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, FLORIDA (CRIMINAL DIVISION)

****

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Richard Knight, was the defendant at trial and will be referred to as the "Defendant" or "Knight". Appellee, the State of Florida, the prosecution below will be referred to as the "State." References to the records will be as follows: Direct appeal record - "R" or "T"; Post-conviction record - "PCR"; any supplemental records will be designated symbols "SR", and to the Appellant's brief will be by the symbol "IB", followed by the appropriate page number(s).

PROCEDURAL & FACTUAL HISTORY

Richard Knight was indicted on August 15, 2001 and was arraigned on August 29, 2001 on two counts of first degree murder for the deaths of Odessia Stephens and Hanessia Mullings, mother and daughter. (ROA: 4-6) The case eventually came to trial on March 13, 2006. The jury was sworn in on March 22, 2006. (T 19:2137) Knight made a motion for mistrial and to disqualify the jury the next day on March 23 based on the contention that jury members may had seen him in handcuffs and shackles. The court held an evidentiary hearing and, thereafter, denied the mistrial motion. (T 44:213-311)

On April 26, 2006 the jury found Knight guilty of both counts of first degree murder. (T 35:3664-67) The penalty phase began on May 22, 2006. After a number of witnesses testified, the court granted the defense a continuance in the

presentation of its case in order to secure another neuropsychologist. (T 53:913-945) The penalty phase trial recommenced on July 24, 2006. Later that day the jury returned a recommendation for death by a vote of twelve (12) to zero (0). (T 54, 55:1164-68)

The court held a Spencer[1] hearing on August 18, 2006. (T 31) The trial court then sentenced Knight to death on March 28, 2007. In its written order the court found two aggravating factors for the murder of Odessia Stephens in Count I. For Count II involving the murder of Hanessia Mullings the court found three aggravating circumstances.The court found no statutory mitigating circumstances but found eight non-statutory ones.

Knight appealed his convictions, raising five issues. In affirming the convictions and the sentence, the Florida Supreme Court found the following facts:

The Guilt Phase

> The evidence presented at trial established that Knight lived in an apartment with his cousin, Hans Mullings, Mullings' girlfriend, Odessia Stephens, and their daughter, Hanessia Mullings. Mullings and Odessia had asked Knight to move out numerous times.
>
> On the night of the murder, June 27, 2000, Mullings was at work. At approximately 9 p.m., Mullings spoke to Odessia, who said she was going to bed, and then Mullings left his office to run errands. Knight was at the apartment with Odessia and Hanessia.
>
> Around midnight, an upstairs neighbor heard multiple thumping sounds on the apartment walls and two female voices, one of which was a child crying. The neighbor called 911 at 12:21 a.m. on June 28, 2000. The cries continued after the police arrived.

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

Officer Natalie Mocny arrived next and walked around the unit.FN1 She also saw the open window and noticed Knight on the other side of some hedges approximately 100 yards from the building. She beckoned him over for questioning. Officer Sachs joined Mocny. According to the officers, Knight had a scratch on his chest, a scrape on his shoulder, and fresh cuts on his hands. Although it was not raining, Knight was visibly wet. Knight was wearing dress clothes and shoes, yet told Mocny that he had been jogging, and that he lived in the apartment, but did not have a key to get inside. There was blood on the shirt he was wearing and on a ten-dollar bill in his possession.

FN1. Officer Amy Allen also testified that she had climbed through the open window to open the apartment door and observed a deceased black female.

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

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

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

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

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

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

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

kitchen for another. Upon returning, Knight saw Hanessia had crawled to the closet door and was drowning in her own blood.

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

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

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

The Penalty Phase

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

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

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

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

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

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

The Spencer FN2 Hearing

FN2. *Spencer v. State*, 615 So.2d 688 (Fla.1993).

The trial court subsequently conducted a *Spencer* hearing on August 18, 2006. At the hearing, the defense submitted the report and deposition of neuropsychologist Dr. Mittenberg who examined Knight but refused to testify at trial. The State submitted the report and

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

Knight v. State, 76 So.3d 879, 881-84 (Fla. 2011). That court denied Knight's motion for re-hearing on December 15, 2011 and issued the mandate on January 3, 2012. 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).

On May 10, 2013 Knight filed his motion for post-conviction relief and the court granted an evidentiary hearing on the ineffective assistance of counsel claims. On March 11, 2014, Knight filed an amended motion. The evidentiary hearing was held on March 27 & 28, 2014. Knight called three witnesses: attorneys Evan Barone and Sam Halpern and the DNA expert Nora Rudin. The State called criminologist Kevin Noppinger. A synopsis of the testimony follows.

Evan Barone ("Barone") has been an attorney since 1978 and has handled over thirty-five (35) capital cases. (PCR 20:283) Barone handled the guilt phase of Knight's trial while Sam Halpern ("Halpern") did the penalty phase. They both discussed strategy for the entire trial and worked together. Their theory was that another person committed the crimes since Knight never admitted to being the perpetrator. (PCR 20:285) When confronted with the jail log showing that Knight had been reprimanded for having a newspaper in his cell, Barone said he would have been interested in knowing about it. He said the information about George Greaves was relevant but that person never testified. (PCR 20:291-93) According to the evidence that came into the trial, Whitsett and Knight spoke in a common area for the inmates, not in any cell. (PCR 20:315) Barone had never seen the memo by Noppinger where he asked to be demoted but he would have wanted to know about it. He did not recall if he tried to find Victoria but thought he must have done. (PCR 20:307-8)

Regarding the DNA evidence, Barone hired Nora Rudin ("Rudin") on the recommendation of the Public Defender's Office and because he had worked with her before. He sent her everything she asked for and provided her with whatever she needed. He communicated with her throughout the preparation for trial and during the trial itself. He spoke to her after McElfresh testified and asked her to

write a second report to encompass the issues raised by that testimony. (PCR 20:297-302) Rudin could not contradict the State's DNA experts' conclusions, nor did she ever suggest to retest any of the samples. Given that, Barone decided not to present her testimony, since it would only bolster the State's case, and, thus, he could preserve the final closing argument for the defense. In a telephone conversation Barone had with Rudin during the trial, she recommended against calling her as a witness. (PCR 20:303-4) He was not aware of any basis to challenge the State's DNA evidence on the basis of Frye and Rudin gave him nothing with which to challenge that evidence. Rudin, in her report, thought McElfresh's testimony was largely inconsequential given the totality of the other DNA evidence linking Knight to the murders. (PCR 20:310-12, 319)

Halpern had been an attorney for thirty years and handled Knight's penalty phase. He worked with Barone in preparing for the entire trial and also worked with Valerie Rivera who was his investigator. They had a break of about two and a half months between the guilt and penalty phase trials. (PCR 20:325-27) He hired a number of mental health experts to prepare mitigation evidence, including a psychologist and a neuropsychologist. Those experts developed a conflict so Halpern then asked the court to appoint Dr. Mittenberg who worked on the case, giving Knight a battery of tests. Halpern also had a MRI and a PET scan done on

Knight to look for brain damage or abnormalities. He also had a doctor conduct a sleep deprived EKG. (PCR 20:329-30)

Halpern crafted his mitigation presentation around Dr. Mittenberg's testimony. He and Rivera met with the doctor several times and discussed the issues in the case and what they wanted to present. They provided him with what Halpern thought appropriate. (PCR 20:330-31) During the penalty phase Dr. Mittenberg imploded and wanted out of the case. The trouble started when he was deposed by the State where he detailed how he had hand-scored a particular test only to tell Halpern during a break that he had in reality used an illegal bootleg computer program. Halpern spoke to him on the Saturday afternoon prior to the Monday the doctor was to testify. Dr. Mittenberg, sounding intoxicated, did not want to participate anymore. Halpern explained that he was crucial to the case and managed to talk him into testifying on Monday. (PCR 20:332-37)

Halpern's strategy for the mitigation presentation was to lay the foundation of Knight's childhood and medical problems with the lay witnesses, then have Dr. Kotler testify about Knight's abnormal PET scan which would then culminate in Dr. Mittenberg putting it all together to explain how the brain damage led to impulsivity and other brain problems Knight had which meant he could not control his actions. The whole plan fell apart when Dr. Mittenberg showed up to

court with an attorney and claimed the fifth due to his use of the illegal program. Halpern made a motion for a mistrial. The court gave him time to find and prepare another expert. Halpern found another doctor to examine Knight and his background material but that doctor was unable to replicate Dr. Mittenberg's findings so Halpern chose not to call him. The State, in the meantime, had gotten its own doctor. Halpern did not consider submitting the deposition of Dr. Mittenberg given his credibility problems in it and that it was inadmissible, but decided to seek another doctor. (PCR 20:335-39, 352-59) Dr. Mittenberg had been recommended to Knight's defense team and gave them a favorable report. Halpern could not change doctors midstream since that part of their case unraveled completely during the trial. He did try to get a mistrial but was given a lengthily recess. The new doctor found no abnormality in Knight's brain so Halpern could not use him. (PCR 20:351-52) Halpern was in an impossible situation given the State's powerful rebuttal witness so he followed the most prudent course and rested having the only expert be Dr. Kotler and his testimony of an abnormal brain. (PCR 20:356-59)

Halpern and Rivera met with Knight's family members a number of times when they went to Jamaica, where they stayed four days, well before the guilt phase trial. Knight's brothers escorted them everywhere, spending everyday with

them. The family was very cooperative, inviting the two into the family home, the school Knight attended, and putting them in touch with his teachers, employers, and friends. Halpern and Rivera gathered all the available documents on Knight's life as well. Noone told them that Knight had been sexually abused. (PCR 20:339-42) Knight's sister said something about Knight being abused but his brother said that did not happen; Halpern would have likely discussed that with Knight himself since they spoke in detail about his childhood and upbringing. Knight was always very pleasant, cooperative, and forthcoming. Halpern repeatedly told him and his family the importance of telling them everything. (PCR 20:343-45) In the four days they spent with the family, noone ever said anything about sexual abuse of Knight or his brother Mark. Mark also never said anything about it to the police when he was interviewed by them. Halpern does not remember Knight ever saying anything about sexual abuse which, if he had, Halpern would have definitely followed it up if there were anything there. (PCR 20:347-48, 363) Halpern discovered Knight had been bullied at school and he had a bad temper. (PCR 20:348-49)

Rudin was the next witness. She is an expert in forensic DNA analysis and was retained as an expert on this case. (PCR 21:371-73) She has had an on-going problem with the Broward Sheriff's Department crime laboratory with it not

providing all the data and notes for their DNA analysis. She spoke with Noppinger who clarified some of the issues she had about the notes and data. (PCR 21:376-77) She wrote two reports on this case, the last being written on April 28, 2006 where she addressed the testing done by Noppinger and the analysis done by McElfresh. While she agreed with Noppinger's work, she had some concerns with the duplicate numbering, missing information, and the difficulty in determining from where the samples came. Noppinger seemed to rely on his memory and context rather than on contemporaneous documentation, which also concerned her. (PCR 21:379-82)

Barone called her after McElfresh testified. McElfresh's conclusions were at odds with those of his laboratory and he failed to write a report on his analysis, both of which were very unusual in the field. It is standard practice in the field to have a written report which can be peer reviewed. McElfresh looked at the two samples taken from the waist areas of a pair of shorts and a pair of boxers. His analysis was backwards, taking the known profile and seeing if any of its alleles were present in the sample; that procedure is scientifically unsound and misleads the jury, problems compounded by the lack of a statistical context. By that improper method, one inherently biased and not scientifically acceptable, McElfresh concluded that the one odd allele out came from Knight. (PCR 21:348-

93) McElfresh's testimony was, however, "relatively inconsequential" given the remainder of the DNA evidence. (PCR 21:394-95) Barone discussed having her testify through a video feed several times. (PCR 21:396)

Noppinger was the last witness. He was a forensic DNA expert in testing and analyzing DNA samples. The Broward crime lab was accredited with a separate quality assurance program as well. (PCR 21:413-14) At some point, he wrote a memo requesting a demotion from a supervisory position due to a personality conflict with the new quality assurance officer. They had a serious disagreement over which new DNA profiling kit the lab should purchase in order to meet the new FBI guidelines for the national database. Nothing in that disagreement affected the quality of the lab's practices or procedures. (PCR 21:415-17)

He did the DNA testing in this case and there was no contamination. (PCR 21:414) He had to renumber various samples the sheriff deputies had placed into evidence because each time they arrived with a group of samples they had started each new group with the number one. He explained that to Rudin and answered all of her questions, informing her of the location of each sample. She never indicated that she had any questions that he had not sufficiently answered. (PCR 21:418-19) Noppinger agreed that written reports are standard in the field and that an analyst

cannot assign a contributor except for intimate samples taken from a victim. (PCR 21:423-33)

After hearing the evidence and considering the written argument from both sides, the post-conviction court denied relief in a written order. (PCR 7:1283-1329). This appeal followed.

SUMMARY OF THE ARGUMENT

I. Trial counsel was not ineffective for deciding not to call his DNA expert when that expert agreed with the results of the State's DNA testing and would have only quibbled about a couple of minor issues with the procedures the State's experts used. Further, there was no basis to challenge the DNA evidence as a whole to a Frye hearing nor would such a hearing have been successful. The memorandum written by Noppinger was not material to the trial and couls not have been used for impeachment so the State had no duty to give it to the defense. Counsel was not ineffective for not investigating the jail log in order to impeach Whitsett with the availability newspaper in the jail, especially given the detailed information Whitsett had about the crimes. Finally, the State had no duty to turn over information about George Greaves's attempt to fabricate a confession by Knight, drawn from news reports, given that it was not material to the case

and could not have been used to impeach Whitsett. Knight also failed to prove the necessary prejudice.

II Counsel was not ineffective in the penalty phase of the trial since he conducted a thorough investigation into the available mitigation, hired mental health experts to assess Knight, and presented all the pertinent information to the jury. Knight also failed to prove the necessary prejudice.

III The rules regarding the interviewing of jurors is constitutional.

IV Florida's lethal injection protocol is constitutional.

ARGUMENT

I

COUNSEL WAS NOT INEFFECTIVE IN THE GUILT PHASE TRIAL. (Restated)

Knight asserts that the post-conviction court improperly denied him relief for the failures of his trial counsel failed to investigate and to prepare his guilt phase trial. He contends that trial counsel, while engaging and consulting with a DNA expert, failed to adequately challenge the State's DNA evidence by both not calling the expert to testify and not demanding a hearing pursuant to Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) to challenge the State's DNA evidence. He further argues that the State violated Brady v. Maryland, 373 U.S. 83

(1963) for not turning over a Sheriff's Department internal personnel memorandum written by Noppinger, alleging that it could have provided impeachment to either or both Noppinger and the Broward Sheriff's Department crime laboratory. Knight also contends that trial counsel was ineffective for not adequately investigating the circumstances in the jail in order to impeach Whitsett regarding the availability of newspapers in his area or, in the alternative, that the State violated Brady by not disclosing the jail log to the defense so Knight could impeach Whitsett with the newspaper. The lower court properly denied all of these claims and the record from the evidentiary hearing fully supports that decision.

Following the United States Supreme Court's decision in Strickland v. Washington, 466 U.S. 668 (1984), this Court has held that the defendant must demonstrate both deficiency and prejudice in order to prove claims of ineffective assistance of counsel.

> First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined.

Bolin v. State, 41 So.3d 151, 155 (Fla.2010) (quoting Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla.1986)).

> There is a strong presumption that trial counsel's performance was not deficient. *See Strickland*, 466 U.S. at 690, 104 S.Ct. 2052. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689, 104 S.Ct. 2052. The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* "[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Occhicone v. State*, 768 So.2d 1037, 1048 (Fla.2000). Furthermore, where this Court previously has rejected a substantive claim on the merits, counsel cannot be deemed ineffective for failing to make a meritless argument. *Melendez v. State*, 612 So.2d 1366, 1369 (Fla.1992).
>
> In demonstrating prejudice, the defendant must show a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

Johnston v. State, 63 So.3d 730, 737 (Fla.2011) (parallel citations omitted).

> Because both prongs of the *Strickland* test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing the circuit court's legal conclusions *de novo*.

Shellito v. State, 121 So. 3d 445, 451 (Fla. 2013) (citing Mungin v. State, 79 So. 3d 726, 737 (Fla. 2011); Sochor v. State, 883 So. 2d 766, 771-72 (Fla. 2004)).

Failure to present Dr. Rudin.

Knight alleges that his counsel should have called Rudin to counter the testimony of the State's expert DNA witnesses. He asserts, without foundation, that Dr. Rudin's testimony would have wholly undermined the State's scientific evidence and that counsel could not have had an strategy for a decision not to call her given the last minute change in McElfresh's conclusions.

The lower court made the following factual findings:

> A. Ineffective assistance of guilt phase counsel for failing to present Dr. Rudinas a defense witness at trial
>
> In this subclaim, Defendant alleges that guilt phase counsel, Evan Baron, without a reasonable tactical or strategic decision, failed to present at trial Dr. Rudin's testimony regarding the State's DNA evidence. He alleges that Dr. Rudin would have been able to completely undermine the State's scientific case, in particular, the testimony of Dr. Kevin McElfresh with Bode Technology. Defendant argues that Mr. Baron's failure to call Dr. Rudin as an expert witness for the defense constituted deficient performance and he was prejudiced because there is more than a reasonable probability that had Dr. Rudin testified the outcome would have been different.
> ...
> After carefully considering the testimony presented during the evidentiary hearing and the trial record in light of these principles, this Court finds that Defendant failed to prove that guilt phase counsel was ineffective for not calling Dr. Rudin as a witness at trial. Contrary to Defendant's assertion, Mr. Baron clearly made a strategic decision not to call Dr. Rudin to testify. During the evidentiary hearing, Mr. Baron testified that his theory of defense at trial was that Defendant was not the person who committed the crimes. (EH6 Vol. 1 at 20). To challenge the State's DNA evidence, Mr. Baron hired Dr. Rudin. (EH Vol. 1 at 32).

Mr. Baron was expecting the State's DNA analyst, Kevin Noppinger, to testify about most of the DNA analysis in the case. (EH Vol. 1 at 32). Mr. Baron recalled that Mr. Noppinger could not include Defendant as a contributor to samples from two important pieces of evidence, i.e., the waistband of the jean and boxer shorts found under the sink, in the bathroom connected to Defendant's bedroom. (EH Vol. 1 at 40). Mr. Noppinger's results were corroborated by Faith Love Patterson with Bode Technology. (EH Vol. 1 at 41). Dr. Rudin reviewed Mr. Noppinger's work, drafted a report, and helped Mr. Baron prepare for his cross-examination of the State's DNA experts. (EH Vol. 1 at 32, 33).

However, Mr. Baron testified that at trial the defense was taken by surprise by Dr. McElfresh's testimony, who had a different interpretation of the DNA profiles on the waistband of the jean and boxer shorts than the one in the initial report issued by Bode Technology. Dr. McElfresh's interpretation included Defendant's DNA profile in the mixture. (EH Vol. 1 at 33). Dr. McElfresh came to this conclusion after a standard DNA sample of Defendant's girlfriend at the time, Victoria Martino, was added to the mix. (EH Vol. 1 at 42-43). Due to this new development, Mr. Baron moved for a mistrial. The motion for mistrial was denied, but the trial court granted a recess for defense counsel to confer with Dr. Rudin regarding Dr. McElfresh's testimony. (EH Vol. 1 at 35, 46).

Mr. Baron testified that prior to Dr. McElfresh's testimony, he did not intend to call Dr. Rudin as a witness, because she had indicated that she could not assist the defense, as her opinion was not different from that of the State's experts. (EH Vol. 1 at 37-38). Mr. Baron recounted that he had a telephone conversation with Dr. Rudin and asked her the specific question whether she would call herself as a witness if she were the defense counsel. Her response was that she would not, because she could not be helpful. (EH Vol. 1 at 39, 48). In making the decision not to call her as a witness, Mr. Baron weighed the option of having an expert testify that would corroborate the State's case and that of preserving the closing argument "sandwich." (EH Vol. 1 at 38, 47). He chose the latter because he did not think that 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. (El-l Vol. 1 at 38, 47).

On cross-examination, Mr. Baron testified that after reviewing the transcript of Dr. McElfresh's testimony, Dr. Rudin informed him that she agreed with his 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).

The trial transcript also reflects that defense counsel's strategy was to preserve the benefit of giving an initial closing argument and a rebuttal closing argument, at the expense of limiting the presentation of evidence. (Supp. ROA Vol. 27 at 227-231). This Court finds the strategy reasonable in light of the procedural rules in force at the time of Defendant's trial. *See Evans v. State*, 995 So. 2d 933, 945 n.16 (Fla. 2008) (finding reasonable trial counsel's decision to take into consideration the possibility of having both the opening and rebuttal closing arguments by not presenting any evidence). Furthermore, the trial record reflects that Defendant agreed with trial counsel's strategic decision not to call Dr. Rudin as a witness. (Suppl. ROA Vol. 27 at 223-31). Therefore, Defendant did not prove deficient performance.

Although case law is clear that "when a defendant fails to make a showing as to one [*Strickland*] prong, it is not necessary to delve into whether he has made a showing as to the other prong," *Preston v. State*, 970 So. 2d 789, 803 (Fla. 2007) (quoting *Whitfield v. State*, 923 So. 2d 375, 384 (Fla. 2005)), this Court also finds that Defendant failed to show any prejudice under *Strickland*.

During the evidentiary hearing, Dr. Rudin testified via videoconference that she would have been available to testify at trial and that she would have testified consistent with her reports regarding Mr. Noppinger's testing and Dr. McElfresh's interpretation of the data. (EH Vol. 2 at 118, 127). Regarding the testing performed by Mr. Noppinger, Dr. Rudin testified that she agreed with his nominal conclusions, but she had some concerns regarding the quality of the work such as duplicate numbering, and the quality of the laboratory notes describing the preliminary documentation, examination, and testing of the evidence. (EH Vol. 2 at 114-15, 139; Defense Exhibit 6). Although Mr. Noppinger helped her understand the numbering, she was not convinced that she had the exact history and source of each DNA sample. (EH Vol. 2 at 115-16). Her concern

was that Mr. Noppinger seemed to rely on memory and contextual information when he helped her understand what piece of evidence his analysis referred to. (EH Vol. 2 at 117; Defense Exhibit 6). She explained that the results of a DNA analysis are irrelevant if the samples from which the DNA was collected are unknown, and that in this case, her confidence in the results was lessened by the labeling problem. (EH Vol. 2 at 116-17). During cross-examination, Dr. Rudin acknowledged that she did not disagree with Mr. Noppinger's results and that his report was peer reviewed by someone else in the BSO crime lab. (EH Vol. 2 at 136).

Dr. Rudin further testified that Mr. Baron contacted her while the trial was ongoing and asked her to review Dr. McElfresh's testimony. After reviewing the testimony, she prepared another report for Mr. Baron that contained all the information in her previous report in addition to her analysis of Dr. McElfresh's interpretation of the data. (EH Vol. 2 at 118, 120, Defense Exhibit 6). According to Dr. Rudin, Dr. McElfresh's testimony was at odds with the report previously issued by Ms. Love Patterson. (EH Vol. 2 at 120-21). They came to different conclusions based on the same data. (EH Vol. 2 at 121). After receiving an additional reference sample for Victoria Martino, Dr. McElfresh was able to include Defendant as one of the contributors to the sample from the jean and boxer shorts found under the sink in Defendant's bathroom. (Defense Exhibit 6). Dr. Rudin testified that to her knowledge, nobody else from Bode had reviewed Dr. McElfresh's interpretation of the data and he had not issued a report, which was unusual for an accredited lab. (EH Vol. 2 at 121, 123). In Dr. Rudin's opinion, Dr. McElfresh's use of a known sample to interpret an evidence sample was misleading and unsupported scientifically. (EH Vol. 2 at 126-27, 128).

This Court finds that even if Dr. Rudin had testified at trial, there is no reasonable probability that the outcome of the proceedings would have been different. *See Strickland*, 466 U.S. at 694. Dr. Rudin's testimony at trial would have been consistent with her report. Notwithstanding the issues Dr. Rudin had with the analysis performed by Mr. Noppinger and with Dr. McElfresh's interpretation of the data, the "Summary" section of her April 28, 2006 report, states that she "generally agreed with the nominal conclusions presented in the DNA reports did not detect any substantive errors that would have changed the conclusions made by the laboratory and

the potential impact of McElfresh's testimony-at trial was minimal when considered within the totality of the evidence." (Defense Exhibit 6 at 1). Furthermore, the trial record reflects that Mr. Baron thoroughly cross-examined Mr. Noppinger as to his numbering and labeling system, and pointed out that a few items of evidence were missing from his report and were not tested. (ROA Vol. 28 at 3094-95, 3100-O3).

In addition, even if Dr. McElfresh's analysis regarding the DNA profile on the boxer and blue jean shorts would have been completely undermined by Dr. Rudin's testimony, as alleged by Defendant in his motion, the State presented an abundance of evidence connecting Defendant to the murders of Odessia and Hanessia. Defendant lived in the same apartment with Odessia, Hanessia, and Hans Mullings. He had ongoing disagreements with Odessia, partly because he was not paying rent. (ROA Vol. 24 at 2590, 2593, 2600-03; 2006-07). According to Trudi Edmond, who had a telephone conversation with Defendant between 11:11 p.m. and 11:30 p.m. on the night of the murders, Defendant was in the apartment that evening, cooking and watching Hanessia. (ROA Vol. 23 at 2525-34). According to the neighbor who called 911 on the night of the murders, the murders occurred around midnight and the police arrived at 12:29 a.m. (ROA Vol. 21 at 2241-72; 2275; 2322). Shortly thereafter, Defendant arrived at the scene. Although it was not raining outside, his clothes and hair were wet as if he had taken a shower. His explanation that he went for a run was not really credible, given that he was wearing a dress shirt, a pair "of slacks, and unbuckled dress shoes. (ROA Vol. 21 at 2285-87.; 2342).

When he was arrested, Defendant had a scratch on his chest, a scrape on his shoulder, and fresh cuts on his hands, consistent with being injured while stabbing the victims. (ROA Vol. 25 at 2735-37; Vol. 27 at 2943-46). There was blood on the shirt he was wearing, on the boxer shorts, the inside waistband of Defendant's jeans, and on a ten-dollar bill in his possession. (ROA Vol. 27 at 2940; 2946-47; 2951). The boxer shorts worn by Defendant when arrested were the same brand and size as the ones found under the sink in Defendant's bathroom, and had Odessia's blood on them. (ROA Vol. 25 at 2738-42; Vol. 27 at 2958; 3012; 3025). The boxers that were found under the sink in Defendant's bathroom had Defendant's, Odessia's, and Hanessia's blood on them. (ROA Vol. 27 at 3007-13; Vol. 31 3302).

> The shirt that was found under the sink in Defendant's bathroom had two different blood stains from Odessia, and a mixed DNA profile from which Defendant and Odessia could not be excluded. (ROA Vol. 27 at 3014-15; Vol. 31 at 3312). The jean shorts found in Defendants bathroom had Odessia's and Hanessia's DNA profile on them. (ROA Vol. 27 at 3015-18). The shirt that Defendant was wearing when arrested had a mixture of Defendant's and Odessia's DNA on it. (ROA Vol. 27 at 3024-25). The statistical analysis of the results showed that the DNA results were 99% accurate. (ROA Vol. 29 at 3135-81). The crime scene investigators also recovered two (2) wet towels from Defendant's bedroom. (ROA Vol. 22 at 2414). Scrapings taken from Odessia's right fingernails contained Defendant's DNA profile. (ROA Vol. 28 at 3034-36). Swabs from Defendant's left hand contained Odessia's DNA profile. (ROA Vol. 28 at 3031-32).
>
> While in jail, Defendant gave a detailed statement to Steven Whitsett, who was housed in the same unit with him, about how he committed the murders." Defendant also drew for Whitsett a diagram of the apartment, pinpointing the location of the victims' bodies. (ROA Vol. 27 at 2959). In light of all this evidence connecting Defendant to the murders, there is no reasonable probability that the outcome would have been different, had Dr. Rudin been called to testify at trial.

(PCR 7:1291-99) The record from the evidentiary hearing clearly supports the court's determination that Knight failed to prove deficient performance and the record from the trial supports the finding that, given the overwhelming evidence of his guilt, he failed to demonstrate any prejudice.

Knight failed to show deficient performance. In Attachment D to his motion, Knight presented a report by Rudin in which she criticized some of the practices of the Broward Crime Laboratory for not providing information that

would save the defense time in its analysis as well as other issues that did not go to the integrity of any of the scientific findings. The majority of her report was critical of McElfresh's analysis of the samples from the waistbands of the boxer and shorts. Importantly, however, Rudin did not reach *any* substantive conclusions which differed from those that the State presented. On the first page of the report, Rudin stated:

> ... I generally agreed with the nominal conclusions presented in the DNA reports. I did not detect any substantive errors that would have changed the general conclusions made by the laboratory. ...
> The testimony presented by Kevin McElfresh was misleading .... Even so, the potential impact McElfresh's testimony at trial was minimal when considered within the totality of the evidence.

(PCR 3:501-507). Dr. Rudin concluded her report, after detailing her criticisms of McElfresh and the Broward Crime laboratory, by writing, "Nevertheless, from the information I received, I did not detect any substantive or significant errors that would change the ultimate conclusions proffered by Mr Knoppinger (sic) regarding the possible source(s) of each sample." Id. Trial counsel, consequently, had an expert witness who, if called, would say that the State's experts were correct in their analysis of the various samples of the DNA other than one sample used solely for identification of who wore the shorts in the past; if counsel had called Rudin, he would have only bolstered the State's case by validating its DNA

evidence. The testimony at the evidentiary hearing confirmed this. Rudin agreed with Noppinger's results and would have so testified. (PCR 21:380, 392, 401-2) Barone contacted her after McElfresh's testimony which resulted in her second report criticizing McElfresh's analysis. (PCR 21:379, 386-402) Rudin thought McElfresh's conclusions were "relatively inconsequential" given the wealth of the other DNA evidence, undermining any argument for prejudice in not calling her as an expert. (PCR 21:394-95)

Furthermore, trial counsel clearly deliberated whether or not to call Rudin after McElfresh testified and made a strategic decision not to call her. Barone testified that he had both email and telephonic consultations with her after that testimony, which resulted in both her April 28 report and in her telling him that she could not help his defense. (PCR 20:300-3,311-13) Counsel spoke to Knight at length about this decision, going over both the positive and negative consequences of having her testify. Counsel put on the record that the defense was making a strategic decision in not calling her. The trial court questioned both counsel and Knight about this decision and took a waiver from Knight on this issue. (SR. 27/223-35) Since this was a considered strategic decision, Knight is not entitled to relief by alleging ineffective assistance of counsel. Asay, 769 So. 2d at 984 ("The defendant bears the burden of proving that counsel's

representation was unreasonable under prevailing professional standards and was not a matter of sound trial strategy."); See Patton v. State, 784 So. 2d 380 (Fla. 2000); Cherryv. State, 659 So. 2d 1069 (Fla. 1995). Knight failed to carry his burden of showing deficient performance at the evidentiary hearing.

Knight also failed to show prejudice. A review of the DNA evidence brought out at trial reveals why Rudin would not have assisted the defense and why Knight failed to meet the necessary prejudice prong under Strickland. The State presented evidence tying Knight to the murders of Odessia Stephens and Hanessia Mullings through the testimony of Noppinger and McElfresh as well as Bode's statistical analyst. Odessia's blood was also discovered on Knight's boxers, shirt, jean shorts, the clothing Knight had been wearing when arrested, and his hand. Fingernail scrapings taken from Odessia contained Knight's DNA profile. Hanessia's blood was found on one of the knives, on Knight's boxers, jean shorts, and on the shower curtain. The front of the boxers from under the sink had either one or both Hanessia's and Odessia's blood on them in a number of different locations. On the back, there were spots containing Knight's and Odessia's blood and then spots with the blood from the two females. It is important to note that these boxers are the ones Knight now focuses on regarding the ownership sample taken from skin cells on the waist band. Even if Knight were excluded from that

one spot, the boxers had both victim's blood as well as Knight's on them. These boxers were the same brand as those Knight was wearing when he was arrested. The shirt in the bathroom had Odessia's blood on both the front and the back. (T 27:3007-14, 3023, 31:3300-012) The jean shorts had both Odessia's and Hanessia's blood on them in various spots. (T 27:3016-19, 31:3313) All three knives had Odessia's blood on them and the third had Hanessia's blood on it. (T 27:3021) The clothes Knight was wearing *when he was arrested* also had blood on them. Inside the jeans the criminalist found Knight's blood. The t-shirt had three separate spots of blood on it. One of the spots had mostly Knight's blood but also had a profile consistent with Odessia's. *The boxers he was wearing also had a spot with a mixture of his and Odessia's blood.* (T 27:3023-30) A swab taken from Knight's hand showed a mixture of his and Odessia's blood. The fingernail scrapings taken from Odessia showed DNA from Knight. (T 27:3031-34) The populations statistical analysis of the results indicated that the DNA matches were generally 99.9 % accurate. (T 29:3131-81, 31:3322-3390) Given this wealth of DNA evidence linking Knight with the murders, counsel cannot be deemed ineffective for not calling Rudin to agree with it.

All the DNA from the blood samples and the fingernails pointed to Knight's culpability from the murders. Furthermore, in addition to the evidence

detailed above, the State presented overwhelming evidence of Knight's guilt. Knight was living in the apartment and had an ongoing disagreement with Odessia. (T 23:2555-57, 2600-01; 24:2589-92, 2600-01, 2606-7, 2699-2701) He was in the home that night around 11:30 P.M. with Hanessia playing in the apartment as evidenced by the telephone call with Edmonds. (T 23:2524-45) The murders happened around midnight. Mullings was at Kinko's around the time Parisi heard the noise and crying in the apartment below hers; the time on both the video tape and register receipt verify this. Parisi's 911 call came in at 12:21 A.M. and the police arrived by 12:29 A.M.. (T 21:2240-72, 2274-75) Knight showed up at the scene within minutes with wet hair and clothes. (T 21:2340-42, 2346) Two wet towels were found in his bedroom which also had its window open and the blinds outside the window as if someone had exited the apartment that way. His clothes, covered in the blood of both victims as well as his own, were in a pile under the sink in the bathroom he used. He also had the same mixture of blood on the clothes he was wearing as well as a dirt mark on the back of his shirt consistent with rubbing against the window as he exited. He had cuts on his hand consistent with being injured while stabbing. Finally, he asked Whitsett to help him with his problems with the blood evidence. In seeking that assistance, he drew the diagram of the apartment including the locations of the attacks and the

bodies while he explained how the murders occurred. (T 29:3208-122, 30:3267-69) Knight failed to carry his burden under Strickland and this Court should affirm the denial of relief.

"Withheld" Alleged Impeachment Evidence of Noppinger

Knight's next sub-issue regards an internal memorandum written by Noppinger requesting a demotion which was addressed to the commander of the Broward Crime Lab. Knight argues that this document should have been disclosed by the State, claiming that it contained favorable material to the defense. He argues that this information would have provided the defense with impeachment and the State's withholding of it violated Brady. This information, regarding an internal personnel reassignment in 2002, is not Brady material, is not impeachment, and is not relevant to Knight's trial. Knight failed to prove any aspect of this claim at the evidentiary hearing so the trial court properly denied it.

The standards applicable to the Brady aspect of this claim are as follows. First, to establish a Brady claim, the defendant must show that the evidence was material and favorable. Next, he must show that the State willfully or inadvertently withheld it. Finally, he must show that he was prejudiced by the State's withholding of the favorable evidence. Strickler v. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936 (1999). To prove prejudice, the defendant must

demonstrate "a reasonable probability that had the suppressed evidence been disclosed, the jury would have reached a different verdict. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Rhodes v. State, 986 So.2d 501, 508 (Fla.2008) (quoting Green v. State, 975 So.2d 1090, 1102 (Fla.2008)); see Strickler, 527 U.S. at 290, 119 S.Ct. 1936 ("[T]he question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' " (quoting Kyles v. Whitley, 514 U.S. 419, 435, 115 S.Ct. 1555 (1995))). The evidence is material "if there is any reasonable likelihood" that it "could have affected" the jury's verdict. Id. at 506 (quoting United States v. Agurs, 427 U.S. 97, 103, 96 S.Ct. 2392 (1976)).

After the evidentiary hearing, the post-conviction court found the following:

> B. The State withheld impeachment evidence regarding its DNA expert witness, Kevin Noppinger.
>
> In the instant subclaim, Defendant alleges that the State committed a *Brady* violation by not disclosing to trial counsel or collateral counsel a memorandum written by Mr. Noppinger. In the memorandum dated July 29, 2002, Mr. Noppinger requested a reclassification from technical manager of the DNA section of the BSO crime lab to a DNA analyst. Collateral counsel became aware of the existence of the memorandum in another case. Defendant also raises a one sentence ineffective assistance of counsel claim, arguing that to the extent trial counsel was, or should have been aware of the existence of the memorandum, he was ineffective for failing to discover and utilize it.

...

During the evidentiary hearing, Mr. Baron testified that he did not recall seeing the memorandum written by Mr. Noppinger until collateral counsel provided him with a copy. (EH Vol. 1 at 42). Mr. Baron stated that he would have wanted to know about the information contained in the memorandum prior to cross-examining Mr. Noppinger at trial. (EH Vol. 1 at 42). On cross-examination, Mr. Baron testified that he had briefly read the memorandum and it seemed that Mr. Noppinger requested a reclassification. 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 48-49). To the contrary, the defense expert agreed with Mr. Noppinger's findings. (EH Vol. 1 at 49).

The State called Mr. Noppinger as a witness. Mr. Noppinger explained that the reason for requesting a reclassification was personal. (EH Vol. 2 at 150). The lab had recently hired a quality assurance officer with whom Mr. Noppinger had differences of opinion that made Mr. Noppinger's job stressful. (EH Vol. 2 at 150). Mr. Noppinger was trying to get approval for a new DNA profiling kit, which was the reason for disagreement between him and the quality assurance officer. (EH Vol. 2 at 150-51). The memorandum, which was introduced into evidence as Defense Exhibit 3, reflects that Mr. Noppinger was concerned about the inability of the BSO crime lab to upload DNA profiles into a national database to solve cold cases. (EH Vol. 1 at 13-14; Defense Exhibit 3). Nothing in the memorandum indicated any problem with the techniques, protocol, or testing that "he did at the BSO lab, and there was nothing in the memorandum specific to the DNA testing he did in the instant case. (EH Vol. 2 at 152-53; Defense Exhibit 3).

This Court finds that Defendant failed to establish the first prong for proving a Brady violation by the State. The information contained in the memorandum was not favorable to Defendant, because it did not contain exculpatory or impeaching evidence. The reason for Mr. Noppinger's request for reclassification was personal and had nothing to do with his ability to perform the DNA analysis in Defendants case. Moreover, Defendant's own expert agreed with the nominal conclusions of Mr. Noppinger's testing. Mr. Noppinger's concern was with the inability of the BSO crime lab to upload DNA profiles into a national database to solve cold cases. Defendant's case

> was not a cold case and the BSO was not trying to solve the case by comparing the sample DNA to the national database.
>
> However, even assuming that the memorandum had some limitted value for impeachment purposes, Defendant failed to establish prejudice for purposes of proving a Erviolation. As discussed above," the State presented an abundance of evidence connecting Defendant to the murders of Odessia and Hanessia. 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.
>
> This Court further finds legally insufficient Defendant's ineffective assistance of counsel claim for failure to discover and use Mr. Noppinger's memorandum. gee *Foster v. State*, 810 So. 2d 910, 915 (Fla. 2002) (noting that the defendant devoted only one sentence to his ineffective assistance of counsel claim, stating: "To the extent trial counsel failed to discover and litigate this issue, Defendant was denied effective assistance of counsel"; and finding that the postconviction court properly denied the claim without an evidentiary hearing, because the defendant failed to allege specific facts that would demonstrate a deficiency on the part of counsel which resulted in prejudice to the defendant.

(PCR 7:1299-1302). The record from the trial and the evidentiary hearing supports those findings.

Without support, Knight claims this document would have impeached Noppinger, that its mere existence would have allowed the jury to assign less weight to his testimony. The evidence does not support that conclusion. Noppinger testified that he wrote the memo solely due to a personality conflict with a new quality control officer over a disagreement about buying a new DNA profiling kit; it had no bearing whatsoever on the work quality of the lab or the

testing and analysis in this case. (PCR 21:415-17) As the document itself shows, Noppinger was concerned, in 2002, about the crime lab's inability to upload DNA profiles into a national data base in order to solve cold cases. He was concerned about the procedures and internal protocols the lab used to get access to the national databases and which personnel within the lab would have final say in determining how the lab would get its samples into that database.

Knight's case and trial was not a "cold case" that the crime lab was trying to solve by comparing the sample DNA to the national database to get identifying information. Here, the crime lab, the State, and the defense had all the individuals' profiles as well as the samples needed to do the necessary comparisons. Knight failed to show that this document was material or even favorable. His counsel could not have impeached Noppinger with the memorandum since it in no way called his methods or expertise into question. The jury heard his expertise and status in the crime lab at the time of his analysis and testimony; this document would not have altered either. The document had no bearing on the quality of work the crime lab did in ordinary current cases like Knight's. Knight's own expert agreed with the overall conclusions, save for the single one by McElfresh, of the crime lab and Bode. This memorandum is completely irrelevant and would not have been admissible at Knight's trial. There was no way its existence could

have possibly affected the jury's verdict. Knight did not show that the State, other than the personnel department of the crime lab, was aware of its existence.

Finally, there is no reasonable probability that this document would have undermined the confidence in the outcome of the trial as is required to show prejudice in a Brady claim. The State respectfully incorporates the synopsis of the trial evidence made above into this section to argue that the outcome of the trial, given the totality of the evidence, would not have differed with the introduction of this evidence even if it were relevant. Additionally, Knight did not demonstrate how his counsel was deficient nor has he shown prejudice given the overwhelming nature of all the evidence against him at trial. Relief was properly denied.

Failure to request a Frye hearing.

Knight next argues that counsel was ineffective in failing to request a Frye hearing on the admissibility of the DNA evidence given the criticisms by his own expert as well as the Noppinger memorandum even though neither counsel or the State was aware of its existence. He concludes, without specifying how, that the hearing would have excluded as a matter of law all the testimony regarding the DNA. Knight failed to meet the Strickland burden at the evidentiary hearing to

demonstrate either deficient performance or prejudice so the lower court properly denied it.

To establish that counsel provided constitutionally ineffective assistance under Strickland a defendant first must identify specific acts or omissions of counsel that are "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland at 687, 104 S.Ct. 2052. The defendant also must establish prejudice by "show[ing] that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S.Ct. 2052. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." Id.

At the time of the trial, courts in Florida followed the test set out in Frye v. United States, 293 F. 1013 (D.C.Cir.1923). "This test requires that the scientific principles undergirding this evidence be found by the trial court to be generally accepted by the relevant members of its particular field." Hadden v. State, 690 So.2d 573, 576 (Fla.1997). Courts should only utilize the Frye test in cases of new and novel scientific evidence. See, U.S. Sugar Corp. v. Henson, 823 So.2d 104 (Fla.2002); Brim v. State, 695 So.2d 268, 271-72 (Fla.1997). "By definition, the Frye standard only applies when an expert attempts to render an opinion that is

based upon new or novel scientific techniques." U.S. Sugar, 823 So.2d at 109 (citing Ramirez v. State, 651 So.2d 1164, 1166-67 (Fla.1995)). Not all expert testimony must meet the Frye test in order to be admissible. See Flanagan v. State, 625 So.2d 827, 828 (Fla. 1993). On remand, a court should consider whether the scientific principle or discovery is generally accepted at the current time, rather than whether it was generally accepted at the time of the trial. See Brim, 695 So.2d at 275; Hadden, 690 So.2d at 579.

The post-conviction court made the following findings on this issue:

> C. Ineffective assistance of guilt phase counsel for failing to request a *Frye* hearing.
>
> In the instant subclaim, Defendant argues that guilt phase counsel unreasonably failed to request a *Fyre* hearing, notwithstanding the issues associated with the DNA testing performed by Mr. Noppinger and the interpretation of data by Dr. McElfresh. Defendant argues that had trial counsel requested a Fyre hearing, there is more than a reasonable probability that the trial court would have had no choice but to exclude the scientific evidence in this case and therefore, the State's case would have been gutted.
>
> ... As explained by the Florida Supreme Court, "DNA results are generally accepted as reliable in the scientific community, provided that the laboratory has followed accepted testing procedures that meet the *Frye* test to protect against false readings and contamination." *Overton*, 976 So. 2d at 550 (citing *Haynes v. State*, 660 So. 2d 257, 264-65 (Fla. 1995)).
>
> Based on the evidence presented during the evidentiary hearing, this Court finds that Defendant did not prove deficient performance of guilt phase counsel for failure to request a Frye hearing. Both Mr. Baron and Mr. Noppinger testified that the Preliminary Chain Reaction (PCR) and the Short Tandem Repeats (STR) techniques were generally accepted in the scientific

community at the time of Defendant's trial. (EH Vol. 1 at 45; Vol. 2 at 146-43).

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. During the evidentiary hearing, Mr. Baron acknowledged that Dr. Rudin's report was critical of the quality of Mr. Noppinger's work, more specifically of his labeling practices, quality control, and sampling identification issues. (EH Vol. 1 at 39). However, contrary to Defendant's allegation, this Court finds 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.

Mr. Noppinger testified that when he did the DNA testing in this case, the BSO lab was accredited by the American Society of Crime Lab Directors (ASCLD), and he was -following the quality assurance program in place at the time. (EH Vol. 2 at 149). His reports in this case were peer reviewed by a second qualified DNA analyst. (EH Vol. 2 at 149, 158-59).

Regarding the labeling of the evidence in this case, Mr. Noppinger explained that he received multiple submissions from the BSO on various days and each day the property receipts for the evidence submissions would start with number one. (EH Vol. 2 at 153). Because that led to duplicate numbers, he could not use the BSO's numbers, so he had his own labeling system that met the lab's protocols. (EH Vol. 2 at 153-54).

Mr. Noppinger testified that he turned over to Dr. Rudin his laboratory notes as soon as he had a court order. (EH Vol. 2 at 153). He recalled that he was in contact with Dr. Rudin mostly via e-mail, he responded to her questions about the location of the samples, and he believed he was able to answer all her inquiries. (EH Vol. 2 at 154-55). He could not remember any issues Dr. Rudin had with his hand written notes. (EH Vol. 2 at 156).

Although Dr. Rudin was also critical of Dr. McElfresh's analysis of the DNA data, Defendant did not raise any issues that would call into question the . scientific admissibility of the DNA testing performed by Bode Technology. The trial record reflects that Dr. McElfresh did not perform any DNA testing in the case, nor did he calculate the statistical probabilities related to the inclusion of Defendant's DNA profile in the mixture found on the boxer and

> jeanlshorts. (ROA Vol. 31 at 3376-83). He merely relied on the data obtained by Mr. Noppinger and Ms. Love Patterson. Regarding Ms. Love Patterson's report, Dr. Rudin testified during the evidentiary Shearing that it was technically and administratively reviewed and it followed the normal protocols that any accredited and qualified lab would do. (EH Vol. 2 at 122-23). Therefore, there was no basis to exclude the results obtained by Mr. Noppinger, Dr. McElfresh, and Ms. Love Peterson.

(PCR 7:1304-4). Again, the record supports these conclusions.

Knight failed to show that the testimony in question was new or novel, thereby requiring a Frye hearing. DNA evidence is neither and has been admissible throughout the state and the nation for decades. Overton v. State, 976 So. 2d 536, 550 (Fla. 2007) (citing Haynes v. State, 660 So. 2d 257, 264-65 (Fla. 1995)). Noppinger testified that the DNA testing methods he used have been standard in the field since approximately 1986 and were generally accepted in the scientific community. (PCR 21:411-13) Rudin's qualms about McElfresh's opinion on an individual sample and her minor criticisms about the way the Broward Crime Lab produced its reports and data to the defense do not call into question the scientific admissibility of DNA evidence. Knight points to no piece of information that would support the trial court granting a Frye hearing as to all the DNA evidence. As noted in the first sub-section of this claim and incorporated here, Rudin agreed with the conclusions of both the crime lab and Bode in their identifications of the sources for the samples with the *only* exception being from

the waistband sample. (PCR 21:380-82, 391, 401) In other words, she agreed that Knight had the victims' blood on the clothes he was wearing, on his hands, and under his fingernails when he was stopped and arrested. She agreed that his clothes, stuffed under the sink when he tried to wash the blood off of him, had the blood of the victims and himself on them as well. Barone testified that he had absolutely no basis to request a Frye hearing on the DNA evidence. (PCR 20:310) Knight failed to show prejudice in not having such a hearing given the evidence summarized in the first sub-section and incorporated here for the prejudice analysis. Knight has not met the Strickland burdens and the denial of this claim should be affirmed.

Counsel did challenge Whitsett's credibility and the State had no Brady obligation to disclose jail logs.

Knight next argues that his trial counsel was ineffective for failing to discover, or the State violated its Brady obligation to disclose, evidence in the jail logs that inmates in Knight's unit had access to a newspaper on July 5, 2000. He asserts that these articles gave important information which would have eroded Whitsett's credibility that Knight confessed to him while explaining how he did the murders. Knight failed to meet his burden of proving either deficient performance or prejudice at the evidentiary hearing. The standard of review is

once again Strickland, discussed in detail before. This Court should affirm the denial of the claim.

The post-conviction court made the following findings:

> D. Ineffective assistance of guilt phase counsel for failing to challenge the credibility of State's witness, Steven Whitsett, and the State's withholding of impeachment evidence as to Steven Whitsett
>
> In the instant subclaim, Defendant alleges that his trial counsel failed to investigate and the State failed to disclose to his trial counsel, crucial information that could have served for impeaching the credibility of the State's jailhouse informant, Steven Whitsett. Defendant avers that during the public records litigation he came across a jail log entry for July 5, 2000, indicating that Defendant received counseling about having newspapers in his cell. (Defense Exhibit 2). Defendant claims that this fact shows that newspaper articles were available in the cell area shared by Defendant and Whitsett, and that Whitsett gleaned information about the case from the media instead of the Defendant.
>
> Defendant further avers that he discovered a sworn statement by Whitsett to law enforcement regarding a 1994 arrest for sexual assault against minors, in which Whitsett acknowledges he drew a map of the location where the assault had occurred. (Defense Exhibit 1). Defendant argues.that had defense counsel known that Whitsett had a penchant for drawing maps, he could have used that information at trial to impeach Whitsett's testimony that Defendant drew a diagram of the apartment for him. This, in turn, would have supported the implication that Whitsett fabricated the alleged confession by Defendant. Defendant further argues that this undisclosed evidence, when considered together, would have led the jury to reject Whitsett's testimony and question the reliability of the State's case as a whole.
>
> This Court finds that Defendant did not show any deficient performance by guilt phase counsel and that he did not show any prejudice under Strickland. During the evidentiary hearing, Mr. Baron testified that his strategy at trial was to undermine Whitsett's credibility. (EH Vol. 1 at 21-22). He achieved that by bringing out

during cross-examination that some of the dates in Whitsett's testimony were wrong. He also emphasized that although Whitsett was only thirty-four (34) years old he already had fourteen (14) felony convictions, including one for an attempt to escape from Martin Correctional Institution by helicopter. (EH Vol. 1 at 21-22). Mr. Baron further testified that he attempted to elicit information whether Whitsett had access to newspapers or any materials about Defendant's case, but Whitsett's response was that he did not have access to media other than seeing some information about Defendant's case on a news channel the day he was transferred to Broward County Jail. (EH Vol. 1 at 23). Mr. Baron had no recollection of seeing the contact-log report introduced into evidence during the evidentiary hearing as Defense Exhibit 2. (EH Vol. 1 at 24). He further testified that he did not have any information about Whitsett drawing a map for law enforcement, but that he would have explored the issue further had he been aware of it. (EH Vol.1 at 31).

Even assuming arguendo that guilt phase counsel should have discovered the existence of the jail log that shows Defendant was counseled for having a newspaper in his cell, Defendant did not show any prejudice under Strickland. The log only reflects that Defendant, not Whitsett, had a newspaper in his cell. Defendant did not present any evidence that Whitsett had access to the newspapers in Defendant's cell. According to Whitsett's testimony at trial, Defendant met with Whitsett in the common areas, not in Defendant's cell. Whitsett testified that he had no access to media while in Martin County Jail because he was under maximum security due to an attempt to escape. On June 29, 2000, he remembered seeing Defendant in the common areas where the television was, when another inmate had called Defendant's name while information about his case was presented during the evening news. (ROA Vol. 29 at 3201-04). Thus, the jury heard from Whitsett that although he did not have access to the media in Martin County Jail, he had access to television in the Broward County Jail.

Furthermore, the information about Defendant's case presented in the newspaper articles attached to Defendant's motion is scant when compared with Whitsett's testimony at trial. The articles merely discuss the fact that when Defendant met with the police outside the apartment, he had blood on his shirt and he explained he cut himself at work. Whitsett's testimony at trial was far more detailed. Whitsett

testified that Defendant asked him for help with explaining certain evidence in his case and that is how Whitsett found out about the murders. Defendant told Whitsett that he lived with his cousin, his cousin's girlfriend, Odessia, and their daughter, Hanessia. He had been unemployed for a while and he could not pay rent. On the night of the murders, Defendant had a conversation with his cousin's girlfriend about leaving the apartment in the morning if he did not pay the rent. Defendant asked to stay a bit longer as he had just found work at Mom's Kitchen and needed a bit of time to gather money for rent. However, Odessia told Defendant that he either paid the rent or he had to move out the following morning, because she already had a child and did not need to raise another one. (ROA Vol. 29 at 3210-11).

Around 12:30 a.m., Defendant left the house for a walk, and the more he walked, the angrier he became. He returned to the apartment and confronted Odessia in the master bedroom. They argued and he got very angry. He went to the kitchen and took a knife out of a butcher block. When he returned to the master bedroom, Odessia was on the right-hand side of the bed and Hanessia was on the left-hand side. He proceeded to stab Odessia multiple times. At first, Odessia put her hands up to stop him, but after the first strike she "balled up" in a defensive position. (ROA Vol. 29 at 3211-12).

Then he attacked Hanessia, and as he was stabbing her, the knife broke. Defendant went to get another knife from the kitchen. As he left, he saw Hanessia crawling in front of the closet and heard popping noises as if she was drowning in her own blood. Defendant cut himself on the broken knife and he bled in the kitchen. He grabbed another knife and went back to attack Odessia, who had managed to get out of the bedroom. He found her in the living room, lying in her own blood in front of the sofa. As he rolled her over to check if she was still alive, he got blood on his hands. He wiped his hands on the carpet, then went to the bathroom, took off his clothes that were drenched in blood, put them on the bathroom counter, and took a shower. (ROA Vol. 29 at 3212-14).

When he got out of the shower he went to his bedroom to get dressed. He picked up a cloth to wipe down the blades in the living room, but heard the doorbell ring. He went to the door and saw a police officer. He returned to his bedroom, opened the window, and ran away. After a few minutes, Defendant realized that because he

lived in the apartment and he was not there, he was going to become a suspect in the case, so he decided to return to deflect suspicion. Upon his return, he saw a police officer at his bedroom window dusting for prints. He started asking her questions, then she asked him questions, and eventually he was taken into custody. Defendant drew a diagram of the apartment for Whitsett on which he noted the location of the victims' bodies. (ROA Vol. 29 at 3214-16).

This detailed information is not contained in the newspaper articles attached to Defendant's motion, and Whitsett could not have learned this information from the media. The diagram corresponded to the layout of the apartment and there was no testimony presented that Whitsett was ever at the apartment to be able to draw the diagram himself. However, there was evidence presented during the penalty phase that Defendant had a passion for drawing." In addition, the testimony of the medical examiner corroborated Whitsett's testimony regarding the location of the bodies and the fact that Hanessia was drowning in her own blood when making the popping sounds. (ROA Vol. 31 at 3394-95). The medical examiner explained that Hanessia had a stab wound in her right lung, which caused bleeding into the lung and difficulty in breathing, which in turn, could have caused her to drown in her own blood. (ROA Vol. 31 at 3396). As discussed above, the State also presented DNA evidence connecting Defendant to the murders.

As to Defendant's *Brady* claims, this Court finds that he did not show a *Brady* violation by the State. Regarding the jail log, Defendant failed to show how the information could have been used to impeach Whitsett. He did not establish any connection between Whitsett and the fact that Defendant was counseled for having a newspaper in his cell. Moreover, Defendant did not demonstrate that he was prejudiced by the alleged suppression by the State because there is not reasonable probability that the jury would have reached a different verdict had it been apprised of the fact that Defendanthad a newspaper in his cell.

Similarly, Defendant did not demonstrate a Brady violation by the State for not disclosing that Whitsett drew a map for law enforcement in connection with a sexual assault case. Even assuming arguendo that the information was favorable to the Defendant and that the State 'willfully or inadvertently suppressed it, Defendant did not show prejudice. There is no reasonable probability that had this

> information been disclosed and used at trial to impeach Whitsett, the jury would have reached a different verdict. Notwithstanding the diagram, Whitsett's testimony contained details that only the perpetrator of the crimes could have known. In addition, the State presented an abundance of evidence connecting Defendant to the murders.

(PCR 7:1304-9). The record supported these findings.

Knight points to a jail log that indicated that he personally was counseled for having a newspaper in his own cell. The log in no way indicated that Whitsett was similarly counseled or was in the same cell as Knight. Since Knight was the one charged with the crimes, any information he got from the newspaper could not have affected his trial. Barone acknowledged at the evidentiary hearing that Knight and Whitsett had their discussions in the common room, not Knight's cell. (PCR 20:315) Whitsett testified that he first saw Knight on June 29, 2000 when he was transferred to Broward County Jail from Martin County. He said that he had no exposure to newspapers or television while in Martin County. (T 29:3202) He stated that he was moved to the same unit as Knight and they shared a common area. That common area, different from the cells themselves, had a television in it and the inmates were watching evening news. Someone called Knight's attention to a story on it about his case. (T 29:3204) This testimony about the inmates watching news coverage of Knight's case, whenever it happened, showed that Whitsett heard about Knight's case from media reports. The jury heard that

information and had it for its consideration. Further, the jail log Knight now says is impeachment relates only to him and whether he was violating jail policy by taking a newspaper to his cell. The information certainly could not have been used to impeach Whitsett since it involved only Knight; the information is irrelevant as impeachment of Whitsett. Obviously, given the newspaper in the unit as well as the television, inmates were allowed access to the media. Any additional questions regarding Whitsett's knowledge gained from the media would have been cumulative. Knight points to information contained in three newspaper articles he attached to his motion. The only information regarding Knight in those articles relating to the crimes was that he was stopped outside the apartment with blood on his shirt, that he explained he had been cut at work, and that he was not arrested for the crimes.

Contrast that scant information to Whitsett's testimony at trial which had a level of detail which could only have come from the perpetrator of the crimes. Whitsett explained that Knight eventually asked him for help with his case. Knight explained to Whitsett that he was living with his cousin, his girlfriend, and their daughter. Knight was unemployed and was not paying rent. On the night of the murders Knight and Odessia argued. She told him that she did not want to support him like a child and that he would have to move. He asked for some more

time since he had just gotten a job. She said no and that he would have to leave in the morning. After that he left the house to go for a walk at 12:30 A.M.. While walking he became increasingly angry. He returned and confronted her in her room and they argued. He went to the kitchen and got a knife. When he went back to the master bedroom, Odessia was on one side of the bed and Hanessia was on the other. He began by stabbing Odessia multiple times who initially tried to stop him with her hands but then gave up and balled up into a fetal position. He then turned to Hanessia who was only four years old. The knife broke while he was stabbing Hanessia so he returned to the kitchen to get another one. He heard a popping sound and saw Hanessia had crawled to the closet door and was drowning in her own blood. (T 29:3210-12, 3215) Facts like the broken knives, their positions, Hanessia crawling to the closet and drowning in her blood while making popping sounds, all of which were corroborated by the forensic and expert evidence presented at trial, are details that Whitsett could only have learned from the killer.

To explain the story to Whitsett, Knight also drew a diagram of the apartment and noted the locations of the rooms and where the bodies were. The knowledge of the locations of the bodies and the layout of the rooms could only have come from the killer. Knight returned to the kitchen and accidentally cut

himself on a broken knife. He grabbed another one and went back to stab Odessia some more but she had crawled to the living room and was lying in her own blood. He rolled her over and attacked her. He got her blood on his hands so he wiped them on the carpet. After he finished the attack, he went to the bathroom, took off the blood soaked shorts and t-shirt and tossed them under the sink. He showered and put on blue polo pants. He wiped down the knives in the living room. He heard a knock on the door and saw the police outside through the peep hole. He ran to his room and out the window. He eventually came back to the building to deflect suspicion away from him. When he returned he went to his bedroom window where a female police officer was. (T 29:3213-22, 30:3267-69) Knight said that he had a cut on his hand from one of the knives he used to stab Odessia and Hanessia. All of these were facts Whitsett could only have learned from Knight. Counsel could not have countered such explicit evidence by asking Whitsett if he read the newspapers. Finally, counsel did try to impeach Whitsett by expressing doubt about his memory, his exposure to media stories about the murders, his motivation for coming forth, and his criminal record. (T. 29:322278). Knight failed to show any deficient performance by trial counsel as required under Strickland.

Furthermore, incorporating the prejudice analysis detailed in the first sub-claim and incorporated here, Knight also failed to prove the necessary prejudice to be granted relief under Strickland. Knight's and the victims' DNA were all over his clothes, on his hands, and under his and Odessia's nails. He was caught at the scene wet from a shower and had argued repeatedly with Odessia. Relief was correctly denied.

In Knight's Brady claim, he simply concludes the State should have turned the information over. The State had no duty to turn over jail logs to the defense and any information in it is neither material or prejudicial under the Brady standards detailed above. The information is not favorable and in no way raises a reasonable probability that the outcome of the trial was undermined. Knight failed to present any evidence at the hearing to support his Brady allegation and, hence, both waived the issue and failed to prove it.

Knight further argues that the State violated Brady by not disclosing Whitsett's 1994 statement to the police when he was interviewed following his arrest. During that statement, Whitsett drew a sketch for the police to show where the assault occurred. Knight argues that he could have impeached Whitsett with the fact that he had previously drawn something in connection to a crime, implying that Whitsett was the one who drew the diagram in this case. Diagram

drawing is not a skilled pursuit and is often done when trying to explain the location of something to someone who was unfamiliar with the location, which is what happened between Knight and Whitsett. Whitsett had never been to the apartment and did not know its layout but Knight did. Knight used it to explain how and where the crimes happened. As detailed above, the image contained so many details of the scene that Whitsett, who had not been there, could not have known on his own. Again, the recitation that Whitsett gave of Knight's statement contained so many details, which were not in the media, that it could only have been made by Knight. Finally, the fact that Whitsett drew a map twelve years before he testified would not have been admissible impeachment since it was remote and irrelevant to the trial testimony. Again, the information was not exculpatory or admissible as impeachment, nor would the outcome of the trial have changed if the jury heard that Whitsett had drawn a map over a decade earlier. Again, Knight failed to present any evidence at the hearing to support this Brady allegation and, hence, both waived the issue and failed to prove it. The denial of relief should be affirmed.

There was no Brady obligation to turn over information on a lying "informant."

In his last sub-claim Knight says that the State violated its Brady obligation when it did not turn over information of another inmate who claimed to have

information on Knight which he wished to bargain with in order to reduce his charges or sentence. He argues that the information, which was in a police report, was exculpatory since it could have been used to impeach Whitsett. Knight also mentionis in a conclusory manner at the end of the sub-claim that counsel failed to utilize the information at trial. If that was an attempt to make this an additional claim of ineffective assistance of counsel, that basis is insufficiently pled and should be summarily denied. On the Brady issue, the information was not exculpatory, could not have been used for impeachment, and would not have resulted in a different outcome of the trial. This Court should affirm the denial of it.

After the evidentiary hearing, the post-conviction court found the following:

> E. The State withheld information that media access in jail led inmate George Greaves to fabricate a confession by Defendant
>
> In this subclaim, Defendant alleges that the State withheld exculpatory information that was uncovered by collateral counsel during the postconviction discovery process. The alleged exculpatory evidence is a report from the Coral Springs Police Department regarding an interview with inmate George Greaves, dated March 16, 2001. The report states that Greaves informed the police that while he was in jail with Defendant, Defendant shared details of the murders with him. However, Greaves did not want to reveal his conversations with Defendant unless he received a deal that would reduce his jail time. The report concluded with a statement that Greaves gleaned information from the media rather than from Defendant. Defendant alleges that this information was exculpatory because it would have

revealed that Whitsett's testimony that Defendant had allegedly confessed to him was also based on information gleaned by Whitsett from media reports. In addition, Defendant argues that this information would have revealed to the jury that the jail was full of snitches happy to invent a confession by a Defendant in a high profile case merely to reduce their jail time.

During the evidentiary hearing, the report regarding Greaves was introduced into evidence as Defense Exhibit 5. (EH Vol. 1 at 15). Mr. Baron testified that he did not have an independent recollection of the report and that the report would have been relevant because it was consistent with his theory that Whitsett could have gleaned information from the media in jail. (EH Vol. 1 at 27-28). However, Defendant did not specify how this information could have been presented to the jury at trial. There was no connection established between Greaves's attempt to fabricate a confession by Defendant and Whitsett's detailed testimony regarding Defendant's confession to him.

Therefore, the information regarding Greaves could not have been used at trial to impeach Whitsett. ln addition, Greaves did not testify at trial. Even assuming arguendo that the report regarding the alleged confession by Defendant to Greaves was favorable to Defendant and that the State either willfully or inadvertently suppressed it, Defendant did not show that any prejudice resulted from the alleged suppression. As discussed above, Whitsett's testimony included details that only someone who was present at the crime scene could have known. Therefore, this Court finds that Defendant did not show that there is a reasonable probability that the outcome of Defendant's trial would have been different had the information about Greaves's attempt to fabricate the confessions been used to impeach Whitsett.

To the extent Defendant is trying to raise an ineffective assistance of counsel claim when he argues that guilt phase counsel should have discovered and used this information at trial, this Court finds that Defendant's claim is legally insufficient. See *Foster v. State*, 810 So. 2d 910, 915 (Fla. 2002) (noting that the defendant devoted only one sentence to his ineffective assistance of counsel claim, stating: "To the extent trial counsel failed to_ discover and litigate this issue, Defendant was denied effective assistance of counsel"; and finding that the postconviction court properly denied

> the claim without an evidentiary hearing, because the defendant failed to allege specific facts that would demonstrate a deficiency on the part of counsel which resulted in prejudice to the defendant).
>
> For the reasons set forth herein, this Court finds that Defendant's amended claim III is without merit and is hereby denied.

(PCR 7:1309-11)

The record shows that George Greaves was the inmate who attempted to cut his jail time by giving the police information allegedly from a confession by Knight. Based upon the content of Greaves statement, the police concluded that Greaves's source of information was solely from the media coverage. The fact that Greaves had come forward was not relevant and would not have been admissible in any manner. There was no connection between Greaves's attempt and Whitsett's actions after Knight had confessed to him. The jury knew that there were "snitches" in the jail; Whitsett was one although he sought nothing for his testimony. The existence and content of this report cannot meet materiality requirement under Brady.

The information the media had was general in nature since the police did not release details due to the on-going investigation and then pending trial. A perusal of the articles in Knight's attachments to his motion for post-conviction relief reveals the type and nature of the information to which the public had access. The media knew that Odessia Stephens and her daughter were killed in her

apartment, with Odessia's body found in the living room and her daughter's in the bedroom. Also in the articles were the facts that Knight was arrested outside the apartment on warrants and that he had argued with Odessia and his cousin about not paying rent for which they wished him to leave. When Knight was stopped by the police he had some blood on his shirt. A neighbor reported hearing some slamming and yelling. (Attachment G) The next article reported that Knight had been arrested on a sex charge and the police had found a kitchen knife in the garbage outside. (Attachment H) The final article informed the public that Odessia was pregnant at the time of her death.

Detailed information that was not released to the public included facts Whitsett told the police and the jury in his detailed testimony. Whitsett gave details only the killer could have known. Knight first stabbed Odessia in the master bedroom after arguing with her. He knew that the knife had come from a butcher clock holder which the police photographed. Whitsett knew which side of the bed each person had been on. He knew that the girl had crawled over to the closet where she made popping sounds as she drowned in her own blood, a fact confirmed by the medical examiner. Whitsett knew Knight had cut himself when the knife broke and had to go get another knife, facts brought out by the police witnesses. Whitsett knew that Knight had then gone into the living room and

stabbed Odessia additional times after turning her over, getting blood on his hands which he then wiped on the carpet, all facts corroborated by the physical evidence and other testimonies. He knew what Knight was wearing during the attacks and knew where the clothes ended up. He knew the color and type of pants Knight put on after he showered. Finally, he knew that the police came to the door while Knight was there so Knight had to escape out a window, walk away, and then come back where he met a female officer at the window he had exited. (T. 29:3211-15) None of these facts were available to the public. The fact that Greaves tried to game the system would not have resulted in a different verdict and did not undermine confidence in the outcome of Knight's trial. Once again, other than asking Barone if he had the information, Knight failed to present any evidence at the hearing to support this Brady allegation or that the information was even admissible. He presented absolutely nothing on the hinted at ineffective assistance of counsel claim. Knight waived the issues and failed to prove it. The denial of relief was appropriate and supported by the record.

ARGUMENT II

COUNSEL WAS NOT INEFFECTIVE IN THE PENALTY PHASE TRIAL. (restated)

Knight next contends that his trial counsel was ineffective in the penalty phase of his trial for failing to fully and adequately investigate his background and

to present the mitigating evidence to the jury. He also asserts that counsel was ineffective in not retaining an effective mental health expert or that failed to present Dr. Mittenberg at trial although he had developed favorable conclusions for mental mitigators, or at least introduce Dr. Mittenburg's report or deposition to the jury. Knight failed to prove either deficient performance or the necessary prejudice required by Strickland. He presented no evidence at the evidentiary hearing that there was or is any brain damage/impairment or any other mental health problems Knight suffers from that counsel could have presented. Thus, Knight both waived this claim by abandoning it and has failed to prove deficient performance. See Booker v. State, 969 So.2d 186, 194–95 (Fla.2007) ("When a defendant fails to pursue an issue during proceedings before the trial court, and then attempts to present that issue on appeal, this Court deems the claim to have been abandoned or waived." (citing Mungin v. State, 932 So.2d 986, 995 (Fla.2006)); Wickham v. State, 124 So. 3d 841, 860 (Fla. 2013), as revised on reh'g (Oct. 17, 2013). The claim was properly denied.

After the evidentiary hearing, the post-conviction court made the following findings:

> *A. Trial counsel's failure to investigate and present to the jury and the sentencing court Defendant's social and personal history.*
>
> In the instant subclaim, Defendant alleges that penalty phase counsel was ineffective for failing to investigate and present to the jury during the penalty phase, a wealth of mitigating evidence about

Defendant's childhood. In support of this subclaim, Defendant proceeds to recount his social and personal history. He was born in Jamaica and abandoned by this natural mother on a bus. A passenger on a bus took Defendant to the local police station and he was placed in the care of the Children's Ward at Port Maria Hospital. He was named Mark. Def.'s Am. Mot. 59.

Although Defendant was never formally adopted, he was taken in by the Knight family, which was highly regarded in the local community. Mrs. Knight, who was politically active in Jamaica, took a tour of the Port Maria Hospital while Defendant was there. She saw him sweeping floors and took him home to spend Easter with her family. The family liked him so much that they decided to keep him. Because the Knight family had another son called Mark, they decided to change Defendants name to Richard. He was assigned the birthdate of July 6, 1978, but nobody knows his real birthdate. Defendant went to Mount Angus All Ages School, where Mr. Knight, his adoptive father, was a principal. Teacher, friends, neighbors, and family members described Defendant as quiet, polite, and "sweet." He was soft spoken and small in stature, and exhibited anger issues when provoked by others. Def.'s Am. Mot. 59-61.

Between the age of eight (8) and eleven (11), Defendant and his brother, Mark, were allegedly sexually abused by a neighbor of the family, Gary Gordon. The boys did not discuss the abuse, and they did not report it to any authority figure. Defendant alleges that he and his brother were subjected to molestation, forced to engage in oral sex and to watch Gordon masturbate while they were naked. Gordon would ejaculate on the boys, but he never penetrated them. Eventually, the family moved and the abuse ended. Def.'s Am. Mot. 61.

Although in school Defendant was not as good as his siblings, he excelled at drawing. He left high school after the tenth grade to work as a mason worker on a construction site. During his employment as a construction worker, Defendant fell off a scaffolding and thereafter he experienced seizures and blackouts that continue to plague him in the present. One time, he collapsed at his girlfriend's house. His girlfriend's mother, Barbara Waverly, took Defendant to a local hospital where he was seen by a doctor and prescribed medication. The doctor recommended that Defendant be seen by a specialist. However, according to Defendant and his family,

no specialist was consulted. Soon after that incident, Defendant moved to the United States. Def.'s Am. Mot. 61-62.

...

Defendant was granted an evidentiary hearing on this subclaim. However, he did not present any evidence during the hearing about his social and personal history. Moreover, Defendant did not present any witnesses during the evidentiary hearing in support of his allegation of sexual abuse. He merely introduced into evidence as Exhibit 9, a memorandum prepared by investigator Rivera, dated May 18, 2006, according to which a relative of the family had told Mrs. Knight that Defendant claimed he was abused as a child. Defendant did not present any evidence in the form of medical records to substantiate his claim that to this day he continues to experience seizures and blackouts as a consequence of falling off a scaffolding.

Mr. Halpern testified during the evidentiary hearing that he could not remember having a conversation with Defendant about the issue of abuse, and he could not remember that issue being developed as a fact. (EH Vol. 1 at 78-79). On cross-examination, he stated that he assumed he had discussed that allegation with Defendant and that if there were any merit to it, he would have followed through. (EH Vol.-1 at 83). He described Defendant as "extremely pleasant cooperative forthcoming with information" regarding his family background. (EH Vol. 1 at 80). Mr. Halpern further testified that when he went to Jamaica with Ms. Rivera for purposes of developing mitigation, they spent a lot of time with Defendant's brothers, Mark and Waddy Knight, who drove them around. (EH Vol. 1 at 82). However, Mark Knight never mentioned anything about him or Defendant being sexually abused as children. (EH Vol. 1 at 82).

The trial record reflects that at the penalty phase, trial counsel presented all the social and personal history described in Defendant's motion, with the exception of the 'sexual abuse claim. Joscelyn Walker, one of Defendant's teachers at Mount Angus All Age School, testified during the penalty phase that he knew the Knight family quite well because they lived in the same area where he worked. Mr. Knight was the principal of the Mount Angus All Age School and Mrs. Knight was the mayor of the province. According to Mr. Walker, the Knight family was a highly respected family in the community. Mr. Walker described Defendant as a respectful and

caring individual, who was loving and supportive of his family. In school, Defendant always looked after children in lower grades. His favorite subject was art. Mr. Walker testified that when provoked, Defendant would have a temper tantrum. Mr. Walker described a particular incident when one of the students had called him to intervene in an altercation Defendant had with another student. Defendant was so angry he could not retaliate that he banged his head on a desk. Mr. Walker also testified that usually he was able to stop Defendant's temper tantrums after shouting at him until he "snapped out of it." Mr. Walker recounted that he would occasionally see Defendant leaning against the wall, "scrunching his face, holding his head" because his head was hurting. (ROA Vol. 51 at 725-52; 762-71).

Defendant's art teacher in high-school, Joscelyn Gopie, also testified that the Knight family was a very well respected family, very ambitious, and hard working. Mr. Gopie described Defendant as a very reserved, quiet, and extremely pleasant person. As a student, Defendant was very attentive, eager to learn, very enthusiastic, and took such a liking to art that Mr. Gopie had to remind him to focus on other subjects as well. Mr. Gopie also testified that Defendant left high school before graduating. (ROA Vol. 52 at 779-92).

Defendant's jury also heard from Barbara Weatherly, the mother of Defendant's girlfriend in Jamaica, about the incident when Defendant collapsed at her house. She testified that she knew Defendant's family because they lived in the same neighborhood. She described them as very decent people, and Defendant as a very honest individual. He asked permission to date her daughter, which surprised her because that was not common practice in Jamaica. She allowed him to date her daughter because his behavior was excellent. However, she asked him to wait until her daughter graduated from high school. Defendant respected the condition and started dating her only after she graduated. While they were dating, he would come to the house in the evenings to help Mrs. Weatherly's younger children with homework and drawing, because he loved drawing. She recounted that one evening Defendant became sick. She observed his eyes rolling back and his mouth foaming. A neighbor helped Mrs. Weatherly take Defendant to the emergency room where he was seen by a doctor. The doctor gave him an injection, wrote a prescription, and recommended that he see a psychiatrist. She conveyed that

information to Defendant's father but she did not know whether there was any follow-up. (ROA Vol. 52 at 794-809).

The jury heard from Stanley Davis, Defendant's supervisor and coworker at a construction company. Mr. Davis testified that Defendant was adopted into a well-regarded family and had a close, loving relationship with his adoptive family. He further testified that Defendant was a good worker. The jury also heard from Mr. Davis about the incident when Defendant fell off the scaffolding and blacked out. According to Mr. Davis, after the accident, Defendant had difficulty concentrating and became timid. (ROA Vol. 52 at 888-908).

Valerie Rivera, the defense investigator who accompanied Mr. Halpern to Jamaica to develop mitigation, testified during the penalty phase regarding her interviews with Defendant's family members and friends. Through her testimony, the jury heard that Defendant was abandoned by his mother on a bus and was taken to a local hospital where he was given the name Mark. Mrs. Knight took him home to spend the Easter weekend with her family and they decided to keep him. They changed his name to Richard as they already had a son named Mark, and one of the children picked a birthday for him. The jury also heard through Ms. Rivera's testimony that Mrs. and Mr. Knight loved Defendant as their biological son. Mr. Knight told Ms. Rivera that he raised Defendant to be caring, loving, respectful, honest, and good. Mr. Knight and Defendant shared a love for outdoors and gardening. After Mr. Knight had a car accident and could no longer tend to his garden, Defendant helped him enjoy the outdoors and took care of his garden. (ROA Vol. 54 at 1037-48; 1058-63).

Ms. Rivera recounted that she interviewed two of Defendant's closest friends, Leonard Brown and Marlin Nicholas, who described Defendant as a very nice person. Defendant's sister-in-law, Susan Knight, described Defendant as a good, caring person, who had identity issues because he was adopted. She told Ms. Rivera that he would occasionally babysit her children and her sister's children. Defendant's siblings, Natalie, Mark, and Waddy, described him as a very good brother, raised like them, and "very much part of the family." Defendant's former employer from Jamaica, Stedman Stevenson, told Ms. Rivera that he had known the Knight family for many years and known the Defendant all his life. He described

> Defendant as a hard worker, a quick learner, respectful to others, and easy to get along with. He took Defendant on vacation with him to Florida and Defendant decided to remain in Florida. Ms. Rivera also had a telephone interview with Defendant's former girlfriend, Kesha Weatherly, who described Defendant as loving, kind, helpful, caring, polite, courteous, respectful, and with a calming effect on others. Kesha also remembered Defendant having two (2) epileptic seizures in her presence, one at her place and another after he got out of work one day. Through Ms. Rivera's testimony, Mr. Halpern also introduced into evidence four (4) cards made by Defendant for his father, mother, brother Mark, and nephew, in which Defendant expressed his love for them. (ROA Vol. 54 at 1037-89).
>
> This Court finds that Defendant failed to show any deficient performance by penalty phase counsel and any prejudice. Defendant did not present during the evidentiary hearing any testimony in support of his allegations. The social and personal history described in the motion was already presented by Mr. Halpern to the jury during the penalty phase. Thus, Defendant did not establish any additional mitigator that this Court could now consider to reweigh the aggravators and mitigators.

(PCR 7:1312-18)

Initially, as the court noted above, Knight failed to present any evidence that he was sexually or physically abused or any evidence about his background that the jury did not hear. Consequently, he waived this issue. See Booker, 969 So.2d at 194–95. Furthermore, in this current appeal, Knight fails to adequately present the issue to this Court and merely references it in his initial brief. As such, he has failed to adequately plead the sub-issue of not investigating or presenting the available mitigation; this Court should deny it on that basis. Pagan v. State, 29 So. 3d 938, 957 (Fla. 2009) (holding that the "purpose of an appellate brief is to

present arguments in support of the points on appeal" and failing to do so or merely referring to arguments made below will mean that such claims are deemed to have been waived (quoting Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990))).

Moving on to the questions revolving around Dr. Mittenberg's competency and counsel's failure to present his findings through his testimony, his deposition, or his report, the lower court made the following findings:

> *B. Trial counsel's failure to ensure effective mental health assistance*
>
> In this subclaim, Defendant alleges that his penalty phase counsel and Dr. Mittenberg, the expert appointed in this case, failed to provide the adequate mental health assistance required under *Ake v. Oklahoma*, 470 U.S. 68 (1985). In support of this subclaim, Defendant refers to Dr. Mittenberg's inability to testify during the penalty phase of Defendant's trial due to emotional distress, exhaustion, and sleep deprivation. (ROA Vol. 53 at 915). As reflected in the trial record, during the penalty phase, Dr. Mittenberg was consuming large amounts of whiskey and was taking anti-anxiety medication. Shortly before Dr. Mittenberg was scheduled to testify at trial, he informed penalty phase counsel that he could not testify because he would "totally crumble" if he had to undergo cross-examination. (ROA Vol. 53 at 918-20). Defendant argues that penalty phase counsel failed to secure another expert to present mental health mitigation at trial, to introduce Dr. Mittenberg's report and/or deposition at the penalty phase, or take any other measures to ensure that Defendant's jury was apprised of all relevant mental health evidence in this case.
>
> Generally, an *Ake* claim is procedurally barred because it could and should have been raised on direct appeal. Stewart v. State, 37 So. 3d 243, 255 (Fla. 2010). However, a defendant is entitled to raise on postconviction a claim that his "mental health expert's examination was so 'grossly inefficient' that the expert 'ignore[d] clear indications of either [intellectual disability] or organic brain damage.'"*Id.* (quoting *Raleigh v. State*, 932 So. 2d 1054, 1060 (Fla. 2006)). In this

case, Defendant failed to show such gross inefficiency. Although Defendant was afforded an evidentiary hearing on this claim, he did not present any evidence in support of his claim, but focused on penalty phase counsel's alleged failure to secure another mental health expert for the penalty phase and on his failure to introduce Dr. Mittenberg's report and/or deposition at the penalty phase. Thus, Defendant's *Ake* claim fails.

Defendant also failed to prove his claim that penalty phase counsel rendered ineffective assistance by not securing a competent mental health expert. During the evidentiary hearing, Mr. Halpern testified that he gave Dr. Mittenberg all the information he thought was relevant, including investigative reports discussing Defendant's head injury; interviews with people who knew Defendant and had witnessed him having seizures in the past; information that Defendant was hospitalized in Jamaica for having a seizure; and interviews with school teachers. (EH Vol. 1 at 65-66). Mr. Halpern further testified that he and his investigator met with Dr. Mittenberg on a few occasions to discuss the mental health mitigation. (EH Vol. 1 at 66). Dr. Mittenberg wrote a report that was introduced into evidence during the evidentiary hearing as defense Exhibit 8. (EH Vol. 1 at 66-67). Mr. Halpern recounted that he and Dr. Mittenberg had a telephone conversation one Saturday afternoon, shortly before Dr. Mittenberg was expected to testify at trial. (EH Vol. 1 at 69). Dr. Mittenberg, who appeared intoxicated, informed Mr. Halpern that he did not wish to continue on the case. Mr. Halpern told Dr. Mittenberg that it was unacceptable for him to abdicate his responsibilities at that stage. (EH Vol. 1 at 69). According to Mr. Halpern, the conversation ended with Dr. Mittenberg agreeing to testify. (EH Vol. 1 at 69).

Mr. Halpern testified that he prepared Dr. Mittenberg's testimony by presenting witnesses who provided information about the Defendant growing up. He also presented the testimony of Dr. Kotler, a neurologist who administered a PET scan to Defendant. Dr. Kotler testified that in his view, Defendant's PET scan was abnormal and unusual. However, Dr. Kotler was unable to testify as to the impact of that abnormality on Defendant's behavior, because that was outside of his area of expertise. (EH Vol. 1 at 70). According to Mr. Halpern’s testimony, he was counting on Dr. Mittenberg’s testimony to show how the brain injury would impact behavior and could lead to impulsive, violent behavior, and to prove the mitigator that at the

time of the crimes Defendant was incapable of controlling his actions. (EH Vol. 1 at 70-71).

Mr. Halpern further testified that during a break in Dr. Kotler's testimony, he learned from Dr. Mittenberg's attorney that Dr. Mittenberg would assert his Fifth Amendment privilege if he had to testify. (EH,Vol. 1 at 71). Dr. Mittenberg had used a bootleg program to score Defendant's Minnesota Multiphasic Personality Inventory (MMPI), which was a federal crime. (EH Vol. 1 at 71). This caused Dr. Mittenberg to drink heavily and be admitted to the emergency room to be treated for psychiatric ailment. (EH Vol. 1 at 71). He was prescribed anti-anxiety medication, but his emotional state deteriorated to such an extent that he could not carry on with the trial. (EH Vol. 1 at 71-72). A hearing was held during which Dr. Mittenberg asserted his Fifth Amendment privilege and Mr. Halpern moved ore tenus for a mistrial. (EH Vol. 1 at 72, 85). The court denied the motion for mistrial, but granted a recess of approximately two (2) months for Mr. Halpern to locate another mental health expert. (EH Vol. 1 at 72, 85).

When asked on direct examination whether he had considered presenting Dr. Mittenberg's report and/or deposition during the penalty phase, Mr. Halpern testified that he does not have a specific recollection about considering that alternative. (EH Vol. 1 at 73-74). He doubted he would have moved in either the report or the deposition, because his goal at that time was to find another mental health expert. (EH Vol. 1 at 74).

On cross-examination, Mr. Halpern testified that during the two-month recess he was able; to hire Dr. Alejandro Arias. (EH Vol. 1 at 86). However, after administering some tests to Defendant, Dr. Arias informed Mr. Halpern that he was unable to help, because he could not replicate Dr. Mittenberg's results and could not find any abnormality he could testify about. (EH Vol. 1 at 86). Mr. Halpern filed a written motion for mistrial, which was denied by the trial court. (EH Vol. 1 at 87).

Mr. Halpern further testified that Dr. Mittenberg's deposition was a pre-trial deposition not a deposition to perpetuate testimony. Because hearsay is admissible during the penalty phase, Mr. Halpern testified that he could have moved Dr. Mittenberg's deposition into evidence. (EH Vol. 1 at 87). Although there were helpful things in the deposition, overall, Dr. Mittenberg was not a very good witness.

(EH Vol. 1 at 88, 90). Dr. Mittenberg began the deposition by talking about a conflict of interest with Dr. Butts, the State's consulting psychologist, who was present during the deposition. In Dr. Mittenberg's opinion, Dr. Butts had gleaned information about the case from him, and assisted the State behind his back. (EH Vol. 1 at 88). Dr. Mittenberg expressed concern that this perceived conflict will impact his working relationship with Dr. Butts and that in the future, he would no longer be invited to assist her in other cases, which would impact his financial situation. (EH. Vol. 1 at 88).

Mr. Halpern further testified that the most damaging aspect of Dr. Mittenberg's deposition was his misrepresentation regarding the way he had scored Defendant's MMPI test. Dr. Mittenberg described at great length how he had manually scored Defendant's MMPI test with a template rather than by using a computer program. (EH Vol.1 at 89). However, during a break in the deposition, Dr. Mittenberg admitted to Mr. Halpern that he had used a bootleg program from Nova University to score Defendant's MMPI test. (EH Vol. 1 at 89). Mr. Halpern testified that he advised Dr. Mittenberg to correct his statement. After the break, Dr. Mittenberg admitted that he used a bootleg program to score Defendants MMPI test. (EH Vol. 1 at 89-90).

Another damaging aspect of Dr. Mittenberg’s deposition was that he stated that it did not make any difference to him what Defendant's mindset was when he committed the crimes. (EH. Vol. 1 at 90). Mr. Halpern-found this damaging because it could have led the jury to infer that Defendant premeditated the crimes. (EH Vol. 1 at 90).

Although Mr. Halpern acknowledged during the evidentiary hearing that he could not definitively testify whether he weighed the alternative of introducing into evidence Dr. Mittenberg's report and/or deposition, he did not think that was an issue for him, because Dr. Mittenberg made a very bad witness. (EH Vol. 1 at 91, 92). Furthermore, the State had its own expert, Dr. LoPiccolo, who would have testified in rebuttal had he introduced Dr. Mittenberg's report and/or deposition into evidence. (EH Vol. 1 at 91, 94). Mr. Halpern testified that in his view, Dr. LoPiccolo was well qualified and made a powerful witness. (EH Vol. 1 at 91). In the deposition, Dr. LoPiccolo was critical of Dr. Mittenberg's work and disagreed with his conclusions. (EH Vol. 1 at 92). In addition, Mr. Halpern

explained that the mental health mitigator he was trying to prove was that Defendant's behavior was impacted by an abnormality in his brain. (EH Vol. 1 at 91). To establish that mitigator, he presented the unimpeached testimony of Dr. Kotler, who testified that Defendant's PET scan was abnormal. (EH Vol. 1 at 91).

During re-direct examination, Mr. Halpern acknowledged that had Dr. Mittenberg testified at the penalty phase as initially intended, his testimony would also have been subject to cross-examination and Dr. LoPiccolo would have been called as a rebuttal witness by the State. (EH Vol. 1 at 95). However, Mr. Halpern stated that he could have presented Dr. Mittenberg's testimony in a more favorable light, by asking follow-up questions that were not asked during the deposition. (EH Vol. 1 at 95).

The trial record corroborates Mr. Halpern's testimony during the evidentiary hearing. In addition, the record reflects that during the recess granted by the trial court for the defense to find another mental health expert, Dr. Diego Rielo was appointed at the recommendation of Dr. Arias. Dr. Rielo conducted a sleep deprived EEG to find evidence of brain damage. (ROA Vol. 60 at 458-66). However, Dr. Rielo's testing did not reveal any brain damage or any abnormalities. (ROA Vol. 60 at 458~64). Mr. Halpern could not hire another neuropsychologist to test Defendant, because not enough time had passed since Dr. Arias had conducted his testing of Defendant. (ROA Vol. 60 at 461-64). The trial record also reflects that Mr. Halpern introduced into evidence Dr. Mittenberg's report and deposition at the Spencer hearing. (ROA Supp. Vol. 31 at 314). Thus, the information about possible brain damage was presented to the sentencing court.

This Court finds that Defendant failed to prove any deficient performance by Mr. Halpern for failure to ensure competent mental health assistance. As testified by Mr. Halpern during the evidentiary hearing, Dr. Mittenberg came recommended as a good neuropsychologist who had done work both for the defense and the State, which would enhance his credibility as a witness. (EH Vol. 1 at 84). Dr. Mittenberg's meltdown was a sudden development in the middle of the penalty phase. Mr. Halpern moved for mistrial twice because of Dr. Mittenberg's unavailability to testify and the impossibility to find another expert to replicate his test results. He hired other mental health experts to develop mitigation, but they could not replicate Dr. Mittenberg's results. Furthermore, Mr.

> Halpern presented Dr. Mittenberg's report and deposition to the sentencing court during the Spencer hearing.
>
> Even assuming arguendo that Defendant could show deficient performance, he failed to prove prejudice. Defendant did not present any testimony during the evidentiary hearing that he has brain damage. He merely introduced into evidence Dr. Mittenberg's report, which was already presented before the trial court prior to sentencing. He did not present anything new in terms of mitigation for this Court to reweigh against the existing aggravators. Even if Mr. Halpern would have introduced Dr. Mittenberg's report and/or deposition at the penalty phase, his credibility would have been seriously undermined by the State's expert and by Dr. Mittenberg's admissions that he used a bootleg program to score one of Defendant's tests and that he incorrectly scored another test. There is no likelihood that the jury would have changed their unanimous vote for the death penalty had they heard Dr. Mittenberg's report and deposition given that the same jury found Defendant guilty of stabbing to death a four-year-old girl and her mother. Accordingly, this Court finds Defendant's instant subclaim without merit.
>
> For the reason stated herein, Defendant's claim IV is denied.

(PCR 7:1318-24)

Initially, Knight argues that the jury did not hear the details about Knight's childhood, although he fails to detail those in his brief. Knight presented no evidence at the hearing of any information the jury did not hear. No witness testified to support his allegation of sexual abuse. The evidence he did present showed that Halpern diligently and thoroughly investigated, prepared, and presented all the available mitigation evidence. (PCR 20:324-63)

The trial record also rebuts that assertion. At the penalty phase trial counsel called two of Knight's teachers, his employer in Jamaica, the mother of his long-

term girlfriend in Jamaica as well as the private investigator hired to conduct a thorough social history. The following evidence came out to the jury. His teacher Joscelyn Walker ("Walker") told the jury that Knight was a respectful and loving boy raised in a very respected family. He said that Knight did have a temper when provoked and would become extremely frustrated at times. Walker had to restrain him from time to time when Knight wanted to fight another child. (T 51:724-71) Knight's high school art teacher Joscelyn Gopie ("Gopie") described Knight as a pleasant, eager boy who was quite talented at art. Gopie explained that Knight was adopted as a toddler by his family. Knight left high school before he graduated. (T 51:779-92) Barbara Weatherly ("Weatherly") is the mother of a Jamaican girl who was affianced to Knight. She described him as a decent honorable guy who respected her rules regarding her daughter. He always helped her younger children with their drawing. He was a quiet and peaceful person who spent a lot of time alone. One night at her house he got sick; his eyes rolled back in his head and he frothed at the mouth before passing out. They took him to the hospital where the doctor said that he needed to see a psychiatrist. She last saw him in 1998 when he left to go to the United States. (T 51:794-809) A former boss and coworker of Knight's also testified. Stanley Davis ("Davis") told how Knight had been adopted into a well respected family and had a close loving relationship with his family

members. Knight took over many of his father's duties when his father lost a leg. Knight worked with him at a construction company and was a good worker. Once he fell from a height and blacked out, after which he had difficulty concentrating and became timid. (T 52:888-908)

Valerie Rivera was the defense investigator. She and the attorney journeyed to Jamaica to interview Knight's family and friends. Knight was abandoned by his mother and the Knight family found him at a hospital and took him home. He was a good brother and son. Knight's close friends and family said that he was a nice and good person. Knight's sister in law used to have Knight babysit her children but eventually stopped that because he was careless around the house. He blacked out on one other occasion. Knight's former boss Stedman Stevenson said that he was a hard worker and a quick learner. He took Knight to Florida and Knight decided to stay. (T 54:1037-89) With the exception of the sexual abuse by a neighbor, all the information Knight cites did come before the jury. Knight has failed to demonstrate any deficient performance in the investigation or the presentation of this mitigating evidence. Additionally, this portion of the claim is insufficiently pled since he fails to address what, if any, prejudice he suffered as a result of not putting on the information about sexual abuse. As such, it is

conclusory and should be summarily denied. Additionally, Knight fails to meet either Strickland prong, again mandating summary denial.

Knight also claims that crucial information about Knight's mental health never reached the jury due to ineffective assistance of counsel. He argues that counsel failed to provide Knight with a competent mental health expert, to have a "stand-in" expert, to introduce Mittenberg's report or deposition testimony, or to take other measures to enlighten the jury about Knight's mental health issues. Knight addresses the prejudice prong in solely conclusory terms so the claim is insufficiently pled. The evidence at the hearing proved that no other doctor could duplicate Dr. Mittenberg's findings. Additionally, the record refutes his allegations so he failed to meet the deficient performance requirement of Strickland as well. This court should summarily deny the claim.

Trial counsel had a battery of mental health experts appointed throughout the pendency of the case, all of whom tested or examined Knight in preparation for the penalty phase mitigation presentation. Initially, in October 2002 counsel had psychologist Ross Seglison appointed to develop mitigation. (T. 58/36-39, 1:63-66) He then in March 2003 had neuropsychologist David Shapiro appointed to conduct testing and to evaluate Knight for brain damage and abnormalities. (T. 58/118-20, 1:63-66) After Shapiro had done his testing, counsel then asked in

May 2003 to have both a MRI and a CAT scan done on Knight. (T. 58/133-37, 1:63-66) More testing was ordered in January 2004. (T. 59/214, 1:63-66) After all those tests and evaluations were complete, counsel returned to court and requested new experts be appointed due to a "conflict of interest" with Shapiro and Seglison. (T. 59/268, 1:63-66) It was at that point that Mittenberg was retained. (T. 59/270-72, 1:63-66) Mittenberg had come highly recommended and was a professor of psychology. (SR 30, 1:84-85)

Trial counsel structured the penalty phase mitigation presentation around Mittenberg's conclusions that Knight suffered from brain damage and that the two mental health statutory mitigators applied. Although neither the MRI nor the CAT scan showed any brain damage, the CAT scan did show an asymmetrical brain which could support Mittenberg's conclusions. (T. 60/483; SR Vol. 30) The defense presentation was set to begin on May 22; counsel spoke to Mittenberg at length on May 20 when Mittenberg told him that he was prepared and would testify. (T. 60/483-88) After the defense presentation had begun, counsel was informed that Mittenberg refused to testify, would invoke his Fifth amendment rights, and had a doctor's note indicating he had mental health problems and was on psycho tropic medication. (T. 53/913-42) Based on this information counsel made a motion for a mistrial which was denied. (T. 53/924-30, 985) Counsel

would renew that motion again in July. (SR 30) The court did give Knight a two month recess. Halpern testified to all of this at the evidentiary hearing.

During the recess, Knight had a new neuropsychologist appointed, Alex Arias who again completed a full round of testing on Knight, covering all the tests conducted by Mittenberg as well as additional ones. (T. 60/457, sealed record July 20, 2006) At Arias's recommendation, counsel had Dr. Diego Rielo appointed to conduct a sleep deprived EEG to determine whether Knight's history of epileptic seizures may have contributed to his behavior during the crime. (T. 60/458-64, 481) It turned out that the other doctors could not replicate Mittenberg's findings and their own findings showed that Knight was normal in all tests. If he truly were brain damaged, his test results could not have changed as dramatically as they did. (sealed record) Counsel could not put on a "stand-in" psychologist to present evidence of brain damage since it was not substantiated by the test results nor would any psychologist present Mittenberg's report or findings if his results were not replicable. Halpern confirmed all of this at the evidentiary hearing, saying the defense was in a Catch-22 situation so he followed the most prudent course and rested without calling an additional expert and, thereby, avoiding the State from calling a "powerful" expert on rebuttal. (PCR 20:356-59)

Mittenberg's testing results were fatally compromised because he used an unauthorized and illegal computer scoring program for the one test's data and incorrectly scored another test. (T. 60/483-88; SR 30, 1:67-72) None of the other mental health professionals with who counsel had consulted came up with Mittenberg's conclusions. As counsel himself stated, he could not ethically call Mittenberg once he knew that his scoring was so flawed nor could he call him given that same information since it completely undermined his credibility once it was brought to the jury's attention. Whether it was a tactical or ethical decision, counsel could not call Mittenberg; if he did, any credibility the defense had with the jury would be gone. Counsel attempted to have yet another neuropsychologist appointed but could not because that doctor could not have done the necessary testing because not enough time had passed since Arias had done his testing. (Id.) Counsel simply could do nothing else. Based on this record, Knight's allegations of deficient performance are completely refuted. This claim should be denied.

Finally, while the jury did not hear from Mittenberg, the trial court did since counsel submitted his report and deposition testimony at the Spencer hearing. (SR 31/314) Consequently, the information about possible brain damage was before the ultimate sentencer and its inclusion in the penalty phase was unlikely to alter

either the 12-0 votes for death by the jury or the court's sentence. This claim should be denied.

ARGUMENT III

THE POST-CONVICTION COURT PROPERLY DENIED THIS CLAIM AS PROCEDURALLY BARRED, LEGALLY INSUFFICIENT, AND WITHOUT MERIT. FURTHER, THE CLAIM IS INSUFFICIENTLY PRESENTED IN THIS APPEAL. (Restated)

In his next claim, Knight alleges that the rules of professional responsibility which prohibit interviews of jurors are unconstitutional under both the state and federal constitutions. Initially the State wishes to point out that Knight merely references this argument and acknowledges that this Court has upheld the constitutionality of these rules repeatedly. As such, he fails to adequately brief or address this issue on appeal and this Court should deny it on those grounds. Pagan, 29 So. 3d at 957. Furthermore, the lower court's summary denial was appropriate since the claim was procedurally barred, legally insufficient, and without merit.

The post-conviction court stated:

> Defendant's constitutional challenge to rule 4-3.5(d)(4) fails for three reasons. First, "this claim is procedurally barred because it should have been raised on direct appeal." *Troy v. State*, 57 So. 3d 828, 841 (Fla. 2011) (citing *Reese v. State*, 14 So. 3d 913, 919) (Fla. 2009)); *See also Israel v. State*, 985 So. 2d 510, 522 (Fla. 2008) (finding that the defendant's constitutional challenge to rule 4-3.5(d)(4) was procedurally barred in the

> postconviction proceeding, because it could have and should have been raised on appeal).
>
> Second, Defendant's claim is legally insufficient because he did not make a prima facie showing of juror misconduct. *Arbelaez v. State*, 775 So. 2d 909, 920 (Fla. 2000). Thus, his claim is "nothing more than a request to investigate possible grounds for finding juror misconduct" and to conduct a "fishing expedition." *Israel*, 985 So. 2d at 523; *Arbelaez*, 775 So. 2d at 920.
>
> Third, even if this claim were not procedurally barred, the constitutionality of rule 4-3.5(d)(4) has been repeatedly analyzed and rejected by the Florida Supreme Court. *Troy*, 57 So. 3d at 841; *see also Barnhill v. State*, 971 So. 2d 106, 117 (Fla. 2007) (finding that rule 4-3.5(d)(4) does not violate a defendant's constitutional rights).
>
> Therefore, for the reasons set forth above, Defendant's claim V for relief is hereby summarily denied.

(PCR 7:1325-26)

The post-conviction court's legal analysis is sound. Additional to the court's citations, this Court's precedents clearly show that the challenge to the rule itself is without merit and has been rejected repeatedly. See Sexton v. State, 997 So.2d 1073, 1089 (Fla. 2008) (rejecting constitutional challenge to rule barring juror interviews "on a wider range of subjects than grounds for legal challenge to the verdicts" and noting "identical claim has been repeatedly rejected as both procedurally barred when brought on postconviction and on the merits." (citing Barnhill v. State, 971 So.2d 106, 116-17 (Fla. 2007)).

As explained by this Court in Baptist Hospital of Miami, Inc. v. Maler, 579 So.2d 97, 100 (Fla. 1991), "juror interviews are not permissible unless the moving

party has made sworn allegations that, if true, would require the court to order a new trial because the alleged error was so fundamental and prejudicial as to vitiate the entire proceedings. This standard was formulated 'in light of the strong public policy against allowing litigants either to harass jurors or to upset a verdict by attempting to ascertain some improper motive underlying it.'" A jury interview was not warranted because Knight has not made sworn allegations that, if true, would require the court to order a new trial because the alleged error was so fundamental and prejudicial as to vitiate the entire proceedings. Baptist Hospital, 579 So.2d at 100. See Devoney v. State, 717 So.2d 501, 502 (Fla. 1998) (describing the matters that may be inquired into as: that a juror was improperly approached by a party, his agent, or attorney; that witnesses or others conversed as to the facts or merits of the cause, out of court and in the presence of jurors; that the verdict was determined by aggregation and average or by lot, or game of chance or other artifice or improper manner).

Moreover, this Court has "cautioned against permitting jury interviews to support post-conviction relief" for allegations which focus upon jury deliberations. Griffin v. State, 866 So.2d 1, 20-21 (Fla. 2003) (citing Johnson v. State, 593 So.2d 206, 210 (Fla. 1992) (stating that "it is a well-settled rule that a verdict cannot be subsequently impeached by conduct which inheres in the verdict

and relates to the jury's deliberations"). Section 90.607(2)(b), Florida Statute, mandates that a "juror is not competent to testify as to any matter which essentially inheres in the verdict or indictment." Matters that "inhere in the verdict" have been defined as "'those which arise during the deliberation process.'" Sconyers v. State, 513 So.2d 1113, 1115 (Fla. 2d DCA 1987). See Mitchell v. State, 527 So.2d 179, 181 (Fla. 1988). Thus, the statute forbids judicial inquiry into the jurors' emotions, mental processes, mistaken beliefs, understanding of the applicable law, or other matter resting alone in the juror's breast. See Devoney, 717 So.2d at 502; State v. Hamilton, 574 So.2d 124 (Fla. 1991). "In short, matters that inhere in the verdict are subjective in nature, whereas matters that are extrinsic to the verdict are objective." Id. There is no constitutional infirmity.

This Court should affirm the summary denial of this claim.

ARGUMENT IV

FLORIDA'S LETHAL INJECTION PROCEDURES ARE CONSTITUTIONAL. (Restated)

In his last issue Knight says that Florida's lethal injection procedures violate the Eighth and Fourteenth Amendments to the United States Constitution as well as the similar provisions in the Florida Constitution. Once again, Knight merely references this argument and acknowledges that this Court has upheld the constitutionality of these procedures repeatedly. As such, he fails to adequately

brief or address this issue on appeal and this Court should deny it on those grounds. Pagan, 29 So. 3d at 957. Furthermore, this claim was insufficiently pled below, warranting the summary denial. Reeves .v. State, 761 So. 2d 1055, 1061 (Fla. 2000) ("Conclusory allegations are insufficient to meet a defendants burden of establishing a prima facie case that he is entitled to postconviction relief." (citing Freeman v. State, 761 So. 2d 1055, 1061 (Fla. 2000). Finally, the claim is without merit.

This Court has upheld the lethal injection protocol in Lightborne v. McCollum, 969 So. 2d 326 (Fla. 2007) and Valle v. State, 70 So. 3d 530 (Fla. 2011). The United States Supreme Court recently issued its opinion in Glossip v. Gross, 135 S. Ct. 2726, 2015 WL 302647 (2015) where it rejected the constitutional challenge to Oklahoma's lethal injection protocol using midazolam as an anesthetic. Previously, in Muhammad v. Florida, 132 So. 3d 176, 195-196 (Fla. 2013), this Court had considered and rejected the constitutional challenge to the use of midaolam in the lethal injection protocol, finding that it is not "sure or very likely" to cause serious illness or needless suffering and give rise to "sufficiently imminent dangers." See also Howell v. State, 138 So. 3d 511, 522 (Fla. 2014) (rejecting Howell's constitutional challenge to the use of midazolam and finding that Howell did not meet his heavy burden under Baze v Rees, 553

U.S. 35, 50 (2008) of showing that the use of midazolam poses a "substantial risk of serious harm," that would prevent prison officials from pleading that they are "subjectively blameless for purposes of the Eighth Amendment").

This Court should affirm the denial of relief.

CONCLUSION

Based on the foregoing arguments and authority, the State respectfully asks this Court should deny all of the post-conviction claims.

Respectfully submitted,

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been electronically furnished to mailto:hallan@17th.flcourts.org,Todd Scher, Assistant CCRC-South, tscher@msn.com, 1 East Broward Blvd, Suite 444, Ft. Lauderdale, FL 33301mailto:jsilvershein@sao17.state.fl.us, on this 4th of August, 2015.

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