IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-1233

RICHARD KNIGHT

Appellant,

v.

STATE OF FLORIDA

Appellee.

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RESPONSE TO APPELLANT'S PETITION FOR HABEAS CORPUS

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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"; Postconviction record - "PCR"; any supplemental records will be designated symbols "SR", and to the Appellant's petition will be by the symbol "Pet.", 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.

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.
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> 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.
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> 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

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

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.

Knight v. State, 76 So.3d 879, 881-84 (Fla. 2011).

On May 10, 2013 Knight filed his motion for post-conviction relief and the court granted an evidentiary hearing for 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. 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).

Knight filed the instant petition for writ of habeas corpus on July 2, 2015.

ARGUMENT

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE NON-MERITORIOUS ISSUES. (Restated)

Knight asserts that his appellate counsel was ineffective for failing to raise the issues on appeal regarding the admission of one autopsy photograph and the trial court's denial of a mistrial based on the testimony of the officer about Knight's statements at the scene of the crime. Initially, Knight fails to adequately plead or argue prejudice on either of these issues and merely states that each was prejudicial to the degree that the direct appeal result may have been different if the issues had been raised.

Claims of ineffective assistance of appellate counsel are presented appropriately in a petition for writ of habeas corpus. See Freeman v. State, 761 So.2d 1055, 1069 (Fla. 2000). When analyzing the merits of the claim of ineffectiveness of appellate counsel, the criteria parallel those for ineffective assistance of trial counsel outlined in Strickland. See Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000) (explaining that the standard of review applicable to claims of ineffective assistance of appellate counsel raised in a habeas petition mirrors the Strickland standard for trial counsel ineffectiveness, i.e., deficient performance and prejudice from the deficiency)).

In Freeman v. State, 761 So.2d 1055, 1069 (Fla. 2000), this Court set out the review appropriate for claims of ineffective assistance of appellate counsel stating:

> In evaluating an ineffectiveness claim, the court must determinewhether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. *Pope v. Wainwright*, 496 So.2d 798, 800 (Fla. 1986). *See also Haliburton*, 691 So.2d at 470; *Hardwick*, 648 So.2d at 104. The defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based. *See Knight v. State*, 394 So.2d 997 (Fla. 1981). "In the case of appellate counsel, this means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error." *Id.* at 1001. In addition, ineffective assistance of counsel cannot be argued where the issue was not preserved for appeal or where the appellate attorney chose not to argue the issue as a matter of strategy. *See Medina v. Dugger*, 586 So.2d 317 (Fla. 1991); *Atkins v. Dugger*, 541 So.2d 1165, 1167 (Fla. 1989) ("Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points.").

Freeman, 761 So.2d at 1069. Appellate counsel cannot be deemed ineffective for failing to raise issues "that were not properly raised during the trial court proceedings," or that "do not present a question of fundamental error." Valle v. Moore, 837 So.2d 905, 907-08 (Fla. 2002) (citations omitted). "If a legal issue 'would in all probability have been found to be without merit' had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not

render appellate counsel's performance ineffective." Rutherford, 774 So.2d at 643. (quoting Williamson v. Dugger, 651 So.2d 84, 86 (Fla. 1994)); Chavez v. State, 12 So.3d 199, 213 (Fla. 2009).

A. Appellate counsel was not ineffective for failing to raise the non-meritorious issue on the admission of an autopsy photograph.

Knight argues that his appellate counsel should have raised the issue of the trial court's admission of an autopsy photograph. The photograph in question was taken at the autopsy of Hanessia Mullings, the little girl Knight murdered. It was one of approximately forty-three photographs admitted during crime scene technician Menke's testimony. The trial court described the photograph:

> THE COURT (JUDGE E. O'CONNOR): All right. These pictures depict Hanessia laying down with numbers across her chest on what appears to be a clean white shirt, but then there's blood on it. And she's clearly not alive. And there's blood around her head and on the clothing. Do you want to add anything?

(ROA 25:2731) Trial counsel objected to the photograph as duplicative since the wounds and clothing were shown in other photographs; he never explicitly said that it was more prejudicial than probative or that it served only to appeal to the jury's emotions. To that extent, counsel did not perfect or preserve the objection that the photograph was unduly prejudicial. It is well established that for an issue to be preserved for appeal, it must be presented to the lower court, and "the specific legal

argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved." Archer v. State, 613 So.2d 446 (Fla. 1993), quoting Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985). If it were not preserved for appeal, then appellate counsel could not be deficient for not making it an issue.

The trial court went ahead and ruled on the issue of prejudice anyway. It noted that the photographs of the child at the crime scene did not show her face and that:

> THE COURT (JUDGE E. O'CONNOR): And, really, the major difference, aside from, you know, this is the full body. And all-in—all the other photographs that you are looking at the body has been cleaned up. There's no blood on any of these other ones that you mentioned, because she's been cleaned, apparently. The pictures of her body, she's been cleaned up.

(ROA 25:2732). As the prosecutor noted, this was the only photograph which showed her full face and the only one to show her full body. Id. at 2732. Based on this, the court found the photograph was relevant and not unduly prejudicial.

The admission of photographic evidence is within the trial judge's discretion and a ruling on this issue will not be disturbed unless there is a clear showing of abuse. Pangburn v. State, 661 So. 2d 1182, 1187 (Fla. 1995). See Davis v. State, 859 So.2d 465, 477 (Fla.2003); Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); Zack v. State, 753 So. 2d 9 (Fla. 2000); Jent v. State, 408 So. 2d 1024 (Fla. 1981). Even gruesome photographs are admissible "[a]bsent a clear showing of abuse of discretion

by the trial court." See Rose v. State, 787 So. 2d 786, 794 (Fla. 2001); Gudinas v. State, 693 So. 2d 953 (Fla. 1997).

In Doorbal v. State, 983 So.2d 464 (Fla.2008) this Court explained:

> "The test for admissibility of photographic evidence is relevancy rather than necessity." Crime scene photographs are considered relevant when they establish the manner in which the murder was committed, show the position and location of the victim when he or she is found by police, or assist crime scene technicians in explaining the condition of the crime scene when police arrived. This Court has upheld the admission of autopsy photographs when they are necessary to explain a medical examiner's testimony, the manner of death, or the location of the wounds.
>
> However, even where photographs are relevant, the trial court must still determine whether the "gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jur[ors] and [distract] them from a fair and unimpassioned consideration of the evidence." In making this determination, the trial court should "scrutinize such evidence carefully for prejudicial effect, particularly when less graphic photos are available to illustrate the same point."

Douglas v. State, 878 So.2d 1246, 1255 (Fla.2004) (citations omitted) (alterations in original) (quoting *Pope v. State*, 679 So.2d 710, 713 (Fla.1996); *Czubak v. State*, 570 So.2d 925, 928 (Fla.1990); *Marshall v. State*, 604 So.2d 799, 804 (Fla.1992)). The admission of photographs will also be upheld if they are corroborative of other evidence. See *Czubak v. State*, 570 So.2d at 928. The admission of the photographs of a deceased victim must be probative of a disputed issue, *see Almeida v. State*, 748 So.2d 922, 929 (Fla.1999), but we have advised "[t]hose whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments." *Chavez v. State*,

832 So.2d 730, 763 (Fla.2002) (quoting *Henderson v. State*, 463 So.2d 196, 200 (Fla.1985)).

Id. at 497-98.

Under the abuse of discretion standard, substantial deference is paid to the trial court's ruling which will be upheld "unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla.1980); see Ford v. Ford, 700 So.2d 191, 195(Fla. 4th DCA 1997); Trease v. State, 768 So.2d 1050, 1053, n. 2 (Fla.2000), citing Huff v. State, 569 So.2d 1247, 1249 (Fla.1990).This standard is one of the most difficult for an appellant to satisfy. Ford, 700 So.2d at 195.

Given the deference this Court gives to a trial court's ruling on the admission of photographs, Knight would not have prevailed if his counsel had raised the issue on appeal. As is clear from the record, this photograph was not repetitious or a duplicate of others also admitted. It also did not appeal to the emotions of the jurors simply because it showed a dead child. It was also clearly admissible since it was the only photograph showing her complete face; the other photographs only showed discrete portions near the wounds. Appellate counsel was not deficient for opting not

to raise this issue on appeal since this Court would not have granted relief on it, much less than granting a new trial due to it.

Knight failed to argue prejudice in anything other than a conclusory manner so the claim should be denied on that basis as well. Further, he could not demonstrate the necessary prejudice given the totality of the evidence against him. The State presented evidence tying Knight to the murders of Odessia Stephens and Hanessia Mullings through DNA evidence. 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).

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 normally used daily. 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) Confidence in the outcome of his direct appeal is not called into question by the failure to challenge the admission of the photograph. Knight failed to carry his burden under Strickland and this Court should deny relief.

B. Appellate counsel was not deficient for failing to raise the issue of the trial court denying a mistrial based on an officer's testimony about what Knight said at the crime scene.

During Officer Mocny's testimony, the prosecutor had her describe her

encounter with Knight and thereby elicited the conversation the officer had with him when she first saw Knight near the apartment the night of the murders. She testified that she shone her flashlight around the area as she stood next to the rear window of the apartment and saw Knight standing near some bushes a distance away. She asked him to come over. She did not "question" on what he was doing in the area but simply asked if he knew who lived in the apartment, to which he replied that he did. Indicating the open window, she asked who stayed in that room and he said he did. At that point she asked him what he was doing and he said taking a run. (ROA 21:2341-42). She never asked Knight for explanations on any of his answers. When the prosecutor asked her if Knight had told her how long he had been away from the apartment, defense counsel objected on the grounds that the questioning was "starting to get to the point of commenting on his right to remain silent" and moved for a mistrial. Id. at 2347.

The trial court cautioned the prosecutor about his questioning, saying:

> THE COURT (JUDGE E. O'CONNOR): Well, from the testimony it was very clear Mr. Knight was simply offering information.
>
> My concern is that, and what I would like to see shored up, I don't care which one does it, you can cross on it, you can do direct on it, I want to make sure, it's very clear on the record, that this is all before he was ever arrested, where he was out and about and chatting back and forth and the nature of the conversation.
>
> If you can do that sufficiently, so it's clear on the record, that this was just -- you know, they are just shooting the breeze type of

conversation, then I may not grant the Motion for a Mistrial. That seems to be an alternative at this time. And we'll see how it goes.

Id. at 2348. The trial court noted the defense would have a continuing objection and motion for mistrial. After that, the prosecutor asked and received the following:

Q Tell me how the exchange occurred between you and Mr. Knight, as far as your communication or your conversation?
A Just talk in general. Spoke first. When I made contact with him, I asked him what he was doing and where he – you know, did he know who lived here. And that's when he told me that he did.

Id. at 2351. The prosecutor then concluded his direct examination and did no re-direct. There was no further testimony on what Knight said.

At the end of the day, the court re-visited the motion for mistrial and ruled:

THE COURT (JUDGE E. O'CONNOR): All right. The Court finds that err, if any, was not so prejudicial as to vitiate the entire trial -- the Court finds that the err, if any, was not so prejudicial as to vitiate the entire trial.

It was clear from the way the witness testified that this was simply a give and take conversation, and that mostly Mr. Knight was offering information. And it was simply that he did not have to offer information relating to the window or -- or the key to the front door, so I'll deny the motion.

Id. at 2366. The record clearly supports the court's findings and ruling.

On direct appeal, this Court would have reviewed the ruling on this motion for mistrial with an abuse of discretion standard. Smith v. State, 866 So.2d 51, 58-59 (Fla. 2004); Anderson v. State, 841 So.2d 390 (Fla. 2002); Smithers v. State, 826 So.

2d 916, 930 (Fla. 2002); Gore v. State, 784 So.2d 418, 427 (Fla. 2001). A motion for mistrial should be granted only when necessary to ensure the defendant receives a fair trial. See Goodwin v. State, 751 So.2d 537, 546 (Fla. 1999). "A motion for a mistrial should only be granted when an error is so prejudicial as to vitiate the entire trial." England v. State, 940 So.2d 389, 401-2 (Fla.2006); see Hamilton v. State, 703 So.2d 1038, 1041 (Fla.1997) ("A mistrial is appropriate only where the error is so prejudicial as to vitiate the entire trial."). Under the abuse of discretion standard, a trial court's ruling will be upheld unless the "judicial action is arbitrary, fanciful, or unreasonable.... [D]iscretion is abused only where no reasonable [person] would take the view adopted by the trial court." Trease v. State, 768 So.2d 1050, 1053 n. 2 (Fla.2000) (second alteration in original) (quoting Huff v. State, 569 So.2d 1247, 1249 (Fla.1990)). Thus, Knight would have been entitled to a new trial only if the the testimony had deprived him of a fair and impartial trial, materially contributed to the conviction, was so harmful or fundamentally tainted as to require a new trial, or were so inflammatory that it might have influenced the jury to reach a more severe verdict than that it would have otherwise. Spencer v. State, 645 So.2d 377, 383 (Fla.1994).

Fundamental error has been defined as error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Id. (citations omitted). It has

also been described as error that is so significant that the sentence of death "could not have been obtained without the assistance of the alleged error." Snelgrove v. State, 107 So. 3d 242, 257 (Fla. 2012) (quoting Simpson v. State, 3 So. 3d 1135, 1146 (Fla. 2009)).

Initially, this situation is clearly distinguishable from the cases Knight cites, many of which deal with the omission of exculpatory details while making a voluntary *post-arrest* statement. The protected speech is post-arrest, even if it is pre-Miranda. State v. Smith, 573 So.2d 306 (Fla. 1990) involved a prosecutor eliciting the spontaneous statements made by the defendant at the crime scene when the defense was self-defense and then arguing in closing the points the defendant had not said in order to discount the defense. Clearly in making the argument, the prosecutor was, in actual fact, commenting on the defendant's right to remain silent. Again, in Robbins v. State, 891 So.2d 1102 (Fla. 5th DCA 2004) the defense was a claim of self-defense. To rebut that defense, the prosecutor elicited testimony about the defendant's statement at the scene about being attacked by sticks to rebut the defendant's testimony that he was attacked with a knife. He then argued that to the jury, directly commenting on what the defendant did or did not say, contrary to the law this Court laid down in State v. Hoggins, 718 So.2d 761 (Fla.1998). Again, in Cowan v. State, 3 So.3d 446 (Fla. 4th DCA 2009), the prosecutor actually argued that the defendant

did not proclaim his innocence when he spoke to his co-defendant. The defendant in Harris v. State, 726 SO.2d 804 (Fla. 4th DCA 1999), was actually in custody, in the police station, when he failed to say something that the prosecutor later used against him during the trial and closing argument.

As noted above, the record fully supports the trial court's contention that the conversation between Knight and the officer was consensual, with Knight simply giving her basic information. At no time did she ask him for explanations nor did the State ever comment on his right to remain silent. Consequently, this would have been a non-meritorious issue on appeal. Appellate counsel's performance was not deficient for not raising it. Furthermore, as noted earlier and incorporated here, Knight cannot show the necessary prejudice under Strickland. There simply was overwhelming evidence of his guilt and neither the trial, nor the direct appeal would have differed but for this alleged error. This Court should deny relief.

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court to deny the petition for writ of habeas corpus.

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 Todd Scher, Assistant CCRC-South, tscher@msn.com, 1 East Broward Blvd, Suite 444, Ft. Lauderdale, FL 33301 on this 10th of August, 2015.

/s/ Lisa-Marie Lerner
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