IN THE SUPREME COURT OF FLORIDA

Case No. SC14-1775

RICHARD KNIGHT
Appellant,

v.

STATE OF FLORIDA,
Appellee.

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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

ARGUMENT IN REPLY

ARGUMENT I

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

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

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

Mr. Knight contends that he was denied a reliable adversarial testing at the guilt phase of his capital trial. The jury never heard compelling evidence that was exculpatory as to Mr. Knight due to trial counsel's unreasonable failure to present it and the State's withholding of material exculpatory evidence. *See Brady v. Maryland*, 373 U.S. 83 (1963). Whether the State suppressed the evidence, defense counsel unreasonably failed to present the evidence, or the evidence is newly discovered, confidence is undermined in the outcome because the jury did not hear the evidence. The result of Mr. Knight's trial is unreliable. As a result of trial counsel's deficient performance[1] in failing to present readily available evidence and effectively challenge the cornerstone of the State's physical evidence, and as a result of the State's withholding of impeachment evidence, Mr. Knight was prejudiced by the lack of adversarial testing at his capital murder trial. Had trial counsel effectively challenged the State's physical evidence there is a reasonable probability that the result of the proceeding would have been different.

[1] Courts are not to evaluate counsel's performance in an isolated fashion; rather, it is the *cumulative nature* of defense counsel's deficiencies that is reviewed. *Hardwick v. Sec'y Dep't of Corrections,* 25 Fla. L. Weekly Fed. C1624 at *8 (11th Cir. Sept. 18, 2015) (affirming district court's finding of deficient performance based on a "combination" of factors that "led ineluctably to the finding that counsel's performance was deficient").

1. Unreasonable and Prejudicial Failure to Present Dr. Rudin

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

In response to Mr. Knight's claim, the State argues that Mr. Knight failed to show how trial counsel's failure to call Dr. Rudin as a witness constituted deficient performance. In support, the State asserts that Dr. Rudin was only critical of certain "practices of the Broward Crime Laboratory…as well as other issues that did not go to the integrity of any of the scientific findings." (AB at 24-25). And, that "the majority of her report was critical of McElfresh's analysis of the samples from the waistbands of the boxer and shorts." (AB at 25).

The State is correct in that Dr. Rudin criticized certain practices of Broward's lab and that her report criticized McElfresh's analysis. However, the State's assertion that she was critical of "other issues that did not go to the integrity of any of the scientific findings[]" is misleading (*Id*.). In Dr. Rudin's report dated April 28, 2006, she concluded:

> Nevertheless, from the information I received, I did not detect any substantive or significant errors that would change the ultimate conclusion **proffered by Mr. Noppinger** regarding the possible source(s) of each sample.

(V. 6 PCR. 992) (emphasis added). Dr. Rudin concluded that she ultimately did not find any errors that would cause her to come to a different conclusion specifically with respect to *Mr. Noppinger's* findings, *which excluded Mr. Knight as a contributor from critical pieces of evidence*. *See Knight v. State*, 76 So. 2d 879, 887 (Fla. 2012) (Based on Noppinger's testimony as a whole, "defense counsel relied on serologist Kevin Noppinger's DNA analysis that Knight's jean shorts and boxers, recovered from the apartment bathroom, contained Odessia and Hanessia's DNA, and excluded the DNA of [Mr.] Knight."). In other words, Dr. Rudin did not quibble with Noppinger's findings that were *favorable* to Mr. Knight. What the State persists in misunderstanding is that Dr. Rudin *was*, however, critical of *other issues that did go to the integrity of the findings*. For example, on page three of her report, she stated:

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

(V. 6 PCR. 990) (emphasis added). She did, in fact, question the substantive findings due to numerous errors committed. She also went on to conclude that:

> **The testimony presented by Kevin McElfresh was incomplete and misleading.** His opinions directly contradicted the prior report released by Bode Technology, reviewed and signed by three other scientists at the company. **His conclusions were apparently reached by assuming the contributors he was trying to prove. This type of analysis is fundamentally incorrect and inherently biased.**

(V. 6 PCR. 992) (emphasis added).

So although trial defense counsel did have an expert who "came to generally the same nominal conclusions as Mr. Knoppinger [sic]", that expert (Dr. Rudin) harshly criticized his quality of work and did not agree with McElfresh's analysis deeming it incomplete and misleading. Contrary to the State's assertion that had defense counsel call Dr. Rudin to testify she "would have only bolstered the State's

case by validating its DNA evidence" by agreeing with Noppinger, her testimony would in fact have significantly undermined the integrity of the State's DNA case as a whole. Had she testified at Mr. Knight's trial, her opinion would have minimized confidence in the accuracy and reliability of Noppinger's work coupled with the blatant misleading and fundamentally incorrect scientific analysis by McElfresh that was inherently biased. In short, Dr. Rudin's testimony would have been significant to the jury and would have cast an inescapable shadow of doubt on the foundation of the State's physical evidence.

In its Answer Brief, the State points to other DNA evidence to support its position that Mr. Knight was not prejudiced by trial counsel's failure to call Dr. Rudin at trial. What the State fails to acknowledge is that had Dr. Rudin testified, she would have cast doubt not only on McElfresh's analysis of the boxer shorts and jean shorts, but on the State's DNA case in its entirety. Had her testimony been presented to the jury, it would have provided a basis to either discredit the State's DNA testimony in its entirety, or at the least, given the jury a basis in fact to give it much less weight. Mr. Knight need not establish that he would have been acquitted had Dr. Rudin testified or that the outcome *would have* changed; *Strickland*'s prejudice prong does ***not*** "require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' of his [trial], but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome."

Porter v. McCollum, 130 S. Ct. 447, 455-56 (2009) (quoting *Strickland*, 466 U.S. at 693-94). Nor does Mr. Knight have to prove that he had a meritorious defense that would have resulted in a not guilty verdict. Rather he need establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "[I]t is sufficient that [Mr. Knight] must show only a reasonable probability that the outcome would have been different; he 'need not show that counsel's deficient conduct more likely than not altered the outcome in the case.'" *Brownlee v. Haley*, 306 F.3d 1043, 1059-60 (11th Cir. 2002) (quoting *Strickland*, 466 U.S. at 693). *See also Wilson v. Mazzuca*, 570 F.3d 490, 507 (2d Cir. 2009) ("[T]he reasonable probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different") (citations omitted). "The *Strickland* test does not require certainty that the result would have been different" but rather only a "reasonable probability of a different outcome." *DeLuca v. Lord*, 77 F.3d 578, 590 (2d Cir. 1996). *See also Williams v. Taylor*, 529 U.S. 362, 405 (2000) (Opinion of O'Connor, J.) ("If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be "diametrically different," "opposite in character or nature," and "mutually

opposed" to our clearly established precedent because we held in *Strickland* that the prisoner need only demonstrate a "reasonable probability that ... the result of the proceeding would have been different.").

The State's reliance on Dr. Rudin's statement that "McElfresh's testimony was relatively inconsequential when viewed in context of the biological evidence as a whole" is misplaced. (V. 6 PCR. 992). This statement is irrelevant to Dr. Rudin's **scientific conclusions** about the evidence in the case as it amounts to a **legal opinion** about the strength of the case—and opinion that she is not qualified to make and which she would not have been permitted to testify about.[2] A conclusion about the strength of the evidence in the case is the responsibility of the jury. Given that the overarching importance of McElfresh's testimony to the State's case, and the fact that the State highlighted McElfresh's testimony to the jury during closing argument (V. 34 R. 3546-3549; 3565), there is more than a reasonable probability that, had Dr. Rudin testified to her **scientific opinions**, a different result would have been obtained. No reasonable tactical or strategic decision can explain why defense counsel failed to call Dr. Rudin as a witness in Mr. Knight's trial. Defense counsel's failure to present Dr. Rudin constituted deficient performance under the Sixth

[2] The State cannot seriously suggest that it would not have been objectionable for the prosecutor to elicit from Dr. Rudin her personal opinion regarding the strength of the State's case against Mr. Knight. Any such testimony would have been improper whether it came from a defense expert, a police officer, or a prosecutor. *See generally Ruiz v. State,* 743 So. 2d 1 (Fla. 1999).

Amendment and *Strickland* and as a result, Mr. Knight was prejudiced. *Strickland v. Washington*, 466 U.S. 668 (1984).

2. The Withheld Impeachment Evidence Regarding Kevin Noppinger

The other principal scientific witness to testify at Mr. Knight's trial was Kevin Noppinger, a serologist with the Broward County Sheriff's Office crime laboratory. In his Rule 3.851, Mr. Knight alleged that he was prejudiced as a result of the State's *Brady* violation for failing to turn over what has become known as the Noppinger Memo. Unbeknownst to either defense counsel or the jury, Noppinger, during the pendency of Mr. Knight's case but well before he testified at trial, had requested a demotion from technical manager of the DNA section of the Broward County Sheriff's Office crime laboratory to a "Criminalist III" position (Defense Exhibit 3/Noppinger Memo).

The State contends that the memo is not *Brady* and relies on the lower court's findings for support. The State asserts that Mr. 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;…" (AB at 33) (emphasis added). The testimony establishes otherwise: When asked about the memo at Mr. Knight's evidentiary hearing, Mr. Noppinger testified as follows:

> Q: Can you please explain to the Court why you wrote this letter.

> A: I was still performing case work and a technical leader is responsible for all technical aspects of the laboratory. We had recently hired a quality assurance officer. We had quite the personnel [sic] differences and opinions. And it was pretty stressful for me, so I decided to give up the position.
>
> Q: Would it be fair to say that the issues you addressed in this letter were personnel [sic] issues that you had with BSO lab?
>
> A: Yes, it was **mostly** getting approval for a new DNA profiling kit **and it was a personnel** [sic] **issue** just between me and the QA officer.

(EH Vol. 2 at 150-151) (emphasis added). To say that Mr. Noppinger testified that his *sole* reason for writing the memo was due to a personality conflict is simply not true (AB at 33). Nowhere in his testimony did Mr. Noppinger state that the **sole** reason for writing the memo was due to personal issues with a new quality control officer. In fact, when one looks to the memo itself, Mr. Noppinger identified his reason for requesting the self-demotion as follows:

> Although I am committed to the Broward County Sheriff's office crime lab, **the current situation precludes me from performing effectively. If conditions allowed me to perform so that I could be effective**, I would like to maintain my position as technical manager of the DNA section; **however, existing conditions preclude this**…

(V. 6 PCR. 996) (emphasis added). Based on his testimony at the evidentiary hearing, Mr. Noppinger clearly did have a personal conflict with the new quality control manager, however that was not the reason stated in his memo for requesting a self-demotion. Therefore, although it may be accurate to assert that Mr. Noppinger

did in fact have a personal conflict with his quality control manager, it cannot be said that that was his **sole** reason for requesting the demotion. The memo itself speaks to the contrary.

The lower court erred in its finding that "…assuming that the memorandum had some limitted [sic] value for impeachment purposes", Mr. Knight was not prejudiced as a result of the State's *Brady* violation. (V. 7 PCR. 1301). The court failed to appreciate the reasons for Mr. Noppinger's self-requested demotion from Broward Sheriff's Office crime lab manager to a DNA analyst. Mr. Noppinger requested the demotion, in part, due to an inability to effectively perform his job. This information was never made known to trial counsel nor the jury.

The State asserts that trial counsel could not have used the memo for impeachment purposes "since it in no way called his methods or expertise into question" and that "the document had no bearing on the quality of work" of the crime lab (AB at 34). To the contrary, the document itself identifies that "the current situation preclude[ed] [Mr. Noppinger] from performing effectively." (V. 6 PCR. 996). Trial counsel Baron testified at the evidentiary hearing that he did not have this document prior to Mr. Knight's trial because it was not produced by the State as part of its disclosure obligation. Baron testified that the memo contained information that he would have wanted to know in terms of his examination of Noppinger at Mr. Knight's trial (V. 20 PCR. 307). This information—coupled with Dr. Rudin's

opinion that "while [she] found no blatant misattribution of DNA profiles, the renumbering, a mislabeling of a reference sample, the generally poor legibility of the handwritten notes, and the initial refusal to provide complete discovery, **combine to lessen one's confidence in the accuracy and reliability of the analysis**"—would have provided invaluable impeachment evidence to be brought out on cross-examination (V. 6 PCR. 991-92) (emphasis added).

It is axiomatic that the State's disclosure obligations under *Brady* and its progeny extend to impeachment evidence, which the Noppinger Memo clearly is. The State's reasoning that no *Brady* violation occurred because Mr. Knight "did not show that the State, other than the personnel department of the crime lab, was aware of its existence" is unfounded. The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and 'material either to guilt or punishment.'" *U.S. v. Bagley*, 473 U.S. 667, 674 (1985). (quoting *Brady*, 373 U.S. at 87). "Under our law, the prosecutor has a duty to be fair, honorable and just . . . [T]he prosecuting attorney 'may prosecute with earnestness and vigor—indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones.'" *Boatwright v. State*, 452 So. 2d 666, 667 (Fla. 4th DCA 1984) (citing *Berger v. United States*, 295 U.S. 78 (1935)). The State cannot plead ignorance in order to escape a *Brady* violation. *Kyles s. Whitley*, 514 U.S. 419, at 420 (1995). ("Thus, the prosecutor, who alone can know what is undisclosed, must be assigned the

responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. Moreover, that responsibility remains regardless of any failure by the police to bring favorable evidence to the prosecutor's attention To hold otherwise would amount to a serious change of course from the *Brady* line of cases."). The State violated *Brady* in failing to disclose the Noppinger Memo to Mr. Knight's trial counsel, depriving him of an opportunity to impeach Mr. Noppinger on cross-examination, thus Mr. Knight was prejudiced under *Brady*.

3. Failure to Request a Frye Hearing

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

from Bode would have to have been excluded as a matter of law. The lower court improperly denied relief on this claim, and a new trial is warranted.

In its Answer, the State asserts that Dr. 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." (AB at 39-40). The State goes on to interpret this to mean that "she agreed that Knight had the victims' blood on the clothes he was wearing, on his hands, and under his fingernails…that his clothes, stuffed under the sink…had the blood of the victims and himself…" (AB at 40). To the contrary, in her report dated April 28, 2006, Dr. Rudin concluded that "while [she] found no blatant misattribution of DNA profiles, the renumbering, a mislabeling of a reference sample, the generally poor legibility of the handwritten notes, and the initial refusal to provide complete discovery, **combine to lessen one's confidence in the accuracy and reliability of the analysis**". (V. 6 PCR. 991-92). In further undermining the reliability of the State's DNA evidence, Dr. Rudin concluded that:

> **The testimony presented by Kevin McElfresh was incomplete and misleading.** His opinions directly contradicted the prior report released by Bode Technology, reviewed and signed by three other scientists at the company. **His conclusions were apparently reached by assuming the contributors he was trying to prove. This type of analysis is fundamentally incorrect and inherently biased.**

(V. 6 PCR. 992) (emphasis added).

This lack of confidence in the accuracy and reliability of the analysis buttressed by the facts that have come to light due to the disclosure of the Noppinger memo, coupled with Dr. Rudin's assertion the McElfresh did not adhere to the procedures generally accepted in the scientific community, demonstrates that trial counsel unreasonably failed to move for a hearing pursuant to *Frye*.

Because reliability of the scientific methodology is the *sine qua non* of admissibility, results of scientific experiments based upon generally accepted scientific principles are still inadmissible if the testing done in the particular case did not adhere to the procedures themselves generally accepted in the scientific community. *See Hadden v. State*, 690 So. 2d 573, 577 (Fla. 1997), *Hayes v. State*, 660 So. 2d 257, 263-64 (Fla. 1995); *Ramirez v. State*, 651 So. 2d 1164, 1168 (Fla. 1995). This is what occurred in Mr. Knight's case, as established through the testimony of Dr. Rudin (V. 21 PCR 388-393). Thus, confidence in the reliability of the State's DNA evidence is undermined, counsel was deficient in failing to request a *Frye* hearing, and as a result, Mr. Knight was prejudiced.

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

Aside from the scientific DNA evidence, the other key portion of the State's case came from the testimony of jailhouse informant Steven Whitsett. Whitsett's testimony was indeed crucial to the State's case, as this Court explained in its direct appeal opinion. *Knight v. State,* 76 So. 3d 879, 883 (Fla. 2011). As the Court set out,

Whitsett provided details about what Mr. Knight purportedly "confessed" to him out of the blue, including a putative motive for the killings.

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

The State asserts that because the "log in no way indicated that Whitsett was similarly counseled or was in the same cell as Knight….any information he got from the newspaper could not have affected his trial." (AB at 45). The fact that Whitsett was not "similarly counseled" has no bearing on the fact that, because he was housed in the same cell area as Mr. Knight, if Mr. Knight had access to newspapers, which the logs confirm that he did, then Whitsett also had access to the same newspapers—

newspapers that contained information about the facts of Mr. Knight's case. The fact that Whitsett wasn't "counseled" simply means that he was not caught having possession of the newspapers. It does not mean that he could not, and did not, gain his knowledge from the newspapers. Moreover it does not mean that he could not have been cross-examined on this topic at trial by Mr. Knight's defense counsel.

Further, because Mr. Knight and Whitsett "had their [alleged] discussions in the common room, and not Knight's cell[]" does not mean that Whitsett did not have access to Mr. Knight's cell where the newspapers were found (*Id*.). Mr. Knight and Whitsett were house in the same cell area which had a common room. Mr. Knight and Whitsett were both free to leave their individual cells and move freely about the common room thus, leaving their individual cells unoccupied and open for others to enter. Therefore, Whitsett did have access to newspapers while at the Broward County Jail. In its Answer, the State points to Whitsett's testimony that he did not have access to newspapers or other media sources while he was housed at **Martin County Jail** (AB at 45) (emphasis added). The logs at issue here are relevant to what Whitsett had access to while being housed at Broward County Jail. To point to the fact that Whitsett had no access to media or newspapers while house at Martin County Jail is irrelevant. In no way does it diminish Mr. Knight's claim that the State committed a *Brady* violation in its failure to disclose this impeachment material and that trial counsel was ineffective in challenging Whitsett's credibility.

Whitsett not only had access to newspapers while at Broward County Jail, he also had access to television. The importance of the discovery of newspapers in the cell area shared by Mr. Knight and Whitsett cannot be overstated because it provides an argument that defense counsel could have made to the jury, and certainly questioned Whitsett about, concerning the provenance of the information he claimed to have gotten from Mr. Knight. The jury was not apprised of the existence of proof that newspapers were in fact in the cell area shared by Mr. Knight and Whitsett. Mr. Knight submits that defense counsel had an obligation to investigate the existence of these documents, which were in available at the time of trial. However, Mr. Knight also submits that the State had an obligation to disclose the jail logs pursuant to its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963). In light of the critical importance of Whitsett's testimony, any information tending to further erode his credibility would have been highly probative and significant for the jury to consider when deliberating this case. Had the jury been made aware of the fact that Whitsett had access to multiple sources of information regarding Mr. Knight's case, the jury would have been given additional reasons to reject Whitsett's testimony and question the reliability of the State's case as a whole.

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

Mr. Knight relies on his Initial Brief in reply to the State's arguments on this Argument.

B. Conclusion.

Singularly and cumulatively, the errors outlined above warrant reversal of the lower court's order. A new trial should be ordered in light of the cumulative nature of the errors occurring at the guilt phase of Mr. Knight's capital trial. *See State v. Gunsby*, 670 So. 2d 920 (Fla. 1996).

ARGUMENT II

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

With the exception of the few matters addressed herein, Mr. Knight relies on his Initial Brief in reply to the arguments advanced by the State as to this claim. A few matters, however, do warrant a brief reply.

First, the State, in wholly contradictory fashion, argues that Mr. 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 (AB at 61). Yet several pages later the State *acknowledges that Mr. Knight's jury did not hear any evidence of sexual abuse* (AB at 69) ("With the exception of the sexual abuse by a neighbor, all the information Knight cites did come before the jury"). Moreover, the State is incorrect

that Mr. Knight failed to present *any* evidence that he was sexually abused as a child; as he noted in his Initial Brief, just days before the penalty phase commenced, the penalty phase investigator, Valerie Bailey, sent defense counsel Halpern a memo with information about the history of abuse (V. 7 PCR 1314). That memo detailing the abuse was introduced at the evidentiary hearing as Defense Exhibit 9. Halpern, however, had not even asked Mr. Knight if he had been abused, much less a victim of sexual abuse (V. 20 PCR. 342-44). This is prejudicially deficient performance in a capital case.

With regard to the issue relating to Dr. Mittenberg, the State writes that defense counsel "simply could do nothing else" (AB at 73). This is not only incorrect but it ignores Mr. Knight's arguments. In his Initial Brief, Mr. Knight argued:

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

(Initial Brief at 82-83) (emphasis added). The State makes no meaningful attempt to address Mr. Knight's argument that trial counsel unreasonably failed to introduce Dr. Mittenberg's report and/or deposition at the penalty phase, a failure for which

no reasonable strategic decision was offered by trial counsel at the evidentiary hearing.

ARGUMENT III

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

Mr. Knight relies on his Initial Brief in reply to the State's arguments on this Argument. To the extent that the State chastises Mr. Knight for following this Court's procedure in *Sireci v. State,* 773 So. 2d 34, 40 n.14 (Fla. 2000), the State's arguments should be rejected.

ARGUMENT IV

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

Mr. Knight relies on his Initial Brief in reply to the State's arguments on this Argument. To the extent that the State chastises Mr. Knight for following this Court's procedure in *Sireci v. State,* 773 So. 2d 34, 40 n.14 (Fla. 2000), the State's arguments should be rejected.

Respectfully submitted,

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CERTIFICATES OF SERVICE AND FONT

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed on this 16th day of October, 2015, and opposing counsel will be served on this date. Counsel further certifies that this brief is typed in Times New Roman 14-point font.

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