IN THE SUPREME COURT OF FLORIDA

Case No. SC14-1775

RICHARD KNIGHT
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Knight's motion for postconviction relief. The following symbols will be used to designate references to the record in this appeal:

" V. R." – volume and page number of record on direct appeal to this Court;

"V. PCR." – volume and page number of record on appeal to this Court following the rule 3.851 motion;

All other references will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Knight requests that oral argument be heard in this case. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF THE CASE AND FACTS

A. Procedural History

The Circuit Court for the Seventeenth Judicial Circuit, in and for Broward County, Florida, entered the final judgments of conviction and death sentence currently at issue.

On June 29, 2000, Mr. Knight was apprehended in Coral Springs, Florida, for questioning regarding the homicides of Odessia Stephens and Hanessia Mullings. Mr. Knight was formally arrested for the murders of Odessia Stephens and Hanessia Mullings on August 21, 2001. Mr. Knight was subsequently indicted for the first degree murders of Odessia Stephens and Hanessia Mullings.

The court appointed Special Assistant Public Defender Warner Olds to represent Mr. Knight. Due to a conflict of interest, Mr. Olds withdrew from representation of Mr. Knight. Subsequently, Evan H. Baron and Samuel R. Halpern were assigned to represent Mr. Knight. Mr. Baron and Mr. Halpern represented Mr. Knight throughout trial, penalty phase, and sentencing.

Before the Honorable Eileen M. O'Connor, in the Circuit Court for the Seventeenth Judicial Circuit, in and for Broward County, Florida, Mr. Knight pled not guilty to all charges. Mr. Knight expressed his desire to proceed to trial.

Voir dire in Mr. Knight's trial began March 13, 2006, and opening statements were presented to the jury on April 03, 2006. Closing arguments took place on April

25, 2006, and on April 26, 2006, the jury returned a verdict of guilty on both counts of first degree murder.

The Court conducted Mr. Knight's penalty phase on May 22 and 23, 2006, and it was continued to July 24, 2006, when the jury recommended Mr. Knight be sentenced to death on both counts by a vote of 12-0. A *Spencer*[1] hearing was held on May 16, 2006. On March 28, 2007, the Court entered its sentencing order, as to Count I[2], finding two (2) aggravating factors[3]. (R. 3708-3710). As to Count II[4], the trial Court found three (3) aggravating factors.[5] (R. 3711-3713). The Court found no statutory mitigating factors and found eight (8) non-statutory mitigating factors.[6] (R.

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

[2] Count I charged Mr. Knight with the first degree murder of Odessia Stephens.

[3] The trial court found the following aggravating factors as to Count I: (1) the defendant was previously convicted of another capital felony involving the use or threat of violence to the person (great weight); and (2) the murder was especially heinous, atrocious, or cruel (great weight) (R. at 3708-3710).

[4] Count II charged Mr. Knight with the first degree murder of Hanessia Mullings.

[5] The trial court found the following aggravating factors as to Count II: (1) the defendant was previously convicted of another capital felony involving the use or threat of violence to the person (great weight); (2) the murder was especially heinous, atrocious, or cruel (great weight); and (3) the victim of the capital felony was a person less than 12 years of age (great weight) (R. 3711-3713).

[6] The trial court found the following non-statutory mitigating factors: (1) the defendant had a good upbringing and was raised in a caring family (slight weight); (2) the defendant continues to express his love and compassion for his family (moderate weight: (3) the defendant attended high school and excelled in art (little

3713-3727). Following a proportionality review, the Court, finding that the great weight of the aggravating factors outweighed the non-statutory mitigating factors, determined that the unanimous jury recommendation in favor of death "was an appropriate proportionate and just conclusion" and sentenced Mr. Knight to death on both Counts. (R. 3727-3729).

On March 28, 2007, the Court appointed the Office of the Public Defender of the Seventeenth Judicial Circuit, Broward County, Florida to represent Mr. Knight in his direct appeal to this Court. This Court affirmed Mr. Knight's conviction and sentence on direct appeal. *Knight v. State*, 76 So. 3d 879 (Fla. 2011).[7] Mr. Knight's

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weight); (4) the defendant was admired by the children in the neighborhood and highly thought of by adults (little weight); (5) the defendant was a valuable employee at Playmate Construction in Jamaica (little weight); (6) the defendant was a good worker at various jobs and was gainfully employed at the time of the offense (the court found this factor proven only to the extent that defendant had a part-time job a the time of the offense) (little weight); (7) the defendant demonstrated appropriate courtroom behavior (little weight); and (8) the defendant is capable of forming loving relationships with family members and friends (moderate weight) (R. 3713-3727).

[7] Mr. Knight raised the following issues of direct appeal: (1) 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 has a "violent background."; (2) the trial court improperly denied his motion for mistrial for being shackled in the presence of the jury during the guilt phase; (3) the trial court's ruling that no discovery violation occurred and alleges that trial court erred in denying his motion for mistrial based on the State's experts' testimony regarding DNA evidence; (4) Hans Mullings' testimony during the guilt phase proceedings that Knight has a "violent background" required the trial court to seat a new jury for purposes of the penalty phase; and (5) Mr. Knight challenged the constitutionality of Florida's death sentencing scheme as set forth in section 921.141 Fla. Stat. (2000).

motion for rehearing was denied on December 15, 2011, and the mandate issued on Jan 3, 2012. Mr. Knight filed a Petition for Writ of Certiorari in the United States Supreme Court, which was denied on May 14, 2012. *Knight v. Florida*, 132 S. Ct. 2398 (2012).

Mr. Knight initiated his State postconviction proceeding by requesting public records pursuant to Fla. R. Crim. P. 3.852, and an initial motion for postconviction relief pursuant to Fla. R. Crim. P. 3.851 was timely filed (V.3 PCR 404-533). The court conducted a number of status hearings, and public records continued to be disclosed up to and including at a hearing on March 6, 2014. An amended Rule 3.851 motion was filed on or about March 11, 2014 (V.5 PCR 884-966).[8] An evidentiary hearing was conducted on Mr. Knight's Amended Rule 3.851 motion on March 27-28, 2014 (V.20, 21). The parties were granted leave to, and later filed, post-hearing memoranda (V.7 PCR 1128-1198; 1199-1282). A written order denying relief was filed by the lower court on or about July 30, 2014 (V.7 PCR 1283-1329).[9] Mr. Knight

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[8] In his amended Rule 3.851 motion, Mr. Knight raised the following claims for relief: Claim I (improper denial of public records); Claim II (unconstitutional application of 1-year deadline in Fla. R. Crim. P. 3.851); Claim III (denial of adversarial testing at guilt phase of Mr. Knight's capital trial); Claim IV (denial of adversarial testing at penalty phase of Mr. Knight's capital trial); Claim V (unconstitutionality of rule prohibiting interview of jurors); and Claim VI (unconstitutionality of Florida's lethal injection protocol and procedures).

[9] The lower court's order was signed on July 30, 2014, but not filed with the Clerk of Court until the following day (V. 7. PCR 1283).

thereafter timely filed his Notice of Appeal (V.8 PCR 1330-1331). This Initial Brief follows.

B. Summary of Trial Facts

The State's first witness, Rosemary Parisi, testified that she awoke when she heard thumping and cries from two females (V. 21 R. 2242-44). Ms. Parisi testified that she went onto her back balcony and still heard frantic crying (V. 21 R. 2248). She testified she heard the words: "Oh Daddy, oh Daddy" (V. 21 R. 2249). Ms. Parisi testified that she believed it was moments between when police arrived and when the crying stopped (V. 21 R. 2251). During cross-examination, the Defense brought out that Ms. Parisi testified during her deposition that she had heard the screen door open, but she couldn't see who opened it (V. 21 R. 2261). When Coral Springs police officers arrived on-scene and entered the apartment, the front door and sliding glass doors were all locked and there were no other signs of forced entry (V. 21 R. 2302). Over the Defendant's objection, the court allowed the jury to hear that during Ms. Parisi's deposition, she testified that it was her impression that the cry for "daddy" was a cry for help by a trapped person who needed help (V. 21 R. 2266-67). Ms. Parisi testified at trial that she never heard the person cry for "help" (V. 21 R. 2271). Coral Springs Officer Vincent Sachs testified he arrived first at the scene (V. 21 R. 2274). Officer Sachs initially saw a small opening in a window with no screen and a light emanating from the room (V. 21 R. 2278-81). Thereafter, Officer Sachs said

that same window which was ajar was fully open and the light was off (V. 21 R. 2281). Officer Sachs pointed his flashlight into the apartment and saw reddish stains on the carpet leading to the front door (V. 21 R. 2283). While Officer Sachs was investigating outside the building, Mr. Knight approached his partner (V. 21 R. 2285). Mr. Knight told the partner that he was out for jog. Officer Sachs testified that Mr. Knight was wearing slacks and dress shoes (V. 21 R. 2285). Officer Sachs also testified that Mr. Knight appeared wet but not from sweating (V. 21 R. 2287). Officers knocked at the door of the apartment building, but no one answered (V. 21 R. 2289).Officer Sachs entered the building through a screen door and saw a child lying in a fetal position (V. 21 R. 2291-92). Officer Sachs assisted another officer in entering the apartment through the open window. Once Officer Sachs was inside the apartment, he saw a female lying in the dining room. Officer Sachs testified that he saw no signs of robbery or ransacking (V. 21 R. 2300-02). The Defense brought out on cross examination that Officer Sachs had recently resigned from Coral Springs Police Department after being accused of falsifying police reports (V. 21 R. 2322). Officer Sachs testified that he failed to document in his report that Knight was wet on the night of the incident (V. 21 R. 2330, 34).

Coral Springs Police Officer Natalie Cohen Mocny testified that Mr. Knight approached her when she was outside of the apartment and told her that he lived there. She testified that Mr. Knight also told her that he was taking a run, but that it

appeared to her that he had just taken a shower. The Officer also testified that Knight was about a 100 yards away from the open window when she first noticed him (V. 21 R. 2346). The Officer took no pictures of Knight at the scene (V. 21 R. 2358). Officer Amy Allen testified that she climbed through the open window to open the apartment front door and that she saw a deceased black female (V. 21 R. 2362).Kevin Adams testified that he lifted the latent prints from the apartment, took pictures of the carpeting, took clippings from Knight's hair and found a knife under Odessia's body (V. 22 R. 2411, 2424; V. 23 R. 2471, 2474-75). Adams testified that he did not recall processing any towels with blood, and that he did not process the screened-in area outside of the apartment (V. 23 R. 2506-2510).

Trudi-Kaye Edmund testified that she knew Knight from school and from mutual friends, and that she had a phone conversation with Knight on June 27, 2000, around 11 p.m. (V. 23 R. 2525). She testified that she had a 20 minute conversation with Knight, and that she heard the din of pots and pans clanging (V. 23 R. 2529). Edmund testified that Knight told her he was cooking and babysitting (V. 23 R. 2529, 2531). Edmund testified that she heard a young girl laughing, and that the young girl did not sound distressed (V. 23 R. 2531). Edmund testified that she spoke with a little girl who mistook Edmund for her mommy (V. 23 R. 2529). Edmund testified that she had an argument with Knight, and that she ended the conversation by telling him not to call her anymore (V. 23 R. 2544). Monica Simms-Dagniewska, who was

the adopted sister of Odessia Stephens, testified that she went to the apartment after the murders and that she did not notice any items of value missing (V. 23 R. 2550). Barbara Haydu, a Coral Springs Police Officer, testified that she went to Kinko's to obtain the surveillance tape and corroborated Hans Mullings' alibi on the night of the murders (V. 24 R. 2582). Robert Oehler, a Plantation Police Officer, testified that he took standard palm prints of Knight (V. 24 R. 2586).

Hans Mullings testified that he lived at the apartment with Odessia and Hannesia, and that Knight was adopted by his aunt (V. 24 R. 2590). He testified that the relationship between Knight and Odessia became strained due to various reasons – that Knight was dating Victoria Martino, that Knight failed to pay rent, and that Knight was incurring long distance charges which he failed to pay (V. 24 R. 2600-01). He testified that Knight broke a window in the apartment (V. 24 R. 2606). Mullings testified that the boxers found at the apartment were not his (V. 24 R. 2649). Explaining his whereabouts on the night of the murders, Mullings testified that he went to Kinko's late on the night of June 27, after which time he went to his friend Sean's house, dropped his brother off at their parent's home, and then dropped another one of his friends off at home (V. 25 R. 2667-68). Mullings testified that when he arrived at the apartment, he saw police and assumed it was for Knight because Knight had outstanding traffic warrants (V. 25 R. 2669).

On cross examination, Mullings testified that he was unaware that Knight was babysitting Hannesia on the night of the murders (V. 25 R. 2679). Mullings testified that, after the murders, he told the police that he was threatened in early June by a woman named Toni, whose car was towed from the nightclub he operated (V. 25 R. 2695). Mullings testified that Knight routinely wore jean shorts underneath his pants and that he recognized the shirt recovered from the apartment as one Knight often wore (V. 25 R. 2700-01). During redirect examination, Hans Mullings testified in the jury's presence that Knight had a "violent background" (V. 25 R. 2709). Mullings' comment ("I was just assuming that, truthfully, probably Odessia and Richard got into an argument or something because I know Richard's violent background") concerned his reaction to having arrived and observing crime scene tape wrapped around the residence (V. 25 R. 2709). Though the defense objection to this testimony was sustained and the jury was asked to disregard the comment, the defense pointed out "[t]here's no way they can disregard that" (V. 25 R. 2710), moving for a mistrial (V. 26 R. 2752-2781), which the trial court denied (V. 26 R. 2781).

Joan Menke, a crime scene technician and 30-year veteran of the Coral Springs Police Department, testified that she took pictures of Knight at the police station, and that Knight had scrapes on his chest and cuts on his left hand (V. 25 R. 2736-37). Menke also verified that the boxers found in the bathroom and the boxers

Knight was wearing were made by the same company (V. 25 R. 2741-42). She testified that fingerprints of Odessia and Hannesia were taken at autopsy, and verified that oral and blood samples were taken from Victoria Martino (V. 26 R. 2817). She testified that Odessia appeared to have defensive wounds (V. 26 R. 2828). Menke acknowledged that the print left on one of the knife blades was unidentified as of the time of trial (V. 26 R. 2848). Between the presentation of Menke's testimony, the court held a hearing regarding the Defense's Motion for Mistrial. The defense argued that the State elicited Mullings' prejudicial statements during its case-in-chief and not as rebuttal (V. 26 R. 2755). The Defense contended that Mullings' description of his reaction to seeing the police tape further suggested bad character to the jury and reinforced the need to grant a mistrial (V. 26 R. 2758). The court ruled that Mullings' comment was "nebulous" and denied the Defense's Motion for Mistrial (V. 26 R. 2777-81).

Claudine Carter Pereira is Coral Springs' supervisor of latent print analysis (V. 26 R. 2878-79). She testified to receiving a total of 13 latent prints, and that she fingerprinted Knight (V. 26 R. 2880-82). She testified to finding a print matching Martino on the exterior of the northeast back door of the apartment (V. 26 R. 2899), and that she found an unidentified print of value on one of the knives (V. 26 R. 2904). Detective Terry Gattis, a crime scene investigator with Broward Sheriff's Office, testified to having processed the knives found in the apartment, and to having

taken swabs from Knight (V. 27 R. 2924-25). Coral Springs Detective Doug Williams was the lead investigator on the case (V. 27 R. 2938). He authenticated that certain items of clothing were taken from Knight, and testified that there were no signs of forced entry in the apartment (V. 27 R. 2938-40). Det. Williams testified that his officers had found a garbage bag in the dumpster near the apartment which contained knives and which was linked to apartment 305, which was in the same building as Mullings' apartment; he testified that there was no connection between the bag and the crime (V. 27 R. 2948-49). He testified that he received a diagram of the apartment from Stephen Whitsett on July 27, 2000, and that he gave a copy of his investigation file to the State Attorney two weeks before Knight was Indicted (V. 27 R. 2960). Det. Williams testified that he made no promises to Whitsett in exchange for his cooperation (V. 27 R. 2965).

Kevin Noppinger, a serologist with Broward Sheriff's Office, testified that he received oral swabs from Knight, Mullings, Martino, Dagniewska, and Melanie Robinson (V. 27 R. 2987), and that he received various samples from the apartment for testing (V. 27 R. 2990). Noppinger testified that the blood on the boxers had a mixture of Odessia and Knight's DNA, and that another portion had a mixture of Odessia's and Hannesia's blood (V. 26 R. 3012-13). Noppinger testified that a sample from the shirt found in the bathroom had Odessia's DNA on it, and that the jean shorts found in the bathroom had a mixture of Odessia's and Hannesia's DNA

(V. 27 R. 3015-16). He testified that no foreign DNA was found in Knight's hair (V. 27 R. 3021). Noppinger testified that a blood sample taken from the clothes that Knight had on at the time of detention had Knight's DNA, and that a portion of the shirt had a major profile consistent with Knight, and a minor profile consistent with Odessia (V. 27 R. 3023-24). He further testified that the DNA found on the shower curtain contained a mixture of Hannesia's and Martino's blood (V. 26 R. 3031). Noppinger testified that Knight's fingernails had a minor DNA profile of Odessia's DNA and that Odessia's fingernails had a minor DNA profile of Knight (V. 27 R. 3032-34). Noppinger testified that he packaged 15 samples for analysis at Bode Technology Group, because Broward Sheriff's Office lacked the capability to conduct mitochondrial DNA testing (V. 28 R. 3055; 3068).

Martin Tracey, a Florida International University biology professor, testified that he reviewed Noppinger's DNA report (V. 29 R. 3134-35). Tracey testified that the stains on the boxers matched Odessia and Hannesia's standards (V. 29 R. 3137-38; 3144). Tracey corroborated that the DNA found on the shower curtain matched Hannesia and Martino (V. 29 R. 3152). Tracey testified that the DNA mixture found on Knight's shirt likely belonged to the victims (V. 29 R. 3153-54). Tracey testified that the DNA material on Knight's boxers matched Odessia and Hannesia (V. 29 R. 3162-63).

Stephen Whitsett testified that he was incarcerated at Broward County Jail when he met Knight on June 29, 2000 (V. 29 R. 3202). Stephens testified that Knight confessed to him about the murders, and that Knight drew a diagram of the apartment in order to explain the events (V. 29 R. 3212-16). On cross examination, Whitsett admitted to having been involved in a prison break (V. 29 R. 3263). Faith Patterson, an analyst with Bode Technology Group, testified that she received the samples sent to her by Noppinger (V. 31 R. 3293). Patterson testified that neither the victims nor Knight could be excluded from the tested samples (V. 31 R. 3302).

When the State began questioning State DNA expert McElfresh of Bode Technology concerning his comparisons of foreign DNA in a mixture found in two samples from the crime scene (a pair of blue jean shorts and a pair of boxers) with standards taken from a minor, Victoria Martino, the latter of which had not previously been sent to the State expert's lab, the defense called for a sidebar and objected, asserting a discovery violation and moving for a mistrial, which the trial court initially overruled without holding a *Richardson* hearing[10] (V. 31 R. 3342; 3347-3355). McElfresh then testified that, based on his new comparisons of the foreign DNA in the mixture with the standards from Martino recently supplied to him, that Knight could not be excluded from the samples (V. 31 R. 3355-3369; 3375). Asked on cross whether his lab had ever analyzed Martino's DNA, McElfresh

[10] *See Richardson v. State*, 246 So. 2d 771 (Fla. 1971).

replied that it had not (V. 31 R. 3372). Asked when he was first given Martino's DNA standards, he replied "Approximately two weeks ago" (V. 31 R. 3372). McElfresh agreed on cross that his lab had previously excluded Knight from the samples (V. 31 R. 3382).

The State's closing argument both reminded jurors of, and quoted from, State DNA expert McElfresh's testimony that, according to Dr. McElfresh's newly presented findings, "the probability of excluding somebody in that mixture, if they were going to be excluded in the Caucasian population, was 99.998 percent, 99.999 percent in the African-American population, and the same in the Hispanic population" (V. 34 R. 3546-3549, 3564, 3570-3571). Dr. Lance Davis, Broward's assistant medical examiner, testified that he performed the autopsies on the victims (V. 31 R. 3391-92). Dr. Davis testified that Hannesia had five stab wounds, and that Odessia had multiple stab wounds (V. 31 R. 3396-97). Dr. Davis testified that Odessia had ligature marks on her neck (V. 31 R. 3400). Dr. Davis also testified that Hannesia had bruises on her neck consistent with strangulation (V. 31 R. 3416). Dr. Davis testified that he believed the attack first occurred in the bedroom, and that Odessia stumbled to the living room (V. 31 R. 3420-21).

C. Summary of Evidentiary Hearing Testimony

At the evidentiary hearing that took place on March 27-28, 2014, Mr. Knight presented the testimony of his trial counsel, Evan Baron and Samuel Halpern, as

well as Dr. Norah Rudin. He also introduced a number of documentary exhibits which were placed into evidence for the Court's consideration. In rebuttal to Mr. Knight's evidence, the State presented the testimony of Kevin Noppinger. Mr. Knight will briefly summarize the testimony adduced at the evidentiary hearing.

1. Evan Baron, Esq.

Mr. Baron has been practicing law for approximately 35 years, and while he presently handles primarily family law cases, he had experience with criminal cases, in particular capital cases (V. 20 PCR. 283). He was court-appointed to represent Mr. Knight as first-chair counsel, and attorney Samuel Halpern was appointed as second-chair (V. 20 PCR. 284). Although the two worked together and consulted on issues as they arose, each attorney focused on his particular part of the trial V. 20 PCR. 285).

Mr. Knight always maintained his innocence, and the State's case consisted primarily of forensic blood evidence and the testimony of a jailhouse informant, Steven Whitsett (V. 20 PCR. 285-86). In terms of dealing with Whitsett's anticipated testimony, the issue came down to his credibility: "It was a question of whether or not he was a credible witness and that's what I tried to do is show that his credibility was certainly suspect" (V. 20 PCR. 286-87). As a defense attorney, it is Baron's understanding that the State is obligated to disclose to the defense any deals it may

have made with the witness and "[w]hatever impeachment evidence is available" (V. 20 PCR. 287).

One of the issues he recalled questioning Whitsett about at trial was his access to media while in the jail in order to undermine his testimony that the information about the crime came from Mr. Knight (V. 20 PCR. 288). Baron was shown Defense Exhibit 2, which was a jail log from the Broward County Jail dated July 5, 2000, reflecting that Mr. Knight was "counseled" by jail personnel about having newspapers in his cell area (V. 20 PCR. 289). Baron had no recollection ever receiving this document or the information contained therein from the State prior to trial (V. 20 PCR. 289-90). According to Baron, if the document was relevant in regard to the time period in which Whitsett and Mr. Knight were in jail, "it would be something that I would have wanted to know about" (V. 20 PCR. 290-91).[11]

Mr. Baron was also questioned about Defense Exhibit 5, a criminal incident report dated March 16, 2001 (V. 20 PCR. 291). The report contained an entry dated July 6, 2000, reflecting a visit by two law enforcement officers—one being Detective Doug Williams—with an inmate named George Greaves, who was also being

[11] The time period in question is consistent with a time when both Whitsett and Mr. Knight were in the Broward County Jail. Mr. Knight was formally apprehended for the homicides on June 29, 2000, and according to Whitsett's trial testimony, he was first transferred to the Broward County Jail on June 29, 2000, where he remained until July 22, 2000 (V. 29 R. 3201-03). According to Whitsett, it was about 5 days later or approximately July 4, 2000), when Mr. Knight purportedly began to talk to him and ultimately "confess" to the murders (V. 29 R. 3206-07).

housed at the Broward County Jail (*Id*.). According to the information contained in Defense Exhibit 5, "Greaves stated that he was housed with Richard Knight" and that "Knight had shared details of the murders with him" (*Id*.). However, according to the report, Greaves would not share whatever information he got from Mr. Knight until a deal was offered to cut his jail time, and law enforcement ultimately determined that Greaves "was gleaning information from media briefs and not from Richard Knight" (V. 20 PCR. 291-92). Baron did not recall one way or the other if he had this report regarding Greaves, but he agreed that the information contained in Exhibit 5 was "relevant" to Mr. Knight's case and consistent with his defense strategy "with respect to the issue of whether there was press in the jail that Whitsett could have gleaned some information from" (V. 20 PCR. 292-93).

Mr. Baron was also questioned about Defense Exhibit 1, which is a written police statement dated November 29, 1994, taken from Whitsett in a prior case (V. 20 PCR. 294). In this statement, Whitsett referred to having drawn a map of the scene of the criminal activity with which he was charged (*Id*.). Baron never received this statement from the State prior to Mr. Knight's trial, and his determination of whether it would have been useful at trial would depend on the facts surrounding the statement; however, Baron testified that had the report been disclosed it would have been "an issue I would have looked into" (V. 20 PCR. 296).

Mr. Baron also testified that he received authorization from the court to engage the services of Dr. Norah Rudin, a forensic DNA analyst (V. 20 PCR. 296-97). During Mr. Knight's trial, an issue arose during the testimony of State's witness McElfresh, a technician from Bode Laboratory (V. 20 PCR. 297). As Baron recalled:

> McElfresh began to testify and the testimony then went into areas that we were not notified about ahead of time. It turned out that he had done some additional work within the last two weeks prior to trial and did not file the report, so there was no report and it was kind of a situation where we were not expecting some of the testimony that came out. I approached sidebar. I moved for a mistrial and it was denied.

(V. 20 PCR. 298). It was "unusual" in this type of case for a forensic analyst not to have prepared a report (*Id*.).

Prior to trial, Baron was working with Dr. Rudin to review BSO analyst Noppinger's work on the DNA samples[12] submitted to the crime lab (V. 20 PCR. 298).[13] Baron provided Dr. Rudin with "whatever she had asked for" (*Id*.). He first received a report from Dr. Rudin dated September 4, 2005, which was introduced

[12] Baron did recall that BSO lab was unable to include Mr. Knight on two pieces of evidence (jeans and boxer shorts), a conclusion corroborated by testing done by Faith Patterson from Bode Laboratory (V. 20 PCR. 305).

[13] Baron was shown Defense Exhibit 3, which was a memorandum from the Broward Sheriff's Office dated July 29, 2002, referencing Noppinger's concerns about the BSO laboratory (V. 20 PCR. 307). Baron was not provided this information prior to Mr. Knight's trial, and it contains information he would have wanted to know in terms of his examination of Noppinger at Mr. Knight's trial (*Id*.).

into evidence as Defense Exhibit 4. Following McElfresh's testimony, the court had allowed a recess in the case to allow the defense to evaluate the new testimony and provide it to Dr. Rudin for her review (V. 20 PCR. 300). At that time, it was Baron's recollection that Dr. Rudin, who works in California, was traveling quite a bit and was "back and forth" between California and other states (V. 20 PCR. 301). After providing Dr. Rudin with a copy of McElfresh's trial testimony and consulting with her about the issues, he recalled receiving a second report from Dr. Rudin dated April 28, 2006, which was introduced into evidence as Defense Exhibit 6 (V. 20 PCR. 301-302).

Baron explained that, before McElfresh's testimony, he was not intending on calling Dr. Rudin as a witness "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" (V. 20 PCR. 302-03). After he provided Dr. Rudin with McElfresh's testimony and after conversing with her, it was Baron's understanding from Dr. Rudin that "she felt that she could not really assist us in the case[,]" that "ultimately her opinion was not going to be any different than the state's case" (V. 20 PCR. 303). Therefore, according to Baron:

> [] I had to make a decision as to whether or not I wanted to put her on to corroborate the state's case, or whether I wanted to be able to have opening and closing and closing argument by not calling a witness. And I think she would have been the only witness we would have called anyway.

> And I made a decision that I didn't think her testimony was going to make a difference in the case. I didn't think it was going to help us and that was the decision I made.

(V. 20 PCR. 303). However, in contradiction to this testimony, Baron later testified that Dr. Rudin "felt that the procedures that McElfresh used were improper and that she didn't necessarily agree with the conclusions that he made based on the way he made them" (V. 20 PCR. 306). In fact, in her report, Dr. Rudin criticized the work performed by McElfresh (V. 20 PCR. 319).

Baron did acknowledge that in his conversations with Dr. Rudin as well as in her reports she also expressed concerns about the quality of the work performed by BSO technician Noppinger in terms of labeling issues, quality control issues, sampling identification issues, and things of that nature (V. 20 PCR. 304). Baron, however, could not recall if that gave rise in his mind to a potential challenge to the admissibility of the DNA results under *Frye* (V. 20 PCR. 304).[14] He later explained that he was not "aware" of a basis for a *Frye* challenge to the DNA testing methods employed in Mr. Knight's case because the PCR-STR method was recognized in the scientific community at the time the testing was performed by the BSO laboratory (V. 20 PCR. 310).

2. Samuel Halpern, Esq.

[14] *See Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

Mr. Halpern has been a practicing attorney for almost 30 years handling primarily criminal trials and appeals (V. 20 PCR. 325). He was court-appointed along with Evan Baron to represent Mr. Knight and was primarily responsible for the penalty phase (V. 20 PCR. 326). In the course of preparing for a potential penalty phase, the court appointed an investigator, Valerie Rivera, along with several mental health experts including Dr. Wiley Mittenberg, a neuropsychologist (V. 20 PCR. 327-28). Dr. Mittenberg evaluated Mr. Knight and performed a battery of neuropsychological tests (V. 20 PCR. 328). Other experts were appointed to conduct additional testing such as sleep-deprived EKG, a PET scan, and an MRI (V. 20 PCR. 329).

Mr. Halpern provided Dr. Mittenberg with "everything I felt was relevant to the issues that he was dealing with" including records and investigative reports (V. 20 PCR. 330-31). Dr. Mittenberg ultimately prepared a report that was introduced into evidence as Defense Exhibit 8 (V. 20 PCR. 331-32). Dr. Mittenberg ultimately did not testify at Mr. Knight's penalty phase (V. 20 PCR. 330).

Halpern recalled that, after the guilt phase concluded in Mr. Knight's case, the State had moved for an order compelling Dr. Mittenberg to disclose his raw data and testing materials (V. 20 PCR. 332). Dr. Mittenberg vehemently objected, and later, at a hearing before the court, expressed his displeasure with not only having to turn over his data but he wanted to be relieved of his responsibilities in the case (*Id*.).

After disclosing the information, the State proceeded to depose Dr. Mittenberg (V. 20 PCR. 333). On the weekend before Mr. Knight's penalty phase was set to commence, Halpern and Dr. Mittenberg spoke on the phone, and Mittenberg "appeared to be intoxicated" and was "very unwilling to continue on in the case" (V. 20 PCR. 334). Halpern told him to "pull it together" because "his testimony was slated for that Monday, two days after that phone call" (*Id*.). Dr. Mittenberg "ultimately agreed that, yes, he will be okay and he would come to testify" (*Id*.).

At the penalty phase, Halpern presented other witnesses to set the foundation for Dr. Mittenberg's anticipated testimony, which would include the existence of statutory mitigating circumstances on Mr. Knight's behalf (V. 20 PCR. 335). However, during a break in the testimony, Halpern saw attorney David Bogenschutz, a prominent Broward attorney, who told Halpern that he was representing Dr. Mittenberg and that Dr. Mittenberg would be asserting his Fifth Amendment privilege because he had used a bootleg program to score one of the tests administered to Mr. Knight (V. 20 PCR. 335-36). Dr. Mittenberg had also totally fallen apart psychologically and medically and had been drinking heavily (V. PCR. 336). Halpern moved for a mistrial but it was denied and the case concluded without the testimony of Dr. Mittenberg (V. 20 PCR. 337). Halpern "very much doubt[ed]" that he gave any consideration to introducing Dr. Mittenberg's report in lieu of his

testimony because of the extraordinary and hurried nature of what had occurred (V. 20 PCR. 338-39).

Halpern also testified that he and investigator Valerie Rivera traveled to Jamaica in order to meet members of Mr. Knight's family and ascertain the existence of mitigating evidence (V. 20 PCR. 339). Mr. Knight's brothers, Mark and Waddy, escorted them around the island and assisted in setting up meetings with family members, school teachers, and others who knew Mr. Knight and his background (V. 20 PCR. 340). The meeting with Mr. Knight's family was a group affair and included his two brothers, his mother, and one if not both of Mr. Knight's sisters (V. 20 PCR. 341).

Halpern was shown a memorandum dated May 18, 2006,[15] from his investigator, Valerie Rivera, and the memorandum was introduced into evidence as Defense Exhibit 9 (V. 20 PCR. 342). According to Rivera's memorandum to Halpern, Mr. Knight's sister Natalie claimed that someone (Aunt Monica) told Mr. Knight's mother that Richard was claiming he was abused as a child (V. 20 PCR. 343). Halpern testified that "this issue about abuse" was never developed by him as potential mitigation (V. 20 PCR. 344). Neither of Mr. Knight's brothers discussed Richard being sexually abused as a child when the brothers were driving Halpern

[15] May 18, 2006, was just a few days before the penalty phase in Mr. Knight's case commenced.

and Rivera around the island (V. 20 PCR. 347). He could not recall Richard ever mentioning that he was sexually abused (V. 20 PCR. 348), and went to far as to say that "I can't swear to that. I can't say yes, I point blank said, Richard, have you ever been sexually abused. It isn't typically something I will ask" (V. 20 PCR. 362).

3. Dr. Norah Rudin., Ph.D.

Dr. Norah Rudin is a forensic DNA expert with extensive experience in the field of DNA analysis in a forensic setting (V. 21 PCR. 371). She primarily provides consulting services in forensic cases both in the United States and internationally (V. 21 PCR. 372). She has consulted on forensic DNA cases in Florida and has testified in Florida and other locations as a forensic DNA expert (*Id*.). Without objection from the State, Dr. Rudin was admitted as a forensic DNA expert to render expert opinions in Mr. Knight's case (V. 21 PCR. 373).

Dr. Rudin explained that she was initially contacted by Evan Baron to review the data and other information from the testing on forensic evidence in Mr. Knight's case performed by the Broward Sheriff's Office crime laboratory (V. 21 PCR. 373-74). Bode Technology Laboratory had also been involved with some testing (V. 21 PCR. 374). Dr. Rudin was familiar with, and had previously worked with, both BSO Crime Lab and Bode (*Id*.). During the course of her consultation in Mr. Knight's case, she generated two reports: one dated September 4, 2005, and the other dated April 28, 2006 (*Id*.).

Initially, the work she was requested to do was review the testing and procedures performed by BSO and Kevin Noppinger, with whom she was familiar from prior cases (V. 21 PCR. 376). As had been her experience with prior cases involving the BSO, she encountered issues with getting the necessary documentation from the lab, and she expended a great deal of time attempting to get all of the information she needed to review Mr. Knight's case (V. 21 PCR. 376-77).

With regard to her report dated April 26, 2006, Dr. Rudin explained that it addressed two main issues: the testing performed by Noppinger and the subsequent testimony of Kevin McElfresh (V. 21 PCR. 379). Dr. Rudin agreed with Noppinger's nominal conclusions but explained, as she did in her report, about the significant concerns she had about Noppinger's work:

> Initially it was very difficult to sort out even what the samples were, it appeared to be some duplicate numbering. I didn't have any of his notes. The notes are required regardless, especially in a case like this where there is so many samples with what appeared at that time to be duplicate numbering and there appeared to be missing information. I had no idea what some of the samples were. It was extremely difficult.
>
> And even when I got the notes, as I mentioned in my report, some of it was illegible. We finally sorted out that some of the duplicate samples, for example 26 and 26B in terms of the way the evidence would come in, the "B" was put in by 26 had nothing to do with 26B. There were some samples that we never really sorted out exactly what they were or what the derivation was.

> It was quite confused. Even with Mr. Noppinger's cooperation, I was never convinced that we really had a solid, documentation of exactly the source and history of each sample and what it was.

(V. 21 PCR. 380-81). As Dr. Rudin explained, while she and Noppinger did not come to any different nominal conclusions for any particular sample, "it does depend on what the numbered sample is and if there is a possibility of a confusion, then the DNA result is kind of irrelevant if we don't know the sample it comes from" (V. 21 PCR. 381). Therefore, because of the problems she noted in her report, her "confidence is lessened" in the results Noppinger obtained (V. 21 PCR. 382).

There came a time when she was contacted by Evan Baron about the testimony given during Mr. Knight's trial by Kevin McElfresh from Bode Technology (V. 21 PCR. 383). She was also familiar with McElfresh from other cases (V. 21 PCR. 384). Dr. Rudin agreed to review his testimony and consult with Baron about her conclusions despite the fact that she was traveling extensively during this time period (*Id*.). Based on her knowledge of the forensic issues in Mr. Knight's case and her review of McElfresh's testimony, she explained that McElfresh's conclusions "were at odds with the report that had been already issued by Faith Love- Patterson from his own company" and that his interpretation and analysis was not reviewed by anyone else or peer-reviewed (V. 21 PCR. 385-86). It is "extremely uncommon" for a forensic laboratory analysis not to write a report because "all laboratories have a system of reviewing conclusions. Technically they

are reviewed and administratively reviewed before a report is issued" (V. 21 PCR. 386). This is required of all accredited labs (*Id*.). For example, Faith Patterson's report had been reviewed by other individuals at the Bode Laboratory through the normal process (V. 21 PCR. 387).

Dr. Rudin explained that McElfresh's trial testimony related to two important pieces of evidence – an unstained cutting from a pair of boxer shorts and an unstained swab for a pair of blue jean shorts (V. 21 PCR. 388). As she testified, and as she explained in detail in her report, aside from the fact that McElfresh came to a completely different conclusion than the other analyst from Bode about these pieces of evidence, McElfresh's analysis comprised a "scientifically unsupported" interpretation of evidence samples (*Id*.). What McElfresh did in order to not rule out Mr. Knight as a contributor to the samples in the boxers and shorts was "extremely tenuous," "unsupported," and "misleading" (V. 21 PCR. 389). McElfresh also failed to provide any statistics to support his conclusions, "which in and of itself is misleading" (*Id*.).

What McElfresh was attempting to do was identify the "habitual wearer" of the two particular items (V. 21 PCR. 390). Testing done by Faith Patterson at Bode established that Hannesia Mullings was the major contributor of whatever profile was on the boxer shorts, and Odessia Stevens was the major contributor to the sample

on the blue jean shorts (*Id*.). As Dr. Rudin explained, "each of these items have at least two and probably three contributors" (*Id*.). Dr. Rudin went on to explain:

> [P]art of what was difficult to determine because of the documentation was exactly where that unstained area was and at this point I think I can tell you – I'm not sure if I could have told you at the time – there are particular ways if you are looking for somebody who wore, potentially wore the items or a particular place you might take those, and I just don't have any documentation to tell me where they took these stains. They were apparently unstained, that's all I know But it was clear and I didn't disagree, that for each of those items, there appeared to be a major contributor in each case. All the types form the major contributor were the same as various ladies, Hanessia or Odessia Mullings. And that went along with the profile. But there are some more minor DNA types or alleles as we call them for 2A, which was the boxer. The profile that McElfresh got that Ms. Patterson didn't have was that of Victoria Martino. And it is true that there are some types from both samples that have found her profile. I don't know if those come from her or they don't, but they are found in her profile. Again, statistics would better answer the question of the probability of seeing this evidence, if in fact it is for example from Odessia and Victoria or some unknown person But instead what McElfresh was trying to do was to see, was there a type here that could be attributed to Mr. Knight, which is simply the wrong way to go around this. And to make conclusions, he attributed alleles than could have been from Martino to her, inspect of the fact that's not necessarily a fact. And then saw there was one allele left over and aid that had to be from Mr. Knight, or could be from Mr. Knight, and he did that in both of these samples.

(V. 21 PCR. 390-92).

Dr. Rudin also explained that the manner employed by McElfresh in coming to his conclusion was "inherently biased" and "fundamentally incorrect":

> [] So what you're asking about type of analysis, fundamentally incorrect and inherently biased. Yes, it is inherently biased, because he went looking for Mr. Knight's DNA in this profile. It was not obviously present, certainly in a way for example, the major profile was the same in each of these as one of the women. That doesn't say absolutely them, certainly, all of the DNA types were found in their profile for major profiles. There was a whole lot of data, it was reliable.
>
> And there is very little data in addition to that and Dr. McElfresh went looking for any little bit he could possibly ascribe to Mr. Knight, which is a fundamentally incorrect way to interpret data and in particular forensic DNA data.

(V. 21 PCR. 393). McElfresh's analysis was not scientifically acceptable (*Id.*).

Dr. Rudin testified that she had been in contact with Evan Baron throughout this period of time, and on April 27, 2006, revised her report and signed it on the following day (V. 21 PCR. 394). She did discuss with Baron the difficulties she would have coming to Florida to testify in person due to scheduling issues (V. 21 PCR. 395). However, there came a time when he decided not to call me and preferred just to have her write the report (V. 21 PCR. 396).

4. Kevin Noppinger

Noppinger was called a witness on behalf of the State (V. 21 PCR. 409). He recalled testifying at Mr. Knight's trial to the DNA analysis he conducted on forensic

samples using the PCR and STR analysis (V. 21 PCR. 411-412). This type of testing has been in existence since the 1980s and was generally accepted in the scientific community (V. 21 PCR. 412-13).

Noppinger agreed that he had communicated with Dr. Rudin because she had some follow-up questions with regard to the evidence he analyzed and the information he had provided her (V. 21 PCR. 420). There were also some legibility issues with his notes (V. 21 PCR. 421). He read Dr. Rudin's report where she was critical of some of the underlying notes and other quality assurance issues with the samples in Mr. Knight's case and had no quibble with her characterizations (V. 21 PCR. 422). Noppinger agreed that it was important for a forensic DNA laboratory to issue a report documenting the work performed (V. 21 PCR. 423). He was familiar with Kevin McElfresh, but could not recall one way or the other whether he discussed with McElfresh any of McElfresh's analysis (V. 21 PCR. 426-27). He could not recall if McElfresh was present with Noppinger and the prosecutor at any of the pretrial conferences leading up to Mr. Knight's trial (V. 21 PCR. 430). Noppinger had no way at this point to tell the court if he had or did not have discussions with McElfresh about his potential testimony at Mr. Knight's trial (V. 21 PCR. 431). But Noppinger agreed with Dr. Rudin's assessment that it would be scientifically unsound to assume a particular donor as a contributor of a sample unless there is some further information (V. 21 PCR. 433).

D. The Lower Court's Order

Following the evidentiary hearing and submission of post-hearing memoranda by the parties (V. 7. PCR 1128-1198; 1199-1282), the lower court entered a written order on July 30, 2014, and filed it with the Clerk on July 31, 2014 (V. 7 PCR 1283-1329).

The lower court denied Claim I of Mr. Knight's amended Rule 3.851 relating to the disclosure of public records, concluding that his challenge was without merit because he was provided access to and copies of all of the records to which he was entitled (V. 7 PCR 1289-1290). Claim II was summarily denied because constitutional challenges to Fla. R. Crim. P. 3.851 have been consistently upheld by this Court and therefore Mr. Knight "is not entitled to any relief." (V. 7 PCR 1290-91). Claim V—regarding the constitutionality of the Rules Regulating the Florida Bar with respect to the prohibition on interviewing jurors—was rejected because the court found it both procedurally barred and without merit (V. 7 PCR 1325-1326). Claim VI—regarding the constitutionality of Florida' lethal injection protocol and procedures—was rejected as "without merit" because this Court had previously rejected similar challenges in other cases (V. 7 PCR 1326-28). The lower court also rejected Mr. Knight's as-applied challenge as "insufficiently pled" because he "does not allege how the application of the lethal injection protocol in his case would

violate the Eighth Amendment's prohibition on cruel and unusual punishment, but merely states in a conclusory fashion that it would." (V. 7 PCR 1328).

As to Claim III, alleging that Mr. Knight was deprived of a reliable adversarial testing at the guilt phase of his capital trial, the lower court addressed each of the subparts alleged in Mr. Knight's motion, as outlined herein:

- As to his allegation that he received constitutionally ineffective assistance of counsel for failing to present Dr. Norah Rudin as a defense witness at trial, the lower court found that Mr. Knight failed to establish either deficient performance or prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). As to deficient performance, the court determined that trial counsel Baron "clearly made a strategic decision not to call Dr. Rudin to testify" because "he did not think Dr. Rudin's testimony would make a difference in the case and he wanted to avail himself of the opportunity to have the last word during closing arguments." (V. 7 PCR 1294). According to the lower court, "Mr. Baron thought it would not be a good trial strategy to call [Dr. Rudin] as a witness to corroborate the testimony of the State's experts and lose the opportunity to have the final word during closing argument. (V. 7 PCR 1295). As to prejudice, the lower court determined that there was no reasonable probability that the outcome of the proceedings would have been different because "Dr. Rudin's testimony at

trial would have been consistent with her report," that she "generally agreed" with the conclusions reached by the State's forensic experts, that defense counsel cross-examined the State's expert about numbering and labeling errors, and that the State presented "an abundance" of evidence establishing Mr. Knight's guilty (V. 7 PCR 1297).

- As to his allegation that the State withheld impeachment evidence regarding its DNA expert, Kevin Noppinger, and therefore violated *Brady v. Maryland*, 373 U.S. 83 (1963), the lower court determined that the information in question was not favorable to Mr. Knight "because it did not contain exculpatory or impeaching evidence." (V. 7 PCR 1301). In the alternative, the court found a lack of materiality because "the State presented an abundance of evidence connecting Defendant to the murders of Odessia and Hanessia" and therefore "there is no reasonable probability that the jury verdict would have been different had the memorandum been used at trial to impeach Mr. Noppinger." (*Id.*).
- As to the allegation that trial counsel unreasonably failed to request a hearing pursuant to *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), the court found that deficient performance had not been established because the testing performed by the State's experts were generally accepted in the scientific community at the time of Mr. Knight's trial. (V.

7 PCR 1303). The court acknowledged that the "argument could be made that Mr. Baron should have requested a *Frye* hearing to challenge the methodology used by Mr. Noppinger based on Dr. Rudin's critical report," but concluded that "there is no reasonable probability that the trial court would have excluded the State's presentation of the DNA results obtained by Mr. Noppinger. (*Id*.).

- As to the allegation that trial counsel failed to investigate, and the State failed to disclose, crucial information to impeach the State's jailhouse informant, Steven Whitsett, the lower court concluded that Mr. Knight failed to prove both deficient performance and prejudice, nor did he prove a violation of *Brady* because he "did not demonstrate that he was prejudiced by the alleged suppression by the State because there is not [sic] reasonable probability that the jury would have reached a different verdict had it been apprised of the fact that Defendant had a newspaper in his cell," nor did he prove materiality flowing from the State's arguable suppression of the map that Whitsett drew in a sexual assault case. (V. 7 PCR 1308-09).
- As to the allegation that the State withheld material exculpatory evidence in violation of *Brady* as to a Coral Springs Police Department report regarding an interview of inmate George Greaves, the court concluded that

no violation had been established. It also found "legally insufficient" Mr. Knight's allegation that trial counsel was ineffective in failing to discover and use this information at trial. (V. 7 PCR 1310-11).

As to Claim IV of Mr. Knight's amended Rule 3.851 motion, challenging the reliability of the outcome of his capital penalty phase proceeding, the lower court denied each of the subparts of this claim, as outlined herein:

- As to his allegation that trial counsel rendered prejudicially deficient performance in failing to investigate and present information about Mr. Knight's background, the trial court denied relief on his claim, concluding that Mr. Knight "merely" introduced into evidence a report from the defense investigator relating to Mr. Knight having been sexually abused as a child and "did not present during the evidentiary hearing any testimony in support of his allegations" (V. 7 PCR 1314; 1318). Moreover, the court concluded that "[t]he social and personal history described in the motion was already presented by Mr. Halpern to the jury during the penalty phase." (V. 7 PCR 1318). Thus, the court denied the claim based on a determination that neither deficient performance nor prejudice had been established by Mr. Knight (V. 7 PCR 1318).
- As to his allegation that trial counsel unreasonably failed to ensure that Mr. Knight received effective mental health assistance at the penalty phase as

required by both *Strickland* and *Ake v. Oklahoma*, 470 U.S. 68 (1985), the lower court rejected the claim, determining that Mr. Knight failed to prove deficient performance by Mr. Halpern nor did he establish prejudice (V. 7 PCR 1323-1324).

SUMMARY OF THE ARGUMENTS

Mr. Knight was denied an adequate adversarial testing at the guilt phase of his capital trial. Without a reasonable tactical or strategic reason, trial counsel, acting unreasonably and acting on factually erroneous information, failed to present to Mr. Knight's jury compelling and credible testimony from Dr. Norah Rudin, a forensic DNA expert who was appointed by the trial court to assist the defense at trial. Dr. Rudin's testimony would have significantly undermined the State's forensic case against Mr. Knight, but without a reasonable tactical decision, counsel failed to prepare and present her at trial. Trial counsel also unreasonable failed to mount a challenge pursuant to *Frye v. United States* to the State's DNA evidence. Such a challenge was more than supported by the record, including the opinions set forth by defense expert Rudin, who, as noted above, was never called to testify on Mr. Knight's behalf either at trial or at any pretrial hearing. A *Frye* hearing would have had further support from a document that the State failed to disclose to the defense prior to trial a memorandum from Kevin Noppinger, one of the State's forensic expert witnesses at trial. The Noppinger memorandum, coupled with Dr. Rudin's exacting review of the forensic evidence in this case, would have resulted in the exclusion of the DNA evidence had counsel brought a *Frye* challenge. The State also failed to disclose impeaching evidence with regard to the jailhouse informant

presented by the State against Mr. Knight. Singularly and cumulatively the errors at Mr. Knight's trial warrant reversal of the lower court and the granting of a new trial.

Confidence in the outcome of Mr. Knight's penalty phase is also undermined due to ineffective assistance of counsel. Mr. Knight was the victim of childhood sexual abuse, but counsel, due to lack of preparation, failed to present the available evidence to the jury. Penalty phase counsel also failed to ensure that Mr. Knight received adequate assistance of the mental health expert chosen by counsel to assist the defense in this case. Singularly and cumulatively, the errors at Mr. Knight's penalty phase warrant reversal of the lower court's order and the granting of a new penalty phase trial before a jury.

Finally, Mr. Knight challenges in this appeal the Florida ethical prohibition on the interview of jurors by collateral counsel, as well as Florida's protocol and procedures for carrying out a lethal injection. Mr. Knight acknowledges that both of these issues have been decided adversely to him by the Court, and he raises them on appeal for preservation purposes. With specific regard to the lethal injection claim, Mr. Knight reserves the right to investigate and take any necessary action depending on the outcome of *Glossip v. Gross*, a case pending in the Supreme Court of the United States on a lethal injection protocol identical in all material aspects to that of Florida.

STANDARD OF REVIEW

The standard of review for a trial court's ruling on an ineffectiveness claim is two-pronged: The appellate court must defer to the trial court's findings on factual issues but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo. *Bruno v. State*, 807 So. 2d 55, 61-62 (Fla. 2001). Review of a claim that the State withheld material exculpatory evidence is *de novo*. *Cardona v. State*, 826 So. 2d 968 (Fla. 2002).

ARGUMENT I

MR. KNIGHT'S CONVICTIONS ARE UNRELIABLE AND IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE OF THE INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT PHASE OF HIS TRIAL AND DUE TO THE STATE'S WITHHOLDING OF MATERIAL EXCULPATORY EVIDENCE.

A. Introduction

In his Rule 3.851 motion, Mr. Knight alleged that he was denied his Fifth, Sixth, Eighth, and Fourteenth Amendment rights to the effective assistance of counsel due to trial counsel's failure to present available evidence in order to effectively challenge the State's presentation of physical evidence and due to the State's withholding of impeachment evidence. The United States Supreme Court has consistently affirmed the right of a capital defendant to the effective assistance of counsel and emphasized counsel's duties in a capital case. *See Strickland v. Washington*, 466 U.S. 668 (1984); *Wiggins v. Smith*, 539 U.S. 510 (2003). With respect to his claims of ineffective assistance of counsel, Mr. Knight can establish both of *Strickland's* prongs—deficient performance and prejudice which undermined the adversarial testing process at trial.

A fair trail is one in which the evidence is subjected to adversarial testing and is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 685 (1984). In order to insure

that an adversarial testing, and hence a fair trial, occurs, certain obligations are imposed upon both the prosecutor and defense counsel: The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and material either to guilt or punishment," *United States v. Bagley*, 473 U.S. 667, 674 (1985) (quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963)); meanwhile, trial counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland*, 466 U.S. at 685. Where either or both fail in their obligations such that confidence is undermined in the outcome, a new trial is required. *See Smith v. Wainwright*, 799 F.2d 1442 (11th Cir. 1986).To the extent that newly discovered evidence is uncovered, that evidence must be considered along with the evidence not disclosed by the State and/or not investigated by defense counsel in assessing the reliability of the outcome. *State v. Gunsby*, 670 So. 2d 920 (Fla. 1996).

Although counsel may provide effective assistance at trial in some areas, the defendant is entitled to relief if counsel renders ineffective assistance through any portion of the trial. *See Rompilla v. Beard*, 545 U.S. 374 (2005); *see also Washington v. Watkins*, 655 F.2d 1346, 1355, *rehearing denied with opinion*, 662 F.2d 1116 (5th Cir. 1981), *cert. denied*, 456 U.S. 949 (1982); *Kimmelman v. Morrison*, 477 U.S. 365 (1986) Even a single error by counsel may be sufficient to warrant relief. *See Nelson v. Estelle*, 626 F.2d 903, 906 (5th Cir. 1981) (counsel may be held to be

ineffective due to a single error where the basis of the error is of constitutional dimension); *Nero v. Blackburn*, 597 F.2d 991, 994 (1979) ("...[s]ometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard"); *Strickland v. Washington*, 466 U.S. 668 (1984); *Wiggins v. Smith*, 539 U.S. 510 (2003).

The Eighth Amendment recognizes the need for increased scrutiny in the review of capital verdicts and sentences. *Beck v. Alabama*, 477 U.S. 625 (1980). When evaluating a claim of ineffective assistance of counsel, the United States Supreme Court has made it clear that the correct focus is on the "fundamental fairness" of the proceeding:

> A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Strickland v. Washington, 466 U.S. at 696. (emphasis added).

Mr. Knight contends that he was denied a reliable adversarial testing at the guilt phase of his capital trial. The jury never heard compelling evidence that was

exculpatory as to Mr. Knight due to trial counsel's unreasonable failure to present it and the State's withholding of material exculpatory evidence. In order "to ensure that a miscarriage of justice [did] not occur," *Bagley*, 473 U.S. at 675, it was essential for the jury to hear the evidence. Whether the State suppressed the evidence, defense counsel unreasonably failed to present the evidence, or the evidence is newly discovered, confidence is undermined in the outcome because the jury did not hear the evidence. The result of Mr. Knight's trial is unreliable. As a result of trial counsel's deficient performance in failing to present readily available evidence and effectively challenge the cornerstone of the State's physical evidence, and as a result of the State's withholding of impeachment evidence, Mr. Knight was prejudiced by the lack of adversarial testing at his capital murder trial. Had trial counsel effectively challenged the State's physical evidence there is a reasonable probability that the result of the proceeding would have been different.

B. Issues Related to DNA Evidence; the State's Brady Violations; and Trial Counsel's failure to Present Evidence Challenging the State's Scientific Evidence

Without question, the State's presentation of scientific DNA evidence to prove its case against Mr. Knight was a significant cornerstone of the prosecution's case. Yet the State's scientific case was troublesome at best, and defense counsel was blindsided by late and last-minute disclosures by the State. Although trial counsel did engage the services of a defense expert, Dr. Norah Rudin, 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. Indeed, Dr. Rudin was listed by defense counsel as a trial witness (V. 6 PCR. 982). Her opinions and testimony would have provided a basis for the jury to either discredit entirely the State's DNA testimony or at least given the jury a basis in fact to give it much less weight.

Moreover, 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), because of, inter alia, the sloppy nature of the work performed, the mislabeling of samples, the errors in labeling, and other laboratory errors. Based on the large number of errors that were immediately obvious to Dr. Rudin, the jury was deprived of information from which they could reasonably conclude that the State's DNA evidence was hardly conclusive evidence about Mr. Knight's guilt. Dr. Rudin could have testified about the existence of yet more undetected errors in the State's DNA evidence and provided the jury with evidence to consider with regard to whether such errors were substantive and material to the conclusions provided to the jury through the State's scientific witnesses.

Without a reasonable tactical or strategic reason, Dr. Rudin's testimony and opinions were never presented to Mr. Knight's jury, a deficiency which overwhelmingly prejudiced Mr. Knight. Moreover, because the State withheld

material impeachment evidence regarding Broward Sheriff's Office witness Noppinger, confidence is further undermined in the State's scientific case and, hence, in Mr. Knight's convictions. Finally, due to the sloppy, unprofessional, and ultimately unreliable nature of the State's DNA evidence, 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 and thus been subject to exclusion by the court.

1. Unreasonable and Prejudicial Failure to Present Dr. Rudin

a. The Trial Record.

At trial, the State's scientific DNA evidence was presented principally through two witnesses: Kevin Noppinger of the Broward County Sheriff's Office and Kevin McElfresh of Bode Technology Group. Noppinger, a serologist with Broward Sheriff's Office, testified that he received oral swabs from Richard Knight, Hans Mullings, Victoria Martino, Monica Simms Dagniewska, and Melanie Robinson (V. 27 T 2987), and that he received various samples from the apartment for testing (V. 27 T 2990). Noppinger testified that the blood on the boxers had a mixture of Odessia and Mr. Knight's DNA, and that another portion had a mixture of Odessia's and Hannesia's blood (V. 26 T 3012-13). Noppinger testified that a sample from the shirt found in the bathroom had Odessia's DNA on it, and that the jean shorts found in the bathroom had a mixture of Odessia's and Hannesia's DNA

(V. 27 T 3015-16). He testified that no foreign DNA was found in Mr. Knight's hair (V. 27 T 3021). Noppinger testified that a blood sample taken from the clothes that Mr. Knight had on at the time of detention had Mr. Knight's DNA, and that a portion of the shirt had a major profile consistent with Mr. Knight, and a minor profile consistent with Odessia (V. 27 T 3023-24). He further testified that the DNA found on the shower curtain contained a mixture of Hannesia's and Victoria Martino's blood (V. 26 T 3031). Noppinger testified that Mr. Knight's fingernails had a minor DNA profile of Odessia's DNA and that Odessia's fingernails had a minor DNA profile of Mr. Knight (V. 27 T 3032-34). Finally, Noppinger testified that he packaged 15 samples for analysis at Bode Technology Group, because Broward Sheriff's Office lacked the capability to conduct mitochondrial DNA testing (V. 28 T 3055; 3068). Based on Noppinger's testimony as a whole, "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 [Mr.] Knight." *Knight v. State*, 76 So. 2d 879, 887 (Fla. 2012).

When the State began questioning DNA expert McElfresh of Bode Technology concerning his comparisons of foreign DNA in a mixture found in two samples from the crime scene (a pair of blue jean shorts and a pair of boxers) with standards taken from the minor, Victoria Martino, the latter of which had not

previously been sent to the State expert's lab, the defense called for a sidebar and objected, asserting a discovery violation and moving for a mistrial, which the trial court initially overruled without holding a *Richardson* hearing (V. 31 T 3342; 3347-3355). *See Richardson v. State*, 246 So. 2d 771 (Fla. 1971).

McElfresh then testified that, based on his new comparisons of the foreign DNA in the mixture with the standards from Martino recently supplied to him, that Knight could not be excluded from the samples (V. 31 T 3355-3369; 3375). Asked on cross-examination whether his lab had ever analyzed Martino's DNA, McElfresh replied that it had not (V. 31 T 3372). Asked when he was first given Martino's DNA standards, he replied "Approximately two weeks ago" (V. 31 T 3372). McElfresh agreed on cross-examination that his lab had previously excluded Knight from the samples (V. 31 T 3382).

The following morning the defense renewed its objection and Motion for mistrial in the following manner:

> MR. EVAN BARON: Your Honor, yesterday, the State called one of their witnesses, Doctor McElfresh from Bode Technology. I believe I have his name correct. If it's not McElfresh, it's close to it. As the Court may recall, prior to that, the other individual who was employed with Bode Technology has, basically, testified that two items of clothing that were found in the bathroom, two tests that were done, one of the boxer shorts and one of the denim jeans, excluded Richard Knight. The DNA excluded him. That was a report that was given over to defense counsel. That's the report defense counsel relied on. Dr. McElfresh, who had not filed any report in this case, but who was listed as a witness, proceeded to get on the witness stand and indicate, basically, because he was given new information that was included in

the mix, because, originally, the only information Bode had was the standards of Richard Knight, Odessa Stephens and Hanessia Mullings, he added Victoria Martino to the mix and low and behold he got a different conclusion, which are two items of evidence that was originally at his lab, that he was in charge of at the time. He indicated that those two items were excluded. He now indicated that Richard Knight was not excluded and even went to the point of saying that the probability of exclusion (sic), I believe, ninety-eight or ninety-nine percent, which is a drastic change in regards to that information. My first notion is to renew my motion for mistrial. I believe based on that evidence that that was a discovery violation. There was, basically – and again, Doctor McElfresh indicated that that information had come to him within two weeks. That means that information was provided to him after we picked a jury or were in the process of picking a jury. We had no information any additional work had been done by any of the expert witnesses, was never given that information, and, as a result, we were given information yesterday that we never had before, could not prepare. And most importantly, I would suggest, we were never able to provide this to our expert, Doctor Norah Rudin. She relied on the reports that were given to us, that we had given to her. Based on the reports she had, it was our belief there was no reason to call her because, basically, from what I understand, she could not get on the stand and disagree with anything. Last night, after Doctor McElfresh's testimony, I e-mailed Doctor Rudin and, basically, told her, as limited as I could, without having a transcript in front of me, what had taken place, and I gave her exactly why he had changed and she had all the DNA profiles, as well.

THE COURT: She had Veronica’s too.

MR. EVAN BARON: Victoria.

THE COURT (JUDGE E. O'CONNOR): Victoria's.

MR. EVAN BARON: Yes. And I asked her if she could find the time to please, basically, include Victoria Martino in the mix and see exactly what comes up. And, basically, again with the limited information she had, is what I told her, she believes that the conclusions that Doctor McElfresh gave are improper conclusions. She does not agree with them any longer. So now we have a situation where my

> expert, because of new information that was never given to me or given to her until yesterday, has reached a conclusion contrary to one of the State's experts. And I believe it's a very crucial issue in this case. So we are left in a situation where the State has presented evidence to the jury. I was not – I was not prepared to cross examine. I did the best I could, but because of the fact I did not have that information, could not review with my expert, never had that opportunity, basically, that information went before the jury, it was never given to us ahead of time, and so for that reason, we are now requesting and renewing our motion for mistrial.

(V. 32 T 3441-3445). The Assistant State Attorney responded that the samples from which the new expert opinion testimony was formed had been produced to the defense, and stated:

> THE STATE: And it wasn't the doctor that came up with this theory, it was me that came up [with] the theory. It's not like there's some new information. It's looking at the information that's available.

(V. 32 T 3445).

The State agreed, however, that the original Bode Technology expert's report had excluded Knight from the pair of blue jean shorts found in the residence's bathroom (V. 32 T 3448-3449). The State argued that any discovery violation arising from the undisclosed comparisons was not willful, but inadvertent and not prejudicial:

> I ask you to find there was no discovery violation. And further, that if the reviewing court might think there was a discovery violation, it was not willful, but inadvertent and not prejudicial in light of the fact that the information existed and had existed since the standard for Victoria Martino was done.

(V. 32 T 3454). The defense responded that the newly contrary expert opinion testimony propagated by the State two weeks earlier and never provided to the defense was a discovery violation and was intentional:

> MR. EVAN BARON: I think Mr. Loe knew he was going to say something opposite yesterday.
>
> THE COURT: To what?
>
> MR. EVAN BARON: To his own lab report than what was said earlier. That Richard was excluded.

(V. 32 T 3459). The trial court's ruling on the asserted discovery violation was ambiguous:

> THE COURT: Okay. We're sort of having a Richardson hearing backwards here. Based on everything that I know, I don't believe there's a discovery violation. * * *
>
> THE COURT: Okay. I don't believe the violation was inadvertent.

(V. 32 T 3459-3460).

The trial court found that any violation was not substantial (V. 32 T 3461), and found that the State's conduct did not prejudice the defense's ability to prepare for trial (V. 32 T 3461), yet offered the defense time to prepare (V. 32 T 3462). However, the record reflects that Dr. Rudin was not presented as a witness despite the fact that she was listed as a witness and no reasonable or tactical strategic reason can be offered as to the failure to call her to refute the single most important piece of evidence against Mr. Knight.

b. Mr. Knight's Claim.

In his Rule 3.851 motion, Mr. Knight alleged that his trial counsel was ineffective for failing to present Dr. Rudin's testimony to the jury to challenge critical pieces of the State's DNA evidence. Dr. Rudin would have been able to provide the jury with significant information that would have wholly undermined the State's scientific case, particularly as it related to the testimony by Kevin McElfresh. Dr. Rudin's testimony would have devastated the testimony presented by McElfresh and thus undermined the entirety of the State's scientific case. Trial counsel's failure to call Dr. Rudin as a witness constituted deficient performance and as a result, Mr. Knight was prejudiced. Had Dr. Rudin's testimony been presented to the jury, there is more than a reasonable probability that the outcome would have been different.

As noted above, an issue arose at Mr. Knight's trial during the testimony of State's witness McElfresh, a technician from Bode Laboratory (V. 20 PCR. 297). At Mr. Knight's postconviction evidentiary hearing, trial defense counsel, Evan Baron, testified that:

> McElfresh began to testify and the testimony then went into areas that we were not notified about ahead of time. It turned out that he had done some additional work within the last two weeks prior to trial and did not file the report, so there was no report and it was kind of a situation where we were not expecting some of the testimony that came out. I approached sidebar. I moved for a mistrial and it was denied.

(V. 20 PCR. 298). Baron went on to state that it was "unusual" for a forensic analyst to not provide a report in a case of this nature (*Id.*).

Prior to trial, Baron was working with Dr. Rudin to review BSO analyst Noppinger's work on the DNA samples[16] submitted to the crime lab (V. 20 PCR. 298). Baron provided Dr. Rudin with "whatever she had asked for" (*Id.*). Upon the defense being blindsided by McElfresh's testimony, the trial court granted a recess to allow the defense time to evaluate the new testimony and provide necessary information to Dr. Rudin for her review (V. 20 PCR. 300). At that time, it was Baron's recollection that Dr. Rudin, who works in California, was traveling quite a bit and was "back and forth" between California and other states (V. 20 PCR. 301). After providing Dr. Rudin with a copy of McElfresh's trial testimony and consulting with her about the issues, he recalled receiving a report from Dr. Rudin dated April 28, 2006, which was introduced into evidence at the evidentiary hearing as Defense Exhibit 6 (V. 20 PCR. 301-02).

Baron explained that, before McElfresh's testimony, he was not intending on calling Dr. Rudin as a witness "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" (V. 20 PCR. 302-

[16] Baron did recall that BSO lab was unable to include Mr. Knight on two pieces of evidence (jeans and boxer shorts), a conclusion corroborated by testing done by Faith Patterson from Bode Laboratory (V. 20 PCR. 305).

03).[17] This opinion was based on her review and analysis of Noppinger's lab work. However, after he provided Dr. Rudin with McElfresh's testimony and after conversing with her, it was Baron's understanding from Dr. Rudin that "she felt that she could not really assist us in the case[,]" that "ultimately her opinion was not going to be any different than the state's case" (V. 20 PCR. 303). Therefore, according to Baron:

> [] I had to make a decision as to whether or not I wanted to put her on to corroborate the state's case, or whether I wanted to be able to have opening and closing and closing argument by not calling a witness. And I think she would have been the only witness we would have called anyway.
>
> And I made a decision that I didn't think her testimony was going to make a difference in the case. I didn't think it was going to help us and that was the decision I made.

(V. 20 PCR. 303). However, in contradiction to this testimony, Baron later testified that Dr. Rudin "felt that the procedures that McElfresh used were improper and that she didn't necessarily agree with the conclusions that he made based on the way he made them" (V. 20 PCR. 306). In fact, in her report, Dr. Rudin criticized the work performed by both Noppinger and McElfresh (V. 6 PCR. 984-93). Had the jury heard

[17] However, in her April 28, 2006 report Dr. Rudin concluded that "[w]hile [she] found no blatant misattribution of DNA profiles, the renumbering, a mislabeling of reference sample, the generally poor legibility of the handwritten notes, and the initial refusal to provide complete discovery, combine to lesson one's confidence in the accuracy and reliability of the analysis" (V. 6 PCR. 988-93).

her criticisms of their work and results, the State's scientific case would have been wholly undermined.

Baron did acknowledge that in his conversations with Dr. Rudin as well as in her reports she expressed concerns about the quality of the work performed by BSO technician Noppinger in terms of labeling issues, quality control issues, sampling identification issues, and things of that nature (V. 20 PCR. 304). Baron, however, could not recall if that gave rise in his mind to a potential challenge to the admissibility of the DNA results under *Frye* (V. 20 PCR. 304). He later explained that he was not "aware" of a basis for a *Frye* challenge to the DNA testing methods employed in Mr. Knight's case because the PCR-STR method was recognized in the scientific community at the time the testing was performed by the BSO laboratory (V. 20 PCR 310).

In denying Mr. Knight's Rule 3.851 motion, the lower court stated:

> On cross-examination, Mr. Baron testified that after reviewing the transcript of Dr. McElfresh's testimony, Dr. Rudin informed him that she agreed with this findings (EH Vol. 1 at 47). Therefore, Mr. Baron thought that it would not be good trial strategy to call her as a witness to corroborate the testimony of the State's experts and lose the opportunity to have the final word during closing argument. (EH Vol. 1 at 47-48).

(V. 7 PCR. 1294-95). However, Dr. Rudin in fact did *not* agree with the State's experts. With respect to Mr. Noppinger, at the evidentiary hearing during re-direct, reading from Dr. Rudin's April 28, 2006 report, Mr. Baron testified that:

> [] Based on the information I received, I came to generally the same nominal conclusions as Mr. Noppinger regarding the possible or apparent sources of the DNA profiles observed in the samples analyzed by STR DNA typing. However, my confidence is lessened as the actual source of these profiles because of the problems obtaining full discovery and the numerous clerical errors.
>
> While Mr. Noppinger was kind enough to provide the best understanding of where the errors had occurred, and a proposed resolution, not all the errors were resolved. Further relying on memory and contextual information to determine the connection of a profile to an item of evidence is tenuous at best.
>
> Finally, based on the relatively large number of errors that were immediately obvious, one must wonder about the existence of undetected errors and if they could have been substantive.

(V. 20 PCR. 319-20).

As the prosecution's case at trial unfolded, in particular to the issues that arose as a result of defense counsel being blindsided by the testimony of McElfresh and the conclusions that he reached at Mr. Knight's trial, Dr. Rudin was being provided additional materials in a rushed fashion in order for her to be able to reach conclusions that could have been of assistance to Mr. Knight's defense. Certainly, defense counsel believed that Dr. Rudin's testimony and opinions would be helpful to Mr. Knight as they listed Dr. Rudin as a defense witness to testify at trial. And counsel was correct: Dr. Rudin would have been able to provide the jury with significant information that would have wholly undermined the State's scientific case, particularly the testimony presented by McElfresh. In fact, Dr. Rudin's

testimony would have devastated that presented by McElfresh and thus undermined the entirety of the State's scientific case.

Dr. Rudin's April 28, 2006, report harshly criticized the scientific credibility of McElfresh's work. Her testimony at the evidentiary hearing remained consistent with these criticisms. Dr. Rudin explained that the manner employed by McElfresh in coming to his conclusion was "inherently biased" and "fundamentally incorrect":

> [] So what you're asking about type of analysis, fundamentally incorrect and inherently biased. Yes, it is inherently biased, because he went looking for Mr. Knight's DNA in this profile. It was not obviously present, certainly in a way for example, the major profile was the same in each of these as one of the women. That doesn't say absolutely them, certainly, all of the DNA types were found in their profile for major profiles. There was a whole lot of data, it was reliable.
>
> And there is very little data in addition to that and Dr. McElfresh went looking for any little bit he could possibly ascribe to Mr. Knight, which is a fundamentally incorrect way to interpret data and in particular forensic DNA data.

(V. 21 PCR. 393). McElfresh's analysis was not scientifically acceptable (*Id*.). Her April 28, 2006, report, concluded as follows:

> **Conclusion**
>
> When the additional requested documentation was finally received from the laboratory, a number of issues were clarified. Most of the items that appear in the DNA reports were described and documented to at least some extent. It became apparent why a number of unrelated items had been assigned similar unique identifiers. The forced renumbering to avoid duplicate alphanumeric identifiers

> may have contributed to clerical errors later in the analysis. **While I found no blatant misattribution of DNA profiles, the renumbering, a mislabeling of a reference sample, the generally poor legibility of the handwritten notes, and the initial refusal to provide complete discovery, combine to lesson one's confidence in the accuracy and reliability of the analysis**.
>
> Nevertheless, from the information I received, I did not detect any substantive or significant errors that would change the ultimate conclusion proffered by Mr. Noppinger regarding the possible source(s) of each sample.
>
> **The testimony presented by Kevin McElfresh was incomplete and misleading.** His opinions directly contradicted the prior report released by Bode Technology, reviewed and signed by three other scientists at the company. **His conclusions were apparently reached by assuming the contributors he was trying to prove. This type of analysis is fundamentally incorrect and inherently biased.** Interestingly, he could have come to exactly the same conclusions, flawed though they may be, without ever having compared the profile of Victoria Martino. Nevertheless, McElfresh's testimony was relatively inconsequential when viewed in the context of the biological evidence as a whole.

(emphasis added) (V. 6 PCR. 991-92).[18]

[18] At the evidentiary hearing, trial counsel was questioned regarding Dr. Rudin's statement that "McElfresh's testimony was relatively inconsequential when viewed in the context of the biological evidence as a whole." When asked if an expert would "be able to be allowed to opine about the strength of the case" and if that comment amounted to "her opinion as opposed to her conclusions about the evidence in the case", Baron responded that "[i]t was reported to me specifically, yes" (V. 20 PCR. 321).

Despite the conclusions contained in her report, defense counsel ultimately, without a reasonable tactical or strategic decision, failed to present Dr. Rudin's testimony at Mr. Knight's trial. Her opinion of a minimized confidence in the accuracy and reliability of Noppinger's work coupled with the blatant misleading and fundamentally incorrect scientific analysis by McElfresh which was inherently biased would have been significant to the jury and would have cast an inescapable shadow of doubt on the foundation of the State's physical evidence. Had Dr. Rudin's testimony been presented, there is more than a reasonable probability of a different outcome because confidence is undermined in the outcome. *See Strickland*.

Attorney Baron's explanation at the evidentiary hearing – that Dr. Rudin's opinions were no different from those testified to by McElfresh – is simply based on a factual inaccuracy (V. 20 PCR. 303). Baron asked Dr. Rudin to evaluate McElfresh's testimony. She did so and concluded, among other things, that his testimony was fundamentally incorrect and inherently biased. Baron could not have asked for a better opinion from his expert, but he either did not understand her conclusions or chose to overlook them in deciding that his closing argument order was more important than ensuring that Mr. Knight's jury was provided with accurate

information that more than reasonably undermined a cornerstone of the State's physical evidence[19] (V. 20 PCR. 312-13).

Given the overarching importance of McElfresh's testimony to the State's case, and the fact that the State highlighted McElfresh's testimony to the jury during closing argument (V. 34 R. 3546-3549; 3565), there is more than a reasonable probability that, had Dr. Rudin testified to her opinions, a different result would have been obtained. Dr. Rudin's report would have significantly undermined the jury's confidence not only in the State's DNA case as a whole, but in particular her opinions and harsh criticisms of Noppinger's quality of work and McElfresh's testing and results would have been important for the jury to hear and consider when deliberating Mr. Knight's guilt. In other words, due to defense counsel's unreasonable and deficient performance, confidence is undermined in the result. Lacking sound reason, Baron failed to present Dr. Rudin's testimony to the jury, testimony that was crucial to challenging the State's DNA evidence. No tactical or strategic decision can explain why defense counsel failed to call Dr. Rudin as a witness in Mr. Knight's trial. The lower court erred in denying Mr. Knight's postconviction claim. Trial counsel's failure to present Dr. Rudin constituted deficient performance under the Sixth Amendment and *Strickland* and as a result,

[19] Mr. Baron certainly did not have the benefit of Dr. Rudin's report in making this decision because her report was not finalized until April 28, 2006. Mr. Knight's trial concluded several days *earlier*, the defense having rested its case on April 25, 2006.

Mr. Knight was prejudiced. *Strickland v. Washington*, 466 U.S. 668 (1984). To the extent that the lower court latched onto defense counsel's statement that he did not want to present otherwise admissible relevant important testimony to the jury out of fear of losing the "last word" at closing argument, this "strategic decision" is unreasonable under the facts of this case. "All too often, defense attorneys believe that their oratorical persuasive abilities in final argument can better serve their clients and the balance is erroneously stricken in favor of closing argument." *See Diaz v. State*, 747 So. 2d 1021 (Fla. 3rd DCA 1999) ("All too often, defense attorneys believe that their oratorical persuasive abilities in final argument can better serve their clients and the balance is erroneously stricken in favor of closing argument.").

2. The Withheld Impeachment Evidence Regarding Kevin Noppinger

The other principal scientific witness to testify at Mr. Knight's trial was Kevin Noppinger, a serologist with the Broward County Sheriff's Office crime laboratory. In his Rule 3.851, Mr. Knight alleged that he was prejudiced as a result of the State's *Brady* violation for failing to turn over what has become known as the Noppinger Memo. Unbeknownst to either defense counsel or the jury, 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 Office crime laboratory to a "Criminalist III" position (Defense Exhibit 3/Noppinger Memo). Trial counsel Baron testified at the evidentiary hearing that he

did not have this document prior to Mr. Knight's trial because it was not produced by the State as part of its disclosure obligation. At the evidentiary hearing, Baron was shown the Noppinger Memo, which was a memorandum from the Broward Sheriff's Office dated July 29, 2002, referencing Noppinger's concerns about the BSO laboratory (V. 20 PCR. 307). Baron testified that he was not provided this information prior to Mr. Knight's trial, and it contains information he would have wanted to know in terms of his examination of Noppinger at Mr. Knight's trial (*Id*.).

The Noppinger Memo was never disclosed to Mr. Knight's trial counsel in violation of the State's obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. Moreover, the Noppinger Memo was not disclosed by the State or the Broward County Sheriff's Office as a result of the demands made by Mr. Knight pursuant to Fla. R. Crim. P. 3.852. Rather, the Noppinger Memo was disclosed by the State in another case arising from Broward County in which Noppinger testified, and it was only because Mr. Knight is represented by the same office that represents the other defendant that Mr. Knight's collateral counsel was even aware of the existence of the Noppinger Memo.

In denying this claim, the lower court stated:

> Mr. Baron admitted that there was nothing in the memorandum showing that Mr. Noppinger did not have the ability to perform the DNA testing in Defendant's case. (EH Vol. 1 at 49). To the contrary, the defense expert agreed with Mr. Noppinger's findings. (EH Vol. 1 at 49).

(V. 7 PCR. 1300). The lower court erred in finding that Mr. Knight failed to meet the first prong of *Brady*; that the information contained in the memorandum was not favorable to Mr. Knight. The court also erred in its finding that "…assuming that the memorandum had some limitted [sic] value for impeachment purposes", Mr. Knight was not prejudiced as a result of the State's *Brady* violation (V. 7 PCR. 1301).

What the lower court failed to appreciate is the importance of the *reasons* for Mr. Noppinger's self-requested demotion from a BSO crime lab manager to a DNA analyst. Mr. Noppinger's job description as a "DNA section technical manager [was] to provide quality assurance for the section by training employees and introducing state-of-the-art technical aspects necessary to the DNA section" (V. 6 PCR. 996). Noppinger requested the demotion because that "[a]lthough I am committed to the Broward County Sherriff's office crime lab, *the current situation precludes me from performing effectively*" (emphasis added) (*Id*.). This information coupled with Dr. Rudin's criticisms of Noppinger's work quality would have provided invaluable impeachment evidence to be brought out on cross-examination. Dr. Rudin concluded in her report that "while I found no blatant misattribution of DNA profiles, the renumbering, a mislabeling of a reference sample, the generally poor legibility of the handwritten notes, and the initial refusal to provide complete discovery, *combine to lesson one's confidence in the accuracy and reliability of the analysis*" (emphasis added) (V. 6 PCR. 991-92). At the evidentiary hearing she testified that "[f]inally,

based on the relatively large number of errors that were immediately obvious, one must wonder about the existence of undetected errors and if they could have been substantive" (V. 20 PCR. 320). This testimony would have given the jury reason to question the State's entire scientific case and had it been presented, there is a reasonable probability that the outcome would have been different. As a result, Mr. Knight was prejudiced.

It is axiomatic that the State's disclosure obligations under *Brady* and its progeny extend to impeachment evidence, which the Noppinger Memo clearly is. In *Brady*, the United States Supreme Court held that suppression by the State of material evidence favorable to a defendant violates due process. In order to insure that an adversarial testing, and hence a fair trial, occurs, due process requires that certain obligations are imposed upon both the prosecutor and defense counsel. The prosecutor is required to disclose evidence to the defense "that is both favorable to the accused and `material either to guilt or punishment'". *United States v. Bagley*, 473 U.S. 667, 674 (1985), quoting *Brady*, 373 U.S. at 87. In order to prove a violation of Brady, a claimant must establish that the government possessed evidence that was suppressed, that the evidence was "exculpatory" or "impeachment" and that the evidence was "material." *Bagley*, 473 U.S. 667 (1985); *Kyles v. Whitley*, 514 U.S. 419 (1995); *Strickler v. Greene*, 527 U.S. 263 (1999). Evidence is "material" and a new trial or sentencing is warranted "if there is a

reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different." *Kyles*, 514 U.S. at 433-434; *Hoffman v. State*, 800 So. 2d 174 (Fla. 2001); *Rogers v. State*, 782 So. 2d 373 (Fla. 2001); *Young v. State*, 739 So. 2d 553 (Fla. 1999). A proper materiality analysis under *Brady* must also view the suppressed evidence in the context of other evidence that was presented at trial. The materiality inquiry is not a "sufficiency of the evidence" test. *Kyles*, 514 U.S. at 434. The burden of proof for establishing materiality is less than a preponderance. *Williams v. Taylor*, 529 U.S. 362 (2000); *Kyles*, 514 U.S. at 434.

To the extent that counsel was or should have been aware of this information, counsel was ineffective under the Sixth Amendment in failing to discover it and utilizing it. The jury should have been made aware of the contents of the Noppinger Memo as the memo would have given the jury reason to assign less, or no, weight to Noppinger's testimony, and further would have given the jury reason to suspect that the entire methodology of the Broward County Sheriff's Office crime laboratory was not worthy of confidence. To the extent the State might contend that it had no duty to disclose the memo but that defense counsel had an obligation to locate it, Mr. Knight submits that counsel's failure to investigate and locate this memorandum was prejudicially deficient performance under the Sixth Amendment.

3. Failure to Request a Frye Hearing

Despite knowing from their own defense expert, Dr. Rudin, of significant problems associated with the work and laboratory conditions performed in Mr. Knight's case by the Broward County Sheriff's Office crime lab and by Bode, problems which are buttressed by the facts that have surfaced as a result of the disclosure of the Noppinger memo, trial counsel unreasonably failed to move for a hearing pursuant to *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Had a *Frye* hearing been requested, the burden would have been placed on the State to establish to the court's satisfaction that the exacting standards of admissibility of scientific evidence had been made. Mr. Knight alleged in his Rule 3.851 motion that the State would have been unable to meet its burden under *Frye* and, as a result, the DNA evidence and the testimony from Broward County Sheriff's Office technicians and from Bode would have to have been excluded as a matter of law. The lower court improperly denied relief on this claim, and a new trial is warranted.

At trial and under the *Frye* test, the State, as the proponent of the scientific evidence, would have to establish by a preponderance of the evidence that (1) both the underlying scientific principle, theory, or methodology used to develop the evidence was generally accepted in the scientific community, and (2) the specific testing procedures employed to develop the evidence were generally accepted in the scientific community. *Hayes v. State*, 660 So. 2d 257, 263-65 (Fla. 1995); *Ramirez v. State*, 651 So. 2d 1164, 1168 (Fla. 1995). The *Hayes/Ramirez* two- part standard

stems directly from this Court's adoption of *Frye* as the basis for evaluating the admissibility of scientific testimony. *See Brim v. State*, 695 So. 2d 268, 271 (Fla. 1997); *Hadden v. State*, 690 So. 2d 573, 578 (Fla. 1997); *Hayes*, 660 So. 2d at 262; *Ramirez*, 651 So. 2d at 1167; *Flanagan v. State*, 625 So. 2d 827, 829 n.2 (Fla. 1993); *Stokes v. State*, 548 So. 2d 188, 193-94 (Fla. 1989). This Court has retained the *Frye* standard because it arguably imposes a "higher standard of reliability" than the federal standard announced in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *Brim*, 695 So. 2d at 271-72.[20]

Because reliability of the scientific methodology is the *sine qua non* of admissibility, *Hadden*, 690 So.2d at 577, results of scientific experiments based upon generally accepted scientific principles are still inadmissible if the testing done in the particular case did not adhere to the procedures themselves generally accepted in the scientific community. *Hayes*, 660 So. 2d at 263-64; *Ramirez*, 651 So. 2d at 1168.[21] This is what occurred in Mr. Knight's case, as established through the testimony of Dr. Rudin (V. 21 PCR 388-393). This inquiry focuses on, among other

[20] Effective July 1, 2013, Florida adopted the federal standard set forth in *Daubert*. Fla. Stat. § 90.702 (2013).

[21] *Accord Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167, 1177 (1999) (it is not reliability of the general theory that must be established, but the reliability of its specific application to the disputed issue in the case); *Holley v. State*, 523 So. 2d 688, 689 (Fla. 1st DCA 1988) (expert testimony regarding results of paternity test admissible, in part, because defendant did not produce any evidence indicating that any significant errors were made in the administration of the tests or calculation of results).

things, the quality of lab work and the testing procedures followed. *Hayes*, 660 So. 2d at 263-64 (finding DNA evidence based on accepted methods still inadmissible because of flaws in particular testing); *Ramirez*, 651 So. 2d at 1167 (principal focus under *Frye* is on the reliability of the scientific theory or discovery from which expert derives opinion); *Husky Industries, Inc., v. Black*, 434 So. 2d 988, 992 (Fla. 4th DCA 1983) (expert opinion inadmissible where based on insufficient data). The evidence offered at trial must be based upon actual test results and not just the opinion of the expert witness. *Hadden*, 690 So. 2d at 577. *Accord Young-Chin v. City of Homestead*, 597 So. 2d 879, 882 (Fla. 3d DCA 1992) (expert testimony inadmissible because based on suppositions rather than review of physical evidence); *Poulin v. Fleming*, 782 So. 2d 452, 457 (5th DCA 2001) (scientific evidence inadmissible under Frye where "the experts' opinions were not shown to be reliable on some basis other than simply that they were their own opinions"); *Kaelbel Wholesale Inc. v. Soderstrom*, 785 So. 2d 539, 549 (Fla. 4th DCA 2001) (rejecting argument that expert himself can establish reliability of testing: "[t]his is tantamount to saying that because the court qualifies a witness as an expert, and the expert testifies to the methodology and opinion, it is therefore accepted in the field. Of course, such a proposition is nowhere supported by the law and is completely contrary to *Frye*").

In Mr. Knight's case, trial counsel, armed with information from their own expert, Dr. Rudin, about problems with the methodology employed in this case in particular by BSO, Bode Laboratory and Kevin McElfresh, unreasonably failed to mount a *Frye* challenge to the State's DNA testimony. The information set forth in Dr. Rudin's report was more than sufficient to raise a red flag that a *Frye* hearing was warranted in Mr. Knight's case. However, no hearing was requested to Mr. Knight's substantial prejudice. Had a *Frye* hearing been requested and held, there is more than a reasonable probability that the Court would have had no choice but to exclude the scientific evidence in this case, as Mr. Knight submits he established at the evidentiary hearing primarily through the testimony of Dr. Rudin. Without that evidence, the State's case would have been gutted. A new trial is warranted.

4. Failure to Challenge Credibility of Steven Whitsett/State's Failure to Disclose

Aside from the scientific DNA evidence, the other key portion of the State's case came from the testimony of jailhouse informant Steven Whitsett. Whitsett's testimony was indeed crucial to the State's case, as this Court explained in its direct appeal opinion. *Knight v. State*, 76 So. 3d 879, 883 (Fla. 2011). As the Court set out, Whitsett provided details about what Mr. Knight purportedly "confessed" to him out of the blue, including a putative motive for the killings.

Unquestionably, Whitsett's credibility was a key issue at trial and while defense counsel did impeach Whitsett, important information was not provided to

the jury with regard to how Whitsett could have come to know about the facts of the crime. What the jury did not know was that, in contrast to the picture portrayed by Whitsett at trial, there was indeed a way that Whitsett could have come across information about the homicides.

Documentation provided to Mr. Knight's collateral counsel as a result of the demands made pursuant to Fla. R. Crim. P. 3.852 included detailed logs that were made by jail personnel at the Broward County Jail. These logs provide specific information not only about Mr. Knight's movements but also other information relating to, for example, the cell area where Mr. Knight and Whitsett were housed at the time that Whitsett purportedly was able to meet and talk with Mr. Knight. One log entry in particular is critical here; on July 5, 2000, an entry in the log indicates that Mr. Knight was "counseled about having newspaper in cell" (Defense Exhibit 2).

The importance of the discovery of newspapers in the cell area shared by Mr. Knight and Whitsett cannot be overstated because it provides an argument that defense counsel could have made to the jury, and certainly questioned Whitsett about, concerning the provenance of the information he claimed to have gotten from Mr. Knight. A review of the newspaper articles that were printed at the time contemporaneous to the discovery of newspapers in the cell (July 5, 2000), reveal that a great deal of information was in the public domain with regard to the

homicides) (V. 6 PCR 1002-1013; V. 7 1306). Equally as important is the fact that a newspaper article from July 4, 2000, discussed the fact that the funeral and burial services were scheduled for July 4, 2000 (V. 6 PCR 1012). This is of particular significance because at trial, Whitsett insisted that the coverage of the funeral was on June 29, 2000 (the first day he arrived at the Broward County Jail), and not on July 4, 2000.

The jury was not apprised of the existence of proof that newspapers were in fact in the cell area shared by Mr. Knight and Whitsett. Mr. Knight submits that defense counsel had an obligation to investigate the existence of these documents, which were in available at the time of trial. However, Mr. Knight also submits that the State had an obligation to disclose the jail logs pursuant to its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963). At the evidentiary hearing, defense counsel testified that he did not have the jail log or the information contained therein, and it would have been useful information to have in cross-examining Whitsett's testimony (V. 20 PCR. 286-91). In light of the critical importance of Whitsett's testimony, any information tending to further erode his credibility would have been highly probative and significant for the jury to consider when deliberating this case.

Additionally, in records disclosed by the Office of the State Attorney during the public records litigation regarding Whitsett, an additional piece of information undermining Whitsett's testimony was provided. This information, too, was not

disclosed to Mr. Knight's defense counsel. The information in question arises from Whitsett's sworn statement to law enforcement as a result of his 1994 arrest for sexual crimes against minors. Of particular interest is that, during his statement, Whitsett acknowledges that he voluntarily drew a map for law enforcement of the location where he assaulted the minor children at issue (Defense Exhibit 1 at 7). Curiously, in Mr. Knight's case, Whitsett claimed that Mr. Knight also drew a map of the house where the murders occurred, and the map was the subject of his testimony and questioning by defense counsel. Had defense counsel known that Whitsett had a penchant for drawing maps, it would have provided further impeachment evidence of his testimony that it was Mr. Knight who drew the map in this case and further support for the implication that Whitsett had fabricated his testimony about Mr. Knight's "confession" and the fact that Mr. Knight drew a map. Cumulatively with the other impeachment evidence, the jury would have been given additional reasons to reject Whitsett's testimony and question the reliability of the State's case as a whole.

5. Failure to Disclose that Media Access in Jail Led to Nonexistent "Confession" by Mr. Knight to George Greaves

Along the same lines as the issue relating to Whitsett, Mr. Knight discovered, in the production of records from the Coral Springs Police Department as a result of the supplemental request made by Mr. Knight, further exculpatory information that was not disclosed by the State prior to trial. The document in question, part of a

computerized supplemental report from the Coral Springs Police Department, provides as follows:

> ON 070600, DET. DOUG WILLIAMS AND I INTERVIEWED GEORGE GREAVES, AN INMATE AT THE BROWARD COUNTY JAIL WHO HAD CONTACTED CRIME STOPPERS STATING THAT HE HAD INFORMATION CONCERNING THIS CASE. GREAVES STATED THAT HE WAS HOUSED WITH RIGHARD KNIGHT AND THAT KNIGHT HAD SHARED DETAILS OF THE MURDERS WITH HIM. GREAVES HOWEVER WOULD NOT DIVULGE THE NATURE OF HIS CONVERSATIONS WITH KNIGHT UNTIL A DEAL WOULD BE OFFERED TO HIM CUTTING HIS JAIL TIME. NO DEAL WAS OFFERED GREAVES **AND IT LATER BECAME APPARENT THAT HE WAS GLEANING INFORMATION FROM MEDIA BRIEFS AND NOT FROM RICHARD KNIGHT.**

(Defense Exhibit 5) (emphasis added).

This document, and more importantly the information contained therein, was not disclosed to Mr. Knight prior to trial, as defense counsel testified during the evidentiary hearing, and is unquestionably exculpatory (V. 20 PCR. 291-93). If Mr. Knight's defense counsel did know of this information, they failed to present it to the jury in order for the jury to make an adequate assessment of Whitsett's reliability and the State's case as a whole. First, the information in this police report shows that, at the very same time that Whitsett testified that Mr. Knight had supposedly "confessed" to him, another inmate (Greaves) was claiming the very same thing. Yet law enforcement determined that Mr. Knight had in fact not confessed anything to

Greaves and that Greaves had gleaned information about the crime from "media briefs and not from Richard Knight" (Defense Exhibit 5).

Contrary to the conclusion reached by the lower court, this information is significant for a number of reasons. First, it shows, and would have shown to the jury, that the jail was apparently crawling with snitches who were only too happy to claim that another defendant, particularly one in a high profile double murder case, had "confessed." Moreover, the Greaves incident occurred at the exact same time as Whitsett testified that Mr. Knight purportedly "confessed" to him, but law enforcement determined that Greaves was lying and had only gotten information about Mr. Knight's case from media. Yet in Mr. Knight's case, Whitsett and the State went to great lengths to discount the possibility that Whitsett could have gleaned information about the crime from media reports. Yet the identical thing happened with Greaves at the exact same time period. The jury should have known of this information, which either the State failed to disclose or defense counsel failed to utilize at trial. Coupled with the additional impeachment evidence regarding Whitsett, outlined above, confidence in the outcome of Mr. Knight's trial is undermined and a new trial is warranted.

C. Conclusion.

Singularly and cumulatively, the errors outlined above warrant reversal of the lower court's order. A new trial should be ordered in light of the cumulative nature

of the errors occurring at the guilt phase of Mr. Knight's capital trial. *See State v. Gunsby*, 670 So. 2d 920 (Fla. 1996).

ARGUMENT II

MR. KNIGHT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF HIS RIGHT TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Introduction

Mr. Knight's counsel was ineffective for failing to present significant available mitigation to both the penalty phase jury and the sentencing judge. Trial counsel's failure in this regard rendered Mr. Knight's death sentences unreliable. "To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Wiggins v. Smith*, 539 U.S. at 521. *Wiggins* recognizes that the ABA GUIDELINES FOR THE APPOINTENT AND PERFORMANCE OF COUNSEL IN CAPITAL CASES (ABA Guidelines) is a "guide to what is reasonable." The Supreme Court further held that counsel has a duty "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland*, 466 U.S. at 668 (citation

omitted). Mr. Knight submits that he proved both deficient performance and prejudice and, therefore, a new penalty phase proceeding should be ordered.

Counsel in a capital case has a duty to conduct a "requisite, diligent investigation" into his client's background for potential mitigation evidence. *Williams v. Taylor*, 529 U.S. 362, 415 (2000). While an attorney is not required to investigate every conceivable avenue of potential mitigation, the Supreme Court has emphasized that "in assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of known evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith*, 539 U.S. 510, 527. Furthermore, "[s]trategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgment supports the limitations on investigation." *Strickland*, 466 U.S. at 690-691.

The 2003 ABA Guidelines impose a duty on counsel to perform an extensive search into the client's background, "[b]ecause the sentencer in a capital case must consider in mitigation, 'anything in the life of a defendant which might militate against the appropriateness of the death penalty for that defendant,' penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history." ABA Guidelines, Guideline 10.7 – Investigation. (excerpt from commentary, citations omitted). Among the areas the ABA requires counsel to

investigate are a client's medical, educational, family, social, employment and any prior juvenile and adult correctional histories.

B. Failure to effectively investigate and present mitigating evidence at penalty phase

Counsel's investigation and presentation of mitigation at Mr. Knight's penalty phase was not constitutionally effective. Although counsel did present some mitigation to the penalty phase jury, additional evidence was available yet went undiscovered and thus unpresented. Moreover, trial counsel failed to ensure that Mr. Knight had the assistance of effective mental health experts, namely Dr. Wiley Mittenberg, who, although conducting testing and arriving at conclusions that were beneficial to Mr. Knight, did not testify before the penalty phase jury. As a result, the jury was deprived of important and relevant mental health and other mitigation that the constitution commands it consider.

When mental health is at issue, counsel has a duty to conduct proper investigation into his or her client's mental health background. *O'Callaghan v. State*, 461 So. 2d 1354, 1355 (Fla. 1984). Counsel has an obligation to ensure that the client is not denied a professionally conducted mental health evaluation. *Mason v. State*, 489 So. 2d. 734 (Fla. 1986); *Maudlin v. Wainwright*, 723 F.2d 799 (11th Cir. 1984). "[A]n attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence." *State v. Riechmann*, 777 So. 2d 342, 350 (Fla. 2000). Where available information indicates that the defendant could have

mental health problems, "such an evaluation is 'fundamental in defending against the death penalty.'" *Arbelaez v. State*, 898 So. 2d 25, 34 (Fla. 2005) (quoting *Bruno v. State*, 807 So. 2d 55, 74 (Fla. 2001) (Anstead, J., concurring in part and dissenting in part)).

In discharging these duties, there are generally accepted practices which counsel is required to perform. Counsel should obtain a complete medical and social history. Historical data must be obtained not only from the defendant but also from independent sources as well. The significance of obtaining collateral data cannot be understated. Counsel should also review information regarding the defendant's past and present physical condition. Furthermore, appropriate diagnostic studies must be undertaken in light of the history and physical examination. ABA Guideline 4.1 (2003) Had defense counsel effectively investigated and presented all areas of Mr. Knight's mental health mitigation, and ensured that Mr. Knight's jury would have all relevant information before considering whether Mr. Knight should live or die, there is a reasonable probability that the outcome of his sentencing would have been different. Had his mental health mitigation been properly investigated and presented, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different. Mr. Knight is entitled to a new penalty phase.

Although the record reflects that Mr. Knight's counsel did present mitigation evidence at the penalty phase, counsel's failure to adequately investigate resulted in the jury being deprived of significant mitigating evidence, namely that Mr. Knight was abused as a child, including sexual abuse. To Mr. Knight's substantial prejudice, Mr. Halpern, who was heading the penalty phase investigation in this case, never even asked his client if he had been abused, much less a victim of sexual abuse (V. 20 PCR. 342-44). Because Mr. Knight was never asked by his attorney, it is hardly surprising that he would not have volunteered such information, much less know that such information would be powerful mitigation. Counsel's failure to investigate this critical area of mitigation is only exacerbated by the fact that, just days before the penalty phase commenced, the penalty phase investigator, Valerie Bailey, sent Mr. Halpern a memo with information about the history of abuse (V. 7 PCR 1314). Mr. Halpern unreasonably failed to follow up with this information.

Mr. Halpern also failed to ensure that Mr. Knight had the assistance of a competent mental health expert. A criminal defendant is entitled to expert psychiatric assistance when the State makes his or her mental state relevant to the proceeding. *Ake v. Oklahoma,* 470 U.S. 68 (1985). Crucial evidence regarding Mr. Knight's mental health never reached the jury here due to ineffective assistance of counsel.

An "adequate psychiatric evaluation of [the defendant's] state of mind" is required. *Blake v. Kemp*, 758 F.2d 523, 529 (11th Cir. 1985). The Due Process Clause protects indigent defendants against professionally inadequate evaluations by psychiatrists or psychologists. The Fourteenth Amendment mandates that an indigent criminal defendant be provided with an expert who is professionally fit to undertake his or her task, and who undertakes that task in a professional manner. *Ake*, 470 U.S. 68 (1985).

Florida law also provides, and thus provided Mr. Knight, with a state law right to professionally adequate mental health assistance. *See, e.g., Mason*, *supra*; *cf.* Fla. R. Crim. P 3.210, 3.211, 3.216. *State v. Hamilton*, 448 So. 2d 1007 (Fla. 1984). Once established, the state law interest is protected against arbitrary deprivation by the federal Due Process Clause. *Cf. Hicks v. Oklahoma*, 447 U.S. 343, 347 (1980); *Vitek v. Jones*, 445 U.S. 480, 488 (1980); *Hewitt v. Helms* 459 U.S. 460, 466-67 (1983); *Meachum v. Fano*, 427 U.S. 215, 223-27 (1976). In this case, both the state law interest and the federal right were arbitrarily denied.

In Mr. Knight’s case, counsel failed to provide his client with "a competent psychiatrist . . . [to] conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.” *Ake v. Oklahoma*, 470 U.S. 68, 82 (1985).

Defense counsel Halpern and the expert appointed in this case, Dr. Mittenberg, failed to provide the professionally adequate expert mental health assistance to which Mr. Knight was entitled. Despite a great deal of litigation surrounding the discovery of Dr. Mittenberg's raw materials and other information he used during his examinations of Mr. Knight, at his deposition, Dr. Mittenberg expressed concern that he might have a conflict given that he had previously worked with Dr. Lori Butts, a forensic expert retained by the State (V. 49 R. 539). Dr. Mittenberg had had recent conversations with Dr. Butts and had learned that she was retained on Mr. Knight's case (V. 49 R. 542). Dr. Mittenberg was concerned that Dr. Butts had unscrupulously gleaned information from him that would be prejudicial to Mr. Knight's case because she had asked him whether the results of various diagnostic tests could be explained by factors other than brain damage, such as a learning disability (V. 49 R. 542-43). Dr. Butts testified to having had recent conversations with Dr. Mittenberg, but insisted that the conversations pertained to unrelated cases on which she was working (V. 49 R. 555-56).

As Mr. Halpern explained during his evidentiary hearing testimony, during the penalty phase testimony of defense expert Dr. Jon Allen Kotler, he (Halpern) first informed the court that Dr. Mittenberg had brought an attorney, David Bogenschutz, to the proceedings and that Dr. Mittenberg was prepared to invoke his Fifth Amendment rights in lieu of testifying (V. 52 R. 865). Mr. Bogenschutz

informed the court that Dr. Mittenberg was emotionally distressed and that he had returned from the hospital suffering from "exhaustion, and sleep deprivation" (V. 53 R. 915). Defense counsel Halpern informed that court that Dr. Mittenberg had been consuming large amounts of whiskey, and that he was taking anti-anxiety medication (V. 53 R. 919-20). Mr. Halpern also informed the court that Dr. Mittenberg had expressed to him that he would be unable to endure the emotional rigors of cross-examination and would "totally crumble" (V. 53 R. 918).

Due to Dr. Mittenberg's inability to testify, Mr. Knight's counsel moved for a mistrial, arguing that he had only learned of Dr. Mittenberg's problem during his deposition and that the court would be risking reversal on grounds of ineffective assistance of counsel by virtue of defense counsel's inability to present mental health mitigation (V. 53 R. 922). The court denied a mistrial, stating: "The defense is the one that picked this witness. As my daddy used to say, you made your bed now you can sleep in it" (V. 53 R. 928). The court did, however, grant a recess but denied the renewed request for mistrial (V 53 R. 985-86). Curiously, it was Dr. Butts, who apparently was the genesis of the issue relating to Dr. Mittenberg, who contended that another psychologist can rely, and frequently does rely, on existing test results to render an opinion as to the functioning of an individual's brain (V. 54 R. 1006).

In Mr. Knight's case, trial counsel failed to provide Mr. Knight with competent mental health assistance, to Mr. Knight's substantial prejudice. *See*

Strickland; *Ake*. Trial counsel failed to introduce Dr. Mittenberg's report and/or deposition at the penalty phase, or take any other reasonable measures to ensure that Mr. Knight's jury was apprised of all relevant mental health evidence in this case. At the evidentiary hearing, Mr. Halpern offered no reasonable decision justifying the failure to introduce Dr. Mittenberg's report and/or deposition to the jury for its consideration.[22] Because the jury was deprived of this significant mental health evidence, confidence is undermined in the result and Mr. Knight is entitled to relief from his sentences of death.

In Mr. Knight's case, "counsel's error[s] had a pervasive effect, altering the entire evidentiary picture at [the penalty phase]." *Coss v. Lackwanna County District Attorney*, 204 F. 3d 453, 463 (3d Cir. 2000). When postconviction counsel is able to demonstrate "that it is likely that a jury would have been persuaded to recommend a penalty other than death," this Court should bear in mind that "it is peculiarly within the province of the jury to sift through the evidence, assess the credibility of the witnesses, and determine which evidence is the most persuasive." *See Coney v. State*, 845 So. 2d 120, 131-132 (Fla. 2003). Had the jury in Mr. Knight's case "been confronted with th[e] considerable mitigating evidence, there is a reasonable

[22] Dr. Mittenberg's report was introduced below at the evidentiary hearing as Defense Exhibit 8. As the lower court noted, penalty phase counsel did introduce Dr. Mittenberg's report and deposition to the court at the *Spencer* hearing but, without a reasonable tactical decision, failed to do at the penalty phase so the jury could consider them. *See Blackwood v. State*, 946 So. 2d 960 (Fla. 2006).

probability that it would have returned with a different sentence." *Wiggins v. Smith*, 539 U.S. 510, 536 (2003).

ARGUMENT III

MR. KNIGHT WAS DENIED HIS RIGHTS UNDER THE FIRST, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE OF THE RULES THAT PROHIBIT HIS LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT.

In his amended Rule 3.851 motion, Mr. Knight alleged that he was being denied his rights under the First, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and corresponding provisions of the Florida Constitution because of rules of professional responsibility that prohibit his lawyers from interviewing jurors to determine if constitutional error was present (V. 5 PCR 950-952). The circuit court rejected the claim on various grounds (V. 7 PCR 1325-1326). Mr. Knight acknowledges that the Court has rejected this same claim on various occasions, but raises it in this appeal from purposes of preservation in accordance with the Court's decision in *Sireci v. State*, 773 So. 2d 34, 40 n.14 (Fla. 2000).

ARGUMENT IV

FLORIDA'S LETHAL INJECTION PROTOCOL AND PROCEDURES VIOLATE THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In his Rule 3.851 motion and amendment thereto, Mr. Knight challenged Florida's method of execution and the then-existing lethal injection protocol as

violative of the Eighth Amendment and requested an evidentiary hearing (V. 5 PCR 952-963). The lower court denied this claim. (V. 7 PCR 1326-1328). Mr. Knight acknowledges that this claim has been rejected by the Court, and also that the United States Supreme Court is presently considering a case raising this very issue. *See Glossip v. Gross,* No. 14-7955. At this time, he raises this argument in this Brief for purposes of preservation, *Sireci v. State*, 773 So. 2d 34, 40 n.14 (Fla. 2000), and reserves the right to take any later action in light of a decision in *Glossip*.

CONCLUSION

Based on the foregoing arguments, the evidence and testimony presented during the evidentiary hearing, and the arguments and authorities contained in Mr. Knight's Amended Rule 3.851 motion, Mr. Knight submits that the Court should grant Mr. Knight a new trial and/or a new sentencing proceeding.

Respectfully submitted,

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CERTIFICATES OF SERVICE AND FONT

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed on this 26th day of May, 2015, and opposing counsel will be served on this date. Counsel further certifies that this brief is typed in Times New Roman 14-point font.

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