That conclusion was also reasonable.

Dr. Rudin generally agreed with Noppinger's conclusions regarding the DNA evidence. With or without Dr. Rudin's testimony, therefore, there was no dispute that Knight had Odessia's blood on his hand and her DNA on his shirt when he was arrested, or that Knight's DNA was found under Odessia's fingernails. Knight's blood—as well as Odessia's blood and Hanessia's—was on the clothes discarded at the crime scene. And even if the jury had heard Dr. Rudin's criticism of McElfresh's testimony that Knight could not be ruled out as a DNA contributor for the waistband of the boxer shorts, other evidence showed that the clothes were his: the boxer shorts were the same brand and size as the ones that Knight was wearing when he was arrested, and Knight's cousin testified that the bloody shirt was one that Knight wore often.

***1341** And the evidence did not stop there. Knight was known to be home with Hanessia less than an hour before the murders, and the jury heard evidence of ongoing tension with Odessia. Police found him near the scene of the murders shortly after they arrived, and his answers to their questions were inconsistent with his appearance. All of that is in addition to the testimony of an inmate housed with Knight at the Broward County jail, who testified that Knight confessed the crime to him, providing a detailed description of events and a floorplan of the apartment. In short, even if the jury had entirely discounted McElfresh's testimony as a result of Dr. Rudin's criticism of his testing methods, the remaining evidence against Knight was so strong that the chance of a not-guilty verdict still would have been remote, to say the least.

The Florida Supreme Court's conclusion that Knight failed to make the required showings of deficient performance and prejudice was not an unreasonable application of *Strickland*.

* * *

In sum, we are prohibited from considering Knight's *Hurst* claim by *Teague*'s rule of nonretroactivity, which eliminates any possibility of relief regardless of whether there was an error and regardless of whether any error was harmless. And our review of Knight's ineffective-assistance claim shows that the state court's ruling on that issue was not an unreasonable application of governing Supreme Court precedent. We therefore affirm the district court's denial of Knight's federal habeas petition.

AFFIRMED.

All Citations

936 F.3d 1322, 28 Fla. L. Weekly Fed. C 238

ATTACHMENT B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-13390-P

RICHARD KNIGHT,

Petitioner - Appellant,

versus

FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent - Appellee.

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

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

BEFORE: TJOFLAT, JORDAN, and GRANT, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-46

ATTACHMENT C

United States District Court
for the
Southern District of Florida

RICHARD KNIGHT, Petitioner, v. JULIE L. JONES, Secretary Florida Department of Corrections, Respondent.	)))))	Civil Action No. 17-61921-Civ-Scola

Order Denying Petition for Writ of Habeas Corpus

THIS CAUSE is before the Court upon Petitioner Richard Knight's ("Petitioner") Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. §2254. ("Petition")(Pet., ECF No. 1). The Petitioner is on Florida's death row at the Union Correctional Institution in Raiford, Florida following his convictions in 2006 for the first-degree murders of Odessia Stephens and Hanessia Mullings which occurred in 2000. The Petitioner filed this petition on September 29, 2017. On January 12, 2018, the State filed its Response. ("Response")(Resp., ECF No. 14). On March 23, 2018, the Petitioner filed his Reply. ("Reply")(Reply, ECF No. 21).[1] The Court has carefully reviewed the Petition, the entire court file and is otherwise fully advised in premises. For the reasons that follow, the Petition for Writ of Habeas Corpus is **denied**.

Factual Background

The Supreme Court of Florida gave the following summary of the pertinent and salient facts:

> The evidence presented at trial established that Knight lived in an apartment with his cousin, Hans Mullings, Mullings' girlfriend, Odessia Stephens, and their daughter, Hanessia Mullings. Mullings and Odessia had asked Knight to move out numerous times.
>
> On the night of the murder, June 27, 2000, Mullings was at work. At approximately 9 p.m., Mullings spoke to Odessia, who said she

[1] The Petitioner's Reply addressed only Claims 1, 2, and 4(a) & (c). *See* [Reply, ECF No. 21].

was going to bed, and then Mullings left his office to run errands. Knight was at the apartment with Odessia and Hanessia.

Around midnight, an upstairs neighbor heard multiple thumping sounds on the apartment walls and two female voices, one of which was a child crying. The neighbor called 911 at 12:21 a.m. on June 28, 2000. The cries continued after the police arrived.

Officer Vincent Sachs was the first to respond. He arrived at 12:29 a.m. and noted that the lights were on in the master bedroom and hall area, and that a second bedroom's window was slightly ajar. After knocking and receiving no response, he walked around the unit and noticed that the lights had been turned off and that the previously ajar window was now completely open and blinds were hanging out of it. Sachs shined his flashlight through the dining room window. He saw blood in the dining room and master bedroom. Further, he noticed Hanessia curled in the fetal position against the closet door. Once inside, he observed Odessia's body in the living room. All of the doors were locked and there had been no ransacking of the apartment.

Officer Natalie Mocny arrived next and walked around the unit. She also saw the open window and noticed Knight on the other side of some hedges approximately 100 yards from the building. She beckoned him over for questioning. Officer Sachs joined Mocny. According to the officers, Knight had a scratch on his chest, a scrape on his shoulder, and fresh cuts on his hands. Although it was not raining, Knight was visibly wet. Knight was wearing dress clothes and shoes, yet told Mocny that he had been jogging, and that he lived in the apartment, but did not have a key to get inside. There was blood on the shirt he was wearing and on a ten-dollar bill in his possession.

The crime scene investigation recovered two wet towels in Knight's bedroom, a shirt, boxers, and a pair of jean shorts under the sink in the bathroom near Knight's bedroom, all of which belonged to Knight and had numerous bloodstains. Two knife blades were also recovered, one from under the mattress in the master bedroom, and another from under Odessia's body.

Odessia's blood was found in the master bedroom between the bed and the wall, on the master bedroom blinds, on the living room carpet, on the knives' handles and blades, and on the knife holder in the kitchen. Odessia's blood was also discovered on Knight's boxers, shirt, jean shorts, the clothing Knight had been wearing when arrested, and his hand. Fingernail scrapings taken from Odessia contained Knight's DNA profile.

Hanessia's blood was found on one of the knives, on Knight's boxers, jean shorts, and on the shower curtain. The shower curtain also contained the blood of Knight's acquaintance, Victoria Martino.

Dr. Lance Davis, the medical examiner, observed the bodies at the scene. Odessia was found on the living room floor near the entrance with several broken knife pieces around her. She had twenty-one stab wounds: fourteen in the neck, one on the chin, and the rest on her back and chest. Additionally, she had twenty-four puncture or scratch wounds and bruising and ligature marks on her neck. The bruises appeared to have been made by a belt or similar object. She also had defensive wounds on both hands and wounds on her leg, chest, back and neck. Several of the knife wounds were fatal but none would have resulted in an instantaneous death. She had bruises from being punched on her scalp and mouth. Davis opined that Knight began his attack in the bedroom with Odessia fleeing to the living room. He estimated that Odessia was conscious for ten to fifteen minutes after the attack.

Davis discovered Hanessia on the floor next to the closet door. There were broken knife pieces around her. She had a total of four stab wounds in her upper chest and neck. Her hand had one additional stab wound and numerous defensive wounds. Hanessia's arms and upper body had numerous bruises and scratches. There were bruises on her neck that were consistent with manual strangulation and bruises on her arms consistent with being grabbed.

Stephen Whitsett and Knight were housed together from June 29, 2000, to July 22, 2000, at the Broward County Jail. Knight confessed to Whitsett about the murders as follows: The night of the murders Knight and Odessia argued. She told him that she did not want to support him and that he would have to move. He asked for some more time because he had just gotten a job, but Odessia refused and told him to leave in the morning. Knight left the house to go for a walk and he became increasingly angry. He returned that night, confronted Odessia in her room, and they argued.

Knight went to the kitchen and got a knife. When he went back to the master bedroom, Odessia was on one side of the bed and Hanessia was on the other. He began by stabbing Odessia multiple times. Odessia eventually stopped defending herself and balled up into a fetal position. Knight then turned to four-year-old Hanessia. The knife broke while he was stabbing Hanessia, so he returned to

> the kitchen for another. Upon returning, Knight saw Hanessia had crawled to the closet door and was drowning in her own blood.
>
> Again, Knight returned to the kitchen and accidentally cut his hand on one of the broken knives that he had used to stab Odessia and Hanessia. He grabbed another knife. Odessia had crawled from the master bedroom to the living room and was lying in her own blood. He rolled her over and continued his attack. Odessia's blood covered Knight's hands, so he wiped them on the carpet.
>
> Knight further confessed that, after he finished with Odessia, he went to the bathroom, took off the blood soaked shorts and T-shirt, and tossed them under the sink. He showered and put on blue polo pants. He wiped down the knives in the living room. At that time, Knight heard a knock on the door and saw the police outside through the peep hole. He ran to his room and out the window. In an attempt to deflect suspicion away from himself, Knight returned to his bedroom window where he saw a female police officer.
>
> Knight was charged by indictment on August 15, 2001, for the murders of Odessia Stephens and Hanessia Mullings. The jury found Knight guilty of both counts of first-degree murder.

Knight v. State, 76 So. 3d 879, 881–83 (Fla. 2011).

Statute of Limitations

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes a one-year limitations period for the filing of an application for relief under § 2254. Accordingly, 28 U.S.C. § 2244(d) provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of State court. The limitation period shall run from the latest of -
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

In most cases, including the present case, the limitation period begins to run pursuant to §2244(d)(1)(A). The Eleventh Circuit has decided that the judgment becomes "final" within the meaning of § 2244(d)(1)(A) as follows: (1) "if the prisoner files a timely petition for certiorari, the judgment becomes 'final' on the date on which the Supreme Court issues a decision on the merits or denies certiorari, or (2) the judgment becomes 'final' on the date on which the defendant's time for filing such a petition expires." *Bond v. Moore*, 309 F.3d 770, 773-74 (11th Cir. 2002). The State has not argued that the petition is time barred. The Court finds the petition is timely and proceeds to the merits.

Procedural History

On August 15, 2001, the Petitioner was charged by indictment with first degree murder in the deaths of Odessia Stephens and Hanessia Mullings. *Knight*, 76 So. 3d at 883. On April 26, 2006, the jury found the Petitioner guilty of both counts. *Id.* Following a penalty phase trial beginning May 22, 2006, the jury recommended death by a vote of twelve to zero for both murders. On August 18, 2006, the court held a *Spencer*[2] hearing. The trial court followed the jury's recommendation and sentenced the Petitioner to death. In the sentencing order, the trial court found two statutory aggravating factors for the murder of Odessia Stephens: (1) a previous conviction of another violent capital felony, and (2) that the murder was especially heinous, atrocious, or cruel (HAC). The court also found three statutory aggravating circumstances for the murder of Hanessia Mullings: (1) a previous conviction of another violent capital felony, (2) HAC, and (3) the victim was under twelve years of age. The court found no statutory mitigating circumstances but found eight nonstatutory mitigators.[3] *Knight*, 76 So. 3d at 885.

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[2] *Spencer v. State*, 615 So.2d 688 (Fla.1993).

[3] (1) Knight had a good upbringing (slight weight), (2) Knight loves his family (moderate weight), (3) Knight went to high school and excelled in art (little weight), (4) Knight was admired by the children in his neighborhood as a youth and was well regarded by the adults (little weight), (5) Knight was a valuable employee in Jamaica (little weight), (6) Knight had part-time employment at the

On direct appeal, the Petitioner raised five claims.[4] The Florida Supreme Court upheld his conviction and sentences. Thereafter, the Petitioner sought certiorari review from the United States Supreme Court. On May 14, 2012, his petition for writ of certiorari was denied. *Knight v. Florida*, 566 U.S. 998 (2012).

The Petitioner next sought post-conviction relief in the state courts. He raised six claims: (1) he was improperly denied access to public records; (2) the one-year deadline in Florida Rule of Criminal Procedure 3.851 was unconstitutionally applied to him; (3) he was denied adversarial testing at the guilt phase; (4) he was denied adversarial testing at the penalty phase; (5) the rule prohibiting juror interviews is unconstitutional; and (6) Florida's lethal injection protocol and procedures are unconstitutional. *Knight v. State*, 225 So.3d 661, 671-72 (Fla. 2017). The circuit court granted an evidentiary hearing on the Petitioner's claims. The evidentiary hearing took place on March 27 and 28, 2014, when the circuit court heard testimony on the Petitioner's claims of ineffective assistance of counsel. On July 30, 2014, the circuit court denied all of the Petitioner's claims for post-conviction relief. *Id.*

The Petitioner appealed the denial of post-conviction relief to the Florida Supreme Court. *Id.* at 680. He also petitioned for a writ of habeas corpus in state court arguing that his was denied the effective assistance of appellate counsel and that he was "unconstitutionally sentenced to death because his penalty phase jury did not find all of the facts necessary to impose the death penalty." *Id.* at 682. The court affirmed the circuit court's denial of post-conviction relief and denied the petition for writ of habeas corpus. *Id.* at 684. Mandate issued on September 29, 2017.

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time of the crime (little weight), (7) Knight behaved well in court (little weight), and (8) Knight is capable of forming loving relationships (moderate weight).

[4] (1) the trial court abused its discretion by denying Knight's motion for mistrial based on Hans Mullings' comment that he knew Knight to have a violent background; (2) the trial court abused its discretion in denying Knight's motion for mistrial based on the allegation that jurors saw him wearing shackles; (3) the trial court erred in ruling that no discovery violation occurred and in denying Knight's motion for mistrial based on the State's expert's testimony regarding DNA evidence; (4) the trial court erred in denying Knight's motion to seat a new jury based on Mullings' testimony; and (5) the Florida death sentencing statute violates the Sixth Amendment and ignores *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

On September 29, 2017, the Petitioner filed his Petition for Writ of Habeas Corpus by a Person in State Custody. (Pet., ECF No. 1).[5] The State has responded. The Petitioner has replied. This matter is now fully briefed. The Court finds as follows:

Claims and Applicable Standards

The Petitioner's habeas corpus petition is governed by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 110 Stat. 1214 (1996) (codified at various provisions in Title 28 of the U.S. Code), which significantly changed the standards of review that federal courts apply in habeas corpus proceedings. Under the AEDPA, if a claim was adjudicated on the merits in state court, habeas corpus relief can only be granted if the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(1)-(2). This is an "exacting standard." *Maharaj v. Sec'y, Dep't. of Corr.*, 432 F.3d 1292, 1308 (11th Cir. 2005). Pursuant to § 2254(d)(1), a state court decision is "contrary to" Supreme Court precedent if it "arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law" or "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at [an] [opposite] result." *Williams v. Taylor*, 529 U.S. 362, 405 (2000). In other words, the "contrary to" prong means that "the state court's decision must be substantially different from the relevant precedent of [the Supreme] Court." *Id.*

With respect to the "unreasonable application" prong of § 2254(d)(1), which applies when a state court identifies the correct legal principle but purportedly applies it incorrectly to the facts before it, a federal habeas court "should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 409. *See also Wiggins v. Smith*, 539 U.S. 510, 520-21 (2003). Significantly, an "objectively unreasonable application of federal law is different from an incorrect application of federal law." *Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2002). An "unreasonable application" can also occur if a state court "unreasonably extends, or unreasonably declines to

[5] On December 12, 2017, the Petitioner filed a Petition for Writ of Certiorari to the United States Supreme Court to review the denial of his state petition for writ of habeas corpus. (No. 17-7099). On March 19, 2018, the petition was denied.

extend, a legal principle from Supreme Court case law to a new context." *Putman v. Head*, 268 F.3d 1223, 1241 (11th Cir. 2001).

As noted above, § 2254(d)(2) provides an alternative avenue for relief. Habeas relief may be granted if the state court's determination of the facts was unreasonable. "A state court's determination of the facts, however, is entitled to deference" under § 2254(e)(1). *See Maharaj*, 432 F.3d at 1309. This means that a federal habeas court must presume that findings of fact by a state court are correct; and, a habeas petitioner must rebut that presumption by clear and convincing evidence. *See Hunter v. Sec'y, Dep't. of Corr.*, 395 F.3d 1196, 1200 (11th Cir. 2005).

Finally, where a federal court would "deny relief under a de novo review standard, relief must be denied under the much narrower AEDPA standard." *Jefferson v. Fountain*, 382 F.3d 1286, 1295 n.5 (11th Cir. 2004). Even if the Court believed the Florida Supreme Court's determination to be an incorrect one, under AEDPA deference that alone is not enough to grant habeas relief. The Court must also find that "there is no possibility fair-minded jurists could disagree that the state court's decision conflicts with [United States Supreme Court] precedents." *Harrington v. Richter*, 131 S.Ct. 770, 783 (2011). In other words, as a condition for obtaining habeas corpus relief from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was *so lacking in justification* that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement. *See id.* (emphasis added).

Analysis

The Petitioner asserts five substantive claims for federal habeas relief: (1) ineffective assistance of guilt phase counsel and the State's withholding of material exculpatory evidence; (2) the Florida Supreme Court's determinations regarding the standard of review under *Hurst v. Florida* and the application of that standard was unreasonable; (3) ineffective assistance of appellate counsel; (4) the Petitioner had a fundamentally unfair trial; and (5) ineffective assistance of penalty phase counsel.

1. Ineffective Assistance of Guilt Phase Counsel

The Petitioner's first claim for federal habeas relief has two sub-parts. First, he argues that the State withheld material exculpatory evidence in violation of *Brady v. Maryland,* 373 U.S. 83 (1963). [Pet., ECF No. 1 at 57].

Second, he asserts that his trial counsel was ineffective "for failing to present Dr. Rudin's [forensic DNA analyst] testimony to the jury to challenge critical pieces of the State's DNA evidence" and "a challenge under *Frye* should have been made and, had it been made, there is more than a reasonable probability that the entirety of the State's DNA evidence would not have passed the *Frye* test." [Pet., ECF No. 1 at 59, 65]. The Petitioner asserts he is entitled to federal habeas relief because the "Florida Supreme Court's conclusions rest on unreasonable determinations of fact and are contrary to and/or an unreasonable application of *Strickland* and its progeny." *Id*. at 70.

The State of Florida responded that the Petitioner has failed "to present clear and convincing evidence on each of these claims to show that the state court's factual findings were unreasonable." [Resp., ECF No. 14 at 35]. The State contends "[t]he facts presented at the evidentiary hearing fully support that court's factual findings and [the Petitioner] has not presented clear and convincing evidence that those findings were objectively unreasonable as required by AEDPA." [Resp., ECF No. 14 at 38]. The State concludes that the Petitioner has failed "to meet his burden under the AEDPA." *Id*. at 35.

The Petitioner replies that the State "materially misrepresents the facts and the record in its attempt to convince the Court to deny relief on this issue." [Reply, ECF No. 21 at 4]. The Petitioner contends that the State is mistaken when it asserts that Dr. Rudin would have only "bolstered the State's case by validating its DNA evidence" because her testimony "would in fact have significantly undermined the integrity of the [S]tate's DNA case as a whole." [Reply, ECF No. 21 at 6].

a. *Brady* violation (the Kevin Noppinger memorandum).

The Petitioner has alleged that the State of Florida failed to disclose a memorandum written by a serologist employed by the Broward County Sheriff's Office crime lab, Kevin Noppinger. *See* [Pet., ECF No. 1 at 80]. According to the Petitioner, "Noppinger, during the pendency of Mr. Knight's case but well before he testified at trial, had requested a demotion from technical manager of the DNA section of the Broward County Sheriff's crime laboratory to a 'Criminalist III' position." *Id*. The Petitioner alleges that he was never provided with this document by the State of Florida and he only became aware of its existence by happenstance. The Petitioner asserts that this information was favorable to him because the memorandum showed that Noppinger himself had doubts as to the effectiveness of the testing done by the Broward Sheriff's Office which certainly would have been useful in challenging the DNA evidence at trial. Therefore, the Petitioner argues, that he has also shown prejudice. *Id*. at 83.

The State contends that this information was not favorable because Noppinger testified that "he wrote the memo solely due to a personality conflict with a new quality control officer involving a disagreement about buying a new DNA profiling kit; it had no bearing whatsoever on the work quality of the lab or the testing and analysis in this case." [Resp., ECF No. 14 at 47]. Moreover, the State argues that "there is no reasonable probability that this document would have undermined the confidence in the outcome of the trial as is required to show prejudice." *Id*. at 48.

The Florida Supreme Court denied the claim as follows:

> Kevin Noppinger worked at the Broward County Sheriff's Office and conducted the DNA testing in Knight's case. On July 29, 2002, before he testified at Knight's trial, Noppinger wrote a memorandum to his superior requesting a voluntary demotion. As the reason for his decision to request a demotion, Noppinger's memorandum cited to conflict with upper management related to his request to improve testing to search the National DNA Index System (NDIS). This memorandum was never discovered by trial counsel or turned over by the State.
>
> Knight argues that this memorandum should have been turned over to the defense because it would have been useful to impeach Noppinger and ultimately would have lessened the confidence the jury had in the DNA testing procedures. Conversely, the State argues that because Knight's case was not an unsolved case requiring use of the NDIS, Noppinger's memorandum was not useful to Knight, let alone prejudicial to the outcome at trial. We affirm the postconviction court's denial of this claim because there is competent, substantial evidence supporting the conclusion that a *Brady* violation did not occur.
>
> Knight is unable to prove the first prong of *Brady*. The Noppinger memorandum would not have been useful to Knight because it was unrelated to Knight's case. Although the memorandum was produced prior to Noppinger's testimony at trial, the memorandum cites to management disagreements as the cause for his request to be demoted. Notably, the State points out that Knight's case is not a cold case that requires the use of the national DNA database, and as such, Noppinger's memorandum is entirely unrelated to Knight's case.

> Next, Knight has to demonstrate that the post-conviction court erred in finding that the State did not willfully or inadvertently withhold evidence. "To comply with *Brady*, the individual prosecutor has a duty to learn of any favorable evidence and to disclose that evidence to the defense." *Mordenti v. State*, 894 So.2d 161, 170 (Fla. 2004) (citing *Allen v. State*, 854 So.2d 1255, 1259 (Fla. 2003)). Knight argues that because the crime lab was working on behalf of the State, the prosecutor should have known about the memorandum. Conversely, the State argues that the prosecutor was never made aware of the memorandum. The record is dispositive on this point.
>
> However, even if Knight satisfied prongs one and two of *Brady*, he is unable to show prejudice. The test for prejudice or materiality under *Brady*, is whether, had the evidence been disclosed to the defense, there is a reasonable probability of a different result. *Guzman*, 868 So.2d at 508. We conclude that there is competent, substantial evidence that the postconviction court did not err in denying relief on this claim. Knight is unable to show how the memorandum specifically reduces the credibility of the State's DNA expert or how that impeachment evidence would have produced a different result. Even if the memorandum had been introduced for the limited purpose of impeaching Noppinger, the State introduced other evidence showing Knight's guilt that would have overcome the little weight the memorandum might have had.

Knight v. State, 225 So. 3d 661, 678–79 (Fla. 2017).

In *Brady*, the Supreme Court established three criteria a criminal defendant must prove in order to establish a violation of due process resulting from the prosecution's withholding of evidence. Specifically, the defendant alleging a *Brady* violation must demonstrate: (1) that the prosecution suppressed evidence, (2) that the evidence suppressed was favorable to the defendant or exculpatory, and (3) that the evidence suppressed was material. *United States v. Severdija*, 790 F.2d 1556, 1558 (11th Cir. 1986). Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Stewart*, 820 F.2d 370, 374 (11th Cir. 1987) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). This is the standard cited and applied by the Florida Supreme Court to the *Brady* claims raised on appeal by the Petitioner. Absent the Court finding that the state court's ruling on the claim "being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement" federal habeas relief must be denied. *Harrington*, 131 S.Ct. at 786.

Here, the Florida Supreme Court made two primary findings. First, the Petitioner was unable to show that the evidence was favorable. Second, the Petitioner was unable to show prejudice. Neither one of these determinations "arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law" or "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at [an] [opposite] result." *Williams v. Taylor*, 529 U.S. 362, 405 (2000).

The Court has reviewed the Noppinger Reclassification Letter. [Ex. C, ECF No. 12-71 at 33]. The letter outlines Mr. Noppinger's concerns regarding the Broward County crime lab's ability to effectively "upload DNA profiles from *unsolved cases* and to search for information in the National DNA Index System (NDIS) database – currently containing information for more than one million offenders." *Id.* (emphasis added). This factual scenario is inapplicable to the Petitioner and his criminal trial for the murders of Odessia Stephens and Hanessia Mullings. While it could, perhaps, call into question in a very remote and tangential way the general effectiveness of the Broward County crime lab, it does little more than that. Rather, the memorandum seems to catalog personal differences and issues between Mr. Noppinger and the crime lab quality assurance coordinator at the time. Regardless, based on the facts, the Court cannot find that the determination of the Florida Supreme Court to be unreasonable pursuant to the AEDPA.

Similarly, the Court does not find the Florida Supreme Court's prejudice determination unreasonable. At trial, the State presented testimony from twenty witnesses. [R., ECF No. 12-21 -12-31]. During trial, the State presented evidence that showed that the Petitioner was found in the hedges at the crime scene, at that time he had a scratch on his chest, a scrape on his shoulder, and fresh cuts on his hands. *Knight*, 225 So.3d at 668. It was not raining, yet he was visibly wet. He was wearing dress clothes and shoes,but told the police officer that he had been jogging. There was blood on the Petitioner's shirt and other clothing found under the bathroom sink. Dr. Kevin McElfresh, an expert in molecular and population genetics and in DNA analysis also testified that the Petitioner's DNA could not be excluded from the clothing found at the crime scene. The State produced a cellmate of the Petitioner who testified that he gave a detailed confession to the murders while they were incarcerated. *Id.* at

699. Given the trial record, the Petitioner has failed to satisfy the third prong of *Brady*. The Florida Supreme Court did not find a reasonable probability that, had the Noppinger letter been disclosed to the defense, the outcome of trial would have been different. The Court does not find that to be an unreasonable determination.

b. Failure to call Norah Rudin, PhD

The Petitioner next argues that his counsel was ineffective for failing to call Dr. Norah Rudin to testify. [Pet., ECF No. 1 at 58]. He argues that "[a]lthough trial counsel did engage the services of a defense expert[], Dr. Rudin ultimately did not testify before Mr. Knight's jury despite the fact that her opinions and testimony would have significantly undermined the DNA work performed in this case." *Id.* at 58. The Petitioner argues that based on Dr. Rudin's opinion, the State's "entire DNA case would have been subject to a challenge under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)." *Id.* at 58. The Petitioner further argues that "[t]rial counsel's failure to call Dr. Rudin as a witness constituted deficient performance and as a result, [he] was prejudiced." *Id.*

The State asserts that the Petitioner "has not and cannot show deficient performance." [Resp., ECF No. 14 at 39]. The State argues that a review of the report produced by Dr. Rudin does not seriously dispute or discredit the findings of the Broward County Sheriff's Office crime laboratory. Therefore, the Petitioner is unable to show prejudice. Further, trial counsel testified in post-conviction that he deliberated and made a strategic decision to not call Dr. Rudin as a witness. *Id.* at 40. Therefore, the State concludes, the Petitioner failed to prove either prong of *Strickland*.

In reply, the Petitioner argues that the State misunderstands that "Dr. Rudin was, however, critical of other issues that did go to the integrity of the findings." [Reply, ECF No. 21 at 5]. The Petitioner maintains that Dr. Rudin's testimony "would have in fact significantly undermined the integrity of the state's DNA case as a whole." *Id.* at 6. The Petitioner argues that Dr. Rudin's testimony would have either discredited the State's DNA evidence in its entirety or, at the least, would have provided the basis to give it much less weight. *See id.*

The Florida Supreme Court rejected this claim as follows:

At trial, the State's DNA evidence was presented through the testimony of Kevin Noppinger of the Broward County Sheriff's Office, who conducted the actual DNA testing, and Kevin McElfresh of Bode Technology Group, who analyzed Noppinger's results. Dr. Rudin worked for Knight's defense team. She employed Noppinger's analysis to develop a report and aid the defense.

Originally, McElfresh opined that Knight's DNA could be excluded from the DNA samples obtained from the clothing found below the sink at the crime scene. *Knight*, 76 So.3d at 887. However, at trial McElfresh testified that Knight's DNA could not be excluded from the shorts and boxers found in the bathroom at the crime scene. *Id*. McElfresh explained that Knight's DNA could no longer be excluded because an additional sample, that of Victoria Martino, Knight's girlfriend, was tested, and it changed the outcome of the initial analysis. Defense counsel objected to the testimony as a discovery violation, but the objection was denied. *Id.* Defense counsel called Dr. Rudin and relayed McElfresh's testimony. He then sent her a transcript of the testimony of the State's expert. She explained to Knight's counsel that even with the new sample, she agreed with Noppinger's DNA analysis. Later, while the trial was ongoing, Dr. Rudin produced a second report, dated April 28, 2006. The report stated that the DNA procedures may have had some errors and that McElfresh's testimony was not scientifically sound. Notably, Dr. Rudin's second report ultimately supported the State's DNA findings.

At the post-conviction evidentiary hearing, trial counsel explained that he did not call Dr. Rudin as a witness because her conclusions ultimately bolstered the State's arguments. Trial counsel also stated that because the rule at the time allowed the defense to have the last word, he did not want to lose that opportunity.

Dr. Rudin also testified at the evidentiary hearing. She testified that her second report addressed her concerns with Noppinger's DNA testing procedures and with McElfresh's analysis of that testing as it pertained to the clothes found in the bathroom. Dr. Rudin found McElfresh's trial testimony problematic, explaining that his conclusions were questionable because he arrived at them through an unreliable testing method. However, even with the possibly flawed procedures, Dr. Rudin stated that she would have testified consistent with Noppinger's report.

Knight now argues that trial counsel was ineffective for failing to call Dr. Rudin as a witness. He posits that had she testified at trial, the jury would have doubted the State's DNA evidence and ultimately would have found him innocent. While it is possible that Dr. Rudin's testimony may have cast doubt on the State's DNA evidence, we conclude that Knight fails to meet either prong of *Strickland*.

This Court has stated that "[a]s long as the trial court's findings are supported by competent substantial evidence, 'this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'" *Blanco v. State*, 702 So.2d 1250, 1252 (Fla. 1997) (quoting *Demps v. State*, 462 So.2d 1074, 1075 (Fla. 1984)); *see also Cox v. State*, 966 So.2d 337, 357–58 (Fla. 2007) (noting that the trial court is frequently in a superior position to evaluate the testimony based upon its observation of the bearing, demeanor, and credibility of the witnesses) (quoting *Stephens v. State*, 748 So.2d 1028, 1034 (Fla. 1999)).

The record reveals competent, substantial evidence to support the post-conviction court's finding that defense counsel's decision not to present Dr. Rudin during the guilt phase was a reasonable trial strategy. At Knight's evidentiary hearing, trial counsel testified that he made a strategic decision before trial not to call Dr. Rudin as a witness because her original report supported the State's conclusions. Trial counsel also stated that prior to trial, he asked Dr. Rudin whether she would call herself as a witness, and she said that she would not because she could not help Knight's case. Moreover, her report ultimately concluded that her findings were consistent with Noppinger's conclusions and that McElfresh's unreliable testimony was "inconsequential."

Knight also cannot establish that trial counsel's actions or omissions were prejudicial to him. To establish prejudice, Knight must establish that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. In reviewing the prejudice prong, the post-conviction court concluded that even if Dr. Rudin had testified, there was no reasonable probability that the outcome of the trial would have been different in light of the other evidence presented by the State. We agree.

At trial, the State presented evidence that Knight lived with the victims, he had ongoing disagreements with one of the victims, and he was at the apartment on the night of the murders. *Knight*, 76 So.3d at 881. The State also showed that on the night of the

> murders, Knight told a detective that he had been out for a run, yet Knight was wearing a dress shirt, slacks, and dress shoes. *Id.* at 882. Accordingly, trial counsel's actions did not prejudice Knight.

Knight v. State, 225 So. 3d 661, 673–74 (Fla. 2017).

There can be no doubt that the Petitioner's claim is governed by *Strickland*. Here, however, his claims are also governed by the deferential standards of the AEDPA. In *Strickland*, the United States Supreme Court set forth the two-prong test that a convicted defendant must meet to demonstrate that his or her counsel rendered ineffective assistance. First, a defendant "must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. Second, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The Court defines a "reasonable probability" as one "sufficient to undermine confidence in the outcome." *Id.* "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693.

> In *Strickland*, this Court made clear that "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation ... [but] simply to ensure that criminal defendants receive a fair trial." 466 U.S., at 689, 104 S.Ct. 2052. Thus, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.*, at 686, 104 S.Ct. 2052 (emphasis added). The Court acknowledged that "[t]here are countless ways to provide effective assistance in any given case," and that "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Id.*, at 689, 104 S.Ct. 2052.

Cullen v. Pinholster, 131 S.Ct. 1388, 1403 (2011).

Following the State's presentation at the guilt phase, the defense rested without calling a single witness. [R., ECF No. 12-34 at 11]. Here, the Petitioner argues that his trial counsel was ineffective because he should have called Dr. Norah Rudin. Dr. Rudin is a forensic DNA consultant from Berkeley, California. She was retained by the defense; however, she did not prepare a substantive written report until April 28, 2006, following the guilt phase of trial.[6] *Id.* at 26. Her prior correspondence with defense counsel was limited to advising counsel of the documents from the State that she still needed or were incomplete or illegible. *Id.* at 24. Yet, Dr. Rudin was listed as a defense witness prior to trial. [R., ECF No. 12-71 at 20].

During the post-conviction evidentiary hearing, trial counsel testified that he had not planned on calling Dr. Rudin because "she had indicated that after reviewing all of the state's evidence, the ultimate opinion that she would have, was that she did not find any contradiction with her opinion versus the state's opinion." [R., ECF 12-85 at 40]. Even after the "change" in Dr. McElfresh's testimony was given to her, Dr. Rudin "felt that she still could not really assist us in the case. That ultimately her opinion was not going to be any different than the state's case." *Id.* So, trial counsel made a strategic decision to not call her as a witness and preserve his ability to have the final word at closing argument. [7] *Id.*

The state court reviewed the trial transcripts along with the post-conviction record and concluded that the Petitioner had failed to prove either deficiency or prejudice as required by *Strickland*. As *Strickland* is the applicable clearly established federal law and the state court applied it to the facts, the remaining consideration for the Court is the reasonableness of the state court's determination regarding the two *Strickland* prongs. In considering the reasonableness of the court's deficiency finding, review of counsel's conduct is to be highly deferential. *Spaziano v. Singletary*, 36 F.3d 1028, 1039 (11th Cir. 1994). Second-guessing of an attorney's performance is not permitted. *White v. Singletary*, 972 F.2d 1218, 1220 (11th Cir. 1992)("Courts should at the start presume effectiveness and should always avoid second-guessing with the benefit of hindsight."); *Atkins v. Singletary*, 965 F.2d 952, 958 (11th Cir. 1992). Because a "wide range" of performance is constitutionally acceptable, "the cases in which habeas petitioners can properly prevail on the ground of

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[6] Dr. Rudin concluded in her report that "the potential impact [sic] McElfresh's testimony at trial was minimal when considered within the totality of the evidence." [R., ECF No. 12-71 at 26].

[7] In Florida, if the Petitioner decided not to call any witnesses in his defense, he was entitled to give the first closing argument to the jury and also a rebuttal closing after the State's closing argument. In 2007, the Florida legislature enacted Section 918.19 which provides that the State shall have opening and rebuttal closing arguments regardless of whether or not the defense presents any witnesses. *See Evans v. State*, 995 So.2d 933, 945, n.16. (Fla. 2008).

ineffective assistance of counsel are few and far between." *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994). In order to establish a claim of ineffective assistance of counsel, "a defendant must show that his counsel's representation fell below an 'objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Devier v. Zant*, 3 F.3d 1445, 1450 (11th Cir. 1993)(citing *Strickland,* 466 U.S. at 688, 694).

Given that Dr. Rudin's report did not contradict the State's expert and Dr. Rudin advised counsel that she did not believe that she could "assist" the defense, it was not unreasonable for the Florida Supreme Court to find that the Petitioner did not establish deficiency on the part of trial counsel. Moreover, the point when counsel determines "'[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,'" *Evans v. Sec'y, Fla. Dep't of Corr.*, 699 F.3d 1249, 1268 (11th Cir.2012) (quoting *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir.1995) (en banc)).

Finally, the Petitioner has also failed to show that the Florida Supreme Court's prejudice analysis was unreasonable. To satisfy the prejudice prong, the "likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 131 S. Ct. 770, 792 (2011). The state court reviewed the other evidence presented at trial and determined that even if the defense had presented the testimony of Dr. Rudin that there was no reasonable probability of a different outcome. The Court does not find that finding unreasonable. As previously catalogued in the *Brady* prejudice analysis above, there was sufficient evidence on which the jury *could have* convicted the Petitioner, even if the State had presented no DNA evidence. Therefore, the decision of the Florida Supreme Court was not unreasonable.

c. Failure to request a *Frye* hearing

The Petitioner argues that trial counsel "unreasonably failed to move for a hearing pursuant to *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)" despite the fact that he knew that there were significant problems associated with the work and laboratory conditions performed in the Petitioner's case.[8]

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[8] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Since the Petitioner's trial, Florida adopted the federal standard governing the admissibility of scientific evidence first announced by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d

[Pet., ECF No. 1 at 84]. If the Petitioner's counsel had requested a *Frye* hearing, the burden would have shifted to the State to establish that the "exacting standards of admissibility of scientific evidence had been made." *Id.* at 85. The Petitioner asserts that the State would have been unable to meet its burden; therefore, trial counsel was ineffective for failing to request the hearing.

The State responded that the Petitioner's claim "is conclusory and thus insufficiently pled." [Resp., ECF No. 14 at 49]. However, the State also addressed the merits of the Petitioner's claim and argued that he is attempting to use a memo which was obtained after the trial to support his claim of ineffective assistance of counsel. Ineffective assistance of counsel, the State argues, must be based on information that trial counsel had *at the time of trial. Id.* at 52. (emphasis in original).

The Florida Supreme Court denied relief on this claim as follows:

> Knight asserts that trial counsel was ineffective for failing to request a hearing pursuant to *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Knight argues that a *Frye* hearing would have shown that the State's DNA expert employed unreliable testing procedures and, thus, exponentially weakened the State's case. We disagree.
>
> As a general rule, a *Frye* hearing is "utilized in Florida only when the science at issue is new or novel." *Overton v. State*, 976 So.2d 536, 550 (Fla. 2007) (quoting *Branch v. State*, 952 So.2d 470, 483 (Fla. 2006). The *Frye* test places the burden of proof "on the proponent of the evidence to prove the general acceptance of both the underlying scientific principle and the testing procedures used to apply that principle to the facts of the case at hand." *Id.* (quoting *Ramirez v. State*, 651 So.2d 1164, 1168 (Fla. 1995)). Where the testing procedures are at issue, "DNA test results are generally accepted as reliable in the scientific community, provided that the laboratory has followed accepted as reliable testing procedures" to prevent false readings and contamination. *Id.*
>
> To show deficiency, Knight must specifically identify acts or omissions of counsel that were manifestly outside the wide range of reasonable, competent performance under prevailing norms. *Bolin v. State*, 41 So.3d 151, 155 (Fla. 2010). Knight argues that counsel was aware of the deficiencies of the DNA testing by

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469 (1993), which replaced the *Frye* standard. Ch. 2013–107, at 1461–63, Laws of Fla, consistent with *Daubert*, section 90.702, Florida Statutes (2013).

> Noppinger and, as such, should have requested a *Frye* hearing. We reject Knight's argument because there is competent, substantial evidence supporting the postconviction court's denial of Knight's claim.
>
> Noppinger and trial counsel both testified at the evidentiary hearing that the "Preliminary Chain Reaction and Short Tandem Repeats" techniques employed in this case were generally accepted by the community at the time of Knight's trial. Second, even though Dr. Rudin pointed out the possible flaws in Noppinger's labeling procedures, her report and testimony at the evidentiary hearing supported Noppinger's scientific conclusions. It seems that although the labeling procedures were different, Dr. Rudin was unable to actually find any errors, and counsel would not have had a reason to challenge the DNA methodology to exclude the evidence. Counsel cannot be deficient for failing to make an ultimately fruitless request. Likewise, because a *Frye* hearing would not have resulted in the exclusion of the State's DNA evidence, the absence of a *Frye* hearing did not prejudice Knight.

Knight v. State, 225 So. 3d 661, 675 (Fla. 2017).

Pursuant to 28 U.S.C. §2254, the Court concerns itself purely with the constitutional protections embodied in the Petitioner's Sixth Amendment right to the effective assistance of counsel. During the course of analyzing this *Strickland* claim, the state court made certain factual and legal determinations based on the application of *Frye* - the law applicable to a challenge of scientific evidence in Florida at the time of the Petitioner's trial. To be clear, this is a *Strickland* claim not a *Frye* claim.

While *Frye* itself is federal law, the state of Florida had adopted the *Frye* test as its state standard for the admission and reliability of scientific evidence. Therefore, the Court does not consider the reasonableness of the Florida Supreme Court's application of *Frye* to the facts at issue here. Rather, the Court accepts the two underlying legal determinations made by the Florida Supreme Court when denying this claim: (1) a *Frye* request would have been "ultimately fruitless" and (2) a *Frye* hearing would not have resulted in the exclusion of a State's DNA evidence to be decided to be true. The Court must defer to the Florida Supreme Court's application of Florida law. *Reaves v. Sec'y, Dep't of Corr.*, 717 F.3d 886, 903 (11th Cir. 2013) ("The Florida Supreme Court's interpretation of state law is binding on federal courts."). The United States Supreme Court has instructed us that "state courts are the ultimate expositors of state law" and federal courts "are bound by their constructions except in extreme circumstances." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975).

The Court's role here is to conduct a reasonableness analysis on whether or not the state court correctly applied *Strickland* to his claim of ineffective assistance of counsel. The Florida Supreme Court applied its *Frye* determinations to the clearly established law of *Strickland* and made two findings regarding deficiency and prejudice. The court ultimately concluded that the Petitioner had failed to establish either prong of *Strickland*. It is this conclusion that the Court must consider for reasonableness.

First, the state court determined the Petitioner did not show a deficient performance because any *Frye* request would have proven fruitless. Accepting as true the state court's determination regarding the fruitlessness of a *Frye* hearing, this analysis is the correct application of the first prong of *Strickland*. It is axiomatic that counsel cannot be deficient for raising a non-meritorious objection. *See Owen v. Sec'y for Dep't of Corr.*, 568 F.3d 894, 915 (11th Cir. 2009) ("As the underlying claim lacks merit, [] counsel cannot be deficient for failing to raise it."). Therefore, the Court finds that the Florida Supreme Court's legal determination did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. *See* 28 U.S.C. §2254(d)(1).

In addition, the state court found that, even if a *Frye* hearing had been conducted, it would not have resulted in the exclusion of the State's DNA evidence. Therefore, the absence of the hearing would likewise not have changed the outcome regarding the admission of evidence. *Knight*, 225 So. 3d at 675. Accordingly, the Petitioner did not show prejudice. This too is a reasonable application of the *Strickland* prejudice standard. Prejudice results only when counsel's errors were "so serious" that they deprived the defendant of a "fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. To satisfy the prejudice prong, the "likelihood of a different result must be substantial, not just conceivable." *Harrington*, 131 S.Ct. at 792. The Petitioner has not met this standard.

If the evidence that the Petitioner sought to exclude by way of a *Frye* hearing has been determined to have been admissible then the Petitioner cannot show prejudice. Moreover, having found that counsel's performance was not deficient, the Court need not address the prejudice prong. *See Strickland,* 466 U.S. at 697, 104 S.Ct. at 2069. ("[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. The Florida Supreme Court’s Hurst determinations were unreasonable.

The Petitioner’s second claim for federal habeas relief is that the Florida Supreme Court’s analysis of his *Hurst v. Florida*, 136 S.Ct. 616 (2016)(“*Hurst I*”) claim was “contrary to and/or an unreasonable application of clearly established federal law, beginning with *Hurst v. Florida* itself...” (Pet., ECF No. 1 at 107). The Petitioner makes two general arguments. Specifically, he argues that a *Hurst I* error is structural, not amendable to harmless error review” and the Florida Supreme Court’s determination otherwise was an unreasonable application of clearly established federal law. *Id*. Further, the Petitioner asserts that even if a *Hurst I* error was subject to a harmless error review, the determination by the Florida Supreme Court that the *Hurst I* error in his case was harmless was an unreasonable application of clearly established federal law. *Id*. at 113.

The State has responded that, not only is the Petitioner wrong about structural error, but also *Hurst I* is not subject to retroactive application for any federal habeas petitioner in Florida whose conviction and sentence was final before *Hurst I* was decided because “there is no federal right for *Hurst I* to apply.” (Resp., ECF No. 14 at 67). The State contends that the basis for the Florida Supreme Court’s retroactivity determination was state, not federal law. Absent a retroactive application determination made by a federal court applicable to federal habeas petitioners, the Petitioner cannot be granted federal habeas relief. *Id.* Moreover, the State argues that the factors considered in the harmless error analysis itself such as “jury unanimity in making findings, weighing the aggravators against the mitigators, the issue of mercy, and so on” are issues of state law. *Id*. at 76. Finally, even if his claim was subject to federal habeas review, the State asserts that the jury was “properly instructed under state law and still came back with two unanimous recommendations of death” thus the harmless error review by the Florida Supreme Court was reasonable. *Id*. at 78.

In reply, the Petitioner argues that the State “misidentifies, misconstrues, and misunderstands” his arguments. [Reply, ECF No. 21 at 10]. Federal habeas retroactivity is not at issue here; rather the issue ripe for consideration is whether the Florida Supreme Court correctly determined whether a *Hurst I* error was structural or amenable to a harmless error analysis. [Reply, ECF No. 21 at 11].

When denying the Petitioner state habeas relief, the Florida Supreme Court held that the Petitioner's death sentence was unconstitutional because his sentence was final after 2002. As such, the court found that *Hurst I* applies retroactively to the Petitioner, but that he is not entitled to habeas relief because the constitutional violation is harmless beyond a reasonable doubt.

> In two rounds of supplemental briefs, Knight argues that he was unconstitutionally sentenced to death because his penalty phase jury did not find all of the facts necessary to impose the death penalty. We agree. *See Hurst v. Florida*, ––– U.S. ––––, 136 S.Ct. 616, 624, 193 L.Ed.2d 504 (2016). Because Knight's death sentence became final in 2012, *Hurst v. Florida* applies retroactively to him. *See Mosley v. State*, No. SC14–436, 209 So.3d 1248, 1283–84, 2016 WL 7406506, at *25 (Fla. Dec. 22, 2016).
>
> Knight also asks that we vacate his death sentence and sentence him to life imprisonment pursuant to section 775.082(2), Florida Statutes, or alternatively, that we remand for a new penalty phase proceeding. We decline to do either. First, we recently held that section 775.082(2), Florida Statutes, does not mandate the imposition of a life sentence in the event of a *Hurst v. Florida* violation. *See Hurst v. State*, 202 So.3d 40, 63–66 (Fla. 2016). We also decline to vacate Knight's death sentence because we find that this is one of the rare cases in which the *Hurst v. Florida* violation is harmless beyond a reasonable doubt. *See Davis v. State,* 207 So.3d 142, 175, 2016 WL 6649941 (Fla. Nov. 18, 2016).
>
> In *Davis,* this Court held that the *Hurst v. Florida* error was harmless: "With regard to Davis's sentences, we emphasize the unanimous jury recommendations of death. These recommendations allow us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors." *Id.* at 174 (emphasis omitted). Knight's jury likewise recommended a death sentence by a unanimous twelve-to-zero vote. Knight's jury received substantially the same standard jury instruction as we cited in *Davis*, ensuring that the jury "determine[d] whether sufficient aggravators existed and whether the aggravation outweighed the mitigation before it … recommend[ed] a sentence of death." *Id.* (citing Fla. Std. Jury Instr. (Crim.) 7.11). As with the jury in *Davis,* Knight's "jury was presented with evidence of mitigating circumstances and was properly informed that it may consider mitigating circumstances that are proven by the greater weight of the evidence." *Id.* (citing Fla. Std. Jury Instr. (Crim.) 7.11). As in *Davis*, Knight's "jury was not informed that the finding that sufficient aggravating circumstances outweighed the

mitigating circumstances must be unanimous, and ... the jury did, in fact, unanimously recommend death." *Id.* (citing Fla. Std. Jury Instr. (Crim.) 7.11).

To be sure, Knight's jury and the *Davis* jury were not identically instructed. For instance, the *Davis* jury "was instructed that it was not required to recommend death even if the aggravators outweighed the mitigators," while Knight's jury was not. *Id.* (citing Fla. Std. Jury Instr. (Crim.) 7.11). Nonetheless, we believe that Knight's jury received substantially the same critical instructions as Davis's jury, allowing us to conclude beyond a reasonable doubt that here, as in *Davis*, "the jury unanimously made the requisite factual findings to impose death before it issued the unanimous recommendations." *Id.*

Finally, as in *Davis*, "the egregious facts of this case" provide "[f]urther support[ ] [for] our conclusion that any *Hurst v. Florida* error here was harmless." *Id.* at 175. In a violent and bloody struggle, Knight murdered a mother and her four-year-old daughter in an argument about whether Knight had to move out of the mother's apartment. Knight strangled and repeatedly stabbed the mother with multiple knives in her bedroom in the middle of the night while the daughter was present. The mother could not yell for help because Knight's attack had destroyed her larynx. The mother suffered, still conscious, through the attack for at least ten minutes following the fatal wounds. She tried and failed to escape. Knight also attempted to strangle and repeatedly stabbed the daughter. Knight's stabbings caused the daughter's lungs to fill with blood, and she essentially drowned in her own blood. Both victims died gruesome, painful deaths.

> The trial court found two statutory aggravating circumstances for the murder of [the mother]: (1) a previous conviction of another violent capital felony, and (2) HAC. The court also found three statutory aggravating circumstances for the murder of [the daughter]: (1) a previous conviction of another violent capital felony, (2) HAC, and (3) the victim was under twelve years of age.

Knight, 76 So.3d at 890. As we have repeatedly noted, "[t]he HAC and prior violent felony aggravators have been described as especially weighty or serious aggravators set out in the sentencing scheme." *Hildwin v. State*, 84 So.3d 180, 190 (Fla. 2011).

What we said in *Davis* is equally true here:

> > Here, the jury unanimously found all of the necessary facts for the imposition of death sentences by virtue of its unanimous recommendations. In fact, although the jury was informed that it was not required to recommend death unanimously, and despite the mitigation presented, the jury still unanimously recommended that [the defendant] be sentenced to death .... The unanimous recommendations here are precisely what we determined in *Hurst*[*v. State*] to be constitutionally necessary to impose a sentence of death.
>
> *Davis*, 207 So.3d at 175. Accordingly, we hold that the *Hurst v. Florida* violation in Knight's case was harmless beyond a reasonable doubt. *See id*. As in *Davis*, the *Hurst v. Florida* violation here does not entitle Knight to a new penalty phase.

Knight v. State, 225 So. 3d 661, 682–83 (Fla. 2017).

a. structural error

The Petitioner is careful to argue before this Court that he is not asking the Court to retroactively apply *Hurst I* as to the fact finding function of his jury; rather, he is seeking a review as to whether or not the constitutional error which is now well-known and defined by *Hurst I* is structural or amenable to a harmless error review. This distinction is important because any retroactive application of *Hurst I* to the facts and substance of his case on federal habeas review would be subject to a retroactivity analysis. This analysis would likely result in a finding that would bar his claim from substantive federal habeas consideration. Nonetheless, a brief history of *Hurst,* both state and federal, is necessary.

In *Hurst I*, the United States Supreme Court considered whether Florida's death sentencing scheme violated the Sixth Amendment or the Eighth Amendment in light of the Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002). *Hurst*, 136 S. Ct. at 619. On January 12, 2016, the Court held the Florida sentencing scheme unconstitutional. "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." *Id*. at 619. The Court "refused to take up the issue of whether the error in sentencing was harmless, but left it to th[e Florida Supreme C]ourt to consider *on remand whether the error was harmless beyond a reasonable doubt*." *See Hurst v. State*, 202 So. 3d 40 (Fla. 2016) ("*Hurst II*")(emphasis added).

On remand, the Florida Supreme Court expanded the United States Supreme Court's *Hurst I* analysis, finding that Florida's sentencing scheme violated both the Sixth and Eighth Amendments of the United States Constitution and the State of Florida's constitutional right to a jury trial. *Hurst II*, 202 So. 3d at 44.

Following *Hurst I* and *Hurst II*, death-sentenced individuals in Florida raised post-conviction claims in the state courts arguing that their death sentences were likewise unconstitutional. The Florida Supreme Court was compelled to conduct a retroactivity analysis to determine the application of *Hurst I* & *Hurst II* to the approximately 363 death row inmates in Florida. Ultimately, the dividing line for the court was the issuance of *Ring* on June 24, 2002.

> After weighing all three of the above factors, we conclude that *Hurst* should not be applied retroactively to *Asay's* case, in which the death sentence became final before the issuance of *Ring*. We limit our holding to this context because the balance of factors may change significantly for cases decided after the United States Supreme Court decided *Ring*. When considering the three factors of the *Stovall/Linkletter* test together, we conclude that they weigh against applying *Hurst* retroactively to all death case litigation in Florida.

Asay v. State, 210 So. 3d 1 (Fla. 2016). However, the *Asay* opinion left open the question of whether *Hurst II* applies retroactively to post-conviction defendants whose sentences of death became final after the United States Supreme Court decided *Ring*. Following *Asay*, the court decided *Mosely v. State*, 209 So.3d 1248 (Fla. 2016).

> Defendants who were sentenced to death under Florida's former, unconstitutional capital sentencing scheme after *Ring* should not suffer due to the United States Supreme Court's fourteen-year delay in applying *Ring* to Florida. In other words, defendants who were sentenced to death based on a statute that was actually rendered unconstitutional by *Ring* should not be penalized for the United States Supreme Court's delay in explicitly making this determination. Considerations of fairness and uniformity make it very "difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases." *Witt*, 387 So. 2d at 925.

Id. at 1283. *Mosely* is applicable to the Petitioner.

Following the Florida Supreme Court's decision in *Hurst II*, the Petitioner submitted supplemental briefing to the Florida Supreme Court arguing that he was "unconstitutionally sentenced to death because his penalty phase jury did not find all of the facts necessary to impose the death penalty." *Knight*, 225 So.3d at 682. The court agreed and found that because his death sentence became final in 2012, prior to *Ring*, *Hurst I* applied retroactively to him. *Id.* However, the court conducted a harmless error analysis and determined that the *Hurst I* violation was harmless beyond a reasonable doubt. *Id.* This denial of relief prompts the Petitioner to now seek federal habeas review of his *Hurst I* claim.

For clarification, the claim before the Court is on federal habeas review pursuant to 28 U.S.C. §2254. Here, both parties have raised complex constitutional issues and procedural rules which may or may not apply to this claim. Perhaps, the most straightforward resolution of the issue is to consider, even if *Hurst I* has a retroactive application, whether, under his structural error argument, the Petitioner could meet the high and stringent standard imposed by AEDPA. As amended by AEDPA, §2254(d) stops short of imposing a complete bar on federal-court re-litigation of claims already rejected in state proceedings. *Cf. Felker v. Turpin*, 518 U.S. 651, 664, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996) (discussing AEDPA's "modified res judicata rule" under § 2244). "It preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no further." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

When the United States Supreme Court found Florida's death penalty sentencing scheme unconstitutional, it remanded the case for a *harmless error* review. *Hurst I*, 136 S.Ct. at 619. (emphasis added). It could have, *but did not*, determine that the constitutional error found in *Hurst I* was structural error. The remand from the United States Supreme Court to the Florida Supreme Court to "consider whether an error is harmless", in and of itself, is enough to satisfy the reasonableness standard of Section 2254(d) of Title 28. Surely, a fairminded jurist (*i.e.*: the Florida Supreme Court) could have read the *Hurst I* opinion and believed that federal law applicable to the constitutional error in *Hurst I* is amenable to a harmless error review. The Petitioner's argument regarding structural error is rejected.

b. <u>harmless error</u>

While the Petitioner asserts that he is not asking this Court to apply *Hurst I* retroactively to his claim; he is, however, seeking an AEDPA review of the Florida Supreme Court's harmless error analysis of his *Hurst I* claim. To the Court, this is a distinction without a difference. For if there was no *Hurst I* claim, there would be no need for review and no claim for the Court to grant habeas relief. In other words, but for *Hurst I*, the Court would not consider the constitutionality of the Petitioner's death sentence or the jury's fact findings at this stage of the proceedings.

The Court views the Petitioner's attempt at a substantive review of the harmless error analysis as an indirect way of achieving federal habeas review which would otherwise be barred due to non-retroactivity. The state court conducted the aforementioned harmless error review for a group of capital defendants whose cases were final after 2002 by virtue of a retroactive application of *Hurst I*. According to the Petitioner's argument, the state court's retroactive application of *Hurst I* is what allows this Court to now review the correctness of the Florida Supreme Court's decision. Under this logic, because the state court decided to undertake a review of a claim, then also must the federal court. This simply cannot be the case.

To date, no court has determined that *Hurst I* applied retroactively to cases on *a 28 U.S.C. §2254 review*. Rather, the Florida Supreme Court determined that *Hurst I* applied retroactively to cases not final prior to 2002 on *state review*. Moreover, it based its retroactivity entitlement on the fundamental fairness doctrine established in *James v. State*, 615 So.2d 668 (Fla. 1993) and the three factors elucidated in *Witt v. State*, 387 So.2d 922 (1980). In *James*, the Florida Supreme Court held "that fundamental fairness alone may require the retroactive application of certain decisions involving the death penalty after the United States Supreme Court decides a case that changes our jurisprudence." *Mosley v. State*, 209 So.3d 1248, 1275 (Fla. 2016). In *Witt*, the Florida Supreme Court applied a three part test: a change in the law does not apply retroactively "unless the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." *Id*. at 1276. A review of federal law shows a clear difference in the determining factors for the application of the retroactivity doctrine between federal and state law.

c. <u>retroactivity</u>

In *Danforth v. Minnesota*, 552 U.S. 264 (2008), the United States Supreme Court clarified the confusing and, sometimes, misleading concept of "retroactivity." The Court explained that the use of the term "retroactivity" should not imply that the right at issue was not in existence prior to the date the "new rule" was announced. *Id*. at 271. Rather, the underlying right pre-exists the articulation of the new rule and what the Court is actually determining is whether a violation of that right that occurred "prior to the announcement of the new rule will entitle a criminal defendant to the relief sought." *Id*. It is the availability or non-availability of a remedy of which the Court is making a retroactivity determination, not whether a constitutional violation occurred that is the subject of the retroactivity doctrine. This distinction is what allowed the State of Florida to decide that it could provide a remedy to the Petitioner and consider the merits of his claim retroactively; it is also what requires this Court to not consider it at all.

Here, the Petitioner's conviction and sentence was final on May 14, 2012, when the United States Supreme Court denied certiorari review of his direct appeal. *Hurst I* was decided on January 12, 2016. Therefore, in order for *Hurst I* to apply retroactively to the Petitioner, it must be that the new rule announced in *Hurst* rendered types of primary conduct "beyond the power of the criminal law-making authority to proscribe" or be a "watershed" rule that implicates the "fundamental fairness of the trial." *Danforth*, 552 U.S. at 274. (citing *Teague v. Lane*, 489 U.S. 288 (1989)).

As of the date of this Order, the United States Supreme Court has not considered the *Hurst I* retroactivity question as applied to an initial §2254 petition. To date, no precedent from the United States Supreme Court exists which expressly states that *Hurst I* is meant (or not meant) to have a retroactive application on federal habeas review. However, the Eleventh Circuit Court of Appeals, in a motion to vacate a certificate of appealability and in the Rule 60(b) context, has said it does not.

> No U.S. Supreme Court decision holds that its *Hurst* decision is retroactively applicable. In *Lambrix V*, this Court already indicated that *Hurst* is not retroactively applicable on collateral review under federal law, and we hold here that no reasonable jurist would find that issue debatable. *Lambrix V*, 851 F.3d at 1165 n.2. More importantly, Lambrix's two capital convictions and death sentences became final in 1986, sixteen years before *Ring* was decided. The Supreme Court has held that *Ring* does not apply retroactively to cases on collateral review. *See Schriro v. Summerlin*, 542 U.S. 348, 358, 124 S.Ct. 2519, 2526, 159 L.Ed.2d 442 (2004) (holding that *Ring* does not apply retroactively under federal law to death-penalty cases already final on direct review). *Ring* applied only prospectively, and thus, defendants who were convicted before *Ring* were treated differently too by the Supreme Court. The Florida Supreme Court's ruling—that *Hurst* is not retroactively applicable to Lambrix—is fully in accord with the U.S. Supreme Court's precedent in *Ring* and *Schriro*.

Lambrix v. Sec'y, Dep't of Corr., 872 F.3d 1170, 1182-83 (11th Cir. 2017)

The Eleventh Circuit based its *Hurst I* retroactivity determination on the fact that the United States Supreme Court has previously determined that *Ring*, which served as the legal basis for *Hurst I*, was not retroactive. *See Lambrix v. Sec'y, Dep't of Corr*. 851 F.3d 1158, 1173 at n.2 (11th Cir. 2017) (citing *Schiriro v. Summerlin*, 542 U.S. 348, 358 (2004)). The decision in *Hurst I* is substantively analogous to the decision in *Ring* for a *Teague*[9] retroactivity analysis.

Ring held that, under the Sixth Amendment, a sentencing court cannot, over a defendant's objections, make factual findings with respect to an aggravating circumstance necessary for the imposition of the death penalty. Such findings must, as a constitutional matter, be made by a jury. *See id.* at 609. Like *Ring*, *Hurst* held "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Hurst*, 136 S.Ct. at 619. Given the similarities between the two cases, there is little doubt that the retroactivity analysis applicable to *Ring* would likewise be applicable to *Hurst*. In *Schriro v. Summerlin*, 542 U.S. 348, 355-57 (2004), the Supreme Court ruled that *Ring* would not be retroactively applied to cases which had become final before *Ring* was decided because "*Ring* announced a new *procedural* rule that does not apply retroactively to cases already final on direct review." *Id.* at 358. (emphasis added). The Court reasoned:

> A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes. *See Bousley, supra*, at 620-621, 118 S.Ct. 1604 (rule "hold[s] that a ... statute does not reach certain conduct" or "make[s] conduct criminal"); *Saffle, supra*, at 495, 110 S.Ct. 1257 (rule "decriminalize[s] a class of conduct [or] prohibit[s] the imposition of ... punishment on a particular class of persons"). In contrast, rules that regulate only the manner of determining the defendant's culpability are procedural. *See Bousley, supra*, at 620, 118 S.Ct. 1604.
>
> Judged by this standard, *Ring*'s holding is properly classified as procedural. *Ring* held that "a sentencing judge, sitting without a jury, [may not] find an aggravating circumstance necessary for imposition of the death penalty." 536 U.S., at 609, 122 S.Ct. 2428. Rather, "the Sixth Amendment requires that [those circumstances]

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[9] *Teague v. Lane*, 489 U.S. 288 (1989)(new constitutional rules of criminal procedure are generally not retroactive, courts must give retroactive effect to new watershed procedural rules and to substantive rules of constitutional law.).

> be found by a jury." *Ibid*. This holding did not alter the range of conduct Arizona law subjected to the death penalty. It could not have; it rested entirely on the Sixth Amendment's jury-trial guarantee, a provision that has nothing to do with the range of conduct a State may criminalize. Instead, *Ring* altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment. Rules that allocate decision making authority in this fashion are prototypical procedural rules, a conclusion we have reached in numerous other contexts. *See Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 426, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996) (*Erie* doctrine); *Landgraf v. USI Film Products*, 511 U.S. 244, 280-281, 114 S.Ct. 1483, 128 L.Ed.2d 229 1994) (antiretroactivity presumption); *Dobbert v. Florida,* 432 U.S. 282, 293-294, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977) (Ex Post Facto Clause).

Schriro v. Summerlin, 542 U.S. 348, 353–54 (2004). Absent precedent to the contrary, the Court is without jurisdiction to consider the merits of the Petitioner's substantive harmless error claim. As there is no retroactive application of *Hurst I* applicable to the Petitioner's *federal habeas* petition, there is no cognizable claim and relief cannot be granted.

3. Ineffective Assistance of Appellate Counsel

The Petitioner's third claim for federal habeas relief is that his appellate counsel was ineffective for failing to raise two meritorious claims on direct appeal: (1) the trial court erred in allowing the introduction of an unduly prejudicial photograph and (2) the trial court erred in denying a motion for mistrial following a comment on the Petitioner's right to remain silent. [Pet., ECF No. 1 at 134-46]. The Petitioner asserts that although trial counsel preserved these issues with contemporaneous objections, the claims were not raised during his direct review at the Florida Supreme Court [Pet., ECF No. 1 at 138]. He argues that had appellate counsel raised these claims, he would have prevailed. The State responds that the Florida Supreme Court correctly applied the *Strickland* standard and, further, the Petitioner has made his claims in "conclusory terms" such that they are "insufficiently pled". [Resp., ECF No. 14 at 79].

a. <u>unduly prejudicial autopsy photograph</u>

The Petitioner's first sub-claim involves the testimony of the crime scene technician from the Coral Springs Police Department. [Pet., ECF No. at 136.].

Trial counsel objected to the admission of a photo of the child victim, Hanessia Mullings, which depicted her lying down with numbers on her chest and blood around her head and on her clothing. *Id.* Trial counsel objected because the photo was essentially cumulative of several photos already introduced; however, the trial court overruled the objection because it found that the picture was not duplicative as it depicted the victim's entire body as opposed to multiple pictures depicting certain select parts of the victim's body. [R., ECF No. 12-25 at 73]. The Petitioner asserts here that the photograph "did nothing more than inflame the passions of the jury by exposing the jurors to a bloody picture of a young child." *Id.* at 138.

The State responds that trial counsel did not preserve the issue for appeal because the objection made at trial was not that the photo was unduly prejudicial but that it was cumulative. [Resp., ECF No. 14 at 80]. The State further argues that because the state court made a factual finding regarding the objection, the Petitioner must rebut those findings with clear and convincing evidence. *Id.* at 81.

The Florida Supreme Court denied the Petitioner state habeas relief.

> At trial, Knight's trial counsel challenged the admission of a photograph as duplicative of other photographs depicting similar images. We have held that a challenge to a photograph is not preserved for appeal when trial counsel does not state specific grounds for an objection. In *Doorbal v. State*, 983 So.2d 464 (Fla. 2008), we concluded that trial counsel did not properly preserve a similar issue for appeal because trial counsel objected to the admission of a picture on the basis that it was "duplicative." *Id.* at 498–99. We stated that trial counsel failed to preserve the issue because trial counsel did not challenge the photograph for being "gruesome," as he did in his postconviction case. *Id.* at 499. Similarly, Knight's trial counsel did not preserve the issue for appeal. As such, Knight's appellate counsel was not ineffective for failing to present a claim that was not properly preserved.

Knight v. State, 225 So. 3d 661, 681 (Fla. 2017).

To begin, claims of ineffective assistance of appellate counsel are governed by the standard articulated in *Philmore v. McNeil*:

> In assessing an appellate attorney's performance, we are mindful that "the Sixth Amendment does not require appellate advocates to raise every non-frivolous issue." *Id.* at 1130-31. Rather, an effective attorney will weed out weaker arguments, even though they may have merit. *See id.* at 1131. In order to establish prejudice, we

> must first review the merits of the omitted claim. *See id*. at 1132. Counsel's performance will be deemed prejudicial if we find that "the neglected claim would have a reasonable probability of success on appeal." *Id*.

575 F.3d 1251, 1264-65 (11th Cir. 2009). In addition, the Petitioner must also satisfy the AEDPA standard. The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold. *See Williams v. Taylor*, 529 U.S. 362, 410 (2000). When conducting the §2254(d)(2) analysis "we do not question the propriety of the legal standard the trial court applied…[i]nstead, we train our attention on the [] underlying factual determinations on which the trial court's decision was premised." *See Brumfield v. Cain*, 135 S.Ct. 2269, 2276 (2015).

In order for the Petitioner to prevail, he must show that his appellate counsel failed to raise a meritorious claim on direct appeal. "Appellate counsel is not ineffective for failing to raise claims reasonably considered to be without merit." *United States v. Nyhuis*, 211 F.3d 1340, 1344 (11th Cir. 2000) (quotation marks omitted). In order for the underlying claim to be meritorious, an objection must first have been made and preserved during the trial. The Florida Supreme Court cannot and would not consider the merits of the objection otherwise. If the objection was not preserved at trial, then appellate counsel cannot be said to have performed deficiently when he failed to raise it on direct appeal. An appellate court would likely not consider the merits of the claim. This is what happened here.

In his state petition for writ of habeas corpus, the Petitioner asserted an ineffective assistance of appellate counsel claim for failing to argue trial court error as to the admission of a prejudicial photograph at trial on direct appeal. When the Florida Supreme Court conducted its *Strickland* analysis, it determined that appellate counsel's performance was not deficient because trial counsel did not properly preserve the objection for appeal because while counsel did object, it was not the same objection he now asserts on direct appeal. Without the objection being properly preserved, the court determined that appellate counsel's performance cannot be deficient for failing to raise a non-meritorious claim.

At trial, counsel argued that "whatever that picture is being introduced to show are found in other pictures that are also being introduced" and "I'm not sure what that picture would represent that hasn't already been shown in other photographs." [R., ECF No. 12-25 at 74-75]. In his state petition for writ of habeas corpus, he argued that appellate counsel "failed to raise this issue despite trial counsel's repeated objections to the introduction of these photographs at trial." [R., ECF No. 12-125 at 259]. In support of his argument, he cited Florida law regarding the inadmissibility of "photographs which prove, or show, nothing more, than a gory scene" and photos of a "shocking nature." *Id.* The record shows that these specific arguments were not the objections made at trial. The Florida Supreme Court recognized the disconnect between the actual objections made at trial and the different objections raised in the post-conviction motion. It denied the claim.

Here, the Petitioner urges the Court to find the Florida Supreme Court's determination of state law regarding contemporaneous and specific objections to be unreasonable. This, the Court cannot do. When the state courts have already answered the question of how an issue would have been resolved under that state's law had appellate counsel done what a petitioner argues he should have done, "federal habeas courts should not second-guess them on such matters" because "it is a fundamental principle that state courts are the final arbiters of state law." *Callahan v. Campbell*, 427 F.3d 897, 932 (11th Cir. 2005)(quotation marks omitted). "A state's interpretation of its own laws or rules provides no basis for federal habeas corpus relief, since no question of a constitutional nature is involved." *McCullough v. Singletary*, 967 F.2d 530, 535 (11th Cir.1992).

Given that the court reviewed the facts and made a legal determination pursuant to state law, the Court reviews only the factual findings which served the basis of the Florida Supreme Court's legal determination for reasonableness. If the factual findings were reasonable, then the Petitioner is not entitled to federal habeas relief. Based on the record cited above, the factual findings of the Florida Supreme Court were not unreasonable and fully supported by the record. The stated objection at trial was that the photo was cumulative. As such, the Petitioner has provided no basis for the Court to grant federal habeas relief on a claim of ineffective assistance of appellate counsel when the state courts have found that the underlying claim had no merit. A federal habeas court may not issue the writ on the basis of a state's interpretation of its own laws and rules, absent extreme circumstances.[10] *See*

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[10] In some circumstances, a totally unsupportable construction of state law by a state court will be subject to review by the federal courts, if the construction amounts to an obvious subterfuge to evade consideration of a federal claim. *Mullaney v. Wilbur*, 421 U.S. 684, 691 n. 11 (1975).

Pulley v. Harris, 465 U.S. 37, 42 (1984); *McCullough v. Singletary*, 967 F.2d 530, 535-36 (11th Cir.1992).

b. comment on the Petitioner's right to silence

The Petitioner's second sub-claim is that his appellate counsel failed to raise a claim on direct appeal that his right to remain silent was violated when Officer Natalie Cohen-Mocny was asked "[d]id Mr. Knight indicate to you how long he had been gone from the apartment for this jog or run?" [Pet., ECF No. 1 at 141]. At trial, defense counsel objected and preserved the issue for appeal. However, appellate counsel did not raise the issue on direct appeal. The Petitioner argues that this constituted deficient performance and that he was prejudiced as a result.

The State responds that the Petitioner has failed to establish that the state court's determination was contrary to or an unreasonable application of federal law. [Resp., ECF No. 14 at 82]. Moreover, the State argues that the Petitioner does not cite to any clearly established federal law which is contrary to the court's ruling and that he argues the issues solely in the terms of state law. *Id.* at 82-83.

The Florida Supreme Court rejected the Petitioner's claim for state habeas relief as follows:

> Knight argues that appellate counsel was ineffective for failing to appeal the trial court's denial of a mistrial following Officer Mocny's testimony concerning Knight's prearrest statements. When reviewing claims of ineffective assistance of appellate counsel,
>
>> "[t]he criteria for proving ineffective assistance of appellate counsel parallel the *Strickland* standard for ineffective trial counsel." *Wilson v. Wainwright*, 474 So.2d 1162, 1163 (Fla. 1985). Thus, the Court must consider
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>>> 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.
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>> *Teffeteller v. Dugger*, 734 So.2d 1009, 1027 (Fla. 1999) (quoting *Suarez v. Dugger*, 527 So.2d 190, 192–93 (Fla. 1988)).
>
> *Mungin*, 932 So.2d at 1003.

> Knight asserts that Officer Mocny testified on the topic of Knight's right to remain silent, thus violating Knight's constitutional rights. We reject Knight's argument because Officer Mocny's testimony of her conversation with Knight did not violate Knight's constitutional rights. Accordingly, appellate counsel was not ineffective for raising a meritless claim.
>
> This Court has repeatedly recognized the concept that courts must prohibit all evidence or argument that may be interpreted by the jury as a comment on the defendant's right to remain silent. *Brown v. State*, 197 So.3d 569 (Fla. 3d DCA 2015) (citing *State v. Smith*, 573 So.2d 306 (Fla. 1990)).
>
>> Based on its interpretation of article I, section 9 of the Florida Constitution, the court in *Hoggins* held that a prosecutor may not comment upon or attempt to impeach a defendant with his or her post-arrest, pre-*Miranda* or post-*Miranda* silence. This prohibition is premised upon the generally accepted principle that a defendant does not waive his or her right to remain silent at the time of arrest by testifying in his or her own defense at trial. The same test applies regardless of whether the evidence of post-arrest silence is admitted in the state's case in chief or during impeachment of the defendant: "If the comment is fairly susceptible of being construed by the jury as a comment on the defendant's exercise of his or her right to remain silent, it violates the defendant's right to silence." *[State v.] Hoggins*, 718 So.2d [761] at 769 [(Fla. 1998)].
>
> *Robbins v. State,* 891 So.2d 1102, 1106 (Fla. 5th DCA 2004); *see also Chamblin v. State*, 994 So.2d 1165, 1168 (Fla. 1st DCA 2008) (concluding that "[t]he Florida Constitution prohibits prosecutorial comment on a defendant's silence at the time of his arrest, prior to the administration of his *Miranda* warnings, as well as attempts to impeach the defendant therewith.").
>
> The record shows that Mocny's testimony referenced Knight's statements before he was arrested regarding his whereabouts on the night of the crime and whether he had a key to Stephens' apartment. Mocny's testimony did not comment on Knight's silence. Because this claim would have been meritless on direct appeal, we conclude that Knight's appellate counsel was not ineffective.

Knight v. State, 225 So. 3d 661, 681–82 (Fla. 2017).

Here, the court identified *Strickland* as the law applicable to ineffective assistance of appellate counsel claims. *Id.* at 681-82. The court then considered the underlying claim which was the subject of the motion for mistrial and found, pursuant to state law, the claim to be without merit. *Id.* Similar to the prior sub-claim, appellate counsel cannot be said to have performed deficiently for failing to raise a claim deemed meritless under state law. *See DeYoung v. Schofield*, 609 F.3d 1260, 1283 (11th Cir. 2010) (observing that in order to ascertain whether appellate counsel was ineffective in failing to raise, or in inadequately raising, a claim of trial-counsel ineffectiveness, a court must "review the merits of the omitted [or inadequately raised] claims"); *Owen v. Sec'y for Dep't of Corr.*, 568 F.3d 894, 915 (11th Cir.2009) (holding that if issues are without merit, "any deficiencies of [appellate] counsel in failing to raise or adequately pursue them cannot constitute ineffective assistance of counsel").

Moreover, the Florida Supreme Court reviewed the underlying claim and determined that, under the law as it existed in Florida at the time of the Petitioner's trial, did not prohibit the testimony as it was made prior to his arrest and did not comment on his right to silence. *See Knight*, 225 So.3d at 682. The Court will not second guess the Florida Supreme Court on an admissibility of evidence determination pursuant to state law. *Hunt v. Tucker*, 93 F.3d 735, 737 (11th Cir.1996) (federal courts entertaining petitions for writs of habeas corpus must follow the state court's interpretation of a state law absent a constitutional violation). The Court must defer to Florida Supreme Court's application of Florida law. *Reaves v. Sec'y, Dep't of Corr.*, 717 F.3d 886, 903 (11th Cir. 2013) ("The Florida Supreme Court's interpretation of state law is binding on federal courts."). The United States Supreme Court has instructed us that "state courts are the ultimate expositors of state law" and federal courts "are bound by their constructions except in extreme circumstances." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). If the statement was admissible then appellate counsel cannot be deemed deficient for failing to raise the issue on direct appeal.

4. Denial of a Fundamentally Fair Trial

The Petitioner's fourth claim for federal habeas relief is that he was denied a fundamentally fair trial in violation of the United States Constitution. [Pet. ECF No. 1 at 146]. He argues that "due to a number of rulings by the state trial court" errors, both singularly and cumulatively, caused him to be convicted with "improper evidence." *Id.* The Petitioner raises three primary arguments: (1) the trial court erred when it refused to grant him a mistrial after a witness commented to the jury that the Petitioner had a violent background; (2) the trial court erred when it refused to grant a mistrial after the jurors were exposed to him in visible handcuffs and leg shackles during the guilt phase of trial and (3) the trial court erred when it refused to grant a mistrial following the State's DNA expert giving a new opinion that did not exclude the Petitioner as a donor of key DNA evidence. [Pet., ECF No. 1 at 151].

The State responds that the Petitioner has failed to meet his AEDPA burden which requires him to show that the Florida Supreme Court's findings were unreasonable. [Resp., ECF No. 14 at 88]. Further, the State argues that parts of his claim are unexhausted and procedurally barred. *Id.*

In reply[11], the Petitioner contends that the state courts ruled on the merits of his federal constitutional claim and, therefore, the issue is exhausted. [Reply, ECF No. 21 at 30]. The Petitioner disputes that his claims are procedurally barred from federal habeas review.

a. <u>denial of motion for mistrial based on witness' comment that the Petitioner had a "violent background"</u>

At trial, the victims' surviving husband and father commented during his testimony that he knew "Richard's violent background." [Pet., ECF No. 1 at 147]. The defense objected and the jury was instructed to disregard the comment. The defense nonetheless sought a mistrial and argued that "there's no way they can disregard that." *Id.* On direct appeal, appellate counsel raised the issue as trial error worthy of a reversal of the Petitioner's conviction. The Florida Supreme Court denied the claim:

> Knight first claims the trial court erred in denying his motion for mistrial following the State's redirect examination of Hans Mullings, during which Mullings stated that Knight had a "violent background." Specifically, Knight contends that Mullings' testimony had a negative impact on his character and resulted in undue prejudice. While we agree with Knight that Mullings' statement was improper, we disagree that the trial court erred by not granting a mistrial under these circumstances.
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> The facts underlying this claim are as follows. During redirect examination by the State, Mullings testified that when he arrived at his residence and saw the police, "I was just assuming that, truthfully, probably Odessia and Richard got into an argument or something because I know Richard's violent background." The defense objected to this testimony and moved for a mistrial. The

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[11] The Petitioner replied as to the application of the exhaustion requirements of Claims 4(a) and (c). [Reply, ECF No. 21 at 29].

> trial court sustained defense counsel's objection and instructed the jury to disregard the comment.
>
> A trial court's denial of a motion for mistrial is reviewed by an abuse of discretion standard. *Cole v. State*, 701 So.2d 845, 852 (Fla. 1997). The granting of a motion for mistrial is not based on whether the error is "prejudicial." Rather, the standard requires that a mistrial be granted only "when an error is so prejudicial as to vitiate the entire trial," *England v. State*, 940 So.2d 389, 401–02 (Fla. 2006), such that a mistrial is "necessary to ensure that the defendant receives a fair trial." *McGirth v. State*, 48 So.3d 777, 790 (Fla. 2010), *cert. denied*, ––– U.S. ––––, 131 S.Ct. 2100, 179 L.Ed.2d 898 (2011). "It has been long established and continuously adhered to that the power to declare a mistrial and discharge the jury should be exercised with great care and caution and should be done only in cases of absolute necessity." *England,* 940 So.2d at 402 (quoting *Thomas v. State*, 748 So.2d 970, 980 (Fla.1999)). Therefore, "[i]n order for [Mullings' statement] to merit a new trial, the comments must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise." *Salazar v. State*, 991 So.2d 364, 372 (Fla.2008) (quoting *Spencer v. State*, 645 So.2d 377, 383 (Fla.1994)).
>
> It has been established that the State cannot introduce evidence attacking the character of the accused unless the accused first puts his good character in issue. *See Wadsworth v. State,* 201 So.2d 836 (Fla. 4th DCA 1967), *quashed on other grounds*, 210 So.2d 4 (Fla.1968), § 90.404(1)(a), Fla. Stat. (2006).
>
> In the instant case, Mullings, the victims' surviving boyfriend and father and the defendant's cousin, testified that he rushed back to the apartment because he knew Knight had a violent background. However, as noted above, the defense objected, the objection was sustained, and the jury was instructed to disregard the remark. The statement was not so prejudicial as to prevent Knight from receiving a fair trial. *See, e.g., Roman v. State*, 475 So.2d 1228, 1234 (Fla.1985) (concluding that the trial court did not err in denying motion for mistrial when prosecutor's question implied that the defendant had a prior criminal record because although the question was improper, there was other overwhelming evidence against the defendant). Accordingly, we conclude the trial court did not abuse its discretion in denying Knight's motion for mistrial.

Knight v. State, 76 So. 3d 879, 885–86 (Fla. 2011).

The issue here is whether, *under state law*, the admission of testimony regarding the Petitioner's "violent background" was so prejudicial as to have deprived him of a fair trial. The question of whether or not a curative instruction was satisfactory or if a mistrial was warranted is also an issue of *state law*.

The Petitioner is simply challenging the state court's interpretation of Florida law and the claim, as pled, does not rise to a federal constitutional violation. Federal habeas relief for a person in custody pursuant to the judgment of a state court is available only on the ground that the custody violates the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2254(a); *Jones v. Goodwin*, 982 F.2d 464, 471 (11th Cir.1993); *Krasnow v. Navarro*, 909 F.2d 451, 452 (11th Cir.1990). A state's interpretation of its own laws or rules provides no basis for federal habeas corpus relief, because no federal constitutional question is presented. 28 U.S.C. § 2254(a); *Estelle v. McGuire*, 502 U.S. 62, 67, 112 S.Ct. 475, 479, 116 L.Ed.2d 385 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.").

Moreover, on direct appeal, the Petitioner made only a singular, limited, and cursory reference to the federal constitution when arguing his claim; not enough to satisfy the 28 U.S.C. §2254(b) exhaustion requirement.[12] Therefore, the Court concludes that Petitioner failed to fairly present his federal claim to the state courts. *See Duncan v. Henry*, 513 U.S. 364, 365 (1995); *Zeigler v. Crosby*, 345 F.3d 1300, 1307 (11th Cir.2003) (finding that the petitioner's federal habeas claims were not raised in the state court when the direct appeal made no reference to the federal constitutional issues raised in the federal habeas petition). "To fairly present a claim, a petitioner must present the *same* federal claim to the state court that he urges the federal court to consider." *Anderson v. Harless*, 459 U.S. 4, 7 (1983)(emphasis in original); *see also Barclay v. Florida*, 463 U.S. 939, 958–59 (1983) ("Mere errors of state law are not the concern of this court ... unless they rise for some other reason to the level of a denial of rights protected by the United States Constitution.") (citations omitted).

[12] The Petitioner argued that "[b]oth the Sixth Amendment and Art. I, §16(a), Fla. Const., guarantee an accused the right to a fair trial, i.e. a dispassionate review of the evidence by an impartial jury." [Reply, ECF No. 12-123 at 169-70].

b. <u>denial of a motion for mistrial when jurors were exposed to the Petitioner wearing handcuffs and shackles</u>

During the guilt phase of trial, the Petitioner moved for a mistrial following the jury inadvertently viewing him in handcuffs and leg shackles. [Pet., ECF No. 1 at 149]. When the issue was brought to the court's attention during trial, an evidentiary hearing was held. [R., ECF No. 12-2 at 70]. Following testimony, the trial court was satisfied that the jurors did not see the Petitioner in shackles or handcuffs and denied the motion for mistrial. On direct appeal, the Petitioner claimed error.

The Florida Supreme Court found no merit to his claim.

> Next, Knight claims that the trial court improperly denied his motion for mistrial for being shackled in the presence of the jury during the guilt phase. On the final day of jury selection and after the jury had been impaneled, two custody deputies escorted Knight past the jury room. At the same time, the bailiff briefly opened the jury room door. Knight was wearing handcuffs and shackles. Knight filed a motion for mistrial and a motion to disqualify the jury. During an evidentiary hearing on the motions, the deputies reenacted the scenario. The trial court found that no juror could have seen Knight and denied the motion for mistrial.
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> This Court reviews a trial court's ruling on a motion for mistrial under an abuse of discretion standard. *England v. State*, 940 So.2d 389, 402 (Fla.2006). If reasonable people could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and therefore is not an abuse of discretion. *Bryant v. State*, 901 So.2d 810, 817 (Fla.2005) (citing *Canakaris v. Canakaris*, 382 So.2d 1197, 1203 (1980)). A motion for mistrial should be granted only when it is necessary to ensure that the defendant receives a fair trial. *Seibert v. State*, 923 So.2d 460, 471–72 (Fla.2006).
>
> First, it is well accepted that shackling a defendant during a criminal trial is "inherently prejudicial." *Deck v. Missouri*, 544 U.S. 622, 635, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005) (quoting *Holbrook v. Flynn*, 475 U.S. 560, 568, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986)); *see also Bryant v. State*, 785 So.2d 422, 429 (Fla. 2001) (quoting *Bello v. State*, 547 So.2d 914, 918 (Fla.1989)). Visible shackling interferes with the accused's presumption of innocence and the fairness of the fact-finding process. *Deck*, 544 U.S. at 630, 125 S.Ct. 2007; *Bryant*, 785 So.2d at 428; *see also Diaz v. State*, 513 So.2d 1045, 1047 (Fla.1987). For that reason, visible shackles must only be used when "justified by an essential

> state interest" specific to the defendant on trial. *Deck*, 544 U.S. at 624, 125 S.Ct. 2007; *see Bello*, 547 So.2d at 918.
>
> Here, Knight was not forced to stand trial while wearing shackles, but was merely shackled during transport when, according to his allegation, he was inadvertently viewed by several jurors. The record indicates that it is unlikely any juror saw Knight in shackles. However, even if we assumed Knight's allegation to be true,
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> > [w]e have long held that a juror's or prospective juror's brief, inadvertent view of a defendant in shackles is not so prejudicial as to warrant a mistrial. *See, e.g.*, *Singleton v. State*, 783 So.2d 970, 976 (Fla. 2001) (explaining that the jurors' brief glances of the defendant while he was being transported in prison garb and shackles, standing alone, were not so prejudicial as to require a mistrial); *Stewart v. State*, 549 So.2d 171, 174 (Fla.1989) (finding that a new trial was not warranted where the defendant's shackles were ruled unobtrusive and necessary by the trial court and were only barely visible beneath the table); *Heiney v. State*, 447 So.2d 210, 214 (Fla.1984) (holding that the jurors' possible inadvertent and brief sight of the defendant being transported into the courtroom in chains did not justify a mistrial); *Neary v. State*, 384 So.2d 881, 885 (Fla.1980) (concluding that the jurors' inadvertent sight of the defendant being brought into the courtroom in handcuffs was not so prejudicial as to require a mistrial). Thus, the mere fact that a prospective juror saw the shackled ankles of a person whom he believed to be [the defendant] underneath a chalkboard set up in the hallway outside the courtroom is not sufficient, standing alone, to warrant a mistrial or dismissal of the venire.
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> *Hernandez v. State*, 4 So.3d 642, 658 (Fla.), *cert. denied*, ––– U.S. ––––, 130 S.Ct. 160, 175 L.Ed.2d 101 (2009).
>
> Applying that reasoning to the facts of this case, we conclude that even if there was an inadvertent sighting of Knight in shackles, it was not so prejudicial as to warrant a mistrial. Thus, the court's decision to deny Knight's motion for mistrial was not an abuse of discretion.

Knight v. State, 76 So. 3d 879, 886–87 (Fla. 2011).

In his petition for writ of federal habeas corpus, the Petitioner argues that this determination rests on an unreasonable determination of fact in light of the record and is contrary to and/or an unreasonable application of clearly established federal law. [Pet., ECF No. 1 at 150]. The Petitioner contends that he was "denied a fundamentally unfair trial because when the jury saw him in shackles, they could have been led to believe that the trial judge possessed some evidence that Mr. Knight was dangerous and needed to be restrained in the courtroom. *Id.* at 150.

The State responds that the record supports the trial "court's findings and the denial of the motion for mistrial was not an abuse of discretion under Florida law." [Resp., ECF No. 14 at 100]. Further, the State asserts that the Petitioner "has again failed to show by clear and convincing evidence that the Florida Supreme Court's factual findings were unreasonable." *Id.*

The Court disagrees, not about the substance, but about the relevance. The Florida Supreme Court did not make a dispositive factual finding about whether or not the jurors saw the Petitioner in shackles and handcuffs; rather it "assumed Knight's allegation to be true" but concluded that, even so, it was "not so prejudicial as to warrant a mistrial." *Knight*, 76 So.3d at 886. This is a legal determination, not a factual one.

In his brief on direct appeal, the Petitioner identified clearly established federal law as the basis for his claim. [R., ECF No. 12-123 at 175-76]. However, the cases the Petitioner cited stood for a different proposition than the facts presented to the state court. *See Estelle v. Williams*, 425 U.S. 501 (1976) ("the state cannot, consistent with the Fourteenth Amendment, compel an accused *to stand trial before a jury while dressed in identifiable prison clothes*"); *Illinois v. Allen*, 397 U.S. 337 (1970)(an accused cannot always claim the benefit of the constitutional right to remain in the courtroom while at the same time he engages in speech and conduct which is so noisy, disorderly, and disruptive that it is exceedingly difficult or wholly impossible to carry on the trial); *Deck v. Missouri*, 544 U.S. 622 (2005)("*routine shackling during the penalty phase* of a capital trial, without a case-specific finding that security needs justify the shackling, violates a defendant's due process rights unless the state shows beyond a reasonable doubt that the shackling did not contribute to the verdict").

Here, the state court considered whether or not a "*brief and inadvertent* view of a defendant in shackles" is so prejudicial to warrant a mistrial. *Knight,* 76 So.3d at 886. There is no clearly established federal law, as defined by the AEDPA, on this issue. Clearly established federal law is not the case law of the lower federal courts, including this Court or the Eleventh Circuit Court of Appeals. Instead, in the habeas context, clearly established federal law "'refers to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state court decision.'" *Putman v. Head*, 268 F.3d 1223, 1241 (11th Cir. 2001) (alteration in original) (*quoting Williams*, 529 U.S. at 362, 120 S.Ct. 1495).

It is, perhaps, noteworthy that the Circuit Courts of Appeals that have looked at this question have found that the error is not so great as to warrant a mistrial. *See United States v. Jackson,* 423 Fed. Appx. 329 (4th Cir. 2011), *United States v. Lattner*, 385 F.3d 947 (6th Cir. 2004), *United States v. Halliburton*, 870 F.2d 557 (9th Cir. 1989), *United States v. Wilson*, 73 Fed. Appx. 78 (5th Cir. 2003), *Harrell v. Israel*, 672 F.2d 632 (7th Cir. 1982), *United States v. Delarosa*, 700 Fed. Appx. 13 (2nd Cir. 2017), *United States v. Gayles*, 1 F.3d 735 (8th Cir. 1993). Nonetheless, without any clearly established federal law on point, the Florida Supreme Court's determination cannot be an unreasonable application of clearly established federal law. *See Hill v. Humphrey*, 662 F.3d 1335 (11th Cir. 2011)("Because there is no "clearly established" federal law supporting Hill's position, AEDPA mandates that we not overturn the Georgia Supreme Court's denial of Hill's constitutional challenge to Georgia's statutory reasonable doubt standard.")(citing *Berghuis v. Smith*, 559 U.S. 314 (2010), *Thaler v. Haynes*, 559 U.S. 43 (2010). Habeas relief is DENIED.

c. refusal to grant a mistrial when the State's DNA expert gave a new, previously undisclosed opinion

The Petitioner's final sub-claim for federal habeas relief is that his constitutional right to a fundamentally fair trial was violated when the State's DNA expert testified at trial to a previously undisclosed opinion regarding key DNA evidence. [Pet., ECF No. 1 at 151].

The State responds that, on direct appeal, the Petitioner raised this claim "solely in terms of state law, never raising a federal or constitutional issue." [Resp., ECF No. 14 at 101]. Moreover, the State argues that the court's determination of the facts "was not unreasonable and the Petitioner "has failed to carry his burden under AEDPA." *Id.* at 103.

The Petitioner replied that the Florida Supreme Court "had 'fair opportunity' to pass on [the Petitioner's] federal constitutional claim." [Reply, ECF No. 21 at 31]. Moreover, the Petitioner contends that he need not "present 'chapter and verse' of all claims to satisfy the exhaustion requirement." *Id.*

The Florida Supreme Court rejected this claim on direct appeal and found no discovery violation:

Knight also challenges the trial court's ruling that no discovery violation occurred and alleges the trial court erred in denying Knight's motion for mistrial based on the State's experts' testimony regarding DNA evidence. Knight argues that the State provided defense counsel with what appeared to be a complete DNA comparison, but then ordered further DNA comparisons without any notice to the defense. Based on the State's discovery produced prior to trial, defense counsel relied on serologist Kevin Noppinger's DNA analysis that Knight's jean shorts and boxers, recovered from the apartment bathroom, contained Odessia and Hanessia's DNA, and excluded the DNA of Knight.

At trial, however, the prosecutor presented testimony from Dr. Kevin McElfresh of Bode Technology Group establishing that Knight's DNA could not be excluded from the jean shorts and boxers. Because the defense was under the impression that the jean shorts and boxers would exclude Knight, Knight argues that the State "ambushed" the defense at trial by failing to disclose the additional DNA analysis that failed to exclude Knight's DNA from the jean shorts and boxers. Knight asserts the State violated discovery rules and that the trial court erred by failing to conduct a *Richardson* hearing on the alleged violation. This claim is without merit.

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.

See also Taylor v. State, 62 So.3d 1101, 1112 (Fla. 2011). Under this precedent, it is only after the trial court finds a discovery violation that it must make an inquiry into 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. *See Richardson v. State*, 246 So. 2d 771, 775 (Fla.1971) (requiring court to determine

> if violation of rule relating to exchange of witness lists was inadvertent or willful, whether violation was trivial or substantial, and what effect, if any, it had upon ability of other party to properly prepare for trial).
>
> In this case, contrary to Knight's argument, the trial court determined that the State provided Knight with all the evidence presented at trial and that no discovery violation occurred, which is supported by the record. The record demonstrates that the questioned evidence was produced and the trial court found no discovery violation occurred after two inquiries. In fact, the trial court found that the defense was actually in receipt of all evidence, but complained of having the evidence interpreted differently by two experts and having relied on the information from the first expert. *See State v. Evans*, 770 So.2d 1174, 1177–78 (Fla. 2000) ("When testimonial discrepancies appear, the witness' trial and deposition testimony can be laid side-by-side for the jury to consider. This would serve to discredit the witness and should be favorable to the defense. Therefore, unlike failure to name a witness, changed testimony does not rise to the level of a discovery violation and will not support a motion for a *Richardson* inquiry." (quoting *Bush v. State*, 461 So.2d 936, 938 (Fla.1984))). Therefore, because the trial court found that no discovery violation occurred, and that finding is supported by the record, we conclude that no *Richardson* hearing was required in this case.
>
> Based on a review of the record, we hold that the trial court did not err in finding that no discovery violation occurred. Thus, a *Richardson* hearing was not required and the trial court properly denied Knight's motion for mistrial. Furthermore, although a *Richardson* hearing was not required, the trial court nevertheless complied with this Court's precedent in holding such a hearing.

Knight v. State, 76 So. 3d 879, 887–88 (Fla. 2011).

The Court reviewed the Petitioner's initial brief on direct appeal and finds the State's assertion to be accurate. This claim was not properly exhausted in state court sufficiently for federal habeas review. In his brief to the Florida Supreme Court, the Petitioner cites to the Florida Rules of Criminal Procedure and state law regarding discovery violations. The Petitioner does not raise any federal constitutional concerns such that this Court could consider the decision of the state court for a reasonableness analysis pursuant to 28 U.S.C. §2254. [R., ECF No. 12-123 at 178-83]. "The writ of habeas corpus was not enacted to enforce State-created rights." *Cabberiza v. Moore*, 217 F.3d 1329, 1333 (11th Cir. 2000) (citation and quotation marks omitted); *Tejada v. Dugger*, 941 F.2d 1551, 1560 (11th Cir. 1991) ("Questions of state law [and procedure] rarely raise issues of federal constitutional significance, because '[a] state's interpretation of its own laws provides no basis for federal habeas corpus relief, since no question of a constitutional nature is involved.'") (quoting *Carrizales v. Wainwright*, 699 F.2d 1053 (11th Cir.1983)). Absent a federal constitutional question, the Court will not review the claim.

5. Ineffective Assistance of Penalty Phase Counsel

The Petitioner's final claim for federal habeas relief is that his penalty phase counsel rendered ineffective assistance for failing to "effectively investigate and present mitigating evidence." [Pet., ECF No. 1 at 156]. Specifically, the Petitioner contends that his counsel failed to "adequately investigate" significant mitigating evidence of childhood abuse, including sexual abuse and "failed to provide the professionally adequate expert mental health assistance to which Mr. Knight was entitled." [Pet., ECF No. 1 at 160].

The State responded that the state court granted an evidentiary hearing on this claim, subsequently made factual findings, and determined that the Petitioner failed to prove his claim. [Resp., ECF No. 14 at 114]. The State asserts that the court did a proper analysis under *Strickland* and its findings were reasonable; therefore, the Petitioner has failed to meet his burden under the AEDPA.

a. <u>sexual abuse</u>

The Florida Supreme Court denied the Petitioner's first sub-claim regarding the failure to investigate sexual abuse and found that he failed to prove his claim based on *Strickland*.

> The State argues that Knight did not pursue this claim at the evidentiary hearing, but the record reflects that Knight did argue this claim and introduced the investigator's report as evidence. Thus, we conclude that Knight did not waive his argument that counsel was ineffective for failing to investigate his background and possible sexual abuse.
>
> This Court has repeatedly considered claims of ineffective assistance of counsel during the penalty phase of a trial. *See Brooks v. State*, 175 So.3d 204 (Fla. 2015); *Diaz v. State*, 132 So.3d 93, 114 (Fla. 2013). In *Diaz*, this Court reiterated that "trial counsel was not ineffective for failing to discover that the defendant was sexually abused when the defendant and his family were not forthcoming with the information, even though trial counsel was aware of the defendant's rough childhood." *Id.* at 114.

> In *Diaz*, trial counsel testified at the evidentiary hearing that Diaz and Diaz's family were not forthcoming with information about Diaz's alleged sexual abuse. *Id.*
>
> Here, we conclude that the postconviction court's denial of Knight's claim is supported by competent, substantial evidence. At trial, counsel presented testimony from Knight's teachers, who testified regarding Knight's family, Knight's personality, and his bad temper when provoked. *Knight*, 76 So.3d at 883–84. During the evidentiary hearing, counsel testified that while investigating Knight's background, counsel traveled to Jamaica, where Knight grew up. Trial counsel also stated that he "spent a great deal of time" getting to know Knight's family and teachers. Trial counsel testified that Knight's family was "very cooperative" and that at no time during the many conversations with family and friends, did Knight's alleged sexual abuse come up. Further, counsel testified that he did not recall ever being notified by Knight or others that Knight had been sexually abused as a child. Counsel was shown an investigative report in which Knight's sister said that an aunt once told that her that Knight may have been abused as a child. The report also stated that the same sister said she was reassured by another family member that this was not true and no such claims had been made. To this, counsel testified that he had never once heard from a family member or Knight that there had been sexual abuse. Because we uphold the postconviction court's finding that Knight's trial counsel was not deficient for failing to discover this childhood abuse, we decline to address whether this failure prejudiced Knight.

Knight, 225 So.3d at 676.

The Petitioner argues that this decision rests on an unreasonable determination of fact and is contrary to and/or an unreasonable application of established federal law. [Pet., ECF No. 1 at 163]. The Petitioner's argument is primarily that "[a] constitutionally adequate investigation entails an in depth review of the entirety of the client's background, not just areas brought up by the client or the family." *Id.* at 164. Therefore, he argues, the court's conclusion that counsel's performance was not deficient because he did not investigate sexual abuse due to the fact that no one in his family or the defendant ever indicated that he had been subjected to sexual abuse was unreasonable. The Petitioner does so without citing any clearly established federal law which stands for the proposition that an attorney should investigate all possible mitigation evidence even though the defendant and his family have not indicated it had occurred or would be relevant or applicable to the defendant.

The Court does not find that the Florida Supreme Court's determination that counsel's performance was not deficient was unreasonable.[13]

b. <u>expert witness</u>

The Petitioner also argues that his penalty phase counsel was ineffective for failing to "ensure that the client is not denied a professionally conducted mental health evaluation." [Pet., ECF No. 1 at 156]. The Petitioner asserts two principle arguments: (1) that counsel failed to obtain a competent mental health expert once the initial expert witness was incapable of testifying and (2) counsel was ineffective when he failed to have the initial expert's deposition admitted into evidence at trial once he became "unavailable."

The Florida Supreme Court rejected both of these arguments. These rejections were entirely reasonable.

> Dr. Mittenberg was the defense's mental health expert. He performed tests on Knight and determined that Knight suffered from a brain abnormality. This determination was further supported by Knight's PET scans. Knight's trial counsel testified at the evidentiary hearing that he was relying on Dr. Mittenberg's testimony to show that Knight's brain abnormality impacted his behavior and to prove the mitigator that on the night of the crime, Knight was unable to control his behavior. However, during trial but before Dr. Mittenberg was scheduled to testify, he notified trial counsel that he would not be testifying due to emotional distress. Counsel later discovered from Dr. Mittenberg's attorney that the emotional distress was caused by his excessive drinking, which began because he believed that he had committed a federal crime by inappropriately scoring Knight's Minnesota Multiphasic

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[13] The Florida Supreme Court declined to conduct a prejudice analysis; however, on the record before the Court, the Petitioner would be unable to show prejudice. At the evidentiary hearing, he did not offer any evidence that he was, in fact, sexually abused. [Rec., ECF No. 12-85 at 79-100]. In his appeal to the Florida Supreme Court, he did not argue that the outcome of his penalty phase would have been different because had the jury heard the details of his alleged sexual abuse, they would have been moved to vote for mercy. [Rec., ECF No. 12-124 at 413-422]. Similarly, in his Petition before this Court, he has not alleged that the Florida Supreme Court unreasonably rejected his prejudice argument because he was, in fact, the victim of childhood sexual abuse. The Petitioner has not argued that he established that fact during any of his post-conviction proceedings. [Pet., ECF No. 1 at 163].

Personality Inventory (MMPI). A hearing was held, during which Dr. Mittenberg asserted his Fifth Amendment privilege, and trial counsel moved for a mistrial. Trial counsel's motion was denied, but the court granted a two-month recess to find another mental health expert. Trial counsel then hired Dr. Arias, who was unable to replicate Dr. Mittenberg's results and was unable to confirm that Knight had a brain abnormality. During the penalty phase of trial, trial counsel could have introduced Dr. Mittenberg's pretrial deposition as well as the report of his findings. However, at the evidentiary hearing, trial counsel testified that he did not introduce either the deposition or the report due to the flaws in Dr. Mittenberg's analysis.

Knight asserts that trial counsel failed to ensure that Knight had the assistance of a competent mental health expert. Consequently, he argues that had the jury been offered mitigating evidence that Knight suffered from a mental health problem, Knight's sentence would have been different. For the reasons below, we conclude that there is competent, substantial evidence to support the postconviction court's finding that Knight failed to show that counsel's performance was deficient and prejudicial.

In *Hoskins v. State*, 75 So.3d 250, 255 (Fla. 2011), this Court reiterated the rule that "counsel's entire investigation and presentation will not be rendered deficient simply because a defendant has now found a more favorable expert." Hoskins also failed to show prejudice because "his experts in both the penalty phase and postconviction hearing testified that Hoskins suffered from brain damage.... The jury in the penalty phase, however, did not find such evidence sufficient to overcome aggravation in this case." *Id.* at 255 (quoting *Card v. State*, 992 So.2d 810, 818 (Fla. 2008); *see also Pham v. State*, 177 So.3d 955, 962 (Fla. 2015) ("As we have repeatedly stated, trial counsel is not deficient simply because postconviction counsel can find a more favorable expert.").

The postconviction court did not err in finding that Knight failed to prove either prong of *Strickland*. Trial counsel was not deficient, as he provided Knight with a mental health expert, Dr. Mittenberg, and when that expert was unable to testify, trial counsel sought to find another expert to replicate Dr. Mittenberg's findings. Trial counsel reached out to another doctor, Dr. Arias, to perform the same tests on Knight. Trial counsel testified at the evidentiary hearing that Dr. Arias could not replicate Dr. Mittenberg's results and, in fact, found the opposite. Trial counsel was unable to find another doctor to administer more testing within the two-month period. It is likely that Dr. Arias was unable to replicate Dr. Mittenberg's results because Dr. Mittenberg used an illegal method

> of scoring Knight's MMPI exam. Furthermore, Knight is unable to show prejudice. Accordingly, we affirm the postconviction court's findings.
>
> Knight's next argument is that trial counsel was deficient because he failed to introduce at trial Dr. Mittenberg's deposition, which would have shown that Knight suffered from a brain abnormality. Trial counsel testified that he did not introduce Dr. Mittenberg's report to the jury because the deposition weakened Dr. Mittenberg's reliability, since he stated in the deposition that he may have a conflict of interest, lied about the reliability of the scoring of Knight's MMPI test, and confessed that he had used an unlicensed scoring system. Additionally, even if counsel was deficient, counsel's actions were not prejudicial. Trial counsel introduced evidence of Knight's brain abnormality through Dr. Kotler's testimony. Even with some evidence of Knight's brain abnormalities, the jury still recommended that Knight be sentenced to death.
>
> Last, Knight argues that trial counsel was deficient because he did not present Dr. Mittenberg's report to the jury. Knight argues that if the jury had heard Dr. Mittenberg's results and opinions, the jury would have recommended a different sentence. At the evidentiary hearing, trial counsel explained that he did not want to introduce Dr. Mittenberg's report because it would have prompted the State to introduce its expert and call into question Dr. Mittenberg's reliability. He further explained that had Dr. Mittenberg been available to testify, he would have called him as a witness, despite the fact that the State would have called its own expert, because trial counsel believed that Dr. Mittenberg's analysis would seem sounder if he were on the stand. Without him, trial counsel felt that using the report would do more harm than good. We conclude that trial counsel employed a reasonable strategy that does not constitute deficient performance under *Strickland*. Further, Knight was not prejudiced because the jury still heard evidence of Knight's alleged brain abnormality in the form of witness testimony.

Knight v. State, 225 So. 3d 661, 676–78 (Fla. 2017).

The history surrounding the retention and subsequent exclusion of Dr. Mittenberg are remarkable. A complete recitation of the facts is not entirely necessary to consider the merits of this claim. The relevant facts are simply that penalty phase counsel hired Dr. Mittenberg following a recommendation by some colleagues, including a consultant working for the State. [Rec., ECF No. 12-53 at 16]. At the time of his retention, there was nothing to indicate or suggest that Dr. Mittenberg would not be qualified to give an expert opinion regarding the Petitioner's mental health. Initially, penalty phase counsel found him to effective, honest, and straightforward. *Id.* Counsel stated that "when I pretried him with my investigator, he was extremely coherent and confident in his opinions." *Id.*

Until Dr. Mittenberg became mentally and physically unable to testify, there was no reason for counsel to believe that he was not qualified to testify regarding mental health mitigation. There is nothing in the record to suggest that counsel's performance in hiring Dr. Mittenberg was deficient. "The test for ineffectiveness is not whether counsel could have done more; perfection is not required. Nor is the test whether the best criminal defense attorneys might have done more. Instead, the test is whether some reasonable attorney could have acted in the circumstances . . . [as this attorney did]-whether what . . . [this attorney] did was within the 'wide range of reasonable professional assistance.'" *Waters v. Thomas*, 46 F.3d 1506, 1518 (11th Cir. 1995) (en banc) (quoting *Strickland*, 466 U.S. at 689) (citation omitted). Given the bizarre circumstances of Dr. Mittenberg's incapacitation, counsel cannot be deemed deficient for failing to anticipate that the expert would have been unable to testify at trial. The determination of the Florida Supreme Court regarding deficiency was not unreasonable.

Moreover, given the credibility issues surrounding Dr. Mittenberg, it was more than reasonable for penalty phase counsel to not seek to have his deposition admitted into evidence; in lieu of his live testimony. Dr. Mittenberg admitted to having provided false testimony during his deposition when he testified that he had hand scored the Petitioner's MMPI test but, in fact, it was computer scored. [Rec., ECF No. 12-53 at 16]. In addition, Dr. Mittenberg had "misscored" the Petitioner's Hopkins Test of Recognition finding initially that the Petitioner was "impaired" but when it was rescored it was "normal." *Id.* at 17. In all candor, penalty phase counsel advised the trial court that he felt "the doctor is somehow not competent in the manner in which he's even doing sort of tasks that don't require anything more than just simply adding up numbers." *Id.* at 18. It cannot be that counsel's performance was deficient for failing to admit deposition testimony which he knew had false or misleading information. The Florida Supreme Court's determination regarding deficiency was not unreasonable under *Strickland*.

Conclusion

Accordingly, after due consideration, it is

Ordered and Adjudged that Petitioner, Richard Knight's Petition for Writ of Habeas Corpus by a Person in State Custody [Pet., ECF No. 1 is **denied**. All pending motions are **denied** as moot. A Certificate of Appealability is **denied**. The Court finds that there is not a substantial showing of a denial of a constitutional right and no "jurists of reason could disagree with the district court's resolution of his constitutional claim or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)(citation omitted). The Clerk of the Court is instructed to **CLOSE** the case.

DONE AND ORDERED, at Miami, Florida, on April 30, 2018.

Robert N. Scola, Jr.
United States District Judge

ATTACHMENT D

225 So.3d 661
Supreme Court of Florida.

Richard KNIGHT, Appellant,
v.
STATE of Florida, Appellee.
Richard Knight, Petitioner,
v.
Julie L. Jones, etc., Respondent.

No. SC14–1775
|
No. SC15–1233
|
[January 31, 2017]

Synopsis

Background: Defendant moved to vacate his death sentence, after his convictions for two counts of first-degree murder were affirmed on appeal, 76 So.3d 879. The Seventeenth Judicial Circuit Court, Broward County, Eileen M. O'Connor, J., denied his motion. Defendant appealed and petitioned for a writ of habeas corpus.

Holdings: The Supreme Court held that:

counsel's decision not to call DNA analyst as witness did not amount to ineffective assistance;

counsel's failure to request *Frye* hearing did not amount to ineffective assistance;

counsel's alleged failures regarding mitigating evidence did not amount to ineffective assistance;

State's alleged failures to disclose documents did not amount to *Brady* violations;

defendant's right to remain silent was not violated; and

unconstitutional imposition of death sentence was harmless.

Affirmed; petition denied.

Canady and Polston, JJ., concurred in result.

Quince, J., concurred in part, dissented in part, and filed opinion in which Perry, Senior Justice, joined.

Perry, Senior Justice, concurred in part, dissented in part, and filed opinion.

***667** An Appeal from the Circuit Court in and for Broward County, Eileen M. O'Connor, Judge—Case No. 062001CF014055A88810 And an Original Proceeding—Habeas Corpus

Attorneys and Law Firms

Neal Andre Dupree, Capital Collateral Regional Counsel, Southern Region, Todd Gerald Scher, Assistant Capital Collateral Regional Counsel, Southern Region, and ***668** Jessica Leigh Houston, Staff Attorney, Fort Lauderdale, Florida, for Appellant/Petitioner

Pamela Jo Bondi, Attorney General, Tallahassee, Florida, and Lisa–Marie Krause Lerner, Assistant Attorney General, West Palm Beach, Florida, for Appellee/Respondent

Opinion

PER CURIAM.

Richard Knight appeals an order of the Seventeenth Judicial Circuit Court in and for Broward County denying his motion to vacate his sentence of death filed under Florida Rule of Criminal Procedure 3.851. Knight also petitions this Court for a writ of habeas corpus. See art. V, § 3(b)(1), (9), Fla. Const. For the reasons discussed below, we affirm the circuit court's denial of Knight's rule 3.851 motion and deny his petition for a writ of habeas corpus.

I. STATEMENT OF THE CASE & FACTS

On April 26, 2006, a jury found Richard Knight guilty of two counts of first-degree murder for the deaths of Odessia Stephens and her four-year-old child, Hanessia Mullings. The jury unanimously recommended a death sentence for each murder. Knight v. State, 76 So.3d 879, 884 (Fla. 2011).

A. Trial & Direct Appeal Proceedings

On direct appeal, we set forth the following relevant factual and procedural background:

> The evidence presented at trial established that Knight lived in an apartment with his cousin, Hans Mullings, Mullings' girlfriend, Odessia Stephens, and their daughter, Hanessia Mullings. Mullings and Odessia had asked Knight to move out numerous times.
>
> On the night of the murder, June 27, 2000, Mullings was at work. At approximately 9 p.m., Mullings spoke to Odessia, who said she was going to bed, and then Mullings left his office to run errands. Knight was at the apartment with Odessia and Hanessia.
>
> Around midnight, an upstairs neighbor heard multiple thumping sounds on the apartment walls and two female voices, one of which was a child crying. The neighbor called 911 at 12:21 a.m. on June 28, 2000. The cries continued after the police arrived.
>
> Officer Vincent Sachs was the first to respond. He arrived at 12:29 a.m. and noted that the lights were on in the master bedroom and hall area, and that a second bedroom's window was slightly ajar. After knocking and receiving no response, he walked around the unit and noticed that the lights had been turned off and that the previously ajar window was now completely open and blinds were hanging out of it. Sachs shined his flashlight through the dining room window. He saw blood in the dining room and master bedroom. Further, he noticed Hanessia curled in the fetal position against the closet door. Once inside, he observed Odessia's body in the living room. All of the doors were locked and there had been no ransacking of the apartment.
>
> Officer Natalie Mocny arrived next and walked around the unit. She also saw the open window and noticed Knight on the other side of some hedges approximately 100 yards from the building. She beckoned him over for questioning. Officer Sachs joined Mocny. According to the officers, Knight had a scratch on his chest, a scrape on his shoulder, and fresh cuts on his hands. Although it was not raining, Knight was visibly wet. Knight was wearing dress clothes and shoes, yet told Mocny that he had been jogging, and that he lived in the apartment, but did not have a key to get inside. There was blood on the shirt he was wearing and on a ten-dollar bill in his possession.
>
> ***669** The crime scene investigation recovered two wet towels in Knight's bedroom, a shirt, boxers, and a pair of jean shorts under the sink in the bathroom near Knight's bedroom, all of which belonged to Knight and had numerous bloodstains. Two knife blades were also recovered, one from under the mattress in the master bedroom, and another from under Odessia's body.
>
> Odessia's blood was found in the master bedroom between the bed and the wall, on the master bedroom blinds, on the living room carpet, on the knives' handles and blades, and on the knife holder in the kitchen. Odessia's blood was also discovered on Knight's boxers, shirt, jean shorts, the clothing Knight had been wearing when arrested, and his hand. Fingernail scrapings taken from Odessia contained Knight's DNA profile.
>
> Hanessia's blood was found on one of the knives, on Knight's boxers, jean shorts, and on the shower curtain. The shower curtain also contained the blood of Knight's acquaintance, Victoria Martino.
>
> Dr. Lance Davis, the medical examiner, observed the bodies at the scene. Odessia was found on the living room floor near the entrance with several broken knife pieces around her. She had twenty-one stab wounds: fourteen in the neck, one on the chin, and the rest on her back and chest. Additionally, she had twenty-four puncture or scratch wounds and bruising and ligature marks on her neck. The bruises appeared to have been made by a belt or similar object. She also had defensive wounds on both hands and wounds on her leg, chest, back and neck. Several of the knife wounds were fatal but none would have resulted in an instantaneous death. She had bruises from being punched on her scalp and mouth. Davis opined that Knight began his attack in the bedroom with Odessia fleeing to the living room. He estimated that Odessia was conscious for ten to fifteen minutes after the attack.
>
> Davis discovered Hanessia on the floor next to the closet door. There were broken knife pieces around her. She had a total of four stab wounds in her upper chest and neck. Her hand had one additional stab wound and numerous defensive wounds. Hanessia's arms and upper body had numerous bruises and scratches. There were bruises on her neck that were

consistent with manual strangulation and bruises on her arms consistent with being grabbed.

Stephen Whitsett and Knight were housed together from June 29, 2000, to July 22, 2000, at the Broward County Jail. Knight confessed to Whitsett about the murders as follows: The night of the murders Knight and Odessia argued. She told him that she did not want to support him and that he would have to move. He asked for some more time because he had just gotten a job, but Odessia refused and told him to leave in the morning. Knight left the house to go for a walk and he became increasingly angry. He returned that night, confronted Odessia in her room, and they argued.

Knight went to the kitchen and got a knife. When he went back to the master bedroom, Odessia was on one side of the bed and Hanessia was on the other. He began by stabbing Odessia multiple times. Odessia eventually stopped defending herself and balled up into a fetal position. Knight then turned to four-year-old Hanessia. The knife broke while he was stabbing Hanessia, so he returned to the kitchen for another. Upon returning, Knight saw Hanessia had crawled to the closet door and was drowning in her own blood.

***670** Again, Knight returned to the kitchen and accidentally cut his hand on one of the broken knives that he had used to stab Odessia and Hanessia. He grabbed another knife. Odessia had crawled from the master bedroom to the living room and was lying in her own blood. He rolled her over and continued his attack. Odessia's blood covered Knight's hands, so he wiped them on the carpet.

Knight further confessed that, after he finished with Odessia, he went to the bathroom, took off the blood soaked shorts and T-shirt, and tossed them under the sink. He showered and put on blue polo pants. He wiped down the knives in the living room. At that time, Knight heard a knock on the door and saw the police outside through the peep hole. He ran to his room and out the window. In an attempt to deflect suspicion away from himself, Knight returned to his bedroom window where he saw a female police officer.

Knight was charged by indictment on August 15, 2001, for the murders of Odessia Stephens and Hanessia Mullings. The jury found Knight guilty of both counts of first-degree murder.

At the penalty phase, Knight called six witnesses, several of whom testified about his childhood and upbringing in Jamaica. His teacher, Joscelyn Walker, told the jury that Knight was a respectful and loving boy raised in a very respected family. He said that Knight did have a temper when provoked and would become extremely frustrated at times. Walker had to restrain him from time to time when Knight wanted to fight another child. Knight's high school art teacher, Joscelyn Gopie, described Knight as a pleasant, eager boy who was quite talented at art. Gopie explained that Knight was adopted as a toddler by his family. Knight left high school before he graduated.

Barbara Weatherly is the mother of Knight's former fiancée. She described him as a decent, honorable guy who respected her rules regarding her daughter. He always helped her younger children with their drawing. He was a quiet and peaceful person who spent a lot of time alone. One night at her house he got sick; his eyes rolled back in his head and he frothed at the mouth before passing out. They took him to the hospital where the doctor said that he needed to see a psychiatrist. She last saw him in 1998 when he left to go to the United States.

A former boss and coworker of Knight's, Stanley Davis, also testified. Davis explained that Knight had been adopted into a well respected family and had a close loving relationship with his family members. Knight took over many of his father's duties when his father lost a leg. Knight worked with him at a construction company and was a good worker. On one occasion Knight fell and blacked out, after which he had difficulty concentrating and became timid.

Valerie River, the defense investigator, and Knight's attorney journeyed to Jamaica to interview Knight's family and friends. Knight was abandoned by his mother and the Knight family found him at a hospital and took him home. He was a good brother and son. Knight's close friends and family said that he was a nice and good person. Knight's sister-in-law used to have Knight babysit her children but eventually stopped because he was careless around the house. Knight blacked out on one occasion. Knight's former boss Stedman Stevenson said he was a hard worker and a quick learner. He took Knight to Florida, and Knight decided to stay.

Knight also presented expert Dr. Jon Kotler who practices nuclear medicine and specializes in PET scans of the ***671** brain. He explained that Knight's physical symptoms indicated that he might have a brain injury. The MRI done on him was normal. Dr. Kotler did a PET scan which he interpreted as showing asymmetrical brain activity indicating possible pathology of the brain, perhaps a seizure disorder. He could not say exactly what the pathology might be or how it might manifest itself in Knight's behavior. Dr. Sfakianakis, another nuclear medicine doctor, read the PET results as showing only a mild difference between the brain hemispheres which was within the normal fluctuations of the brain.

Following the presentation of penalty-phase testimony, the jury unanimously recommended the death penalty for both murders.

The trial court subsequently conducted a [Spencer v. State, 615 So.2d 688 (Fla. 1993),] hearing on August 18, 2006. At the hearing, the defense submitted the report and deposition of neuropsychologist Dr. Mittenberg who examined Knight but refused to testify at trial. The State submitted the report and deposition of Dr. Lopickalo, another neuropsychologist. Mullings and Eunice Belan also gave victim impact statements.

Subsequent to the Spencer hearing, the trial court followed the jury's [unanimous] recommendation and sentenced Knight to death. In pronouncing Knight's sentence, the trial court determined that the State had proven beyond a reasonable doubt two statutory aggravating circumstances for the murder of Odessia Stephens: (1) a previous conviction of another violent capital felony, and (2) that the murder was especially heinous, atrocious, or cruel (HAC). The court also found three statutory aggravating circumstances for the murder of Hanessia Mullings: (1) a previous conviction of another violent capital felony, (2) HAC, and (3) the victim was under twelve years of age. The court found no statutory mitigating circumstances but found eight nonstatutory mitigators, which are set forth in our proportionality discussion.

Knight, 76 So.3d at 881–84 (footnote and headings omitted). On direct appeal, Knight raised five claims: (1) the trial court abused its discretion by denying Knight's motion for a mistrial based on Hans Mullings' comment that he knew Knight to have a violent background; (2) the trial court abused its discretion in denying Knight's motion for a mistrial based on the allegation that jurors saw him wearing shackles; (3) the trial court erred in ruling that no discovery violation occurred and in denying Knight's motion for a mistrial based on the State's expert's testimony regarding DNA evidence; (4) the trial court erred in denying Knight's motion to seat a new jury based on Mullings' testimony; and (5) Florida's death sentencing statute violates the Sixth Amendment and ignores Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Knight, 76 So.3d at 885, n.3.

We affirmed Knight's convictions and sentence of death. Id. at 885. Knight's sentence became final on May 14, 2012, when the United States Supreme Court denied certiorari. Knight v. Florida, ––– U.S. ––––, 132 S.Ct. 2398, 182 L.Ed.2d 1038 (2012) (Mem).

B. Postconviction Relief Proceedings

On May 10, 2013, Knight filed his "Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend," pursuant to Florida Rule of Criminal Procedure 3.851. He raised the following claims: (1) he was improperly denied access to public records; (2) the one-year deadline in Florida Rule of Criminal Procedure 3.851 was unconstitutionally applied to him; (3) he was denied adversarial testing at the guilt phase; (4) he was ***672** denied adversarial testing at the penalty phase; (5) the rule prohibiting juror interviews is unconstitutional; and (6) Florida's lethal injection protocol and procedures are unconstitutional. The circuit court granted an evidentiary hearing on Knight's claims. The evidentiary hearing took place on March 27 and 28, 2014, when the circuit court heard testimony on Knight's claims of ineffective assistance of counsel. On July 30, 2014, the circuit court denied all of Knight's claims for postconviction relief.

II. POSTCONVICTION RELIEF CLAIMS

A. Ineffective Assistance of Counsel During Guilt Phase

Knight argues that he is entitled to a new trial because trial counsel rendered ineffective assistance. First, Knight argues that trial counsel was ineffective for failing to call as a witness Dr. Nora Rudin, a DNA analyst who worked for the defense prior to trial. Second, Knight argues that trial counsel was ineffective for failing to request a Frye [1] hearing to examine the reliability of the DNA testing procedures employed by the State. Third, Knight argues that trial counsel failed to discover and introduce a memorandum from one of the State's experts requesting a voluntary demotion. For the reasons below, we conclude that the postconviction court did not err in denying Knight's claims of ineffective assistance of counsel.

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

In accordance with Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), to obtain relief on a claim of ineffective assistance of counsel, a defendant must establish

> deficient performance and prejudice, as set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See Rutherford v. State, 727 So.2d 216, 218 (Fla. 1998). As to the first prong, deficient performance, a defendant must establish conduct on the part of counsel that is outside the broad range of competent performance under prevailing professional standards. See Strickland, 466 U.S. at 688, 104 S.Ct. 2052. Second, as to the prejudice prong, the deficient performance must be shown to have so affected the fairness and reliability of the proceedings that confidence in the outcome is undermined. See id. at 694, 104 S.Ct. 2052; Rutherford, 727 So.2d at 220.
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> Gore v. State, 846 So.2d 461, 467 (Fla. 2003) (parallel citations omitted).
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> "[W]hen a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong." Waterhouse v. State, 792 So.2d 1176, 1182 (Fla. 2001). Further, as the United States Supreme Court explained in Strickland,
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>> [j]udicial scrutiny of counsel's performance must be highly deferential.... A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance....
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> 466 U.S. at 689, 104 S.Ct. 2052.

Mungin v. State, 932 So.2d 986, 996 (Fla. 2006). "In reviewing a trial court's ruling after an evidentiary hearing on an ineffective assistance of counsel claim, this Court defers to the factual findings of the trial ***673** court to the extent that they are supported by competent, substantial evidence, but reviews de novo the application of the law to those facts." Id. at 998 (citing Stephens v. State, 748 So.2d 1028, 1031–32 (Fla. 1999))." With this standard of review in mind, we turn to Knight's arguments of ineffective assistance of counsel.

1. Failure to Call Dr. Rudin

At trial, the State's DNA evidence was presented through the testimony of Kevin Noppinger of the Broward County Sheriff's Office, who conducted the actual DNA testing, and Kevin McElfresh of Bode Technology Group, who analyzed Noppinger's results. Dr. Rudin worked for Knight's defense team. She employed Noppinger's analysis to develop a report and aid the defense.

Originally, McElfresh opined that Knight's DNA could be excluded from the DNA samples obtained from the clothing found below the sink at the crime scene. Knight, 76 So.3d at 887. However, at trial McElfresh testified that Knight's DNA could not be excluded from the shorts and boxers found in the bathroom at the crime scene. Id. McElfresh explained that Knight's DNA could no longer be excluded because an additional sample, that of Victoria Martino, Knight's girlfriend, was tested, and it changed the outcome of the initial analysis. Defense counsel objected to the testimony as a discovery violation, but the objection was denied. Id. Defense counsel called Dr. Rudin and relayed McElfresh's testimony. He then sent her a transcript of the testimony of the State's expert. She explained to Knight's counsel that even with the new sample, she agreed with Noppinger's DNA analysis. Later, while the trial was ongoing, Dr. Rudin produced a second report, dated April 28, 2006. The report stated that the DNA procedures may have had some errors and that McElfresh's testimony was not scientifically sound. Notably, Dr. Rudin's second report ultimately supported the State's DNA findings.

At the postconviction evidentiary hearing, trial counsel explained that he did not call Dr. Rudin as a witness because her conclusions ultimately bolstered the State's arguments. Trial counsel also stated that because the rule at the time allowed the defense to have the last word, he did not want to lose that opportunity.

Dr. Rudin also testified at the evidentiary hearing. She testified that her second report addressed her concerns with Noppinger's DNA testing procedures and with McElfresh's analysis of that testing as it pertained to the clothes found in the bathroom. Dr. Rudin found McElfresh's trial testimony problematic, explaining that his conclusions were questionable because he arrived at them through an unreliable testing method. However, even with the possibly flawed procedures, Dr. Rudin stated that she would have testified consistent with Noppinger's report.

Knight now argues that trial counsel was ineffective for failing to call Dr. Rudin as a witness. He posits that had she testified at trial, the jury would have doubted the State's DNA evidence and ultimately would have found him innocent. While it is possible that Dr. Rudin's testimony may have cast doubt on the State's DNA evidence, we conclude that Knight fails to meet either prong of Strickland.

This Court has stated that "[a]s long as the trial court's findings are supported by competent substantial evidence, 'this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.' " Blanco v. State, 702 So.2d 1250, 1252 (Fla. 1997) (quoting Demps v. State, 462 So.2d 1074, 1075 (Fla. 1984)); see also Cox v. State, 966 So.2d 337, 357–58 (Fla. 2007) (noting that the ***674** trial court is frequently in a superior position to evaluate the testimony based upon its observation of the bearing, demeanor, and credibility of the witnesses) (quoting Stephens v. State, 748 So.2d 1028, 1034 (Fla. 1999)).

The record reveals competent, substantial evidence to support the postconviction court's finding that defense counsel's decision not to present Dr. Rudin during the guilt phase was a reasonable trial strategy. At Knight's evidentiary hearing, trial counsel testified that he made a strategic decision before trial not to call Dr. Rudin as a witness because her original report supported the State's conclusions. Trial counsel also stated that prior to trial, he asked Dr. Rudin whether she would call herself as a witness, and she said that she would not because she could not help Knight's case. Moreover, her report ultimately concluded that her findings were consistent with Noppinger's conclusions and that McElfresh's unreliable testimony was "inconsequential."

Knight also cannot establish that trial counsel's actions or omissions were prejudicial to him. To establish prejudice, Knight must establish that "but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S.Ct. 2052. In reviewing the prejudice prong, the postconviction court concluded that even if Dr. Rudin had testified, there was no reasonable probability that the outcome of the trial would have been different in light of the other evidence presented by the State. We agree.

At trial, the State presented evidence that Knight lived with the victims, he had ongoing disagreements with one of the victims, and he was at the apartment on the night of the murders. Knight, 76 So.3d at 881. The State also showed that on the night of the murders, Knight told a detective that he had been out for a run, yet Knight was wearing a dress shirt, slacks, and dress shoes. Id. at 882. Accordingly, trial counsel's actions did not prejudice Knight.

2. Failure to Request a Frye Hearing Regarding DNA Evidence

Knight asserts that trial counsel was ineffective for failing to request a hearing pursuant to Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). Knight argues that a Frye hearing would have shown that the State's DNA expert employed unreliable testing procedures and, thus, exponentially weakened the State's case. We disagree.

As a general rule, a Frye hearing is "utilized in Florida only when the science at issue is new or novel." Overton v. State, 976 So.2d 536, 550 (Fla. 2007) (quoting Branch v. State, 952 So.2d 470, 483 (Fla. 2006)). The Frye test places the burden of proof "on the proponent of the evidence to prove the general acceptance of both the underlying scientific principle and the testing procedures used to apply that principle to the facts of the case at hand." Id. (quoting Ramirez v. State, 651 So.2d 1164, 1168 (Fla. 1995)). Where the testing procedures are at issue, "DNA test results are generally accepted as reliable in the scientific community, provided that the laboratory has followed accepted as reliable testing procedures" to prevent false readings and contamination. Id.

To show deficiency, Knight must specifically identify acts or omissions of counsel that were manifestly outside the wide range of reasonable, competent performance under prevailing norms. Bolin v. State, 41 So.3d 151, 155 (Fla. 2010). Knight argues that counsel was aware of the deficiencies of the DNA testing by Noppinger and, as such, should have requested a Frye hearing. We reject Knight's argument because there is competent, substantial evidence ***675** supporting the postconviction court's denial of Knight's claim.

Noppinger and trial counsel both testified at the evidentiary hearing that the "Preliminary Chain Reaction and Short Tandem Repeats" techniques employed in this case were generally accepted by the community at the time of Knight's trial. Second, even though Dr. Rudin pointed out the possible flaws in Noppinger's labeling procedures, her report and testimony at the evidentiary hearing supported Noppinger's scientific conclusions. It seems that although the labeling procedures were different, Dr. Rudin was unable to actually find any errors, and counsel would not have had a reason to challenge the DNA methodology to exclude the evidence. Counsel cannot be deficient for failing to make an ultimately fruitless request. Likewise, because a Frye hearing would not have resulted in the exclusion of the State's DNA evidence, the absence of a Frye hearing did not prejudice Knight.

3. Failure to Locate Evidence

Third, Knight alleges that trial counsel was ineffective for failing to locate a memorandum prepared by Kevin Noppinger, in which Noppinger requested a voluntary demotion. The entirety of Knight's argument in his initial brief is comprised of two sentences that do not cite any case law or refer to any facts that could have supported his argument that trial counsel was ineffective for failing to locate Noppinger's memorandum. Accordingly, we conclude that this claim is insufficiently pled. See Bryant v. State, 901 So.2d 810, 827 (Fla. 2005) (holding a claim is insufficiently pled when the entire argument is contained in a phrase, and stating that "[s]uch a cursory argument is insufficient to preserve the issue for consideration").

B. Ineffective Assistance of Counsel During Penalty Phase

Knight also asserts that trial counsel was deficient during the penalty phase of trial. First, Knight argues that trial counsel was ineffective for failing to properly investigate and introduce mitigating evidence regarding child abuse that Knight allegedly endured. Second, Knight argues that counsel was ineffective for failing to ensure that he was examined by a competent mental health expert. We disagree with both arguments.

The postconviction court found that Knight was unsuccessful on both claims because he did not present any evidence during the hearing regarding a history of abuse or his alleged brain injury. Further, the court reasoned that counsel had presented all social and personal history known to him in the form of several witnesses who knew Knight as a child, a witness who knew of his seizures and blackouts, and testimony from the defense investigator who interviewed many members of Knight's adoptive family. For the reasons below, we conclude that there is competent, substantial evidence supporting the postconviction court's order denying Knight's claims.

With respect to the investigation and presentation of mitigation evidence, the Supreme Court of the United States observed 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." Wiggins v. Smith, 539 U.S. 510, 512, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). Rather, in deciding whether trial counsel exercised reasonable professional judgment with regard to the investigation and presentation of mitigation evidence, a ***676** reviewing court must focus on whether the investigation resulting in counsel's decision not to introduce certain mitigation evidence was itself reasonable. "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.' " Taylor v. State, 62 So.3d 1101, 1110 (Fla. 2011) (quoting Wiggins, 539 U.S. at 527, 123

S.Ct. 2527) (citations omitted); see also Lebron v. State, 135 So.3d 1040, 1062 (Fla. 2014) ("One of our principle concerns in deciding whether counsel exercised reasonable professional judgment during a penalty phase proceeding is whether counsel should have presented a mitigation case. We also focus on whether the investigation supporting counsel's decision to not introduce certain mitigating evidence was itself reasonable.").

1. Sexual Abuse

The State argues that Knight did not pursue this claim at the evidentiary hearing, but the record reflects that Knight did argue this claim and introduced the investigator's report as evidence. Thus, we conclude that Knight did not waive his argument that counsel was ineffective for failing to investigate his background and possible sexual abuse.

This Court has repeatedly considered claims of ineffective assistance of counsel during the penalty phase of a trial. See Brooks v. State, 175 So.3d 204 (Fla. 2015); Diaz v. State, 132 So.3d 93, 114 (Fla. 2013). In Diaz, this Court reiterated that "trial counsel was not ineffective for failing to discover that the defendant was sexually abused when the defendant and his family were not forthcoming with the information, even though trial counsel was aware of the defendant's rough childhood." Id. at 114. In Diaz, trial counsel testified at the evidentiary hearing that Diaz and Diaz's family were not forthcoming with information about Diaz's alleged sexual abuse. Id.

Here, we conclude that the postconviction court's denial of Knight's claim is supported by competent, substantial evidence. At trial, counsel presented testimony from Knight's teachers, who testified regarding Knight's family, Knight's personality, and his bad temper when provoked. Knight, 76 So.3d at 883–84. During the evidentiary hearing, counsel testified that while investigating Knight's background, counsel traveled to Jamaica, where Knight grew up. Trial counsel also stated that he "spent a great deal of time" getting to know Knight's family and teachers. Trial counsel testified that Knight's family was "very cooperative" and that at no time during the many conversations with family and friends, did Knight's alleged sexual abuse come up. Further, counsel testified that he did not recall ever being notified by Knight or others that Knight had been sexually abused as a child. Counsel was shown an investigative report in which Knight's sister said that an aunt once told that her that Knight may have been abused as a child. The report also stated that the same sister said she was reassured by another family member that this was not true and no such claims had been made. To this, counsel testified that he had never once heard from a family member or Knight that there had been sexual abuse. Because we uphold the postconviction court's finding that Knight's trial counsel was not deficient for failing to discover this childhood abuse, we decline to address whether this failure prejudiced Knight.

2. Mental Health Mitigation

Dr. Mittenberg was the defense's mental health expert. He performed tests on Knight and determined that Knight suffered from a brain abnormality. This determination was further supported by Knight's PET scans. Knight's trial counsel ***677** testified at the evidentiary hearing that he was relying on Dr. Mittenberg's testimony to show that Knight's brain abnormality impacted his behavior and to prove the mitigator that on the night of the crime, Knight was unable to control his behavior. However, during trial but before Dr. Mittenberg was scheduled to testify, he notified trial counsel that he would not be testifying due to emotional distress. Counsel later discovered from Dr. Mittenberg's attorney that the emotional distress was caused by his excessive drinking, which began because he believed that he had committed a federal crime by inappropriately scoring Knight's Minnesota Multiphasic Personality Inventory (MMPI). A hearing was held, during which Dr. Mittenberg asserted his Fifth Amendment privilege, and trial counsel moved for a mistrial. Trial counsel's motion was denied, but the court granted a two-month recess to find another mental health expert. Trial counsel then hired Dr. Arias, who was unable to replicate Dr. Mittenberg's results and was unable to confirm that Knight had a brain abnormality. During the penalty phase of trial, trial counsel could have introduced Dr. Mittenberg's pretrial deposition as well as the report of his findings. However, at the evidentiary hearing, trial counsel testified that he did not introduce either the deposition or the report due to the flaws in Dr. Mittenberg's analysis.

Knight asserts that trial counsel failed to ensure that Knight had the assistance of a competent mental health expert. Consequently, he argues that had the jury been offered mitigating evidence that Knight suffered from a mental health problem, Knight's sentence would have been different. For the reasons below, we conclude that there is competent, substantial evidence to support the postconviction court's finding that Knight failed to show that counsel's performance was deficient and prejudicial.

In Hoskins v. State, 75 So.3d 250, 255 (Fla. 2011), this Court reiterated the rule that "counsel's entire investigation and presentation will not be rendered deficient simply because a defendant has now found a more favorable expert." Hoskins also failed to show prejudice because "his experts in both the penalty phase and postconviction hearing testified that Hoskins suffered from brain damage.... The jury in the penalty phase, however, did not find such evidence sufficient to overcome aggravation in this case." Id. at 255 (quoting Card v. State, 992 So.2d 810, 818 (Fla. 2008); see also Pham v. State, 177 So.3d 955, 962 (Fla. 2015) ("As we have repeatedly stated, trial counsel is not deficient simply because postconviction counsel can find a more favorable expert.").

The postconviction court did not err in finding that Knight failed to prove either prong of Strickland. Trial counsel was not deficient, as he provided Knight with a mental health expert, Dr. Mittenberg, and when that expert was unable to testify, trial counsel sought to find another expert to replicate Dr. Mittenberg's findings. Trial counsel reached out to another doctor, Dr. Arias, to perform the same tests on Knight. Trial counsel testified at the evidentiary hearing that Dr. Arias could not replicate Dr. Mittenberg's results and, in fact, found the opposite. Trial counsel was unable to find another doctor to administer more testing within the two-month period. It is likely that Dr. Arias was unable to replicate Dr. Mittenberg's results because Dr. Mittenberg used an illegal method of scoring Knight's MMPI exam. Furthermore, Knight is unable to show prejudice. Accordingly, we affirm the postconviction court's findings.

Knight's next argument is that trial counsel was deficient because he failed to introduce at trial Dr. Mittenberg's deposition, which would have shown that ***678** Knight suffered from a brain abnormality. Trial counsel testified that he did not introduce Dr. Mittenberg's report to the jury because the deposition weakened Dr. Mittenberg's reliability, since he stated in the deposition that he may have a conflict of interest, lied about the reliability of the scoring of Knight's MMPI test, and confessed that he had used an unlicensed scoring system. Additionally, even if counsel was deficient, counsel's actions were not prejudicial. Trial counsel introduced evidence of Knight's brain abnormality through Dr. Kotler's testimony. Even with some evidence of Knight's brain abnormalities, the jury still recommended that Knight be sentenced to death.

Last, Knight argues that trial counsel was deficient because he did not present Dr. Mittenberg's report to the jury. Knight argues that if the jury had heard Dr. Mittenberg's results and opinions, the jury would have recommended a different sentence. At the evidentiary hearing, trial counsel explained that he did not want to introduce Dr. Mittenberg's report because it would have prompted the State to introduce its expert and call into question Dr. Mittenberg's reliability. He further explained that had Dr. Mittenberg been available to testify, he would have called him as a witness, despite the fact that the State would have called its own expert, because trial counsel believed that Dr. Mittenberg's analysis would seem sounder if he were on the stand. Without him, trial counsel felt that using the report would do more harm than good. We conclude that trial counsel employed a reasonable strategy that does not constitute deficient performance under Strickland. Further, Knight was not prejudiced because the jury still heard evidence of Knight's alleged brain abnormality in the form of witness testimony.

C. Brady Violations

Next, Knight asserts that the State withheld (1) evidence regarding a memorandum by Kevin Noppinger requesting a voluntary demotion, (2) information regarding proof that newspapers existed in the cell area shared by Knight and Steven Whitsett, who testified against Knight; and (3) information regarding a false confession by Knight to another inmate, George Greaves. For the reasons below, we conclude that none of Knight's claims require relief.

To successfully raise a Brady violation claim, Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), Knight must show that (1) the evidence was favorable to him, either because it was exculpatory or impeaching; (2) the evidence was suppressed by the State; and (3) the suppression of material evidence resulted in prejudice. Conahan v. State, 118 So.3d 718, 729

(Fla. 2013) (citing Strickler v. Greene, 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)). "To establish the materiality element of Brady, the defendant must demonstrate 'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " Id. at 730 (quoting Guzman v. State, 868 So.2d 498, 506 (Fla. 2003)). A "reasonable probability" is defined as "sufficient to undermine confidence in the outcome." Johnson v. State, 135 So.3d 1002, 1028 (Fla. 2014). This Court reviews a postconviction court's denial of this claim under a mixed standard: we defer to the lower court's factual findings that are supported by competent, substantial evidence and review the application of law de novo. Id.

1. Noppinger Memorandum

Kevin Noppinger worked at the Broward County Sheriff's Office and conducted ***679** the DNA testing in Knight's case. On July 29, 2002, before he testified at Knight's trial, Noppinger wrote a memorandum to his superior requesting a voluntary demotion. As the reason for his decision to request a demotion, Noppinger's memorandum cited to conflict with upper management related to his request to improve testing to search the National DNA Index System (NDIS). This memorandum was never discovered by trial counsel or turned over by the State.

Knight argues that this memorandum should have been turned over to the defense because it would have been useful to impeach Noppinger and ultimately would have lessened the confidence the jury had in the DNA testing procedures. Conversely, the State argues that because Knight's case was not an unsolved case requiring use of the NDIS, Noppinger's memorandum was not useful to Knight, let alone prejudicial to the outcome at trial. We affirm the postconviction court's denial of this claim because there is competent, substantial evidence supporting the conclusion that a Brady violation did not occur.

Knight is unable to prove the first prong of Brady. The Noppinger memorandum would not have been useful to Knight because it was unrelated to Knight's case. Although the memorandum was produced prior to Noppinger's testimony at trial, the memorandum cites to management disagreements as the cause for his request to be demoted. Notably, the State points out that Knight's case is not a cold case that requires the use of the national DNA database, and as such, Noppinger's memorandum is entirely unrelated to Knight's case.

Next, Knight has to demonstrate that the postconviction court erred in finding that the State did not willfully or inadvertently withhold evidence. "To comply with Brady, the individual prosecutor has a duty to learn of any favorable evidence and to disclose that evidence to the defense." Mordenti v. State, 894 So.2d 161, 170 (Fla. 2004) (citing Allen v. State, 854 So.2d 1255, 1259 (Fla. 2003)). Knight argues that because the crime lab was working on behalf of the State, the prosecutor should have known about the memorandum. Conversely, the State argues that the prosecutor was never made aware of the memorandum. The record is dispositive on this point.

However, even if Knight satisfied prongs one and two of Brady, he is unable to show prejudice. The test for prejudice or materiality under Brady, is whether, had the evidence been disclosed to the defense, there is a reasonable probability of a different result. Guzman, 868 So.2d at 508. We conclude that there is competent, substantial evidence that the postconviction court did not err in denying relief on this claim. Knight is unable to show how the memorandum specifically reduces the credibility of the State's DNA expert or how that impeachment evidence would have produced a different result. Even if the memorandum had been introduced for the limited purpose of impeaching Noppinger, the State introduced other evidence showing Knight's guilt that would have overcome the little weight the memorandum might have had.

2. Stephen Whitsett

Stephen Whitsett and Knight were housed together from June 29 to July 22, 2000, at the Broward County Jail. Knight, 76 So.3d at 883. Whitsett testified that Knight confessed to murdering the victims. Knight argues that the State improperly withheld favorable impeachment evidence in the form of a jail log showing that Knight was reprimanded for having newspapers in his cell. Knight argues that if he had access to the media, so did Whitsett, and the media reports may have tainted his testimony against Knight. The State argues that the log does not indicate ***680** that Whitsett fabricated his testimony because the log showed that Knight had the newspapers in his cell, which he did not share with Whitsett. Since Knight fails to show that the log was favorable to him, that the State suppressed it, or that suppression prejudiced him at trial, we conclude that a Brady violation did not occur.

3. George Greaves' False Statements

After Knight's trial, Knight made a supplemental request for a police report made by Detective Doug Williams. Knight's request was granted, and the Coral Springs Police Department turned over the report of Detective Williams' interview of George Greaves, an inmate at Broward County Jail who contacted crime stoppers stating that he had information regarding Knight's case. Ultimately, it became apparent that Greaves was gleaning information from media reports. Knight asserts that the State's withholding of the report was a Brady violation, and he should have been granted a new trial. Knight argues that if defense counsel had known about the false statements made on the basis of accessible media reports, counsel could have discredited Whitsett's testimony. After the evidentiary hearing, the postconviction court found that Knight failed to meet the Brady standards. We conclude that there is competent, substantial evidence that the postconviction court did not err in its findings.

Knight asserts that the police report would have been favorable to him because it would have helped to discredit Whitsett's testimony against Knight. However, Knight fails to show how the fact that Greaves had access to media reports that led to false statements would have discredited the detail-intensive testimony that Whitsett provided. Further, from the record it is unclear whether the prosecutor knew or should have known that the police report existed, and Knight fails to discuss this point.

Moreover, Knight is unable to show prejudice because the State introduced other evidence of Knight's guilt, including the victim's blood on the clothes Knight was wearing the night of the crime and that Knight was in the apartment that evening.

D. Constitutionality of Rule Regulating the Florida Bar 4–3.5(d)(4)

Knight challenges the constitutionality of rule 4–3.5(d)(4) of the Rules Regulating the Florida Bar. We reject this claim because it is procedurally barred.

The Court has held that claims challenging the constitutionality of rule 4–3.5(d)(4) must be raised on direct appeal. See Deparvine v. State, 146 So.3d 1071, 1106 (Fla. 2014) ("Deparvine's claim is both procedurally barred because it was not raised on direct appeal and meritless."); Troy v. State, 57 So.3d 828, 841 (Fla. 2011) ("First, this claim is procedurally barred because it should have been raised on direct appeal.").

E. Constitutionality of Lethal Injection Protocol

Knight argues that Florida's administration of the death penalty by lethal injection constitutes cruel and unusual punishment, in violation of the Eight Amendment. We conclude that Knight's claim is unsuccessful because this Court has repeatedly denied such claims. See, e.g., Banks v. State, 150 So.3d 797, 800–01 (Fla. 2014); Chavez v. State, 132 So.3d 826, 831 (Fla. 2014).

III. HABEAS CORPUS CLAIMS

A. Ineffective Assistance of Counsel

Claims of ineffective assistance of appellate counsel are appropriately raised in a petition of writ of habeas corpus. See Jackson v. State, 127 So.3d 447, 476 (Fla. 2013). This Court has stated the following standard of review:

> ***681** The alleged error must first be of "such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance" and, second, the deficiency in performance must have "compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." Id. (quoting Pope v. Wainwright, 496 So.2d 798, 800 (Fla. 1986)). Further, "appellate counsel will not be deemed ineffective for failing to raise a claim that is without merit." Id. (citing Freeman v. State, 761 So.2d 1055, 1070 (Fla. 2000)).

Hayward v. State, 183 So.3d 286, 327 (Fla. 2015).

1. Admission of Photograph at Trial

At trial, Knight's trial counsel challenged the admission of a photograph as duplicative of other photographs depicting similar images. We have held that a challenge to a photograph is not preserved for appeal when trial counsel does not state specific grounds for an objection. In Doorbal v. State, 983 So.2d 464 (Fla. 2008), we concluded that trial counsel did not properly preserve a similar issue for appeal because trial counsel objected to the admission of a picture on the basis that it was "duplicative." Id. at 498–99. We stated that trial counsel failed to preserve the issue because trial counsel did not challenge the photograph for being "gruesome," as he did in his postconviction case. Id. at 499. Similarly, Knight's trial counsel did not preserve the issue for appeal. As such, Knight's appellate counsel was not ineffective for failing to present a claim that was not properly preserved.

2. Denial of Motion for Mistrial

Knight argues that appellate counsel was ineffective for failing to appeal the trial court's denial of a mistrial following Officer Mocny's testimony concerning Knight's prearrest statements. When reviewing claims of ineffective assistance of appellate counsel,

> "[t]he criteria for proving ineffective assistance of appellate counsel parallel the Strickland standard for ineffective trial counsel." Wilson v. Wainwright, 474 So.2d 1162, 1163 (Fla. 1985). Thus, the Court must consider
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> > 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.
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> Teffeteller v. Dugger, 734 So.2d 1009, 1027 (Fla. 1999) (quoting Suarez v. Dugger, 527 So.2d 190, 192–93 (Fla. 1988)).

Mungin, 932 So.2d at 1003.

Knight asserts that Officer Mocny testified on the topic of Knight's right to remain silent, thus violating Knight's constitutional rights. We reject Knight's argument because Officer Mocny's testimony of her conversation with Knight did not violate Knight's constitutional rights. Accordingly, appellate counsel was not ineffective for raising a meritless claim.

This Court has repeatedly recognized the concept that courts must prohibit all evidence or argument that may be interpreted by the jury as a comment on the defendant's right to remain silent. Brown v. State, 197 So.3d 569 (Fla. 3d DCA 2015) (citing State v. Smith, 573 So.2d 306 (Fla. 1990)).

> Based on its interpretation of article I, section 9 of the Florida Constitution, the court in Hoggins held that a prosecutor may not comment upon or attempt to impeach a defendant with his or her ***682** post-arrest, pre-Miranda [2] or post-Miranda silence. This prohibition is premised upon the generally accepted principle that a defendant does not waive his or her right to remain silent at the time of arrest by testifying in his or her own defense at trial. The same test applies regardless of whether the evidence of post-arrest silence is admitted in the state's case in chief or during impeachment of the defendant: "If the comment is fairly susceptible of being construed by the jury as a comment on the defendant's exercise of his or her right to remain silent, it violates the defendant's right to silence." [State v.] Hoggins, 718 So.2d [761] at 769 [(Fla. 1998)].

Robbins v. State, 891 So.2d 1102, 1106 (Fla. 5th DCA 2004); see also Chamblin v. State, 994 So.2d 1165, 1168 (Fla. 1st DCA 2008) (concluding that "[t]he Florida Constitution prohibits prosecutorial comment on a defendant's silence at the time of his arrest, prior to the administration of his Miranda warnings, as well as attempts to impeach the defendant therewith.").

2 Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

The record shows that Mocny's testimony referenced Knight's statements before he was arrested regarding his whereabouts on the night of the crime and whether he had a key to Stephens' apartment. Mocny's testimony did not comment on Knight's silence. Because this claim would have been meritless on direct appeal, we conclude that Knight's appellate counsel was not ineffective.

3. Hurst v. Florida

In two rounds of supplemental briefs, Knight argues that he was unconstitutionally sentenced to death because his penalty phase jury did not find all of the facts necessary to impose the death penalty. We agree. See Hurst v. Florida, ––– U.S. ––––, 136 S.Ct. 616, 624, 193 L.Ed.2d 504 (2016). Because Knight's death sentence became final in 2012, Hurst v. Florida applies retroactively to him. See Mosley v. State, No. SC14–436, 209 So.3d 1248, 1283–84, 2016 WL 7406506, at *25 (Fla. Dec. 22, 2016).

Knight also asks that we vacate his death sentence and sentence him to life imprisonment pursuant to section 775.082(2), Florida Statutes, or alternatively, that we remand for a new penalty phase proceeding. We decline to do either. First, we recently held that section 775.082(2), Florida Statutes, does not mandate the imposition of a life sentence in the event of a Hurst v. Florida violation. See Hurst v. State, 202 So.3d 40, 63–66 (Fla. 2016). We also decline to vacate Knight's death sentence because we find that this is one of the rare cases in which the Hurst v. Florida violation is harmless beyond a reasonable doubt. See Davis v. State, 207 So.3d 142, 175, 2016 WL 6649941 (Fla. Nov. 18, 2016).

In Davis, this Court held that the Hurst v. Florida error was harmless: "With regard to Davis's sentences, we emphasize the unanimous jury recommendations of death. These recommendations allow us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors." Id. at 174 (emphasis omitted). Knight's jury likewise recommended a death sentence by a unanimous twelve-to-zero vote. Knight's jury received substantially the same standard jury instruction as we cited in Davis, ensuring that the jury "determine[d] whether sufficient aggravators existed and whether the aggravation outweighed the mitigation before it ... recommend[ed] a sentence of death." Id. (citing Fla. Std. Jury Instr. (Crim.) 7.11). As with the jury in Davis, ***683** Knight's "jury was presented with evidence of mitigating circumstances and was properly informed that it may consider mitigating circumstances that are proven by the greater weight of the evidence." Id. (citing Fla. Std. Jury Instr. (Crim.) 7.11). As in Davis, Knight's "jury was not informed that the finding that sufficient aggravating circumstances outweighed the mitigating circumstances must be unanimous, and ... the jury did, in fact, unanimously recommend death." Id. (citing Fla. Std. Jury Instr. (Crim.) 7.11).

To be sure, Knight's jury and the Davis jury were not identically instructed. For instance, the Davis jury "was instructed that it was not required to recommend death even if the aggravators outweighed the mitigators," while Knight's jury was not. Id. (citing Fla. Std. Jury Instr. (Crim.) 7.11). Nonetheless, we believe that Knight's jury received substantially the same critical instructions as Davis's jury, allowing us to conclude beyond a reasonable doubt that here, as in Davis, "the jury unanimously made the requisite factual findings to impose death before it issued the unanimous recommendations." Id.

Finally, as in Davis, "the egregious facts of this case" provide "[f]urther support[ ] [for] our conclusion that any Hurst v. Florida error here was harmless." Id. at 175. In a violent and bloody struggle, Knight murdered a mother and her four-year-old daughter in an argument about whether Knight had to move out of the mother's apartment. Knight strangled and repeatedly stabbed the mother with multiple knives in her bedroom in the middle of the night while the daughter was present. The mother could not yell for help because Knight's attack had destroyed her larynx. The mother suffered, still conscious, through the attack for at least ten minutes following the fatal wounds. She tried and failed to escape. Knight also attempted to strangle and repeatedly stabbed the daughter. Knight's stabbings caused the daughter's lungs to fill with blood, and she essentially drowned in her own blood. Both victims died gruesome, painful deaths.

> The trial court found two statutory aggravating circumstances for the murder of [the mother]: (1) a previous conviction of another violent capital felony, and (2) HAC. The court also found three statutory aggravating circumstances for the murder of [the daughter]: (1) a previous conviction of another violent capital felony, (2) HAC, and (3) the victim was under twelve years of age.

Knight, 76 So.3d at 890. As we have repeatedly noted, "[t]he HAC and prior violent felony aggravators have been described as especially weighty or serious aggravators set out in the sentencing scheme." Hildwin v. State, 84 So.3d 180, 190 (Fla. 2011).

What we said in Davis is equally true here:

> Here, the jury unanimously found all of the necessary facts for the imposition of death sentences by virtue of its unanimous recommendations. In fact, although the jury was informed that it was not required to recommend death unanimously, and despite the mitigation presented, the jury still unanimously recommended that [the defendant] be sentenced to death .... The unanimous recommendations here are precisely what we determined in Hurst[v. State] to be constitutionally necessary to impose a sentence of death.

Davis, 207 So.3d at 175. Accordingly, we hold that the Hurst v. Florida violation in Knight's case was harmless beyond a reasonable doubt. See id. As in Davis, the Hurst v. Florida violation here does not entitle Knight to a new penalty phase.

*684 IV. CONCLUSION

Based on the foregoing analysis, we affirm the circuit court's denial of postconviction relief. We also deny Knight's petition for a writ of habeas corpus.

It is so ordered.

LABARGA, C.J., and PARIENTE, and LEWIS, JJ., concur.

CANADY and POLSTON, JJ., concur in result.

QUINCE, J., concurs in part and dissents in part with an opinion, in which PERRY, Senior Justice, concurs.

PERRY, Senior Justice, concurs in part and dissents in part with an opinion.

QUINCE, J., concurring in part and dissenting in part.

I concur with my colleagues that Knight is not entitled to relief on the majority of his claims, however, I cannot agree with the majority's conclusion that the Hurst error in this case is harmless beyond a reasonable doubt. Because I would find that the Hurst error in this case requires a new penalty phase, I dissent.

I agree with Senior Justice Perry's statement that "[t]he majority's reweighing of the evidence ... to support its conclusion" contravenes our decision in Hurst v. State, 202 So.3d at 49, and is the conduct the United States Supreme Court reproached in Hurst v. Florida, 136 S.Ct. at 622.

Here, although the jury unanimously recommended a death sentence, we cannot know that the jury found each aggravating factor unanimously. Because one of the aggravators found by the trial court for each murder in this case—that the murder was especially heinous, atrocious or cruel—requires specific factual findings, Hurst requires that the jury, not the trial judge, make that determination. The jury made no such determination in Knight's case. Accordingly, I would vacate Knight's death sentence and remand for resentencing. See Hurst, 202 So.3d at 69.

PERRY, Senior Justice, concurs.

PERRY, Senior Justice, concurring in part and dissenting in part.

While I concur in most respects with the majority's decision, I cannot agree with the majority's analysis that the Hurst v. Florida, ––– U.S. ––––, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), error was harmless beyond a reasonable doubt. To the extent that I would not find the error harmless beyond a reasonable doubt, I dissent. I likewise dissent from the majority's determination that section 775.082(2), Florida Statutes, is inapplicable to this case: I would follow the Legislature's command to impose a sentence of life imprisonment.

In Hurst v. State, 202 So.3d 40, 69 (Fla. 2016), we declined to speculate why the jurors voted the way they did; yet, here, the majority "conclude[s] beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors." Majority op. at 682 (quoting Davis v. State, 207 So.3d 147, 174, 2016 WL 6649941 (Fla. Nov. 18, 2016). Even though the jury unanimously recommended the death penalty, whether the jury unanimously found each aggravating factor remains unknown.

The majority's reweighing of the evidence—particularly the gruesome facts of the victims' deaths—to support its conclusion is not an appropriate harmless error review. The harmless error review is not a sufficiency of the evidence test, and the majority's analysis should instead focus on the effect of the error on the trier of fact. State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986). By ignoring the record and concluding that all aggravators were unanimously ***685** found by the jury, the majority is engaging in the exact type of conduct the United States Supreme Court cautioned against. See Hurst v. Florida, 136 S.Ct. at 622.

Because the harmless error review is neither a sufficiency of the evidence review nor "a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence," DiGuilio, 491 So.2d at 1139, I cannot conclude beyond a reasonable doubt that the error here was harmless, and I would vacate Knight's unconstitutional death sentence. Rather than remand for resentencing, however, I would apply the remedy that the Legislature explicitly provided: a sentence of life imprisonment. See § 775.082(2), Fla. Stat. (2016).

As I have previously explained, the Legislature has decided that the appropriate remedy "[i]n the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court" is for "the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment." § 775.082(2), Fla. Stat.; see also Hurst v. State, 202 So.3d at 75–76 (Perry, J., concurring in part and dissenting in part). The death penalty in Knight's capital felony has been held unconstitutional by this Court. See majority op. at 681–82. Accordingly, Knight is entitled to the clear and unambiguous statutory remedy that the Legislature has specified: a sentence of life imprisonment.

The majority disagrees. See majority op. at 682 (citing Hurst v. State, 202 So.3d at 63–66). But the plain language of the statute does not rely on a specific amendment to the United States Constitution, nor does it refer to a specific decision by this Court or the United States Supreme Court. Further, it does not contemplate that all forms of the death penalty in all cases must be found unconstitutional. Instead, the statute uses singular articles to describe the circumstances by which the statute is to be triggered. Indeed, the statute repeatedly references a singular defendant being brought before a court for sentencing to life imprisonment. I consequently cannot agree that the statute was intended as a fail-safe mechanism for when this Court or the United States Supreme Court declared that the death penalty was categorically unconstitutional. Cf. Hurst v. State, 202 So.3d at 66.

Knight's death sentence is unconstitutional. That constitutional violation is not harmless beyond a reasonable doubt. The remedy for that violation is a sentence of life imprisonment. To the extent that the majority finds harmless error and declines to order a sentence of life imprisonment, I respectfully dissent.

All Citations

225 So.3d 661, 42 Fla. L. Weekly S133

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ATTACHMENT E

76 So.3d 879
Supreme Court of Florida.

Richard KNIGHT, Appellant,
v.
STATE of Florida, Appellee.

No. SC07–841.
|
Sept. 28, 2011.
|
Rehearing Denied Dec. 15, 2011.

Synopsis

Background: Defendant was convicted following jury trial in the Circuit Court, Broward County, Eileen M. O'Connor, J., of two counts of murder in the first degree for the murder of his cousin's girlfriend and four year old who was the daughter of his cousin and his cousin's girlfriend, and he was sentenced to death. Defendant appealed.

Holdings: The Supreme Court held that:

trial court did not abuse its discretion by denying defendant's motion for a mistrial on basis of witness's statement;

trial court did not abuse its discretion by denying motion for mistrial on the basis that jury might have seen him wearing handcuffs and shackles;

trial court did not err in finding that no discovery violation occurred;

trial court did not abuse its discretion in refusing to dismiss the venire;

evidence was sufficient for conviction; and

sentence was proportionate.

Affirmed.

Attorneys and Law Firms

***881** Melodee A. Smith of Law Offices of Melodee A. Smith, Fort Lauderdale, FL, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, FL, and Lisa–Marie Lerner, Assistant Attorney General, West Palm Beach, FL, for Appellee.

Opinion

PER CURIAM.

Richard Knight was convicted of two counts of first-degree murder for the deaths of Odessia Stephens and four-year-old Hanessia Mullings, which occurred on June 28, 2000. **Knight** appeals his first-degree murder convictions and sentence of death. We have mandatory jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. For the reasons explained below, we affirm **Knight's** convictions and sentences of death.

FACTS AND PROCEDURAL HISTORY

The Guilt Phase

The evidence presented at trial established that Knight lived in an apartment with his cousin, Hans Mullings, Mullings' girlfriend, Odessia Stephens, and their daughter, Hanessia Mullings. Mullings and Odessia had asked Knight to move out numerous times.

On the night of the murder, June 27, 2000, Mullings was at work. At approximately 9 p.m., Mullings spoke to Odessia, who said she was going to bed, and then Mullings left his office to run errands. Knight was at the apartment with Odessia and Hanessia.

Around midnight, an upstairs neighbor heard multiple thumping sounds on the apartment walls and two female voices, one of which was a child crying. The neighbor called 911 at 12:21 a.m. on June 28, 2000. The cries continued after the police arrived.

Officer Vincent Sachs was the first to respond. He arrived at 12:29 a.m. and noted that the lights were on in the master bedroom and hall area, and that a second ***882** bedroom's window was slightly ajar. After knocking and receiving no response, he walked around the unit and noticed that the lights had been turned off and that the previously ajar window was now completely open and blinds were hanging out of it. Sachs shined his flashlight through the dining room window. He saw blood in the dining room and master bedroom. Further, he noticed Hanessia curled in the fetal position against the closet door. Once inside, he observed Odessia's body in the living room. All of the doors were locked and there had been no ransacking of the apartment.

Officer Natalie Mocny arrived next and walked around the unit.[1] She also saw the open window and noticed Knight on the other side of some hedges approximately 100 yards from the building. She beckoned him over for questioning. Officer Sachs joined Mocny. According to the officers, Knight had a scratch on his chest, a scrape on his shoulder, and fresh cuts on his hands. Although it was not raining, Knight was visibly wet. Knight was wearing dress clothes and shoes, yet told Mocny that he had been jogging, and that he lived in the apartment, but did not have a key to get inside. There was blood on the shirt he was wearing and on a ten-dollar bill in his possession.

1 Officer Amy Allen also testified that she had climbed through the open window to open the apartment door and observed a deceased black female.

The crime scene investigation recovered two wet towels in Knight's bedroom, a shirt, boxers, and a pair of jean shorts under the sink in the bathroom near Knight's bedroom, all of which belonged to Knight and had numerous bloodstains. Two knife blades were also recovered, one from under the mattress in the master bedroom, and another from under Odessia's body.

Odessia's blood was found in the master bedroom between the bed and the wall, on the master bedroom blinds, on the living room carpet, on the knives' handles and blades, and on the knife holder in the kitchen. Odessia's blood was also discovered on Knight's boxers, shirt, jean shorts, the clothing Knight had been wearing when arrested, and his hand. Fingernail scrapings taken from Odessia contained Knight's DNA profile.

Hanessia's blood was found on one of the knives, on Knight's boxers, jean shorts, and on the shower curtain. The shower curtain also contained the blood of Knight's acquaintance, Victoria Martino.

Dr. Lance Davis, the medical examiner, observed the bodies at the scene. Odessia was found on the living room floor near the entrance with several broken knife pieces around her. She had twenty-one stab wounds: fourteen in the neck, one on the chin, and the rest on her back and chest. Additionally, she had twenty-four puncture or scratch wounds and bruising and ligature marks on her neck. The bruises appeared to have been made by a belt or similar object. She also had defensive wounds on both hands and wounds on her leg, chest, back and neck. Several of the knife wounds were fatal but none would have resulted in an instantaneous death. She had bruises from being punched on her scalp and mouth. Davis opined that Knight began his attack in the bedroom with Odessia fleeing to the living room. He estimated that Odessia was conscious for ten to fifteen minutes after the attack.

Davis discovered Hanessia on the floor next to the closet door. There were broken knife pieces around her. She had a total of four stab wounds in her upper chest and neck. Her hand had one additional stab wound and numerous defensive ***883** wounds. Hanessia's arms and upper body had numerous bruises and scratches. There were bruises on her neck that were consistent with manual strangulation and bruises on her arms consistent with being grabbed.

Stephen Whitsett and Knight were housed together from June 29, 2000, to July 22, 2000, at the Broward County Jail. Knight confessed to Whitsett about the murders as follows: The night of the murders Knight and Odessia argued. She told him that she did not want to support him and that he would have to move. He asked for some more time because he had just gotten a job, but Odessia refused and told him to leave in the morning. Knight left the house to go for a walk and he became increasingly angry. He returned that night, confronted Odessia in her room, and they argued.

Knight went to the kitchen and got a knife. When he went back to the master bedroom, Odessia was on one side of the bed and Hanessia was on the other. He began by stabbing Odessia multiple times. Odessia eventually stopped defending herself and balled up into a fetal position. Knight then turned to four-year-old Hanessia. The knife broke while he was stabbing Hanessia, so he returned to the kitchen for another. Upon returning, Knight saw Hanessia had crawled to the closet door and was drowning in her own blood.

Again, Knight returned to the kitchen and accidentally cut his hand on one of the broken knives that he had used to stab Odessia and Hanessia. He grabbed another knife. Odessia had crawled from the master bedroom to the living room and was lying in her own blood. He rolled her over and continued his attack. Odessia's blood covered Knight's hands, so he wiped them on the carpet.

Knight further confessed that, after he finished with Odessia, he went to the bathroom, took off the blood soaked shorts and T-shirt, and tossed them under the sink. He showered and put on blue polo pants. He wiped down the knives in the living room. At that time, Knight heard a knock on the door and saw the police outside through the peep hole. He ran to his room and out the window. In an attempt to deflect suspicion away from himself, Knight returned to his bedroom window where he saw a female police officer.

Knight was charged by indictment on August 15, 2001, for the murders of Odessia Stephens and Hanessia Mullings. The jury found Knight guilty of both counts of first-degree murder.

The Penalty Phase

At the penalty phase, Knight called six witnesses, several of whom testified about his childhood and upbringing in Jamaica. His teacher, Joscelyn Walker, told the jury that Knight was a respectful and loving boy raised in a very respected family. He said that Knight did have a temper when provoked and would become extremely frustrated at times. Walker had to restrain him from time to time when Knight wanted to fight another child. Knight's high school art teacher, Joscelyn Gopie, described Knight as a pleasant, eager boy who was quite talented at art. Gopie explained that Knight was adopted as a toddler by his family. Knight left high school before he graduated.

Barbara Weatherly is the mother of Knight's former fiancée. She described him as a decent, honorable guy who respected her rules regarding her daughter. He always helped her younger children with their drawing. He was a quiet and peaceful person who spent a lot of time alone. One night at her house he got sick; his eyes rolled back in his head and he frothed at the mouth before passing out. ***884** They took him to the hospital where the doctor said that he needed to see a psychiatrist. She last saw him in 1998 when he left to go to the United States.

A former boss and coworker of Knight's, Stanley Davis, also testified. Davis explained that Knight had been adopted into a well respected family and had a close loving relationship with his family members. Knight took over many of his father's duties when his father lost a leg. Knight worked with him at a construction company and was a good worker. On one occasion Knight fell and blacked out, after which he had difficulty concentrating and became timid.

Valerie River, the defense investigator, and Knight's attorney journeyed to Jamaica to interview Knight's family and friends. Knight was abandoned by his mother and the Knight family found him at a hospital and took him home. He was a good brother and son. Knight's close friends and family said that he was a nice and good person. Knight's sister-in-law used to have Knight babysit her children but eventually stopped because he was careless around the house. Knight blacked out on one occasion. Knight's former boss Stedman Stevenson said he was a hard worker and a quick learner. He took Knight to Florida, and Knight decided to stay.

Knight also presented expert Dr. Jon Kotler who practices nuclear medicine and specializes in PET scans of the brain. He explained that Knight's physical symptoms indicated that he might have a brain injury. The MRI done on him was normal. Dr. Kotler did a PET scan which he interpreted as showing asymmetrical brain activity indicating possible pathology of the brain, perhaps a seizure disorder. He could not say exactly what the pathology might be or how it might manifest itself in Knight's behavior. Dr. Sfakianakis, another nuclear medicine doctor, read the PET results as showing only a mild difference between the brain hemispheres which was within the normal fluctuations of the brain.

Following the presentation of penalty-phase testimony, the jury unanimously recommended the death penalty for both murders.

The *Spencer*[2] Hearing

2 *Spencer v. State,* 615 So.2d 688 (Fla.1993).

The trial court subsequently conducted a *Spencer* hearing on August 18, 2006. At the hearing, the defense submitted the report and deposition of neuropsychologist Dr. Mittenberg who examined Knight but refused to testify at trial. The State submitted the report and deposition of Dr. Lopickalo, another neuropsychologist. Mullings and Eunice Belan also gave victim impact statements.

The Sentencing Order

Subsequent to the *Spencer* hearing, the trial court followed the jury's recommendation and sentenced Knight to death. In pronouncing Knight's sentence, the trial court determined that the State had proven beyond a reasonable doubt two statutory aggravating circumstances for the murder of Odessia Stephens: (1) a previous conviction of another violent capital felony, and (2) that the murder was especially heinous, atrocious, or cruel (HAC). The court also found three statutory aggravating circumstances for the murder of Hanessia Mullings: (1) a previous conviction of another violent capital felony, (2) HAC, and (3) the victim was under twelve years of age. The court found no statutory mitigating circumstances but found eight nonstatutory mitigators, which are set forth in our proportionality discussion.

***885** On direct appeal, Knight raises five claims.[3] We conclude that each issue is without merit. We also find the evidence sufficient to support Knight's convictions, and that the death sentences are proportionate.

3 Knight asserts the following: (1) the trial court abused its discretion by denying Knight's motion for mistrial based on Hans Mullings' comment that he knew Knight to have a violent background; (2) the trial court abused its discretion in denying Knight's motion for mistrial based on the allegation that jurors saw him wearing shackles; (3) the trial court erred in ruling that no discovery violation occurred and in denying Knight's motion for mistrial based on the State's expert's testimony regarding DNA evidence; (4) the trial court erred in denying Knight's motion to seat a new jury based on Mullings' testimony; and (5) the Florida death sentencing statute violates the Sixth Amendment and ignores *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

ANALYSIS

Hans Mullings' Testimony

Knight first claims the trial court erred in denying his motion for mistrial following the State's redirect examination of Hans Mullings, during which Mullings stated that Knight had a "violent background." Specifically, Knight contends that Mullings' testimony had a negative impact on his character and resulted in undue prejudice. While we agree with Knight that Mullings' statement was improper, we disagree that the trial court erred by not granting a mistrial under these circumstances.

The facts underlying this claim are as follows. During redirect examination by the State, Mullings testified that when he arrived at his residence and saw the police, "I was just assuming that, truthfully, probably Odessia and Richard got into an argument or something because I know Richard's violent background." The defense objected to this testimony and moved for a mistrial. The trial court sustained defense counsel's objection and instructed the jury to disregard the comment.

A trial court's denial of a motion for mistrial is reviewed by an abuse of discretion standard. *Cole v. State,* 701 So.2d 845, 852 (Fla.1997). The granting of a motion for mistrial is not based on whether the error is "prejudicial." Rather, the standard requires that a mistrial be granted only "when an error is so prejudicial as to vitiate the entire trial," *England v. State,* 940 So.2d 389, 401–02 (Fla.2006), such that a mistrial is "necessary to ensure that the defendant receives a fair trial." *McGirth v. State,* 48 So.3d 777, 790 (Fla.2010), *cert. denied,* ––– U.S. ––––, 131 S.Ct. 2100, 179 L.Ed.2d 898 (2011). "It has been long established and continuously adhered to that the power to declare a mistrial and discharge the jury should be exercised with great care and caution and should be done only in cases of absolute necessity." *England,* 940 So.2d at 402 (quoting *Thomas v. State,* 748 So.2d 970, 980 (Fla.1999)). Therefore, "[i]n order for [Mullings' statement] to merit a new trial, the comments must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise." *Salazar v. State,* 991 So.2d 364, 372 (Fla.2008) (quoting *Spencer v. State,* 645 So.2d 377, 383 (Fla.1994)).

It has been established that the State cannot introduce evidence attacking the character of the accused unless the accused first puts his good character in issue. *See Wadsworth v. State,* 201 So.2d 836 (Fla. 4th DCA 1967), *quashed on other* ***886** *grounds,* 210 So.2d 4 (Fla.1968), § 90.404(1)(a), Fla. Stat. (2006).

In the instant case, Mullings, the victims' surviving boyfriend and father and the defendant's cousin, testified that he rushed back to the apartment because he knew Knight had a violent background. However, as noted above, the defense objected, the objection was sustained, and the jury was instructed to disregard the remark. The statement was not so prejudicial as to prevent Knight from receiving a fair trial. *See, e.g., Roman v. State,* 475 So.2d 1228, 1234 (Fla.1985) (concluding that the trial court did not err in denying motion for mistrial when prosecutor's question implied that the defendant had a prior criminal record because although the question was improper, there was other overwhelming evidence against the defendant). Accordingly, we conclude the trial court did not abuse its discretion in denying Knight's motion for mistrial.

Allegation That Jurors Saw Knight in Shackles

Next, Knight claims that the trial court improperly denied his motion for mistrial for being shackled in the presence of the jury during the guilt phase. On the final day of jury selection and after the jury had been impaneled, two custody deputies escorted Knight past the jury room. At the same time, the bailiff briefly opened the jury room door. Knight was wearing handcuffs and shackles. Knight filed a motion for mistrial and a motion to disqualify the jury. During an evidentiary hearing on the motions, the deputies reenacted the scenario. The trial court found that no juror could have seen Knight and denied the motion for mistrial.

This Court reviews a trial court's ruling on a motion for mistrial under an abuse of discretion standard. *England v. State,* 940 So.2d 389, 402 (Fla.2006). If reasonable people could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and therefore is not an abuse of discretion. *Bryant v. State,* 901 So.2d 810, 817 (Fla.2005) (citing *Canakaris v. Canakaris,* 382 So.2d 1197, 1203 (1980)). A motion for mistrial should be granted only when it is necessary to ensure that the defendant receives a fair trial. *Seibert v. State,* 923 So.2d 460, 471–72 (Fla.2006).

First, it is well accepted that shackling a defendant during a criminal trial is "inherently prejudicial." *Deck v. Missouri,* 544 U.S. 622, 635, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005) (quoting *Holbrook v. Flynn,* 475 U.S. 560, 568, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986)); *see also Bryant v. State,* 785 So.2d 422, 429 (Fla.2001) (quoting *Bello v. State,* 547 So.2d 914, 918 (Fla.1989)). Visible shackling interferes with the accused's presumption of innocence and the fairness of the fact-finding process. *Deck,* 544 U.S. at 630, 125 S.Ct. 2007; *Bryant,* 785 So.2d at 428; *see also Diaz v. State,* 513 So.2d 1045, 1047 (Fla.1987). For that reason, visible shackles must only be used when "justified by an essential state interest" specific to the defendant on trial. *Deck,* 544 U.S. at 624, 125 S.Ct. 2007; *see Bello,* 547 So.2d at 918.

Here, Knight was not forced to stand trial while wearing shackles, but was merely shackled during transport when, according to his allegation, he was inadvertently viewed by several jurors. The record indicates that it is unlikely any juror saw Knight in shackles. However, even if we assumed Knight's allegation to be true,

> [w]e have long held that a juror's or prospective juror's brief, inadvertent view of a defendant in shackles is not so prejudicial as to warrant a mistrial. *See, e.g.,* ***887** *Singleton v. State,* 783 So.2d 970, 976 (Fla.2001) (explaining that the jurors' brief glances of the defendant while he was being transported in prison garb and shackles, standing alone, were not so prejudicial as to require a mistrial); *Stewart v. State,* 549 So.2d 171, 174 (Fla.1989) (finding that a new trial was not warranted where the defendant's shackles were ruled unobtrusive and necessary by the trial court and were only barely visible beneath the table); *Heiney v. State,* 447 So.2d 210, 214 (Fla.1984) (holding that the jurors' possible inadvertent and brief sight of the defendant being transported into the

> courtroom in chains did not justify a mistrial); Neary v. State, 384 So.2d 881, 885 (Fla.1980) (concluding that the jurors' inadvertent sight of the defendant being brought into the courtroom in handcuffs was not so prejudicial as to require a mistrial). Thus, the mere fact that a prospective juror saw the shackled ankles of a person whom he believed to be [the defendant] underneath a chalkboard set up in the hallway outside the courtroom is not sufficient, standing alone, to warrant a mistrial or dismissal of the venire.

Hernandez v. State, 4 So.3d 642, 658 (Fla.), *cert. denied,* ––– U.S. ––––, 130 S.Ct. 160, 175 L.Ed.2d 101 (2009).

Applying that reasoning to the facts of this case, we conclude that even if there was an inadvertent sighting of Knight in shackles, it was not so prejudicial as to warrant a mistrial. Thus, the court's decision to deny Knight's motion for mistrial was not an abuse of discretion.

Discovery Violations

Knight also challenges the trial court's ruling that no discovery violation occurred and alleges the trial court erred in denying Knight's motion for mistrial based on the State's experts' testimony regarding DNA evidence. Knight argues that the State provided defense counsel with what appeared to be a complete DNA comparison, but then ordered further DNA comparisons without any notice to the defense. Based on the State's discovery produced prior to trial, defense counsel relied on serologist Kevin Noppinger's DNA analysis that Knight's jean shorts and boxers, recovered from the apartment bathroom, contained Odessia and Hanessia's DNA, and excluded the DNA of Knight.

At trial, however, the prosecutor presented testimony from Dr. Kevin McElfresh of Bode Technology Group establishing that Knight's DNA could not be excluded from the jean shorts and boxers. Because the defense was under the impression that the jean shorts and boxers would exclude Knight, Knight argues that the State "ambushed" the defense at trial by failing to disclose the additional DNA analysis that failed to exclude Knight's DNA from the jean shorts and boxers. Knight asserts the State violated discovery rules and that the trial court erred by failing to conduct a *Richardson* [4] hearing on the alleged violation. This claim is without merit.

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

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 ***888** 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.

See also Taylor v. State, 62 So.3d 1101, 1112 (Fla.2011). Under this precedent, it is only after the trial court finds a discovery violation that it must make an inquiry into 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. *See Richardson v. State,* 246 So.2d 771, 775 (Fla.1971) (requiring court to determine if violation of rule relating to exchange of witness lists was inadvertent or willful, whether violation was trivial or substantial, and what effect, if any, it had upon ability of other party to properly prepare for trial).

In this case, contrary to Knight's argument, the trial court determined that the State provided Knight with all the evidence presented at trial and that no discovery violation occurred, which is supported by the record.

The record demonstrates that the questioned evidence was produced and the trial court found no discovery violation occurred after two inquiries. In fact, the trial court found that the defense was actually in receipt of all evidence, but complained of having the evidence interpreted differently by two experts and having relied on the information from the first expert. *See State v. Evans,* 770 So.2d 1174, 1177–78 (Fla.2000) ("When testimonial discrepancies appear, the witness' trial and deposition testimony can be laid side-by-side for the jury to consider. This would serve to discredit the witness and should be favorable to the defense. Therefore, unlike failure to name a witness, changed testimony does not rise to the level of a discovery violation and will not support a motion for a *Richardson* inquiry." (quoting *Bush v. State,* 461 So.2d 936, 938 (Fla.1984))). Therefore, because the trial court found that no discovery violation occurred, and that finding is supported by the record, we conclude that no *Richardson* hearing was required in this case.

Based on a review of the record, we hold that the trial court did not err in finding that no discovery violation occurred. Thus, a *Richardson* hearing was not required and the trial court properly denied Knight's motion for mistrial. Furthermore, although a *Richardson* hearing was not required, the trial court nevertheless complied with this Court's precedent in holding such a hearing.

Knight's Motion to Seat a New Jury

Knight contends Mullings' testimony during the guilt phase proceedings that Knight had a "violent background" required the trial court to seat a new jury for purposes of the penalty phase of the trial. Knight argues that Mullings' testimony was so prejudicial that this Court should reverse and remand for a new penalty phase proceeding. Knight's argument is without merit.

A trial court's decision on whether to dismiss a venire is reviewed for an abuse of discretion. *See Richardson v. State,* 706 So.2d 1349, 1357 (Fla.1998); *Valderrama v. State,* 816 So.2d 1143, 1144 (Fla. 4th DCA 2002); *Bauta v. State,* 698 So.2d 860, 861–62 (Fla. 3d DCA 1997).

We have previously considered this issue as a guilt-phase claim and concluded that the trial court did not abuse its discretion in failing to grant a mistrial after Mullings made this statement. We likewise conclude that the trial court did not abuse its discretion in refusing to dismiss ***889** the venire prior to the penalty phase based on the impact of this same statement. We have held that defendants subject to the death penalty are not entitled to separate guilt and penalty phase juries. *See Melton v. State,* 638 So.2d 927, 929 (Fla.1994); *Riley v. State,* 366 So.2d 19, 21 (Fla.1978) (concluding that there is "no compulsion in law or logic" to bifurcate juries in capital case trials). Here, the jury is presumed to have followed the trial judge's admonition to disregard Mullings' testimony during the guilt phase. Accordingly, there is no basis that would disqualify this jury from rendering a penalty recommendation. Accordingly, the trial court did not err, and we deny relief on this claim.

Florida's Death Sentence Statute

Knight's final claim challenges the constitutionality of Florida's death sentencing scheme as set forth in section 921.141, Florida Statutes (2000). This argument is without merit. We have repeatedly rejected requests to revisit this issue. *See Abdool v. State,* 53 So.3d 208, 228 (Fla.2010) ("This Court has also rejected [the] argument that this Court should revisit its opinions in *Bottoson v. Moore,* 833 So.2d 693 (Fla.2002), and *King v. Moore,* 831 So.2d 143 (Fla.2002), and find Florida's sentencing scheme unconstitutional.") (citing *Guardado v. State,* 965 So.2d 108, 118 (Fla.2007)), *petition for cert. filed,* No. 10–10531 (U.S. Apr. 25, 2011).

Sufficiency of the Evidence

Additionally, we must review the record for competent, substantial evidence to sustain Knight's convictions for the murders of Odessia and Hanessia. *See Miller v. State,* 42 So.3d 204, 227 (Fla.2010). A review of the record shows there is sufficient evidence to support the murder convictions.

As outlined above, the evidence presented at trial showed that Odessia and Hanessia died after being stabbed numerous times and strangled. There were three knives used in the attacks, all of them broken. There were a combined twenty-six stab wounds between the victims, plus additional puncture and scratch wounds. Hanessia had bruises consistent with Knight having repositioned his hands to strangle her, and Odessia had ligature marks on her neck that appeared to have been made by a belt or similar object. Odessia had bruises consistent with Knight having struck her on her head and punched her in the mouth. Both victims' blood was found on Knight's clothing. There was evidence of a struggle and that Knight had pursued Odessia to continue his attack on her. Both victims showed evidence of defense. Neither victim died instantly. Knight was found at the crime scene wet, although it was not raining, and claiming to have been jogging despite the fact he was wearing dress shoes. Further, Knight confessed to a fellow inmate while he was in jail awaiting trial. Accordingly, the record demonstrates that there is competent, substantial evidence to sustain Knight's convictions for the first-degree murders of Odessia and Hanessia.

Proportionality

Finally, "[t]his Court must review the proportionality of a death sentence, even if the issue has not been raised by the defendant." *Bolin v. State,* 869 So.2d 1196, 1204 (Fla.2004). Proportionality review "is not a comparison between the number of aggravating and mitigating circumstances." *Crook v. State,* 908 So.2d 350, 356 (Fla.2005) (quoting *Porter v. State,* 564 So.2d 1060, 1064 (Fla.1990)). Instead, the Court considers the totality of the circumstances to determine if death is warranted in comparison to other cases where the death sentence has been upheld. ***890** *Davis v. State,* 859 So.2d 465, 480 (Fla.2003). In addition, the heinous, atrocious, or cruel aggravator is one of the "most serious aggravators set out in the statutory sentencing scheme." *Larkins v. State,* 739 So.2d 90, 95 (Fla.1999).

The trial court found two statutory aggravating circumstances for the murder of Odessia Stephens: (1) a previous conviction of another violent capital felony, and (2) HAC. The court also found three statutory aggravating circumstances for the murder of Hanessia Mullings: (1) a previous conviction of another violent capital felony, (2) HAC, and (3) the victim was under twelve years of age. The aggravators in this case were weighed against eight nonstatutory mitigators: (1) Knight had a good upbringing (slight weight), (2) Knight loves his family (moderate weight), (3) Knight went to high school and excelled in art (little weight), (4) Knight was admired by the children in his neighborhood as a youth and was well regarded by the adults (little weight), (5) Knight was a valuable employee in Jamaica (little weight), (6) Knight had part-time employment at the time of the crime (little weight), (7) Knight behaved well in court (little weight), and (8) Knight is capable of forming loving relationships (moderate weight).

Based on the evidence set forth earlier, the aggravators the trial court found, and the totality of the circumstances, Knight's death sentences are proportionate compared to other death sentences this Court has upheld. *See, e.g., Aguirre–Jarquin v. State,* 9 So.3d 593, 610 (Fla.2009) (finding the death sentence proportionate in a double murder where three aggravators were found for one murder, five for the other, including prior capital felony, commission during a burglary, and HAC for both and eight mitigating circumstances were found, three statutory); *Smithers v. State,* 826 So.2d 916, 931 (Fla.2002) (finding the death sentence proportionate in a double murder where three aggravators were found for one murder and two for the other, including HAC and prior violent felony for both, and two statutory and seven nonstatutory mitigating factors were found); *Francis v. State,* 808 So.2d 110 (Fla.2001) (finding the death sentence proportionate in the double stabbing murders of elderly sisters where the trial court found four aggravators for each murder, including HAC, the victims vulnerability due to age, prior violent felony based on the contemporaneous murder, that the murders were committed during the course of a robbery, two statutory mitigators, and six nonstatutory mitigators); *Morton v. State,* 789 So.2d 324 (Fla.2001) (finding the death sentence proportionate in a double murder by gunshot and stabbing where trial court found three aggravators with respect to one murder and five with respect to the other, including prior violent felony based on the contemporaneous murder and cold, calculated and premeditated for both and two statutory mitigators and five nonstatutory mitigators).

CONCLUSION

In accordance with our analysis above, we affirm Knight's convictions for first-degree murder and sentences of death.

It is so ordered.

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

All Citations

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