UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

RONALD KNIGHT, CASE NO. 17-81159-CIV-DIMITROULEAS

Petitioner,

vs.

JULIE J. JONES,

Respondent.
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FINAL JUDGMENT AND ORDER DENYING HABEAS CORPUS

THIS CAUSE is before the Court on Petitioner, Ronald Knight's October 16, 2017 Petition for Writ of Habeas Corpus. [DE-1]. The Court has considered the State's February 16, 2018 Response [DE-17], the State's Conventional Filings of State Records [DE-19, 25], the State's March 1, 2018 Supplemental Response [DE-20], Knight's *pro* se March 22, 2018 Motion to Amend [DE-21] and Knight's March 30, 2018 Reply, [DE-24] and finds as follows:

BACKGROUND

1. Knight was initially charged with Second Degree Murder in 1994 for the death of Richard Kunkel in 1993. Jose Sosa represented him. [DE-25, p. 11]. The charge was *nolle prossed* on January 3, 1995. Meanwhile, Knight had been charged with another murder. In that case (Meehan), Knight had moved for the production of all grand jury transcripts pursuant to the Public Information Act. The trial court granted the motion. However, that order was quashed by the Fourth District Court of Appeal on October 5, 1995. *State v. Knight*, 661 So. 2d 344 (Fla. 4th DCA 1995). On December 8, 1995, in that separate murder case, Knight was convicted of the First Degree Murder of Brendan Meehan. That conviction was affirmed on April 9, 1997 [4D96-307]. Rehearing was denied on May 2, 1997. *Knight v.*

State, 692 So. 2d 903 (Fla. 4th DCA 1997).[1] Knight was then indicted on May 8, 1997 and charged with the up-graded charge of First Degree Murder of Richard Kunkel, Armed Robbery, Burglary of a Dwelling and Grand Theft. [DE-19-1, pp. 32-34].

2. Attorney Ann Perry was appointed to represent Knight, [DE-19-1, p. 83], with Attorney Jose Sosa appointed as second chair counsel [DE-19-1, p. 102].[2] Knight later discharged both counsel and proceeded to represent himself at the guilt phase, with Sosa as standby counsel.

A. On October 20 1997, Knight sent Judge Garrison a letter complaining about Perry. [DE-19-2, pp. 269-270]. The trial court held a proper inquiry on October 31, 1997, in response to Knight's request to dismiss Ann Perry, his court-appointed counsel. At that hearing, Judge Garrison found that Ms. Perry had not been incompetent in representing Knight.[3] Knight was told that substitute counsel would not be appointed to replace Ms. Perry and that, if he did not hire substitute counsel, he would have to represent himself.

B. On December 3 and 21, 1997, Knight asked that Mr. Sosa be dismissed from his case. [DE-19-2, pp. 107-109]. He had previously asked Sosa to file a motion to withdraw. [DE-19-6, p. 135]. Judge Garrison found that Knight's complaints about Sosa's agreement to postpone the trial and the alleged

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[1] The Fourth District Court of Appeals affirmed denials of motions for post-conviction relief on November 10, 1999 [4D99-3015] and on April 25, 2012 [4D11-1449] and [4D12-1072]. Mandamus petitions were denied on February 10, 2010 [4D10-236], on April 13, 2010 [4D10-913], on December 10, 2010 [4D-10-1703], and on April 18, 2011 [4D11-1125]. A prohibition petition was denied on September 20, 2010 [4D-10-2586], A petition was denied by the Florida Supreme Court on May 9, 2013. *Knight v. State,* 120 So. 3d 561 (Fla. 2013).

[2] On October 20, 1997, Knight complained about Ms. Perry. [DE-19-2, p. 77]. She was discharged on November 6, 1997. [DE-19-2, p. 98]. On December 3, 1997, Knight complained about Mr. Sosa. [DE-19-2, pp. 107-108]. Knight complained again on December 21, 1997. [DE-19-2, p. 109].

[3] Perry was appointed on June 13, 1997. [DE-19-2, p 64]. On September 17, 1997, Perry indicated that the prosecutor had listed 101 witnesses, and she requested a continuance of the trial. [DE-19-2, pp. 11-12]. On September 24, 1997, Perry scheduled seven (7) depositions for October 21, 1997. [DE-19-2, pp. 18-19, 70-71] and eleven (11) depositions for October 14, 1997. [DE-9-2, pp. 20-21]. On October 29, 1997, four (4) depositions were scheduled for November 19, 1997. [DE-19-2, pp. 83-84]. Five (5) more depositions were schedule for November 18, 1997. [DE-19-2 pp. 93-97, 99-102]. On September 24, 1997, Perry filed a Supplemental Demand for Discovery. [DE-19-2, pp. 22-23]. On October 15, 1997, Perry requested better addresses. [DE-19-2, 60-61]. On October 15, 1997 and October 28, 1997, Perry requested permission to transcribe depositions [DE-19-2, pp. 62-63, 81-82]. The record supports Judge Garrison's conclusion. On November 21, 1997, the State indicated that it would be seeking the death penalty. [DE-19-2, p. 106]. As of October 13, 1997, Perry had expended 97 hours working on Knight's case. [DE-19-2, pp. 111-117]. A private investigator was awarded over $8,000 for his work on the case at Perry's request. [DE-19-2, p. 120, 122]. In total, Perry expanded over 107 hours representing Knight. [DE-19-2, p. 156].

lack of contact with him did not indicate incompetence. [DE-19-6, pp. 161-162]. Knight understood and agreed that he would represent himself at the upcoming trial. On January 8, 1998, Sosa was discharged [DE-19-6, p. 162]. On February 18, 1998, Sosa was reappointed as standby counsel. Knight was pleased with that arrangement. [DE-19-2, pp. 133-134]. On March 11, 1998, Knight reiterated his previous answers to the Court's questions and indicated a continuing desire to represent himself. [DE-19-8, pp. 3-5]. Sosa later represented Knight at the penalty phase, having been reappointed on April 15, 1998, the first day of the penalty phase. [DE-19-10, p. 7].

3. On February 20, 1998, Knight waived his right to a jury trial, both as to the guilt and penalty phases. [DE-19-2, p. 145]. The trial commenced on March 11, 1998. At the start of the trial, Judge Garrison confirmed that Knight had reviewed the transcript of the January 8, 1998, *Faretta* hearing. Judge Garrison was satisfied that Knight's answers to the previous questions would be the same. [DE-19-8, pp. 3-5]. Knight wanted to finish representing himself. [DE-19-8, p. 4]. The State called fourteen (14) witnesses[4]. Knight called no witnesses.

4. On March 16, 1998, Knight was found guilty as charged [DE-19-9, pp. 77-78]. On March 15, 1988, Knight complained about the verdict. [DE-19-2, pp. 187-189]. On April 15, 1998, the penalty phase commenced, and John Van Houten testified about his investigation of the Meehan case. [DE-19-10, pp. 19-33]. Later on April 15, 1998, Karen Gerheiser [DE-19-10, pp. 35-79]; Theresa Scott [DE-19-10, pp. 79-89]; and Michael Wayne Knight [DE-19-11, pp. 45-54] testified as defense witnesses. Susan Lafehr-Hession and Abbey Strauss testified as defense experts [DE-19-10, pp. 93-122 and 123-152, respectively]

[4] James Wood [19-8, pp. 22-27]; Dale Holland [19-8, pp. 28-35]; Mike Gehring [DE-19-8, pp. 35-72]; Dain Brennault [DE-19-8, pp. 75-93; DE-25-2, pp. 16-91, DE-19-7, pp. 23-98]; Lance Patrick Jackson [DE-19-8, pp. 93-124,]; Steven Nelson, MD [DE-25-2, pp. 3-16]; John O'Rourke [DE-25-2, pp. 93-96]; Robbie Brennault [DE-25-2, pp. 96-117]; Michael Brown [DE-25-2, pp. 118-121]; Jeffrey Pearson [DE-25-2, pp. 122-132]; Kenneth Resnick [DE-25-2, pp. 134-145]; Heather Hope Edwards [DE-25-2, pp. 146-171]; Tracey Bauchaman [DE-19-9, pp. 12-20]; and Christopher Holt [DE-19-9, pp. 20-60].

Following the penalty phase, Knight was sentenced to death on May 29, 1998. [DE-19-3, pp. 33-36, 40; DE-19-11, pp. 57-68]. At the penalty phase, the State relied on Knight's murder conviction (Meehan) as a prior felony violent conviction, an aggravating factor, even though the murder of Richard Kunkel had preceded the murder of Brendan Meehan. The trial court found four aggravating factors. The trial court gave considerable weight to the mitigating factor of "under the influence of extreme mental or emotional disturbance." The trial court gave some consideration to Knight's "capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." The trial court found non-statutory mitigation of: 1) broken home and unstable childhood; 2) support and love of family members; 3) alleged disparate treatment of co-defendants, but little weight was given to those three factors.

5. On November 2, 2000, with no dissents, the Florida Supreme Court affirmed. [DE-19-12. pp. 5-22]. *Knight v. State*, 770 So. 2d 663 (Fla. 2000).

> The Florida Supreme Court gave the following summary of the facts:
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> A. The evidence presented during the guilt phase indicated that Knight and two accomplices, Timothy Pierson (Pierson) and Dain Brennault (Brennault), agreed that they would go to a gay bar, lure a man away from the bar, and beat and rob him. The three found Richard Kunkel (Kunkel) and invited him to go to a party with them. Kunkel was driving his own car and followed Knight and the others to Miami Subs. After stopping to eat, the three convinced Kunkel to leave his car parked there and ride to the party with them. Knight then drove to a secluded area where they stopped twice and got out of the car to urinate.
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> B. Before they got back into the car after their second stop, Knight pointed a gun at Kunkel and told him to turn around and take off his jeans. As Kunkel was complying, Knight fired one shot striking Kunkel in the back. Kunkel fell to the ground and began crying for help. Knight then ordered Brennault and Pierson to search Kunkel's pockets. Pierson complied, but Brennault refused. Knight and Pierson then dragged Kunkel's body out of the road. They left Kunkel to die beside a canal where his body was later discovered. Knight threatened to kill Pierson and Brennault if they told anyone about the murder.
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> C. Later that night, the three men went back to Miami Subs where they had left Kunkel's car. Knight then stole Kunkel's car and took it for a joy ride to see how fast it would go. Sometime later that evening, the three men broke into Kunkel's house and stole various items.

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

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

F. The Court found that a proper *Faretta*[5] hearing had been held, and it was not error to allow Knight to represent himself, both at the guilt and penalty phases. Moreover, the Court found that once a defendant has properly waived his right to counsel at the trial stage, there is no obligation on the trial court to renew the offer of counsel at that stage. Additionally, the Court found that it was proper at the penalty phase to consider a subsequent murder (Meehan) as a prior violent felony aggravator. Finally, the Florida Supreme Court found that adequate weight had been given to both aggravating and mitigating factors and that the death sentence was proportionate to other similar cases, citing four (4) similar death sentences. On April 30, 2001, the U.S. Supreme Court denied certiorari. [DE-19-13, p. 3]. *Knight v. Florida*, 532 U.S. 1011 (2001).

6. On September 27, 2001, Knight filed a post-conviction motion in the trial court. An amended motion was filed on June 3, 2004. Supplemental motions were filed on December 7, 2006, March 28, 2008, April 16, 2010, February 11, 2011, and May 24, 2011. Three *pro se* claims were adopted by post-conviction counsel. Altogether, there were twenty-one (21) claims for relief:

(1) *Brady* and *Giglio* violations
(2) Invalid waiver of guilt phase jury
(3) Invalid waiver of guilt phase counsel
(4) Invalid waiver of penalty phase jury
(5) Actual innocence of First Degree Murder
(6) Ineffective Assistance of Penalty Phase Counsel
- failure to present mitigating evidence

[5] *Faretta v. Calif.*, 422 U.S. 806 (1975).

(7) Inadequate mental health evaluation
(8) Actual innocence of death penalty
(9) Right to confront witnesses violated
(10) *Ring v. Arizona* violations
(11) Public Records denial
(12) Death Sentence applied discriminately where Caucasians are killed
(13) Arbitrary and capricious imposition of death penalty in Florida
(14) Unconstitutional lethal injection procedures
(15) Knight is insane to be executed
(16) Cumulative Error
(17) Double jeopardy/speedy trial violated because of the January 3, 1995 *nolle prosequi*
(18) Ineffective Assistance of Counsel in not filing a motion to discharge
(19) Newly discovered evidence of cruel and unusual punishment, ABA report
(20) *Richardson v. State*, 246 So. 2d 771 (Fla. 1971) violation
(21) Ineffective Assistance of Counsel, failed to ensure Knight had access to records on appeal

Knight also filed a habeas petition, complaining about appellate counsel.

7. Meanwhile, Knight had petitions or writs dismissed or denied by the Florida Supreme Court on:

A. October 17, 2007. *Knight v. State*, 969 So. 2d 1013 (Fla. 2007).]DE-19-16, p. 3]. [SC07-867]

B. May 7, 2008. *Knight v. State*, 983 So. 2d 1154 (Fla. 2008). [DE-19-17, p. 3]. [SC07-2251]

C. September 14, 2009. *Knight v. State*, 19 So. 3d 311 (Fla. 2009). [DE-19-20, p. 3]. [SC09-265]

D. December 23, 2009. *Knight v. State*, [SC08-2241, SC08-2251]. [DE-19-19, p. 25]. Rehearing was denied on February 23, 2010. [DE-19-19, p. 17].

E. February 18, 2010. *Knight v. State*, 30 So. 3d 493 (Fla. 2010). [SC09-2130]

F. March 2, 2010. *Knight v. State*, 31 So. 3d 782 (Fla. 2010). [SC09-2132].

G. October 8, 2010. *Knight v. State,* 46 So. 3d 1002 (Fla. 2010). [SC10-1431].

H. February 1, 2013. *Knight v. State*, 109 So. 3d 781 (Fla. 2013). [SC12-2521].

I. May 9, 2013. *Knight v. State*, 120 So. 3d 561 (Fla. 2013).

J. February 11, 2015. *Knight v. State*, 163 So. 3d 510 (Fla. 2015). [DE-19-21, p. 3]; [DE-19-22, p. 3], [DE-19-23, p. 3], [SC10-1431], [SC10-2523]. [SC12-483].

8. On October 5, 2007, Knight filed a § 1983 case in federal court. [DE-1 in 07-80954]. He alleged a conspiracy to destroy records; on January 16, 2008, Judge Ryskamp adopted the Magistrate Judge's Report and dismissed the case. [DE-14 in 07-80954]. Upon reconsideration, Judge Ryskamp again dismissed the case on February 21, 2008. [DE-24 in 07-80954].

9. On November 16, 2017, Knight filed a habeas petition with the Florida Supreme Court. [SC17-2021]. It was denied on January 29, 2018. *Knight v. Jones*, 2018 WL 580765 (Fla. 2018). Rehearing was denied on March 27, 2018. .

10. An evidentiary hearing was held on May 1-3, June 21 and August 1-2, 2012 on all of Knight's claims except claims 14, 19 and 20. No evidence was presented on claims 8, 12, 13 and 15. Knight called Dr. Abby Strauss, Dr. Philip Harvey, Zebedee Fennell, Terry Fowler, Timothy Pearson, Dain Brennault, Ann Perry, Dr. Jonathan Lipman, Phyllis Danes, Rick Hussey, and Andrew Slater. Knight also testified on his own behalf. The State called former prosecutors, Marc Shiner and Shirley DeLuna. On February 5, 2013, the trial court (Judge Colbath) denied relief in an extensive sixty-five (65) page order. [DE-19-30, pp. 87-151]. The post conviction motion had been pending in the trial court for over eleven (11) years. Knight raised the following issues on appeal (1) penalty phase counsel was ineffective for failing to adequately investigate and present mitigating evidence; (2) guilt and penalty phase counsel were ineffective for failing to move for a discharge of the instant case based on the 1994 case against the Petitioner, in which the State entered a *nolle prosequi;* (3) guilt and penalty phase counsel were ineffective for failing to raise the issue of the State's *Richardson* violation before being discharged; (4) the reappointment of CCRC –South over the Petitioner's objection deprived the Petitioner of his right to self-representation; (5) the Petitioner's waiver of guilt phase counsel and of both guilt and penalty phase

juries was not knowing, intelligent, and voluntary, and (6) Florida's lethal injection procedures are unconstitutional. The Petitioner also petitioned for a writ of habeas corpus based on ineffective assistance of appellate counsel for failing to raise the following three claims: (1) the Petitioner's waiver of a guilt phase jury was not knowing, intelligent, and voluntary; (2) the Petitioner's waiver of a penalty phase jury was not knowing, intelligent, and voluntary; and (3) that the record on appeal was incomplete.

11. On December 15, 2016, in a unanimous opinion, the Florida Supreme Court affirmed the denial of post conviction relief and denied habeas relief. [DE-19-38, pp. 17-51]. *Knight v. State*, 211 So. 3d 1 (Fla. 2016). Rehearing was denied on March 3, 2017. [DE-19-38, p. 5]. *Knight v. State*, 2017 WL 836799 (Fla. 2017). Mandate issued on May 20, 2017. The Florida Supreme Court addressed several issues.

A. The Supreme Court found no deficient performance in the presentation of mitigating evidence. Therefore, the Court did not address the prejudice prong of the ineffective assistance of counsel claim.

B. There was no double jeopardy violation because the jury had not been sworn in the courtroom before the 1994 Second Degree Murder charge was nolle prossed. The Court found that a venire panel being sworn in the jury assembly room does not constitute the commencement of a trial for double jeopardy purposes.

C. There was no speedy trial violation because Knight's having requested continuances had waived his speedy trial rights before the 1994 case was nolle prossed. Moreover, Knight's intimidation of a witness had contributed to causing the entry of the *nolle prosequi.*

D. There was no prejudice in counsel's failing to raise a *Richardson* objection to perceived discovery violations:

(1) Failure to provide records and transcripts from the 1994 case

(2) Failure to provide statements and depositions of accomplice, Brennault

(3) Failure to provide Medical Examiner Arbaczowski's report

E. Knight's speculative complaints about due process being violated when he was denied access to public records did not merit any relief.

F. Post-Conviction Court's reappointment of CCRC-South as counsel was not on abuse of discretion.

G. Waiver of Counsel claims were procedurally barred.

H. Appellate counsel was not ineffective in failing to raise waivers of jury trial as issues on appeal, as that claim would have been denial.

I. Knight's conclusory allegations of ineffective assistance of counsel in failing to ensure a complete record on appeal did not merit any relief.

Rehearing was denied on March 3, 2017. *Knight v. Sate,* 2017 WL 836799 (Fla. 2017). Mandate issued on March 20, 2017. Knight did not seek certiorari review in the U.S. Supreme Court.

12. On April 30, 2014, Knight filed a motion to appoint counsel in federal court. [DE-1 in 14-80800-MC]. It was denied on June 19, 2014. [DE-4 in 14-80800-MC]. On June 24, 2015, the Eleventh Circuit vacated the order. [DE-12 in 14-80800-MC]. On June 10, 2015, Judge Hurley appointed Orlando do Compo to represent Knight. [DE-13 in 14-80800-MC]. Linda McDermott was substituted on December 26, 2016. [DE-20 in 14-80800-MC].

13. On November 16, 2017, Knight filed a habeas petition in the Florida Supreme Court. It was denied on January 24, 2018. *Knight v. Jones,* 2018 WL 580765 (Fla. 2018). A motion for Rehearing was filed on February 13, 2018. [SC-2021].

DISCUSSION

14. In this timely habeas petition, Knight and his counsel have raised eleven (11) issues:

(1) Ineffective Assistance of Counsel at the Penalty Phase

(2) Involuntary waiver of Counsel

(3) Involuntary waiver of counsel at both phases and an Involuntary waiver of jury trial

(4) Ineffective Assistance of Appellate Counsel

(5) *Brady* violation

(6) Improper Weighing of Mitigating Evidence

(7) Disproportionate Sentence

(8) Ineffective Assistance of Counsel regarding Prior Violent Felony Aggravator

(9) *Ring* violation

(10) Meehan investigation

(11) Structural error

An evidentiary hearing was held on Issues One, Two, Three, Four and Five. The state court findings are entitled to a presumption of correctness. *Consalvo v. Sec'y, D.O.C.,* 664 F. 3d 842, 845 (11th Cir. 2011) *cert. denied,* 568 U.S. 8 49 (2012). Knight has not overcome that presumption by clear and convincing evidence.

15. **First**, Knight complains about ineffective assistance of counsel at the penalty phase:

A. He complains that counsel failed to conduct a reasonable investigation for possible mitigating evidence.[6] As a result Knight contends that the trial court, sitting as trier of fact, knew little of Knight's (1) childhood trauma; (2) emotional abuse/neglect; (3)

[6] Such a failure can constitute ineffective assistance of counsel. *Cooper v. Sec'y D.O.C.*, 646 F. 3d 1328, 1351 (11th Cir. 2011). However, Knight should not be allowed to fire his second chair counsel, accept him back as second chair counsel after the guilt phase, and then criticize his investigation, which Knight interrupted. Indeed, Sosa was not formally re-appointed until April 15, 1998, the first day of the penalty phase. On January 8, 1998, Knight rejected Sosa as stand-by counsel. Six (6) weeks later, Knight accepted Sosa back as stand-by counsel. [DE-19-2, p. 133].

substance abuse problems; and (4) psychiatric problems. Knight continues claiming that had the sentencing court heard the post-conviction evidentiary presentation it would have had a "greater appreciation for the aspects of [Knight's] conduct and character and there is , at the very least, a reasonable probability that the result of the penalty phase would have been different." The trial court properly rejected those arguments. The Florida Supreme Court found that Knight had not shown counsel to be deficient. No error has been shown. Moreover, Knight understood that by representing himself, he would not be able to argue ineffective assistance of counsel. [DE-19-6, p. 155]. Moreover, Knight had complained about Sosa's agreement to postpone the guilt phase. [DE-19-2 p. 108]; [DE-19-6, pp. 136, 138]. Knight continually pressed for a speedy resolution of his case. On January 8, 1998, Knight was warned that he would not be entitled to a continuance just because he wished to represent himself. [DE-19-6, p. 152]. Knight indicated that he would not ask for a continuance.

B. Knight complains that counsel did not ask for a continuance of the penalty phase. Mr. Sosa asked for two-three weeks to prepare, and Knight agreed with that assessment [DE-19-9, p. 82]. This speculative allegation does not warrant any relief.

C. Knight complains about the preparation of expert Susan Lafehr-Hession and Dr. Abbey Strauss. Knight fired Sosa, and Sosa was not formally re-appointed until the morning of the penalty phase. This conclusory allegation dos not merit any relief.

D. Knight points to evidence at the post conviction evidentiary hearing that was not presented at the penalty phase.

(i) specific instances of abuse

(ii) conditions at the Okeechobee Boys School

(iii) drug issues

(iv) living in woods as a child

The brutality of Knight's crimes would have overwhelmed any cumulative mitigating evidence. *Tibbetts v. Bradshaw,* 633 F. 3d 436, 445 (6th Cir.) *cert. denied*, 565 U.S. 876 (2011). After conducting an evidentiary hearing, Judge Colbath found that the aggravators in this case were incredibly strong. [DE-19-30, p. 124].

There is no showing that any of these matters would have changed the outcome. The mere fact that a defendant can find, years after the fact, witnesses who will testify favorably for him, does not demonstrate ineffectiveness. *See Davis v. Singletary*, 119 F. 3d 1471, 1475 (11th Cir. 1997). *DeYoung v. Schofield*, 609 F. 3d 1260, 1288 (11th Cir. 2010), *cert. denied*, 562 U.S. 1293 (2011). For the most part these matters were cumulative to wehat had already been presented to Judge Garrison. [DE-19-30, p. 125].

E. In his reply, Knight complains that Respondent is inconsistent in relying on some of his proclamations, but discounting others. [DE-24, p. 3]. However, credibility is not an all or nothing issue.

F. Even under a *de novo* review, Knight was not prejudiced by the absence of any perceived mitigating circumstances. Here, the likelihood of a different result must be substantial, not just conceivable. *Harrington v. Richter*, 562 U.S. 86, 112 (2011). In light of the evidence presented, Knight cannot show that any additional evidence would have changed the judge's verdict. *Cullen v. Pinholster*, 563 U.S. 170, 200-01 (2011). Indeed, Judge Colbath, after the evidentiary hearing, found that the additional evidence was cumulative or not available to Sosa. [DE-19-30, p. 124]. The court had found several mitigating factors. The additional evidence presented at the post conviction evidentiary hearing was cumulative of the mitigation already found. The Florida Supreme Court's

finding of no deficient performance was supported by the record. Although the Florida Supreme Court did not address the prejudice prong, no prejudice can be shown.

The *Strickland* Standard

There can be no doubt that Knight'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).

16. **Second**, Knight complains about an involuntary waiver of counsel.

A) Inadequate *Faretta* inquiry. The trial court conducted *Faretta* hearings on October 31, 1997 [DE-19-6, pp. 133-164] and on January 8, 1998 [DE-25-1]. The trial court listed many advantages that Knight would have with a lawyer representing him. [DE-19-6, pp. 147-160]. Knight had previously been through a guilt and penalty phase in the Meehan

case. [DE-19-6, pp. 141, 145]. The state trial court again revisited the issue of self-representation at the beginning of the guilt phase. [DE-19-8, pp. 3-5]. Knight faults the trial court's failure to inquire into:

1) work experience

2) no inquiry of mental health experts. Knight disavowed any mental illness [DE-19-6, p. 157]. His last psychological counseling was at a juvenile facility twelve (12) years ago. [DE-19-1, p. 158].

3) limited education. Knight indicated he had gone to the ninth grade; he could read and write. [DE-19-6, p. 143]. He knew his way around a law library and understood procedures enough to do without a lawyer. [DE-19-6, pp. 143-144]. He had acquired a GED. [DE-25-1, p. 18]. He had received advice from jailhouse lawyers. [DE-25-1, p. 18]. He knew the State had no case against him. [DE-25-1, p. 19].

However, the trial court inquired into those areas and found Knight to be an intelligent person [DE-25-1, p. 20] and a "fairly intelligent, bright young man". [DE-19-6, p. 143]. Here, Knight understood the choices before him and the risk of self-representation. *Jones v. Walker*, 540 F. 3d 1277, 1293 (11th Cir. 2008), *cert. denied*, 556 U.S. 1154 (2009). The Florida court's adjudication of this claim was not contrary to, or an unreasonable application of federal law. *Holley v. Sec'y D.O.C.*, 518 Fed. Appx. 857, 858 (11th Cir. 2013) *cert. denied*, 134 S. Ct. 913 (2014). Here, Knight made the decision with "eyes wide open". *Iowa v. Tovar*, 541 U.S. 77, 80-81 (2004).

B) Failed to renew offer of counsel. Knight was offered assistance of counsel at the start of the trial; stand-by counsel was available. [DE-19-8, pp. 3-12]. Counsel was again offered after the guilty verdict. [DE-19-9, pp. 81-82]. Here, the state trial court decision

was an objectively reasonable application of *Faretta*. *Lang v. Sec'y D.O.C.*, 2007 WL 1120333*4 (M.D. Fla. 2007); *see also U.S. v. Hantzis*, 625 F. 3d 575, 580-81 (9th Cir. 2010), *cert. denied*, 563 U.S. 952 (2011).

The United States Supreme Court expressly recognized the right to self representation in 1975. *Faretta v. California*, 422 U.S. 806 (1975). The Supreme Court held that the Sixth and Fourteenth Amendments include a "constitutional right to proceed without counsel when" a criminal defendant "voluntarily and intelligently elects to do so." 422 U.S. at 807. The *Faretta* Court found that right existed based on:

> (1) a "nearly universal conviction," made manifest in state law, that "forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so," *id*., at 817-818; (2) Sixth Amendment language granting rights to the "accused"; (3) Sixth Amendment structure indicating that the rights it sets forth, related to the "fair administration of American justice," are "persona[l]" to the accused, *id*., at 818-821; (4) the absence of historical examples of forced representation, *id*., at 821-832, 95 S.Ct. 2525; and (5) "respect for the individual," *id.*, at 834, 95 S.Ct. 2525 (quoting *Illinois v. Allen*, 397 U.S. 337, 350-351 (1970) (Brennan, J., concurring) (a knowing and intelligent waiver of counsel "must be honored out of 'that respect for the individual which is the lifeblood of the law'")).

Indiana v. Edwards, 554 U.S. 164, 170 (2008).

Judge Colbath conducted an evidentiary hearing, determined credibility of witnesses and found that Knight knowingly, intelligently and voluntarily waived his right to counsel and had clear and calculated reasons to do so. [DE-19-30, p. 111].

17. **Third**, Knight complains that the waiver of jury trial was not proper.

A) Procedural bar was inappropriate. Knight has not shown that the procedural bar was not applied regularly.

"Not all claims that are procedurally barred in state court, however, are precluded from federal review. In order for a claim to be procedurally defaulted in federal court, the state court rule of procedure barring state court review must be both 'independent of the federal question and adequate to support the [state-court] judgment.'" *Cone v. Bell*,129 S.Ct. 1769, 1780(2009) (quoting *Coleman*, 501 U.S. at 729,

111 S.Ct. 2546); *see also Harris v. Reed,* 489 U.S. 255 (1989). Therefore, the Court must consider the procedural rule which the state courts relied and determine if that rule was "firmly established and regularly followed." *James v. Kentucky*, 466 U.S. 341, 348-49, 104 S.Ct. 1830, 80 L.Ed.2d 346 (1984); *Payne v. Allen*, 539 F.3d 1297, 1312-13 (11th Cir.2008). "The state's application of a procedural bar "must be faithfully and regularly applied, and must not be manifestly unfair in its treatment of a petitioner's federal constitutional claim." *Card v. Dugger*, 911 F.2d 1494, 1516-17 (11th Cir.1990) (citation and quotation omitted).

In Florida, issues which could be but are not raised on direct appeal may not be the subject of a subsequent Rule 3.850 motion for post-conviction relief. *Kennedy v. State*, 547 So.2d 912 (Fla. 1989). Further, even if the subject claim was amenable to challenge pursuant to a Rule 3.850 motion, it cannot now be raised in a later Rule 3.850 motion because, except under limited circumstances not present here, Florida law bars successive Rule 3.850 motions. *See* Fla.R.Crim.P. 3.850(f). *See also Moore v. State*, 820 So.2d 199, 205 (Fla. 2002)(holding that a second or successive motion for post-conviction relief can be denied on the ground that it is an abuse of process if there is no reason for failing to raise the issues in the previous motion).

B) Six jurors means life. However, six (6) jurors only meant a recommendation of life when Knight was tried.

C) Could waive just guilt phase jury. Knight was offered a jury penalty phase after the guilty verdict. [DE-19-9, pp. 80-81].

D) Paranoid personality. The state trial court was within its discretion to determine that any personality flaws did not negate Knight's voluntary waiver of jury trial.

E) Inability to make complex legal decisions. Knight need not have the skill or experience of a lawyer in order to choose self-representation. *U.S. v. Turner*, 644 F. 3d 713, 721 (8th Cir. 2011).

Knight was going to represent himself and waived a jury trial because he was unhappy with the last jury trial. Judge Colbath conducted an evidentiary hearing, determined credibility of witnesses, and concluded that Knight's decision to waive jury trial was knowingly, voluntarily and intelligently made. [DE-19-30, pp. 106, 114]. No error has been shown.

18. **Fourth**, Knight complains about Ineffective Assistance of Appellate Counsel.

A) Failure to raise waiver of guilt phase jury trial. The Florida Supreme Court properly found that an appeal would have been meritless on this issue

B) Failure to raise waiver of penalty phase jury trial. Knight did not want a jury trial for either the guilt or penalty phase.

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).

Declining to raise a claim on appeal is not deficient unless that claim was plainly stronger than those actually presented to the appellate court. *Davila v. Davis*, 137 S. Ct. 2058, 2067 (2017).

19**.** **Fifth**, Knight complains about *Brady* violations. Knight has not shown that the alleged violations were either exculpatory or impeaching to warrant relief. *Rimmer v. Sec'y D.O.C.,* 876 F. 3d 1039, 1055 (11th Cir. 2017) *pet. filed* (March 6, 2018). Here, these issues were decided adversely to Knight at an evidentiary hearing. Moreover, the Florida Supreme Court properly found that this claim was procedurally barred. *Knight v. State*, 211 So. 3d 1, 13-14 (Fla. 2016).

A) March 20, 1995, deposition of Dain Brennault. Brennault was impeached at trial.

Any additional impeachment would not have affected the verdict. *Knight,* 211 So. 3d at 14.

B) Medical Examiner's Crime Scene Report would not have assisted Knight's theory that someone else shot the victim

C) Discovery violation not raised. The Florida Supreme Court properly found that there was no prejudice. Knight fired Ms. Perry, so he should not be heard to complain. *Knight*, 211 So. 3d at 14.

D) Ineffective assistance of post conviction counsel. No prejudice has been shown.

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

20. **Sixth**, Knight complains that the trial court improperly weighed mitigating evidence. None of these complaints were raised on direct appeal or state habeas petition and are unexhausted or procedurally barred.

A) Difficult childhood

B) School problems

C) Parent's divorce

D) Drugs

None of these allegations would have changed Judge Garrison's mind.

E) Ineffective Assistance of Appellate Counsel and Ineffective Assistance of Post Conviction Relief Counsel. There is no showing that this conclusory allegation would have succeeded on appeal or on collateral attack.

There is no showing that Knight was prejudiced by these perceived deficiencies.

21. **Seventh**, Knight complains of a Disproportionate Sentence.

A) Co-defendants. Knight is not similarly situated to his co-defendants. *U.S. v. Cavallo*, 790 F. 3d 1202, 1237 (11th Cir. 2015).

B) Ineffective Assistance of Appellate Counsel and Ineffective Assistance of Post Conviction Relief Counsel. There is no showing that this conclusory allegation would have been successful on appeal or on collateral attack.

No prejudice has been shown. This was Knight's second conviction for First Degree Murder.

> Before filing a federal habeas petition, a state prisoner must exhaust state court remedies, either on direct appeal or in a state postconviction motion. 28 U.S.C. § 2254(b), (c). To exhaust state remedies, the petitioner must fairly present every issue raised in his federal petition to the state's highest court, either on direct appeal or on collateral review. *Mason v. Allen*, 605 F.3d 1114, 1119 (11th Cir.2010) (per curiam) (citing *Castille v. Peoples*, 489 U.S. 346, 351, 109 S.Ct. 1056, 1060, 103 L.Ed.2d 380 (1989)).

Galin v. Sec'y, Dep't. of Corr., 479 Fed. Appx. 938, 939 (11th Cir. 2012)

> To "fairly present" a claim, the petitioner is not required to cite "book and verse on the federal constitution." *Picard v. Connor*, 404 U.S. 270, 278, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971) (quotation omitted). Nevertheless, a petitioner does not "fairly present" a claim to the state court "if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so." *Baldwin*, 541 U.S. at 32, 124 S.Ct. 1347. In other words, "to exhaust state remedies fully the petitioner must make the state court aware that the claims asserted present federal constitutional issues." *Jimenez v. Fla. Dep't of Corr.*, 481 F.3d 1337, 1342 (11th Cir.2007) (quoting *Snowden v. Singletary*, 135 F.3d 732, 735 (11th Cir.1998)) (concluding that the petitioner's claims were raised where the petitioner had provided enough information about the claims (and citations to Supreme Court cases) to notify the state court that the challenges were being made on both state and federal grounds).

Lucas v. Sec'y, Dep't. of Corr., 682 F.3d 1342, 1352 (11th Cir. 2012)

"When a petitioner fails to properly raise his federal claims in state court, he deprives the State of "an opportunity to address those claims in the first instance" and frustrates the State"s ability to honor his constitutional rights." *Cone v. Bell*, 129 S.Ct. 1769, 1780 (2009)(internal citations omitted). Claims that are unexhausted and procedurally defaulted in state court are not reviewable by the Court unless the petitioner can demonstrate cause for the default and actual prejudice, *Wainwright v. Sykes*, 433 U.S. 72 (1977), or establish the kind of fundamental miscarriage of justice occasioned by a constitutional violation that resulted in the conviction of a defendant who was "actually innocent," as contemplated in *Murray v. Carrier*, 477 U.S. 478 (1986). *See House v. Bell,* 547 U.S. 518 (2006); *Dretke v. Haley*, 541 U.S. 386 (2004). *See also United States v. Frady*, 456 U.S. 152, 168 (1982).

22. **Eighth**, Knight complains about Ineffective Assistance of Counsel in not investigating his prior violent felony aggravating factor. This claim was not raised in the state court and is procedurally barred.

A) Inadequate proof. Knight was found guilty, and the conviction was affirmed on appeal. The certified copy of conviction was all the State needed to prove the prior violent conviction.

B) Inadequate Cross-Examination

C) Whiteside: Alibi Witness

D) Kristy Price

E) Ineffective Assistance of Post Conviction Relief Counsel

These conclusory allegations do not merit any relief. By the time Knight was re-indicted on this First Degree Murder charge , the First Degree Murder conviction and life sentence for killing Brendan Meehan had already been affirmed. This claim was not raised on direct appeal or in post conviction and is therefore procedurally barred. The Court is unable to consider the merits. *See Mason v. Allen*, 605

F.3d 1114, 1119 (11th Cir.2010) (per curiam) (citing *Castille v. Peoples*, 489 U.S. 346, 351, 109 S.Ct. 1056, 1060, 103 L.Ed.2d 380 (1989)). "'It is not enough that all the facts necessary to support the federal claim were before the state courts or that a somewhat similar state-law claim was made.' *Anderson v. Harless*, 459 U.S. 4, 6, (1982). To exhaust the claim sufficiently, [Knight] must have presented the state court with this particular legal basis for relief in addition to the facts supporting it." *Kelley v. Sec'y, Dep't. of Corr.*, 377 F.3d 1317, 1350 (11th Cir. 2004).

<u>*Martinez v. Ryan*</u>

The United States Supreme Court answered an open question as to whether a federal habeas court may excuse the procedural default of an ineffective assistance of trial counsel claim when that claim was not properly presented in state court due to postconviction counsel's errors in an initial-review collateral proceeding. *See Martinez v. Ryan*, 132 S.Ct. 1309, 1315 (2012). The Court found that it may. *Martinez* has a specific and narrow holding with limited application.

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Id. at 1309. "This opinion qualifies *Coleman* by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." Id. at 1315. The *Martinez* Court was careful to qualify the limited application.

> The rule of *Coleman* governs in all but the limited circumstances recognized here. The holding in this case does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in a State's appellate courts. *See* 501 U.S., at 754, 111 S.Ct. 2546; Carrier, 477 U.S., at 488, 106 S.Ct. 2639. It does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial, even though that initial-review collateral proceeding may be deficient for other reasons.

Id. (emphasis added). *Martinez* excuses a state procedural default when post-conviction counsel fails to assert a claim of ineffective assistance of trial counsel at the first opportunity that post-conviction counsel had to do so. The exception created in *Martinez* was simply to provide equitable relief. Equitable relief is available to a petitioner who establishes that his ineffective assistance of trial counsel claims were procedurally defaulted in state court due to the ineffective assistance of post-conviction counsel.

It is clear, that *Martinez* only applies to claims of ineffective assistance of trial counsel which were not properly made during postconviction and only if the petitioner can show that post-conviction counsel was ineffective for failing to bring the ineffective assistance of trial counsel claims at the first opportunity to do so. *Martinez* does not apply to procedurally defaulted ineffective assistance of appellate counsel claims . *See Davila v. Davis*, 137 S.Ct. 2058 (2017).

23. **Ninth**, Knight complains about a *Ring* violation.

A) *Hurst* not applied retroactively. *Hurst* has not been given retroactive application. *Lambrix v. Sec'y D.O.C.*, 872 F. 3d 1170 (11th Cir.) *cert.* denied, 138 S. Ct. 312 (2017); Ybarra *v. Filson*, 869 F. 3d 1016, 1032 (9th Cir. 2017).). Knight received a unanimous verdict; but there was only one juror (Judge Garrison). Knight had been unhappy with his prior jury trial experience and gambled on Judge Garrison.

B) Equal Protection Violation and Due Process Violation. Chapter 2017-1 not applying retroactively does not violate due process or equal protection. *Hannon v. Sec'y, D.O.C.,* 2017 WL 5177614 * 2 (11th Cir*) pet. filed* (Nov. 8, 2017).

<u>*Hurst v. Florida* & *Hurst v. State*</u>

In *Hurst v. Florida*, (*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").

On remand, the Florida Supreme Court expanded the United States Supreme Court's 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 postconviction 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 postconviction 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.

<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 nonavailability of a remedy which the Court is making a retroactivity determination of - 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.

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* retroactivity analysis. *Ring* held that, under the Sixth Amendment, a sentencing court cannot, over a defendant's objections, make factual findings with respect to 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." *Hurs*t, 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] 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).

24. **Tenth**, Knight complains that trial counsel was ineffective in not investigating the facts surrounding the nolle prosse. This conclusory allegation does not merit any relief. Had Knight decided to allow Ms. Perry to continue her representation, she may well have conducted additional investigations into other areas. Knight's decision to represent himself eliminated that possibility. Having decided to represent himself, Knight cannot be heard to complain about deficiencies in trial counsel's investigation before she would have been allowed to finish her investigations. Even if this complaint had been exhausted in state court, no relief is appropriate. Jeopardy had not attached to Knight. Jeopardy attaches when the jury is empaneled and sworn. *Crist v. Bratz*, 437 U.S. 28, 35 (1978). Jeopardy does not even attach when the jury has been selected but was discharged before its members were sworn. *U.S. v. Gates,* 557 F. 3d 1086, 1088-89 (5th Cir. 1977)[7]. The word "sworn" refers to the trial jury oath and not to the voir dire oath. *U.S. v. Ramirez*, 812 F. Supp. 2d 1295, 1296 (S.D. Ala. 2011). *citing U.S. v. Wedalowski*, 572 F. 2d 69, 74 (2d Cir. 1978). Judge Colbath conducted an evidentiary hearing, determined credibility of witnesses and found that a jury had not been sworn. [DE-19-30, p. 138]. Here, Knight's first jury was not even selected. No double jeopardy violation occurred when the Second Degree Murder charged was nolle prossed, and Knight was indicted for First Degree Murder.

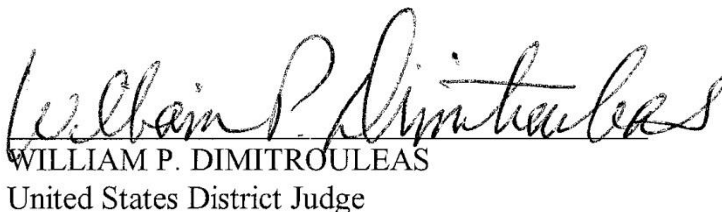
[7] Decisions of the Former Fifth Circuit rendered prior to October 1, 1981 are binding precedent on the Eleventh Circuit. *Bonner v. Prichard*, 661 F. 2d 1206, 1209 (11th Cir. 1981).

25. **Eleventh**, Knight complains about structural error. The Florida Supreme Court appropriately found that Knight was properly allowed to represent himself. Judge Garrison's finding of Ms. Perry's competence was not unreasonable. He conducted an appropriate *Nelson*[8] hearing. [DE-25]. Knight's right to counsel did not involve the right to a meaningful relationship between him and Ms. Perry. *U.S v. Taylor*, 652 F. 3d 905, 908 (8th Cir. 2011).

Wherefore, Knight's habeas petition [DE-1] is Denied.

The Clerk shall close this case and deny any pending Motions as Moot.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 6th day of April, 2018.



WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Counsel of Record

[8] *Nelson v. State*, 274 So. 2d 256, 258-59 (Fla. 4th DCA 1973).