No. _____

IN THE
Supreme Court of the United States

PAUL H. EVANS,
Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Under Florida's capital sentencing regime, the jury makes an advisory sentence recommendation but the judge finds the aggravating factors necessary to impose a death sentence and ultimately makes the decision. In *Hildwin v. Florida*, 490 U.S. 638 (1989) (per curiam), this Court held that Florida's system was constitutional because "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by a jury." *Id.* at 640-41.

The question presented in this case is whether *Hildwin* remains good law after *Ring v. Arizona*, 536 U.S. 584 (2002), which held that "[c]apital defendants, no less than noncapital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at 589.

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PETITION FOR WRIT OF CERTIORARI

Paul H. Evans petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

This petition seeks the review of the decision of the United States Court of Appeals for the Eleventh Circuit in *Evans v. Sec'y*, reprinted at Pet. App. A, 1a, and published at 699 F.3d 1249. The Eleventh Circuit reversed an Order of the United States District Court for the Southern District of Florida (per Martinez, J.) granting habeas relief. The District Court Order is reprinted at Pet. App. C, 69a. The Eleventh Circuit Order denying rehearing and rehearing *en banc* is reprinted at Pet. App. I, 321a.

JURISDICTION

Petitioner's motion for rehearing and rehearing *en banc* was denied on December 18, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "No

State shall . . . deprive any person of life, liberty, or property, without due process of law."

The pertinent provision of the United States Code, 28 U.S.C. § 2254 ("AEDPA"), and the Florida Statutes, Fla. Stat. §§ 775.082 & 921.141, are reprinted in the appendix to this petition. Pet. App. J, 324a–334a.

STATEMENT OF THE CASE

In *Ring v. Arizona*, this Court held that under the Sixth Amendment, "[c]apital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. 584, 589 (2002). Nonetheless, in this case the Eleventh Circuit held that Florida's capital sentencing procedure — which, in contravention of *Ring*, requires the judge rather than the jury to find the aggravating factors necessary to expose the defendant to a sentence of death — is constitutional. Pet. App. A, 31a. While acknowledging a conflict between Florida's procedure and *Ring*, the Eleventh Circuit explained that this Court's pre-*Ring* decision in *Hildwin v. Florida*, 490 U.S. 638 (1989) (per curiam), upheld Florida's procedure, and that as a result, the lower federal courts must continue to follow *Hildwin* until it is expressly overruled. Pet. App. A, 32a–33a. This case presents this Court with the opportunity to confirm expressly what it implicitly held in *Ring*: because Florida's capital sentencing procedure exposes a defendant to a sentence of death based upon facts found only by a judge, it violates the Sixth Amendment right to trial by jury.

This Court is now the only court able to render this holding. The Eleventh Circuit's decision below makes clear that it will continue to uphold Florida's unconstitutional sentencing regime until this Court instructs otherwise. The Florida Supreme Court has similarly held that it will rely on *Hildwin* until it is expressly overruled, even as every other state that retains the death penalty has acted to bring its system into compliance with *Ring*. The importance of this case thus cannot be overstated — unless this Court confirms that *Hildwin* is no longer good law, capital defendants in Florida, including the Petitioner, will be exposed to the death penalty in violation of their Sixth Amendment right to have all necessary facts underlying their capital sentence found by a jury of their peers.

On February 11, 1999, after his first trial ended in a hung jury, Paul Evans was convicted of one count of first degree murder, stemming from his role in a 1991 killing in Vero Beach, Florida. Pet. App. H, 307a. Pursuant to Florida Statute § 775.082(a) (1991) and Florida Statute § 921.141 (1991), Evans's trial was bifurcated into two segments. First, Evans was tried and convicted for his participation in the murder, a capital felony under Florida law. Fla. Stat. § 782.04(1) (1991). The jury's verdict did not encompass any aggravating fact necessary to expose Evans to a death sentence, nor did the State allege any such fact in the underlying indictment. Fla. Stat. § 775.082 provided that Evans "shall be punished by life imprisonment . . . unless the proceeding held to determine sentence according to the procedure set forth in § 921.141 results in

findings by the court that such person shall be punished by death." Thus, upon his initial conviction, the findings and verdict made by the jury exposed Evans only to a sentence of life imprisonment. Evans could not be sentenced to death unless the State established sufficient aggravating circumstances enumerated in Fla. Stat. § 921.141(5).

To determine whether those aggravating circumstances existed, the trial court conducted a "separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment," as prescribed by Fla. Stat. § 921.141(1). Pursuant to this procedure, the same jury that adjudicated Evans's guilt heard evidence of aggravating and mitigating circumstances in order to "render an advisory sentence" to the court. *Id.* § 921.141(2). The trial court instructed the jury that it could consider two potential aggravating circumstances: whether the murder had been committed for pecuniary gain, and whether the murder was cold, calculated, and premeditated. Pet. App. A, 3a–4a. The standard instruction given to the jury stated that the jury could not recommend a sentence of death, or even proceed to weighing aggravating and mitigating circumstances, unless it determined that one or more aggravating circumstances was established beyond a reasonable doubt. Pet. App. A, 4a. The Florida Supreme Court has held, however, that this requires only a bare majority of jurors to agree on any combination of

aggravating circumstances.[1] *State v. Steele*, 921 So. 2d 538, 545 (Fla. 2005).[2] In this case, for example, the jury could have recommended death so long as three of twelve jurors thought the murder was committed for pecuniary gain and four others thought it was cold, calculated, and premeditated. The jurors were not required to agree on which fact exposed the defendant to the death penalty.

The jury recommended death by a vote of nine to three. Pet. App. H, 307a. The jury's recommendation did not make any factual findings or reveal whether a majority of jurors had agreed on which aggravating factor(s) was established beyond a reasonable doubt. The Florida Supreme Court has prohibited the use of special verdict forms in the penalty phase. *Steele*, 921 So. 2d at 547–48. At this

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[1] The opinion below points out that the jury is instructed that "each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision." But the Florida Supreme Court's decision in *Steele* necessarily means that "you" in the instruction refers to the individual juror; each juror must be convinced that each aggravating circumstance he or she considers is established beyond a reasonable doubt before voting for death, but '[n]othing in . . . the standard jury instructions . . . requires a majority of the jury to agree on which aggravating circumstances exist." *Steele*, 921 So. 2d at 545.

[2] Whether to recommend a sentence of death is the only proceeding in which Florida juries are *not* required to be unanimous. *See* Fla. R. Crim. P. 3.440; *see also* Raoul G. Cantero & Robert M. Kline, *Death is Different: The Need for Jury Unanimity in Death Penalty Cases*, 22 St. Thomas L. Rev. 4, 7 (2009) (noting that in Florida, "the maxim that 'death is different' takes on ironic tones").

point, the jury was dismissed and its role in the case was over.

The trial court, sitting alone, then made factual findings as to the existence of aggravating and mitigating circumstances and conducted its own weighing of those circumstances to determine the appropriate sentence. Fla. Stat. § 921.141(3); Pet. App. H, 307a–20a. Before doing so, the trial court conducted a so-called *Spencer* hearing, in which it heard additional evidence — not presented to the jury — regarding the existence of aggravating and mitigating factors. Pet. App. H, 307a–08a; *see Spencer v. State*, 615 So. 2d 688, 691 (Fla. 1993); *see also Williams v. State*, 967 So. 2d 735, 751 (Fla. 2007) (holding that the trial court may consider and find aggravating factors never presented to the jury). The court then rendered the only factual findings that exposed Evans to a death sentence, finding that the murder was committed for pecuniary gain and that it was cold, calculated, and premeditated. Pet. App. H, 309a–13a. The court concluded that these facts outweighed any mitigating circumstances, including that Evans was only nineteen years old at the time of the crime. *Id.* at 313a–34a. The court sentenced Evans to death. *Id.* at 320a.

On December 13, 2001, the Florida Supreme Court affirmed, rejecting among other things Evans's claim that Florida's sentencing procedure was contrary to the Sixth Amendment. Pet. App. G, 272a. While Evans's timely petition for certiorari was pending, on June 24, 2002, this Court issued its opinion in *Ring v. Arizona*, 536 U.S. 584 (2002).

Evans's petition for certiorari was denied on October 15, 2002. Pet. App. E, 241a.

Evans next filed a timely petition for state post-conviction review in which he argued, *inter alia*, that his sentence was imposed in violation of *Ring*. Pet. App. F, 243a. The circuit court denied that motion. *Id.* at 246a–70a. Evans both appealed that decision and filed an original petition for state habeas relief in the Florida Supreme Court. Pet. App. D, 201a. Addressing Evans's claim under *Ring*, the Florida Supreme Court decided that Evans was not entitled to relief because *Ring* does not apply retroactively to convictions that were final before it was decided. *See Schriro v. Summerlin*, 542 U.S. 348, 355–58 (2004). The Florida Supreme Court only reached this conclusion by determining that "a death sentence becomes final for purposes of *Ring* once the Court has affirmed the conviction and sentence on direct appeal and issued the mandate." Pet. App. D, 236a. This holding was contrary to this Court's clearly established precedent that a conviction becomes final when direct appeals are exhausted and a petition for certiorari is time-barred or has been denied. *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987). The parties in this case have never disputed that Evans's conviction became final on October 15, 2002, several months after *Ring* was decided.

Having exhausted state post-conviction proceedings, Evans timely filed a petition for relief pursuant to 28 U.S.C. § 2254 in the United States District Court for the Southern District of Florida. In an Order by Judge Jose E. Martinez, the court

granted Evans's petition for habeas relief. Pet. App. C, 69a–200a. Judge Martinez explained that, because the Florida Supreme Court's decision on Evans's *Ring* claim was contrary to or based on an unreasonable application of clearly established federal law, *see* 28 U.S.C. § 2254(d)(1), Evans was entitled to *de novo* review of that claim in federal court. Pet. App. C, 180a. Applying *de novo* review, Judge Martinez held that Evans's sentence was imposed in violation of the Sixth Amendment because the jury had not found the facts that exposed Evans to a death sentence. Pet. App. C, 195a–99a. Judge Martinez denied the State's motion to alter or amend the judgment. *Id.* at 44a–45a.

The Eleventh Circuit reversed. Pet. App. A, 33a. Also applying *de novo* review, the court observed that, prior to *Ring,* this Court had upheld Florida's capital sentencing procedure against a similar Sixth Amendment challenge in *Hildwin*. *Id.* at 15a–16a. As a result, and despite recognizing that *Ring* "arguably conflicts with the *Hildwin* decision, and [*Hildwin*] arguably was implicitly overruled," *id.* at 26a, the Eleventh Circuit held that the lower federal courts are precluded from discarding *Hildwin* until expressly instructed to do so by this Court. *Id.* at 32a–33a.

REASONS FOR GRANTING THE WRIT

When this Court decided *Ring v. Arizona*, it unequivocally held that every capital defendant is "entitled to a jury determination of any fact on which the legislature conditions an increase in [his] maximum punishment." 536 U.S. at 589. In doing

so, this Court directly repudiated the holding, the reasoning, and the language of its 1989 per curiam opinion in *Hildwin*. Despite the clear effect of this Court's decision, the Florida courts and the Eleventh Circuit have refused to apply the dictates of *Ring* and instead cling to *Hildwin*'s deficient application of the Sixth Amendment. Florida is now the only state in the country where a defendant can be sentenced to death without a jury determination of the aggravating factors that expose him to capital punishment. Florida will not change its practice to conform to the Sixth Amendment unless this Court directs it do so. This case provides an ideal vehicle for resolving this important issue.

A. *Hildwin v. Florida* Is No Longer Good Law After *Ring v. Arizona*.

Even the most perfunctory review of the line of cases leading to *Ring* compels the conclusion that *Hildwin* is no longer good law and that Florida's capital sentencing procedures violate the Sixth Amendment.

In *Hildwin*, this Court confronted the question whether Florida's practice was unconstitutional because "it permits the imposition of death without a specific finding by the jury that sufficient aggravating circumstances exist to qualify the defendant for capital punishment." 490 U.S. at 639. The Court reasoned that the Sixth Amendment was not implicated because "the existence of an aggravating factor here is not an element of the offense but instead is a sentencing factor that comes into play only after the defendant has been found

guilty." *Id.* at 640 (internal quotation marks omitted). Accordingly, the Court held, "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Id.* at 640–41.

The next year, this Court reaffirmed *Hildwin* when it upheld Arizona's capital sentencing statute in *Walton v. Arizona*, 497 U.S. 639 (1990). Arizona's statute was slightly different from Florida's in that Arizona juries did not provide even an advisory sentence. *See id.* at 642–44. But the Court recognized that this difference was immaterial with respect to the finding of aggravating circumstances:

> The distinctions Walton attempts to draw between the Florida and Arizona statutory schemes are not persuasive. It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.

Id. at 648. The Court concluded that Arizona's statute also withstood Sixth Amendment scrutiny, again relying on the reasoning that aggravating circumstances were not "elements" of the offense but instead mere sentencing factors that need not be found by a jury. *See id.* at 649.

Ten years later, this Court abandoned this

approach to the Sixth Amendment when it decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In *Apprendi*, this Court held that any fact on which the State conditions an increase in the defendant's authorized punishment must be found by a jury beyond a reasonable doubt. *See id.* at 482–84. The Court explained that, contrary to its earlier precedents, merely labeling such a fact a "sentence enhancement" did not make it materially different from an element of the crime, and a criminal defendant has a Sixth Amendment right to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Id.* at 476–77 (bracket in original).

Then, in 2002, this Court decided *Ring*, overruling its previous decision in *Walton* because it could not be reconciled with *Apprendi*. *Ring*, 536 U.S. at 589. In reaching this conclusion, the Court emphasized the substantial similarities between *Walton* and its per curiam opinion in *Hildwin*. First, the Court again recognized that the sentencing regimes in *Walton* and *Hildwin* were materially indistinguishable, explaining that in Florida the jury "makes no explicit findings on aggravating circumstances," and that *Walton* had "found unavailing the attempts . . . to distinguish Florida's capital sentencing system from Arizona's." *Id.* at 598. Second, the *Ring* Court acknowledged that it had used the same reasoning to uphold the regimes in both states: "In neither State, according to *Walton*, were the aggravating factors 'elements of the offense'; in both States, they ranked as 'sentencing

considerations' guiding the choice between life and death." *Id.* Finally, the *Ring* Court noted that its holdings in both cases had used precisely the same language: "We so ruled . . . on the ground that 'the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.'" *Id.* (quoting *Walton*, 497 U.S. at 648 (quoting *Hildwin*, 490 U.S. at 640–41)).

The *Ring* majority then proceeded to reject each part of those previous rulings. Explaining that "the distinction relied upon in *Walton* between elements of an offense and sentencing factors" is "untenable," *id.* at 604, the Court held that because "Arizona's enumerated aggravating factors operate as the functional equivalent of an element of a greater offense, the Sixth Amendment requires that they be found by a jury." *Id.* at 609 (internal quotation marks omitted). "Capital defendants, no less than noncapital defendants," the Court concluded, "are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at 589.

This conclusion was not limited to a particular jurisdiction, and given the *Ring* court's unambiguous discussion of the link between *Hildwin* and *Walton*, there can be no doubt that the holding of *Ring* applies to Florida. Nor can there be any doubt that Florida's capital sentencing scheme — and the sentence imposed on Mr. Evans in this case — violates the rule announced in *Ring*. As discussed above, Florida juries do not make factual findings

regarding the existence of the aggravating circumstances that are required to expose a defendant to the death penalty. As the Florida Supreme Court has explained, "the trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely." *Steele*, 921 So. 2d at 546. Even when juries recommend an advisory sentence of death, a factual finding cannot be inferred from that recommendation, because even a simple majority of jurors is not required to agree on any particular aggravating circumstance. *See id.* at 545. Moreover, attempting to make such an inference is a meaningless exercise, because the jury's recommendation has no binding effect and thus does not actually expose the defendant to a higher sentence. After the jury gives its recommendation, the judge, sitting alone, hears new evidence and "determines the presence or absence of the aggravating factors required by . . . law for imposition of the death penalty." *Ring*, 536 U.S. at 588.

B. The Eleventh Circuit And The Florida Supreme Court Have Determined That Only This Court Can Resolve The Question Presented.

Despite the direct application of *Ring* to Florida's statute, neither the Eleventh Circuit Court of Appeals nor the Florida Supreme Court has applied *Ring* to invalidate Florida's sentencing regime. Instead, both courts have made clear that they will continue to rely on *Hildwin* until this Court explicitly

disavows it. The only relevant lower federal and state courts therefore agree that this Court must decide whether Florida's capital sentencing regime violates the Sixth Amendment as interpreted in *Ring*. The question presented will not benefit from any further percolation in the lower courts.

In the opinion below, the Eleventh Circuit determined that, even using *de novo* habeas review, it was powerless to hold that *Ring* had implicitly overruled this Court's earlier decision in *Hildwin*. Pet. App. A, 27a–33a. The Eleventh Circuit outlined the conflict in this Court's decisions, pointing out that *Walton* had relied directly on *Hildwin*; that the Court in *Walton* stated that the Florida and Arizona statutes were indistinguishable with respect to jury findings; and that when overruling *Walton* in *Ring* this Court expressly repudiated the language originating from the *Hildwin* decision. *Id.* at 23a–24a. The opinion even acknowledged that the reasoning of *Ring* "arguably conflicts with the *Hildwin* decision, and [*Hildwin*] arguably was implicitly overruled." *Id.* at 26a.

But this analysis, the panel concluded, was "not enough for Evans to prevail." *Id.* at 26a. The Eleventh Circuit stated that it was bound by the this Court's instructions that "when one of its earlier decisions with direct application to a case appears to rest on reasons rejected in a more recent line of decisions, we must follow the directly applicable decision and leave to the high court the prerogative of overruling its own decisions." *Id.* at 1a–2a. With that, the court held that it would continue to follow

Hildwin until this Court expressly states that it is no longer good law after *Ring*. That decision is firmly entrenched; the Eleventh Circuit has subsequently denied the *Ring* claim of another capital habeas petitioner by relying on *Evans*. *Grim v. Sec'y, Fla. Dep't of Corrs.*, 705 F.3d 1284, 1287-88 (11th Cir. 2013) (per curiam).

The Florida Supreme Court has also recently reaffirmed its position that it will continue to follow *Hildwin* until this Court resolves the question presented. Shortly after *Ring* was decided, the Florida Supreme Court issued two plurality opinions stating that it would continue to rely on *Hildwin* because it had not been expressly overruled. *Bottoson v. Moore*, 833 So. 2d 693, 695 (Fla. 2002); *King v. Moore*, 831 So. 2d 143, 144–45 (Fla. 2002) (per curiam). In each case, three justices joined the opinion, and four concurred in result only based on the facts and procedural posture of those particular cases.[3] *See Bottoson*, 833 So. 2d at 695; *King*, 831 So. 2d at 145. The four justices who concurred in result only each wrote separately to express their belief that, in the appropriate case, the Florida Supreme Court should address whether Florida's statute was invalid in light of *Ring*. *See Bottoson*, 833 So. 2d at 703–34; *King*, 831 So. 2d at 148–56.

Instead, for the next several years the Florida Supreme Court chose to affirm death sentences on

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[3] Because *Ring* is not retroactive under either federal or Florida law, the petitioners in *King* and *Bottoson* would not have been entitled to relief in any event. *Summerlin*, 542 U.S. at 55-58; *Johnson v. State*, 904 So. 2d 400 (Fla. 2005).

other grounds, holding that *Ring* was not implicated in any event because either (1) the judge had relied on an aggravator that did not need to be found by the jury, such as a prior violent felony conviction, a prior capital felony conviction, or commission of the crime while under a sentence of imprisonment; or (2) the jury had necessarily found the aggravating factor beyond a reasonable doubt in the guilt phase, such as in the case of murder committed in the course of certain enumerated felonies. *See, e.g.*, *Belcher v. State*, 851 So.2d 678, 685 (Fla. 2003) (explaining that "[r]egarding the prior violent felony aggravator . . . the U.S. Supreme Court exempted prior convictions from facts that must be submitted to a jury" and "[r]egarding the murder being committed in the course of a sexual battery aggravator . . . a unanimous jury found Belcher guilty of both murder and sexual battery").

In 2005, the court noted that it had "not yet forged a majority view about whether *Ring* applies in Florida; and if it does, what changes to Florida's sentencing scheme it requires," indicating that the question might still be resolved by the state courts. *Steele*, 921 So. 2d at 540. In that same case, the Florida Supreme Court also urged the legislature to amend Florida's capital sentencing statute to require unanimity in the jury's recommendation, expressing dismay that Florida was the only remaining state that did not require either a unanimous jury finding on aggravating factors or a unanimous recommendation of death. *Id.* at 548.

Now, eight years after the Florida Supreme

Court's call for action in *Steele*, it is clear that neither the state courts nor the legislature will bring Florida's statute into compliance with *Ring*. In recent cases, the Florida Supreme Court has affirmed death sentences while rejecting *Ring* claims without discussion, even in cases without an aggravator based on a prior conviction or a fact necessarily found by the jury in the guilt phase. *See, e.g.*, *Altersberger v. State*, 103 So. 3d 122, 126 n.4 (Fla. 2012) (rejecting a *Ring* claim without discussion where the defendant pleaded guilty solely to first-degree murder, the jury divided 9 to 3 in the penalty phase, and neither of the aggravators found by the judge involved prior convictions). Legislation proposing changes to Florida's sentencing system has been routinely defeated before even making it out of legislative committee. *See, e.g.*, H.B. 29, 2012 Leg., Reg. Sess. (Fla.) (house bill requiring the jury's advisory recommendation to be unanimous that was defeated in the Criminal Justice Subcommittee); S.B. 352, 2012 Leg., Reg. Sess. (Fla.) (senate bill requiring jury's advisory recommendation to be unanimous that was defeated in the Criminal Justice Committee); S.B. 772, 2012 Leg., Reg. Sess. (Fla.) (senate bill requiring that both the jury's advisory recommendation be unanimous and the jury use a special verdict form to find unanimously the aggravating factors that was defeated in the Criminal Justice Committee).

Meanwhile, every other state that previously required the judge to find the necessary aggravating factors — including Alabama, Delaware, and Indiana, the other "hybrid" states that used an

advisory jury — has changed its procedure in light of *Ring*.[4] Every state that retains the death penalty, other than Florida, now requires the jury to make a unanimous finding that one or more specific aggravating factors exist. *See Steele*, 921 So. 2d at 548–49 & n.3 (collecting statutes and cases).[5] Only

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[4] Arizona, Colorado, and Idaho require by statute that the jury make a unanimous finding as to each aggravating circumstance and as to whether death is the appropriate sentence. Ariz. Rev. Stat. §§ 13-752(E), (H) (2012); Colo. Rev. Stat. § 18–1.3–1201(2)(b)(II) (2012); Idaho Code §§ 19–2515(3)(b), (8)(a) (2006). Delaware, Montana, and Nebraska require by statute that the jury make a unanimous finding regarding each aggravating circumstance. Del. Code Ann. tit. 11, § 4209(c)(3) (2012); Mont. Code Ann. §§ 46–1–401(1)(b), (3) (2003); Neb. Rev. Stat. § 29–2520(4)(f) (2011). Indiana requires by statute that the jury find each aggravating factor beyond a reasonable doubt using a special verdict form, and the Indiana Supreme Court has clarified that the finding must be unanimous. Ind. Code § 35–50–2–9(e) (2007); *State v. Barker*, 809 N.E.2d 312, 316 (Ind. 2004). In Alabama, the state supreme court has held that unless an aggravating factor was necessarily included in the jury's verdict of guilty for capital murder, the defendant cannot be sentenced to death unless the jury unanimously finds the existence of an aggravating factor in the sentencing phase. *See Ex Parte McGriff*, 908 So. 2d 1024, 1037 (Ala. 2004) (citing *Ex Parte McNabb*, 887 So. 2d 998 (Ala. 2004)).

[5] When the Florida Supreme Court issued its 2005 opinion in *Steele*, it stated that in Utah and Virginia, "the jury need not find each aggravator unanimously, but the jury must unanimously recommend the death penalty." 921 So.2d at 549. Since that time, the Utah Supreme Court has clarified that each aggravating factor must be found unanimously in the guilt phase, *see Archuleta v. Galetka*, 267 P.3d 232, 259 (Utah 2011), *cert. denied*, 133 S, Ct, 112 (2012), and the Virginia Supreme Court has held that juries must use special verdicts to find each aggravating factor unanimously in order to comply with *Ring*,

Florida continues to assert that a bare majority of jurors implicitly agreeing on some combination of unspecified aggravating factors in support of a non-binding sentencing recommendation satisfies the Sixth Amendment. This Court's intervention is required because both the state and federal courts have now made clear that they will not require Florida to retreat from this position until this Court resolves the question presented.

C. The Question Presented Is Recurring And Extraordinarily Important.

The surpassing importance of the question presented in this capital case merits this Court's guidance. Although Florida is the lone remaining state to ignore completely the requirements of *Ring*, it is responsible for a substantial and disproportionate number of the nation's death sentences. Since 2002, the year *Ring* was decided, Florida judges have sentenced 164 defendants to death. *See* Death Penalty Info. Ctr., Death Sentences in the United States From 1997 By State and By Year, http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008 (aggregating data from annual reports by the Bureau of Justice Statistics) (last visited Mar. 15, 2013). This amounts to approximately thirteen percent of death sentences nationwide, although Florida contains only six percent of the country's population. U.S. Census Bureau: State & County QuickFacts (2012). In 2011 and 2012, Florida judges sentenced more people to

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see Prieto v. Commonwealth, 682 S.E.2d 910, 935 (Va. 2009).

death than judges or juries in any other state. Death Penalty Info. Ctr., Death Sentences in the United States From 1997 By State and By Year, http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008#2010 (last visited Mar. 15, 2013).

At the time of this filing, there are three active death warrants in Florida. *See* Florida Supreme Court, Public Information: Pending Death Warrant Filings, http://www.floridasupremecourt.org/pub_info/ deathwarrants.shtml (last visited Mar. 15, 2013).

Many of these sentences are imposed despite deep divisions among the jurors over whether death is appropriate. Even in cases where the jury recommends death, unanimous recommendations are rare, and death sentences are routinely affirmed when fewer than ten out of twelve jurors agreed that death was warranted.[6] Of course, because the jury

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[6] An examination of Florida Supreme Court decisions citing *Ring* yielded 104 cases where the court affirmed a death sentence on direct appeal despite the defendant's claim that his sentence violated *Ring*. The jury unanimously recommended the death penalty in only 19 of those cases. *See, e.g.*, *Salazar v. State*, 991 So. 2d 364, 370 (Fla. 2008); *Guardado v. State*, 965 So. 2d 108, 111 (Fla. 2007); *Taylor v. State*, 937 So. 2d 590, 597 (Fla. 2006). In 48 cases — almost half — the death sentence was affirmed despite fewer than ten out of twelve jurors voting for death. *See, e.g.*, *Hampton v. State*, 103 So. 3d 98, 107 (Fla. 2012) (nine jurors recommending death); *Caylor v. State*, 78 So. 3d 482, 490 (Fla. 2011) (eight jurors recommending death), cert. denied, 132 S. Ct. 2405 (2012); *Phillips v. State*, 39 So. 3d 296, 301 (Fla. 2010) (seven jurors recommending death).

does not make any findings regarding whether one or more aggravating factors was proved beyond a reasonable doubt, it is impossible to tell whether these divisions reflect disagreement over the existence of aggravating factors or the balance of the aggravating and mitigating circumstances. But in almost all of these cases — including the unanimous ones — it remains possible that not even a bare majority of jurors agreed on the existence of a particular aggravating factor, because Florida does not require agreement on the same factor in order to recommend a sentence of death.[7] *Steele*, 921 So. 2d at 545.

Empirical research conducted as part of the Capital Jury Project has also shown that Florida juries decide whether to impose a death sentence in less than an hour and on the first vote more often than jurors in any other state studied. See William J. Bowers, et al., *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making*, 63 Wash. & Lee L. Rev. 931, 974 (2006). This data suggests that because the votes of the dissenting jurors are not necessary to decide on a sentence, the views of those jurors are quickly passed over in deliberations.

Finally, Florida's troubling experience with the death penalty demonstrates the ultimate risk of

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[7] In a few cases, special verdict forms were used in the penalty phase until the Florida Supreme Court held that doing so was not appropriate and "departs from the essential requirements of law." *Steele*, 921 So. 2d at 548.

allowing a judge to impose a death sentence without a jury finding that an aggravating factor exists and often over the dissent of several jurors. No less than twenty-four people on Florida's death row have been exonerated. *See* Death Penalty Info. Ctr., Innocence Database, http://www.deathpenaltyinfo.org/innocence (last visited Mar. 15, 2013). This is by far the highest number in the country among states that continue to use the death penalty; Texas is a distant second with twelve exonerations.[8] *Id.* Evans does not challenge this Court's statement that "[t]he Sixth Amendment jury trial right . . . does not turn on the relative rationality, fairness, or efficiency of potential factfinders," *Ring*, 536 U.S. at 607, and compliance with *Ring* in the sentencing phase will not necessarily lead to greater accuracy in the guilt phase. Nonetheless, it adds to the urgency of the question presented that Florida, the state with the worst record of wrongful convictions in capital cases, has the weakest procedural safeguards for imposing a sentence of death.

D. This Case Is An Ideal Vehicle For The Court To Resolve The Question Presented.

This case presents an ideal vehicle for this Court to resolve the question presented using *de novo*

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[8] One of these inmates, Frank Lee Smith, spent fifteen years on death row before dying in prison of pancreatic cancer just months before DNA testing proved his innocence. *See* Innocence Project, Profiles: Frank Lee Smith, http://www.innocenceproject.org/Content/Frank_Lee_Smith.php (last visited Mar. 15, 2013).

review and free from ancillary questions.

1. The district court and the Eleventh Circuit appropriately applied *de novo* review to Evans's claim under *Ring*. Although this is a federal habeas case subject to the constraints of AEDPA, the last state court judgment on the merits of Evans's *Ring* claim resulted in a decision that is contrary to clearly established Supreme Court precedent. *See* 28 U.S.C. § 2254(d)(1). This case therefore presents the rare circumstance where "§ 2254(d) entitles the prisoner to an unencumbered opportunity to make his case before a federal judge," *Johnson v. Williams*, 133 S. Ct. 1088, 1097 (2013).

The last reasoned state-court judgment on Evans's *Ring* claim was the decision of the Florida Supreme Court in state postconviction proceedings. Pet. App. D, 201a. *See Ylst v. Nunnemaker*, 501 U.S. 797, 805 (1991) (stating that federal habeas review begins by asking which is the last explained state-court judgment on the federal claim). But while the Florida Supreme Court adjudicated Evans's claim under *Ring*, it did not answer the underlying question whether *Ring* requires Florida juries to find the aggravating factors necessary to impose a death sentence. Pet. App. D, 236a. Instead, the court inexplicably held that Evans was not entitled to relief because "this Court and the United States Supreme Court have held that *Ring* does not apply retroactively." *Id.* The court justified this ruling by stating that "a death sentence becomes final for purposes of *Ring* once the Court has affirmed the conviction and sentence on direct appeal and issued

the mandate." *Id.*

There can be no doubt that this decision was contrary to the clearly established law of *Griffith v. Kentucky* that finality occurs when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." 479 U.S. 314, 321 n.6 (1987); *see Williams v. Taylor*, 529 U.S. 362, 405 (2000) ("A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases."). Here, it is undisputed that Evans's conviction became final when this Court denied certiorari on October 15, 2002, several months after *Ring* was decided. *See* Pet. App. E, 241a. No party has ever argued that Evans was seeking retroactive application of *Ring*.

Accordingly, while the district court gave appropriate deference to the Florida Supreme Court's decision when reviewing Evans's federal habeas petition, it correctly determined that Evans's claim under *Ring* must be decided using de novo review. Pet. App. C, 180a. "AEDPA permits *de novo* review in those rare cases when a state court decides a federal claim in a way that is 'contrary to' clearly established Supreme Court precedent." *Johnson*, 133 S. Ct. at 1097. The district court characterized the Florida Supreme Court's holding as an unreasonable application of *Summerlin* to the facts of Evans's case, rather than focusing on the court's use of a rule that was contrary to *Griffith*. Pet. App.

C, 180a. But however it is characterized, the Florida Supreme Court's decision is indefensible under this Court's precedent, and Evans is therefore entitled to *de novo* review of his claim that Florida's sentencing procedures violate *Ring*. *See Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) ("When a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in § 2254(d)(1) is satisfied. A federal court must then resolve the claim without the deference AEDPA otherwise requires."). Indeed, on appeal to the Eleventh Circuit, the State did not challenge the district court's ruling that the Florida Supreme Court's retroactivity decision was contrary to or an unreasonable application of clearly established law.

2. This case is also an ideal vehicle because Evans presents the same "tightly delineated" claim that was at issue in *Ring* itself: "that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him." *Ring*, 536 U.S. at 597 n.4. As in *Ring*, "no aggravating circumstances related to past convictions" in Evans's case, so his challenge does not implicate *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), or similar Florida cases holding that *Ring* does not apply where one of the aggravating circumstances found by the judge was a prior violent felony conviction, a prior capital felony conviction, or commission of the crime while under sentence of imprisonment or felony probation. *See, e.g.*, *Hampton v. State*, 103 So. 3d 98, 116 (Fla. 2012) *petition for cert. filed* (U.S. Feb. 20, 2013) (No. 12-

8923). As in *Ring*, this case also does not require this Court to decide whether "the Sixth Amendment require[s] the jury to make the ultimate determination whether to impose the death penalty," whether an appellate court may re-weigh the aggravating and mitigating circumstances, or whether Evans's indictment was constitutionally defective for failing to charge the aggravating circumstances. *Ring*, 536 U.S. at 597 n.4.

3. Finally, this case does not present the possibility that the requirements of *Ring* were satisfied by the jury's verdict in the guilt phase. The Florida Supreme Court has held that where the trial court finds the aggravating factor that the murder was committed in the course of an enumerated felony, and the jury unanimously convicted the defendant of that contemporaneous felony in the guilt phase, the requirements of *Ring* are satisfied by the jury's guilt-phase verdict. *See, e.g.*, *McGirth v. State*, 48 So. 3d 777, 796 (Fla. 2010). Evans's case does not implicate this principle; he was convicted solely of first-degree murder, and whether he committed the murder for pecuniary gain was not "reflected in the jury verdict alone." *Ring*, 536 U.S. at 586 (quoting *Apprendi*, 530 U.S. at 483).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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March 18, 2013

APPENDIX

Appendix A

United States Court of Appeals
Eleventh Circuit

PAUL H. EVANS, Petitioner-Appellee Cross Appellant,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, Attorney General, State of Florida, Respondents-Appellants Cross Appellees,

No. 11-14498
Oct. 23, 2012

Before CARNES, MARCUS and PRYOR, Circuit Judges.

CARNES, Circuit Judge:

Confident that he knew what the future would bring, one of Shakespeare's characters boasted that "[t]here are many events in the womb of time which will be delivered." William Shakespeare, *Othello,* Act I, Scene 3, lines 412–13. On the subject of lower courts predicting that the Supreme Court is going to overrule one of its own decisions, however, Judge Hand cautioned against "embrac[ing] the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant." *Spector Motor Serv. v. Walsh*, 139 F.2d 809, 823 (2d Cir. 1943) (Hand, J., dissenting). The Supreme Court has made Hand's warning a clear command by repeatedly instructing lower courts that when one of its earlier decisions with direct application to a case appears to rest on reasons

rejected in a more recent line of decisions, we must follow the directly applicable decision and leave to the high Court the prerogative of overruling its own decisions. As will become apparent, those instructions are dispositive of the State's appeal from the grant of habeas corpus relief in this case.

I.

This is a murder for hire case in which Paul Evans contracted with Paul Pfeiffer's wife to kill her husband in return for a camcorder, a stereo, and some of the insurance money. *Evans v. State*, 808 So.2d 92, 95–98 (Fla. 2001). Evans performed his part of the contract by murdering Pfeiffer with three shots from a .38 caliber pistol—one bullet to his spine and two bullets to his head. *Id.* at 97.

Evans was indicted and convicted on one count of first-degree murder. As is the practice in Florida, the indictment did not charge a sentencing stage aggravating circumstance. There was, however, no evidence that Evans had any motive for murdering the victim except for pecuniary gain in the form of the compensation that the victim's wife had agreed to give him in return for killing her husband. *See id.* at 95–98. And the fact that a murder was committed for pecuniary gain is a statutory aggravating circumstance that makes the defendant eligible for a death sentence in Florida. *See* Fla. Stat. § 921.141(5)(f) (1990).

After the jury convicted Evans of first-degree murder, as charged, the trial court conducted a separate sentence proceeding in front of the jury. During that proceeding the jury heard evidence of

mitigating circumstances. The court instructed the jury that it was to render "an advisory sentence based upon [its] determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist." Although Florida law provided a total of eleven aggravating circumstances at the time Evans murdered Pfeiffer, *see id.* § 921.141(5)(a)–(k), the court decided that the evidence would support finding only two of them.[1] The court instructed the jury that the only aggravating circumstances it could consider were whether Evans had committed the murder for pecuniary gain, *id.* § 921.141(5)(f), and whether he had committed the murder "in a cold and calculated and premeditated manner without any pretense of moral or legal justification," *id.* § 921.141(5)(i). The court also instructed the jury that:

> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment

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[1]Florida law currently provides a total of sixteen aggravating circumstances. See Fla. Stat. § 921.141(5)(a)–(p) (2010). Under Florida law a criminal statute applies as of the date the offense was committed, *see Bernard v. State*, 571 So.2d 560, 561 (5th DCA 1990), so in this opinion, we cite to the Florida death penalty statute that was in effect at the time Evans committed the murder on March 24, 1991, *see* Fla. Stat. § 921.141 (1990), even though the statute has since been amended in some aspects. (Because the post–1991 amendments do not affect any of the challenged provisions in this case, it does not matter which version of the statute applies.)

without possibility of parole for twenty-five years.

Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

....

Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision. If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.

(Emphasis added.) About mitigating circumstances, the court instructed the jury: "Among the mitigating circumstances you may consider, if established by the evidence, are age of the Defendant at the time of the crime, any other aspect of the Defendant's character, record, or background that would mitigate against the imposition of the death penalty." The court explained that while aggravating circumstances had to be established beyond a reasonable doubt in order for the jury to consider them, mitigating circumstances did not require the same level of proof. It told the jury that: "If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established."

The jury returned a verdict recommending by a vote of nine to three that Evans be sentenced to death. The practice in Florida is for the advisory verdict not to specify which aggravating circumstances the jury found and this verdict followed that practice. It did not indicate whether the jury had found the pecuniary gain aggravating circumstance or the cold, calculated and premeditated aggravating circumstance, or both. We do know, however, that the jury had to have found one or both of those aggravating circumstances or it would not have returned the verdict that it did. *See Francis v. Franklin*, 471 U.S. 307, 324 n. 9, 105 S.Ct. 1965, 1976 n. 9, 85 L.Ed.2d 344 (1985) ("[W]e adhere to the crucial assumption underlying our constitutional system of trial by jury that jurors carefully follow instructions."); *see also United States v. Lopez*, 649 F.3d 1222, 1237 (11th Cir. 2011) ("We presume that juries follow the instructions given to them."); *United States v. Townsend*, 630 F.3d 1003, 1013–14 (11th Cir. 2011) (same).

After the jury recommended a death sentence, the trial court held a *Spencer* hearing,[2] at which the State presented for the court's consideration letters from the victim's father and mother. The court also

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[2] *See Spencer v. State*, 615 So.2d 688, 691 (Fla. 1993) (requiring trial judges, after receiving the jury's advisory verdict, to "hold a hearing to: a) give the defendant, his counsel, and the State, an opportunity to be heard; b) afford, if appropriate, both the State and the defendant an opportunity to present additional evidence; c) allow both sides to comment on or rebut information in any presentence or medical report; and d) afford the defendant an opportunity to be heard in person").

heard from Evans' mother and from Evans himself. The court entered an order finding that both of the statutory aggravating circumstances that it had permitted the jury to consider did exist: (1) Evans committed the murder for pecuniary gain, and (2) he committed the murder "in a cold, calculated, and premeditated manner without any pretense of legal or moral justification." *Evans*, 808 So.2d at 99. The court found one statutory mitigating circumstance, which was Evans' age at the time he committed the murder (19), and eleven nonstatutory mitigating circumstances. *Id.* After determining that the two aggravating circumstances outweighed the mitigating circumstances, the court sentenced Evans to death, as the jury had recommended. *Id.* at 95. The Florida Supreme Court affirmed Evans' conviction and sentence on direct appeal. *Id.* The United States Supreme Court denied his petition for a writ of certiorari. *Evans v. Florida*, 537 U.S. 951, 123 S.Ct. 416, 154 L.Ed.2d 297 (2002).

Seeking postconviction relief in state court, Evans filed a motion under Florida Rule of Criminal Procedure 3.851, asserting six claims for relief, including for the first time a claim that Florida's capital sentencing statute, Fla. Stat. § 921.141, violates the Sixth Amendment, as interpreted in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).[3]

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[3]Those six claims were (1) ineffective assistance of counsel during the guilt stage (based on six sub-claims) and the State's withholding exculpatory and impeachment evidence in violation

of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); (2) ineffective assistance of counsel during the sentence stage (based on two sub-claims); (3) ineffective assistance for failing to object to several jurors and failing to object to a limitation on backstriking; (4) cumulative error; (5) denial of due process by rules prohibiting juror interviews to uncover constitutional error; and (6) that the sentence violates *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). *Evans v. State*, 995 So.2d 933, 939–40 (Fla. 2008).

> On the sixth claim, Evans argued to the state collateral court that the capital sentencing procedures in Fla. Stat. § 921.141 violated his Sixth Amendment right under *Ring* to have a unanimous jury determine his guilt on all elements of capital first degree murder. He made the same argument based on *Apprendi*, but the state collateral court found that he had already raised that claim on direct appeal and that it was "both without merit and procedurally barred." Doc. 12–35 at 70. In Evans' federal habeas petition, he did not pursue that "unanimity" claim. Instead, he asserted that Florida's death penalty procedures violated *Ring* because "they do not allow the jury to reach a verdict with respect to an aggravating fact that is an element of the aggravated crime punishable by death." Doc. 1 at 176 (quotation marks and alteration omitted). Evans pointed out that "Florida law only requires the judge to consider the recommendation of a majority of the jury." *Id.* (quotation marks omitted). Evans also argued that his sentence was unconstitutional because "the aggravating circumstances were not alleged in the indictment." *Id.* at 177. In its order on the State's motion to alter or amend the judgment granting habeas relief, the district court distinguished Evans' *Ring* claim from the unanimity claim he had made on direct appeal and to the state collateral court, explaining that those were "two separate and distinct claims" and that the

The state collateral court granted an evidentiary hearing on three of his other claims and heard testimony from Evans' trial counsel, alibi witnesses, mental health experts, and family members. The court denied Evans' Rule 3.851 motion and his motion for a rehearing. The Florida Supreme Court affirmed the denial of Rule 3.851 relief and denied Evans' petition to it for a writ of habeas corpus. *Evans v. State*, 995 So.2d 933, 954 (Fla. 2008). It also denied his motion for rehearing.

Evans then filed a 176–page petition for a writ of habeas corpus in federal district court, raising 17 claims for relief. The district court denied habeas relief on 16 of Evans' claims but granted him relief from his death sentence on his seventeenth claim, ruling that Florida's capital sentencing statute

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Ring decision "does not decide this issue or even address the need for unanimity." Doc. 27 at 16.

The six ineffective assistance at the guilt phase subclaims were: (1) failing to object to an individual juror's participation in trial; (2) failing to timely request a hearing under *Richardson v. State*, 246 So.2d 771 (Fla. 1971); (3) failing to object to inflammatory and prejudicial comments elicited by the State; (4) failing to object to improper bolstering of witness credibility; (5) failing to object during the State's closing argument regarding mutually exclusive factual theories of prosecution; and (6) failing to present evidence. *Id.* at 939 n. 8. The two ineffective assistance at the sentence stage subclaims were: (1) failing to present mitigation; and (2) failing to object to serious misstatements of the law, including that the jury's role was merely advisory and that Evans had the burden of proof to establish that mitigation outweighed aggravation. *Id.* at 939 n. 9.

violates the Sixth Amendment as interpreted in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). The State filed a motion to alter or amend, contending that the district court had erred in that part of its ruling; the district court denied that motion.

Evans also filed a motion to alter or amend, which the district court denied, reasserting its rejection of Evans' claims that (1) his Sixth Amendment right to a public trial was violated; (2) his counsel was ineffective during the guilt stage of the trial; and (3) his Eighth and Fourteenth Amendment rights were violated because the trial court did not require the State to specify its theory of the prosecution.

The district court granted Evans a certificate of appealability on two of his claims: (1) that his rights were violated by closure of the courtroom during voir dire; and (2) that his counsel rendered ineffective assistance by failing to call Mindy McCormick to testify. The State appealed the district court's grant of habeas relief on Evans' *Ring* claim, and Evans cross-appealed the district court's denial of relief on the two claims on which the district court had granted a certificate of appealability.

Evans asked this Court to expand the certificate of appealability, and we did but only insofar as it concerned his claim that counsel was ineffective at the guilt phase for failing to call alibi and impeachment witnesses. We will take up the issue in the State's appeal before moving to Evans' cross-appeal.

II.

The State appeals the part of the district court's judgment that granted Evans habeas relief from his death sentence on the theory that application of the jury sentencing provisions of the Florida statute violated his Sixth Amendment rights, as interpreted in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Florida's procedures comply with the Sixth Amendment and *Ring*, according to the State, because a judge may sentence a defendant to death only after considering and giving "great weight" to a jury's advisory sentence. *See, e.g., Ault v. State*, 53 So.3d 175, 200 (Fla. 2010) ("[T]he court must independently consider the aggravating and mitigating circumstances and reach its decision on the appropriate penalty, giving great weight to the jury's advisory sentence." (citing *Tedder v. State*, 322 So.2d 908 (Fla. 1975))). And a jury cannot advise in favor of death unless it finds beyond a reasonable doubt at least one statutory aggravating circumstance. *See, e.g.*, *Ault*, 53 So.3d at 205. Evans, on the other hand, contends that the district court got it right because under Florida's sentencing procedure a judge and not the jury actually finds the facts necessary to establish an aggravating circumstance, which makes the defendant death eligible.

Three lines of Supreme Court decisions are relevant to our decision in this case. The first line of decisions specifically upholds the advisory jury verdict and judicial sentencing component of Florida's capital punishment statute. The second line

involves the unconstitutionality of Arizona's former capital sentencing procedures under which a judge, without any input from the jury, found the facts necessary to authorize a death sentence. The third and decisive line of decisions instructs us to follow directly applicable Supreme Court decisions until that Court itself explicitly overrules them.

A.

We begin with the line of decisions upholding Florida's allocation of sentencing functions between the jury and judge in capital cases. Under Florida law, after a jury convicts a defendant of a capital felony, the trial court must conduct a separate sentence proceeding before the jury. Fla. Stat. § 921.141(1) (1990). The jury must then "render an advisory sentence to the court, based upon [the jury's determination of] the following matters: (a) [w]hether sufficient [statutory] aggravating circumstances exist ...; (b) [w]hether sufficient mitigating circumstances exist which outweigh the aggravating circumstances ...; and (c) [b]ased on these considerations, whether the defendant should be sentenced to life imprisonment or death." *Id.* § 921.141(2)(a)–(c). After the jury renders its advisory sentence:

[T]he court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

> (a) That sufficient [statutory] aggravating circumstances exist ..., and
>
> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

Id. § 921.141(3)(a)–(b). The court's findings must specify the statutory aggravating and any mitigating circumstances that do exist. *See, e.g., Oyola v. State*, 99 So.3d 431, 446, No. SC 10–2285, 2012 WL 4125816, at *12 (Fla. Sept. 20, 2012) ("[A] sentencing order must expressly consider each proposed mitigating circumstance, determine if the circumstance exists, and, if the circumstance does exist, what weight to allocate it. For [the Florida Supreme] Court to sustain a trial court's final decision in its sentencing order, competent, substantial evidence of record must support the trial court's weighing process. Moreover, the trial court's sentencing order must reflect 'reasoned judgment' by the trial court as it weighed the aggravating and mitigating circumstances.") (citations omitted). In making the sentence determination, the trial court must give "great weight" to the jury's advisory sentence. *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975); *see also Ross v. State*, 386 So.2d 1191, 1197 (Fla. 1980); *LeDuc v. State*, 365 So.2d 149, 151 (Fla. 1978).

In *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), the Supreme Court upheld Florida's judge-based death sentencing procedure under the Eighth Amendment. In reaching that conclusion, the Court stated:

This Court has pointed out that jury sentencing in a capital case can perform an important societal function, but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.

The Florida capital-sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida to determine independently whether the imposition of the ultimate penalty is warranted. The Supreme Court of Florida ... has not hesitated to vacate a death sentence when it has determined that the sentence should not have been imposed ....

Under Florida's capital-sentencing procedures, in sum, trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life. Moreover, their

> decisions are reviewed to ensure that they are consistent with other sentences imposed in similar circumstances.

Id. at 252–53, 96 S.Ct. at 2966–67(plurality opinion) (citations and quotation marks omitted).

The Supreme Court returned to Florida's death sentencing procedures in *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). In that case the defendant contended the trial judge had violated the Sixth Amendment by sentencing him to death even though the jury had recommended a life sentence. *Id.* at 457, 104 S.Ct. at 3160. Rejecting that contention, the Court reasoned that "[t]he fact that a capital sentencing is like a trial in the respects significant to the Double Jeopardy Clause ... does not mean that it is like a trial in respects significant to the Sixth Amendment's guarantee of a jury trial." *Id.* at 459, 104 S.Ct. at 3161. The Court continued:

> There is no ... danger [of an erroneously imposed death penalty] involved in denying a defendant a jury trial on the sentencing issue of life or death. The sentencer, whether judge or jury, has a constitutional obligation to evaluate the unique circumstances of the individual defendant and the sentencer's decision for life is final. More important, despite its unique aspects, a capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding—a determination of the appropriate punishment to be imposed on an

> individual. The Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue.

Id.(citations omitted).

The Court reevaluated Florida's judge-based death sentencing procedure five years later in *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989) (per curiam), and once again held that those procedures comply with the Sixth Amendment. The defendant in *Hildwin* contended that Florida's procedures violated the Sixth Amendment because they "permit[ ] the imposition of death without a specific finding by the jury that sufficient aggravating circumstances exist to qualify the defendant for capital punishment." *Id.* at 639, 109 S.Ct. at 2056. The Court disagreed, holding that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Id.* at 640–41, 109 S.Ct. at 2057. That decision is directly on point against Evans' contention and the district court's ruling in this case.

While the *Hildwin* decision is the Supreme Court's last word in a Florida capital case on the constitutionality of that state's death sentencing procedures, the Court did speak favorably again about those procedures in a decision involving Alabama's capital punishment statute. *Harris v. Alabama*, 513 U.S. 504, 508–09, 515, 115 S.Ct. 1031, 1034, 1037, 130 L.Ed.2d 1004 (1995). Alabama's sentencing procedures, like Florida's, provide for an advisory jury sentencing verdict. *See id.* at 508, 115

S.Ct. at 1034. A difference is that, unlike Florida, Alabama allows a judge to impose a death sentence without giving a jury's advisory verdict recommending life "great weight." In comparing the two procedures, the Court said:

> In various opinions on the Florida statute we have spoken favorably of the deference that a judge must accord the jury verdict under Florida law. While rejecting an *ex post facto* challenge in *Dobbert v. Florida*, 432 U.S. 282, 294, 97 S.Ct. 2290, 2298 [53 L.Ed.2d 344] (1977), we noted the "crucial protection" provided by the standard of *Tedder v. State.* In the same fashion, in dismissing Spaziano's argument that the *Tedder* standard was wrongly applied by the lower courts in his case, we stated:
>
> "This Court already has recognized the significant safeguard the *Tedder* standard affords a capital defendant in Florida. We are satisfied that the Florida Supreme Court takes that standard seriously and has not hesitated to reverse a trial court if it derogates the jury's role."

Id. at 510–11, 115 S.Ct. at 1035 (some citations omitted). The Court went on in the *Harris* case to uphold the Alabama statute anyway, but its opinion makes clear that Florida's *Tedder* standard adds a measure of protection to the jury's role in sentencing. Just three years ago the Court reiterated that point, stating: "In Florida, the sentencing judge makes the determination as to the existence and weight of

aggravating and mitigating circumstances and the punishment, Fla. Stat. § 921.141(3), but he must give the jury verdict of life or death 'great weight.' " *Porter v. McCollum*, 558 U.S. 30, 130 S.Ct. 447, 453, 175 L.Ed.2d 398 (2009).

The Supreme Court's confidence in the Florida Supreme Court's stringent application of the *Tedder* standard has not been misplaced. The State represents to us that the last time the Florida Supreme Court affirmed a trial judge's decision to sentence to death a defendant for whom the jury had not recommended a death sentence was eighteen years ago. Appellant/Cross–Appellee's Reply Br. at 14 n. 4; *see Washington v. State*, 653 So.2d 362 (Fla. 1994).[4] Evans does not dispute that fact.

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[4]In making that statement, the State distinguishes, with some justification, between cases in which the jury did not recommend a death sentence at all (pure override cases) and one multiple-victim case in which the jury recommended a death sentence for some but not all of the murders the defendant had been convicted of committing (a mixed override case). Fourteen years ago the Florida Supreme Court did affirm an override in a mixed override case involving unique circumstances. See *Zakrzewski v. State*, 717 So.2d 488 (Fla. 1998). The defendant murdered his wife, his seven-year-old son, and his five-year-old daughter. *Id.* at 490–91. He hacked the two children to death with a machete. *Id.* The jury recommended a death sentence for the murder of the wife and son but a life sentence for the murder of the daughter. *Id.* at 491. The trial judge overrode the life recommendation regarding the murder of the daughter, imposing on the defendant three death sentences instead of only the two that the jury recommended. *Id.* The Florida Supreme Court found that "we are certain that by murdering his children with a machete, [the defendant] caused his children to suffer an

B.

We next turn to the line of decisions assessing the constitutionality of Arizona's former death sentencing procedures. An Arizona statute provided that, after a defendant was convicted of first-degree murder, the trial judge would "conduct a separate sentencing hearing to determine the existence or nonexistence of [statutory] circumstances ... for the purpose of determining the sentence to be imposed." Ariz.Rev.Stat. Ann. § 13–703(C) (West Supp.2001). The statute specified that "[t]he hearing shall be conducted *before the court alone*" and that "[t]he court alone shall make all factual determinations required." *Id.* (emphasis added). After the sentence hearing, the judge would find the existence or nonexistence of statutory "aggravating circumstances" and any "mitigating circumstances." A death sentence could be imposed only if the judge found at least one statutory aggravating circumstance and found that "there [were] no mitigating circumstances sufficiently substantial to call for leniency." *Id.* § 13–703(F).

So, the Arizona statute was like Florida's in that no death sentence could be imposed unless the trial

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unthinkable horror." *Id.* at 492. And in affirming the override of the life sentence recommendation for the murder of the little girl, it also concluded that the facts warranting a death sentence for her murder were even more compelling than those supporting the death sentences for the murder of her mother and older brother. *Id.* at 494. So far as the parties have informed us and we can tell, the *Zakrzewski* case is the last one in which the Florida Supreme Court affirmed an override of a jury's life sentence recommendation in any capital case.

judge found that the facts and circumstances established an aggravating circumstance or circumstances justifying the death penalty. The statutes were different, however, because under the Arizona statute the jury played no part at all in sentencing and did not constrain in any way the judge's sentencing authority.

The Supreme Court first considered the constitutionality of Arizona's judge-only death sentencing procedure in *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990). The defendant contended that Arizona's procedure violated the Sixth Amendment, and he sought a broad ruling that the Constitution requires that a jury, not a judge, make the findings of fact underlying the death sentencing decision. *Id.* at 647, 110 S.Ct. at 3054. The Supreme Court rejected that contention and upheld Arizona's procedure, noting that in *Hildwin* it had upheld Florida's similar judge-based death sentencing procedure. *Id.* at 647–49, 110 S.Ct. at 3054–55. The Court reiterated in *Walton* that the Sixth Amendment does not require a state to "permit only a jury to determine the existence of ... circumstances" that authorize a death sentence. *Id.* at 649, 110 S.Ct. at 3055.

Ten years later the Court issued its decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000),[5] which held that a jury

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[5]In *Apprendi*, the defendant had been convicted in state court of, among other things, second-degree possession of a firearm, which carried a statutory maximum penalty of 10 years in prison. 530 U.S. at 469–70, 120 S.Ct. at 2352. The sentencing

must find beyond a reasonable doubt any fact that increases a defendant's statutorily authorized punishment, *see id.* at 482–84, 120 S.Ct. at 2359. In light of the *Apprendi* decision, the Court revisited the constitutionality of Arizona's judge-only death sentencing procedure in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). The Court decided that the Arizona procedure violated the Sixth Amendment because it authorized a death sentence only if the judge, not the jury, found at least one statutory aggravating circumstance. *Id.* at 609, 122 S.Ct. at 2443. The *Ring* opinion explained that *Apprendi* had held that "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Id.* at 602, 122 S.Ct.

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judge found by a preponderance of the evidence that racial bias had motivated the defendant's crime, which increased the statutory maximum for the crime to 20 years. *Id.* at 470–71, 120 S.Ct. at 2352. The judge sentenced the defendant to 12 years in prison, two years above the maximum sentence the defendant could have received without the racial bias enhancement. *Id.* at 471, 120 S.Ct. at 2352.

> The Supreme Court held in *Apprendi* that the defendant's enhanced sentence violated his Sixth Amendment right to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Id.* at 477, 120 S.Ct. at 2356. The Court explained that the Sixth Amendment does not permit a defendant to be "expose[d] ... to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.* at 483, 120 S.Ct. at 2359.

at 2439. The Court reasoned that "[c]apital defendants, no less than noncapital defendants, ... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at 589, 122 S.Ct. at 2432. The *Ring* Court recognized that its decision in *Walton* and its decision in *Apprendi* were "irreconcilable," *id.* at 609, 122 S.Ct. at 2443, and it "overrule[d] *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty."*Id.*

C.

Because *Ring* concluded that under the Sixth Amendment "[c]apital defendants, no less than noncapital defendants, ... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment," 536 U.S. at 589, 122 S.Ct. at 2432, Evans contends—and the district court concluded—that his death sentence is unconstitutional because the trial judge in his case, not the jury, ultimately found the facts that authorized the death penalty. *See* Fla. Stat. § 921.141(3)(a) (requiring the trial judge to find that "sufficient [statutory] aggravating circumstances" exist). The State counters that Evans' death sentence does not conflict with the *Ring* decision because the trial judge sentenced Evans to death only after considering and agreeing with the jury's advisory death sentence, which itself found the existence of an aggravating circumstance or circumstances sufficient to support a death sentence.

The jury's verdict necessarily contained such findings because the jury was instructed that it could not recommend a death sentence unless it found beyond a reasonable doubt that one or more aggravating circumstances existed and also found after considering the mitigating circumstances that the aggravating circumstances were sufficient to support a death sentence. *See Francis*, 471 U.S. at 324 n. 9, 105 S.Ct. at 1976 n. 9; *Lopez*, 649 F.3d at 1238; *Townsend*, 630 F.3d at 1014.

The State is correct that its death sentencing procedures do provide jury input about the existence of aggravating circumstances that was lacking in the Arizona procedures the Court struck down in *Ring*. It is not just that a Florida jury renders an advisory verdict addressing the existence of aggravating circumstances, see Fla. Stat. § 921.141(2)(a), but also that the sentencing judge must give the jury's sentencing verdict "great weight," *see, e.g., Tedder*, 322 So.2d at 910; see also *supra* pp. 1255–56, 1256–57, 1258–59 & n. 4 (discussing application of Florida's *Tedder* standard). The Supreme Court has not decided whether the role that a Florida jury plays in the death-eligibility determination is different enough from the absence of any role, which was involved in *Ring*, for the Florida procedures to be distinguishable.

In its *Walton* opinion, the Court did make these statements about the Florida and Arizona death sentencing procedures in the course of upholding the Arizona procedures:

> It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.

497 U.S. at 648, 110 S.Ct. at 3054.Nine years later, however, the Supreme Court recognized that there is a difference in the jury's role in the two sets of procedures, which may be constitutionally significant. *See Jones v. United States*, 526 U.S. 227, 250–51, 119 S.Ct. 1215, 1227–28, 143 L.Ed.2d 311 (1999). In *Jones*, which interpreted the penalty provisions of the federal carjacking statute, 18 U.S.C. § 2119, the Court discussed favorably its *Hildwin* decision and pointed out that Florida juries do play an important role in the capital sentencing process: "In [Florida], a jury ma[kes] a sentencing recommendation of death, thus necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved." *Jones*, 526 U.S. at 250–51, 119 S.Ct. at 1228.

Three years later came the *Ring* decision, which overruled *Walton.* In the course of doing that, the Supreme Court had this to say in *Ring* about the Florida procedures and the *Hildwin* decision, which had provided some of the support for the reasoning in the *Walton* case:

> In *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), we upheld Arizona's scheme against a charge that it violated the Sixth Amendment. The Court had previously denied a Sixth Amendment challenge to Florida's capital sentencing system, in which the jury recommends a sentence but makes no explicit findings on aggravating circumstances; we so ruled, *Walton* noted, on the ground that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Id.*, at 648, 110 S.Ct. 3047 (quoting *Hildwin v. Florida*, 490 U.S. 638, 640–41, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989) (per *curiam*)). *Walton* found unavailing the attempts by the defendant-petitioner in that case to distinguish Florida's capital sentencing system from Arizona's. In neither State, according to *Walton*, were the aggravating factors "elements of the offense"; in both States, they ranked as "sentencing considerations" guiding the choice between life and death. 497 U.S., at 648, 110 S.Ct. 3047 (internal quotation marks omitted).

Ring, 536 U.S. at 598, 122 S.Ct. at 2437.That passage may be read to imply a retreat from the reasoning behind the *Hildwin* decision, but nowhere in its *Ring* opinion did the Court say that it was overruling *Hildwin.*

And there are indications in *Ring* that the Court did not mean to overrule even implicitly its *Hildwin* decision. As they concern the Sixth Amendment rights recognized in *Apprendi*, the Court in *Ring* divided into three categories the 38 states with capital sentencing procedures at that time. One category consisted of the 29 states which "generally commit sentencing decisions to juries," *Ring*, 536 U.S. at 608 n. 6, 122 S.Ct. at 2442 n. 6, and for that reason have no *Apprendi* problem. The second category consisted of the five States (Arizona and four others) that "commit both capital sentencing factfinding and the ultimate sentencing decision entirely to judges," *id.*, and for that reason run afoul of the *Apprendi* decision. The Court's third category consisted of four states, including Florida, that had "hybrid systems, in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determinations." *Id.*

By placing Florida's sentencing procedures in a "hybrid" category separate from the jury-only category of sentencing procedures that are clearly permissible, and separate from the judge-only category of sentencing procedures that are impermissible under *Ring*, the Court indicated that its decision in the *Ring* case might not be inconsistent with its earlier *Hildwin* decision; it indicated that the question of whether *Hildwin* should be overruled was left for another day. Otherwise, there was no point in separating out, as the Court did, the hybrid system. If the Court had intended to rule in *Ring* that jury-only sentencing was required in capital cases, there would be only

two categories that mattered: those in which the jury sentenced and those in which the judge did; hybrid systems would not be a separate category.[6] *See Brice v. State*, 815 A.2d 314, 318–19 (Del.2003) ("The United States Supreme Court designated Delaware's capital sentencing scheme as a "hybrid system," *Ring*, 536 U.S. at 608 n. 6, 122 S.Ct. at 2442 n. 6, and thus distinguished our system from Arizona's."). The most that can be said for Evans' position is that while *Ring* did not explicitly overrule *Hildwin*, its reasoning arguably conflicts with the *Hildwin* decision, and it arguably was implicitly overruled. That is not enough for Evans to prevail in the district court or in this Court.

D.

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[6]The closing paragraph of the *Ring* opinion states: "Accordingly, we overrule *Walton*to the extent that it allows a sentencing judge, *sitting without a jury,* to find an aggravating circumstance necessary for imposition of the death penalty." *Id.* at 609, 122 S.Ct. at 2443 (emphasis added). But the important qualifier "sitting without a jury" is not defined outside the context of the case before the Court, which was one in which the jury had no role at all, not even an advisory one, in sentencing. As the opening paragraph of the *Ring* opinion states: "In Arizona, following a jury adjudication of a defendant's guilt of first-degree murder, the trial judge, *sitting alone,* determines the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty." *Id.* at 588, 122 S.Ct. at 2432 (emphasis added); *see also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399, 5 L.Ed. 257 (1821) ("It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.").

Having set out the line of decisions upholding the constitutionality of Florida's advisory jury verdict system, and the line of decisions casting doubt on the constitutionality of that system, we turn now to the third and decisive line of decisions in these circumstances.

The Supreme Court has not always been consistent in its decisions or in its instructions to lower courts. There are, however, some things the Court has been perfectly consistent about, and one of them is that "it is [that] Court's prerogative alone to overrule one of its precedents." *United States v. Hatter*, 532 U.S. 557, 567, 121 S.Ct. 1782, 1790, 149 L.Ed.2d 820 (2001) (quotation marks omitted). The Supreme Court has told us many times "that, 'if a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court, the prerogative of overruling its own decisions.' " *Jefferson Cnty. v. Acker*, 210 F.3d 1317, 1320 (11th Cir. 2000) (alteration omitted) (quoting *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 1921–22, 104 L.Ed.2d 526 (1989)). Even if a Supreme Court decision looks dead to us, "the Supreme Court has insisted on reserving to itself the task of burying its own decisions." *Id.* at 1320. We must not, to borrow Judge Hand's felicitous words, "embrace the exhilarating opportunity of anticipating" the overruling of a Supreme Court decision. *Walsh*, 139 F.2d at 823 (Hand, J., dissenting).

The high Court could not have been clearer about this than it has been. The Court has told us, over and over again, to follow any of its decisions that directly applies in a case, even if the reasoning of that decision appears to have been rejected in later decisions and leave to that Court "the prerogative of overruling its own decisions." *Tenet v. Doe*, 544 U.S. 1, 10–11, 125 S.Ct. 1230, 1237, 161 L.Ed.2d 82 (2005) (quotation marks omitted); *accord Hatter*, 532 U.S. at 567, 121 S.Ct. at 1790 (overruling one of its earlier decisions but noting with approval that the court of appeals had not done so because, while doubt had been cast on that earlier decision the Supreme Court had not expressly overruled it); *Hohn v. United States*, 524 U.S. 236, 252–53, 118 S.Ct. 1969, 1978, 141 L.Ed.2d 242 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continued vitality."); *State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S.Ct. 275, 284, 139 L.Ed.2d 199 (1997) ("Despite what Chief Judge Posner aptly described as *Albrecht's* [*v. Herald Co.,* 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968)] infirmities, and its increasingly wobbly, moth-eaten foundations, there remains the question whether *Albrecht* deserves continuing respect under the doctrine of *stare decisis.* The Court of Appeals was correct in applying that principle despite disagreement with *Albrecht*, for it is this Court's prerogative alone to overrule one of its precedents." (alteration and citation omitted)).

A good example of how serious the Supreme Court is about its supreme prerogative rule is

Agostini v. Felton, 521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997). In that case the lower courts had refused to vacate an injunction that was based on the Supreme Court's earlier decision in *Aguilar v. Felton*, 473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed.2d 290 (1985), even though *Aguilar* simply could "not be squared with" some of the Court's intervening decisions, which had brought about "a significant change in" the applicable constitutional law. *Agostini*, 521 U.S. at 208–09, 235–36, 117 S.Ct. at 2003, 2016. In *Agostini* the Court pronounced that its *Aguilar* decision was overruled in relevant part, and instructed the lower courts in the case before it to vacate the order that had been based on the *Aguilar* decision. *Id.* at 239–40, 117 S.Ct. at 2018–19. The important part of the *Agostini* decision for present purposes is not that the Supreme Court explicitly overruled *Aguilar* but that the Court expressly stated that the lower courts had been correct to follow *Aguilar*, even if it had been implicitly overruled by intervening decisions, and to leave the supreme prerogative of overruling that decision to the one and only Court with the authority to do so. This is what the Supreme Court said about that:

> We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which

> directly controls, leaving to this Court the prerogative of overruling its own decisions.

Id. at 237, 117 S.Ct. at 2017(alteration and quotation marks omitted). And that is true even where the earlier Supreme Court decision that directly applies "cannot be squared with" the Court's later jurisprudence in the area that has "significantly change[d]" the law. *Id.* at 521 U.S. at 208–09, 235–36, 117 S.Ct. at 2003, 2016. It is true even if the earlier decision has "infirmities" and "increasingly wobbly, moth-eaten foundations." *Khan,* 522 U.S. at 20, 118 S.Ct. at 284.

Like the lower courts in *Agostini* and in *Khan*, we have always been careful to obey the supreme prerogative rule and not usurp the Supreme Court's authority to decide whether its decisions should be considered overruled. See *United States v. Greer*, 440 F.3d 1267, 1275–76 (11th Cir. 2006) ("The problem with lower courts basing decisions on predictions that the Supreme Court will overturn one of its own decisions is that the Supreme Court has repeatedly told us not to do it. We take that admonition seriously.") (citations omitted); *Jefferson Cnty.*, 210 F.3d at 1320; *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519, 525 (11th Cir. 1997) ("It may be that the Supreme Court has cut *Alexander* [*v. Gardner–Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974),] back so far that it will not survive. Perhaps, but we are not convinced we are authorized to sing the dirge of *Alexander*. We will leave that to the Supreme Court ...."); *Eng'g Contractors Ass'n of S. Fla. Inc. v. Metro. Dade*

Cnty., 122 F.3d 895, 908 (11th Cir. 1997) ("[W]e are not at liberty to disregard binding case law that is so closely on point and has been only weakened, rather than directly overruled, by the Supreme Court.").

The problem with Evans' argument that *Ring*, which held that Arizona's judge-only capital sentencing procedure violated the Sixth Amendment, controls this case is the *Hildwin* decision in which the Supreme Court rejected that same contention. *See Hildwin,* 490 U.S. at 640–41, 109 S.Ct. at 2057 (considering the procedures prescribed by Fla. Stat. § 921.141 (Supp.1988) and holding that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury."). *Hildwin* is directly on point, and it is binding on us, unless and until the Supreme Court explicitly overrules it. Although the Court in *Ring* overruled *Walton*, it did not overrule *Hildwin*.[7]

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[7]Members of the Florida Supreme Court have recognized that *Ring*did not overrule *Hildwin. See Bottoson v. Moore*, 833 So.2d 693, 704 n. 16 (Fla. 2002) (Anstead, J., concurring) ("[T]he Court [in *Ring* overruled *Walton*, but did not specifically recede from or overrule *Hildwin* or any of the Court's previous opinions approving of Florida's capital sentencing system."); *King v. Moore*, 831 So.2d 143, 155 (Fla. 2002) (Pariente, J., concurring) ("[T]he Supreme Court [in *Ring*did not directly address *Spaziano* and *Hildwin* and thus, of course, this Court is bound by that precedent to the extent those cases govern the issues presented to us."); *Bottoson v. Moore*, 824 So.2d 115, 124 (Fla. 2002) (Wells, J., dissenting) ("The Supreme Court in *Ring* overruled neither *Hildwim*n or multiple decisions in which the Supreme Court rejected the very same constitutional challenges to Florida's capital sentencing statute ...."); *King v. Moore*, 824

It is true that a principled argument can be made that the Supreme Court's statement in *Hildwin* that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury," 490 U.S. at 640–41, 109 S.Ct. at 2057, conflicts with the Court's reasoning in *Ring* that "[c]apital defendants, no less than noncapital defendants, ... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment," *Ring*, 536 U.S. at 589, 122 S.Ct. at 2432.[8] The most that can be said, however, is that this is a situation where "a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions." *Rodriguez de Quijas*, 490 U.S. at 484, 109 S.Ct. at 1921–22. And, to reiterate it one last time, the Supreme Court has told us exactly what we are to do in this situation: we must follow the

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So.2d 127, 130 (Fla. 2002) (Wells, J., dissenting) ("The Supreme Court in *Ring* overruled neither *Hildwim*n or multiple decisions in which the Supreme Court rejected the very same constitutional challenges to Florida's capital sentencing statute made now by King.").

[8]A principled argument can also be made that the result in *Hildwin* is not inconsistent with the result in *Ring* And that is especially true in cases like this one where no rational jury could have found the defendant guilty beyond a reasonable doubt of the murder with which he was charged without implicitly finding that at least one of the statutory aggravating circumstances existed. There was no evidence presented, and there could have been no rational inference from any of the evidence that was presented, that Evans committed the murder but did not do it for pecuniary gain.

decision that directly controls, unless and until the Supreme Court makes it non-controlling by overruling it. *Id.*, 109 S.Ct. at 1921–22. We understand that instruction, we have always taken it seriously, and we follow it here. The district court's judgment is due to be reversed insofar as it granted federal habeas relief to Evans on *Ring* grounds.[9]

III.

In his cross-appeal, Evans contends that his Sixth Amendment right to a public trial was violated when the court partially closed the voir dire proceedings because of the limited seating that was available in a small hearing room. That room was used for individual voir dire of those jurors who had given answers indicating that more specific questioning of them in front of the other jurors might lead to a mistrial, like the one that had occurred when the case was last tried.[10] The issue was raised and

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[9]Our *de novo* decision on the merits of the *Hildwin/ Ring* issue makes it unnecessary for us to decide a number of other issues relating to this claim, including: 1) whether the claim is procedurally barred because Evans did not raise it in the state trial court and on direct appeal; 2) whether the Florida Supreme Court's rejection of the claim in the state collateral proceeding is subject to deference under 28 U.S.C. § 2254(d)(1); 3) whether any *Ring*err or in this case would have been harmless in light of the evidence establishing that if Evans committed the murder he must have done it for pecuniary gain; and 4) whether any of the four previously listed issues have been waived by the State.

[10]There had been two mistrials in this case before the third trial, which is the one involved in these proceedings. "The first trial ended in a mistrial when the jury could not agree upon a

rejected on appeal to the Florida Supreme Court. *Evans v. State*, 808 So.2d 92, 105 (Fla. 2001). The district court carefully considered Evans' arguments and rejected them, concluding that the decision of the Florida Supreme Court on this issue was not contrary to or an unreasonable application of clearly established Federal law as determined by the Supreme Court. *See* 28 U.S.C. § 2254(d)(1); Doc. 21 at 61–69.

We agree with the district court's reasoning and resolution of this issue but add three points about the nature of the deference due the Florida Supreme Court's decision under § 2254(d). First, Evans' best arguments on this issue rely on *Presley v. Georgia*, 558 U.S. 209, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010), but that Supreme Court decision was issued more than nine years after the Florida Supreme Court decided this issue in this case. It is hornbook AEDPA law that the only Supreme Court decisions against which a state court decision is to be measured are those on the books at the time the state court decision was issued. *Greene v. Fisher*, —— U.S. ——, 132 S.Ct. 38, 45, 181 L.Ed.2d 336 (2011) (a Supreme Court decision issued three months after the last state court decision on the merits of a federal constitutional issue cannot be considered in determining clearly established federal law for § 2254(d)(1) purposes); *Cullen v. Pinholster*, —— U.S. –

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verdict. Evans' second trial ended in a mistrial due to prejudicial information regarding the first trial disseminated by a juror during voir dire questioning." *Evans*, 808 So.2d at 105 n. 9.

——, 131 S.Ct. 1388, 1399, 179 L.Ed.2d 557 (2011) ("State-court decisions are measured against [the Supreme] Court's precedents as of the time the state court renders its decision.") (quotation marks omitted); *Lockyer v. Andrade*, 538 U.S. 63, 71–72, 123 S.Ct. 1166, 1172, 155 L.Ed.2d 144 (2003) (explaining that "clearly established Federal law under § 2254(d)(1)" is measured "at the time the state court renders its decision") (quotation marks omitted).

Second, Evans also relies on some decisions of this Court to support his position on this issue. But a federal court of appeals decision favorable to a habeas petitioner cannot clearly establish that a state court decision of a federal constitutional issue is contrary to or an unreasonable application of federal law under § 2254(d)(1). *See Parker v. Matthews*, —— U.S. ——, 132 S.Ct. 2148, 2155, 183 L.Ed.2d 32 (2012) ("The Sixth Circuit also erred by consulting its own precedents, rather than those of this Court, in assessing the reasonableness of the Kentucky Supreme Court's decision .... As we explained in correcting an identical error by the Sixth Circuit two Terms ago, circuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court,' 28 U.S.C. § 2254(d)(1). It therefore cannot form the basis for habeas relief under AEDPA.") (citation omitted); *Carey v. Musladin*, 549 U.S. 70, 77, 127 S.Ct. 649, 654, 166 L.Ed.2d 482 (2006) ("Given the lack of holdings from this Court regarding the potentially prejudicial effect of spectators' courtroom conduct of the kind involved here, it cannot be said that the

state court unreasonably applied clearly established Federal law.") (quotation marks and alterations omitted); *Dombrowski v. Mingo*, 543 F.3d 1270, 1274 (11th Cir. 2008) ("We have held that the 'clearly established law' requirement of § 2254(d)(1) does not include the law of the lower federal courts."); *Hawkins v. Alabama*, 318 F.3d 1302, 1309 (11th Cir. 2003) ("Our inquiry into what is clearly established federal law for AEDPA purposes must focus on the decisions of the Supreme Court. Clearly established federal law is *not* the case law of the lower federal courts, including this Court.") (quotation marks omitted); *Putman v. Head*, 268 F.3d 1223, 1241 (11th Cir. 2001) (same).[11]

Third, the obstacles that a habeas petitioner faces under § 2254(d)(1) are daunting. *Bobby v. Dixon*, —— U.S. ——, 132 S.Ct. 26, 27, 181 L.Ed.2d 328 (2011) ("Under the Antiterrorism and Effective Death Penalty Act, a state prisoner seeking a writ of habeas

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[11]On the other hand, our decisions that are unfavorable to a habeas petitioner can defeat his claim under § 2254(d)(1). If we have rejected a materially identical claim in a published opinion, that means it is the law of the circuit that the claim has no merit, and if the claim has no merit a state court's rejection of it cannot be "contrary to, or involv[e] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). Otherwise, we would not have rejected the claim ourselves. This Court sitting en banc or the Supreme Court can, of course, overrule our decisions but until that happens we are bound to follow our own published decisions to the extent that they are inconsistent with a habeas petitioner's claim that a contrary position is "clearly established Federal law" within the meaning of § 2254(d)(1).

corpus from a federal court must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.") (quotation marks omitted); *Cullen v. Pinholster*, ——U.S. ——, 131 S.Ct. 1388, 1411, 179 L.Ed.2d 557 (2011) ("We have said time and again that an *unreasonable* application of federal law is different from an *incorrect* application of federal law.") (quotation marks omitted); *Schriro v. Landrigan*, 550 U.S. 465, 473–74, 127 S.Ct. 1933, 1939–40, 167 L.Ed.2d 836 (2007) ("The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold."); *Harrington v. Richter*, —— U.S. ——, 131 S.Ct. 770, 785–86, 178 L.Ed.2d 624 (2011) ("A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision.") (quotation marks omitted); *Hill v. Humphrey*, 662 F.3d 1335, 1343 (11th Cir. 2011) (en banc) ("Under AEDPA, our review of a final state habeas decision is greatly circumscribed and is highly deferential to the state courts.") (quotation marks omitted); *Johnson v. Sec'y, Dep't of Corr.*, 643 F.3d 907, 910 (11th Cir. 2011) ("Stated the other way, only if there is no possibility fairminded jurists could disagree that the state court's decision conflicts with the Supreme Court's precedents may relief be granted.")

(quotation marks and alteration omitted). Evans' closure claim does not clear these high hurdles.

IV.

Evans' final contention is that his counsel rendered ineffective assistance of counsel by failing to call seven potential witnesses at the guilt stage of the trial. The Florida Supreme Court rejected this claim on performance grounds without reaching the prejudice issue. *Evans*, 995 So.2d at 943–45. That court explained in detail why not calling each of the potential witnesses did not amount to constitutionally deficient performance under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).[12] *Id.* The district court

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[12]The Florida Supreme Court concluded that Evans' counsel made a strategic decision on this point, and it explained:

> In sum, counsel clearly made an informed decision about not presenting any witnesses during the guilt phase, which is exactly what he told the judge at the guilt phase: "After a year-and-a-half of consultation, followed by the last few minutes here, we're going to rest ...." Because the trial court's findings are supported by competent substantial evidence and counsel's decision not to present these witnesses was reasonable, we affirm the trial court's denial. Because counsel's failure to present these witnesses was not deficient, we do not address the prejudice prong of *Strickland.*

Evans, 995 So.2d at 945(footnote omitted). The court also noted:

> Counsel also testified that he did not believe that any of these witnesses, who had credibility or other problems associated with their testimony, was worth giving up the "sandwich," *i.e.*, losing the opportunity to give two

denied relief on this claim, concluding that the Florida Supreme Court's rejection of the claim on performance grounds as to six of the seven witnesses was not contrary to or an unreasonable application of federal law under § 2254(d)(1). Doc. 21 at 17–21. Its conclusion is correct. As we have explained:

Id. at n. 16.

Even without the deference due under § 2254, the *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), standard for judging the performance of counsel "is a most deferential one." *Harrington*, 131 S.Ct. at 788. When combined with the extra layer of deference that § 2254 provides, the result is double deference and the

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closing arguments at the guilt phase. *See Van Poyck v. State*, 694 So.2d 686, 697 (Fla. 1997) (concluding that there were tactical reasons for limiting the presentation of evidence that might indicate another person was the triggerman, such as losing the opportunity to give two closing arguments at the guilt phase); *accord Reed*, 875 So.2d at 430. The Legislature has since enacted section 918.19, Florida Statutes (2007), which provides that the State shall have opening and rebuttal closing arguments. In addition, this Court amended Florida Rule of Criminal Procedure 3.250 and adopted Florida Rule of Criminal Procedure 3.381, confirming that the State is entitled to opening and rebuttal closing arguments even if the defense presents no evidence at trial. *In re Amendments to the Florida Rules of Criminal Procedure–Final Arguments*, 957 So.2d 1164, 1166–67 (Fla. 2007). However, when Evans was prosecuted in 1999, the defense was permitted to have both the opening and rebuttal closing arguments if it presented no evidence; thus, counsel's decision to take this into consideration was reasonable at that time.

question becomes whether "there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Id.*, 131 S.Ct. at 788. Double deference is doubly difficult for a petitioner to overcome, and it will be a rare case in which an ineffective assistance of counsel claim that was denied on the merits in state court is found to merit relief in a federal habeas proceeding.

Johnson, 643 F.3d at 910–11.We agree with the district court that this is not one of those rare cases.

In addition to the reasons the Florida Supreme Court gave for its decision and the reasons the district court gave for finding that decision to be reasonable as to six of the potential witnesses, we add the point that "[w]hich witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess." *Waters v. Thomas,* 46 F.3d 1506, 1512 (11th Cir. 1995) (en banc); *accord Cook v. Warden*, 677 F.3d 1133, 1137 (11th Cir. 2012); *Allen v. Sec'y, Fla. Dep't of Corr.*, 611 F.3d 740, 759 (11th Cir. 2010).

As to one of the seven potential witnesses, however, the district court stated that it "agree[d] with the ultimate conclusion of the state supreme court but disagree[d] with the rationale for how it concludes that Mr. Evans was provided effective assistance of counsel." Doc. 21 at 23–24. Applying what appears to be *de novo* review, the district court concluded that the Florida Supreme Court had erred in deciding that Evans had not met the performance prong of the *Strickland* test as to trial counsel not

presenting the testimony of Mindy McCormick, but the district court denied relief anyway on the prejudice prong as to that witness. *Id.* at 26.

If, as it appears, the district court reviewed the part of the ineffective assistance of counsel claim involving potential witness McCormick without any deference to the state court decision, it erred. The Florida Supreme Court decided that Evans had failed to establish performance deficiency under *Strickland* as to all of the potential witnesses, including McCormick, and its decision was entitled to full AEDPA deference under § 2254(d)(1). The question is not how the district court or this Court would rule if presented with the issue for the first time and not whether we think the state court decision is correct, but whether its decision is contrary to or an unreasonable application of clearly established federal law. *Bobby*, 132 S.Ct. at 27; *Cullen,* 131 S.Ct. at 1410–11; *Schriro*, 550 U.S. at 473–74, 127 S.Ct. at 1939–40. We need not decide that, however, because we agree with the district court that, for the reasons it stated, Evans has not established that he was prejudiced by his counsel's failure to call McCormick as a witness.

One of Evans' arguments is that the district court's analysis of the prejudice issue as to potential witness McCormick was flawed because the court did not consider any prejudice Evans suffered from the failure to call six other potential witnesses. The prejudice inquiry, he insists, must be a cumulative one. It is Evans' argument, not the district court's analysis, that is flawed. While the prejudice inquiry

should be a cumulative one as to the effect of all of the failures of counsel that meet the performance deficiency requirement, only the effect of counsel's actions or inactions that do meet that deficiency requirement are considered in determining prejudice. *Strickland*, 466 U.S. at 692, 104 S.Ct. at 2067 ("[A]ny deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution"); *id.* at 694, 104 S.Ct. at 2068 ("The defendant must show that there is a reasonable probability that, *but for counsel's unprofessional errors,* the result of the proceeding would have been different.") (emphasis added). Because Evans has failed to show any deficiency in counsel's performance based on not calling any of the other six witnesses, there is no deficiency to accumulate in order to establish prejudice. *Cf. Morris v. Sec'y, Dep't of Corr.*, 677 F.3d 1117, 1132 (11th Cir. 2012) ("[N]one of Morris's individual claims of error or prejudice have any merit, and therefore we have nothing to accumulate."). We reject Evans' cumulative prejudice argument.

We also reject Evans' argument that "the focus of a court's prejudice inquiry must be to try to find a constitutional violation, by engaging with the evidence and speculating as to its cumulative effect." Appellee/Cross–Appellant's Reply Br. at 13. Our role is not to try and find a way to set aside state court judgments. The Supreme Court has instructed us that "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the

defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065 (quotation marks omitted). And it has instructed us that "[a]ttorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial," *id.* at 693, 104 S.Ct. at 2067. And that "a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors," *id.* at 696, 104 S.Ct. at 2069. Instead of trying to find errors, "[w]e begin with the premise that under the circumstances, the challenged actions might be considered sound trial strategy." *Cullen,* 131 S.Ct. at 1404 (quotation marks and alteration omitted). And if there were errors that amounted to deficient performance, to establish prejudice "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington*, 131 S.Ct. at 792. The presumption runs against the defendant, the burden is on him, and speculation about the merits of counsel's trial strategy is not enough to carry that burden.

V.

The district court's judgment is affirmed insofar as it denied relief as to Evans' conviction but reversed insofar as it granted relief as to his sentence.

AFFIRMED in part and **REVERSED** in part.

Appendix B

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division
Case Number: 08-14402-CIV-MARTINEZ

PAUL H. EVANS,
Petitioner,

vs.

KENNETH S. TUCKER, Secretary,
Florida Department of Corrections[1],
Respondent.
_____/

ORDER ON RESPONDENT'S MOTION TO ALTER OR AMEND

THIS CAUSE came before the Court upon Respondent's Motion to Alter or Amend filed pursuant to Federal Rule of Civil Procedure 59(e) ("Motion"). [D.E. 22]. The Petitioner has filed a response. [D.E. 23]. The Respondent filed a reply. [D.E. 25]. The Court has reviewed the written

[1] During the course of these proceedings, Walter A. McNeil was replaced as the Secretary of the Department of Corrections. Kenneth S. Tucker is now the proper respondent in this proceeding. Tucker should, therefore, "'automatically" be substituted as a party under Federal Rule of Civil Procedure 25(d)(1). The Clerk is directed to docket and change the designation of the Respondent.

submissions and applicable law. For the reasons that follow, the Motion to Alter or Amend is DENIED.

Petitioner, Paul H. Evans ("Mr. Evans"), is on death row at the Union Correctional Institution in Raiford. Florida, following a conviction in 1999 for first degree murder. On June 20, 2011, the Court issued its Order granting, in part, and denying, in part, Mr. Evans' petition for writ of habeas corpus by a person in state custody ("Order"). [D.E. 21]. The Court granted Mr. Evans' seventeenth claim for habeas relief because Florida's capital sentencing statute violates *Ring v. Arizona* (the "*Ring* claim"). The State argues that this ruling represents manifest errors of both fact and law. ([D.E. 22] at 2). The State requests that the Court grant the Motion to Alter or Amend, deny all habeas relief or "[a]t a minimum, this Court should clarify its decision and limit its application to Mr. Evans's death sentence." ([D.E. 22] at 2).

As an initial matter, the State has asserted that the Court's Order "appears to implicate all death penalty cases." ([D.E. 22] at 1). The Court granted Mr. Evans's *Ring* claim because Florida's capital sentencing statute violated *Ring v. Arizona*. In the Order, the Court expressly recognized that *Ring* "in certain respects, has a limited holding." ([D.E. 21] at 89). Also, the Court clearly articulated that the United States Supreme Court had answered a limited question.

> The Court noted that *Ring* presented a narrow claim. First, as no aggravating circumstance related to past convictions in his case, he was

> not challenging *Almendarez-Torres v United States*, 523 U.S. 224 (1998), which held that the fact of a prior conviction may be found by the judge even if it increases the statutory maximum sentence. *Ring*, 536 U.S. at 597 n.4. Second, Ring made no Sixth Amendment claim with respect to mitigating circumstances. *Id.* Finally, *Ring* did not argue that the Sixth Amendment required the jury to ultimately decide whether the death penalty should be imposed: *Ring* did not challenge judicial re-weighing. *Id.; see also Clemons v. Mississippi*, 494 U.S. 738, 745 (1990)(holding that "an appellate court [may] invalidate[] one of two or more aggravating circumstances found by the jury, but affirm[] the death sentence after itself finding that one or more valid remaining aggravating factors outweigh the mitigating evidence.") It is important to note what *Ring* is and what it is not, as discussed in more detail below.

([D.E. 21] at 86). Therefore, when the Court determined that the Florida capital sentencing statute violates *Ring*, it did so with the limited holding delineated in *Ring*. To the extent that the State interpreted the Court's Order to mean something more than it does, it is not as a result of any "'clear and manifest error'" made by the Court.

In support of the Motion, the State makes five arguments. First, the State argues that "[t]he first error this court committed was factual error in finding that this claim was first raised during the

postconviction pleadings." ([D.E. 22] at 3). Second, the State asserts that even if the Court was correct to review the claim *de novo* rather than afford the state court's decision AEDPA deference this Court would have still committed manifest error by granting habeas relief because the Florida Supreme Court has held numerous times "that the statutory maximum for first-degree murder is death." ([D.E. 22] at 13). Third, the State contends that the Court also erred because it "imposed on Florida's capital sentencing law" requirements that have been "rejected as part of the Sixth Amendment jury clause regarding a determination that a defendant is even guilty of a crime." ([D.E. 22] at 16). Fourth, the State argues that the Court erred because "this Court seems to believe that the jury participation was insufficient because it was making an advisory recommendation that may be overridden..."[2] ([D.E. 22] at 18). Finally, the State asserts that even if the Court "had properly reviewed the issue *de novo* and found error, the judgment would still need to be altered or amended" because the Court should have determined that any

[2] This argument is meritless. The Court did not decide or base its determination of Mr. Evans's *Ring* claim on the judge's ability to override the jury's recommendation. The Court was quite clear about the fact that it was not addressing this issue because this issue was not before the Court. "However, as this is not the factual scenario before the Court, that issue is left for another day." ([D.E. 21] at 93). This argument completely misconstrues the Court's Order.

sentencing error made by the state court was harmless error.[3] ([D.E. 22] at 19).

Standard of Review

"The decision whether to alter or amend a judgment pursuant to Rule 59(e) is 'committed to the sound discretion of the district judge.'" *Mincey v Head*, 206 F.3d 1106, 1137 (11th Cir. 2000) (quoting *Am Home Assurance Co v. Glenn Estess & Assocs.*, 763 F.2d 1237. 1238-39 (11th Cir. 1985)). The only grounds for a district court to grant a motion to alter or amend judgment are new evidence and manifest error." *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir.2007). "Rule 59 motions 'should not be used to raise arguments which could, and should, have been made before the judgment was issued.' *O'Neal v Kennamer*, 958 F.2d 1044, 1047 (11th Cir. 1992). The denial of a Rule 59 motion raising new arguments is 'especially soundly exercised when the party has failed to articulate any reason for the failure to raise [an] issue at an earlier stage in the litigation.' *Id.* (*quoting Lussier v. Dugger*, 904 F.2d 661, 667 (11th Cir.1990))." *Hill v. Oil Dri Corp. of Georgia*, 198 Fed.Appx. 852 (11th Cir. 2006). Here, the State does not attempt to articulate any reason for why the

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[3] This argument is also without merit. The State misstates, not only the law, but also the record. To assert that Mr. Evans "did not contest the application of CCP or pecuniary gain" is misleading. Mr. Evans's counsel specifically objected to both aggravating circumstances being presented to the jury at sentencing because he argued that neither applied to the facts of Mr. Evans's case. However, the objections were overruled. ([D.E. 12, Ex. 12-13] at 4402-06).

arguments asserted in the instant motion were not made before the Court granted habeas relief. Indeed, the State does not even acknowledge this failure.

Analysis

To begin, the State has presented the Court with a well-reasoned and thorough motion that appears to contain compelling arguments. However, as the State attempts to persuade the Court that the Court committed manifest error, it does so while misconstruing the Court's Order and misstating the law and facts. Moreover, the arguments presented here could have been raised prior to the entry of judgment. Indeed, the majority of the arguments made are being made for the first time in the Motion. This the State cannot do. "A Rule 59(e) motion [cannot be used] to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." *Arthur v King*, 500 F.3d 1335. 1343 (11th Cir. 2007). "There is a significant difference between pointing out errors in a court's decision on grounds that have already been urged before the court and raising altogether new arguments ...; if accepted, the latter essentially affords a litigant two bites at the apple." *See Am. Home Assurance Co. v Glenn Estess & Assoc., Inc.*, 763 F.2d 1237, 1238-39 (11th Cir. 1985). To be clear, in response to Mr. Evans's *Ring* claim, the State argued as follows:

> Relying on *Ring v. Arizona,* 536 U.S. 584 (2002),Evans claims Florida's capital sentencing statutes violates the 6th and 14th Amendments to the United States Constitution

because: (1) aggravators are not included in the indictment; (2) the jury did not find unanimously an aggravator as an element of capital murder; (3) the sentencing recommendation is by majority vote; (4) the jury does not have to agree on any particular aggravator; (5) the jury does not have to agree whether sufficient aggravation exists to support a death sentence, and (6) the jury does not have to agree on whether the aggravation outweighs the mitigation. (P at 176-77). The FSC rejected these allegations and that decision is neither contrary to nor an unreasonable application of Supreme Court precedent. Relief must be denied.

In denying the *Ring* claim raised in both the postconviction appeal and state habeas corpus litigation, the FSC opined:

> Evans next asserts that Florida's death sentencing statute is unconstitutional under *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348. 147 L.Ed.2d 435 (2000).FN28 However, this Court and the United States Supreme Court have held that *Ring* does not apply retroactively. *Schriro v. Summerlin*, 542 U.S. 348, 358, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004) ("*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review."); *Franqui v. State*, 965 So.2d 22, 36 (Fla.2007). In *Johnson v State*,

> 904 So.2d 400 (Fla.2005), which was the seminal Florida decision on the issue of the retroactivity of *Ring*, we held that a death sentence becomes final for purposes of *Ring* once the Court has affirmed the conviction and sentence on direct appeal and issued the mandate. *Id.* at 407. Thus, Evans' death sentence became final after this Court both affirmed on direct appeal and issued the mandate in February 2002. Because *Ring* was not decided until June 2002, Evans cannot rely on it to vacate his death sentence.

Evans, 995 So.2d at 952.

Because the Supreme Court has held *Ring* [sic] not to be retroactive in *Schriro v. Summerlin*, and the FSC applied that case properly, Evans is not entitled to relief. Furthermore, *Ring* held that any fact which increases the penalty beyond the statutory maximum must be found by the jury. However, the FSC has determined that under Florida law, death is the statutory maximum for first-degree murder and death eligibility occurs at time of conviction. *Mills v. Moore*, 786 So.2d 532 (Fla. 2001)(holdlng statutory maximum sentence for first degree murder in Florida is death and death eligibility occurs at the time of conviction for first-degree murder). *See Proffitt v. Florida*, 428 U.S. 242, 252 (1976) (holding Constitution does not require jury sentencing); *Hildwin v. Florida*, 490 U.S. 638 (1989) (per curiam) (finding no 6th Amendment violation with

> Florida's death penalty scheme that permits judge to find aggravating circumstance authorizing death sentence; *Espinosa v. Florida*, 509 U.S. 1079 (1992) (characterizing jury's role in Florida as "co-sentencer"). The aggravators and mitigators are merely sentencing factors to help the jury select between to [sic] alternate sentences of life or death. Given this, Evans has not carried his burden under AEDPA and this Court should deny habeas relief.

([D.E. 9] at 156-58). This was the entire response filed by the State. Accordingly, of the five arguments raised here, the only argument properly before the Court is the State's second assertion that the Court committed manifest error because the Florida Supreme Court has held numerous times "that the statutory maximum for first degree murder is death." ([D.E. 22] at 13).

In order for the Court to grant Mr. Evans's *Ring* claim, the Court had to first find that *Ring* applies in Florida and then the Court had to find that the jury did not make a factual finding which would comport with the Sixth Amendment to the Constitution. The Florida Supreme Court declined to determine either issue because the court incorrectly determined that *Ring* could not be used to vacate Mr. Evans's death sentence because his sentence was final before *Ring* was decided.[4] In response to Mr. Evans's federal

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[4] The Court notes that the State does not argue that the Court's analysis regarding the retroactivity of *Ring* and the determination of the finality of Mr. Evans's conviction and

habeas petition, the State argued that *Ring* is not applicable in Florida. Similar, to the Florida Supreme Court, the State did not argue the second consideration. At the time the Court issued the Order, the only argument before it was that *Ring* is not applicable in Florida because the Florida Supreme Court has held that the "statutory maximum sentence for first-degree murder in Florida is death." For the reasons that follow, this argument is again rejected. The determinative question is not whether the "maximum" penalty is death but rather whether the "authorized" punishment of death requires an additional finding of fact before a defendant may be sentenced to death in Florida. This specific issue has yet to be analyzed by the Florida Supreme Court.

Statutory Maximum for First-Degree Murder

The State asserts that the Florida Supreme Court has held that its statutory maximum is death and, therefore, *Ring* is inapplicable. ([D.E. 22] at 14). In

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sentence for retroactivity purposes was error under federal law. Rather, the State chose to argue, *for the first time*, that Mr. Evans's *Ring* claim was, in essence, barred because it had been first raised on direct appeal. Therefore, the State argues, the Court should have accorded the state court's decision on direct appeal with AEDPA deference rather than review Mr. Evans's *Ring* claim *de novo*. In fact, the State devoted twelve of the twenty pages of its Motion to this specific argument. Aside from being an impermissible argument for a Rule 59 motion, this argument is also flawed in many respects. In conjunction with this argument, the State also asserts that state law determines whether to provide a postconviction remedy based on a new United States Supreme Court case. The Court finds the State's application of *Danforth v. Minnesota*, 552 U.S. 264 (2008) and *Davis v. United States*, 131 S.Ct. 2419 (2011) unsound.

conducting its *de novo* review, the Court found otherwise. The State now argues that even if "this Court could review the rejection of the claim *de novo*, this Court would have still have committed manifest errors of law in granting relief" because it was error for "this Court to substitute its judgment for the judgment of the Florida Supreme Court on what the statutory maximum is for first degree murder." ([D.E. 22] at 12-13). While the Court finds this contention in direct contradiction with the entire premise of a *de novo* review, the State further argues that even in a *de novo* review, the Court is "bound by" the determinations made by the Florida Supreme Court on whether Florida's statutory maximum is death. ([D.E. 22] at 14). The Court finds that argument lacking in merit. *See Ferrell v. Hall*, 640 F.3d 1199, 1224 (11th Cir. 2011)("we have no state court judgment to afford deference. Accordingly, we evaluate this element *de novo*, just as the district court did"); *see also Rompilla v. Beard*, 545 U.S. 374, 390 (2005)("Because the state courts found the representation adequate, they never reached the issue of prejudice, App. 265. 272-273, and so we examine this element of the Strickland claim *de novo*"); *Wiggins v. Smith*, 539 U.S. 510, 534 (2003)("our review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the Strickland analysis."). However, this distinction matters little because, even if the Court were to afford the strict AEDPA deference to the Florida Supreme Court's determination (not made in Mr. Evans's case) that the statutory maximum for first-degree murder

was death, the Court would still reject that this determination applies to *Ring* claims because it is an unreasonable interpretation of clearly established federal law. In the Order, the Court found:

> Here, the death penalty is a penalty exceeding the maximum penalty (of life imprisonment without the possibility of parole until after 25 years) and, therefore, requires that the additional fact finding required to "enhance" Mr. Evans' sentence must be made by a jury. As the United States Supreme Court instructed in *Apprendi* and reaffirmed in *Ring*, "the relevant inquiry is one not of form but of effect." *Ring*, 536 U.S. at 604. Here, like the Arizona sentencing scheme in *Ring*, the statute authorizes "a maximum penalty of death only in a formal sense for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty." *Id.* Simply put, without a separate hearing and a finding that the aggravating factors outweigh the mitigating factors, the defendant cannot be sentence to death. It is that critical finding - the finding of an aggravating factor - which increases the maximum authorized punishment.

([D.E. 21] at 89-90). The Court's decision remains unchanged. When *Ring* was decided, under Arizona law, *Ring* "could not be sentenced to death, the statutory maximum penalty for first degree murder, unless further findings were made." *Ring*, 536 U.S. at

592. Here, the Florida statute operates in a similar fashion. After listing the enumerated offenses which are considered murder in the first degree and constitute a capital felony, the statute provides that capital felonies are "punishable as provided in § 775.082." Fla. § 782.04. Further, § 782.04(b) provides that "[i]n all cases under this section, the procedure set forth in s. 921.141 shall be followed in order to determine sentence of death or life imprisonment." *Id.* § 775.082 is the "penalties" section of the statute and § 921.141 is "sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence." Despite the State's argument, the Court continues to find that this constitutes an "enhanced" sentence under Florida law and the Sixth Amendment requires that the enumerated aggravating factors be found by a jury. *See Ring*, 536 U.S. at 609. The Court remains convinced that its determination was correct and the State's argument is rejected.

While the Court rejects the State's argument regarding the deference that the Court must give to the decisions of the Florida Supreme Court on this issue, the Court reviewed the cases cited by the State nonetheless. The Court finds these specific cases inapplicable to the argument made by the State because, while rejecting the *Ring* claim, the Florida Supreme Court did not do so on the basis that the "statutory maximum in Florida is death." ([D.E. 25] at 3-7). Despite this fact, the State contends that "it is clear that a consensus has been reached by the Florida Supreme Court that *Ring* does not call into question Florida's capital sentencing as the statutory

maximum for first-degree murder is death and a defendant becomes eligible for the death penalty upon his conviction of first-degree murder. *See Mills v. Moore*, 786 So.2d 532. 536-37 (Fla, 2001), *cert-denied*, 532 U.S. 1015 (2001)." ([D.E. 25] at 5) (emphasis added). This is not accurate.

First, *Mills* was decided a year before the United States Supreme Court's decision in *Ring*. Aside from *Mills*, the State also cited cases which were all decided or briefed before *Ring* such that their decisions rested on a post-*Apprendi* / pre-*Ring* analysis, *see Porter v. Crosby*, 840 So.2d 981, 986 (Fla. 2003)(claim denied based on *Apprendi* with no mention of *Ring* other than in the concurrence where Justice Pariente states that the court should reconsider *Mills* in light of *Ring*); *Shere v. Moore*, 830 So.2d 56. 62 (Fla. 2002)(stating that a defendant is "eligible for a sentence of death only if he or she is convicted of a capital felony" with no mention of *Ring*, *Apprendi* or *Mills*.); *Mann v Moore*, 794 So.2d 595, 599 (Fla. 2001)(decision before *Ring* and rested on *Apprendi*). The remaining cases cited were not decided on this issue at all but on a completely different basis for denying a *Ring* claim (i.e: prior violent felony, retroactive application, or where the jury unanimously found the defendant guilty of other felonies committed at the same time as the murder). *See* ([D.E. 25] at 2-5). These cases beg the question why, if the Florida Supreme Court has reached a consensus that the maximum sentence for first-degree murder is death and a defendant becomes eligible for the death penalty upon his conviction of first-degree murder such that *Ring* is inapplicable,

then why has the Florida Supreme Court not denied a single *Ring* claim on this specific basis. More importantly, as the State cites *Mills* as the basis for the Court's manifest error of law, the Court must note the distinction made in Mills is not reconcilable with *Ring* because *Ring* overruled *Walton v. Arizona*, 497 U.S. 639 (1990). The Supreme Court in *Ring* overruled *Walton* since Arizona's enumerated aggravating factors "operate[d] as 'the functional equivalent of an element of a greater offense,' *Apprendi*, 530 U.S., at 494, n. 19, 120 S.Ct. 2348, the Sixth Amendment requires that they be found by a jury." *Ring*, 536 U.S. at 609. Indeed, despite the numerous death penalty opinions issued in Florida since *Ring* was decided, *Mills* has not been cited for this proposition in any majority opinion of the Florida Supreme Court.[5] Therefore, the Court does not find the State's argument persuasive.

Finally, even if the Court were convinced that the Florida Supreme Court, in a post-*Ring* era, found that the maximum possible penalty described in the capital sentencing scheme is death, the Court would still reject the State's argument. The maximum penalty in Florida is not dispositive of this claim. *Ring* clearly held that the maximum penalty is not the

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[5] The limited exception being *Porter v. Crosby*, 840 So.2d 981, 986 (Fla. 2003)(claim denied based on *Apprendi* with no mention of *Ring* other than in the concurrence where Justice Pariente states that the court should reconsider *Mills* in light of *Ring*). The parties in *Porter* had fully briefed the issues before *Ring* was decided and the majority makes no mention of *Ring* in the opinion.

issue. Indeed, the *Ring* Court expressly rejected this assertion and found that "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact - no matter how the State labels it - must be found by a jury beyond a reasonable doubt." *Ring*, 536 U.S. at 602. (emphasis added). Here, it matters little how the State categorizes the punishment; rather, the determinative issue is whether the punishment, regardless of whether it is the *maximum* punishment or the *authorized* punishment, requires an additional finding of fact. It clearly does in Florida because death is the *authorized* punishment which is contingent on the fact finding of, at least, one aggravator. *See* FLA. STAT. §775.082 and §921.141. This factual finding must be made by a jury. The Court did not commit manifest error of law or fact. The Motion to Alter or Amend is DENIED.

Remaining Arguments

While the Court has denied the Motion to Alter or Amend because the Court did not commit manifest error and the remaining arguments raised were impermissible, certain of the State's remaining arguments are worthy of discussion.

First, based on the State's response to Mr. Evans's petition for writ of habeas corpus, and after review of the opinion of the Florida Supreme Court, the Court made the determination that Mr. Evans's *Ring* claim was "first argued ... in his Rule 3.851 post-conviction motion." ([D.E. 21] at 79). Now. the State has argued that the Court committed manifest error when it failed to consider an argument that: 1) the State

never made and 2) was not referenced, even in passing, by the Florida Supreme Court. Indeed, for the State's contention to be correct, the Court *sua sponte* (without being prompted by the State or, more importantly, by the Florida Supreme Court) should have gone back through all of Mr. Evans's state court pleadings to determine if any of the specific claims made by Mr. Evans in his federal habeas petition were similar or, perhaps, just had a component of any prior claims Mr. Evans may have made in state court so that the Court could then *sua sponte* determine that a claim made in a Rule 3.850 motion was actually barred by a claim made on direct appeal despite the absence of such a finding by the Florida Supreme Court. The Court rejects such a contention.[6] Here, Mr. Evans did not argue that the claim he brought *on direct appeal* was denied because of an unreasonable determination of law or facts by the Florida Supreme Court. Further, the State did not argue that Mr. Evans's *Ring* claim should be rejected

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[6] The Court also rejects the State's argument that "even more compelling" is that Mr. Evans's made a *Ring* claim in his Petition for Writ of Certiorari which the United States Supreme Court denied. ([D.E. 22] at 4, n.3). It is well known that a "denial of certiorari does not constitute an expression of any opinion on the merits." *Boumediene v. Bush*, 549 U.S. 1328, 1329, 127 S.Ct. 1478, 167 L.Ed.2d 578 (2007) (Stevens and Kennedy, JJ., statement respecting denial of certiorari). In fact, perhaps, the Supreme Court denied the writ because Mr. Evans raised his *Ring* claim for the "*first time*" and "the state courts have had no opportunity to pass upon it." *Monks v. New Jersey*, 398 U.S. 71 (1970) (emphasis added). One will never know. However, the denial of certiorari certainly does not make the State's argument that the Court committed error "even more compelling."

because it had been argued and denied on *direct appeal*. More importantly, the Florida Supreme Court never said that they would not or did not consider the merits of Mr. Evans's *Ring* claim because they had previously rejected this claim on direct appeal. In fact, no party ever mentioned or referenced the claim made by Mr. Evans on *direct appeal*. Accordingly, the Court did not either.

Moreover, the State completely misstated the Court's Order by asserting that "'when this Court addressed Claim XVII of the petition, this Court held that the claim was raised for the first time in the postconviction proceedings and that the Florida Supreme Court's refusal to *reconsider the rejection* of the claim in light of *Ring v Arizona*, 536 U.S. 584 (2002), was an unreasonable application of federal law. (DE 21 at 79)." ([D.E. 22] at 2) (emphasis added). The Court held nothing of the kind. To be clear, the Court's Order reads as follows.

> However, the Court finds that the Florida Supreme Court made an "unreasonable application of clearly established federal law" when it identified the correct legal rule from Supreme Court case law" but unreasonably applied it to the facts of Mr. Evans' case. *See Putman*, 268 F. 3d at 1241. Here, the court determined that Mr. Evans' "sentence became final after this Court both affirmed on direct appeal and issued the mandate in February 2002." *Evans*, 995 So.2d at 952. This is incorrect. Mr. Evans' death sentence became final (for retroactivity purposes) in October of

2002, when the Supreme Court denied certiorari in *Evans v. Florida*, 537 U.S. 951 (2002). *Ring* was decided in June of 2002 which makes it applicable to Mr. Evans' petition because his sentence was not final on direct review until October of 2002. *See Nix v. Sec'y, Dep't. of Corr.*, 393 F.3d 1235, 1237 (11th Cir. 2004); *see also Newland v. Hall*, 527 F.3d 1162, 1196 (11th Cir. 2008). Thus, *Ring* is to be applied to his case and the Court will review Mr. Evans' claim *de novo*. *See Mason v. Allen*, 605 F.3d 1114 (11th Cir. 2010)("When, however, a claim is properly presented to the state court, but the state court does not adjudicate it on the merits, we review *de novo*. *Cone v. Bell*, --- U.S. ---, 129 S.Ct. 1769, 1784, 173 L.Ed.2d701 (2009))."[25]

[25] In conducting the *de novo* review of Mr. Evans' claim, the Court notes that the Florida Supreme Court has "yet to conclude that a death sentence unsupported by a separate-conviction aggravator exempt from *Ring* or a unanimous penalty-phase finding of an aggravator-implicitly in a death recommendation or explicitly in a special verdict-violates neither the state nor federal constitutional right to trial by jury.'" *Coday v. State*, 946 So.2d 988, 1023 (Fla. 2006) (Pariente, J., *concurring*, in part, *dissenting*, in part). This is the factual scenario before the Court here.

([D.E. 21] at 79). Nowhere in the Order did the Court remotely suggest that the Florida Supreme Court "*refus[ed] to reconsider*" any claim. Aside from the plain text of the Order, it is obvious that the Order would not say or imply this because the Court did not find that Mr. Evans's *Ring* claim had ever been made before. It is axiomatic that you cannot *reconsider* something that you never *considered* in the first instance. A basic reading of the Order clearly shows that the Court conducted a *de novo* review because the state court did not adjudicate Mr. Evans's *Ring* claim on the merits. The state court did not adjudicate on the merits because the state court found that Mr. Evans's death sentence became final before *Ring* was decided; the Court disagreed and found that Mr. Evans's sentence was final after *Ring*. The Court found the state court's determination regarding the finality of Mr. Evans's sentence and the retroactive application of *Ring* was an unreasonable application of clearly established federal law. This determination had nothing to do with a *refusal* or *reconsideration* of any sort. In his federal habeas petition, Mr. Evans did request relief on certain claims that were rejected by the Florida Supreme Court on direct appeal but the claim that the State cites here was not one of them. (*See* [D.E. 22] at 54-77). The State asserts that the Court should have disposed of Mr. Evans's *Ring* claim - which was made for the first time in his postconviction Rule 3.851 motion - based on a prior decision of the Florida Supreme Court of what the State now categorizes as a similar claim made on *direct appeal* even though the Florida Supreme Court did not deny Mr. Evans's *Ring*

claim because it had been previously argued and rejected on *direct appeal*. This argument requires the application of the most convoluted logic.

Of course, the most obvious resolution to the Slate's argument is that Mr. Evans's *Ring* claim could not have been made on direct appeal because Mr. Evans's direct appeal was filed on August 31,2000. *Ring* was not decided until June of 2002. Therefore, he certainly could not have raised his *Ring* claim on *direct appeal*. Without addressing the glaring inconsistency in their argument[7], the State proceeds by parceling out what the State believes are components of the *Ring* decision and then arguing that because certain of those components were argued to the Florida Supreme Court in a claim made years before *Ring* was decided. Even assuming the State's Segal arguments were correct, the argument fails unless the claim made on *direct appeal* and the

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[7] The State actually argues that "the Florida's Supreme Court's postconviction rejection of this claim amounts to nothing more than the state court determining the scope of the availability of postconviction relief in Florida and a determination that the claim could not be raised during a Florida postconviction proceeding because such claim could and should be raised on direct appeal." Therefore, the State argues, the Court "was required to give AEDPA deference to the original rejection of this claim on direct appeal." ([D.E. 22] at 7). The opinion of the Florida Supreme Court does not even remotely suggest that the court considered Mr. Evans's claim procedurally barred because he could and should have made it on direct appeal nor does it imply that this argument was given any consideration whatsoever. The Florida Supreme Court denied the claim because it found that Mr. Evans's death sentence became final before the *Ring* decision. Nothing more. Nothing less.

subsequent *Ring* claim are the same. The Court finds they are not. Mr. Evans's claim made on *direct appeal* was resolved by the Florida Supreme Court in two sentences.[8] "In Evans' remaining points on appeal, he asserts that the trial court erred in imposing the death penalty because the jury made no unanimous findings of fact as to death eligibility. We have previously rejected that argument in *Mills v. Moore*, 786 So.2d 532, 536-37 (Fla.2001), *cert denied*, 532 U.S. 1015, 121 S.Ct. 1752. 149 L.Ed 2d 673 (2001)" Evans. 808 So.2d at 110, n. 10 (Fla. 2001). The Florida Supreme Court determined that Mr. Evans's claim on direct appeal was that "the trial court erred in imposing the death penalty because the jury made no unanimous findings of fact as to death eligibility." *Id.* This is not a *Ring* claim. *Ring* does not decide this issue or even address the need for unanimity. In the Order, the Court conceded "that unanimity may not be required." ([D.E. 21] at 92).[9] The claim made on *direct appeal* and Mr. Evans's *Ring* claim are two separate and distinct claims. Therefore, the Court rejects the State's direct appeal argument and all the

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[8] The State cites three pages of block quotes from the Florida Supreme Court regarding the application of *Apprendi v. New Jersey* to capital cases and the implications of *Walton v. Arizona* on that determination. First, this quote is not from Mr. Evans's case. Rather, it is from *Mills v. Moore*, 786 So.2d 532 (Fla. 2001). Second, this precise issue was addressed in *Ring* which expressly overruled *Walton*.

[9] This statement does not suggest that unanimity should not be required given Florida law. (*See Bottson v. State*, 833 So.2d 693, 710 (Shaw, J., concurring). Rather, the Court merely concedes that unanimity may not be required given current federal law.

arguments that follow which were premised on the fact that Mr. Evan's *Ring* claim was made on *direct appeal*.[10]

Second, the Court must address the State's misrepresentation of the Court's Order regarding the "broad language suggesting that Florida's capital sentencing statutes violates *Ring* because the jury does not make specific factual findings about the aggravators and mitigators and the weighing process, does not have to be unanimous and does not make the final sentencing decision." ([D.E. 22] at 16). None of these facts were the reason that the Court found that the Florida sentencing statute violated *Ring* Rather, the Court included those facts in the Court's analysis to explain how sentencing in capital cases is conducted in Florida. Where the Court found fault with the Florida sentencing statute was "[t]he Court's interpretation of *Ring* is such that, at the very minimum, the defendant is entitled to a jury's majority fact finding of the existence of an aggravating factor; not simply a majority of jurors finding the existence of any unspecified combination of aggravating factors upon which the judge may or may not base the death sentence." ([D.E. 21] at 92). Here, the State conceded that "[i]nstead, the most

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[10] The State devotes several pages of argument to the reasonableness of the Florida Supreme Court's determination of Mr. Evans's direct appeal and the then existing federal law ([D.E. 22] at 7-12). Because the Court has determined that Mr. Evans's claim made on *direct appeal* is not a *Ring* claim, the Court does not analyze the merits of the Florida Supreme Court's determination on direct appeal.

Ring could command of Florida's capital sentencing law is that the jury be required to determine in a non-unanimous decision that a single aggravator had been proven beyond a reasonable doubt." ([D.E. 22] at 16). This precise process, as described here by the State as being commanded by *Ring*, is exactly what did not occur at Mr. Evans's sentencing hearing. "[T]here is nothing in the record to show that Mr. Evans's jury found the existence of a single aggravating factor by even a simple majority." ([D.E. 21] at 92). In order to alter or amend judgment, the Court would have to find that the United States Constitution does not require that at least seven out of twelve jurors agree on a single aggravating factor before the imposition of a death sentence.[11] This the Court will not do.

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[11] The State also argues that because "a general verdict had to be upheld if there was legally sufficient evidence to sustain it on one basis even if the evidence was insufficient to sustain it on a different basis" then the Florida sentencing scheme is constitutional even if a simple majority of jurors do not agree to the existence of a specific aggravating factor because the existence of an unspecified combination of aggravating factors by a simple majority of jurors will do. ([D.E. 22] at 17). The Court disagrees. In support of its argument, the State cites *Griffin v. United States*, 502 U.S. 46 (1991) and *Schad v. Arizona*, 501 U.S. 624 (1991). First, *Griffin* and *Schad* did not analyze general verdicts in the context of the Sixth Amendment. Second, *Griffin* and *Schad* recognized that there are limitations to "the State's capacity to define different courses of conduct, or states of mind, as merely an alternative means of committing a single offense, thereby permitting a defendant's conviction without jury agreement as to which course or state actually occurred." *Schad*, 501 U.S. at 632. As an example, the Supreme Court explained that "nothing in our history suggests that the Due Process

It is ORDERED and ADJUDGED that the Respondent's Motion to Alter or Amend [D.E. 22] is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 15th day of September, 2011.

/ss/
JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
All counsel of Record

Clause would permit a State to convict anyone under a charge of "Crime" so generic that any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion or littering, for example would suffice for conviction." *Id.* at 633. Yet, here, the State argues that the Constitution permits a finding of the existence of an "Aggravating Factor" from any *combination* of the sixteen enumerated statutory aggravators that range from "the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws" to "the capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb" without a jury even reaching a simple majority on any specific one. The Court squarely rejects this argument.

Appendix C

United States District Court, S.D. Florida,
Miami Division.
Paul H. EVANS, Petitioner,
v.
Walter A. McNEIL, Secretary, Florida Department of Corrections, Respondent.

No. 08–14402–CIV.
June 20, 2011.

I. Factual and Procedural Background

The factual summary in this section is quoted from the opinion of the Florida Supreme Court:

> This is a murder-for-hire case involving four coconspirators: Evans, who was nineteen at the time of the crime; Sarah Thomas, Evans's girlfriend; Donna Waddell, Evans's and Thomas's roommate; and Connie Pfeiffer, the wife of the victim. At trial, the sequence of events regarding the murder, and Evans's role in the murder, were provided predominantly by Thomas and Waddell, who both testified on behalf of the State.FN1 Waddell signed a deal with the State in which she agreed to plead guilty to second-degree murder in exchange for giving a sworn statement explaining her involvement in the murder and agreeing to testify in any proceeding. Thomas was never charged with any crime. The evidence at trial demonstrated that the victim and Connie had a "rocky" marriage, and that each were dating other people while they were married. A few

weeks before the murder, Connie approached several individuals about killing her husband, but each person refused. Connie then asked Waddell if she knew anyone who would be willing to kill her husband, and Waddell suggested that Evans might be willing to commit the murder. Thomas testified at trial that Evans told her that he would kill Alan in exchange for a camcorder, a stereo, and some insurance money.

> FN1. Connie never testified at Evans's trial because she invoked her Fifth Amendment rights. Connie was ultimately convicted of first-degree murder, the jury recommended a life sentence, and the trial court imposed a life sentence.

Waddell stated at trial that she, Evans, Connie, and Thomas all collaborated to come up with the plan to kill the victim. Testimony also established that Evans initiated the plan to commit murder and that he was the "mastermind" behind the plot. Pursuant to the agreement, on Saturday morning, March 23, 1991, Waddell, Connie, and Evans all participated in arranging the Pfeiffers' trailer to make it look like a robbery had taken place. Waddell testified that it was Evans's idea to stage the robbery. They stacked electronic equipment near the back door. During the staging of the robbery, Evans wore gloves.

After the trailer was arranged, Waddell and Evans went to her parents' house to steal Waddel's father's gun. Evans broke into the house through a window to steal the gun and also stole a jar of quarters from Waddell's father's bedroom. Waddell and Evans disposed of the jar, keeping the quarters, and then Waddell, Evans, and Thomas went to test-fire the gun.

Waddell testified that after firing the gun, she, Evans, and Thomas went back to the trailer to go over the alibi with Connie, and Evans told the other three what to say. Waddell stated that Evans explained that he was going to hide behind furniture and shoot Alan when he entered the trailer.

Waddell testified that she, Evans, and Thomas were at the fair that evening but left the fair and arrived at the trailer at dusk. They went in the front door. Evans had a bag containing the gun and dark clothing. Waddell and Thomas left Evans in the trailer, locked the door, and went back to the fair.FN2 They paid for the fair with the quarters stolen from Waddel's parents' house.

> FN2. Although Waddell did not remember whether she went back to the fair after dropping Evans off at the trailer, Thomas testified that they did go back to the fair after dropping Evans off at the trailer.

Thomas testified that she and Waddell paid with quarters to avoid having their hands stamped, so it would not look like they left the fair and later returned. Thomas also testified that she and Waddell stayed at the fair for approximately one to two hours before returning to the trailer. According to Thomas, it was Evans who told them to wait at the fair before returning to the trailer.

Between 7 p.m. and 7:15 p.m. that evening, Alan's girlfriend, Linda Tustin, met Alan at the store where he worked. She observed that Alan was agitated and talking on the phone to Connie. When Alan got off of the phone, he told Tustin that "his wife and her biker friends were going to clean him out." He left work to drive back to the trailer at approximately 7:30 p.m. Alan worked thirty minutes away from the trailer.

Although there is some dispute between the testimony of Waddell and Thomas as to the following sequence of events,FN3 both witnesses agreed that they returned to the pickup site, where Evans got into the back of the car and said, "It's done." Waddell stated that Evans told her that he turned the stereo up loud so that nobody would hear the gunshots, then hid behind some furniture and shot Alan when he came into the trailer. Leo Cordary, one of the Pfeiffers' neighbors, testified that he heard gunshots between 8

p.m. and 8:30 p.m., but did not recall anyone running from the trailer.

> FN3. Thomas testified that when she and Waddell originally went to the pickup spot for Evans, he was not there. Thomas stated that they proceeded to drive around and parked at a gravel parking lot. She testified that they did not see Evans, so they went back to the fair and waited another 30 to 45 minutes before leaving again to meet Evans at the pickup spot.

Waddell also testified that Evans did not want to tell her or Thomas too much about the murder so that they would not be able to tell the authorities anything if they were caught. Evans told Waddell, "Just stick to the story that we were at the fair and just we were all together all night at the fair." Thomas and Waddell both testified that they disposed of the gun in a canal near Yeehaw Junction.FN4 They then went back to the fair to meet up with Connie.

> FN4. Thomas stated that she and Evans disposed of the gun a few days after the murder in a canal so that fingerprints would be hard to find. By contrast, Waddell testified that the three of them disposed of the gun in a canal that night after shooting off the rest of the bullets. Moreover, according to Waddell, after they disposed of the gun, they went to a

> dirt road where Evans changed clothes and discarded the dark colored shirt and his shoes. He kept the dark colored pants.

Although there is a dispute in the testimony of Waddell and Thomas as to the timing and specific circumstances, both women stated that Evans tried to burn his pants in the bathtub following the murder.FN5 Thomas testified that shortly after the murder, Evans took the camcorder apart and threw the pieces in a dumpster because he was afraid this could implicate him. Moreover, Waddell testified that she, Thomas, and Evans smashed the television and that Thomas and Evans disposed of the pieces.

> FN5. Waddell testified that this occurred the next day, and that they used pool chemicals. They also tried to burn the gun carrying case. According to Waddell, she, Evans, and Thomas were present when they tried to burn the pants. However, according to Thomas, she and Evans tried to burn Evans's pants after they got home from Denny's.

In the early morning on March 23, 1991, the Vero Beach Police Department was summoned to the trailer that the victim shared with Connie, due to a complaint of loud music. The police found the south door of the trailer ajar and, upon entering, discovered the victim's

body on the living room floor. The police noticed that the interior of the residence was illuminated by a dim kitchen light. Moreover, the police discovered that the dining area paddle fan light had been disabled. There were no signs of a forced entry or a struggle within the trailer, but the trailer was in a state of disarray, with electronic equipment and other items stacked near the south door. The victim was wearing two gold chains and had $48 in his pocket when the police found him. Moreover, the police found the victim's life insurance policies which were worth approximately $120,000 lying on the table. Each policy listed Connie as the beneficiary.

The police also discovered a marijuana roach on the end table in the living room and found a crack pipe and roach clip on the bedroom dresser. The roach in the living room had lipstick on it, but the police never sent it for DNA analysis. A television, camcorder, and VCR were reported missing from the trailer and never recovered. These items were rented from Alan's place of work.

Three bullets were recovered from the victim, one from his spine, and two from his head. The testimony at trial identified the bullets as .38 special Nyclad bullets that were fired from the same gun, and that the shots likely occurred from a distance of more than two feet away. Moreover, spent casings found in Waddell's

father's home were consistent with those which would have held the Nyclad bullets.

The police did not speak with Connie until she arrived at the station the following afternoon. Detective Elliot testified at trial that Connie was uncooperative throughout the investigation. Connie told Detective Elliot that she was at the fair with Evans, Waddell, and Thomas on the evening of the murder. Waddell stated that they stayed at the fair "long enough to be seen." Waddell, Thomas, and Evans each confirmed this alibi.

Thomas broke up with Evans about a month after the murder. Evans told her that he did not actually kill Alan, but that he had three African–American men do it. Moreover, Evans called Thomas some time after the murder and told her to "stick to the story."

Following the murder of her husband, Connie moved out of Vero Beach and purchased a horse farm near Ocala worth approximately $120,000, which was the same amount as the life insurance proceeds. Although Waddell testified that she never received anything for the death of Alan, Waddell acquired a taxi company some time after the murder. About three years after the murder, Waddell met with Evans. Evans told Waddell that she better keep quiet or his "old family members [were] going to kill" her. Evans also told Waddell that the person who killed Alan was dead. Evans told Waddell that he went and got

> the gun, took it apart, and took a bus to the woods in Ocala to dispose of the pieces. At the end of the conversation, Evans threatened to kill Waddell and her son if she talked to the police.
>
> Ultimately, the case grew cold and was closed. However, in 1997, the Vero Beach Police Department reopened the case and Detective Daniel Cook focused his investigation upon Evans, Connie, Waddell, and Thomas. Thomas was the first suspect the police interviewed. Thomas explained the events surrounding the homicide and agreed to wear a wire and contact Waddell. At the meeting between Thomas and Waddell, Thomas stated: "We helped." Waddell responded: "I know. I think about it every day." The police arrested Waddell and, after the police showed Waddell the statement that she gave to Thomas, Waddell agreed to cooperate with the police and provide a statement. Based on Thomas and Waddell's cooperation, Connie and Evans were arrested for their alleged involvement in the murder.

Evans v. State, 808 So.2d 92, 95–98 (Fla. 2002).

On August 6, 1997, Mr. Evans was indicted on one count of first-degree murder. On February 11, 1999, a jury found Mr. Evans guilty. At a separate sentencing proceeding, the same jury, by a vote of nine to three, recommended a death sentence for Mr. Evans. On June 16, 1999, the trial judge ordered Mr. Evans sentenced to death. The trial court found two

statutory aggravators: (1) Evans had committed the crime for pecuniary gain (great weight); and (2) the murder was committed in a cold, calculated, and premeditated manner without any pretense of legal or moral justification ("CCP") (great weight). *Evans v. State,* 808 So.2d 92 (Fla. 2001). The court found only one statutory mitigator: Evans's age of nineteen when he committed the murder (little weight). *Id.* In addition, the trial court found and gave weight to the following nonstatutory mitigators: (1) Evans's good conduct while in jail (little weight); (2) Evans's good attitude and conduct while awaiting trial (little weight); (3) Evans had a difficult childhood (little weight); (4) Evans was raised without a father (little weight); (5) Evans was the product of a broken home (little weight); (6) Evans suffered great trauma during childhood (moderate weight); (7) Evans suffered from hyperactivity and had a prior psychiatric history and a history of hospitalization for mental illness (moderate weight); (8) Evans was the father of two young girls (very little weight); (9) Evans believes in God (very little weight); (10) Evans will adjust well to life in prison and is unlikely to be a danger to others while serving a life sentence (very little weight); (11) Evans loves his family and Evans's family loves him (very little weight). The trial court found that Evans failed to establish that he was immature, and therefore gave this proposed mitigator no weight. Moreover, the court refused to recognize Evans's artistic ability as a mitigating circumstance and therefore gave this no weight. Concluding that the aggravation outweighed the

mitigation, the trial court imposed the death penalty. *Id.* at 100.

On direct appeal of his conviction and sentence, Mr. Evans raised fourteen claims: (1) the trial court erred in denying Evans's motion to quash the indictment or dismiss the charge; (2) reversal is required under *Anderson v. State,* 574 So.2d 87 (Fla. 1991), because the State's testimony at trial contradicted the case it presented to the grand jury; (3) the trial court erred in excluding the testimony concerning cannabanoids in the victim's blood; (4) the trial court erred in limiting the cross-examination of Detective Brumley to exclude hearsay; (5) the trial court erred in closing individual voir dire to Evans's family; (6) the trial court erred in denying Evans's motion for a statement of particulars and in allowing the State to argue in the alternative that Evans was the shooter or a principal; (7) the State's closing argument comments during the guilt phase were reversible error; (8) the State's voir dire examination of the jury regarding the testimony of coconspirators or codefendants constituted fundamental error; (9) Evans's death sentence is disproportionate; (10) Evans's death sentence is either disproportionate or unconstitutional because the State presented the jury with the alternative theories that Evans was either the shooter or a principal; (11) the State's closing argument comments during the penalty phase were fundamental error; (12) the trial court erred in giving no weight to valid mitigation; (13) the trial court erred in imposing the death penalty when the jury made no unanimous findings of fact as to

death eligibility; (14) the trial court erred in finding that the murder was both cold, calculated, and premeditated and that the murder was committed for pecuniary gain (improper doubling). The Florida Supreme Court affirmed Mr. Evans's conviction and sentence. *Id.* Mandate issued on February 12, 2002. Thereafter, Mr. Evans filed a petition for writ of certiorari in the United States Supreme Court which was denied on October 15, 2002.

On October 2, 2003, Mr. Evans filed his Rule 3.851 motion for postconviction relief. He raised six claims for relief: (1) several instances of ineffective assistance of counsel during the guilt phase and the State's withholding exculpatory and impeachment evidence in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963);FN8 (2) several instances of ineffective assistance of counsel during the penalty phase;FN9 (3) ineffective assistance for failing to object to several objectionable jurors and failing to object to a limitation on backstriking; (4) cumulative error; (5) denial of due process by rules prohibiting juror interviews to uncover constitutional error; and (6) Evans's sentence violates *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). *Evans v. State,* 995 So.2d 933, 939 (Fla. 2008)[1]. The trial court held an

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FN8. Evans alleged the following ineffective assistance of counsel claims: (1) failing to object to an individual juror's participation in trial; (2) failing to timely request a hearing

evidentiary hearing on three of his six claims. The trial court denied relief and Mr. Evans appealed. Simultaneously, Mr. Evans filed a petition for writ of habeas corpus. He raised three claims: 1) ineffective assistance of appellate counsel for failing to raise meritorious issues on direct appeal, including the denial of Evans's motion for a mistrial and request for a *Richardson* hearing based on *Brady* and discovery violations, and the denial of Evans's motion for a mistrial and *Richardson* hearing when the State's witness improperly and without prior notice testified as to the character of Evans; (2) Evans's sentence of death constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution because of his mental impairments and his age at the time of the crime; and (3) Florida's capital sentencing procedure deprived Evans of due process rights to notice and a jury trial under *Ring* and *Apprendi.*

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pursuant to *Richardson v. State,* 246 So.2d 771 (Fla. 1971); (3) failing to object to inflammatory and prejudicial comments elicited by the State; (4) failing to object to improper bolstering of witness credibility; (5) failing to object during the State's closing argument regarding mutually exclusive factual theories of prosecution; and (6) failing to present evidence.

FN9. Evans alleged the following ineffective assistance of counsel claims during the penalty phase: (1) failing to present mitigation; and (2) failing to object to serious misstatements of the law, including that the jury's role was merely advisory and that the burden of proof rested with Evans to prove that mitigation outweighed aggravation.

On August 28, 2008, the Florida Supreme Court affirmed the denial of postconviction relief and denied the habeas petition. *Evans v. State,* 995 So.2d 933 (Fla. 2008). Mandate issued on December 8, 2008.

On December 1, 2008, Mr. Evans filed the instant petition under 28 U.S.C. § 2254 for writ of habeas corpus by a person in state custody with the Court. (D.E.1.) On July 20, 2010, the State filed its response. On September 13, 2010, Mr. Evans filed his reply. This matter is now ripe. In total, seventeen claims for relief are pending before the Court.

II. Standard of Review

Mr. Evans has filed a petition for writ of habeas corpus challenging his state court conviction and sentence. "[A] district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or law or treaties of the United States." 28 U.S.C. § 2254(a). The Court's review of Mr. Evans's petition is limited by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The AEDPA, as incorporated in the federal habeas corpus statute for persons in custody pursuant to a state court judgment, provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Id. § 2254(d).

"The 'contrary to' and 'unreasonable application' clauses of § 2254(d)(1) are separate bases for reviewing a state court's decisions." *Putman v. Head,* 268 F.3d 1223, 1241 (11th Cir. 2001). "A state court decision is 'contrary to' clearly established federal law if either (1) the state court applied a rule that contradicts the governing law set forth by Supreme Court case law, or (2) when faced with materially indistinguishable facts, the state court arrived at a result different from that reached in a Supreme Court case.' " *Id.* The relevant Supreme Court case law for this analysis are the "holdings, as opposed to the dicta ... of [the United States Supreme Court's] decisions as of the time of the relevant state-court decision." *Williams v. Taylor,* 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Moreover, "[a] federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is, at best, ambiguous." *Mitchell v. Esparza,* 540 U.S. 12, 17, 124 S.Ct. 7, 157 L.Ed.2d 263 (2003).

"A state court conducts an 'unreasonable application' of clearly established federal law if it identifies the correct legal rule from Supreme Court case law but unreasonably applies that rule to the facts of the petitioner's case." *Putman,* 268 F.3d at 1241. An unreasonable application may also occur where "a state court unreasonably extends, or unreasonably declines to extend a legal principle from Supreme Court case law to a new context." *Id.* The Supreme Court has stated with respect to the term "unreasonable" that:

> The term " 'unreasonable' " is "a common term in the legal world and, accordingly, federal judges are familiar with its meaning ." At the same time, the range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.

Yarborough v. Alvarado, 541 U.S. 652, 663–64, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004) (citation omitted).

III. Timeliness

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposed a one-year limitations period for the filing of an application for relief under § 2254. Accordingly, 28 U.S.C. § 2244(d) provides:

> (1) A 1–year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of State court. The limitation period shall run from the latest of—
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented form filing by such State action;
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> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

In most cases, including the present case, the limitation period begins to run pursuant to § 2244(d)(1)(A). The Eleventh Circuit has decided that the judgment becomes "final" within the meaning of § 2244(d)(1)(A) as follows: (1) "if the prisoner files a timely petition for certiorari, the judgment becomes 'final' on the date on which the Supreme Court issues a decision on the merits or denies certiorari, or (2) the judgment becomes 'final' on the date on which the defendant's time for filing such a petition expires." *Bond v. Moore,* 309 F.3d 770, 773–74 (11th Cir. 2002). Under § 2244(d)(2), AEDPA's statutory tolling provision, the word "pending" covers the time between a lower court's decision and the filing of a notice of appeal to a higher state court. *Carey v. Saffold,* 536 U.S. 214, 215, 122 S.Ct. 2134, 153 L.Ed.2d 260 (2002).

The State concedes that the Petition is timely. Therefore, the Court analyzes Petitioner's claims below.

IV. Exhaustion and Procedural Bars

In response to Mr. Evans's petition, the State has argued that certain of his claims are unexhausted and procedurally barred from federal review. To exhaust state remedies, a petitioner must fairly present every issue raised in his federal petition to the *state's highest court. Castille v. Peoples,* 489 U.S. 346, 351, 109 S.Ct. 1056, 103 L.Ed.2d 380 (1989) (emphasis added). "When a petitioner fails to properly raise his federal claims in state court, he deprives the State of 'an opportunity to address those claims in the first instance' and frustrates the State's ability to honor his constitutional rights." *Cone v. Bell,* 556 U.S. 449, 129 S.Ct. 1769, 1780, 173 L.Ed.2d 701 (2009) (internal citations omitted). Therefore, these types of claims are unexhausted and barred from federal habeas review. *Id.*

Ordinarily, a federal habeas corpus petition which contains unexhausted claims is dismissed pursuant to *Rose v. Lundy,* 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), allowing Mr. Evans to return to the state forum to present his unexhausted claim or claims. However, such a result in this instance would be futile, since Mr. Evans's unexhausted claim is now incapable of exhaustion at the state level and would be procedurally barred under Florida law. Mr. Evans has already pursued a direct appeal and filed his Rule 3.851 motion in state court, with the denial of the motions affirmed on appeal.[2] Because there are no procedural avenues

[2]In Florida, issues which could be but are not raised on direct appeal may not be the subject of a subsequent Rule 3.850

remaining available in Florida which would allow the Mr. Evans to return to the state forum and exhaust the subject claim, the claim is likewise procedurally defaulted from federal review. *Collier v. Jones,* 910 F.2d 770, 773 (11th Cir. 1990) (where dismissal to allow exhaustion of unexhausted claims would be futile due to state procedural bar, claims are procedurally barred in federal court as well).

Claims that are unexhausted and procedurally defaulted in state court are not reviewable by the Court unless the petitioner can demonstrate cause for the default and actual prejudice, *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), or establish the kind of fundamental miscarriage of justice occasioned by a constitutional violation that resulted in the conviction of a defendant who was "actually innocent," as contemplated in *Murray v. Carrier, All* U.S. 478 (1986). *See House v. Bell,* 547 U.S. 518, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006); *Dretke v. Haley,* 541 U.S. 386, 124 S.Ct. 1847, 158 L.Ed.2d 659 (2004). *See also United States v. Frady,* 456 U.S. 152, 168, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982). Since Mr. Evans

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

has not established cause to excuse his default, it need not be determined whether he suffered actual prejudice. *See Glover v. Cain,* 128 F.3d 900, 904 n. 5 (5th Cir. 1997).

V. Analysis

I. The State's Withholding of Material Impeachment Evidence Denied the Petitioner a Full and Fair Evidentiary Hearing.

Mr. Evans argues that he was denied a full and fair evidentiary hearing when the trial court denied his public records request. (D.E. 1 at 23.) In advance of the evidentiary hearing on Mr. Evans's Rule 3.851 hearing, the assistant state attorney drafted written correspondence in preparation for certain witness testimony. After preparation, the state sent this correspondence to the witnesses. The two witnesses at issue were trial counsel for Mr. Evans who testified at the evidentiary hearing on his claims of ineffective assistance of counsel.[3] The letter purportedly contained responses to areas of questioning to be asked by post-conviction counsel at the evidentiary hearing. Upon discovery that such correspondence existed, Mr. Evans filed a Demand for Additional Public Records pursuant to Fla. R.Crim. P. 3.852(I). After hearing, this motion was denied. The trial court found that this document was

[3]The Court makes no comment on the appropriateness of the Assistant State Attorney sending a letter of this kind to former defense counsel prior to an evidentiary hearing because the substance of the letter is not the crux of this claim.

attorney work product and exempt from disclosure by Fla. Stat. § 119.07(6)(1). On appeal, the Florida Supreme Court affirmed as follows:

> Contrary to Evans's contention that the letter went beyond mere witness preparation, the State is correct that the letter contains nothing more than the state attorney's impressions of the pending litigation. As in *Kearse,* the letter here was written by an agency attorney, contained his mental impressions about the claims raised in the postconviction motion, and was produced exclusively for the pending evidentiary hearing as contemplated in section 119.071(1)(d) 1, Florida Statutes (2007).

Evans, 995 So.2d 933, 941 (Fla. 2008). While Mr. Evans tries to couch this claim under the guise of a constitutional protection, at its core, it is really a claim challenging the state court's interpretation of state law. At the trial court, Mr. Evans filed a Demand for Additional Public Records. (D.E. 12, Ex. C, Vol. 6 at 1143–44). This request was made pursuant to a state rule of criminal procedure. Mr. Evans argues that his due process rights were violated despite the fact that he did not even mention due process in his demand. *Id.* The trial court held a hearing and after an *in camera* inspection determined that the letter was exempt from disclosure as a public record pursuant to Fla. Stat. § 119.07(6)(1). *Id.* Therefore, this claim is not cognizable in Mr. Evan's federal habeas petition. "A state's interpretation of its own laws or rules

provides no basis for federal habeas corpus relief, since no question of a constitutional nature is involved." *McCullough v. Singletary,* 967 F.2d 530, 535 (11th Cir. 1992).

Assuming *arguendo* that Mr. Evans could assert that he is entitled to a new evidentiary hearing because the evidentiary hearing in state court was not a "full and fair" hearing, this claim lacks merit.[4] At the start of the postconviction evidentiary hearing, former trial counsel for Mr. Evans, Mark Harllee, Esq., testified that in preparing for the hearing he reviewed certain documents, one of which was "some work product of the state attorney who prepared some responses to the things he anticipated would be asked of me." (D.E. 12, Ex. C, Vol. 10 at 210). In fact, Mr. Harllee testified that he had the very document in front of him in his files during his testimony. *Id.* Counsel for Mr. Evans did not ask one question or make a single inquiry regarding this document during the hearing. In fact, defense counsel notified the court that "we would have no objection to Mr. Harllee refreshing his recollection [with the documents he brought with him on the witness stand] as long as he would let us know what he it is utilizing." (D.E. 12, Ex. C, Vol. 10 at 211). It was not until six months after the evidentiary hearing that counsel even made its request for the document that Mr. Harllee testified that not only he

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[4]This does not imply that the Court thinks the document in question was attorney work product. The document was sealed and has not been made part of this record. The Court makes no determination as to the application of the privilege.

reviewed but, in fact, had them with him while he was on the witness stand. On these facts, Mr. Evans would not be entitled to an evidentiary hearing even if he had a cognizable claim. If the petitioner was not diligent in his efforts to develop his claim in state court, he may not receive an evidentiary hearing unless he can satisfy the provisions of § 2254(e)(2)(A) and (B). *See Williams v. Taylor,* 529 U.S. 420, 437, 120 S.Ct. 1479, 1491, 146 L.Ed.2d 435 (2000). Habeas relief is denied.

II. Ineffective Assistance of Counsel at the Guilt Phase.

In *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court set forth the two-prong test that a convicted defendant must meet to demonstrate that his or her counsel rendered ineffective assistance. First, a defendant "must show that counsel's representation fell below an objective standard of reasonableness" "under prevailing professional norms." *Strickland,* 466 U.S. at 688. "The test for ineffectiveness is not whether counsel could have done more; perfection is not required. Nor is the test whether the best criminal defense attorneys might have done more. Instead the test is whether some reasonable attorney could have acted in the circumstances ... [as this attorney did]-whether what ... [this attorney] did was within the 'wide range of reasonable professional assistance.' " *Waters v. Thomas,* 46 F.3d 1506, 1518 (11th Cir. 1995) (en banc) (quoting *Strickland,* 466 U.S. at 689) (citation omitted). *See also Provenzano v. Singletary,* 148 F.3d

1327, 1332 (11th Cir. 1998) (stating that to show unreasonableness "a petitioner must establish that no competent counsel would have made such a choice."). "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Strickland,* 466 U.S. at 689 (quoting *Michel v. Louisiana,* 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)); *see also Chandler v. United States,* 218 F.3d 1305, 1314 (11th Cir. 2000) (en banc). "Given the strong presumption in favor of competence, the petitioner's burden of persuasion-though the presumption is not insurmountable-is a heavy one." *Chandler,* 218 F.3d at 1314.

Second, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694. The Court defines a "reasonable probability" as one "sufficient to undermine confidence in the outcome." *Id.* "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Each ineffective assistance claim is addressed below.

A. Failure to Present Evidence.

In his second claim for relief, Mr. Evans argues that he received ineffective assistance of counsel when his attorneys failed to adequately interview

and prepare certain witnesses for trial. (D.E. 1 at 30). Mr. Evans identifies seven witnesses whose testimony, had they been properly investigated and interviewed, would have changed the outcome of the trial. *Id.* The trial court held an evidentiary hearing on this issue. At the hearing, Mark Harllee, Esq. (lead counsel for Mr. Evans during the guilt phase), Diamond Littty (lead counsel for Mr. Evans during the penalty phase), Rosa Hightower, Jesus Cruz, Christopher Evers, Mindy McCormick, and Anthony Kovaleski testified for the defense. (D.E.12, 38–40, Ex.C, Vol.10–12). After hearing, the trial court denied Mr. Evans's postconviction motion and he appealed. The Florida Supreme Court affirmed finding:

> In sum, counsel clearly made an informed decision about not presenting any witnesses during the guilt phase, which is exactly what he told the judge at the guilt phase: "After a year-and-a-half of consultation, followed by the last few minutes here, we're going to rest...." Because the trial court's findings are supported by competent substantial evidence and counsel's decision not to present these witnesses was reasonable, we affirm the trial court's denial.FN16 Because counsel's failure to present these witnesses was not deficient, we do not address the prejudice prong of Strickland. *Nixon v. State,* 932 So.2d 1009, 1018 (Fla. 2006).

Evans v. State, 995 So.2d 933, 945 (Fla. 2008). The uncalled witnesses for which Mr. Evans claims error

fall into three categories: 1) contradictory testimony regarding timing of gun shots, 2) alibi witnesses and 3) a reasonable doubt witness. Underlying Mr. Evans's assertion that these witnesses should have been called in his defense at trial was the practice in Florida of what it is called a "sandwich."[5] If Mr. Evans decided not to call any witnesses in his defense, he was entitled to give the first closing argument to the jury and also a rebuttal closing after the State's closing argument. Defense counsel often weigh the value of the testimony to be offered against losing the opportunity to be the final person to address the jury prior to deliberations. Such was the case with Mr. Evans. As to the contradictory testimony and the alibi witnesses, Mr. Evans's arguments lack merit and warrant little discussion.

Contradictory Witnesses

The three contradictory witnesses were either unavailable at the time of trial or had serious credibility issues. Therefore, Mr. Harllee testified that it was a strategic decision to not call these witnesses because any value of their testimony was outweighed by the loss of presenting a rebuttal closing argument. *See* (D.E. 12, Ex. C, Vol. 10 at 224–25). The Florida Supreme Court affirmed finding that "[t]rial counsel clearly had tactical reasons for not calling Magia and Cruz to testify, including the fact that both had questionable

[5]In 2007, the Florida legislature enacted section 918.19 which provides that the State shall have opening and rebuttal closing arguments regardless of whether or not the defense presents any witnesses. *See Evans,* 995 So.2d at 945, n. 16

credibility and were admittedly drunk on the night of the murder, and Cruz had a memory lapse about when he heard the gunshots; thus, counsel's decision not to present their testimony does not constitute ineffective assistance." Further, in regards to the witness that was unavailable, Mr. Harllee testified that he attempted to find the witness and also filed a motion to quash the indictment for undue delay base on an inability to locate witnesses. *See* (D.E. 12, Ex. C, Vol. 10 at 254–55). Accordingly, the Florida Supreme Court denied the claim "[b]ecause it is clear from the record that counsel made reasonable attempts to locate Lynch but was unable to find him, Evans cannot establish that counsel was ineffective for failing to call him at trial." *Evans,* 995 So.2d at 943.

Based on the testimony of counsel at the evidentiary hearing, Mr. Evans's counsel did not present these witnesses for either strategic reasons or due to unavailability. The Court will not second guess Mr. Harllee's decisions after he conducted an appropriate investigation of the facts. Nor will the Court reverse the Florida Supreme Court's determination of this issue absent a finding of unreasonableness. Review of counsel's conduct is to be highly deferential. *Spaziano v. Singletary,* 36 F.3d 1028, 1039 (11th Cir. 1994). Second-guessing of an attorney's performance is not permitted. *White v. Singletary,* 972 F.2d 1218, 1220 (11th Cir. 1992) ("Courts should at the start presume effectiveness and should always avoid second-guessing with the benefit of hindsight."); *Atkins v. Singletary,* 965 F.2d 952, 958 (11th Cir. 1992). Therefore, the foregoing

resolution of his assertion of ineffectiveness of counsel was reasonable and in accord with applicable federal authority, and should not be disturbed. *Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), *supra.*

Alibi Witnesses

The second group of uncalled witnesses were alibi witnesses. At the hearing, Mr. Harllee testified that he did interview two of the three witnesses and that they did not establish a complete alibi for Mr. Evans. Both witnesses remember seeing Mr. Evans before 7pm but did not remember seeing him after 7pm which was well before the time of the murder. Therefore, the Florida Supreme Court found that "[b]ecause the testimony of both witnesses, as known to Harllee at the time of trial, offered an incomplete alibi and counsel made a strategic decision not to present their testimony, counsel's performance was not deficient." *Evans,* 995 So.2d at 944.

The third uncalled witness was the then twelve-year-old son of a co-conspirator, Christopher Evers. Mr. Harllee testified that he did not recall if he spoke to Mr. Evers and did not recall if Mr. Evers' fingerprints were in the trailer or if Mr. Evers attended the fair with his mother. *See* (D.E. 12 Ex. C, Vol. 11 at 324–25). At the postconviction hearing, Mr. Evers testified. He testified that he had been to the fair on the night of the murder and had seen Mr. Evans. Mr. Evers was not clear on the time he saw Mr. Evans or for how long he was at the fair. He also testified that he was not with Mr. Evans the entire time he was at the fair. *See* (D.E. 12, Ex. C, Vol. 11

at 436–37). The Florida Supreme Court affirmed the denial of this claim finding:

> Counsel's failure to interview this single witness, Connie's twelve-year old son, does not render his entire investigation and representation deficient. This is especially so where the only information that might have led counsel to interview Evers was a single fingerprint alleged to have been found in Pfeiffer's trailer,FN15 which would neither have established an alibi defense for Evans nor contradicted Waddell's testimony concerning the events of that night.
>
> FN15. Although Evans questioned counsel about his failure to interview Evers, specifically citing the fact that he was listed as a source of a fingerprint inside of Pfeiffer's trailer, the record does not confirm that Evers' fingerprint was actually lifted from the trailer. In fact, detective Allan Elliot testified at trial that several prints were lifted from the trailer, but he was unsure whether a print on a glass inside the trailer was identified as Evers' or whether it was just a small child or petite person. Moreover, counsel's failure to investigate Evers based on a single fingerprint found in the victim's trailer, which happened to belong to his mother's husband, should not render his assistance deficient.

Evans, 995 So.2d at 944. This was the conclusion of the Florida Supreme Court as to this claim. Giving the state courts a high level of deference, which the Court is required to do, the conclusion reached by both the trial court and the Florida Supreme Court was not contrary to or an unreasonable application of federal law. After a careful review of the record, including the evidence presented at trial and the postconviction hearing, the Court concurs with the state court and finds that Mr. Evans has failed to meet the first prong *of Strickland.*

Reasonable Doubt Witness

The final uncalled witness that is the subject of this claim is Mindy McCormick. Ms. McCormick had befriended Connie Pfeiffer approximately two weeks after the murder. At the evidentiary hearing Ms. McCormick testified that she saw electronic items (a TV and camcorder) in a storage facility occupied by Ms. Pfeiffer. These two items were the same type of items promised to Mr. Evans by Ms. Pfeiffer if he murdered her husband. Ms. McCormick also testified that she witnessed an unidentified man give Ms. Pfeiffer a manilla envelope which she later threw into a river. Mr. Evans argues that had she testified, she could have provided the reasonable doubt necessary to secure an acquittal. Accordingly, Mr. Evans asserts that his counsel was ineffective for failing to have her testify at trial.

At the postconviction hearing both Mr. Harllee and Ms. McCormick testified. Mr. Harllee had taken Ms. McCormick's deposition back on May 27, 1998. When questioned about why he had not called Ms.

McCormick to testify at trial when she testified during deposition that she had seen the items in Ms. Pfeiffer's storage facility which would contradict the co-defendant's testimony, Mr. Harllee responded:

> Urn, I'm not sure it would. Urn, I'm not sure how specific Ms. McCormick could describe the items to see if they were in fact the same items that were alleged to have been the subject of the payoff. Urn, and also the timing. I don't know when she went to the storage shed, how long after the shooting, but I seem to recall the trial testimony is that the TV and camcorder and all of that were at Paul's house or Sarah's house for a very short period of time and then were gone, so I don't know that it would in fact contradict trial testimony.

(D.E. 12, Ex.C, Vol. 12 at 238–39). However, Mr. Harllee later conceded that "it may have negated somewhat the allegation of a payoff with these goods, but I'm not sure it's a direct contradiction." *Id.* at 241.

Additionally, Mr. Harllee was questioned about the package that Ms. McCormick witnessed being given to Ms. Pfeiffer and later discarded. Mr. Harllee testified that he did not remember knowing about this but testified that had he known he "probably" would have followed up with an investigation regarding possible defenses. (D.E. 12, Ex.C, Vol. 12 at 241). While it appeared from the record that Mr. Harllee was provided with Ms. McCormick's statement in discovery, he had no recollection of the package and seem to have failed to inquire about it

in her deposition. *See id.* When questioned during the hearing, Mr. Harllee testified that "[t]his is not ringing a bell at all." *Id.* at 242. Mr. Evans argues that Ms. McCormick could have been a key defense witness and Mr. Harllee's failure to investigate her statements to police and present her testimony was a deficient performance and he was prejudiced by this failure.

When Mr. Evans argued this claim during his postconviction proceedings, the Florida Supreme Court rejected it finding:

> The last witness that Evans asserts should have been presented is Mindy McCormick, a friend of Connie's who saw electronic items in Connie's storage facility shortly after the murder and witnessed an unidentified man give Connie a manila envelope. However, Evans cannot demonstrate that counsel was deficient on these grounds. As to the electronic items in Connie's storage facility, counsel testified at the evidentiary hearing that he remembers questioning McCormick at the pretrial deposition about the items she saw in the storage facility, but did not investigate further or present her testimony because she was unable to identify the items with any specificity. Counsel is correct that without a more specific identification of the items she saw, it is difficult to ascertain whether these unidentified items were even relevant to the murder. Because her testimony would not have directly contradicted Thomas and

Waddell's testimony that before the murder Connie had given Evans similar electronic items as partial payment for the murder, counsel's decision not to present her testimony was strategic and that decision is not unreasonable or outside the realm of professional norms. *See Occhicone v. State,* 768 So.2d 1037, 1048 (Fla. 2000).

As to McCormick's testimony about the package and the description of the man she had given to the police, counsel testified that he did not recall being told about this information, but that he would have investigated further had he known. Conversely, McCormick testified at the evidentiary hearing that she informed defense counsel during a deposition that she had given a taped statement to the police, described the unidentified man who had given Connie the package, and even went with the police to Pfeiffer's electronics store to identify the items she saw in the storage facility. However, without introducing the deposition into the record, which would enable the Court to determine whether counsel was aware of this information, Evans cannot demonstrate that counsel was deficient for failing to investigate further. *See, e.g ., Freeman v. State,* 761 So.2d 1055, 1062 (Fla. 2000) (stating that it is defendant's burden to establish both prongs of *Strickland*).

Evans, 995 So.2d at 944–45. The Court agrees with the ultimate conclusion of the state supreme court but disagrees with the rationale for how it concludes that Mr. Evans was provided effective assistance of counsel. As to the items seen in Ms. Pfeiffer's storage unit, the Court finds the Florida Supreme Court's determination reasonable. Mr. Harllee testified that he deposed Ms. McCormick and found her lack of detail to be a detriment when it came to her testimony. While it may be that her testimony would have been helpful to Mr. Evans, counsel clearly decided that it was not to his utmost benefit to put her on the stand. This is clearly a strategic decision which will go undisturbed by the Court. "The test for ineffectiveness is not whether counsel could have done more; perfection is not required. Nor is the test whether the best criminal defense attorneys might have done more. Instead the test is whether some reasonable attorney could have acted in the circumstances ... [as this attorney did]-whether what ... [this attorney] did was within the 'wide range of reasonable processional assistance.' " *Waters v. Thomas,* 46 F.3d 1506, 1518 (11th Cir. 1995) (en banc) (quoting *Strickland,* 466 U.S. at 689) (citation omitted). *See also Provenzano v. Singletary,* 148 F.3d 1327, 1332 (11th Cir. 1998) (stating that to show unreasonableness "a petitioner must establish that no competent counsel would have made such a choice.").

However, the Court finds the Florida Supreme Court's determination regarding the envelope and its subsequent destruction unreasonable. The Florida Supreme Court found that because Mr. Harllee could

not recall whether or not he knew of this information and because Mr. Evans's counsel, at the evidentiary hearing, did not admit a deposition transcript into evidence which may have shown that Mr. Harllee did know, this claim must be denied because Mr. Evans "cannot demonstrate that counsel was deficient for failing to investigate further." This misses the point. There is evidence in the record that Mr. Harllee should have known about this evidence, given that he was principally responsible for the investigation which would have yielded this information to begin with. "In judging the defense's investigation, as in applying *Strickland* generally, hindsight is discounted by pegging adequacy to 'counsel's perspective at the time' investigative decisions are made, and by giving a 'heavy measure of deference to counsel's judgments.' " *Rompilla v. Beard,* 545 U.S. 374, 380–81, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) (citations omitted). Here, the record is not entirely clear about whether or not Mr. Harllee knew the details of this claim and Ms. McCormick's deposition was not admitted into evidence at the hearing. But, the statement given by Ms. McCormick to the police which was admitted into evidence (Defense Exhibit 7) and was arguably in the possession of defense counsel when turned over by the State in discovery is not in the record before the Court.[6] Not only did Ms.

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[6]The record does show that Mr. Evan's counsel moved the statement into evidence but the clerk of the court in Indian River County, when preparing the record for appellate review, filed a notice that "after a diligent and thorough search of the court records" that "[a]ll evidence submitted by Mr. Evans and by the State during the evidentiary hearing 11–08, 11–09 and

McCormick tell the police about this event but she gave information to a police sketch artist who drew a composite of the person alleged to have delivered the envelope. This too should have been given to counsel in discovery. Mr. Harllee had countless opportunities to have been made aware of this information. The most compelling inference that Mr. Harllee should have known came from the State on cross examination of Ms. McCormick:

> Q: So you gave a deposition?
>
> A: I did give a deposition.
>
> Q: To Mr. Evans's lawyer?
>
> A: Okay
>
> Q: And in that deposition there was mention made of the statement that you gave to the police, the taped statement; do you recall that?
>
> A: Yes.
>
> Q: So everyone knew that you gave a statement to the police?
>
> A: Right.
>
> Q: And that statement was recorded?
>
> A: Right.
>
> Q: There was a transcript of that statement?
>
> A: Okay.

11–22–05" could not be "located for inclusion in this supplement." (D.E. 12, Ex.C, Vol. Supp. 1 at 14). Therefore, the Court has not reviewed the statement.

Q: Correct?

A: Correct.

Q: And then you then spoke to Mr. Evans's lawyers?

A: Yes, I guess Idid.

(D.E. 12, Ex.C, Vol. 12 at 445–46.) While this is not conclusive of Mr. Harllee's knowledge, the proper question is not did Mr. Harllee know about the package and its destruction but should he have known. It is not an insignificant detail that another person—not Mr. Evans—approached the victim's wife (and co-conspirator) after the murder and gave her an envelope which she discarded later that evening by throwing it into a river. At trial Mr. Evans's defense was that he was innocent. This information certainly could have cast doubt on his guilt. Clearly, it should have been investigated by defense counsel. Therefore, the Court finds counsel's performance deficient and the Florida Supreme Court's decision to the contrary was unreasonable.

But, the Court finds that while Mr. Evans has shown that his counsel's performance was deficient, he has not shown prejudice. To show prejudice, Mr. Evans would need to establish that his counsel's conduct rendered his trial "fundamentally unfair" or that "there is a reasonable probability that, but for counsel's unprofessional errors that the result of the proceeding would have been different." *Devier v. Zant,* 3 F.3d 1445, 1451 (11th Cir. 1993); *Strickland,* 466 U.S. at 694. "[T]he absence of exculpatory witness testimony from a defense is more likely

prejudicial when a conviction is based on little record evidence of guilt." *Fortenberry v. Haley,* 297 F.3d 1213, 1228 (11th Cir. 2002). At trial, Mr. Evans's co-conspirators testified against him. The defense put on no witnesses instead arguing that the State did not meet its burden to prove Mr. Evans's guilt beyond a reasonable doubt. This argument was obviously rejected by the jury. In order to be prejudiced, Mr. Evans would have to show that there is at least a reasonable probability that the outcome of the proceeding would have been different had Ms. McCormick testified. *See Crawford v. Head,* 311 F.3d 1288, 1327–28 (11th Cir. 2002). Mr. Evans has not done so.

At trial, the State's witnesses testified that Mr. Evans killed Alan Pfeiffer. Both witnesses testified that they drove Mr. Evans to the crime scene during the time in question, later picked him up, disposed of the gun used in the murder, discarded/destroyed the clothes Mr. Evans wore on the night of the murder and numerous other inculpatory details. On the other hand, nothing in Ms. McCormick's testimony directly or explicitly linked the man she saw or the envelope Pfeiffer's wife threw away to Alan Pfeiffer's murder. As discussed above, testimony did explicitly link Mr. Evans to Alan Pfeiffer's murder. During Mr. Evans's trial, the defense rigorously cross-examined the State's witnesses and pointed out multiple inconsistencies in their testimony. The jury, having heard issues which could have raised a reasonable doubt in their minds, nonetheless convicted Mr. Evans. Mr. Evans has failed to put forth a compelling argument that if Ms. McCormick had

testified that there was a reasonable probability that the result would have been different. Habeas relief is denied.

B. Failure to Object to an Individual Juror's Participation in Trial.

Mr. Evans second claim for relief is that his counsel was ineffective for failing to object to a comment made by a juror during open court in front of the other jurors. The record is less than clear but it appears that Juror Taylor—from the jury box—responded "yes or no" to a question posed to a witness on the stand. At the end of the witness' testimony, the court instructed this juror to not "make any comments to help the witnesses answer questions." *See* (D.E. 12, Ex. A, Vol. 31 at 3180–81). The court then asked counsel for Mr. Evans if he heard what the juror said. Mr. Harllee responded "[s]omething about the light at the intersection." The court then responded that she "just said 'yes' or 'no' or something like that.' " *Id.* at 3181. At the evidentiary hearing on Mr. Evans's postconviction motion, Mr. Harllee testified that he believed that he did not consider having her removed from the jury because she was viewed as a better defense juror. *See* (D.E. 12, Ex.C, Vol. 38 at 280). Accordingly, the trial court denied relief on this claim.

On appeal, the Florida Supreme Court affirmed, in relevant part, as follows:

> Based on this testimony, we agree that counsel strategically decided not to object to a juror's single comment, where the juror was admonished by the trial judge and the

> comment appears to have had minimal relevance in relation to the trial as a whole, because he believed she was a good defense juror. Because "strategic decisions do not constitute ineffective assistance" and counsel's decision here is reasonable considering the circumstances, counsel cannot be deficient for failing to further object. *See Occhicone,* 768 So.2d at 1048.

Evans, 995 So.2d at 946. Upon review of the record, there is nothing to suggest that the state court's decision was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court or that there was an unreasonable determination of the facts. *See Fotopoulos,* 516 F.3d at 1232. Mr. Harllee testified that he had considered his options and determined that this juror was favorable for the defense. Given the minor impact, if any, that the juror's statement may have had on the jury, this was not an unreasonable strategic decision. Review of counsel's conduct is to be highly deferential. *Spaziano v. Singletary,* 36 F.3d 1028, 1039 (11th Cir. 1994). Second-guessing of an attorney's performance is not permitted. *White v. Singletary,* 972 F.2d 1218, 1220 (11th Cir. 1992) ("Courts should at the start presume effectiveness and should always avoid second-guessing with the benefit of hindsight."); *Atkins v. Singletary,* 965 F.2d 952, 958 (11th Cir. 1992). Therefore, the foregoing resolution of his assertion of ineffectiveness of counsel was reasonable and in accord with applicable federal authority, and should not be disturbed. *Williams v. Taylor,* 529 U.S.

362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Habeas relief is denied as to this claim.

C. Failure to Timely Request a Richardson Hearing.

At trial, the crux of Mr. Evans's defense was that he could not have committed the murder at the time that the State alleges it was committed. Therefore, someone else must have committed the crime. In support of that theory, Mr. Evans planned to rely on the testimony of Charles Cannon. Mr. Cannon had previously testified at Mr. Evans's first trial and had given sworn statements. At Mr. Evans's third trial, Mr. Cannon's recollection differed from his prior recollection of events. Previously, Mr. Cannon testified that he did not see the victim's car in the driveway or he didn't remember seeing a car in the driveway. At the third trial, Mr. Cannon's testimony was that he did not remember seeing the victim's car. *See* (D.E. 12, Ex.A, Vol. 33 at 3515–18). He also testified that he had spoken to the State Attorney about this issue and was advised that if he did not remember—he did not remember—he should testify truthfully. As Mr. Harllee cross-examined him on this issue, Mr. Cannon inadvertently informed the jury that he had also testified at Mr. Evans's first trial. *See id.* It was at this point that the court sent out the jury and had Mr. Cannon's testimony proffered. After the conclusion of Mr. Cannon's testimony and before the next witness testified, Mr. Harllee moved for a *Richardson*[7] hearing. *See* (D.E.

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[7] *Richardson v. State,* 346 So.2d 771 (Fla. 1971). Under *Richardson,* a trial court must determine "(1) whether [a]

12, Ex.A, Vol. 34 at 3587). The court listened to argument and denied the motion finding that no discovery violation occurred. *Id.* at 3587.

Later, in his postconviction motion, Mr. Evans argued that his counsel was ineffective for failing to timely request a *Richardson* hearing. The claim was denied and the Florida Supreme Court affirmed "because the trial record completely refutes this claim." *Evans,* 995 So.2d at 933. The Court finds this claim to be entirely without merit and agrees with the Florida Supreme Court. After Mr. Cannon's testimony and before the next witness testified, Mr. Harllee moved for a *Richardson* hearing. His performance was not deficient nor was Mr. Evans prejudiced. While Mr. Evans may object to the disposition of the motion by the trial court, he cannot convert that into an ineffective assistance of counsel claim. Further, Mr. Evans failed to satisfy either prong *of Strickland.* Habeas relief is denied.

D. Failure to Object to Inflammatory and Prejudicial Comments Elicited by the State.

Mr. Evans argues that his counsel was ineffective when he failed to object to certain objectionable comments elicited by the state. Those comments are as follows: 1) the age of Sarah Thomas, the petitioner's ex-girlfriend and witness for the state; 2) that Mr. Evans was part of a gang and 3) the State's

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discovery violation was willful or inadvertent; (2) whether it was trivial or substantial; and (3) whether it had a prejudicial effect on the opposing party's trial preparation." *Id.*

reference to the murder being "execution style". (D.E. 1 at 54–57).

I. Sarah Thomas

Ms. Thomas was a minor during the time that she had a sexual relationship with Mr. Evans which resulted in the birth of a child. The two ended their relationship after the murder of Alan Pfeiffer and Ms. Thomas testified against Mr. Evans at trial. Mr. Evans asserts that his counsel's performance was deficient for not objecting to the State eliciting information regarding her age and teen pregnancy because it painted Mr. Evans in a bad light and exposed criminal (impregnation of a minor) behavior on his part. Mr. Harllee testified at the evidentiary hearing that this information was helpful in Mr. Evans's defense because it gave her a motive to lie. Underlying this defense was that Ms. Thomas was lying to get Mr. Evans out of her and her child's life. Mr. Evans argues that this was an unreasonable strategy. The Florida Supreme Court rejected this argument and agreed with the trial court that "neither deficiency nor prejudice has been demonstrated." *Evans,* 995 So.2d 933. At first glance this seemed a reasonable trial strategy on the part of Mr. Harllee. However, Mr. Evans argues before the Court that this could not have been a sound trial strategy on the part of Mr. Harllee because "[t]here is no basis for this finding. At trial there was ***no questioning,*** nor ***any mention*** of a 'custody battle.' The ***only testimony*** elicited at trial by counsel included Sarah's marital status and her admission that she does not care for Paul. She merely stated

that it did not matter to her whether Paul is around or not." (D.E. 1 at 55–56) (emphasis added) (internal citations omitted). This seemed illogical given the testimony of Mr. Harllee at the evidentiary hearing, and the decisions of both the trial and state supreme courts. So, this Court reviewed the testimony of Ms. Thomas for second time—only to find that not only were these statements in Mr. Evans's habeas petition misleading, they were completely false. In fact, during cross-examination of Ms. Thomas, the following exchange occurred:

> Q: Now, you had problems on and off with Paul about your child, Courtney, over the years, haven't you?
>
> A: He's made threats.
>
> Q: And you've withheld visitation.
>
> A: Just when I was not able to take her over there.
>
> Q: Okay. Did you ever say that you took her over there only when you wanted to?
>
> A: When I was able to, yes.
>
> Q: There's been problems about ***custody*** as well, has there not?
>
> A: Just the threats that he's made.
>
> Q: Now, actually what happened when you went over to Paul's house that day, on that tape, is that he wanted to talk with you about joint ***custody*** of Courtney; isn't that true?
>
> A: No, that's not.

> Q: And he was writing out the terms of the ***custody*** or the visitation with you; isn't that accurate?
>
> A: No, he was not.

(3775–77) (emphasis added)[8]. Accordingly, the Court finds that this was a reasonable defense strategy and the Florida Supreme Court's determination was reasonable. "A determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e). Under the applicable AEDPA standards, Mr. Evans is not entitled to habeas relief. The Florida Supreme Court's ruling on Mr. Evans's ineffective assistance of claim was not contrary to, or an unreasonable application, of clearly established federal law. Nor was the ruling based on an unreasonable determination of the facts. The Court has reviewed the testimony presented at the evidentiary hearing before the state court, and finds that Mr. Evans has not overcome the presumption prescribed by 28 U.S.C. § 2254(e). Habeas relief is denied.

ii. Gang Reference

Mr. Evans asserts that his counsel was ineffective for failing to request a *Richardson* hearing after the

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[8] This not the only complete misstatement of the record in Mr. Evans's petition, there are more. *See* (D.E. 1 at 59). However, the Court does not find it productive to catalog them all here. Suffice it to say that the Court questions the accuracy of the allegations in the Petition.

State's witness testified that Mr. Evans had been in a gang. At trial, Ms. Waddell testified that Mr. Evans had threatened her that if she told anyone about their involvement in the murder that "the old family will kill you." *See* (D.E. 12, Ex.A, Vol. 37 at 3855). When the state attorney inquired as to what that meant, Ms. Waddell said "[i]t was just a gang he was in, I guess, called the—his old family. *Id.* At that point, outside the presence of the jury, Mr. Harllee moved for a mistrial. The trial court denied the motion and Mr. Harllee moved for a curative instruction. The trial judge instructed the jury that there was no evidence that Mr. Evans was in a gang and they should disregard Ms. Waddell's testimony. Now, Mr. Evans argues that his counsel was ineffective for failing to ask for a *Richardson* inquiry and waiving the motion for mistrial by accepting a curative instruction. Mr. Evans first raised this claim in his postconviction motion. The Florida Supreme Court affirmed the denial finding that:

> Although counsel never requested a *Richardson* hearing based upon the State's failure to inform the defense about this testimony, the colloquy that followed his objection to the remark and motion for a mistrial confirms that the State was unaware of this information and did not willfully withhold it from the defense or otherwise violate a discovery rule that would have required a *Richardson* hearing. Because counsel took immediate action to rectify the improper testimony and there was no basis to conclude that the State violated a discovery

> rule, counsel's decision to move for a mistrial rather than request a *Richardson* hearing was reasonable "under the norms of professional conduct." *Occhicone,* 768 So.2d at 1048.

Evans, 995 So.2d at 947. The decision of the Florida Supreme Court was reasonable. The record does not indicate that a *Richardson* inquiry was warranted but even so, there is no indication that trial counsel's failure to request a *Richardson* hearing rendered Mr. Evans's trial "fundamentally unfair" or that "there is a reasonable probability that, but for counsel's unprofessional errors that the result of the proceeding would have been different." *Devier,* 3 F.3d at 1451; *Strickland,* 466 U .S. at 694. Habeas relief is denied.

iii. "Execution Style"

Mr. Evans final sub-claim is that his counsel was ineffective when he failed to object during closing statements when the prosecution referred to the homicide as "a cold-blooded killing, execution style ..." *See* (D.E. 12, Ex. A, Vol. 38 at 4205). Mr. Evans first raised this claim in his Rule 3.850 postconviction motion. It was denied. The Florida Supreme Court affirmed the denial determining:

> Evans also claims that counsel was deficient for failing to object to the State's comment during closing argument that the murder was "execution-style." This Court has previously held that a murder involving a gunshot to the head can be classified as an "execution-style" killing. *See Ford v. State,* 802 So.2d 1121, 1133 (Fla. 2001). Here, evidence was

> presented that Pfeiffer was shot three times, once in the back and twice in the head, at a distance of at least two feet. Because the facts in evidence support the inference that this was an "execution-style" murder and the prosecutor's comment was therefore not improper, counsel cannot be deemed ineffective for failing to object. *See Rogers v. State,* 957 So.2d 538, 549 (Fla. 2007). Thus, we affirm the trial court's denial.

Evans, 995 So.2d at 947 (footnote omitted). Given the record below, the Florida Supreme Court's assessment is certainly reasonable. Further, since the argument "did not manipulate or misstate evidence, nor did it implicate other specific rights of the accused such as the right to remain silent," Mr. Harllee should not have objected. *Darden,* 477 U.S. at 182. Counsel cannot be ineffective for not making a frivolous argument. Habeas relief is denied.

E. Failure to Object to Improper Bolstering of Witness Credibility.

Mr. Evans's fifth claim for habeas relief is based on the effectiveness of counsel when failing to object to the improper bolstering of witnesses Sarah Thomas and Donna Waddell. Mr. Evans argues that Detective Cook improperly bolstered the witnesses credibility when he testified that no promises were made to the witnesses in exchange for the testimony. He also argues that the bolstering continued during the State's closing argument. Mr. Evans claims that his counsel was ineffective for failing to object. Mr. Evans raised this claim in his postconviction motion

which was denied. The Florida Supreme Court affirmed finding that "the record confirms that the comments elicited from Detective Cook during direct examination occurred in close proximity to each other and counsel objected five times during this period, ultimately moving for a mistrial based on improper bolstering" and also "when Detective Cook confirmed on cross-examination that Thomas was not arrested and commented that 'the Grand Jury made that final decision,' counsel immediately requested a sidebar conference and the court issued a curative instruction directing the witness to answer the question as posed without any additional comment." *Evans,* 995 So.2d at 948. Further, when Mr. Harllee failed to object during closing arguments the court found no deficiency because "the prosecutor's statement during closing argument was a legitimate comment on the evidence presented at trial and proper rebuttal to the defense's closing argument, counsel cannot be ineffective for failing to object." *Id.* The Court agrees. The record reflects that Mr. Harllee objected several times and requested a mistrial. After careful review of Mr. Evans's claim for ineffective assistance of counsel, there is nothing in the record to suggest that the state court's decision was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court or that there was an unreasonable determination of the facts. *See Fotopoulos,* 516 F.3d at 1232. Habeas relief is denied.

F. Failure to Object during State's Closing Argument.

Mr. Evans's final claim for ineffective assistance of counsel is that his counsel's performance was deficient for failing to object when the State argued during closing argument that the jury did not have to agree as to which theory of the crime Mr. Evans was guilty of. *See* (D.E. 1 at 62). During closing argument the State advised the jury that "[h]alf of you could go back there and think that Paul Evans is the shooter and half of you could believe that he is so actively involved as a principal, that you can find him guilty of first degree murder. You don't have to agree as to which theory. You just have to agree to the verdict." *See* (D.E. 12, Ex. A, Vol. 38 at 4173–74). When Mr. Evans made this claim to the trial court, it was denied because he had failed to show prejudice. On appeal, the Florida Supreme Court affirmed finding that "[t]his Court has never specifically decided whether a jury must unanimously find a defendant guilty under either a principal or shooter theory or whether the jury may be split between the two. Because this Court has neither prohibited the State from arguing to jurors that they can be split on the principal or shooter factual theories nor required the use of special verdict forms in such situations, counsel's failure to object to this comment cannot be deemed deficient performance." *Evans,* 995 So.2d at 949 (citations omitted). This claim is one of ineffective assistance of counsel. Perhaps the result would be different if this was a claim regarding the constitutionality of allowing the State to argue dual theories of the crime, but it is not. The Court has to

determine if the Florida Supreme Court's determination of the law and facts was unreasonable. Given that the court had not prohibited the State from doing exactly what they did here, Mr. Harllee's failure to object was not deficient. *See Strickland,* 466 U.S. at 688. Mr. Harllee was not obligated to make frivolous objections. Habeas relief is denied.

III. The State Withheld Material Exculpatory or Impeachment Evidence.

In his third claim for relief, Mr. Evans argues that the State withheld key information regarding three witnesses. Mr. Evans asserts that the withholding of this information was in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

In *Brady,* the Supreme Court established three criteria a criminal defendant must prove in order to establish a violation of due process resulting from the prosecution's withholding of evidence. Specifically, the defendant alleging a *Brady* violation must demonstrate: (1) that the prosecution suppressed evidence, (2) that the evidence suppressed was favorable to the defendant or exculpatory, and (3) that the evidence suppressed was material. *United States v. Severdija,* 790 F.2d 1556, 1558 (11th Cir. 1986). Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Stewart,* 820 F.2d 370, 374 (11th Cir. 1987)

(quoting *United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)).

As an initial matter, the Court finds that Mr. Evans has not cited the appropriate standard for successfully making a *Brady* claim. Mr. Evans argues that he is entitled to a new trial because "[w]hether the prosecutor failed to disclose this significant or material evidence or whether defense counsel failed to do his job, the jury did not hear the evidence in question." (D.E. 1 at 71). The Court notes that if the jury did not hear exculpatory or impeachment evidence because "his counsel failed to do his job," this is not a *Brady* claim. The Court can only surmise that Mr. Evans made this argument as part of his *Brady* claim because, as greater detailed below, his counsel failed to ask the questions during the postconviction hearing which could have established Mr. Evans's entitlement to such a claim.

A. Leo Cordary

Mr. Evans asserts that the State withheld information that Mr. Cordary received a benefit from the State for his testimony at Mr. Evans's trial. At the time of his testimony, Mr. Cordary was in custody on a probation violation charge. At some point, the State arranged for a bond hearing and did not object to a $10,000 bond for Mr. Cordary. It is this benefit that Mr. Evans argues was wrongfully withheld from him. Mr. Evans first made this claim in his Rule 3.850 motion. At the evidentiary hearing, the prosecutor testified that after Mr. Cordary testified, she agreed to reduction in bond. She also testified that she did not enter into any agreements

with Mr. Cordary regarding his bond before his testimony. *See* (D.E. 12, Ex. C, Vol. 12 at 596). She was unclear if this occurred during Mr. Evans trial or shortly after but she was clear that it did not occur prior to Mr. Cordary's testimony. The Florida Supreme Court rejected this claim finding that "[b]ecause the decision on the bond reduction was not made until after Cordary testified and he was thus unaware of the benefit he was receiving, there is no 'favorable' or impeachment evidence. Therefore, Evans fails to meet the first prong of *Brady." Evans,* 995 So.2d at 951.

To be sure, "[t]he United States Supreme Court has clearly held, however, that evidence that could be useful in impeaching prosecution witnesses must be disclosed under *Brady. See Bagley,* 473 U.S. at 676, 105 S.Ct. at 3380. And the Court has held that evidence of motivation to testify, especially for key prosecution witnesses, is impeachment evidence that must be disclosed. *See Giglio,* 405 U.S. at 154–55, 92 S.Ct. at 767 ("Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it."); *Kyles,* 514 U.S. at 442 n. 13, 115 S.Ct. at 1569 n. 13 (evidence showing the motive for an important government witness to come forward is impeachment evidence covered by the *Brady* rule); *Napue v. Illinois,* 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is

upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.")." *Smith v. Sec'y, Dep't. of Corr.,* 572 F.3d 1327, 1343 (11th Cir. 2009).

However, in the instant case, Mr. Cordary was not conveyed any benefit by the State until after he testified. Simply, there was no information to impeach him with at the time he testified. Therefore, the *Brady* rule was not implicated.[9] The record before the Court shows that Mr. Cordary was questioned while on the stand during Mr. Evans trial about any benefits given to him by the State in exchange for his testimony. He unequivocally testified that he had not received any benefit from the State. Further, at the postconviction hearing, the prosecutor testified that she had not made any agreement with Mr. Cordary or his counsel regarding bond until after he had testified. Given the record before the Court, the determination of the Florida Supreme Court that there was no "favorable" information to disclose to the defense is not an unreasonable one. Without

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[9] At the evidentiary hearing, the prosecutor testified that she did not remember if bond was granted to Mr. Cordary while Mr. Evans's trial was ongoing or if it was after the close of the penalty phase. This could have been an important fact to know. "*Brady* concerned the suppression of evidence *prior to and during* trial that was material to the proceedings and denied the defendant a fair trial." *Grayson v. King,* 460 F.3d 1328, 1337 (11th Cir. 2006). Nonetheless, the prosecutor was clear that she did not reach an agreement regarding the bond until after Mr. Corday testified. Although clearer testimony regarding the timing of the sequence of events would have been helpful, the evidence before the Court is sufficient to conclude there was no *Brady* violation.

having met the second prong of *Brady,* habeas relief cannot be granted.

B. Donna Waddell

Mr. Evans asserts that the State was in possession of two letters detailing Ms. Waddell's psychological instability at the time of the crime and at Mr. Evans's trial. Mr. Evans argues that had he known of Ms. Waddell's instability, his counsel could have challenged the veracity of her testimony. At the evidentiary hearing, both prosecutors from Mr. Evans trial testified. Postconviction counsel did not ask a single question to either prosecutor about when or if they were in possession of these two letters. In affirming the denial of this claim on appeal, the Florida Supreme Court found:

> Although it was his burden to prove that the State withheld this information, Evans never questioned either prosecutor at the evidentiary hearing to ascertain whether they knew about Waddell's mental status at the time of the trial. Further, one letter was clearly not yet in existence, as it was dated several months after Evans's trial, and Evans cannot establish when the other letter was written. Because Evans cannot demonstrate that either of the letters was in existence at the time of his trial, there can be no *Brady* violation.

Evans, 995 So.2d at 951. Based on the record before it, the Florida Supreme Court's determination was not unreasonable. The United States Supreme Court established three criteria a criminal defendant must

prove in order to establish a violation of due process resulting from the prosecution's withholding of evidence. Mr. Evans has failed to do so. Habeas relief is denied.

C. Mindy McCormick

Mr. Evans final sub-claim is that exculpatory evidence was withheld from him. Ms. McCormick testified that she was with Ms. Pfeiffer the day a man gave her a package which Ms. Pfeiffer discarded by throwing in a river. Ms. McCormick testified that she gave a statement to the police and also provided them with a description of this person so they could make a sketch. Mr. Evans first raised this claim in his postconviction motion, the Florida Supreme Court affirmed as follows:

> However, Evans failed to demonstrate that the unidentified man and the contents of the package were exculpatory because the incident occurred several weeks after the murder and may not have been relevant to the case, and McCormick confirmed at the evidentiary hearing that she still had no specific details about the incident. Thus, the information was neither exculpatory nor impeachment evidence subject to *Brady* and we deny relief on this issue.

Evans, 995 So.2d at 951. The Court disagrees that Ms. McCormick's statements to the police were not exculpatory. Evidence is exculpatory when it is "favorable to an accused." *See Brady,* 373 U.S. at 87. Mr. Evans's defense was that someone else committed the crime. The Court finds that evidence

regarding an unidentified male who gave a package to the victim's wife which she later then discarded in a river is favorable to the accused. However, Mr. Evans claims must fail because he has failed to show that this information was suppressed by the government.[10] The record fails to show that the government withheld this information as opposed to Mr. Evans's counsel either ignoring it or deciding not to use it at trial for whatever reason. The record shows that Mr. Evans took Ms. McCormick's deposition on May 27, 1998. *See* (D.E. 12, Ex. C, Vol. 10 at 234). At the evidentiary hearing on Mr. Evans Rule 3.850 hearing, his counsel was asked about Ms. McCormick's meeting with police and sketch of the person who she saw Connie Pfeiffer with at the time of the package transfer. Mr. Harllee testified as follows:

> Q: Now, did Ms. McCormick or anyone else from the State Attorney's office ever talk to you about—were you ever made aware of Ms. McCormick saying that a package containing a gun had been delivered to Ms. Pfeiffer—just a package. I'm sorry. A package had been delivered to Ms. Pfeiffer and that that package was disposed of?

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[10] Mr. Evans would also have to show that this information was material for *Brady* purposes but since he has failed to establish the first prong of the three prong *Brady* analysis, the Court need not determine if this information was material. "Materiality is determined by asking whether the government's evidentiary suppressions, viewed cumulatively, undermine confidence in the guilty verdict." *See Kyles v. Whitley,* 514 U.S. 419, 436–37, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

A: I do not remember that.

Q: Were you ever made aware of there being a sketch of anyone who delivered this package to Connie Pfeiffer?

A: I don't remember that either.

* * *

Q: First of all, were you provided with that statement [Ms. McCormick's statement to police] in discovery?

A: I didn't [sic] know. I would have to go back and go through every item of discovery. I think you got a copy of our file so if it's in there, it's in there. I don't have any independent recollection of this.

Q: Now, regarding the issue of the package, do you believe you had the statement before you took her deposition?

A: This is not ringing a bell at all.

Q: Had you known anything about a package, would you have sent your investigator to go find out further information about it, to see if it was connected to the case of Paul Evans?

A: Probably, and I probably would have asked her about it in the deposition as well.

* * *

Q: Now, this guy that delivered the package. You were never made aware that there was a composite sketch made by police of this guy

> that delivered the package that Ms. McCormick refers to?
>
> A: I do not recall that at all.

(D.E. 12, Ex. C, Vol. 10 at 242–44). There is nothing conclusive in the record to show that the State improperly withheld this evidence. Mr. Evans has failed to show that this evidence was withheld from his counsel, as opposed to his counsel simply failing to remember that he had seen this information in his files. If the evidence could have been obtained by defense counsel with reasonable diligence, it is not a *Brady* violation. *See Baxter v. Thomas,* 45 F.3d 1501, 1506 (11th Cir. 1995). Mr. Evans has not shown that the State suppressed this information such that his counsel would have been unable to obtain the information, and it is Mr. Evans burden to show that. *See Baxter v. Thomas,* 45 F.3d 1501, 1506 (11th Cir. 1995). Habeas relief is denied.

IV. Ineffective Assistance of Counsel at the Penalty Phase.

In his fourth claim for relief, Mr. Evans argues that his counsel was ineffective for failing to properly investigate, prepare and present mitigation evidence. (D.E. 1 at 72). Mr. Evans asserts that he has a long history of psychological instability which should have been presented to the jury.[11] The State responds that

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[11] Mr. Evans also, in a singular sentence, appears to also be making a claim pursuant to *Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). *See* (D.E. 1 at 80). If that was Mr. Evans's intention, the claim is denied as insufficiently plead. "Conclusory allegations which are not supported by a

the trial court correctly determined that counsel's performance may not be deemed deficient "because a more favorable diagnosis is developed years later." (D.E. 9 at 85). Further, the State asserts that the Florida Supreme Court's determination was reasonable because counsel for Mr. Evans made appropriate strategy decisions given the defense theory. *Id.* at 88. Mr. Evans replies that applying all the facts relevant to the analysis shows that counsel's investigation and presentation of mitigation was deficient. *See* (D.E. 15 at 15). Mr. Evans first raised this claim in his Rule 3.850 motion. The Florida Supreme Court affirmed the denial of this claim finding as follows:

> Despite the fact that Evans has now found more favorable experts to testify to additional mitigation, our confidence in the outcome is not undermined because the testimony adduced at the evidentiary hearing may not have supported any of the statutory mitigators. Neither expert testified at the evidentiary hearing that Evans was in fact suffering from extreme mental or emotional disturbance at the time of the crime. Although one expert testified that Evans's cognitive impairments were detectable at a young age and "are very likely to have been operative at the point in time of his crime," this does not appear to contain the specificity that is required to support statutory mitigation. *See*

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statement of specific facts do not warrant habeas relief." *James v. Borg,* 24 F.3d 20 (9th Cir. 1994).

Jones v. State, 949 So.2d 1021, 1030 (Fla. 2006) (rejecting claim of ineffective assistance of penalty-phase counsel where defendant failed to present expert evidence that he was suffering from any cognitive impairment at the time of the crime that would have supported any statutory mental health mitigation, other than expert testimony that "he thought both of the statutory mental health mitigators applied").

Further, the trial court gave moderate weight to nonstatutory mitigation based on Evans's cognitive impairments, including a difficult childhood (little weight), that Evans suffered great trauma during childhood (moderate weight), and that he suffered from hyperactivity and a history of hospitalization for mental illness (moderate weight), notwithstanding the fact that expert testimony was limited on that issue at the penalty phase. Thus, although Evans asserts that the testimony of Dr. Harvey and Dr. Silverman would have supported additional nonstatutory mitigation, the trial court had already given moderate weight to his cognitive impairments as nonstatutory mitigation without this expert testimony and found it insufficient to outweigh two weighty aggravators, pecuniary gain and CCP, which were assigned "great weight" by the trial court. We therefore deny relief on this claim.

Evans, 995 So.2d at 950. In order for Mr. Evans to prevail on this claim, he must establish that his counsel's performance was deficient and that he was prejudiced under the *Strickland* standard. He has not done so. At the evidentiary hearing on Mr. Evans's postconviction motion, penalty phase counsel, Diamond Litty testified that the witnesses were chosen carefully based on the defense presented at trial and after an investigation into possible mitigation determined that having expert witnesses testify to historical events in Mr. Evans's life could put negative testimony in front of the jury unnecessarily. *See* (D.E. 12, Ex. C, Vol. 11 at 378, 384, 393).

During the penalty phase of the trial, Mr. Evans presented seven witnesses in mitigation. Both of his parents testified about his troubled childhood and difficult family history. The defense also presented two expert witnesses, Drs. Gregory Landrum and Laurence Levine, who testified about Mr. Evans ability to adapt to life in a structured environment like prison. Finally, the defense presented the three lay witnesses who testified that Mr. Evans had not been a disciplinary problem during his incarceration and that he had become a Jehovah's Witness and devoted to God. *See* (D.E. 12, Ex. A, Vol. 29 at 4289).

Mr. Evans argues that there were many more witnesses who could have and should have been called. In particular, he asserts that the defense should have retained an expert to conduct testing to confirm a frontal lobe injury, should have presented expert testimony about medications that Mr. Evans

had been prescribed throughout his life, and informed the jury about a long series of hospitalizations from the time Mr. Evans was a child. At the evidentiary hearing, Mr. Evans presented the testimony of multiple witnesses who could corroborate these events. Mr. Evans concludes that had these witnesses testified, "there is a reasonable probability that the jury would have recommended life and the judge would have given the recommendation great weight." (D.E. 1 at 91). Having reviewed the entire record in this case, the Court disagrees. However, the Court does not need to analyze the prejudice prong because Mr. Evans's penalty phase counsel's performance was not deficient.

At the penalty phase, trial counsel made a strategic determination to not put on a testimony about Mr. Evans's past hospitalizations and medications through mental health experts rather this information was testified to by his parents. This strategic decision was made because defense counsel thought it was "more compelling to have it come in from the parents and more of a layman's term type way than to get experts that so many times people are critical of and think it's psycho babble or whatever and think you're trying to pull something over on them." (D.E. 12, Ex. C, Vol. 11 at 378). The Court does not find this strategy unreasonable. Review of counsel's conduct is to be highly deferential. *Spaziano v. Singletary,* 36 F.3d 1028, 1039 (11th Cir. 1994). Second-guessing of an attorney's performance is not permitted. *White v. Singletary,* 972 F.2d 1218, 1220 (11th Cir. 1992)

("Courts should at the start presume effectiveness and should always avoid second-guessing with the benefit of hindsight."); *Atkins v. Singletary,* 965 F.2d 952, 958 (11th Cir. 1992).

Further, what is clear from the record is that defense counsel did conduct an investigation into mitigation evidence. Ms. Litty testified that their investigation revealed one problem after another. *See* (D.E. 12, Ex. C, Vol. 11 at 384. "Every time we would think we'd have something that we would present, it would just open the door to five bad things. Everything we found was—it was horrible. It never seemed—you know. We'd find something that we thought through a psychologist or whatever we could elicit, it would be good to put that expert on the—um, have that expert testify, but then there would be five or six incidents of things that he would either do at the hospitals or the institutions or the schools that were more damaging than anything good we could elicit." *Id.* at 384. These "bad things" included, but were not limited to: 1) his medical records which showed that he exhibited little remorse over the accidental shooting of his brother and, in fact, had shown hostility towards him; 2) as a youth he started a brush fire and when he was jailed by police in an effort to scare him, he simply laughed; 3) a medical diagnosis of a conduct disorder; 4) Mr. Evans's prior preoccupation with violence, including murder; 5) Mr. Evans's prior stabbing of boy (with a butter knife) who was making fun of him; and 6) a variety of notations in his prior medical records which indicated Mr. Evans's poor conduct and prone to violence. *See* (D.E. 12, Ex. A, Vol. 11 at 70). Faced

with the potential of this information being presented to the jury, who could have construed Mr. Evans's conduct to be sociopathic, it was not unreasonable for defense counsel to limit expert testimony and get Mr. Evans's life story in front of the jury through his parents. Counsel's performance was not deficient. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable ...." *Strickland,* 466 U.S. at 690. Habeas relief is denied.

V. CLAIM V

Mr. Evans did not argue a fifth claim for relief. He did, however, argue his fourth claim for relief twice. *See* (D.E. 1 at 92–112). The State noted this in its Response but Mr. Evans failed to address the issue in his Reply. *See* (D.E. 9 at 80, n. 43); (D.E.15).

VI. Rule Regulating the Florida Bar 4–3.5(d)(4) is Unconstitutional.

In his sixth claim for relief, Mr. Evans argues that because the Florida Bar prohibits attorneys from contacting jurors, his First, Fifth Sixth, Eighth and Fourteenth Amendment rights were violated. *See* (D.E. 1 at 112–13). In particular, Mr. Evans asserts that because Juror Taylor "assisted a witness in answering a question pertaining to the existence of a traffic light" that juror misconduct occurred which warranted interviews of the jury. *See id.* The State responds that juror interviews are permitted when a sufficient showing of misconduct is alleged, and Mr. Evans did not meet that criteria. *See* (D.E. 9 at 96). The Florida Supreme Court denied this claim as follows:

> Evans next asserts that Rule Regulating the Florida Bar 4–3.5(d)(4) is unconstitutional because it denies him the right to effective assistance of counsel in pursuing postconviction relief by preventing the defense from interviewing jurors for possible misconduct. However, this Court has repeatedly rejected challenges to the constitutionality of rule 4–3.5(d)(4). *See, e.g., Barnhill,* 971 So.2d at 116–17. Furthermore, where the defendant merely complains about the "inability to conduct 'fishing expedition' interviews," the claim is without merit. *Johnson v. State,* 804 So.2d 1218, 1225 (Fla. 2001) (quoting *Arbelaez v. State,* 775 So.2d 909, 920 (Fla. 2000)). Here, although Evans asserts that juror Taylor commented during a witness's testimony about a light at an intersection, Evans presented no sworn allegations that the juror's comment "fundamental[ly] and prejudicial[ly] ... vitiate[d] the entire proceedings." *Power v. State,* 886 So.2d 952, 957 (Fla. 2004). Without more substantial allegations of how juror Taylor's single "yes or no" response prejudiced the entire proceeding, this appears to be a "fishing expedition" after a guilty verdict has been returned. *See Arbelaez,* 775 So.2d at 920. Thus, we affirm the trial court's summary denial.

Evans, 995 So.2d at 952 (footnote omitted). There is no need to turn to the particular substance of Mr. Evans's claim because it suffers a fatal flaw. Mr.

Evans has failed to allege that he made a request to interview jurors and that request was denied. Rather, he argues, in the abstract, that his Constitutional rights were violated by the very existence of Florida Bar Rule 4–3.5(d)(4). This argument is disingenuous. Mr. Evans mischaracterizes the rule as being an across the board prohibition of juror interviews. This is simply not so.

> Rule 4–3.5(d) (4) states: "A lawyer shall not ... after dismissal of the jury in a case with which the lawyer is connected, initiate communication with or cause another to initiate communication with any juror regarding the trial except to determine whether the verdict may be subject to legal challenge; provided, a lawyer may not interview jurors for this purpose *unless the lawyer has reason to believe that grounds for such challenge may exist; and provided further, before conducting any such interview the lawyer must file in the cause a notice of intention to interview setting forth the name of the juror* ... to be interviewed."

Evans, 955 So.2d at 952 n. 27. (emphasis added). Clearly, there is a procedural mechanism in place which Mr. Evans could have used to attempt to interview the jurors in his case. He chose not to do so. Mr. Evans does not argue that this procedure had some sort of chilling effect on his rights but rather he misinforms the Court of the true operation of Rule 4–3.5(d)(4). However, even if Mr. Evans had argued the

procedure in place was unconstitutional, his claim would be denied. Rule 4–3.5(d)(4) operates in a similar manner to S.D. Fla. L.R. 11.1(e) which has been previously found to be constitutional. *See United States v. Hooshmand,* 931 F.2d 725 (11th Cir. 1991); *see also United States v. Griek,* 920 F.2d 840 (11th Cir. 1991). Therefore, Mr. Evans's claim is denied.

VII. Ineffective Assistance of Appellate Counsel

Mr. Evans asserts two sub-claims of ineffective assistance of appellate counsel. As an initial matter, if the trial court did not err, then appellate counsel cannot be faulted for not raising this issue on appeal. *See Jones v. Campbell,* 436 F.3d 1285, 1304 (11th Cir. 2006) (finding it *fortiori* that appellate counsel was not ineffective for failing to raise an issue on appeal when the trial counsel's inactions were not deemed ineffective assistance of counsel for initially failing to object). Mr. Evans asserts two claims of trial error that appellate counsel failed to assert on direct appeal of his conviction and sentence. Mr. Evans argues that both constitutional violations were "obvious on the record" and "leaped out upon even a casual reading of the transcript." (D.E. 1 at 115). They are as follows:

A. Failure to Appeal the Denial of Mr. Evans's Motion for a Mistrial and Request for a Richardson Hearing and Brady Violations.

At trial, Mr. Evans defense was that "Alan Pfeiffer was not at his trailer when the Government

says he was killed." (D.E. 1 at 119). In support of that argument, Mr. Evans called C.J. Cannon to testify. Mr. Cannon had given a prior statement to the police, a deposition, and had testified at Mr. Evans's first trial. During his prior statements, Mr. Cannon indicated that he returned home between 9:30–9:45pm and that the victim's car was not at his home. This testimony would have refuted the State's theory that Mr. Pfieffer was murdered between 8:00pm and 8:30pm. However, at Mr. Evans's third trial (at issue here), Mr. Cannon testified that he didn't remember whether he looked over at the victim's house and didn't know if anyone was parked at the home. *See* (D.E. 12–4, Vol. 33 at 3506). After defense objection, the trial court sent out the jury and make inquiry. Mr. Cannon then testified that, prior to his testimony, he had notified the State that he was concerned about his recollection of events. He testified that the Assistant State Attorney advised in him to not "make up something or don't force a memory. If you don't remember, you don't remember." *Id.* at 3520. At that point the defense made a motion for a mistrial and a request for a *Richardson* hearing. The trial court denied the motions. Mr. Evans did not appeal the denial of these motions on direct appeal. Mr. Evans argued in his state petition for writ of habeas corpus that this constituted ineffective assistance of appellate counsel. The Florida Supreme Court denied this claim.

> This Court applies an abuse of discretion standard to both denials of a motion for a mistrial, *see England v. State,* 940 So.2d 389,

> 402 (Fla. 2006), and to denials of a request for a *Richardson* hearing. *See Conde v. State,* 860 So.2d 930, 958 (Fla. 2003). Here, the trial court was well within its discretion to deny the motion for a mistrial and the request for a *Richardson* hearing because Cannon's testimony had not changed in any material way. When he spoke to the police immediately after the incident, Cannon said that he was "trying to think" if he remembered seeing the TransAm. Then, about seven years later, Cannon gave a deposition that completely contradicted both his first statement to the police and his testimony from the first trial, stating that the TransAm was parked outside the trailer. Subsequently, at Evans's first trial, Cannon said that he did not remember seeing the TransAm that night. Lastly, at the retrial, Cannon testified that he did not remember if he saw the TransAm. As noted by the trial court, Cannon's consistently equivocal statements evidence an individual who could not exactly remember what he saw that night, even when asked in close proximity to the murder. Thus, the trial court was within its discretion in denying the motion for a mistrial and *Richardson* inquiry because no discovery violation occurred and appellate counsel cannot be deficient for failing to raise the issue on direct appeal.

Evans, 995 So.2d at 953. In Florida, a defendant "who has established the existence of a discovery violation is entitled to a hearing as a matter of law."

Curry v. State, 1 So.3d at 398. This is not discretionary. *See id.* However, a discovery violation must be established. Here, the trial court found that the State had not committed a discovery violation when it failed to notify the defense that Mr. Cannon had been in contact with them and indicated that he may not be able to remember certain facts during his testimony. The Florida Supreme Court concurred. Given the inconsistencies in Mr. Cannon's testimony over the years, the Court agrees. Mr. Cannon's memory has seemed to wane during the time of the crime and Mr. Evans's third trial. Therefore, when he discussed his inability to remember certain details with the State's Attorney, it is not entirely clear that this would have been a discovery violation when the State did not disclose this information to the defense as he had the inability to remember certain information on previous occasions. In order to prevail on his claim here, Mr. Evans must establish the two prongs of the *Strickland* standard. He has not done so. "The test for ineffectiveness is not whether counsel could have done more; perfection is not required. Nor is the test whether the best criminal defense attorneys might have done more. Instead the test is whether some reasonable attorney could have acted in the circumstances ... [as this attorney did]—whether what ... [this attorney] did was within the 'wide range of reasonable processional assistance.' " *Waters v. Thomas,* 46 F.3d 1506, 1518 (11th Cir. 1995) (en banc) (quoting *Strickland,* 466 U.S. at 689) (citation omitted); *see also Provenzano v. Singletary,* 148 F.3d 1327, 1332 (11th Cir. 1998) (stating that to show

unreasonableness "a petitioner must establish that no competent counsel would have made such a choice."). Further, even if Mr. Evans could show deficiency, he must also show prejudice. Prejudice exists if' "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding [i.e., the sentencing hearing] would have been different [i.e., resulted in something other than a sentence of death].' " *Id.* at 390 (citations omitted). Mr. Evans bears the burden of establishing both deficient performance and prejudice. *See, e.g., Dill v. Allen,* 488 F.3d 1344, 1354 (11th Cir. 2007).

The Florida Supreme Court's determination that the trial court did not err was not unreasonable. If the trial court did not err, then appellate counsel cannot be faulted for not raising this issue on appeal. *See Jones,* 436 F.3d at 1304. Habeas relief is denied.

B. Failure to Appeal the Denial of Mr. Evans's Motion for Mistrial and Richardson Hearing Where Witness Testified to Mr. Evans's Character.

Mr. Evans further argues that his appellate counsel was ineffective for failing to appeal the denial of Mr. Evans's motion for mistrial and *Richardson* hearing when Donna Waddell, the state's witness, testified that she believed Mr. Evans had been in a gang. *See* (D.E. 1 at 125–27). The State responds that the Florida Supreme Court correctly determined that because there was no discovery violation, appellate counsel was not ineffective for not raising the issue on direct appeal. *See* (D.E. 9 at 106.) Mr. Evans first raised this claim in his state

petition for writ of habeas corpus. The Florida Supreme Court denied this claim.

> Evans also asserts that appellate counsel was ineffective for failing to challenge on direct appeal the trial court's denial of a motion for a mistrial based upon Waddell's testimony that Evans was in a gang. However, the claim would likely have been found to be without merit even if it had been raised on direct appeal because this Court has previously held that a trial court did not abuse its discretion in similar circumstances. *See, e.g., Mendoza v. State,* 964 So.2d 121, 130–31 (Fla. 2007) (holding that trial court did not abuse its discretion in denying motion for mistrial because it gave a curative instruction following an improper comment on the jury's responsibility). Because Evans cannot demonstrate that the trial court abused its discretion in denying the motion, appellate counsel cannot be ineffective for failing to raise the meritless issue on direct appeal.

Evans, 995 So.2d at 953–54 (footnote omitted). Mr. Evans argues that because the trial court denied his motion, his right to a fair trial and due process under both the State and Federal constitutions was violated.

At trial, Ms. Waddell was testifying on direct examination about Mr. Evans "threat" to her if she told the authorities about his involvement in the crime. She testified that Mr. Evans said if she told the police that "the old family will kill you." *See* (D.E.

12–7, Vol. 36 at 3855). The prosecutor asked what did he mean by "the old family?" Ms. Waddell responded "[i]t was just a gang he was in, I guess, called the—his old family." *Id.* The defense made a motion for mistrial. Outside the presence of the jury, the State proceeded by proffer. Ms. Waddell testified that she just "assumed" he was in a gang. *Id.* at 3585. The State advised the judge that they "don't know where she got the gang." *Id.* at 3856. After her proffered testimony, the defense renewed its motion for mistrial. The trial court denied it and the defense asked for a curative instruction which was given. *Id.* at 3862. It was as follows:

> All right. Members of the jury, there is no evidence that the defendant was in a gang. That was pure speculation on the part of Ms. Waddell. The Jury should disregard that statement in its entirety.

See (D.E. 12–7, Vol. 36 at 3855).

The Florida Supreme Court's opinion has not "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(1)-(2). There is nothing in the record to suggest that a discovery violation occurred. Ms. Waddell was simply testifying to her assumption. Further, even if appellate counsel performance was deficient, Mr. Evans would also have to show

prejudice. In order to establish prejudice, Mr. Jones "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694. The Court cannot find that had appellate counsel raised this claim on direct appeal that the result of his conviction would have been different. Habeas relief is denied.

VIII. Trial Court Erred in Denying Mr. Evans's Motion to Quash the Indictment or Dismiss the Charge Due to Pre-indictment Delay.

In his eighth claim for habeas relief, Mr. Evans argues that the trial court erred when it denied his motion to quash the indictment or dismiss the charges based on the "delay between the March 1991 murder and his August 1997 indictment." (D.E. 1 at 127). The State responds that the Florida Supreme Court correctly affirmed the denial of the motion because Mr. Evans had not shown actual prejudice. *See* (D.E. 9 at 107).

On January 6, 1999, the trial court held a hearing on Mr. Evans's Motion to Quash the Indictment and to Dismiss the Charges. *See* (D.E. 10–24, Vol. 19 at 1808). In his motion, Mr. Evans lists several witnesses who could have provided either an alibi or who would have testified that Mr. Evans was not the perpetrator of the crime. After hearing, the trial court denied the motion based on Mr. Evans failure to demonstrate actual prejudice. *Id.* Mr. Evans first raised this claim on direct appeal. The Florida Supreme Court affirmed.

> In this case, although Evans made a particularized claim that key witnesses had become unavailable to the defense, and also made a generalized claim that the physical evidence was so stale that it was of no evidentiary value, Evans did not submit any evidence to support these claims. We conclude that the mere assertion that particular witnesses helpful to the defense are unavailable, absent record evidence, precludes a finding of actual prejudice under these circumstances. Because we find that Evans has failed to demonstrate actual prejudice in this case, we need not "balance the demonstrable reasons for the delay against the gravity of the particular prejudice." *Rogers,* 511 So.2d at 531. Accordingly, we deny relief on this claim.

Evans, 808 So.2d at 101. At the outset, the Court must note that Mr. Evans does not cite a single case in support of his argument. *See* (D.E. 1 at 127–132). To be clear, Mr. Evans claim is not that there was an unconstitutional delay between his indictment and his trial; rather his claim is that the delay between the crime occurring and the indictment and arrest unconstitutionally prejudiced him. *See id.* The United States Supreme Court addressed this issue in *United States v. Lovasco,* 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977). In *Lovasco,* the Court held "that to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been

somewhat prejudiced by the lapse of time." *Id.* at 796.

Here, Mr. Evans alleges trial error. In his petition, Mr. Evans alleged the unavailability of certain witnesses of alibi witnesses, in particular three witnesses who could have placed him at the fair during the time of the murder. *See* (D.E. 1 at 128). He also alleges that he was prejudiced by the delay because he did not have access to the 911 emergency calls or the dispatcher to lay the proper predicate. Mr. Evans also argues that the delay caused him an inability to show that he was an abettor and then he could illustrate that his sentence was disparate in comparison to the others involved in the crime. *See* (D.E. 1 at 132). In order to show that the State's delay amounted to a denial of due process, Mr. Evans points to the fact that the police could have obtained Sarah Thomas's cooperation earlier then it did. Mr. Evans avers that the "police merely left the file inactive for many years before assigning it to a new detective." This is the singular explanation offered by Mr. Evans for the State's delay. *See* (D.E. 1 at 128–132).

A petitioner making a claim before a federal habeas court "may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.' " *Fining v. Sec'y, Dep't. of Corr.,* 610 F.3d 568 (11th Cir. 2010) (citing *Brecht v. Abrahamson,* 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)). To establish actual prejudice, Mr. Evans "must shoulder

the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady,* 456 U.S. 152, 170, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982). Mr. Evans's claim fails to specifically allege, let alone establish, actual prejudice. Further, there is nothing in the record to suggest that the state court's decision was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court or that there was an unreasonable determination of the facts. *See Fotopoulos,* 516 F.3d at 1232. Habeas corpus relief is denied.

IX. The State Presented Testimony at Trial that Contradicted Evidence Presented to the Grand Jury.

Mr. Evans asserts that he was denied his constitutional rights "when his case went to trial on an indictment based on materially false testimony." (D.E. 1 at 132). Specifically, Mr. Evans argues that the State's "case at the time of the indictment, as set out in the 'complaint Affidavit', and its case at trial were materially different from each other." (D.E. 1 at 133). Mr. Evans cites to multiple examples of inconsistencies between the affidavit and the trial testimony in support of this claim.[12]

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[12] Mr. Evans claims the discrepancies involve (1) the time of the murder, (2) whether or not the front door was ajar, (3) whether he attended the fair and dined at Denny's, and (4) how long he

The State argues that the claim was not preserved below and that the case law cited [13] by Mr. Evans is not "clearly established law" such that the Florida Supreme Court's findings could be found to have been an unreasonable application. *See* (D.E. 9 at 118).

In reply, Mr. Evans asserts that "any procedural bar found by the Courts cannot preclude federal review of his claims under independent and adequacy principles. In the alternative, Mr. Evans has clearly demonstrated cause and prejudice for any procedural bar asserted by the State." (D.E. 15 at 23). Mr. Evans first argued this claim on direct appeal. The Florida Supreme Court rejected the claim finding that the matter was not preserved for appeal but, even so, that the allegations do not amount "to error, let alone fundamental error." *Evans,* 808 So.2d at 101. The problem with Mr. Evans's claim, in large part, is that he failed to allege that the State "deliberately presented false testimony to the grand jury, and there is no indication that the State did present false testimony to the grand jury." *Id.* The court determined that without a showing that the State knowingly put forth false testimony "Evans's claim that reversal is justified based on alleged inconsistencies between the complaint and the trial testimony" is rejected. *Id.* at 102.

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was at the fair without being with other people. *See* (D.E. 1 at 133–135).

[13] *United States v. Basurto,* 497 F.2d 781 (9th Cir. 1974).

Procedural Bar

> A State's procedural rules are of vital importance to the orderly administration of its criminal courts; when a federal court permits them to be readily evaded, it undermines the criminal justice system. We do not mean to suggest that the procedural-bar issue must invariably be resolved first; only that it ordinarily should be. Judicial economy might counsel giving the *Teague* question priority, for example, if it were easily resolvable against the habeas petitioner, whereas the procedural-bar issue involved complicated issues of state law.

Lambrix v. Singletary, 520 U.S. 518, 525, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997) (citing 28 U.S .C. § 2254(b)(2)). As this claim is more easily resolved on the lack of merit, the Court declines to review the procedural bar issue.

Merits

As an initial matter, it should be noted that Mr. Evans cites an opinion from the Ninth Circuit Court of Appeals, *United States v. Basurto,* 497 F.2d 781 (1974), as his primary support for this claim. This opinion offers him little, if any, assistance before a federal habeas court reviewing his claim for relief.

> Under AEDPA, a petitioner must show the state court's decision denying his claim "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the

> United States." 28 U.S.C. § 2254(d)(1). The phrase "clearly established Federal law" refers "to the holdings, as opposed to the dicta, of the Supreme Court's decisions as of the time of the relevant state-court decision." *Spencer v. Sec'y, Dep't of Corr.,* 609 F.3d 1170, 1178 (11th Cir. 2010) (brackets omitted).

Puiatti v. Mc Neil, Case No. 09–15514, 2010 WL 4813715, at *32 n. 30. (11th Cir. Nov.29, 2010). Accordingly, the Ninth Circuit's opinion in *Basurto* is of little consequence here. Regardless, the Court is not convinced that Mr. Evans would prevail even if *Basurto* controlled because the facts here are quite different. In *Basurto,* the witness came forward and informed the prosecutor—in advance of trial—that he had lied during his grand jury testimony. The prosecutor informed the court and the defense but refused to dismiss the indictment. There is no evidence here that the state's attorney knew that the testimony given to the grand jury was false. While it later appeared that the witnesses had different recollections of events at trial then they did during their statements to the police and in the complaint affidavit, it certainly could have been the result in a changed recollection or some other less nefarious reason. The Court has no real way of knowing but what is clear is that there is no evidence to suggest that the State knew that the testimony was false. As such, Mr. Evans's claim is materially distinguishable from *Basurto.*

Also, the record reflects that Mr. Evans's counsel was aware of these "changes" in testimony in

advance of trial and cross-examined those witnesses about those changes. For example, Leo Cordary testified that he told the police officer to whom he gave his original statement that he believed he heard shots at 8:00, 8:30. *See* (D.E. 12–3, Vol. 32 at 3401). At trial, Mr. Harllee cross-examined him about a sworn statement that he gave to defense counsel about a year prior to trial wherein he stated under oath that he thought he heard the shots at 10:30, 11:00. Mr. Cordary testified, when confronted with the change in his testimony, that he "did the best he could." [14] He reiterated that it was his current belief that he heard the shots at 8:00pm; that was what he originally told the police and that was what he testified to at trial. While the Court would agree that Mr. Cordary has credibility issues, it does not find that the State knowingly put on perjured material testimony in violation of Mr. Evans constitutional rights. In fact, it is unclear that the State put forth perjured testimony at all.

Finally, what is clear here is that Mr. Evans has either forgotten or simply failed to meet his burden under the AEDPA. In his claim, he not only fails to articulate why the Florida Supreme Court's determination unreasonably extended, or unreasonably declined to extend a legal principle from Supreme Court case law to a new context, he also failed to even cite their opinion denying his claim on direct appeal. Habeas relief is denied.

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[14] The investigation of this crime spanned approximately eight years.

X. Deprivation of the Constitutional Right to Cross–Examine State Witnesses and Present Evidence.

In his tenth claim for relief, Mr. Evans argues that the "trial court improperly denied Mr. Evans the right to question the medical examiner about the presence of cannabis in the victim's blood." (D .E. 1 at 136). The State responds that the Florida Supreme Court correctly determined that the trial court "did not abuse its discretion in sustaining the State's objection because Evans failed to lay the proper predicate for the questioning of the medical examiner." (D.E. 9 at 124). Mr. Evans asserts no argument in reply.

At trial, during the testimony of the medical examiner, defense counsel inquired as to a toxicology report performed on the victim during the course of his autopsy. *See* (D.E. 12–1 at 3250). The State objected because the medical examiner was not the person who performed the actual test and therefore the defense had not laid the proper foundation for the question. *Id.* at 3251. The Court sustained the objection and struck the question from the record with a jury instruction to disregard.

Mr. Evans first asserted this claim on direct appeal. In support of his claim then and again here, Mr. Evans cites to *Capehart v. State,* 583 So.2d 1009 (Fla. 1991). The Florida Supreme Court rejected this argument finding:

> In contrast to *Capehart,* in this case, Evans never attempted to establish that the toxicology report was of the type reasonably

> relied upon by Dr. Bell or that Dr. Bell formed his opinion based upon the toxicology report. Therefore, we conclude that Evans failed to establish a proper foundation for Dr. Bell to testify regarding the cannabanoids found in the victim's blood and that the trial court did not abuse its discretion in refusing to allow this testimony at trial.

Evans, 808 So.2d at 103. A federal habeas court may review state court evidentiary rulings to determine if the petitioner's due process were violated.

> The standard of review for state evidentiary rulings in federal habeas corpus proceedings is a narrow one. Only when evidentiary errors "so infused the trial with unfairness as to deny due process of law" is habeas relief warranted. *Lisenba v. California,* 314 U.S. 219, 228, 62 S.Ct. 280, 286, 86 L.Ed. 166 (1941), quoted and applied in, *Estelle v. McGuire,* 502 U.S. 62, 75, 112 S.Ct. 475, 484, 116 L.Ed.2d 385 (1991); *accord Baxter v. Thomas,* 45 F.3d 1501, 1509 (11th Cir. 1995) (evidentiary ruling claims reviewed only to determine whether the error "was of such magnitude as to deny fundamental fairness"), *cert. denied,* 516 U.S. 946, 116 S.Ct. 385, 133 L.Ed.2d 307 (1995); *Kight v. Singletary,* 50 F.3d 1539, 1546 (11th Cir. 1995), *cert. denied,* 516 U.S. 1077, 116 S.Ct. 785, 133 L.Ed.2d 735 (1996). Such a determination is to be made in light of the evidence as a whole.

Felker v. Turpin, 83 F.3d 1303, 1311–12 (11th Cir. 1996). A review of the record reveals that the defense asked the medical examiner a question without laying the proper foundation. When the trial court sustained the objection, the defense did not attempt to go back and lay the proper foundation such that the question could be answered. The defense, in response to the objection, stated "Well, Judge, this is in his autopsy report. He testified to this in the last trial. It's in his deposition as well. He ordered the test. He's qualified to interpret the results, and he has the results in his report." (D.E. 12–1, Vol. 31 at 3251). The State responded that this information was not in his report; that it was in a separate report. The trial court asked to see the report and then sustained the objection. Counsel for Mr. Evans made no further argument and proceeded with an entirely different line of questioning. The Court agrees with the Florida Supreme Court that the "trial court did not abuse it discretion in sustaining the State's objection because Evans failed to lay the proper predicate for the questioning of the medical examiner." *Evans,* 808 So.2d at 102. As no evidentiary ruling error exists, habeas relief is denied.

XI. Deprivation of Constitutional Right when the Trial Court Closed Individual Voir Dire to Mr. Evans's Parents.

Here, Mr. Evans asserts that his Sixth Amendment rights were violated because the "[e]xclusion of the defendant's family from jury selection is unconstitutional." (D.E. 1 at 141). The

State responds that "[d]ue to the fact that Evans's second trial ended in a mistrial when prejudicial information was disseminated by a juror and tainted the entire panel; causing the panel to be struck and a new venire called, the judge took additional steps to guard against the error recurring in the third trial including conducting individual voir dire in a separate hearing room." (D.E. 9 at 130–31).

During jury selection in Mr. Evans's trial, the judge decided to conduct individual questioning of the jury in a smaller room and not in the main courtroom. This resulted in there being less space for the public to observe the voir dire. At the outset, trial counsel asked if Mr. Evans's parents could be present in the hearing room. The court stated "[p]robably not, I made room in the courtroom for everybody, but not in the individual questioning sessions." (D.E. 10, Ex. A, Vol. 23 at 2161). However, later during the questioning, a reporter was allowed to observe and the next day a student working with the Public Defender's Office was allowed to observe also. Mr. Evans argues that this denial of a public trial is a structural error that cannot be harmless. *See* (D.E. 1 at 142). Mr. Evans first made this claim on direct appeal. The Florida Supreme Court denied the claim:

> Evans next contends that the trial court's closure of individual voir dire to his parents violated his right to a public trial under the Sixth Amendment of the United States Constitution and article 1, section 16 of the Florida Constitution. Evans did not object to

this issue and we hold that any closure during voir dire was partial in nature.

The trial court in this case utilized the hearing room rather than the courtroom for individual voir dire because it did not want to contaminate the jury pool by having a potential juror state his or her knowledge about the case, which was the reason for the second mistrial in this case.FN9 Moreover, the record in this case indicates that throughout the individual voir dire questioning, both members of the press and a student "shadowing" one of the defense attorneys were allowed to observe the proceedings.

> FN9. This case had resulted in a mistrial two times before the instant trial. The first trial ended in a mistrial when the jury could not agree upon a verdict. Evans's second trial ended in a mistrial due to prejudicial information regarding the first trial disseminated by a juror during voir dire questioning.

Therefore, given the limited nature of the exclusion of Evans's parents, the fact that other members of the public were allowed to observe individual voir dire, and the fact that Evans did not object when the trial court stated that there was not enough room in the hearing room for Evans's parents, we conclude that there is no reversible error.

Evans, 808 So.2d at 105.

In January of 2010, the United States Supreme Court issued its opinion in *Presley v. Georgia,* 558 U.S. 209, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010).[15] The facts are similar. In *Presley,* the defendant's uncle was ordered out of the courtroom before the beginning of jury selection because the prospective jurors would be occupying all the rows in the courtroom and his uncle "cannot sit and intermingle with members of the jury panel." *Id.* at 722. Mr. Presley's counsel objected to the closure of the courtroom at the start of jury selection but did not offer any reasonable alternatives to the trial judge as to how to accomplish the goal of having numerous jurors in the courtroom and also have Mr. Presley's uncle present. The trial proceeded without the public having been present during the voir dire. Mr. Presley was convicted of a cocaine trafficking offense. The United States Supreme Court granted *certiorari.* The Court reversed and remanded holding that "[t]rial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials." *Id.* at 725. The Court further held that "[t]he public has a right to be present whether

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[15] This decision was issued on January 19, 2010. The State filed its Response to Mr. Evan's petition on July 20, 2010. *See* (D.E.9). The case was not cited or discussed by the State-not even in an attempt to distinguish it factually or argue that it was inapplicable. Worse yet, the case was also not cited by the Mr. Evans in his Reply filed September 13, 2010, despite the fact that this case strongly supports Mr. Evans's argument. *See* (D.E.15). Therefore, the Court ordered the parties to file supplemental briefs addressing the impact *of Presley. See* (D.E.16).

or not any party has requested the right." *Id.* at 724–25.

Mr. Evans was first tried for the first degree murder of Alan Pfeiffer on October 26, 1998. The process that the court utilized for jury selection was: first, the court had the State read the indictment. *See* (D.E. 10, Ex. A, Vol. 7 at 238). Then, the court inquired as to whether anyone had knowledge of the case either personally or through the news media. Next, the jurors were asked if they knew any of the lawyers or potential witnesses. Those jurors who responded affirmatively to knowledge of the case were later questioned in the courtroom individually (and outside the presence of any other jurors) while the jurors who responded negatively had a longer lunch period. After the individual questioning, the entire panel was questioned by both the State and the defense. The record indicates that Mr. Evans's parents were in the courtroom at that point in time.[16] *See* (D.E. 10, Ex. A, Vol. 8 at 440). Using this process, a jury was impaneled and Mr. Evans trial ended in a mistrial as the result of a hung jury.

On January 11, 1999, Mr. Evans's second trial began. During jury selection, the court followed the same procedure as the first trial. The record indicates that at a certain point in time, Mr. Evans's parents were not allowed to be present in the

[16] The record is silent as to whether or not they were present during the initial voir dire of the jury, but they were present when the defense counsel began its questioning of the jurors because counsel for Mr. Evans introduced them to the jury. *See* (D.E. 10, Ex. A, Vol. 8 at 440).

courtroom.[17] *See* (D.E. 10, Ex. A, Vol. 22 at 2095). The case ended in a mistrial because a juror, who was assumed to be hearing impaired, *waited until the general questioning* by the State and in front of the entire jury panel to make a statement about his knowledge of a witness who had testified at the "first trial." After which the judge excused the entire panel and declared a mistrial.

On February 1, 1999, Mr. Evans's third trial began. At the beginning of jury selection, the judge made the following decision:

> So, those are the questions that we'll do on individual voir dire examination. What I'm going to do is I'm going to leave the panel—I'm going to use a numbering scheme to isolate the jurors that we need to question individually. We're going to let the ones that don't have any problems with those seven items go for the rest of the day, come back tomorrow.
>
> We're going to keep the rest of the panel here and we're going to go into the jury room and we're going to question them individually with the court reporter there. And that way the

[17] The record seems to indicate that Mr. Evans parents were required to sit in a separate room and somehow observe the voir dire. However, there is nothing in the record to indicate why or how that decision was made by the trial judge. It appears that there may have been a space issue inside the courtroom. *See* (D.E. 10, Ex. A, Vol. 22 at 2095). At the second trial defense counsel wanted them present in the courtroom to introduce to the jury but that request was denied. *Id.* at 2095.

bailiffs can keep these jurors isolated and not talking about the case, things of that nature.

* * *

So what I'm going to do is go with—we're going to isolate knowledge of the case, knowledge of the Defendant and/or attorneys, knowledge of the witnesses, physical impairments, conscientious beliefs, and hardships. Those will be the issues that will be discussed during individual questioning.

What we've done, we looked at the jury room; the jury room is not set up. It's not conducive to individual questioning. So we're going to go into the hearing room, which is right around the corner. And what we'll do is escort each juror around to the hearing room, and we've set it up where we have the State Attorneys on one side, we have the Public Defenders and your client on the other side, and the juror at the end of the table. And at the main bench we'll have a clerk and we'll have myself up there and the court reporter will be right around between the juror and the parties. So we've got that all set up. We think there's plenty of room in there for that and that's what we're going to use.

I will have a bailiff in here to make sure that the jurors don't discuss the case among themselves. Basically they're just going to have to be quiet while they sit in here. They can move around; we're going to let them use the facilities if they need to, but they need to

> stay here and await their turn at the questioning.
>
> * * *
>
> After I go through my questions, I'll call you up and verify that we all have the same number of jurors that we need to question individually. Then I'm going to separate the ones that we do not need to question individually and I'm going to advise them not to read the newspapers and discuss the case and discuss it with other jurors. Then I'm going to let them go and have them come back tomorrow at 9:30, and hopefully we'll finish all the individual questions this afternoon. If we don't, they can remain downstairs and we'll finish up with everybody tomorrow.

(D.E. 10, Ex. A, Vol. 24 at 2146, 2159–60). It was at this point that Mr. Evans's counsel inquired as to whether to not Mr. Evans's parents could observe the proceedings. The trial judge responded:

> Probably not. I made room in the courtroom for everybody, but not in the individual questioning sessions. We'll have to do that in the courtroom, and then we have to move all the jurors outside, and I don't really think that is going to work out. So I don't know how we could accommodate that other than to do the individual questioning inside the courtroom.

(D.E. 10, Ex. A, Vol. 24 at 2146, 2161).

Jury selection began on February 1, 1999, at approximately 1:00 p .m. (D.E. 10, Ex. A, Vol. 24 at

2164). The record is unclear as to what time the general questioning ended and the individual questioning in the hearing room began but it was some time during the afternoon of February 1, 1999. The proceedings adjourned at 5:00 p.m. (D.E. 10, Ex. A, Vol. 25 at 2360). It was during that day that the court allowed a reporter to attend a portion of the proceedings in the hearing room. At that time, the photographer was denied access, however, because there was not enough room. The record indicates, however, that the photographer was later permitted to sit in a corner of the hearing room. (D.E. 10, Ex. A, Vol. 25 at 2330–31.) The proceedings reconvened in the hearing room at 9:00 a.m. on February 2, 1999. (D.E. 10, Ex. A, Vol. 26 at 2362). It was then that counsel for Mr. Evans requested that a high school student who was shadowing an attorney from the public defender's office be allowed to attend. *Id.* The State did not object, stating, "I think the jury process is open to the public. So we can't really stop anybody." *Id.* At 10:30 a.m., for reasons unknown, the proceedings resumed in the main courtroom. (D.E. 10, Ex. A, Vol. 24 at 2146, 2414). In fact, the court conducted more *individual* questioning of the remaining jurors in the courtroom the remainder of that day. *See id.* On the third day of jury selection, the court decided to go back to the hearing room but this time to individually question all the jurors including those who had not indicated that they knew anything about the case or the witnesses. *See* (D.E. 10, Ex. A, Vol. 28 at 2725). Yet, in the afternoon, the court conducted the individual questioning in the courtroom again. In total, the *voir*

dire lasted three full days. Based on the record, it is difficult to assign a precise amount of time to questioning done in the courtroom versus in the hearing room.

The initial, preliminary question before the Court is whether the voir dire proceedings were open to the public. When Mr. Evans's attorney initially asked the Court about permitting Mr. Evans's parents to see the individual questioning, the trial judge did not issue a definitive ruling. Instead, the judge said, "Probably not," and went on to discuss the limited accommodations in the hearing room. Subsequently, once the individual voir dire questioning began, the trial judge permitted access by single individual members of the public. He permitted a reporter and a photographer to enter the room. Later, in response to another request by Mr. Evans's attorney, he permitted a high school student to observe the proceedings. In other words, having perceived what the hearing room would accommodate, the trial judge did permit members of the public to observe the proceedings. The trial judge never explicitly barred the public from observing the proceedings, and he also never sealed the record of those proceedings. Therefore, this case is distinct from *Press Enterprise Co. v. Superior Court of Ca.,* 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) ("Press–Enterprise I"), where the individual voir dire questioning was conducted without any members of the press or public permitted to attend and the record of that questioning was sealed, and *Presley,* where the sole member of the public who wished to view voir dire

was barred from the courtroom. In this case, at least three members of the public attended voir dire.

Nothing in the record indicates that Mr. Evans's parents sought to attend the individual voir dire at the time that individual voir dire began, when the trial judge determined that there was room for one or two [18] members of the public inside the hearing room. Although Mr. Evans's parents' right to attend was not contingent on any request or objection by defense counsel, *see Presley,* 130 S.Ct. at 725 (citing *Press Enterprise L,* 464 U.S. at 503–04) ("[t]he public has a right to be present whether or not any party has asserted the right"), if spaces are made available and thereafter they never attempt to avail themselves of those spaces, then the Defendant cannot maintain a claim that voir dire was closed to the public.

Controlling cases on the issue of the public's right to be present at voir dire proceedings do not specify a certain number of members of the public that have to be permitted to observe in order for the proceeding to be considered open to the public. *See Waller v. Georgia,* 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984); *Press Enterprise Co. v. Superior Court of Ca.,* 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984). In other words, "clearly established Federal law, as determined by the Supreme Court of the United States" does not hold that permitting one member of the public at a time to observe voir dire amounts to

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[18] It is not clear from the record whether the photographer went into the hearing room in addition to the reporter, or whether he replaced the reporter in the hearing room.

closing the proceedings in violation of a defendant's Sixth Amendment right to a public trial. *See* 28 U.S.C. § 2254(d).[19] Therefore, the trial judge's decision regarding the public's observation of voir dire in this case, as well as the Florida Supreme Court's ruling regarding the same, was not contrary to clearly established federal law and does not give rise to habeas relief.

XII. State's Voir Dire of Jury Violated Mr. Evans's Constitutional Rights.

In his twelfth claim for relief, Mr. Evans argued that his constitutional rights were violated when the State "assured jurors [during *voir dire]* that it vouched for the credibility of the witnesses by making sure that their testimony was fully substantiated and that the state considered them to be lesser participants in the crime." *See* (D.E. 1 at 143). The State responds that "the prosecutor did not request a commitment from the jurors to return a certain verdict, but merely inquired as to potential bias. The State was not preconditioning jurors or lending credibility to its witnesses." (D.E. 9 at 141). The Florida Supreme Court agreed with the State and "conclude[d] that the trial court did not abuse its discretion in allowing the State to interrogate the potential jurors about whether they harbored any biases against a witness who had accepted a plea bargain." *Evans,* 808 So.2d at 105. The Court agrees.

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[19] If voir dire was not closed to the public, then it follows naturally that the trial judge had no obligation to consider alternatives to closure.

The State's case rested primarily on the direct testimony of Mr. Evans's co-conspirators who had taken a plea deal or who were not prosecuted. It is not unreasonable for the State to inquire as to a juror's bias against a person who was testifying pursuant to a plea agreement. "The conduct of voir dire of a jury panel is a matter directed to the sound discretion of the trial judge, subject to the essential demands of fairness." *United States v. Brooks,* 670 F.2d 148, 152 (11th Cir. 1982), *cert. denied,* 457 U.S. 1124, 102 S.Ct. 2943, 73 L.Ed.2d 1339 (1982); *United States v. Booher,* 641 F.2d 218, 219 (5th Cir. 1981). Mr. Evans has failed to show that the State's question resulted in the an unfair advantage being conveyed upon the State. The Florida Supreme Court's determination was not an unreasonable one.

Further, as Mr. Evans has claimed his counsel objected and the objection was sustained but the State continued to ask objectionable questions, his claim is one of prosecutorial misconduct. The standard for federal habeas corpus review of a claim of prosecutorial misconduct is whether the alleged actions rendered the entire trial fundamentally unfair. *Donnelly v. DeChristoforo,* 416 U.S. 637, 642–45, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); *Hall v. Wainwright,* 733 F.2d 766, 733 (11th Cir. 1984). In assessing whether the fundamental fairness of the trial has been compromised, such a determination depends on whether there is a reasonable probability that, in the absence of the improper remarks, the outcome of the trial would have been different. *See Williams v. Weldon,* 826 F.2d 1018, 1023 (11th Cir.

1987), *cert. denied,* 485 U.S. 964, 108 S.Ct. 1231, 99 L.Ed.2d 431 (1988).

Given the standard of review and in conjunction with the deference the Court must give the state court's determination pursuant to the AEDPA, Mr. Evans's claim fails. Mr. Evans has not shown how the statements of the prosecutor during voir dire rendered his trial fundamentally unfair. Habeas relief is denied.

XIII. Trial Court Erred in Denying Mr. Evans's Motion for Statement of Particulars.

Mr. Evans asserts that the trial court erred when it denied the defense motion for a statement of particulars which would have required the state to choose its theory of prosecution. *See* (D.E. 1 at 144). The denial of this motion, Mr. Evans argues, resulted in a violation of due process because the jury could convict Mr. Evans of murder under alternate theories of the crime. *Id.* The State responds that the Florida Supreme Court found that this issue had not been preserved for appeal and that was an independent state ground which prohibits the federal courts from addressing the merits of this claim. *See* (D.E. 9 at 142). On direct appeal, Mr. Evans made this claim to the Florida Supreme Court.

> Evans next asserts that the trial court erred in denying his motion for a statement of particulars. At trial, Evans's motion for statement of particulars sought to commit the State to either a theory that Evans was the shooter or that he was the principal, arguing

that the State should not be allowed to present alternative theories that Evans was the shooter or a principal. Specifically, Evans contended that the State "must specify which theory of prosecution it intends to proceed under to obtain a conviction for First Degree Murder in order to permit the Defendant to properly prepare and present a defense." The trial court denied the motion.

The State's theory of the case was that, in fact, Evans was the shooter and the trial court so found in its sentencing order. Evans does not contend on appeal that there was not substantial competent evidence to support the conclusion that Evans was the shooter. During closing argument, the State did argue: "Six of you may agree that he is the actual shooter. Six of you may agree he's a principal. Under either theory he is guilty of first degree murder." Evans did not object to this statement nor did he request a jury instruction or special verdict form that would have required jury unanimity on whether he was the shooter or the principal.

On appeal, Evans raises for the first time that the State's use, in a capital case, of two mutually exclusive factual theories so that the jury may be divided as to the elements of the crime violates both the state and federal constitutions based on the United States Supreme Court's decisions in *Schad v. Arizona,* 501 U.S. 624, 111 S.Ct. 2491, 115

> L.Ed.2d 555 (1991), and *Richardson v. United States,* 526 U.S. 813, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999). We conclude that this claim was not preserved.

Evans, 808 So.2d 92, 106 (Fla. 2001). Under Florida law, besides filing the motion for a statement of particulars, the defendant should also later object in order to preserve this issue for appeal. *See Shamburger v. State,* 559 So.2d 455 (1st DCA 1990). Here, the record shows that trial counsel filed a Motion for Statement of Particulars under Florida Rule of Criminal Procedure 3.140(n). On February 1, 1999, the first day of trial, the court denied the motion.[20] However, this was not the end of the issue. The record shows that counsel again raised this issue in the form of a motion for judgment of acquittal at both the end of the State's case and a renewed motion at the close of evidence *and* as an objection as to the jury instructions. *See* (D.E. 12–9, Ex. Vol. 37 at 4089, 4091, 4099, 4112, 4115); *see also* (D.E. 12–11, Ex. A, Vol. 38 at 4269–70). As such, the Court is not convinced that Mr. Evans failed to preserve this issue for appeal. Regardless, his claim is denied.

As Mr. Evans has not properly alleged that the denial of his Motion for Statement of Particulars

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[20] The Eleventh Circuit has stated that it "views this claim primarily as an issue of state law. Issues of state law are ordinarily immune from federal review.... The ultimate source of any state's law is found in the decisions of its highest court." *Knight v. Bugger,* 863 F.2d 705, 725 (11th Cir. 1988) (citing *Francois v. Wainwright,* 741 F.2d 1275, 1281 (11th Cir. 1984) and *Ford v. Strickland,* 696 F.2d 804, 810 (11th Cir. 1983)).

caused him surprise at trial causing him to be prejudiced, he cannot meet the requirements to prevail on this claim. Mr. Evans clearly was not surprised because this was the second time he was tried on these charges; the first ending with a hung jury and resulting in a mistrial.[21] At the hearing on the Motion for Statement of Particulars, trial counsel argued that this had been an issue at the initial trial and during the initial charge conference on jury instructions. *See* (D.E. 10–27, Ex. A, Vol.23 at 2137, 2148–55).

> *Mr. Harllee:* We have a couple of motions, Judge, very brief. Present an *ore tenus* motion under 3.140N, motion for statement of particulars. In the complete trial that we tried last year, the State argued both that Mr. Evans was the shooter in the case and also a principal. We're asking at this time that the State commit to one theory or the other. It's very difficult, if not impossible, to defend this case, as in the first trial, with all the evidence presented by the case that Mr. Evans is the shooter. And at the tail end of the case to throw in, if you don't believe that, he might be a principal.
>
> So we're asking the Court on motion for statement of particulars and also a motion in

[21] As stated previously, Evans's first trial resulted in a hung jury and the judge declared a mistrial during voir dire during his second trial. Evans was finally convicted at his third trial, which is the subject of the postconviction motion at issue in this case. *Evans v. State,* 995 So.2d 933, 938 n. 2 (Fla. 2008).

> limine that the State commit itself to on theory or the other.
>
> What brought this about is the contradiction in the jury instructions between principal and alibi. Under the principal it says the defendant does not have to be present in order to be found guilty. Under the alibi instruction it says if you find this defendant was not present, you must find him not guilty, a direct contradiction which forced us to amend the alibi instruction except if you find him to be a principal.
>
> It's confusing. There is no evidence presented by the State that he is a principal. We're asking the Court to force the State to pick one theory or the other.

(D.E. 10–28, Ex. A, Vol. 23 at 2137–38).

Mr. Evans was not surprised by the testimony of witnesses, as he had heard already heard them testify at his first trial. Nor was he surprised by the State's theory at trial as it was largely unchanged from the previous trial. Mr. Evans knew what to expect at, this, his third trial.

> At any rate, a refusal by a court to grant a bill of particulars is reversible error only if it can be shown that the defendant was actually surprised at trial and thereby suffered prejudice to his substantial rights. *See, e.g., United States v. Cole,* 755 F.2d 748 (11th Cir. 1985); *United States v. Williams,* 679 F.2d

504,510 (5th Cir. 1982) (citing *United States v. Colson,* 662 F.2d 1389, 1391 (11th Cir. 1981)).

Knight v. Dugger, 863 F.2d 705, 725 (11th Cir. 1988). Habeas relief is denied.

XIV. Florida Supreme Court Failed to Conduct a Meaningful Proportionality Review.

In his fourteenth claim for relief, Mr. Evans argues that the Florida Supreme Court failed to conduct a meaningful proportionality review under the Florida sentencing scheme. *See* (D.E. 1 at 148). This claim is premised on the fact that his co-defendant, Connie Pfeiffer received a life sentence despite the fact that she was equally as culpable as Mr. Evans. The State responds that this claim is not cognizable in a federal habeas petition.[22] *See* (D.E. 9 at 148). The State is correct. Indeed, it has been the law since the mid 1980's that the Constitution does not require proportionality review of capital sentences. *Pulley v. Harris,* 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). "Under 28 U.S.C. § 2241, a writ of habeas corpus disturbing a state-court judgment may issue only if it is found that a prisoner is in custody 'in violation of the Constitution or laws or treaties of the United States.' 28 U.S.C. § 2241(c)(3) (1976). A federal court may not issue the writ on the basis of a perceived error of state law." *Pulley,* 465 U.S. at 41. Mr. Evans offers no reason for

[22] However, the State also responds that the Florida Supreme Court did conduct a proportionality review in this case, as required by Florida law. See (D.E. 9] at 146).

why this determination is inapplicable to him, in fact, he fails to even acknowledge that this is the law. Habeas relief is denied.

XV. Trial Court Erred in Giving No Weight to Valid Mitigation

Mr. Evans next argues that the trial court acted unreasonably when it failed to give any weight to his immaturity and artistic ability as mitigating factors. *See* (D.E. 1 at 163). Mr. Evans does not allege that the trial court excluded or failed to consider mitigation evidence but rather argues that the court erred when it rejected the evidence by giving it no weight. The State responds that the Constitution does not mandate that a particular fact constitutes a mitigating evidence or dictate the particular weight that that evidence must be given. *See* (D.E. 9 at 152). The Florida Supreme Court affirmed the denial of this claim on appeal finding that the trial court's rejection of Mr. Evans's alleged immaturity as a mitigating factor was "supported by competent, substantial evidence" because no testimony on this factor was presented during the penalty phase. *Evans,* 808 So.2d at 108. The court, however, found that the trial court erred when it concluded that artistic ability was "not a relevant mitigating factor" but determined that "[g]iven the likelihood that the mitigator would have been assigned little weight, given the fact that the trial court engaged in a careful weighing of much more significant mitigation and given the aggravators found to exist by the trial court, we conclude that the any error in failing to

weigh this mitigator is harmless beyond a reasonable doubt." *Id.* at 108. The Court agrees.

As to the immaturity mitigation, Mr. Evans did not present testimony at to this factor at the penalty phase. Despite that failure, the trial court did address his young age in the sentencing order but gave it little weight finding that Mr. Evans was legally an adult, was the "mastermind" in planning, organizing and carrying out the murder, and that he committed the crime "like a professional executioner." *Id.* The Eleventh Circuit addressed this issue in *Puiatti v. McNeil,* 626 F.3d 1283 (11th Cir. 2010), writing that

> [In] *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), ... the Supreme Court vacated a death sentence because the Ohio statute narrowly limited the type of mitigating factors the sentencer could consider. A Supreme Court plurality discussed "the concept of individualized sentencing," stressing "[t]he need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual."

Puiatti v. McNeil, 626 F.3d 1283, 1311 (11th Cir. 2010). Following *Lockett,* the Supreme Court, in *Eddings v. Oklahoma* reasoned "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law,* any relevant mitigating evidence." *Id.* at 1312 (citing *Eddings v. Oklahoma,* 455 U.S. 104, 113–14, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)) (emphasis in

original). "Further, the sentencer 'may determine the weight to be given relevant mitigating evidence,' but 'may not give it no weight by excluding such evidence from their consideration.'" *Id.* (citing *Eddings,* 455 U.S. at 114–15). Accordingly, as Mr. Evans presented no specific evidence regarding his immaturity [23], the trial court did not violate his constitutional rights by failing to consider this as a non statutory mitigating factor. In addition, the trial court did consider his age (arguably related to his maturity) as a statutory mitigator and gave it little weight. That is all that is required by the Eighth Amendment. The Court finds, after careful review of the record, that the Florida Supreme Court's ruling was not contrary to, and did not involve an unreasonable application of, clearly established federal law, as determined by the Supreme Court. Nor was it based on an unreasonable determination of the facts in light of the evidence presented. Habeas relief is denied.

As to his artistic ability, Mr. Evans did present evidence that he was a good artist. This testimony was before the trial court, however, the court concluded that this was not a relevant mitigating factor. The Florida Supreme Court disagreed but found that this error was harmless. This was not an unreasonable interpretation of the facts or law. Given that the court found two aggravators which were given great weight, it is unlikely that Mr.

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[23] In his petition, Mr. Evans argues that "overwhelming" evidence existed that showed that a "profoundly troubled adolescence" caused Mr. Evans's immaturity. *See* (D.E. 1 at 164). This was generally in the form of anecdotal evidence.

Evans's artistic ability would have been given such weight that it would have changed the outcome of his penalty phase.

> Under the strict criterion of *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), which governs harmless error analysis, "[t]he error must be harmless beyond a reasonable doubt." *Demps v. Dugger,* 874 F.2d 1385, 1389–90 (11th Cir. 1989), cert. denied, 494 U.S. 1090, 110 S.Ct. 1834, 108 L.Ed.2d 963 (1990). For a *Hitchcock* error to be harmless under this standard, "the court must determine beyond a reasonable doubt that the proposed mitigating evidence ... would not have influenced the jury to recommend [or the trial judge to impose] a life sentence ." *Id.* at 1390; *see Jones v. Dugger,* 867 F.2d 1277, 1279 (11th Cir. 1989) (state must prove beyond reasonable doubt that error "did not contribute to the jury's sentencing recommendation"); *Clark v. Dugger,* 834 F.2d 1561, 1569 (11th Cir. 1987) (error "could not have affected" sentence), cert. denied, 485 U.S. 982, 108 S.Ct. 1282, 99 L.Ed.2d 493 (1988); *Magill v. Dugger,* 824 F.2d 879, 894 (11th Cir. 1987) (errors must have "had no effect" on decision).

Booker v. Dugger, 922 F.2d 633, 637–38 (11th Cir. 1991) (J. Tjoflat, specially concurring). Here, the Florida Supreme Court properly applied federal law to the facts of the case. Habeas relief is denied.

XVI. Mr. Evan's Death Sentence Constitutes Cruel and Unusual Punishment

In his sixteen claim for relief, Mr. Evans argues that because of his mental and emotional impairments, in combination with his age at the time of the offense makes his death sentence unconstitutional. *See* (D.E. 1 at 165). The State responds that because Mr. Evans is not mentally retarded nor was he a minor at the time the crime was committed, his death sentence does not violate the Eighth Amendment. *See* (D.E. 9 at 154). Mr. Evans first raised this claim in his state petition for writ of habeas corpus. The Florida Supreme Court denied his claim finding that Mr. Evans has never been "diagnosed as mentally retarded and, in fact, the record reflects that he has previously received verbal and performance IQ scores of 91 and 110, respectively" making him ineligible for relief under *Atkins v. Virginia* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). *Evans,* 995 So.2d at 954. Further, "[b]ecause Evans was nineteen at the time of the crime, his death sentence cannot be unconstitutional under *Roper"* The Florida Supreme Court is correct.

Here, Mr. Evans does not assert that he is mentally retarded or that he was under the age of eighteen at the time of a crime. Rather, he argues that the reasoning behind the United States Supreme Court's decisions in *Atkins* and *Roper* should make those decisions applicable to him. Mr. Evans is wrong. Mr. Evans's claim is premised on the argument *that Atkins* stands for something other

than what is explicitly stated which is that the execution of mentally retarded offenders is categorically prohibited by the Eighth Amendment to the U.S. Constitution. *Atkins,* 536U.S. at 321. Likewise, Mr. Evans would like the Court to make broaden the holding of *Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), to stand for something other than the clearly defined rule of law "that execution of individuals who were under 18 years of age at time of their capital crimes is prohibited by Eighth and Fourteenth Amendments." *Id.* Mr. Evans urges the Court, absent precedent, to create a class of persons (or perhaps just make a limited exception in Mr. Evans's case) who don't met the age and retardation criteria but who are still ineligible for the death penalty based on immaturity and emotional intelligence. The Court declines to do so. Mr. Evans meets neither criteria established by the Supreme Court where his death sentence would be cruel and unusual punishment. Habeas relief is denied.

XVII. Florida's Capital Sentencing Statute Violates Ring v. Arizona.

Mr. Evans contends that Florida's death penalty scheme—in which a jury recommends a sentence of life imprisonment or death but the trial court actually decides what sentence to impose—and his death sentence are unconstitutional in light of *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). *Ring* held that, under the Sixth Amendment, a sentencing court cannot, over a defendant's objections, make factual findings with

respect to aggravating circumstance necessary for the imposition of the death penalty. Such findings must, as a constitutional matter, be made by a jury. *Id.* at 609. Mr. Evans argues that his death sentence must be set aside under *Ring* because it was imposed by the trial court, which made factual findings as to the existence of aggravating factors. (D.E. 1 at 176–77).

Mr. Evans first argued this claim in his Rule 3.851 post-conviction motion.[24] On appeal of the denial of that motion, the Florida Supreme Court found that

> [i]n *Johnson v. State,* 904 So.2d 400 (Fla. 2005), which was the seminal Florida decision on the issue of the retroactivity of *Ring,* we held that a death sentence becomes final for purposes of *Ring* once the Court has affirmed the conviction and sentence on direct appeal and issued the mandate. *Id.* at 407. Thus, Evans's death sentence became final after this Court both affirmed on direct appeal and issued the mandate in February 2002. Because *Ring* was not decided until June 2002, Evans cannot rely on it to vacate his death sentence.

Evans, 995 So.2d at 952. As to the retroactivity issue, the Florida Supreme Court is correct. In *Schiro v. Summerlin,* 542 U.S. 348, 355–57, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004), the Supreme Court

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[24] Mr. Evans also argued this claim in his petition for writ of habeas corpus filed with the Florida Supreme Court. *Evans,* 995 So.2d at 952.

ruled that *Ring* would not be retroactively applied to cases which had become final before *Ring* was decided.

However, the Court finds that the Florida Supreme Court made an "unreasonable application of clearly established federal law" when it identified the correct legal rule from Supreme Court case law but unreasonably applied it to the facts of Mr. Evans's case. *See Putman,* 268 F.3d at 1241. Here, the court determined that Mr. Evans's "sentence became final after this Court both affirmed on direct appeal and issued the mandate in February 2002." *Evans,* 995 So.2d at 952. This is incorrect. Mr. Evans's death sentence became final (for retroactivity purposes) in October of 2002, when the Supreme Court denied certiorari in *Evans v. Florida,* 537 U.S. 951, 123 S.Ct. 416, 154 L.Ed.2d 297 (2002). *Ring* was decided in June of 2002 which makes it applicable to Mr. Evans's petition because his sentence was not final on direct review until October of 2002. *See Nix v. Sec'y, Dep't. of Corr.,* 393 F.3d 1235, 1237 (11th Cir. 2004); *see also Newland v. Hall,* 527 F.3d 1162, 1196 (11th Cir. 2008). Thus, *Ring* is to be applied to his case and the Court will review Mr. Evans's claim *de novo. See Mason v. Allen,* 605 F.3d 1114 (11th Cir. 2010) ("When, however, a claim is properly presented to the state court, but the state court does not adjudicate it on the merits, we review *de novo. Cone v. Bell,* 556 U.S.

449, 129 S.Ct. 1769, 1784, 173 L.Ed.2d 701 (2009).").[25]

On February 12, 1999, the penalty phase of Mr. Evans's trial began. The jury recommended death by a vote of nine to three. *See* (D.E. 12–13, Vol. 39 at 4460). They did so after the court explained which aggravating factors they might find based upon the evidence presented. The jury did not articulate which, if any, mitigating or aggravating circumstances they found in reaching their ultimate conclusion that Mr. Evans should be sentenced to death. *Id.* Thereafter, on March 8, 1999, the trial court conducted a *Spencer*[26] hearing. Each side presented the court with sentencing memoranda. *See* (D.E. 12–14, Vol. 40 at 4469). The State submitted additional letters from both of the victim's parents. *Id.* The defense presented the testimony of the defendant's mother, Sandra Kipp. *Id.* at 4479. Mr. Evans also addressed the court and made a statement declaring his innocence. *Id.* at 4491. On June 16, 1999, the trial court entered a detailed order outlining its findings.

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[25] In conducting the *de novo* review of Mr. Evans's claim, the Court notes that the Florida Supreme Court has "yet to conclude that a death sentence unsupported by a separate-conviction aggravator exempt from *Ring* or a unanimous penalty-phase finding of an aggravator—implicitly in a death recommendation or explicitly in a special verdict—violates neither the state nor federal constitutional right to trial by jury." *Coday v. State,* 946 So.2d 988, 1023 (Fla. 2006) (Pariente, J., *concurring,* in part, *dissenting,* in part). This is the factual scenario before the Court here.

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

> The trial court found the following in aggravation: (1) Evans had committed the crime for pecuniary gain (great weight)[27]; and (2) the murder was committed in a cold, calculated, and premeditated manner without any pretense of legal or moral justification ("CCP") (great weight). The trial court found only one statutory mitigator: Evans's age of nineteen when he committed the murder (little weight).FN7
>
> > FN7. The defense waived the following statutory mitigators: (1) lack of significant prior criminal history; (2) the defendant acted under the influence of another; (3) the defendant acted under any strong emotional duress; (4) impaired capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of the law; and (5) the victim's participation in or consent to the defendant's conduct.
>
> In addition, the trial court found and gave weight to the following nonstatutory mitigators: (1) Evans's good conduct while in jail (little weight); (2) Evans's good attitude and conduct while awaiting trial (little weight); (3) Evans had a difficult childhood

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[27] Mr. Evans was convicted solely of one count first-degree murder. *See* (D.E. 1 at 3). Therefore, the jury did not make any findings during the guilt phase that Mr. Evans had committed this crime for pecuniary gain.

> (little weight); (4) Evans was raised without a father (little weight); (5) Evans was the product of a broken home (little weight); (6) Evans suffered great trauma during childhood (moderate weight); (7) Evans suffered from hyperactivity and had a prior psychiatric history and a history of hospitalization for mental illness (moderate weight); (8) Evans was the father of two young girls (very little weight); (9) Evans believes in God (very little weight); (10) Evans will adjust well to life in prison and is unlikely to be a danger to others while serving a life sentence (very little weight); (11) Evans loves his family and Evans's family loves him (very little weight).

Evans, 808 So.2d at 99–100. Ultimately, the trial court adopted the jury's recommendation and sentenced Mr. Evans to death. *Id.* The trial court found that the two identified aggravating factors outweighed the mitigating factors as such a finding is required for the imposition of the death penalty. It is from this sentence that Mr. Evans seeks habeas corpus relief.

Florida's death penalty statute, in place at the time of Mr. Evans's resentencing, provided as follows:

> A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth

> in § 921.141 results in finding by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.

FLA. STAT. § 775.082(1). After Mr. Evans was convicted, a separate sentencing proceeding was conducted before a jury pursuant to § 921.141. Mr. Evans contends that Florida's sentencing statute violates the Sixth and Fourteenth Amendments under *Ring v. Arizona* . (D.E. 1 at 176–77). At the penalty phase, the trial court instructed the jury as follows:

> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole for twenty-five years.
>
> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.
>
> Among the mitigating circumstances you may consider, if established by the evidence, are age of the Defendant at the time of the crime, any other aspect of the Defendant's character, record, or background that would mitigate against the imposition of the death penalty.
>
> Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your

decision. If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.

A mitigating circumstance need not be proved beyond a reasonable doubt by the Defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it established.

The sentence that you recommend to the Court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations.

In these proceedings, it is not necessary that the advisory sentence of the Jury be unanimous. The fact that the determination of whether you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings.

Before you ballot, you should carefully weigh, sift, and consider the evidence, and all of it, realizing that a human life is at stake and bring to bear your best judgment in reaching your advisory sentence.

> If a majority of the jury determines that Paul Hawthorne Evans should be sentenced to death, your advisory sentence will be "A majority of the Jury, by a vote of 'blank,' advises and recommend to the Court that it impose the death penalty upon Paul Hawthorne Evans ."
>
> On the other hand, if by six or more votes the Jury determines that Paul Hawthorne Evans should not be sentenced to death, your advisory sentence will be, "The Jury advises and recommends to the Court that it impose a sentence of life imprisonment upon Paul Hawthorne Evans without possibility of parole for twenty-five years."
>
> You will now retire to consider your recommendation. When you have reached an advisory sentence in conformity with these instructions, that Form of Recommendation should be signed by your foreperson and returned to the Court.

(D.E. 12, Vol. 39 at 4441–43). If the jury had found that the state failed to prove a statutory aggravating circumstance beyond a reasonable doubt or that the aggravating circumstances proven were not sufficient enough to justify the death penalty, the jury was instructed not to recommend a death sentence. § 921.141(2). Next, when the jury decided that sufficient aggravating circumstances existed beyond a reasonable doubt, it then had to determine whether any mitigating circumstances outweighed the aggravating circumstances. *Id.* Pursuant to the

considerations listed in § 921.141(2), the jury heard evidence relevant to the nature of the crime and Mr. Evans's character; following deliberations, the jury rendered an advisory sentence of death by a vote of nine-to-three.[28]

Pursuant to state law, the jury was only required to make a recommendation as to Mr. Evans's sentence; the jury did not answer any interrogatories as to the finding of the existence of specific aggravating or mitigating circumstances, the vote of the jury as to each of them, or how the various circumstances were weighed.[29] *See State v. Steele,* 921 So.2d 538, 545–48 (Fla. 2005) (holding that

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[28] Under Florida's sentencing scheme for capital felonies, if six or more jurors determine that the defendant should be sentenced to death, the jury *may* recommend a death sentence instead of life imprisonment. Fla. Standard Jury Instructions in Criminal Cases § 7 .11 (5th ed.2005). On the other hand, if six or more jurors determine that the defendant should not be sentenced to death, the jury *must* recommend life imprisonment instead of a death sentence. *Id.*

[29] The jury did not have to find the existence of an aggravating circumstance unanimously; a majority of the jurors had to find at least one statutory aggravating circumstance beyond a reasonable doubt in order to ultimately recommend the death penalty. *State v. Steele,* 921 So.2d 538, 547–48 (Fla. 2005). In fact, the trial judge is explicitly prohibited by law from requiring the jury to make findings about aggravating factors through a verdict containing special interrogatories. *Id.* In *Steele,* the Florida Supreme Court implored the Florida Legislature to amend the death penalty statute to allow for unanimous jury findings of aggravators and the use of special verdict forms. *Id.* at 548–49. Despite that plea, no such legislative action has been taken to date.

Florida law does not presently permit a trial judge to require the jury to make findings about particular aggravating factors through a verdict form containing special interrogatories). The jury's recommendation was advisory.[30] Here, the sentencing judge, after weighing the statutory aggravating circumstances and both statutory and nonstatutory mitigating circumstances, adopted the jury's recommendation of a death sentence. *Evans,* 808 So.2d at 99–100; *see also* Fla. Stat. § 921.141(3). Mr. Evans argues that this process is unconstitutional under *Ring.*

In *Ring v. Arizona,* the United States Supreme Court held that capital defendants "are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. 584, 587, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). In that case, the trial jury convicted Ring of first-degree murder in Arizona. Under Arizona law, he could not have been sentenced to death, the statutory maximum penalty for first-degree murder, unless the trial judge, sitting alone, conducted a separate sentencing hearing and determined that at least one statutory aggravating factor existed beyond a reasonable doubt. *Ring,* 536 U.S. at 592, 597. State law authorized the judge to

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[30] Although the jury's recommendation was advisory, the sentencing judge had to give it "great weight." *Tedder v. State,* 322 So.2d 908, 910 (Fla. 1975). The sentencing judge could not have overriden a jury recommendation of life imprisonment if the jury recommendation had a "reasonable basis." *Hall v. State,* 541 So.2d 1125, 1128 (Fla. 1989).

sentence a first-degree murder defendant to death *only* if there was at least one aggravating factor and no mitigating circumstances sufficiently substantial to call for leniency. *Ring,* 536 U.S. at 593. Otherwise, the sentence would be life imprisonment. *Ring,* 536 U.S. at 596. In other words, based solely on the jury verdict finding Ring guilty of first-degree murder, the maximum punishment Ring could have received was life imprisonment. *Ring,* 536 U.S. at 597. The trial judge found two aggravating factors and one nonstatutory mitigating factor that was insufficiently substantial to call for leniency: the trial judge sentenced Ring to death.[31] *Ring,* 536 U.S. at 595.

On appeal, Ring argued that Arizona's capital sentencing scheme violated the Sixth and Fourteenth Amendments to the United States Constitution because it entrusted to a judge the finding of a fact raising the defendant's maximum penalty. *Ring,* 536 U.S. at 595. The Court framed the question presented as whether, given that in "in Arizona, a death sentence may not legally be imposed ... unless at least one aggravating factor is found to exist beyond a reasonable doubt, ... the Sixth Amendment's jury trial guarantee, made applicable to the States by the Fourteenth Amendment,

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[31] The two aggravating factors found by the judge were that Ring committed the offense in expectation of receiving something of pecuniary value, and the offense was committed in an especially heinous, cruel or depraved manner. The one nonstatutory mitigating factor was that Ring had a minimal criminal record. *Ring,* 536 U .S. at 595.

requires that the aggravating factor determination be entrusted to the jury." *Ring,* 536 U.S. at 597 (internal quotations omitted). The Court noted that Ring presented a narrow claim. First, as no aggravating circumstance related to past convictions in his case, he was not challenging *AmendarezTorres v. United States,* 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), which held that the fact of a prior conviction may be found by the judge even if it increases the statutory maximum sentence. *Ring,* 536 U.S. at 597 n. 4. Second, Ring made no Sixth Amendment claim with respect to mitigating circumstances. *Id.* Finally, Ring did not argue that the Sixth Amendment required the jury to ultimately decide whether the death penalty should be imposed; Ring did not challenge judicial re-weighing of factors found by the jury. *Id.; see also demons v. Mississippi,* 494 U.S. 738, 745, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990) (holding that "an appellate court [may] invalidate[ ] one of two or more aggravating circumstances found by the jury, but affirm[ ] the death sentence after itself finding that the one or more valid remaining aggravating factors outweigh the mitigating evidence."). It is important to note what *Ring* is and what it is not, as discussed in more detail below.

In *Ring,* the Supreme Court decided to overrule its decision in *Walton v. Arizona,* 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), to the extent that it allowed a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. *Ring,* 536 U.S. at 609. Under the then-current Arizona law, the finding

of one aggravating circumstance exposed the defendant to a greater punishment (death) than that authorized by the jury's guilty verdict alone (life imprisonment). "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." *Ring,* 536 U.S. at 609 (quoting *Apprendi v. New Jersey,* 530 U.S. at 494 n. 19). This is the foundation upon which Mr. Evans makes his *Ring* claim.

The *Ring* Court held that *Walton v. Arizona* and *Apprendi v. New Jersey* were irreconcilable and that its Sixth Amendment jurisprudence could not be home to both: "Capital defendants, no less than noncapital defendants ... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. at 589.

In *Walton v. Arizona,* the Court held that Arizona's sentencing scheme was compatible with the Sixth Amendment because the additional facts found by the judge, which authorized the imposition of death, qualified as sentencing considerations, not as "element[s] of the offense of capital murder." 497 U.S. 639, 649, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990). *In Apprendi v. New Jersey,* the defendant-petitioner was convicted of second-degree possession of a firearm, an offense carrying a maximum penalty of ten years under New Jersey law. 530 U.S. 466, 469–70, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The sentencing judge's finding that the crime had been

motivated by racial animus triggered application of New Jersey's hate crime enhancement, which doubled Apprendi's maximum authorized sentence. The judge sentenced Apprendi to twelve years in prison, two years over the maximum that would have applied but for the enhancement. The *Apprendi* Court held that the sentence violated Apprendi's right to a "jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." 530 U.S. at 477. According to the Court, that right attached not only to Apprendi's weapons offense but also to the hate crime enhancement (the aggravating circumstance in that case). The *Apprendi* Court held that the Sixth Amendment does not permit a defendant to be "expose[d] ... to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." 530 U.S. 466, 483, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The *Apprendi* Court held that this prescription governs even if the State characterizes the additional findings made by the judge as "sentencing factor[s]." *Id.* at 492. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. Thus, according to *Apprendi,* if a State makes an increase in a defendant's punishment contingent on a finding of fact, that fact, no matter how the State labels it, must be found by a jury beyond a reasonable doubt. 530 U.S. at 482–83.

The *Apprendi* Court asserted that *Walton* could be reconciled with *Apprendi:* the key distinction was

that a conviction of first-degree murder in Arizona carried a maximum sentence of death. "[O]nce a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed." 530 U.S. at 497.

The *Apprendi* dissent called the Court's distinction of *Walton* "baffling": a defendant convicted of first-degree murder could not receive a death sentence unless a judge made the factual determination that a statutory aggravating factor existed. 530 U.S. at 538. Without that critical finding, the maximum sentence was life imprisonment. *Id.* According to *Apprendi's* dissenters, "If a State can remove from the jury a factual determination that makes the difference between life and death, as *Walton* holds it can, it is inconceivable why a State cannot do the same with respect to a factual determination that results in only a 10–year increase in the maximum sentence to which a defendant is exposed." 530 U.S. at 537 (opinion of O'Connor, J.). Ultimately, the *Ring* court held "that *Walton* and *Apprendi* are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both. Accordingly, we overrule *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Ring,* 536 U.S. at 609.

While *Ring* in certain respects has a limited holding, it does clearly provide that the Constitution

requires that the jury find, beyond a reasonable doubt, any aggravating factor that must be found before the death penalty may be imposed. Implicit in this holding is that the jury's fact finding be meaningful. As the Florida sentencing statute currently operates in practice, the Court finds that the process completed before the imposition of the death penalty is in violation of *Ring* in that the jury's recommendation is not a factual finding sufficient to satisfy the Constitution; rather, it is simply a sentencing recommendation made without a clear factual finding. In effect, the only meaningful findings regarding aggravating factors are made by the judge.

Here, the death penalty is a penalty exceeding the maximum penalty (of life imprisonment without the possibility of parole until after 25 years) and, therefore, requires that the additional fact finding required to "enhance" Mr. Evans's sentence must be made by a jury. As the United States Supreme Court instructed in *Apprendi* and reaffirmed in *Ring,* "the relevant inquiry is one not of form but of effect." *Ring,* 536 U.S. at 604. Here, like the Arizona sentencing scheme in *Ring,* the statute authorizes "a maximum penalty of death only in a formal sense for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty." *Id.* Simply put, without a separate hearing and a finding that aggravating factors exist and outweigh any mitigating factors, the defendant cannot be sentence to death. It is that critical finding—the finding of an aggravating factor—which increases the maximum

authorized punishment. This requires a jury determination.[32] "[T]he relevant 'statutory maximum,' this Court has clarified, 'is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.'" *Cunningham v. California,* 549 U.S. 270, 290, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007) (quoting *Blakely,* 542 U.S. at 303–04). Accordingly, the death penalty is an "enhanced" sentence under Florida law and the Sixth Amendment requires that the enumerated aggravating factors be found by a jury. *See Ring,* 536 U.S. at 609.

In Florida, a separate sentencing hearing is conducted in front of a jury. The jury returns its recommendation as to life imprisonment or death based on the existence of an aggravating circumstance which then outweighs any mitigating circumstances. There are no specific findings of fact made by the jury. Indeed, the reviewing courts never know what aggravating or mitigating factors the jury found. *See State v. Steele,* 921 So.2d at 545–48. It is conceivable that some of the jurors did not find the

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[32] As noted elsewhere in this Order, there are certain exceptions to this rule, such as where the aggravating factor relates to the existence of prior convictions. The Court notes, however, that this case does not fall within that exception or within any of the limitations on the holding in *Ring* that the Supreme Court listed in footnote 4 of the *Ring* decision. *See Ring,* 536 U.S. at 597 n. 4. None of the aggravating factors in this case related to prior convictions. Furthermore, as noted above, the jury did not make a unanimous finding regarding an aggravating factor during the penalty phase of Evans's trial.

existence of an aggravating circumstance, or that each juror found a different aggravating circumstance, or perhaps all jurors found the existence of an aggravating circumstance but some thought that the mitigating circumstances outweighed them. There need not be anything more than a simple majority vote to recommend the death sentence to the judge. After the jury's recommendation, there is a separate sentencing hearing conducted before the judge only. At that hearing both the State and the defendant may put on additional evidence not presented to the jury. The judge then determines and imposes the sentence. The defendant has no way of knowing whether or not the jury found that same aggravating factors as the judge. Indeed, the judge, unaware of the aggravating factor or factors found by the jury, may find an aggravating circumstance that was not found by the jury while failing to find the aggravating circumstance that was found by the jury. Under the current statute, the State could have presented additional evidence that Mr. Evans qualified for an entirely different aggravating factor which the jury had never considered. *See generally Williams v. State,* 967 So.2d 735, 765 (Fla. 2007) (striking an aggravating factor found by a sentencing judge not on the basis that the factor was not presented to the jury in the sentencing phase—which it was not—but instead on the basis that the factor was not supported by competent, substantial evidence). Moreover, the trial judge did not merely re-weigh aggravating factors found by the jury; he made his own separate findings. Without a special verdict

form, it is possible that the trial judge found the existence of one aggravating factor while the jury found the existence of another, resulting in a sentence of death for a defendant based on an invalid aggravator, i.e., an aggravator not found by the jury.[33] This cannot be reconciled with *Ring.*

More troubling is that there is nothing in the record to show that Mr. Evans's jury found the existence of a single aggravating factor by even a simple majority. The jury was presented with two aggravating factors for its consideration. (D.E. 12, Ex. A., Vol. 39 at 4439–41). As the final vote was nine to three, it is possible that the nine jurors who voted for death reached their determination by having four jurors find one aggravator while five jurors found another. Either of these results would

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[33] The Florida Supreme Court reviewed this issue on a very limited certified question from the Second District Court of Appeal of an order from the trial court requiring a majority of jurors to agree on existence of particular statutory aggravating factor. The Court found that "[u]nless and until a majority of this Court concludes that *Ring* applies in Florida, *and* that it requires a jury's majority (or unanimous) conclusion that a particular aggravator applies, or until the Legislature amends the statute (see our discussion at section C below), the court's order imposes a substantive burden on the state not found in the statute and not constitutionally required." *State v. Steele,* 921 So.2d 538,545–46 (Fla. 2006). Section C is entitled: "The Need for Legislative Action." *Id.* at 548. In Section C, the court begins with the fact that Florida is "now the only state in the country that allows a jury to decide that aggravators exist *and* to recommend a sentence of death by a mere majority vote." *Id.* Here, the Court finds that *Ring* does apply in Florida and the Florida sentencing statute is unconstitutional.

have the aggravator found by less than a majority of the jurors. Although the Court concedes that unanimity may not be required, it cannot be that Mr. Evans's death sentence is constitutional when there is no evidence to suggest that even a simple majority found the existence of any one aggravating circumstance. *See generally Apodaca v. Oregon,* 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972) (unanimous jury verdicts required in federal trials but not in state trials). Any one singular aggravating factor may not have been found beyond a reasonable doubt by a majority of the jury. The Court's interpretation of *Ring* is such that, at the very minimum, the defendant is entitled to a jury's majority fact finding of the existence of an aggravating factor; not simply a majority of jurors finding the existence of any unspecified combination of aggravating factors upon which the judge may or may not base the death sentence.[34] Because the jury

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[34] The Court notes that in *Ring,* the Supreme Court identified four states with "hybrid" death penalties similar to but not identical to Arizona's. *Ring,* 536 U.S. at 608 n. 6. The "hybrid" states provided for advisory verdicts from juries but left ultimate sentencing determinations to the judge. *Ring,* 536 U.S. at 608 n. 6. Those states were Florida, Alabama, Delaware, and Indiana. *Id.* Of those four states, two—Delaware and Indiana—require that juries make unanimous findings regarding particular, specified aggravating factors. *See* 11 Del. Code. § 4209 ("In order to find the existence of a statutory aggravating circumstance ... beyond a reasonable doubt, the jury must be unanimous as to the existence of *that* statutory aggravating circumstance. As to any statutory aggravating circumstances ... which were alleged but for which the jury is not unanimous, the jury shall report the number of the affirmative and negative votes on *each such circumstance* .... the Court shall discharge

may have not reached a majority finding as to any one aggravating factor, the Florida sentencing statute leaves open the very real possibility that in substance the judge still makes the factual findings necessary for the imposition of the death penalty as opposed to the jury as required by *Ring.* [35] Habeas relief is granted.

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that jury after it has reported its findings *and* recommendation") (emphasis added); Ind. Code Ann. § 35–50–2–9 ("The court shall instruct the jury that, in order for the jury to recommend to the court that the death penalty or life imprisonment without parole should be imposed, the jury must find at least one (1) aggravating circumstance beyond a reasonable doubt ... and shall provide a special verdict form for each aggravating circumstance alleged"). Alabama, which presently requires at least ten jurors to recommend the death penalty, has proposed legislation pending that would commit the sentencing decision entirely to the jury. *See* 2011 Alabama Senate Bill No. 247. Florida law, which requires a mere majority for a death penalty recommendation and forecloses special verdict forms to record specific findings by the jury, is an outlier.

[35] Further under the current Florida statute, the judge can reject the jury's recommendation and find for death even when the jury finds the existence of facts that do not support a death sentence. This emphasizes how the jury's "factual findings" at the sentencing phase—to the extent they are findings—are meaningless. The jury could fail to find any aggravating circumstance at all, and the judge could nevertheless find the jury's recommendation unreasonable, make findings, and impose a death sentence based on those findings. *See* Fla. Stat. § 921.141(3) This too cannot be reconciled with the Constitutional requirements of *Ring* because a defendant is entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum

VI. Conclusion

It is **ORDERED** and **ADJUDGED** that

1. Petitioner's Petition for Writ of Habeas Corpus (D.E. No. 1) is **GRANTED** in part and **DENIED** in part. A Writ of Habeas Corpus shall issue upon the bases stated in Mr. Evans's seventeenth claim for habeas relief, Florida's Capital Sentencing Statute Violates *Ring v. Arizona.* It is the Order of the Court that Petitioner, Paul Hawthorne Evans, should receive a new sentencing hearing consistent with the decision of the Court before an untainted jury within ninety (90) days of the date of this Order, unless Respondent files a timely appeal and obtains a stay of this Order.

2. This case is **CLOSED** and all pending motions are **DENIED as MOOT.**

DONE AND ORDERED.

/ss/
JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

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punishment. However, as this is not the factual scenario before the Court, that issue is left for another day.

Appendix D

Supreme Court of Florida.

Paul H. EVANS, Appellant,
v.
STATE of Florida, Appellee.
Paul H. Evans, Petitioner,
v.
Walter A. McNeil, etc., Respondent.

Nos. SC05–1617, SC07–494.
Aug. 28, 2008.
Rehearing Denied Nov. 21, 2008.

PER CURIAM.

Paul H. Evans appeals an order of the circuit court denying his motion to vacate his conviction of first-degree murder and sentence of death filed under Florida Rule of Criminal Procedure 3.851 and petitions this Court for a writ of habeas corpus. We have jurisdiction. *See* art. V, § 3(b)(1), (9), Fla. Const. For the following reasons, we affirm the trial court's denial and deny the habeas petition.

FACTS AND PROCEDURAL HISTORY

In the early morning hours of March 24, 1991, Alan Pfeiffer was found murdered in his trailer as a result of three gunshot wounds. After almost six years without an arrest, the police investigation ultimately led to four co-conspirators: Connie Pfeiffer, the victim's wife; Paul Evans; Sarah Thomas, Evans' girlfriend; and Donna Waddell, Thomas and Evans' roommate. The co-conspirators,

with Evans as the "mastermind," collaborated on a plan to murder Pfeiffer. *Evans v. State,* 808 So.2d 92, 95–96 (Fla. 2001).

Pursuant to the plan, Connie, Waddell and Evans went over to Pfeiffer's trailer on the morning of the murder and, among other things, placed electronic equipment close to the back door to make it look like a robbery. Evans told the others what to say and stated that he planned to hide behind the furniture and shoot Pfeiffer when he came home. Later that evening, Evans, Waddell and Thomas went to a local fair and then left the fair in order to arrive at Pfeiffer's trailer by dusk. Waddell and Thomas left Evans inside, locked the door, and went back to the fair. After approximately one to two hours, they returned to the pickup site to meet Evans and then went back to the fair to meet up with Connie. *Id.* at 96–97.

The next morning, the Vero Beach Police Department was called to the trailer because of complaints due to loud music. When the police arrived, the south door of the trailer was open and the victim's body was lying on the living room floor. Although there was no sign of forced entry and the victim was still wearing two gold chains and had money in his pocket, the house was in disarray. In addition, a camcorder, television and VCR, which were rented from Pfeiffer's place of work, were missing from the trailer and never recovered. *Id.* at 97.

After six years and no arrests, the police reopened their investigation and focused on Evans, Connie,

Waddell and Thomas. Thomas admitted involvement and agreed to contact Waddell while wearing a wire. Based on the cooperation of Thomas and Waddell, Connie and Evans were arrested for the murder. *Id.* at 98.[1]

During the guilt phase of Evans' trial,[2] the State presented the testimony of several witnesses to piece together the events of the murder. Waddell and Thomas testified about the plan and how the events on the day of the murder and the time period after unfolded.[3] One of Pfeiffer's neighbors, Leo Cordary,

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[1] Connie was prosecuted and convicted of first-degree murder and received a life sentence. *Id.* at 96 n. 1. Waddell agreed to plead guilty to second-degree murder in exchange for providing a sworn statement and testifying on behalf of the State. *Id.* at 95. Thomas agreed to testify on behalf of the State and was never charged for her involvement in this murder. *Id.*

[2] Evans' first trial resulted in a hung jury and the judge declared a mistrial during voir dire during his second trial. Evans was finally convicted at his third trial, which is the subject of his postconviction motion at issue in this case.

[3] Waddell and Thomas were not in agreement about certain circumstances surrounding the murder. Although both witnesses agreed that they eventually met Evans at the prearranged site, Waddell testified that they immediately picked him up, whereas Thomas testified that they drove around for a while, parked in a gravel parking lot, went back to the fair for another 30 to 45 minutes, and then picked up Evans. *Id.* at 96–97, 97 n. 3. Additionally, as to when the gun was discarded,

> Thomas stated that she and Evans disposed of the gun a few days after the murder in a canal so that fingerprints would be hard to find. By contrast, Waddell testified that the three of them disposed of the gun in a

testified that he heard the gunshots between 8 and 8:30 p.m., but did not remember seeing anyone run from the trailer. The defense presented no witnesses during the guilt phase. The jury found Evans guilty of first-degree murder.

At the penalty phase, Evans presented the testimony of his parents and some family members who testified about his emotional and behavioral problems and his poor childhood. The defense also presented two psychology experts who testified as to his ability to do well in a structured environment. Other than the testimony of his parents and family members, the defense presented no expert testimony as to any specific mental illness or impairment. Ultimately, the jury recommended death by a vote of nine to three. The trial court found two aggravators,[4] one statutory mitigator,[5] and eleven nonstatutory

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> canal that night after shooting off the rest of the bullets. Moreover, according to Waddell, after they disposed of the gun, they went to a dirt road where Evans changed clothes and discarded the dark colored shirt and his shoes. He kept the dark colored pants.
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> *Id.* at 97 n. 4. They also gave conflicting testimony about when Evans burned his pants following the murder. However, the testimony confirmed that the camcorder and television that were allegedly given to Evans as payment were destroyed after the murder.

[4] The trial court found the following: (1) the murder was committed for pecuniary gain (great weight); and (2) the murder was committed in a cold, calculated, and premeditated manner ("CCP") (great weight). *Id.* at 99.

[5] The trial court found that Evans was nineteen when he committed the murder (little weight). *Id.*

mitigating circumstances.[6] The trial court concluded that the aggravation outweighed the mitigation and sentenced Evans to death. *Id.* at 99–100. This Court affirmed the conviction and sentence on direct appeal.[7]

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[6] "The trial court found and gave weight to the following nonstatutory mitigators: (1) Evans' good conduct while in jail (little weight); (2) Evans' good attitude and conduct while awaiting trial (little weight); (3) Evans' difficult childhood (little weight); (4) Evans was raised without a father (little weight); (5) Evans was the product of a broken home (little weight); (6) Evans suffered great trauma during childhood (moderate weight); (7) Evans suffered from hyperactivity and had a prior psychiatric history and a history of hospitalization for mental illness (moderate weight); (8) Evans was the father of two young girls (very little weight); (9) Evans believes in God (very little weight); (10) Evans will adjust well to life in prison and is unlikely to be a danger to others while serving a life sentence (very little weight); (11) Evans loves his family and Evans' family loves him (very little weight). The trial court found that Evans failed to establish that he was immature, and therefore gave this proposed mitigator no weight. Moreover, the court refused to recognize Evans' artistic ability as a mitigating circumstance and therefore gave this no weight." *Id.* at 99.

[7] Evans raised the following claims on direct appeal: "(1) the trial court erred in denying Evans' motion to quash the indictment or dismiss the charge; (2) reversal is required under *Anderson v. State,* 574 So.2d 87 (Fla. 1991), because the State's testimony at trial contradicted the case it presented to the grand jury; (3) the trial court erred in excluding the testimony concerning cannabanoids in the victim's blood; (4) the trial court erred in limiting the cross-examination of Detective Brumley to exclude hearsay; (5) the trial court erred in closing individual voir dire to Evans' family; (6) the trial court erred in denying Evans' motion for a statement of particulars and in allowing the State to argue in the alternative that Evans was

Evans timely filed his motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851, alleging the following six claims for relief: (I) several instances of ineffective assistance of counsel during the guilt phase and the State's withholding exculpatory and impeachment evidence in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963);[8] (II) several instances of

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the shooter or a principal; (7) the State's closing argument comments during the guilt phase were reversible error; (8) the State's voir dire examination of the jury regarding the testimony of coconspirators or codefendants constituted fundamental error; (9) Evans' death sentence is disproportionate; (10) Evans' death sentence is either disproportionate or unconstitutional because the State presented the jury with the alternative theories that Evans was either the shooter or a principal; (11) the State's closing argument comments during the penalty phase were fundamental error; (12) the trial court erred in giving no weight to valid mitigation; (13) the trial court erred in imposing the death penalty when the jury made no unanimous findings of fact as to death eligibility [under *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)]; (14) the trial court erred in finding that the murder was both cold, calculated, and premeditated and that the murder was committed for pecuniary gain (improper doubling)." *Id.* at 100 n. 8.

[8] Evans alleged the following ineffective assistance of counsel claims: (1) failing to object to an individual juror's participation in trial; (2) failing to timely request a hearing pursuant to *Richardson v. State,* 246 So.2d 771 (Fla. 1971); (3) failing to object to inflammatory and prejudicial comments elicited by the State; (4) failing to object to improper bolstering of witness credibility; (5) failing to object during the State's closing argument regarding mutually exclusive factual theories of prosecution; and (6) failing to present evidence.

ineffective assistance of counsel during the penalty phase;[9] (III) ineffective assistance for failing to object to several objectionable jurors and failing to object to a limitation on backstriking; (IV) cumulative error; (V) denial of due process by rules prohibiting juror interviews to uncover constitutional error; and (VI) Evans' sentence violates *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

At the evidentiary hearing,[10] Evans presented the testimony of several witnesses in support of the guilt and penalty-phase ineffective assistance claims, including his trial attorneys who testified as to their strategies during the guilt and penalty phases, alibi witnesses, two mental health experts, and two family members. Mark Harllee, guilt-phase counsel, testified about his strategy for deciding not to present any witnesses at trial. Harllee testified that he chose this strategy because the testimony of the potential witnesses was not credible, did not provide a complete alibi, or was too unspecific to contradict the State's evidence, and he did not want to forgo the

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[9] Evans alleged the following ineffective assistance of counsel claims during the penalty phase: (1) failing to present mitigation; and (2) failing to object to serious misstatements of the law, including that the jury's role was merely advisory and that the burden of proof rested with Evans to prove that mitigation outweighed aggravation.

[10] Evans was granted an evidentiary hearing on all claims except his claim that counsel was ineffective during the penalty phase for failing to object to serious misstatements of law.

chance to have the opening and rebuttal closing argument by presenting these witnesses. He also discussed his reasons for not striking certain jurors during voir dire and his reasons for not objecting to several comments elicited by the State. Diamond Litty, who served as Evans' penalty phase counsel and has been the Public Defender for the Nineteenth Judicial Circuit since 1992, testified about her strategy of using Evans' parents to present the mental mitigation and utilizing the mental health experts to discuss his ability to be a good inmate, which was essentially to limit the introduction of damaging evidence contained in Evans' school and medical records.

Evans also presented the testimony of several witnesses he alleges should have been called during the guilt phase, including Rosa Hightower, Jesus Cruz, Chris Evers, Mindy McCormick, and Anthony Kovaleski. As to deficiencies in the penalty phase, Evans presented the testimony of two of his aunts, Patricia Dennis and Sandy Kipp, who testified about his poor childhood and behavioral problems. Then, Evans called two new mental health experts, Dr. Seth Silverman and Dr. Philip Harvey, who discussed in detail their opinions that Evans was misdiagnosed throughout his life and that he suffers from both conduct and cognitive disorders, based on an abnormal EEG and unusual thought processes. Specifically, Dr. Silverman testified that Evans has schizoid/schizotypal personality disorder and Dr. Harvey testified that Evans suffered from "failure to thrive" disorder as an infant, which is consistent

with an abnormal EEG and someone with significant discrepancy between verbal and nonverbal IQ scores.

After holding a three-day evidentiary hearing, the trial court issued a detailed order denying relief on all claims. Evans now appeals the trial court's denial of thirteen separate claims.[11] In addition, Evans has filed a petition for writ of habeas corpus, raising three claims. [12]

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[11] Evans has appealed the denial of the following claims: (1) denial of access to public records, whereby the State withheld material impeachment evidence; (2) guilt-phase ineffective assistance for failing to present evidence; (3) guilt-phase ineffective assistance for failing to object to an individual juror's participation in the trial; (4) guilt-phase ineffective assistance for failing to timely request a *Richardson* hearing; (5) guilt-phase ineffective assistance for failing to object to inflammatory and prejudicial comments elicited by the State; (6) guilt-phase ineffective assistance for failing to object to improper bolstering of witness credibility; (7) guilt-phase ineffective assistance for failing to object to State's closing argument regarding mutually exclusive factual theories of prosecution; (8) the State withheld material exculpatory or impeachment evidence; (9) penalty-phase ineffective assistance for failing to present mitigation evidence; (10) ineffective assistance of counsel at voir dire, for failing to challenge an objectionable juror for cause, failing to reassert his challenge for cause against another unqualified juror, and failing to object to the court limiting his ability to backstrike members of the panel; (11) the trial court failed to conduct an adequate cumulative error analysis; (12) due process violation because the rules prohibit Evans from interviewing jurors to determine if constitutional error was present during deliberations; and (13) Evans' sentence violates *Ring.*

[12] Evans raises the following claims: (1) ineffective assistance of appellate counsel for failing to raise meritorious issues on direct appeal, including the denial of Evans' motion for a mistrial and

ANALYSIS

I. MOTION FOR POSTCONVICTION RELIEF

A. Public Records Request

In his first issue on appeal, Evans asserts that his due process rights were violated when the trial court denied his motion for public records. Specifically, Evans sought the disclosure of a letter from Assistant State Attorney Lawrence Mirman sent to Diamond Litty and Mark Harllee, defense counsel from Evans' trial, which purportedly contained responses to areas of questioning to be asked by postconviction counsel at the evidentiary hearing. Based on our decision in *Kearse v. State,* 969 So.2d 976 (Fla. 2007), we affirm the trial court's denial.

In *Kearse,* the assistant state attorney sent the defendant's trial counsel, who was listed as both a State and defense witness at the evidentiary hearing, a letter in anticipation of the attorney's testimony. The letter contained the state attorney's "mental impressions" about the case and about the ineffective assistance claims that were raised in

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request for a *Richardson* hearing based on *Brady* and discovery violations, and the denial of Evans' motion for a mistrial and *Richardson* hearing when the State's witness improperly and without prior notice testified as to the character of Evans; (2) Evans' sentence of death constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution because of his mental impairments and his age at the time of the crime; and (3) Florida's capital sentencing procedure deprived Evans of due process rights to notice and a jury trial under *Ring* and *Apprendi.*

Kearse's postconviction motion. *Id.* at 988–89. The trial court conducted an in-camera examination and ruled that, given the nature of the letter and the fact that counsel was listed as a witness for both parties, the letter was attorney work product exempt from disclosure. *See id.* at 988. We held that the letter "clearly fits within the exemption of attorney work product prepared with regard to the ongoing postconviction proceedings" and affirmed the trial court's decision. *Id.* at 989.

Contrary to Evans' contention that the letter went beyond mere witness preparation, the State is correct that the letter contains nothing more than the state attorney's impressions of the pending litigation. As in *Kearse,* the letter here was written by an agency attorney, contained his mental impressions about the claims raised in the postconviction motion, and was produced exclusively for the pending evidentiary hearing as contemplated in section 119.071(1)(d)1, Florida Statutes (2007).[13] 969 So.2d at 989. Accordingly, we affirm the trial court's denial.

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[13] Section 119.071(1)(d) exempts the following records from disclosure:

> A public record that was prepared by an agency attorney ... or prepared at the attorney's express direction, that reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency, and that was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or that was prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings....

B. Ineffective Assistance of Counsel

Evans next raises several ineffective of counsel claims. Following the United States Supreme Court's decision in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), this Court has held that for ineffective assistance of counsel claims to be successful, two requirements must be satisfied:

> 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. A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied.

Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986) (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. *See Sochor v. State,* 883 So.2d 766, 771–72 (Fla. 2004).

1. Ineffective Assistance at Voir Dire

Evans next contends that counsel provided ineffective assistance during voir dire by failing to object when the trial court limited his right to back strike unqualified members of the panel and by allowing two unqualified jurors, Schumann and Combs, to sit on the panel. As to the issue of back striking, the trial court conducted further voir dire to fill a vacancy on the panel and gave each side additional peremptories to do so. Defense counsel asked whether the parties could back strike and the judge, although initially indicating that he wanted to complete jury selection, confirmed that he would not prohibit the defense from further back striking. The record indicates that the judge was frustrated and wanted to complete jury selection; however, competent, substantial evidence supports the trial court's finding that the judge never enforced such a prohibition and counsel therefore cannot be deficient for failing to object.

Evans also asserts that counsel was ineffective for failing to challenge juror Schumann for cause or take advantage of back striking to remove her from the jury because of her views on the death penalty. Although juror Schumann clearly supported the death penalty and initially indicated that a case of self-defense would be the only time she would recommend life, she immediately confirmed that she would listen to the judge's instructions, "consider all circumstances" and follow the law. Based on her clear confirmation of her ability to follow the law and counsel's belief that she would be a good guilt-phase

juror, counsel's decision not to challenge juror Schumann was reasonable and a matter of trial strategy. *See Dufour v. State,* 905 So.2d 42, 54–55 (Fla. 2005); *cf. Harvey v. Dugger,* 656 So.2d 1253, 1256 (Fla. 1995) (concluding that counsel's decision not to strike a juror who appeared biased as to guilt but favorable as to the sentence was reasonable).

Evans' last assertion in this claim is that counsel was ineffective for failing to reassert his challenge for cause against juror Combs or use a peremptory challenge to remove him from the jury when Combs stated that he knew two potential witnesses. However, even if counsel was deficient in failing to object based upon juror Combs' potential bias, we conclude that Evans cannot demonstrate prejudice because neither of the identified witnesses testified during the trial. Accordingly, we affirm the trial court's denial of this claim.

2. Failure to Present Evidence

Evans asserts that the trial court erred in denying his claim that counsel provided ineffective assistance by failing to present certain evidence. Evans first asserts that counsel was ineffective for failing to present the testimony of Cruz, Magia, and Lynch, who could have contradicted the State's purported timing of the murder. At the evidentiary hearing, Evans did not call Magia, but presented the testimony of Cruz, who testified that he lived with Magia at the time, that they were both extremely drunk that night, and that he has no recollection of looking at his watch that evening, but believes he heard the gunshots around 9:30 or 10 p.m. Cruz also

stated that he broke his neck in an accident in 1997, which was between the night of the murder and the trial in 1999, and has had a memory lapse ever since. Trial counsel clearly had tactical reasons for not calling Magia or Cruz to testify, including the fact that both had questionable credibility and were admittedly drunk on the night of the murder, and Cruz had a memory lapse about when he heard the gunshots; thus, counsel's decision not to present their testimony does not constitute ineffective assistance. *See Whitfield v. State,* 923 So.2d 375, 381 (Fla. 2005) (holding counsel not deficient for deciding, after considering alternatives, not to present witnesses who were neither good historians nor articulate).

William Lynch, who passed away before the evidentiary hearing, originally gave a statement to the police that he heard gunshots around 10:30 p.m. However, counsel testified that he conducted background research attempting to find Lynch and would have considered presenting his testimony had he located him. In fact, counsel filed a motion to quash the indictment for undue delay based in part on an inability to locate witnesses such as Lynch. Because it is clear from the record that counsel made reasonable attempts to locate Lynch but was unable to find him, Evans cannot establish that counsel was ineffective for failing to call him at trial. *See White v. State,* 964 So.2d 1278, 1286 (Fla. 2007) ("A defendant cannot establish ineffective assistance of counsel based on counsel's failure to call a witness who is unavailable.").

Evans also asserts that counsel was ineffective for failing to present the testimony of three alibi witnesses, Rosa Hightower, Anthony Kovaleski, and Christopher Evers. Counsel testified that he investigated Hightower because she had originally informed the defense investigator that she was with Evans at the fair sometime between 6 and 7 p.m., but she later told him that she was not with Evans the entire time at the fair and did not remember seeing him again that night. Counsel also investigated Kovaleski, who said he saw Evans at the fair near dusk and that he walked around with him for about an hour. However, counsel testified that sunset was at 6:34 p.m., which meant that if Kovaleski and Evans met at dusk or sometime around 6 p.m., it would have left enough time for Evans to leave the fair to reach Pfeiffer's trailer. Because the testimony of both witnesses, as known to Harllee at the time of trial, offered an incomplete alibi and counsel made a strategic decision not to present their testimony, counsel's performance was not deficient. *See Reed v. State,* 875 So.2d 415, 429–30 (Fla. 2004) (rejecting ineffective assistance claim where alibi defense is not complete).[14]

Evans also contends that counsel was deficient for failing to present the testimony of Evers, Connie

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[14] Counsel's decision was also reasonable because presenting Kovaleski would have opened the door to damaging testimony on cross-examination. Kovaleksi had been convicted of several felony offenses involving crimes of dishonesty, his demeanor rendered him not credible, and he had previously allowed his wife to have sex with Evans in front of him.

Pfeiffer's twelve-year-old son who was at the fair with her on the night of the murder. Evans asserts that counsel should have interviewed Evers as an alibi witness because he stated that he saw Evans at the fair around 8 p.m. and for impeachment purposes because his testimony that Waddell drove him home at 8 p.m. contradicted her testimony at trial. However, Evers admitted that he had no reason to be watching the clock that evening, that he was not really sure about the timing, and that there was a substantial amount of time at the fair that he was neither with Waddell nor with Evans. Counsel's failure to interview this single witness, Connie's twelve-year old son, does not render his entire investigation and representation deficient. This is especially so where the only information that might have led counsel to interview Evers was a single fingerprint alleged to have been found in Pfeiffer's trailer,[15] which would neither have established an alibi defense for Evans nor contradicted Waddell's testimony concerning the events of that night.

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[15] Although Evans questioned counsel about his failure to interview Evers, specifically citing the fact that he was listed as a source of a fingerprint inside of Pfeiffer's trailer, the record does not confirm that Evers' fingerprint was actually lifted from the trailer. In fact, detective Allan Elliot testified at trial that several prints were lifted from the trailer, but he was *unsure* whether a print on a glass inside the trailer was identified as Evers' or whether it was just a small child or petite person. Moreover, counsel's failure to investigate Evers based on a single fingerprint found in the victim's trailer, which happened to belong to his mother's husband, should not render his assistance deficient.

The last witness that Evans asserts should have been presented is Mindy McCormick, a friend of Connie's who saw electronic items in Connie's storage facility shortly after the murder and witnessed an unidentified man give Connie a manila envelope. However, Evans cannot demonstrate that counsel was deficient on these grounds. As to the electronic items in Connie's storage facility, counsel testified at the evidentiary hearing that he remembers questioning McCormick at the pretrial deposition about the items she saw in the storage facility, but did not investigate further or present her testimony because she was unable to identify the items with any specificity. Counsel is correct that without a more specific identification of the items she saw, it is difficult to ascertain whether these unidentified items were even relevant to the murder. Because her testimony would not have directly contradicted Thomas and Waddell's testimony that before the murder Connie had given Evans similar electronic items as partial payment for the murder, counsel's decision not to present her testimony was strategic and that decision is not unreasonable or outside the realm of professional norms. *See Occhicone v. State,* 768 So.2d 1037, 1048 (Fla. 2000).

As to McCormick's testimony about the package and the description of the man she had given to the police, counsel testified that he did not recall being told about this information, but that he would have investigated further had he known. Conversely, McCormick testified at the evidentiary hearing that she informed defense counsel during a deposition that she had given a taped statement to the police,

described the unidentified man who had given Connie the package, and even went with the police to Pfeiffer's electronics store to identify the items she saw in the storage facility. However, without introducing the deposition into the record, which would enable the Court to determine whether counsel was aware of this information, Evans cannot demonstrate that counsel was deficient for failing to investigate further. *See, e.g., Freeman v. State,* 761 So.2d 1055, 1062 (Fla. 2000) (stating that it is defendant's burden to establish both prongs of *Strickland*).

In sum, counsel clearly made an informed decision about not presenting any witnesses during the guilt phase, which is exactly what he told the judge at the guilt phase: "After a year-and-a-half of consultation, followed by the last few minutes here, we're going to rest...." Because the trial court's findings are supported by competent substantial evidence and counsel's decision not to present these witnesses was reasonable, we affirm the trial court's denial.[16] Because counsel's failure to present these

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[16] Counsel also testified that he did not believe that any of these witnesses, who had credibility or other problems associated with their testimony, was worth giving up the "sandwich," i.e., losing the opportunity to give two closing arguments at the guilt phase. *See Van Poyck v. State,* 694 So.2d 686, 697 (Fla. 1997) (concluding that there were tactical reasons for limiting the presentation of evidence that might indicate another person was the triggerman, such as losing the opportunity to give two closing arguments at the guilt phase); *accord Reed,* 875 So.2d at 430. The Legislature has since enacted section 918.19, Florida Statutes (2007), which provides that the State shall have opening and rebuttal closing arguments. In addition, this Court

witnesses was not deficient, we do not address the prejudice prong of *Strickland. Nixon v. State,* 932 So.2d 1009, 1018 (Fla. 2006).

3. Failing to Object to a Juror's Participation in the Trial

Evans asserts that his counsel provided ineffective assistance at the guilt phase by failing to object to juror Taylor's participation in the trial. Evans argues that juror Taylor interjected herself into the trial as an unsworn witness to answer a question concerning a traffic light that was of particular importance to the defense's theory, namely, that it was impossible for Evans to have traveled the distances in the allotted time as asserted by the State. Although counsel did not remember whether he heard juror Taylor make the comment or about which intersection she was speaking, he recalled the judge reminding her that jurors were not allowed to participate in the trial. He decided not to further object or request an additional inquiry into whether any members of the panel were improperly influenced because she was a good defense juror, counsel believed the judge cured any

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amended Florida Rule of Criminal Procedure 3.250 and adopted Florida Rule of Criminal Procedure 3.381, confirming that the State is entitled to opening and rebuttal closing arguments even if the defense presents no evidence at trial. *In re Amendments to the Florida Rules of Criminal Procedure—Final Arguments,* 957 So.2d 1164, 1166–67 (Fla. 2007). However, when Evans was prosecuted in 1999, the defense was permitted to have both the opening and rebuttal closing arguments if it presented no evidence; thus, counsel's decision to take this into consideration was reasonable at that time.

possible error with the comment by instructing the juror not to participate in the trial, and he knew that she was the alternate and therefore any extrinsic information that she may have had was unlikely to reach the deliberation room. Based on this testimony, we agree that counsel strategically decided not to object to a juror's single comment, where the juror was admonished by the trial judge and the comment appears to have had minimal relevance in relation to the trial as a whole, because he believed she was a good defense juror. Because "strategic decisions do not constitute ineffective assistance" and counsel's decision here is reasonable considering the circumstances, counsel cannot be deficient for failing to further object. *See Occhicone,* 768 So.2d at 1048.

4. Failing to Timely Request a Richardson Hearing

In his next claim, Evans argues that counsel was ineffective for failing to timely request a *Richardson*[17] hearing, object to the trial court's denial of a full inquiry, and seek sanctions against the State after Charles Cannon, Pfeiffer's next-door neighbor, changed his testimony at the third trial. The State asserts that Evans' claim is without merit because counsel timely requested a *Richardson* hearing and the trial court simply denied the request on the merits because the State's conversation with Cannon about the possibility of forgetting parts of his testimony did not qualify as discoverable evidence

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

under the rules. The postconviction court denied this claim because Evans failed to demonstrate deficiency and prejudice where the record indicated that no discovery violation had occurred. We affirm the denial because the trial record completely refutes this claim.

5. Failing to Object to Prejudicial Comments Elicited by the State

Evans argues that counsel was ineffective for failing to object to several improper comments elicited by the State, including testimony from Thomas that she was sixteen or seventeen at the time of the crime and later became pregnant with Evans' child and testimony from Waddell that Evans was in a gang. Evans also asserts that counsel failed to object to the State's comment during closing arguments that the murder was "execution-style."

As to the testimony that Thomas was sixteen or seventeen years old at the time of the crime and later became pregnant with Evans' child, the trial court concluded that counsel made a strategic decision not to object. At the evidentiary hearing, counsel testified that he decided not to object to this testimony because it comported with the defense's strategy that Thomas had a motivation to lie and was information that would not be viewed negatively as it is "commonplace now, and ... pretty well accepted by society." Additionally, he believed the prosecutor could simply have asked Thomas her age and the jury could clearly see how old she was when she testified. We agree with the trial court that

neither deficiency nor prejudice has been demonstrated.

Evans next asserts that counsel was deficient for failing to request a *Richardson* hearing and waiving a motion for mistrial by accepting a curative instruction concerning Waddell's comment that Evans was in a gang.[18] Although counsel never requested a *Richardson* hearing based upon the State's failure to inform the defense about this testimony, the colloquy that followed his objection to the remark and motion for a mistrial confirms that the State was unaware of this information and did not willfully withhold it from the defense or otherwise violate a discovery rule that would have required a *Richardson* hearing. Because counsel took immediate action to rectify the improper testimony and there was no basis to conclude that the State violated a discovery rule, counsel's decision to move for a mistrial rather than request a *Richardson*

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[18] During direct examination of Donna Waddell, she testified that Evans threatened her after the murder and told her not to tell the police anything because "you'll lose your child and the old family will kill you." Defense counsel immediately approached the bench and asked for a mistrial based upon this reference to Evans' membership in a gang, which was denied. Defense counsel then renewed his motion and requested a curative instruction, which was read to the jury as follows: "All right. Members of the Jury, there is no evidence that the Defendant was in a gang. That was pure speculation on the part of Ms. Waddell. The Jury should disregard that statement in its entirety."

hearing was reasonable "under the norms of professional conduct." *Occhicone,* 768 So.2d at 1048.[19]

Evans also claims that counsel was deficient for failing to object to the State's comment during closing argument that the murder was "execution-style." This Court has previously held that a murder involving a gunshot to the head can be classified as an "execution-style" killing. *See Ford v. State,* 802 So.2d 1121, 1133 (Fla. 2001). Here, evidence was presented that Pfeiffer was shot three times, once in the back and twice in the head, at a distance of at least two feet. Because the facts in evidence support the inference that this was an "execution-style" murder and the prosecutor's comment was therefore not improper, counsel cannot be deemed ineffective for failing to object. *See Rogers v. State,* 957 So.2d

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[19] As to counsel's failure to preserve the motion for a mistrial for appellate review, this claim is without merit. Counsel preserved the issue by both immediately moving for a mistrial and then renewing the motion after the attempt to proffer Waddell's testimony was deemed insufficient to cure the problem. *See Card v. State,* 803 So.2d 613, 620–21 (Fla. 2001) (finding an issue preserved for review where counsel objected and moved for a mistrial, even though the trial court denied the motion and issued a curative instruction). This Court has held that counsel need not request a curative instruction to preserve an issue for review once they have timely objected and moved for a mistrial. *See Kearse v. State,* 770 So.2d 1119, 1129 (Fla. 2000) (concluding that counsel "need not request a curative instruction in order to preserve an improper comment issue for appeal," where counsel objects or moves for a mistrial); *James v. State,* 695 So.2d 1229, 1234 (Fla. 1997). Accordingly, the trial court correctly concluded that this claim is without merit because counsel preserved the issue for review.

538, 549 (Fla. 2007).[20] Thus, we affirm the trial court's denial.

6. Failing to Object to Improper Bolstering

Evans argues that counsel was ineffective for failing to object to several statements elicited by the State and to comments during the State's closing argument that improperly bolstered the State's witnesses. First, Evans contends that counsel should have objected to statements by Detective Cook regarding his investigation and his conversations with Thomas. However, the record confirms that the comments elicited from Detective Cook during direct examination occurred in close proximity to each other and counsel objected five times during this period, ultimately moving for a mistrial based on improper bolstering. Similarly, when Detective Cook confirmed on cross-examination that Thomas was not arrested and commented that "the Grand Jury made that final decision," counsel immediately requested a sidebar conference and the court issued a curative instruction directing the witness to

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[20] Although Evans asserts that counsel was also deficient for failing to object because the "execution-style" remark could be used to support the CCP aggravator, the trial court supported its CCP finding by describing in detail all of the calculated and premeditated actions that Evans took in murdering Pfeiffer, including that he deliberately planned the murder, attempted to make it look like a robbery, hid in Pfeiffer's trailer, waited for him to arrive, and then shot him in the back once and in the head twice. Thus, the trial court based its finding of the CCP aggravator on more than the mere fact that the murder was "execution-style."

answer the question as posed without any additional comment.[21] We agree with the trial court that counsel's assistance was neither deficient nor outside the norms of professional conduct. *See Occhicone,* 768 So.2d at 1048.

Second, Evans argues that counsel was ineffective for failing to object during the State's closing argument, in which the prosecutor discounted the defense's theory because Waddell pled to second-degree murder. However, Thomas and Waddell were both accomplices to the crime and witnesses at the trial; therefore, the State was permitted to discuss Thomas's incriminating statements and Waddell's plea agreement, which were valid impeachment tactics used by the defense while cross-examining both of these witnesses. *See Bell v. State,* 965 So.2d 48, 56 (Fla. 2007) (citing *Bruton v. United States,* 391 U.S. 123, 137, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), and *Parker v. State,* 458 So.2d 750, 753 (Fla. 1984)). Because the prosecutor's statement during

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[21] After Cook's comment, defense counsel immediately requested a sidebar:

> MR. HARLLEE: I know he's trying to help, Judge, but he keeps throwing in these little comments after almost every single response. The Jury should not have heard that last statement that Sarah Thomas is not indicted by the Grand Jury.
>
> MS. ROBINSON: He asked the question.
>
> THE COURT: I think that came out during opening statements, I believe. But I agree. I've tried to hold him back, but what I'll do is just instruct him to answer the question and not offer any information.

closing argument was a legitimate comment on the evidence presented at trial and proper rebuttal to the defense's closing argument, counsel cannot be ineffective for failing to object. *See id.* at 57.

7. Failing to Object to State's Closing Argument Concerning Mutually Exclusive Factual Theories of Prosecution

Evans argues that counsel was ineffective for failing to object during the State's guilt-phase closing argument when the prosecutor told the jury that they could find Evans guilty of first-degree murder as a principal or as the shooter and that this decision need not be unanimous on this point.[22] The trial court denied the claim based on Evans' failure to demonstrate prejudice.[23]

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[22] Evans also asserts that counsel was deficient for failing to object to the State's comment during closing argument that if the jury believed that Evans had an alibi, then he was guilty as a principal. However, the record confirms that the State's comment was proper in the context of the dual theories it presented to the jury. Specifically, the State presented evidence that Evans not only planned the murder but also was the shooter. Therefore, if the jury believed that Evans had an alibi for the time period during the crime, there was still sufficient evidence of his liability as a principal for the jury to find him guilty. Accordingly, this assertion is refuted by the record and without merit.

[23] The trial court noted that Evans raised this issue on direct appeal, but this Court never addressed the merits because the claim was unpreserved. *See Evans,* 808 So.2d at 106. To the extent that Evans now argues that this Court's decision on direct appeal stands for the proposition that due process rights

This Court has never specifically decided whether a jury must unanimously find a defendant guilty under either a principal or shooter theory or whether the jury may be split between the two. Because this Court has neither prohibited the State from arguing to jurors that they can be split on the principal or shooter factual theories nor required the use of special verdict forms in such situations, counsel's failure to object to this comment cannot be deemed deficient performance. *See Occhicone,* 768 So.2d at 1048. Based on counsel's multiple attempts to prevent the State from proceeding under dual theories and considering his perspective at the time given this Court's precedent, we affirm the trial court's denial.

8. Failing to Present Mitigation Evidence

In this issue, Evans argues that the trial court erred in denying his claim that counsel failed to present expert testimony concerning his mental and emotional deficiencies, interview witnesses other than his parents regarding his childhood, or have additional tests conducted to ascertain whether he suffered from organic brain damage. The trial court

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are violated under the United States Supreme Court's decisions in *Schad v. Arizona,* 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991), and *Richardson v. United States,* 526 U.S. 813, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999), when a jury's decision on whether the defendant was the principal or the shooter is not unanimous, that argument is without merit. This Court's rejection of a claim as unpreserved is not a statement that the claim would have had merit if it had been preserved.

denied this claim, finding that counsel was not deficient because he made informed decisions after conducting a thorough evaluation and strategically decided to present testimony through lay witnesses. Because Evans cannot demonstrate that counsel's failure to present additional mitigation evidence resulted in prejudice, we affirm the trial court's denial.

At the evidentiary hearing, Evans presented additional lay witnesses and two experts to support this ineffective assistance claim. Two of Evans' aunts testified about his poor childhood, his ADHD, and the drugs he was taking for his hyperactive behavior. However, such evidence would have been cumulative to the testimony of his parents, who testified at the penalty phase about these issues.[24] *See Barnhill v. State,* 971 So.2d 106, 116 (Fla. 2007) (concluding that counsel cannot be ineffective for failing to present cumulative evidence).

Evans also presented the testimony of two mental health experts.[25] Dr. Silverman testified that Evans

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[24] Evans' parents testified about his poor childhood, his ADHD and the drugs he was taking, his hospitalizations and institutionalizations due to his behavioral problems, how he dealt with his parents' divorce, and the difficulty Evans had in dealing with the traumatic incident in which he accidentally shot his younger brother.

[25] At the penalty phase, two mental health experts, Dr. Landrum and Dr. Levine, testified about the psychological testing they performed, Evans' high to superior intelligence, his artistic ability, and his ability to respond well to a structured environment.

had unusual thought processes, which were consistent with a thinking or personality disorder as opposed to a conduct or behavioral disorder. Dr. Silverman acknowledged that Evans was diagnosed on numerous occasions with conduct disorder and that his impulse behaviors were consistent with that diagnosis, but believed the conduct was merely a symptom of the underlying problem—unusual thought processes. He stated that Evans had an abnormal EEG test, which is consistent with frontal lobe problems and the possibility of brain damage. Dr. Silverman diagnosed Evans, albeit just two days before the evidentiary hearing, with schizoid-type personality disorder.

Dr. Harvey also testified at the evidentiary hearing and diagnosed Evans with a "significant profile of current cognitive impairments ... consistent with a profile that's seen in children who have failure to thrive," a disorder that was briefly discussed in some of his records. Dr. Harvey testified that Evans' striking deficit between his verbal and performance IQ scores and his abnormal EEG are consistent with infants who suffer from "failure to thrive," which often causes neurological impairments and abnormal brain development. On cross-examination, Dr. Harvey admitted that his diagnosis may be somewhat inconsistent, both with the fact that Evans lived for almost eight years after the murder without being arrested and the testimony of Waddell and Thomas that Evans was the mastermind behind the plan to murder Pfeiffer. However, Dr. Harvey noted that Evans was on social security disability for psychological issues at the

time of the murder and that he was skeptical about testimony that Evans planned the murder because it came from two codefendants.

Despite the fact that Evans has now found more favorable experts to testify to additional mitigation, our confidence in the outcome is not undermined because the testimony adduced at the evidentiary hearing may not have supported any of the statutory mitigators. Neither expert testified at the evidentiary hearing that Evans was in fact suffering from *extreme* mental or emotional disturbance at the time of the crime. Although one expert testified that Evans' cognitive impairments were detectable at a young age and "are very likely to have been operative at the point in time of his crime," this does not appear to contain the specificity that is required to support statutory mitigation. *See Jones v. State,* 949 So.2d 1021, 1030 (Fla. 2006) (rejecting claim of ineffective assistance of penalty-phase counsel where defendant failed to present expert evidence that he was suffering from any cognitive impairment at the time of the crime that would have supported any statutory mental health mitigation, other than expert testimony that "he thought both of the statutory mental health mitigators applied").

Further, the trial court gave moderate weight to nonstatutory mitigation based on Evans' cognitive impairments, including a difficult childhood (little weight), that Evans suffered great trauma during childhood (moderate weight), and that he suffered from hyperactivity and a history of hospitalization for mental illness (moderate weight),

notwithstanding the fact that expert testimony was limited on that issue at the penalty phase. Thus, although Evans asserts that the testimony of Dr. Harvey and Dr. Silverman would have supported additional nonstatutory mitigation, the trial court had already given moderate weight to his cognitive impairments as nonstatutory mitigation without this expert testimony and found it insufficient to outweigh two weighty aggravators, pecuniary gain and CCP, which were assigned "great weight" by the trial court. We therefore deny relief on this claim.

D. *Brady* Violation

Evans next asserts that the trial court erred in denying his claim that the State withheld material exculpatory and impeachment evidence in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Specifically, Evans argues that the State withheld the following evidence: (1) information that the State's key witness, Leo Cordary, received a benefit for his testimony; (2) two letters detailing Waddell's psychological instability at the time of the crime and Evans' trial; and (3) a taped statement of McCormick, in which she explained that an unidentified man gave Connie a heavy manila envelope several weeks after the murder and how Connie discarded the envelope into a river to get rid of "old memories," and a description she had given police of the unidentified man.

When a defendant alleges a *Brady* violation, they must prove the following: "(1) the State possessed evidence favorable to the accused because it was either exculpatory or impeaching; (2) the State

willfully or inadvertently suppressed the evidence; and (3) the defendant was prejudiced." *Allen v. State,* 854 So.2d 1255, 1259 (Fla. 2003). Evans first argues that the State withheld evidence that Leo Cordary, one of the State's witnesses, received a benefit for testifying in Evans' trial, namely, that he was arrested for violating his probation two days before Evans' third trial and that the State arranged for a bond hearing as a benefit to him for his testimony. Although this Court has previously held that evidence that a witness is receiving a benefit for testifying could be subject to a *Brady* challenge, *see Guzman v. State,* 868 So.2d 498, 508 (Fla. 2003), the prosecutor in this case testified that both the conversation she had with Cordary's attorney and the bond hearing itself did not occur until after Cordary testified in February 1999. Because the decision on the bond reduction was not made until after Cordary testified and he was thus unaware of the benefit he was receiving, there is no "favorable" or impeachment evidence. Therefore, Evans fails to meet the first prong of *Brady.*

Second, Evans asserts that the State withheld two letters indicating that Waddell was mentally unstable.[26] Although it was his burden to prove that

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[26] The first was a handwritten letter from Waddell to Judge Hawley, which was received on July 12, 1999, in which she described the mental issues she was enduring at the time of the murder and pleaded for leniency in her sentence. The second was a letter from Waddell's counsel to Maria Lawson, in which counsel described the mental issues that Waddell was experiencing at the time of the murder and noted that he would be seeking a sentence below the guidelines.

the State withheld this information, Evans never questioned either prosecutor at the evidentiary hearing to ascertain whether they knew about Waddell's mental status at the time of the trial. Further, one letter was clearly not yet in existence, as it was dated several months after Evans' trial, and Evans cannot establish when the other letter was written. Because Evans cannot demonstrate that either of the letters was in existence at the time of his trial, there can be no *Brady* violation.

Third, Evans argues that the State withheld exculpatory evidence that McCormick had given a taped statement to the police, in which she described an unidentified man who gave Connie a manila envelope several weeks after the murder, and gave the police sufficient information to create a composite sketch that could have indicated another suspect. However, Evans failed to demonstrate that the unidentified man and the contents of the package were exculpatory because the incident occurred several weeks after the murder and may not have been relevant to the case, and McCormick confirmed at the evidentiary hearing that she still had no specific details about the incident. Thus, the information was neither exculpatory nor impeachment evidence subject to *Brady* and we deny relief on this issue.

E. Rules Prohibiting Juror Interviews

Evans next asserts that Rule Regulating the Florida Bar 4–3.5(d)(4) is unconstitutional because it denies him the right to effective assistance of counsel in pursuing postconviction relief by preventing the

defense from interviewing jurors for possible misconduct.[27] However, this Court has repeatedly rejected challenges to the constitutionality of rule 4–3.5(d)(4). *See, e.g., Barnhill,* 971 So.2d at 116–17. Furthermore, where the defendant merely complains about the "inability to conduct 'fishing expedition' interviews," the claim is without merit. *Johnson v. State,* 804 So.2d 1218, 1225 (Fla. 2001) (quoting *Arbelaez v. State,* 775 So.2d 909, 920 (Fla. 2000)). Here, although Evans asserts that juror Taylor commented during a witness's testimony about a light at an intersection, Evans presented no sworn allegations that the juror's comment "fundamental[ly] and prejudicial[ly] ... vitiate[d] the entire proceedings." *Power v. State,* 886 So.2d 952, 957 (Fla. 2004). Without more substantial allegations of how juror Taylor's single "yes or no" response prejudiced the entire proceeding, this appears to be a "fishing expedition" after a guilty verdict has been returned. *See Arbelaez,* 775 So.2d at 920. Thus, we affirm the trial court's summary denial.

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[27] Rule 4–3.5(d)(4) states: "A lawyer shall not ... after dismissal of the jury in a case with which the lawyer is connected, initiate communication with or cause another to initiate communication with any juror regarding the trial except to determine whether the verdict may be subject to legal challenge; provided, a lawyer may not interview jurors for this purpose unless the lawyer has reason to believe that grounds for such challenge may exist; and provided further, before conducting any such interview the lawyer must file in the cause a notice of intention to interview setting forth the name of the juror ... to be interviewed."

F. *Ring* Claim

Evans next asserts that Florida's death sentencing statute is unconstitutional under *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).[28] However, this Court and the United States Supreme Court have held that *Ring* does not apply retroactively. *Schriro v. Summerlin,* 542 U.S. 348, 358, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004) (" *Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review."); *Franqui v. State,* 965 So.2d 22, 36 (Fla. 2007). In *Johnson v. State,* 904 So.2d 400 (Fla. 2005), which was the seminal Florida decision on the issue of the retroactivity of *Ring,* we held that a death sentence becomes final for purposes of *Ring* once the Court has affirmed the conviction and sentence on direct appeal and issued the mandate. *Id.* at 407. Thus, Evans' death sentence became final after this Court both affirmed on direct appeal and issued the mandate in February 2002. Because *Ring* was not decided until June 2002, Evans cannot rely on it to vacate his death sentence.

E. Cumulative Error

Evans argues that the trial court conducted an improper cumulative analysis in this case because the errors involved deprived him of a fundamentally fair trial. However, we affirm the denial of Evans'

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[28] Evans raised a similar claim in his habeas petition so we address both issues here.

cumulative error claim because there is no individual error in any of his claims. *See Griffin v. State,* 866 So.2d 1, 22 (Fla. 2003) ("Because the alleged individual errors are without merit, the contention of cumulative error is similarly without merit....").

II. PETITION FOR WRIT OF HABEAS CORPUS

A. Ineffective Assistance of Appellate Counsel

Consistent with *Strickland,* granting habeas relief based on ineffectiveness of appellate counsel

> is limited to those situations where the petitioner establishes first, that appellate counsel's performance was *deficient* because "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, that the petitioner was *prejudiced* because appellate counsel's deficiency "compromised the appellate process to such a degree as to undermine confidence in the correctness of the result."

Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000) (quoting *Thompson v. State,* 759 So.2d 650, 660 (Fla. 2000)). Counsel is not ineffective for failing to raise an issue on direct appeal that "would in all probability have been found to be without merit." *Id.* (quoting *Williamson v. Dugger,* 651 So.2d 84, 86 (Fla. 1994)).

Evans first contends that appellate counsel was ineffective for failing to argue on direct appeal that

the trial court erred in denying his motion for a mistrial and request for a *Richardson* hearing after witness Cannon testified that he did not remember whether he saw Pfeiffer's TransAm outside the trailer when he arrived home. Evans argues that the trial court should have granted either the motion for a mistrial or the request for a *Richardson* hearing because Cannon had discussed the possibility of his lack of memory with the State prior to the third trial and the State improperly allowed the defense to argue in its opening statement that Cannon would testify that he did not see the TransAm that night.

This Court applies an abuse of discretion standard to both denials of a motion for a mistrial, *see England v. State,* 940 So.2d 389, 402 (Fla. 2006), and to denials of a request for a *Richardson* hearing. *See Conde v. State,* 860 So.2d 930, 958 (Fla. 2003). Here, the trial court was well within its discretion to deny the motion for a mistrial and the request for a *Richardson* hearing because Cannon's testimony had not changed in any material way. When he spoke to the police immediately after the incident, Cannon said that he was "trying to think" if he remembered seeing the TransAm. Then, about seven years later, Cannon gave a deposition that completely contradicted both his first statement to the police and his testimony from the first trial, stating that the TransAm was parked outside the trailer. Subsequently, at Evans' first trial, Cannon said that he did not remember seeing the TransAm that night. Lastly, at the retrial, Cannon testified that he did not remember if he saw the TransAm. As noted by the trial court, Cannon's consistently equivocal

statements evidence an individual who could not exactly remember what he saw that night, even when asked in close proximity to the murder. Thus, the trial court was within its discretion in denying the motion for a mistrial and *Richardson* inquiry because no discovery violation occurred and appellate counsel cannot be deficient for failing to raise the issue on direct appeal.

Evans also asserts that appellate counsel was ineffective for failing to challenge on direct appeal the trial court's denial of a motion for a mistrial based upon Waddell's testimony that Evans was in a gang.[29] However, the claim would likely have been found to be without merit even if it had been raised on direct appeal because this Court has previously held that a trial court did not abuse its discretion in similar circumstances. *See, e.g., Mendoza v. State,* 964 So.2d 121, 130–31 (Fla. 2007) (holding that trial court did not abuse its discretion in denying motion for mistrial because it gave a curative instruction

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[29] Evans also argues that appellate counsel should have challenged the trial court's failure to hold a *Richardson* hearing without a request by defense counsel. However, this Court has repeatedly held that counsel is not ineffective for failing to raise errors that were not preserved "and do not present a question of fundamental error." *Valle v. Moore,* 837 So.2d 905, 907–08 (Fla. 2002). As previously mentioned, the record confirms that the State was equally surprised by Waddell's comment, did not willfully withhold it from the defense, and did not otherwise violate a discovery rule that would have required a *Richardson* hearing. Because Evans fails to demonstrate any trial court error, much less one that is fundamental, appellate counsel was not ineffective on this basis. *Id.*

following an improper comment on the jury's responsibility). Because Evans cannot demonstrate that the trial court abused its discretion in denying the motion, appellate counsel cannot be ineffective for failing to raise the meritless issue on direct appeal.

B. Cruel and Unusual Punishment Under Atkins and Roper

Lastly, Evans contends that his death sentence is unconstitutional under *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), and *Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). However, Evans was never diagnosed as mentally retarded and, in fact, the record reflects that he has previously received verbal and performance IQ scores of 91 and 110, respectively. Thus, Evans is not entitled to relief under *Atkins. See Hill v. State,* 921 So.2d 579, 584 (Fla. 2006). Further, this Court has consistently held that *Roper* only prohibits the execution of defendants "whose *chronological* age is below eighteen" at the time of the capital crime. *Id.* Because Evans was nineteen at the time of the crime, his death sentence cannot be unconstitutional under *Roper.* Accordingly, this claim is without merit.

CONCLUSION

For the reasons explained above, we affirm the denial of Evans' motion for postconviction relief and deny his habeas petition.

It is so ordered.

Appendix E

SUPREME COURT OF THE UNITED STATES

PAUL H. EVANS v. FLORIDA

02-5345

537 U.S. 951; 123 S. Ct. 416; 154 L. Ed. 2d 297; 71 U.S.L.W. 3264

October 15, 2002, Decided

PRIOR HISTORY: *Evans v. State*, 808 So. 2d 92 (Fla. 2001)

JUDGES: Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer.

OPINION

Petition for writ of certiorari to the Supreme Court of Florida denied.

Appendix F

IN THE CIRCUIT COURT OF THE
NINETEENTH JUDICIAL CIRCUIT
IN AND FOR INDIAN RIVER COUNTY, FLORIDA

STATE OF FLORIDA — FELONY DIVISION
CASE NO. 311997CF000754A

vs.

PAUL HAWTHORNE EVANS,

Defendant.
_____/

ORDER DENYING MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE

THIS CAUSE came before the Court on the Defendant's Motion to Vacate Judgments of Conviction and Sentence With Special Request for Leave to Amend filed on October 2, 2003, pursuant to Florida Rule of Criminal Procedure 3.851. The Court finds and determines as follows:

PROCEDURAL HISTORY

The murder of Alan Pfeiffer was the result of a murder-for-hire conspiracy involving Connie Pfeiffer (Alan Pfeiffer's wife), Paul Evans, Sarah Thomas (Evan's girlfriend) and Donna Waddell (Evan's roommate). Arrests were made six years after the 1991 homicide during a cold case investigation.

Paul Evans and Connie Pfeiffer were indicted for first degree murder. The trials were severed, and Evans was prosecuted first. Evans' first two trials ended in mistrial. At the third trial, the jury found Evans guilty. The defense presented no witnesses at the guilt phase. At the penalty phase the jury recommended death by a vote of nine to three. Evans' judgment and sentence were affirmed on appeal. *Evans v. State*, 808 So. 2d 92 (Fla. 2001). The United States Supreme Court denied certiorari. *Evans v. Florida*, 537 U.S. 951 (2002).

On October 23, 2003, Evans filed his Rule 3.851 postconviction motion. On February 10, 2004, a case management conference was conducted by the trial judge. At the conference, the trial judge granted an evidentiary hearing on Claim I, part of Claim II, and Claim III. Later, on May 24,2004, as the result of a motion to disqualify the trial judge, the case was reassigned to the undersigned.

The evidentiary hearing was initially scheduled on September 13, 2004, but was rescheduled due to courthouse closings resulting from Hurricanes Frances and Jeanne. The evidentiary hearing was later bifurcated to accommodate a defense witness. The hearing was conducted over three days on November 8, 9, and 22, 2004. At the evidentiary hearing, both parties presented witnesses. Evans called Chief Assistant Public Defender Mark Harllee, Public Defender Diamond Litty, Rosa Hightower, Jesus Cruz, Christopher Evers, Mindy McCormick, Anthony Kovaleski, Patricia Dennis, Sandra Kipp, Dr. Seth Silverman, and Dr. Philip Harvey. In

rebuttal, the State called Assistant State Attorneys Nikki Robinson and Christopher Taylor. After the evidentiary hearing, the parties submitted written closing arguments. This order follows.

The Court will address each claim in the order set forth in the Defendant's motion.

POSTCONVICTION MOTION

In his motion, Evans raises six grounds for relief, three grounds involve claims of ineffective assistance of counsel. A defendant alleging ineffective assistance of counsel must satisfy the two-pronged standard of *Strickland v. Washington*, 466 U.S. 668 (1984). First, the defendant must demonstrate that his attorney's performance was so deficient that his attorney was not functioning as the "counsel" guaranteed by the Sixth Amendment of the United States Constitution. *Id.*, at 687. Second, the defendant must establish that there is a reasonable probability but for counsel's deficient performance the outcome of the proceedings would have been different. A "reasonable probability" has been defined as a probability sufficient to undermine confidence in the outcome of the proceedings. *Id.*, at 694. In the context of ineffectiveness during the penalty phase of a trial, the defendant must establish that there is a reasonable probability that but for counsel's errors the defendant would have probably received a life sentence. *Hildwin v. Dagger*, 654 So. 2d 107, 109 (Fla. 1995).

Findings of Fact

At trial. Chief Assistant Public Defender, Mark Harllee, was the lead defense counsel. He tried the case with elected Public Defender, Diamond Litty. Harllee made the decisions regarding the guilt phase. In addition, Harllee consulted and advised Litty on her decisions regarding the penalty phase.

At the time of trial, Harllee had been practicing law for fifteen years and doing capital defense work for ten years. Harllee has attended every Life Over Death seminar hosted by the Public Defender's Association since 1992, and serves on the Death Penalty Steering Committee as the representative of the 19th Judicial Circuit. Prior to Evans' trial, Harllee tried eight, capital cases to verdict.

Litty has been the elected Public Defender for twelve years. At the time of trial, she had been serving for approximately seven years and had tried two capital cases to verdict. Litty worked closely with Harllee on Evans' case and deferred to Harllee's expertise in consulting on decisions stating that Harllee was the "captain of the ship."

Harllee and Litty used two investigators for trial preparation and support. Brandon Perron, a private investigator, was involved in the guilt phase; and Sandy Warner, an in-house investigator compiled mitigation information for the penalty phase.

In addition, in preparation for the penalty phase, the defense hired three mental health experts. Drs. Rifkin, Landrum, and Levine conducted

psychological evaluations and submitted reports on behalf of Evans.

CLAIM I

COUNSEL WAS INEFFECTIVE AND THE STATE COMMITTED BRADY VIOLATIONS DURING THE GUILT PHASE.

Claim I(1) Counsel failed to object to alternate Juror Taylor's participation in the trail by offering an answer while a witness was testifying.

During examination of Officer Kevin Martin, Juror Taylor answered a question posed to the officer concerning an intersection traffic light. Although Juror Taylor's comment is not a part of the record, the record does include the trial court's admonishment of Juror Taylor not to participate in the trial, Evans claims that counsel was ineffective for failing to object to Juror Taylor's comment, and for failing to object to the trial court's admonishment in front of the other jurors, thereby drawing more attention to the comment. Evans contends that counsel's deficiencies "could negatively influence the plausibility of the defense case or improperly bolster the credibility of the prosecutor's theory."

At the evidentiary hearing, Harllee testified that he had not heard Juror Taylor's comment at trial and that he had no independent recollection of the comment. However, Harllee stated that he did not have alternate Juror Taylor, venire panel #13, removed from the jury because she was a good defense juror. Harllee explained the process that he

uses for taking notes during jury selection. For questions asked to jurors he places a plus for each response positive to the defense and a minus for each response negative to the defense. In addition, Harlee asks jurors to rank themselves on a death penalty scale of one to ten - ten being a death recommendation on every first degree murder conviction and one being practically no death recommendations. (EHT Vol. I 76-78, Vol. II 136)

Harllee reasoned that Juror Taylor was a good defense juror because her brother was incarcerated for attempted murder or armed burglary, she had three pluses and only one minus for her responses during voir dire, and she ranked herself a five on the death penalty scale. (EHT Vol. I 88-91, Vol. I1135-136 & State's Exhibit 1.) In addition, Harllee stated that the trial court's instruction was sufficient to cure Juror Taylor's comment, and Harllee would not have wanted to embarrass a good defense juror by objecting to the trial court's admonishment.

The Court finds Harllee's trial strategy reasonable. Further, the Court finds that Evans fails to show how this single juror comment prejudiced the outcome of the trial in light of the other evidence presented. Thus, Evans fails to satisfy both prongs of the *Strickland* standard.

Claim I(2) Counsel failed to timely request a *Richardson*[1] hearing regarding disclosure of Charles Cannon's lack of memory on seeing the TransAm parked in front of the Victim's trailer on the evening of the murder.

Evans claims that counsel was ineffective for failing to timely move for a *Richardson* hearing based on the State's failure to disclose a change in Charles Cannon's testimony. At the trial in October 1998, Cannon testified that he did not see the Trans Am parked at the victim's home. In February 1999, at the third trial. Cannon testified that he could not remember whether or not he saw the car. During cross examination followed by proffer. Cannon explained that between trials he had inquired of the State whether he should testify to what he remembered, or to what he had said in prior statements. Without inquiring into the content of the testimony, Assistant State Attorney Nikki Robinson advised Cannon that if he did not remember he should answer accordingly. (ROA Vol. 37, 3505-3533)

The defense did not become aware of the change in testimony until Cannon testified at the third trial. Consequently, the defense requested a mistrial on two grounds: (1) Cannon told the jury that there was a "last trial" and (2) Cannon's change in testimony regarding the sighting of the TransAm. In addition, the defense requested additional time to investigate. The trial court denied both requests. (ROA Vol. 37,

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

3505-3533) Later, defense counsel in fact did move for a *Richardson* hearing based on Cannon's significant change in testimony. The State argued that there was no discovery violation because Cannon's statement was not in writing and there was no change from the prior deposition or trial testimony. *Fla. R. Crim. P.* 3.220(b)(1)(B). The trial court considered the argument, found no discovery violation, and denied the request for a *Richardson* hearing. (ROA Vols. 37 & 38, 3580-3587)

At the evidentiary hearing, Harllee explained that the matter had been preserved for appeal and that he had thoroughly cross-examined Cannon on the change in testimony.(EHT Vol. I 91-100; & Vol. II 137-138) Further, the record shows that the *Richardson* hearing was denied on the basis that there was no discovery violation and not on the basis that the motion was untimely. (ROA Vol. 38, 3587) Thus, defense counsel could do no more in that the trial court found no discovery violation. Therefore, absent other evidence of a discovery violation and prejudice in trial preparation, the Court finds that Evans fails to demonstrate deficient performance of counsel or prejudice to the proceedings required to satisfy both prongs of the Strickland standard.

Claim I(3) Counsel failed to object to inflammatory and prejudicial comments elicited by the State (a) from Sarah Thomas regarding her age and Evans' child, and (b) from Donna Waddell regarding Evans' gang membership; and (c) to improper closing argument that the murder was committed execution style.

(a) Evans claims that counsel was ineffective for failing to object to trial testimony that Sarah Thomas was 16 or 17 years of age in 1991 when she was living with Evans and was pregnant with his child, and in failing to object to testimony regarding Evans' limited contact with the child. Evans contends that this testimony was irrelevant and served only to show Evans' prior bad acts and bad character.

At the evidentiary hearing, Harllee testified that he did not object because he had evaluated the impact of the testimony and determined that the jury could determine Thomas' age by watching her testify or the State could just ask her birthday. Further, Harllee reasoned that teen pregnancy did not carry the stigma that it once had thus Harllee did not see it as a bad act. In addition, Harllee explained that the testimony concerning the child and the custody battle were to the defense's advantage because these factors gave Thomas a motivation to lie about Evans' role in the murder. (EHT Vol. I 102-106)

The Court finds Harllee's trial strategy reasonable. Therefore, Evans fails to demonstrate deficient performance of counsel required to satisfy the first prong of the Strickland standard.

(b) Evans claims that counsel was ineffective for failing to object to Donna Waddell's testimony that Evans belonged to a gang. On proffer at trial, Waddell stated that she was not aware of Evans being in a gang but thought a threat made to her by Evans meant that he was in a gang. (ROA Vol 40 3855-3862) Evans contends that defense counsel was deficient in failing to move for a Richardson hearing and in waiving a motion for mistrial by accepting a curative instruction.

It is clear from the record that the State was unaware of, and surprised by, Waddell's speculation regarding Evans' gang membership. (ROA Vol 40 3856) Further, Waddell admitted in her proffer that she was making an assumption as to Evans' involvement in a gang. Thus, the Court finds no deficient performance in failing to move for a Richardson hearing or prejudice to the outcome of the trial in the lack of a Richardson hearing.

Lastly, counsel moved for mistrial which the trial court denied preserving the issue for appeal. *Kearse v. State*, 770 So. 2d 1119, 1129 (Fla. 2000). (ROA Vol 40 3858) Further, the curative instruction directed the jury to disregard Waddell's gang statement and informed the jury that there was no gang connection. Because the issue was preserved for appeal and the jury is presumed to follow the court's instructions in the absence of contrary evidence, this Court finds no prejudice. *Sutton v. State*, 718 So. 2d 215, 216 n. 1 (Fla. 1st DCA1998). Thus, Evans fails to satisfy both prongs of the *Strickland* standard.

(c) Evans contends that counsel was ineffective for failing to object to the State's comment during closing argument that the murder was execution style. Evans' claim is legally insufficient. The Court finds no deficient performance where the theory of defense was that Evans did not commit the crime and where the description of the crime was fair comment on the evidence — describing two shots to the head as an execution style killing. *Parker v. State*, 873 So. 2d 270, 289 (Fla. 2004). Thus, Evans fails to satisfy the first prong of the *Strickland* standard.

Claim I(4) Counsel failed to object to improper bolstering of (a) Sarah Thomas, and Donna Waddell during Detective Cook's testimony, and (b) failed to object to the State's closing argument related to believing Thomas and Waddell.

(a) Evans claims that counsel was ineffective for failing to object to Detective Cook's improper bolstering of Sarah Thomas' and Donna Waddell's credibility when the detective answered questions concerning whether Thomas thought she would be arrested and whether Thomas was promised anything in exchange for her cooperation, when the detective testified he refused to let Thomas make an unmonitored telephone call so that he could "ensure the integrity of the operation," and when the detective stated that he thought the Grand Jury made the final decision on Thomas' arrest. (ROA Vol. 38 3604-3611) Evans contends that counsel failed to adequately object to the State's line of questioning

despite sustained objections to speculation and hearsay, and a denied motion for mistrial on grounds of improper bolstering.

The Court disagrees and finds no deficient performance or prejudice during this line of questioning. It was defense strategy to challenge Thomas' credibility by focusing on Thomas' lack of charges beginning in opening statement. (EHT Vol 2 138-140). This line of questioning by the State was proper examination to show how Thomas and Waddell became State witnesses and to solicit information concerning promises, threats, or coercion that may have been exerted by law enforcement in obtaining Thomas' statement. Further, the detective's explanation of monitoring telephone calls in the context of describing the use of the body bug merely reports how the detective avoided contaminating the investigation by preventing Thomas from alerting her accomplices. (ROA Vol. 38 3604-3611) Thus, the Court finds the detective's testimony resulted in no prejudice to Evans because the testimony is distinguishable from the examples of improper vouching cited by Evans.[2] The detective was presenting facts concerning the investigation and not testifying as to whether Thomas was telling the truth or whether the jury should believe her.

In addition, in light of defense counsel's sustained objections and denied motion for mistrial, the Court

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[2] Cases cited by Mr. Evans- *Weatherford v. State*, 561 So. 2d 629, 634 (Fla. 1" DCA1990); *Capehari v. State*, 583 So. 2d 1009 (Fla. 1991); *Tingle v. State*, 536 So. 2d 202 (Fla. 1988); and *Words v. State*, 525 So. 2d 998 (Fla 5th DCA 1988).

finds Evans' claim merely disagreement with trial strategy, and thus not deficient performance of counsel. *Occhicone v. State*, 768 So.2d 1037,1048 (Fla. 2000). Therefore, Evans fails to satisfy both prongs of the *Strickland* standard.

(b) Evans claims that counsel was ineffective for failing to object to the State's closing argument related to believing Thomas and Waddell. Evans contends that it was improper bolstering for the State to refer to Waddell's plea to second degree murder, and to Thomas' and Waddell's inculpatory testimony. (ROA Vol. 42 4201-05). The Court disagrees finding the State's arguments legitimate and logical inferences from the evidence. *Breedlove v. State*, 413 So. 2d 1, 8 (Fla. 1982); *Spencer v. State*, 133 So. 2d 729, 731 (Fla. 1961), *cert. denied*, 372 U.S. 904 (1963). Thus, Evans fails to demonstrate deficient performance of counsel or prejudice to the proceeding required to satisfy both prongs of the *Stickland* standard.

Claim I(5) Counsel failed to object during the State's closing argument regarding mutually exclusive factual theories of prosecution that Evans was the shooter or a principal, and counsel failed to request a jury instruction or special verdict form.

Evans claims that counsel was ineffective for not objecting to the State's closing argument that half of the jury could determine that Mr. Evans was the shooter and the other half could believe that he was a principal. (ROA Vol. 42 4173-74.) This was based

on the testimony of Thomas and Waddell, that Evans either killed the victim or had gotten others to kill the victim.

Before trial, defense counsel moved to have the State elect under which theory it would proceed, shooter or principal, and to preclude the State from arguing both theories to the jury. The trial court properly denied the motion as to not obligating the State to disclose a single theory of prosecution. Defense counsel did not object to the dual theory argument during closing and did not request a jury instruction or special verdict form, thus the claim was not preserved.[3] However, in rebuttal closing argument, defense counsel did argue to the jury that the State could not have it both ways. (EHT Vol. I 139-141.)

The Court finds Evans' claim legally insufficient. In light of the denial of counsel's pre-trial motion challenging the dual theories of prosecution, and absent proof that either theory was legally inadequate or that the State failed to make a prima facie showing under either theory, Evans fails to demonstrate how counsel's alleged deficiencies prejudiced the outcome of the proceeding. *Mackerley v. State*, 777 So. 2d 969 (Fla. 2001); Steverson v. State, 787 So. 2d 165 (Fla. 2nd DCA 2001). Thus, the Defendant fails to satisfy the second prong of the *Strickland* standard.

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[3] *Evans v. State*, 808 So. 2d 92, 105 (Fla. 2001), Point 5 on direct appeal.

Claim 1(6) Counsel failed to present witnesses Jesus Cruz, Jose Magia, RosaHightower, Mindy McCormick, William Lynch, Anthony Kovaleski, and Christopher Evers, to refute the State's timing of the gunshots, to corroborate Evans' alibi, to contradict that Evans' was the shooter, and to contradict evidence of Evans' pecuniary gain.

Timing of gunshots

Evans claims that counsel was ineffective for failing to present witnesses to refute the State's timing of gunshots heard by the State's witness Leo Cordary between 8:00 and 8:30 p.m. Evans contends that Jesus Cruz, Jose Magia, and William Lynch would have testified to hearing the gunshots between 9:30 and 10:30 p.m.

At the evidentiary hearing, no evidence was admitted concerning witnesses Magia and Lynch. Cruz testified through an interpreter. The Court makes the following finding of fact with respect to Cruz. At the hearing Cruz was able to understand, and began to respond to some of the questions, prior to translation by the interpreter. Cruz was extremely drunk the night of the murder. Cruz's report of gunshots between 9:30 and 10:00 was only an estimate because Cruz did not look at a watch. Cruz sustained memory loss from a neck injury two years before the trial. Cruz could not recall a contact with Assistant State Attorney Christopher Taylor at the time of trial where Cruz told Taylor that he was drunk the night of the murder and did not remember

anything. Taylor memorialized the contact in a memo dated February 10, 1999. (State's Exhibit 6.) The Court finds that Taylor did have contact with Cruz as memorialized in the memo dated February 10,1999.

Harllee testified that he made a strategic decision not to call Cruz at trial because Cruz admitted to being drunk on the night of the murder and was not credible. The Court finds Harllee's strategy reasonable with respect to Cruz. Thus, absent testimony of Magia and Lynch, Evans fails to demonstrate deficient performance of counsel as to these gunshot witnesses.

Alibi witnesses

Evans claims that counsel was ineffective for failing to present alibi witnesses Rosa Hightower, Anthony Kovaleski, and Christopher Evers. Evans contends that these witnesses would show that he was at the Firefighters' Fair and did not have the opportunity to commit the murder between 8:00 and 8:30 p.m. at the victim's trailer twenty minutes away.

At the evidentiary hearing, Harllee testified that he made a strategic decision not to call two of these alibi witnesses because the witnesses could not give Evans a complete alibi and one of the witnesses was not credible. Harllee stated that he did not want to give up the rebuttal closing argument because the incomplete alibi did not put Evans at the Fair at the time of the shooting and would not rebut evidence that Evans had manufactured and implemented the

alibi in planning the homicide. Further, Harllee testified that he was unaware of the third witness.

The Court makes the following findings of fact with respect to Rosa Hightower. The court file contains no report or deposition describing Hightower's contact with Evans at the Firefighters' Fair. However, prior to trial Hightower reported to the defense investigator that she was with Evans at the Firefighters' Fair sometime between 6:00 and 7:00 p.m. but that she did not remember seeing Evans again that night. (Defense Exhibit 4.) During trial. Hightower told the prosecutor that she saw Evans when she arrived at the Fair but never saw him again the rest of the night. (State Exhibit 5.) At the evidentiary hearing, Hightower testified differently stating that she was with Evans for about twenty minutes when she arrived at the Fair between 6:00 and 7:00 p.m., and that she saw Evans a second time sometime between 8:15 and 8:45 p.m. before she left the Fair.

Harllee based his strategic decision not to call Hightower on her pre-trial statement of incomplete alibi made to the defense investigator. Absent evidence that the investigator's report was inaccurate, or absent other proof that Harllee knew or should have known that Hightower saw Evans a second time between 8:15-8:45 p.m., the Court finds no deficiency in the defense investigation and finds Harllee's trial strategy reasonable.

The Court makes the following findings of fact with respect to Anthony Kovaleski. Prior to trial Kovaleski reported to the defense investigator that

he was with Evans at the Firefighters' Fair for about an hour starting at around dusk.[4] (Defense Exhibits 1 and 2.) At the evidentiary hearing, Kovaleski testified differently stating that he was with Evans for 11/2 to 2 hours starting at around 6:00 p.m. Kovaleski's evidentiary hearing testimony was uncorroborated by Rosa Hightower who reported seeing Evans at the Fair during the same time period but was not questioned about seeing Kovaleski with Evans.

Harllee testified that he made a strategic decision not to call Kovaleski because the pre-trial alibi testmony was incomplete for the time of the homicide and Kovaleski was not a credible witness. In light of Kovaleski's convictions on crimes of dishonesty and absent corroboration of Kovaleski's evidentiary hearing testimony, the Court finds no deficiency in the defense investigation and finds Harllee's trial strategy reasonable.

The Court makes the following findings of fact with respect to Christopher Evers. Evers was 12 years old at the time of the murder. Evers saw Evans at the Firefighters' Fair sometime around dark. Evans was at the Fair when Evers left sometime around 7:00-8:00. p.m. Harllee does not recall considering Evers as a potential alibi witness.

Evans' claim as to Evers is legally insufficient because there was no showing that Evers testimony would have changed the outcome of the proceeding.

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[4] Sunset was at 6:43 p.m.

Thus, Evans fails to satisfy the second prong of the Strickland standard.

Contradiction evidence

Evans claims that counsel was ineffective for failing to call Mindy McCormick to contradict evidence of pecuniary gain and to contradict evidence that Evans was the shooter. The Court makes the following findings of fact with respect to Mindy McCormick's evidentiary hearing testimony. McCormick would have test storage shed similar to the types of items allegedly received by Evans as pecuniary gain, that McCormick observed Pfeiffer receive a package containing unidentified contents from an unidentified man who was not Evans, and that McCormick saw Pfeiffer throw the package in the river and heard Pfeiffer comment that the package contained "old memories."

The Court concludes that Evans has not met his burden of showing how failure to present McCormick's testimony prejudiced the outcome of the trial. Evans offered no evidence to identify the electronic items with any specificity or to connect the electronic items to the homicide. Further, Evans did not offer any evidence to demonstrate that the unidentified man and the unidentified contents of the package had any relevance to the homicide. Thus, Evans fails to satisfy the second prong of the Strickland standard.

Claim 1(7) The State committed a *Brady* violation by failing to disclose (a) Donna Waddell's mental health status at the time of the crime and during trial; (b) Mindy McCormick's composite sketch, and (c) the prosecutor's involvement in Leo Cordary bonding out of jail on his violation of probation.

To successfully maintain a *Brady* claim, Evans must establish the following three elements: (1) the evidence at issue is favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) the evidence was suppressed by the State, either willfully or inadvertently; and (3) the State's failure to disclose the evidence was prejudicial. *Spencer v. State*, 842 So.2d 52, 67 (Fla. 2003).

(a) Evans claims that the State committed a *Brady* violation by failing to disclose Donna Waddell's mental health status at the time of the crime and during the trial. At the evidentiary hearing, Evans presented two letters referring to Waddell's mental health and psychiatric treatment discovered pursuant to a public records request of Waddell's court file. One letter was undated and the other letter was dated five months after Evans' trial. (Defense Exhibits 9 and 10.) At the evidentiary hearing, no evidence was admitted showing that the State knew of Waddell's psychiatric treatment prior to or at the time of trial. Further, Evans did not demonstrate that the letters would have been admissible at trial. Thus, Evans fails to show that

the State willfully or inadvertently suppressed evidence.

(b) Evans claims that the State committed a *Brady* violation by failing to disclose the composite sketch made of an unidentified man seen by Mindy McCormick giving a package with unidentified contents to Connie Pfeiffer. Based on the Court's analysis in Claim I(6), *supra*, Evans fails to show prejudice required to succeed in a *Brady* claim.

(c) Evans claims that the State committed a *Brady* violation by failing to disclose the prosecutor's involvement in Leo Cordary bonding out of jail on his violation of probation. Evans contends that this information could have been used to impeach Cordary, the State's only witness to the timing of the gunshots. No evidence was presented at the evidentiary hearing to show that Cordary was aware of bond discussions between his attorney and the State, or to show that Cordary bonded out prior to testifying at the third trial. Further, no evidence was presented that Cordary's testimony at the third trial was inconsistent with Cordary's statements made prior to his violation of probation, including: Cordary's statement to police, Cordary's deposition, and Cordary's testimony at the first trial. Thus, Evans fails to demonstrate prejudice required to succeed in a Brady claim.

CLAIM II

COUNSEL WAS INEFFECTIVE DURING THE PENALTY PHASE (A) FOR FAILING TO OBJECT TO SERIOUS MISSTATEMENTS OF THE LAW, (B) FOR FAILING TO PRESENT EXPERT AND FAMILY TESTIMONY OF EVANS' PSYCHOLOGICAL HISTORY AND THE EFFECTS OF INSTITUTIONALIZATION ON EVANS, AND (C) FOR FAILING TO PRESENT EVIDENCE TO REFUTE THE AGGRAVATOR OF PECUNIARY GAIN.

(a) Evans claims that counsel was ineffective during the penalty phase for failing to object to improper instruction of the jury. Evans contends that instructing the jury that their role was advisory was a serious misstatement of the law and that the instructions impermissibly shifted the burden to Evans to prove that a life sentence was appropriate. Evans' claim is without merit. The jury instructions in the penalty phase tracked the language of the Standard Jury Instruction Penalty Proceedings - Capital Cases, section 921.141. The Supreme Court of Florida has held that the standard instructions are proper and do not impermissibly shift the burden to the defendant. *Brown v. State*, 721 So. 2d 274, 283 (Fla. 1998); *Cooper v. State*, 856 So. 2d 969 (Fla. 2003). Thus, Evans fails to demonstrate deficient performance and prejudice required to satisfy both prongs of the Strickland standard.

(b) Evans claims that counsel was ineffective during the penalty phase for failing to present expert testimony of Evans' psychological history and the effects of institutionalization on Evans. Evans contends that experts should have been used to

present detailed evidence of Evans' hospitalizations, medical diagnoses and treatments, abandonment by his parents, difficulties in school, circumstances surrounding his brother's death and funeral, and Evans' qualification for disability compensation.

At the evidentiary hearing, defense counsel testified that the limited use of expert witnesses was a matter of penalty phase strategy. Diamond Litty, lead counsel at the penalty phase, testified that it was the defense strategy to present Evans as the product of a bad marriage and absentee parents. The objective was to show an emotionally disturbed client who had been in many hospitals and who had experienced significant emotional trauma. After investigating Evans' family, school, and medical history, the defense team determined that the best way to present evidence of Evans' troubled childhood was through Evans' mother and father. Litty reasoned that these lay witnesses could bring in beneficial evidence engendering sympathy from the jury while at the same time limiting the focus of damaging evidence contained in Evans" medical records. Litty explained that defense counsel did not want the jury to know that Evans had no remorse for killing his brother, that he laughed off jail after starting a brush fire, that he was preoccupied with violent thoughts, that his drawings expressed themes of violence, that he bragged about killing his brother, that he stabbed a boy with a butter knife for making fun of him, that he threatened the staff with violence, that he was discharged from a facility for being too aggressive, that he beat people up for

money, and that he wrote a letter threatening that he was watching and could kill at anytime.

At the evidentiary hearing, Evans presented two mental health experts, Drs. Seth Silverman and Dr. Philip Harvey. Both experts disagreed with the primary diagnosis o conduct disorder made by multiple institutions during Mr. Evans' hospitalizations from age 6 through age 17.

Dr. Silverman diagnosed Evans with idiosyncratic thought processes and personality disorders. During cross-examination. Dr. Silverman admitted that his diagnosis had been made only two days prior to the evidentiary hearing and not included in his report submitted months earlier. Also, Dr. Silverman conceded that there was ample evidence in the record to support the more than 30 diagnoses of conduct disorder made by multiple institutions over ten years of hospitalization and the diagnosis made by defense expert. Dr. Rifkin.

Dr. Harvey diagnosed Evans with cognitive impairments resulting in poor impulse control likely due to a growth deficiency reported at 18 months of age. On cross-examination, Dr. Harvey admitted that there was no medical record evidence of Evans' growth deficiency, merely anecdotal evidence from Evan's parents to support Harvey's diagnosis of cognitive impairments.

Both experts testified that it is unlikely that Social Security benefits would have been awarded to Evans at age 17 solely on the basis of conduct disorder. However, no evidence was presented

explaining another basis for the award of disability compensation.

The Court finds the testimony of Drs. Silverman and Harvey insufficient to refute the record replete with evidence of multiple diagnoses of conduct disorder throughout Evans' childhood. Thus, there is insufficient evidence to show that trial counsel was ineffective merely on the basis that the more favorable diagnoses from Evans' new doctors conflict with the diagnoses of the original experts. *See Jones v. State,* 855 So. 2d 611, 618 (Fla. 2003); *Asay v. State*, 769 So. 2d 974, 986 (Fla. 2000).

Also at the evidentiary hearing, Evans presented testimony of his aunt, Patricia Dennis, and his mother, Sandra Kipp. Both witnesses testified to Evans' parents' lack of supervision, neglect, and lack of involvement with Evans. The Court finds this evidence cumulative to the testimony presented during the penalty phase.

Based on the foregoing, the Court finds trial counsel's mitigation investigation and penalty phase strategy reasonable. Trial counsel made informed decisions after thoroughly evaluating Evans' history and determined that the information could be more effectively presented through lay witnesses. Thus, Evans fails to demonstrate deficient performance required to satisfy the first prong of the *Strickland* standard.

(c) Evans claims that counsel was ineffective for failing to present evidence to refute the aggravator of pecuniary gain, Evans relies on Mindy McCormick's testimony discussed in Claim 1(6). Based on the

Court's analysis in Claim 1(6), supra, Evans fails to demonstrate prejudice required to satisfy the second prong of the *Strickland* standard.

CLAIM III

COUNSEL WAS INEFFECTIVE DURING VOIR DIRE FOR FAILING TO STRIKE JURORS SCHUMANN AND COMBS FOR CAUSE AND FOR FAILING TO OBJECT TO THE PROCEDURE FOR SELECTING THE TWELFTH JUROR AND ALTERNATE.

Claim III(1) Counsel failed to challenge Juror Schumann for cause or move for mistrial during the penalty phase based on Juror Schumann's conduct.

Evans claims that counsel was ineffective for failing to challenge Juror Schumann for cause because the juror was biased in favor of the death penalty for homicides not involving self defense. In addition, Evans contends that counsel should have moved for mistrial during the penalty phase as the result of Juror Schumann's body language when information came out concerning Evans' accidental shooting of his brother. No authority was presented to show that a juror's body language would be grounds for a cause challenge.

Harllee testified that he selected Juror Schumann because she was a good guilt phase juror for the defense. Harllee reasoned that Juror Schumann's brother-in-law had been arrested, the juror was frustrated by a police investigation of an assault in her home, and the juror and her husband had discussed Connie Pfeiffer's receipt of life insurance.

Harllee's jury selection notes show five pluses on Juror Schumann's voir dire responses and a self-ranking of nine on Harllee's ten-point death penalty scale. (State's Exhibit 2). Despite Juror Schumann's pro death penalty ranking, Harllee explained that he selected the juror in an effort to win the guilt phase. Further, it is clear from the evidentiary hearing testimony that Harllee knew that backstriking was permitted had Harllee elected to do so. The Court finds Harllee's trial strategy reasonable.

On the issue of moving for mistrial, Harllee stated that defense counsel requested the trial court to permit inquiry of Juror Schumann to determine whether mid-trial publicity about the accidental shooting was the reason for heated deliberations during the guilt phase and for the juror's body language during the penalty phase. The request was denied. The trial court invited defense counsel to file a motion. No motion was filed because Harllee believed it was mere speculation as to what the body language meant. The Court finds Harllee's trial strategy reasonable.

Claim III(2) Counsel failed to challenge Juror Combs.

Evans claims that counsel was ineffective for failing to strike Juror Combs because the juror knew some of the lay witnesses from the bar where he worked. Harllee moved to challenge Juror Combs for cause but the challenge was denied. Harllee did not exercise a peremptory challenge but decided to keep Juror Combs as an otherwise good defense juror. Harllee's jury selection notes show four pluses on

Juror Comb's voir dire responses and a self-ranking of five on Harllee's ten-point death penalty scale. (State's Exhibit 2). Further, it is clear from the evidentiary hearing testimony that Harllee knew that backstriking was permitted had Harllee elected to do so. The Court finds Harllee's trial strategy reasonable.

CLAIM IV

THE CUMULATIVE EFFECT OF PROCEDURAL AND SUBSTANTIVE ERRORS DENIED MR. EVANS A FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Based on the analysis and denial of Claims I through V, *supra*, the Court finds no cumulative procedural or substantive errors affecting the fairness of Evans' trial. *See Freeman v. State*, 761 So. 2d 1055, 59 (Fla. 2000).

CLAIM V

THE RULE PREVENTING THE INTERVIEWING OF JURORS DENIED MR. EVANS EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Evans claims that Rule 4-3,5(d)(4), Rules Regulating the Florida Bar, is unconstitutional because the rule prevented defense counsel from exploring possible juror bias and misconduct. Evans contends that he was prejudiced by the inability to interview Juror Taylor concerning unrecorded comments made during trial that were discussed in Claim I(1), *supra*. This claim is procedurally barred because the inability to interview jurors could and

should have been raised on direct appeal. *Arbalaez v. State*, 775 So. 2d 909 (Fla. 2000). Further, Evans does not make a prima facie showing of juror misconduct by alleging "overt acts" by Juror Taylor sufficient to warrant postconviction juror interviews. *Marshall v. State*, 854 So. 2d 1235, 1244 (Fla. 2003), Therefore, Evans is not entitled to relief.

CLAIM VI

THE FLORIDA CAPITAL SENTENCING PROCEDURES VIOLATED MR. EVANS' SIXTH AMENDMENT RIGHT UNDER *RING v. ARIZONA* TO HAVE A UNANIMOUS JURY DETERMINE HIS GUILT ON ALL ELEMENTS OF CAPITAL FIRST DEGREE MURDER.

Evans challenges the validity of his death sentence under *Ring v. Arizona*, 536 U.S. 584 (2002). The Florida Supreme Court has considered Florida's capital sentencing scheme in light of *Ring* and has reaffirmed its constitutionality. *Jones v. State*, 845 So. 2d 55, 74 (Fla. 2003). Further, on direct appeal Evans challenged the constitutionality of Florida Statutes, Section 921.141, under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Evans v. State*, 808 So. 2d 92, 110 n.10 (Fla. 2001). Thus, the claim is both without merit and procedurally barred.

The Defendant's motion is denied. The Defendant has the right to appeal within thirty days of the rendition of this order.

DONE AND ORDERED in Chambers in Vero Beach, Indian River County. Florida this 7 day of May, 2005.

/s/
DAN L. VAUGHN
CIRCUIT COURT JUDGE

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Appendix G

Supreme Court of Florida.

Paul H. EVANS, Appellant,
v.
STATE of Florida, Appellee.

No. SC96404.
Dec. 13, 2001.
Rehearing Denied Feb. 12, 2002.

PER CURIAM.

We have on appeal the judgment and sentence of the trial court imposing the death penalty upon Paul H. Evans for the March 24, 1991, killing of Alan Pfeiffer. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. For the reasons that follow, we affirm Evans' conviction and sentence of death.

FACTS

The trial record establishes the following facts. This is a murder-for-hire case involving four coconspirators: Evans, who was nineteen at the time of the crime; Sarah Thomas, Evans' girlfriend; Donna Waddell, Evans' and Thomas's roommate; and Connie Pfeiffer, the wife of the victim. At trial, the sequence of events regarding the murder, and Evans' role in the murder, were provided predominantly by Thomas and Waddell, who both testified on behalf of the State.[1] Waddell signed a deal with the State in

[1] Connie never testified at Evans' trial because she invoked her Fifth Amendment rights. Connie was ultimately convicted of

which she agreed to plead guilty to second-degree murder in exchange for giving a sworn statement explaining her involvement in the murder and agreeing to testify in any proceeding. Thomas was never charged with any crime. The evidence at trial demonstrated that the victim and Connie had a "rocky" marriage, and that each were dating other people while they were married. A few weeks before the murder, Connie approached several individuals about killing her husband, but each person refused. Connie then asked Waddell if she knew anyone who would be willing to kill her husband, and Waddell suggested that Evans might be willing to commit the murder. Thomas testified at trial that Evans told her that he would kill Alan in exchange for a camcorder, a stereo, and some insurance money.

Waddell stated at trial that she, Evans, Connie, and Thomas all collaborated to come up with the plan to kill the victim. Testimony also established that Evans initiated the plan to commit murder and that he was the "mastermind" behind the plot. Pursuant to the agreement, on Saturday morning, March 23, 1991, Waddell, Connie, and Evans all participated in arranging the Pfeiffers' trailer to make it look like a robbery had taken place. Waddell testified that it was Evans' idea to stage the robbery. They stacked electronic equipment near the back door. During the staging of the robbery, Evans wore gloves.

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first-degree murder, the jury recommended a life sentence, and the trial court imposed a life sentence.

After the trailer was arranged, Waddell and Evans went to her parents' house to steal Waddell's father's gun. Evans broke into the house through a window to steal the gun and also stole a jar of quarters from Waddell's father's bedroom. Waddell and Evans disposed of the jar, keeping the quarters, and then Waddell, Evans, and Thomas went to test-fire the gun.

Waddell testified that after firing the gun, she, Evans, and Thomas went back to the trailer to go over the alibi with Connie, and Evans told the other three what to say. Waddell stated that Evans explained that he was going to hide behind furniture and shoot Alan when he entered the trailer.

Waddell testified that she, Evans, and Thomas were at the fair that evening but left the fair and arrived at the trailer at dusk. They went in the front door. Evans had a bag containing the gun and dark clothing. Waddell and Thomas left Evans in the trailer, locked the door, and went back to the fair.[2] They paid for the fair with the quarters stolen from Waddell's parents' house.

Thomas testified that she and Waddell paid with quarters to avoid having their hands stamped, so it would not look like they left the fair and later returned. Thomas also testified that she and Waddell stayed at the fair for approximately one to two hours

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[2] Although Waddell did not remember whether she went back to the fair after dropping Evans off at the trailer, Thomas testified that they did go back to the fair after dropping Evans off at the trailer.

before returning to the trailer. According to Thomas, it was Evans who told them to wait at the fair before returning to the trailer.

Between 7 p.m. and 7:15 p.m. that evening, Alan's girlfriend, Linda Tustin, met Alan at the store where he worked. She observed that Alan was agitated and talking on the phone to Connie. When Alan got off of the phone, he told Tustin that "his wife and her biker friends were going to clean him out." He left work to drive back to the trailer at approximately 7:30 p.m. Alan worked thirty minutes away from the trailer.

Although there is some dispute between the testimony of Waddell and Thomas as to the following sequence of events,[3] both witnesses agreed that they returned to the pickup site, where Evans got into the back of the car and said, "It's done." Waddell stated that Evans told her that he turned the stereo up loud so that nobody would hear the gunshots, then hid behind some furniture and shot Alan when he came into the trailer. Leo Cordary, one of the Pfeiffers' neighbors, testified that he heard gunshots between 8 p.m. and 8:30 p.m., but did not recall anyone running from the trailer.

Waddell also testified that Evans did not want to tell her or Thomas too much about the murder so

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[3] Thomas testified that when she and Waddell originally went to the pickup spot for Evans, he was not there. Thomas stated that they proceeded to drive around and parked at a gravel parking lot. She testified that they did not see Evans, so they went back to the fair and waited another 30 to 45 minutes before leaving again to meet Evans at the pickup spot.

that they would not be able to tell the authorities anything if they were caught. Evans told Waddell, "Just stick to the story that we were at the fair and just we were all together all night at the fair." Thomas and Waddell both testified that they disposed of the gun in a canal near Yeehaw Junction.[4] They then went back to the fair to meet up with Connie.

Although there is a dispute in the testimony of Waddell and Thomas as to the timing and specific circumstances, both women stated that Evans tried to burn his pants in the bathtub following the murder.[5] Thomas testified that shortly after the murder, Evans took the camcorder apart and threw the pieces in a dumpster because he was afraid this could implicate him. Moreover, Waddell testified that she, Thomas, and Evans smashed the television and that Thomas and Evans disposed of the pieces.

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[4] Thomas stated that she and Evans disposed of the gun a few days after the murder in a canal so that fingerprints would be hard to find. By contrast, Waddell testified that the three of them disposed of the gun in a canal that night after shooting off the rest of the bullets. Moreover, according to Waddell, after they disposed of the gun, they went to a dirt road where Evans changed clothes and discarded the dark colored shirt and his shoes. He kept the dark colored pants.

[5] Waddell testified that this occurred the next day, and that they used pool chemicals. They also tried to burn the gun carrying case. According to Waddell, she, Evans, and Thomas were present when they tried to burn the pants. However, according to Thomas, she and Evans tried to burn Evans' pants after they got home from Denny's.

In the early morning on March 23, 1991, the Vero Beach Police Department was summoned to the trailer that the victim shared with Connie, due to a complaint of loud music. The police found the south door of the trailer ajar and, upon entering, discovered the victim's body on the living room floor. The police noticed that the interior of the residence was illuminated by a dim kitchen light. Moreover, the police discovered that the dining area paddle fan light had been disabled. There were no signs of a forced entry or a struggle within the trailer, but the trailer was in a state of disarray, with electronic equipment and other items stacked near the south door. The victim was wearing two gold chains and had $48 in his pocket when the police found him. Moreover, the police found the victim's life insurance policies which were worth approximately $120,000 lying on the table. Each policy listed Connie as the beneficiary.

The police also discovered a marijuana roach on the end table in the living room and found a crack pipe and roach clip on the bedroom dresser. The roach in the living room had lipstick on it, but the police never sent it for DNA analysis. A television, camcorder, and VCR were reported missing from the trailer and never recovered. These items were rented from Alan's place of work.

Three bullets were recovered from the victim, one from his spine, and two from his head. The testimony at trial identified the bullets as .38 special Nyclad bullets that were fired from the same gun, and that the shots likely occurred from a distance of more

than two feet away. Moreover, spent casings found in Waddell's father's home were consistent with those which would have held the Nyclad bullets.

The police did not speak with Connie until she arrived at the station the following afternoon. Detective Elliot testified at trial that Connie was uncooperative throughout the investigation. Connie told Detective Elliot that she was at the fair with Evans, Waddell, and Thomas on the evening of the murder. Waddell stated that they stayed at the fair "long enough to be seen." Waddell, Thomas, and Evans each confirmed this alibi.

Thomas broke up with Evans about a month after the murder. Evans told her that he did not actually kill Alan, but that he had three African-American men do it. Moreover, Evans called Thomas some time after the murder and told her to "stick to the story."

Following the murder of her husband, Connie moved out of Vero Beach and purchased a horse farm near Ocala worth approximately $120,000, which was the same amount as the life insurance proceeds. Although Waddell testified that she never received anything for the death of Alan, Waddell acquired a taxi company some time after the murder. About three years after the murder, Waddell met with Evans. Evans told Waddell that she better keep quiet or his "old family members [were] going to kill" her. Evans also told Waddell that the person who killed Alan was dead. Evans told Waddell that he went and got the gun, took it apart, and took a bus to the woods in Ocala to dispose of the pieces. At the end of

the conversation, Evans threatened to kill Waddell and her son if she talked to the police.

Ultimately, the case grew cold and was closed. However, in 1997, the Vero Beach Police Department reopened the case and Detective Daniel Cook focused his investigation upon Evans, Connie, Waddell, and Thomas. Thomas was the first suspect the police interviewed. Thomas explained the events surrounding the homicide and agreed to wear a wire and contact Waddell. At the meeting between Thomas and Waddell, Thomas stated: "We helped." Waddell responded: "I know. I think about it every day." The police arrested Waddell and, after the police showed Waddell the statement that she gave to Thomas, Waddell agreed to cooperate with the police and provide a statement. Based on Thomas and Waddell's cooperation, Connie and Evans were arrested for their alleged involvement in the murder.

Although Evans did not testify at trial,[6] the State presented the statement Evans made to Sergeant Daniel Brumley on March 28, 1991, in which he stated that he was at the fair the entire night of March 23. With regard to Alan's death, Evans told Sergeant Brumley: "I know it was none of us. I don't care what nobody says. We were all together. One thing, Connie couldn't do a thing (sic) like that. Just the nature of her, how she is."

The jury found Evans guilty of first-degree murder and the case proceeded to the penalty phase.

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[6] In fact, the defense presented no witnesses during the guilt phase.

The defense presented testimony establishing that Evans was a hyperactive child and was placed on Ritalin when he was six years old. His parents divorced at that time, and between 1978 and 1984, his father saw Evans only once because Evans' father was in the military. In late 1983, Evans' mother asked Evans' father to take custody of both Evans and his younger brother, Matthew, because of the children's behavioral problems. Shortly thereafter, Evans' father received news that Evans had accidentally shot Matthew while they were playing. Evans' parents testified at the penalty phase that Evans went through a "very emotional traumatic time" after the shooting. Although there was testimony from family members regarding the effect that the shooting incident had on Evans and the treatment he subsequently received, there was no expert testimony regarding any specific mental illness or impairment from which Evans may have suffered.

Dr. Gregory Landrum, a clinical and forensic psychologist, testified that Evans' intelligence was in the high average to superior range. Moreover, Dr. Laurence Levine, a psychologist who performed a number of psychological and neuropsychological tests on Evans, stated that Evans had above average intelligence and was an avid reader. Finally, Evans' mother and Dr. Levine both testified to Evans' artistic ability, with Dr. Levine stating that Evans was a "stupendous" artist.

Drs. Landrum and Levine both testified that Evans would respond well to a structured

environment and would adapt well to prison. However, Dr. Levine stated on cross-examination that Evans' record at all of the institutions he attended was replete with disciplinary problems. Deputies Carl Lewis and Gregory George, who were corrections officers at the Indian River County Jail, testified that Evans had been a good prisoner and had not exhibited any disciplinary problems. Finally, Paul George, a Jehovah's Witness who conducted bible study in prison with Evans, stated that Evans has a sincere belief in God.

Following the penalty-phase proceedings, the jury recommended the imposition of the death penalty by a vote of nine to three. The trial court found the following in aggravation: (1) Evans had committed the crime for pecuniary gain (great weight); and (2) the murder was committed in a cold, calculated, and premeditated manner without any pretense of legal or moral justification ("CCP") (great weight). The trial court found only one statutory mitigator: Evans' age of nineteen when he committed the murder (little weight).[7]

In addition, the trial court found and gave weight to the following nonstatutory mitigators: (1) Evans' good conduct while in jail (little weight); (2) Evans'

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[7] The defense waived the following statutory mitigators: (1) lack of significant prior criminal history; (2) the defendant acted under the influence of another; (3) the defendant acted under any strong emotional duress; (4) impaired capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of the law; and (5) the victim's participation in or consent to the defendant's conduct.

good attitude and conduct while awaiting trial (little weight); (3) Evans had a difficult childhood (little weight); (4) Evans was raised without a father (little weight); (5) Evans was the product of a broken home (little weight); (6) Evans suffered great trauma during childhood (moderate weight); (7) Evans suffered from hyperactivity and had a prior psychiatric history and a history of hospitalization for mental illness (moderate weight); (8) Evans was the father of two young girls (very little weight); (9) Evans believes in God (very little weight); (10) Evans will adjust well to life in prison and is unlikely to be a danger to others while serving a life sentence (very little weight); (11) Evans loves his family and Evans' family loves him (very little weight). The trial court found that Evans failed to establish that he was immature, and therefore gave this proposed mitigator no weight. Moreover, the court refused to recognize Evans' artistic ability as a mitigating circumstance and therefore gave this no weight. Concluding that the aggravation outweighed the mitigation, the trial court imposed the death penalty.

On appeal, Evans raises fourteen claims.[8] Although Evans does not raise the issue of

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[8] Evans claims that: (1) the trial court erred in denying Evans' motion to quash the indictment or dismiss the charge; (2) reversal is required under *Anderson v. State,* 574 So.2d 87 (Fla. 1991), because the State's testimony at trial contradicted the case it presented to the grand jury; (3) the trial court erred in excluding the testimony concerning cannabanoids in the victim's blood; (4) the trial court erred in limiting the cross-examination of Detective Brumley to exclude hearsay; (5) the trial court erred in closing individual voir dire to Evans' family;

sufficiency of the evidence on appeal, we have independently reviewed the evidence in this case and we conclude that the evidence is sufficient to support the murder conviction. *See Rodriguez v. State,* 753 So.2d 29, 43 (Fla. 2000).

GUILT PHASE ISSUES

1. Preindictment Delay

In Evans' first claim on appeal, he asserts that the trial court erred in denying his motion to quash the indictment or dismiss the murder charge because of preindictment delay. The murder occurred in March 1991, but Evans was not indicted until August 1997. Evans maintains that this delay of more than six years has prejudiced him because

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(6) the trial court erred in denying Evans' motion for a statement of particulars and in allowing the State to argue in the alternative that Evans was the shooter or a principal; (7) the State's closing argument comments during the guilt phase were reversible error; (8) the State's voir dire examination of the jury regarding the testimony of coconspirators or codefendants constituted fundamental error; (9) Evans' death sentence is disproportionate; (10) Evans' death sentence is either disproportionate or unconstitutional because the State presented the jury with the alternative theories that Evans was either the shooter or a principal; (11) the State's closing argument comments during the penalty phase were fundamental error; (12) the trial court erred in giving no weight to valid mitigation; (13) the trial court erred in imposing the death penalty when the jury made no unanimous findings of fact as to death eligibility; (14) the trial court erred in finding that the murder was both cold, calculated, and premeditated and that the murder was committed for pecuniary gain (improper doubling).

witnesses were lost and evidence could not be examined or admitted at trial.

The trial court denied the motion after hearing oral argument from both the defense and the State, finding that Evans had failed to demonstrate actual prejudice by the delay in the indictment. We agree and conclude that no due process violation occurred because Evans has failed to make the threshold showing of actual prejudice in this case.

In *Rogers v. State,* 511 So.2d 526, 531 (Fla. 1987), this Court explained the procedure a defendant must follow when the defendant asserts a due process violation based on preindictment delay:

> When a defendant asserts a due process violation based on preindictment delay, he bears the initial burden of showing actual prejudice.... If the defendant meets this initial burden, the court then must balance the demonstrable reasons for delay against the gravity of the particular prejudice on a case-by-case basis. The outcome turns on whether the delay violates the fundamental conception of justice, decency, and fair play embodied in the Bill of Rights and fourteenth amendment.

The contention of prejudice must be based on more than mere speculation, and must be supported by substantial evidence. *See id.* Thus, in *Rogers,* the Court rejected the defendant's claim of actual prejudice from the State's delay of nearly a year where the defendant claimed that the memories of those familiar with the murder had faded and two alibi witnesses had allegedly disappeared. *See id.*

The Court concluded that these claims were based on "mere speculation unsupported by any substantial evidence." *Id.*

In *Scott v. State,* 581 So.2d 887, 892-93 (Fla. 1991), this Court held that the defendant was actually prejudiced by a delay in prosecution of seven years and seven months where the record established the following: First, the defendant was no longer able to corroborate his alibi that was initially checked out by the police; second, the defendant was unable to present certain witnesses in his defense because the witnesses had died in the interim; third, investigative reports, statements, and evidence that may have been helpful to the defendant were lost as a result of the delay and because of changes in police personnel and administrations; and finally, the reliability of hair comparison evidence was adversely affected by the delay and the manner in which the comparison was made. *See id.*

In this case, although Evans made a particularized claim that key witnesses had become unavailable to the defense, and also made a generalized claim that the physical evidence was so stale that it was of no evidentiary value, Evans did not submit any evidence to support these claims. We conclude that the mere assertion that particular witnesses helpful to the defense are unavailable, absent record evidence, precludes a finding of actual prejudice under these circumstances. Because we find that Evans has failed to demonstrate actual prejudice in this case, we need not "balance the

demonstrable reasons for the delay against the gravity of the particular prejudice." *Rogers,* 511 So.2d at 531. Accordingly, we deny relief on this claim.

2. Alleged Error under Anderson v. State, 574 So.2d 87 (Fla. 1991)

Evans also claims that reversal is required because the State's case at the time of the indictment, as set out in the "Complaint Affidavit," and the State's case at trial were materially different from each other, relying upon this Court's decision in *Anderson v. State,* 574 So.2d 87 (Fla. 1991). In response, the State maintains that although Evans requested the grand jury testimony, Evans did not raise the alleged variances between the complaint and the trial testimony at trial, and, therefore, this claim is unpreserved. Furthermore, the State contends that even if the Court decides to reach the merits of this claim, Evans has failed to show that the grand jury testimony was either perjured or material.

We agree with the State that the matter is unpreserved. Moreover, we do not find that Evans' allegation amounts to error, let alone fundamental error. In *Anderson,* the defendant claimed that the trial court erred in failing to dismiss the indictment when a witness admitted that her grand jury testimony differed from her trial testimony. 574 So.2d at 90. The defendant contended that because the State knew prior to trial that the witness's grand jury testimony was perjured and did nothing to correct the testimony, the trial court should have

dismissed the indictment. *See id.* This Court held that "due process is violated if a prosecutor permits a defendant to be tried upon an indictment *which he or she knows is based on perjured, material testimony* without informing the court, opposing counsel, and the grand jury." *Id.* at 91 (emphasis supplied). However, the Court found that although the testimony was false in part, "it was not false in any material respect that would have affected the indictment." *Id.* at 92. Moreover, the Court explained that this was not a case where it was faced with deliberate subornation, because the State did not knowingly present false testimony to the grand jury. *See id.*

In this case, Evans does not maintain that the State deliberately presented false testimony to the grand jury, and there is no indication that the State did present false testimony to the grand jury. Rather, Evans contends that variances between the complaint and the trial testimony necessitate a reversal. In *Brookings v. State,* 495 So.2d 135, 137 (Fla. 1986), a case similar to this case, the defendant claimed that he was entitled to an inspection of the grand jury testimony due to certain inaccuracies and conflicts between two witnesses' depositions and the original criminal affidavit. This Court rejected the defendant's claim, explaining "there is no pretrial right to inspect grand jury testimony." *Id.* Although the defendant enumerated several instances of alleged inconsistencies between the grand jury testimony and the witnesses' depositions, this Court found "that appellant's counsel, through cross-examination at trial of both [witnesses], was able to

direct the jury's attention to any purported inconsistencies between the witnesses' trial testimony and their prior depositions, thus obviating any need for resort to the grand jury testimony." *Id.* at 138. Therefore, based on this Court's decision in *Brookings,* we reject Evans' claim that reversal is justified based on alleged inconsistencies between the complaint and the trial testimony.

3. Foundation for Testimony Concerning Cannabanoids

In Evans' third claim, he contends that the trial court erred in sustaining the State's objection to the defense's questioning of a medical examiner regarding tests revealing cannabanoids in the victim's blood on the ground that the defense failed to lay a proper foundation for the results of the tests. We hold that the trial court did not abuse it discretion in sustaining the State's objection because Evans failed to lay the proper predicate for the questioning of the medical examiner.

"Admission of evidence is within the discretion of the trial court and will not be reversed unless there has been a clear abuse of that discretion." *Ray v. State,* 755 So.2d 604, 610 (Fla. 2000) (citing *Alston v. State,* 723 So.2d 148 (Fla. 1998)). Evidence Code section 90.704, Florida Statutes (2001), provides: "The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion

expressed, the facts or data need not be admissible in evidence."

The defense relies upon this Court's opinion in *Capehart v. State,* 583 So.2d 1009 (Fla. 1991), for the proposition that a doctor need not perform blood tests in order to testify about the results. However, the *Capehart* opinion required that a party lay a proper foundation before introducing medical testimony. *Id.* at 1012-13. In *Capehart,* the Court concluded that the State laid a proper foundation for a medical examiner to testify regarding the cause of the victim's death and the condition of the victim's body, even though the medical examiner did not perform the autopsy and the autopsy report was not admitted into evidence. 583 So.2d at 1012. The Court explained that the State had laid a proper foundation because the State "properly qualified [the examiner] as an expert without objection and ... she formed her opinion based upon the autopsy report, the toxicology report, the evidence receipts, the photographs of the body, and all other paperwork filed in the case." *Id.* at 1012-13.

In contrast to *Capehart,* in this case, Evans never attempted to establish that the toxicology report was of the type reasonably relied upon by Dr. Bell or that Dr. Bell formed his opinion based upon the toxicology report. Therefore, we conclude that Evans failed to establish a proper foundation for Dr. Bell to testify regarding the cannabanoids found in the victim's blood and that the trial court did not abuse its discretion in refusing to allow this testimony at trial.

4. Limitation on the Cross-Examination of Detective Brumley

In Evans' fourth point, he asserts that the trial court erred in limiting cross-examination of Detective Brumley to exclude hearsay after the State allegedly opened the door by eliciting hearsay statements on direct examination. During the State's direct examination of Detective Brumley, he testified about the police investigation of the Pfeiffers' trailer after the murder, stating: "We got out more detectives to start neighborhood canvasses and backgrounds on the deceased," and "we followed up whatever leads we had from the neighborhood canvass and followed up the background on the deceased and the financial aspect of him." Moreover, the following inquiry took place during the State's direct examination of Detective Brumley:

> Q: Now, in regards to the overall crime scene, and we've already talked about that as far as the investigation, how did y'all proceed? Or how did you proceed?
>
> A: Well, we followed up whatever leads we had from the neighborhood canvass and followed up the-had a detective follow up the background on the deceased and the financial aspect of him.

The defense did not object to the State's question. During the defense's cross-examination of Detective Brumley, the State made a motion in limine, which the trial court granted, to prevent the defense from eliciting from Detective Brumley whether or not there were any other individuals who heard a

gunshot at 10:30 p.m., on the grounds that it would constitute a hearsay statement.

We hold that the State's questioning of Detective Brumley on direct examination neither constituted hearsay nor "opened the door" to allow the defense to ask about specific leads on cross-examination. Section 90.801(1)(c), Florida Statutes (2001), defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." In this case, Detective Brumley stated several times that the police followed up leads and had a detective follow up on the victim's background and finances. However, this testimony does not constitute a "statement ... offered in evidence to prove the truth of the matter asserted." Rather, Detective Brumley provided testimony concerning the police department's conduct after the investigation. Even under the definition of a "statement" that provides "nonverbal conduct of a person if it is intended by the person as an assertion," section 90.801(1)(a)2., Detective Brumley's statements do not qualify as hearsay. Detective Brumley did not state with specificity who he or other detectives spoke to in following up on leads. Moreover, Detective Brumley did not allude to any conversations he or other detectives had with leads or how these leads contributed to the investigation. Therefore, we conclude that Detective Brumley's testimony did not constitute hearsay.

Accordingly, we hold that the trial court did not err in granting the State's motion in limine to

exclude the defense from asking about whether any of the leads heard gunshots at 10:30 p.m. on the night of the murder. The defense concedes that its inquiry as to whether any leads heard gunshots at 10:30 p.m. constitutes hearsay. However, the defense contends that because the State "opened the door" by eliciting hearsay on direct, the defense was entitled to ask follow-up questions that elicited hearsay.

This Court rejected a similar contention in *Crump v. State,* 622 So.2d 963 (Fla. 1993). In *Crump,* the trial court limited the defendant's questioning of a detective's testimony concerning interviews the detective conducted during the investigation. *Id.* at 969. Over the State's objection, the trial court permitted the defendant to question the detective about whether the police interview focused on other suspects during the investigation. *See id.* However, the trial court refused to allow the detective to testify about the substance of his interview. *See id.* The defendant argued that because the detective's interviews tended to show that another suspect may have killed the victim, the trial court improperly limited this evidence. *See id.* This Court rejected the defendant's argument, explaining:

> The evidence here concerning the detective's interviews is hearsay that does not fall within one of the hearsay exceptions. The substance of the interviews does not constitute reverse *Williams* rule evidence because it would not have been admissible had the other suspect been on trial for the present offense. Thus, the trial court properly excluded these statements.

Id.

Therefore, we conclude that the State did not "open the door" to the defense's eliciting of hearsay on cross-examination in this case. *Cf. Keen v. State,* 775 So.2d 263, 273-76 (Fla. 2000) (explaining that mistrial should have been granted where inference from detective's hearsay testimony was that the police investigation had produced evidence that defendant was the murderer).

Finally, we reject Evans' reliance upon *Sweet v. State,* 693 So.2d 644 (Fla. 4th DCA 1997), *Williams v. State,* 689 So.2d 393 (Fla. 3d DCA 1997), and *Johnson v. State,* 653 So.2d 1074 (Fla. 3d DCA 1995), for the proposition that the "rule of completeness" demands that Evans be allowed to elicit hearsay in cross-examination based upon the statements made in the direct examination. The purpose of the "rule of completeness" is "to avoid the potential for creating misleading impressions by taking statements out of context." *Williams,* 689 So.2d at 398 (quoting *Larzelere v. State,* 676 So.2d 394, 401 (Fla. 1996)). Moreover, "[t]he admission of such testimony is subject to a judicial determination that the statements "'in fairness ought to be considered contemporaneously" with the introduction of the partial statements.'" *Id.* at 398 (quoting *Larzelere,* 676 So.2d at 402); *see* § 90.108(1), Fla. Stat.; *Ramirez v. State,* 739 So.2d 568, 580 (Fla. 1999).

In this case, it does not appear that the jury was misled or left confused by Detective Brumley's testimony. Detective Brumley did not testify about a partial statement a specific witness gave him that

required further clarification. Further, Detective Brumley did not testify about the results or actions he took in response to the canvass. In fact, on cross-examination the defense asked extensive questions about the canvassing by the police, including which specific leads the police followed up and which leads went into the police report. The trial court precluded the defense from eliciting hearsay only with regard to what a single lead's actual statements were. Therefore, we reject Evans' fourth claim on appeal.

5. Individual Voir Dire

Evans next contends that the trial court's closure of individual voir dire to his parents violated his right to a public trial under the Sixth Amendment of the United States Constitution and article 1, section 16 of the Florida Constitution. Evans did not object to this issue and we hold that any closure during voir dire was partial in nature.

The trial court in this case utilized the hearing room rather than the courtroom for individual voir dire because it did not want to contaminate the jury pool by having a potential juror state his or her knowledge about the case, which was the reason for the second mistrial in this case.[9] Moreover, the record in this case indicates that throughout the individual voir dire questioning, both members of the

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[9] This case had resulted in a mistrial two times before the instant trial. The first trial ended in a mistrial when the jury could not agree upon a verdict. Evans' second trial ended in a mistrial due to prejudicial information regarding the first trial disseminated by a juror during voir dire questioning.

press and a student "shadowing" one of the defense attorneys were allowed to observe the proceedings.

Therefore, given the limited nature of the exclusion of Evans' parents, the fact that other members of the public were allowed to observe individual voir dire, and the fact that Evans did not object when the trial court stated that there was not enough room in the hearing room for Evans' parents, we conclude that there is no reversible error.

6. Voir Dire Examination Regarding Testimony of Coconspirators

Evans also asserts that the State engaged in improper questioning during group voir dire regarding the subject of a plea bargain. The State counters that it was not preconditioning jurors or lending credibility to its witnesses, but rather was attempting to find those jurors with biases. We agree with the State and conclude that the trial court did not abuse its discretion in allowing the State to interrogate the potential jurors about whether they harbored any biases against a witness who had accepted a plea bargain.

"Whether a trial judge should have allowed interrogation of jurors on specific subjects is reviewed under an abuse of discretion standard." *Davis v. State,* 698 So.2d 1182, 1190 (Fla. 1997) (citing *Farina v. State,* 679 So.2d 1151, 1154 (Fla. 1996)). This Court has explained: "The purpose of the voir dire proceeding is to secure an impartial jury for the accused. Consequently, the possible bias of a member of the jury venire which ... might affect the fairness of the trial of the accused, is clearly a proper

ground of inquiry during this proceeding." *Lewis v. State,* 377 So.2d 640, 642-43 (Fla. 1979) (citations omitted).

The questioning challenged by Evans in this case is similar to the questioning challenged in *Moody v. State,* 418 So.2d 989, 993 (Fla. 1982). In that case, the prosecutor asked prospective jurors during voir dire "whether they would never return a verdict of guilty under any circumstances where the evidence presented was from a witness who was present at the scene of the crime and who was granted immunity by the State." *Id.* The defendant claimed that this question asked the jurors to prejudge the credibility of a witness. *See id.* This Court rejected the defendant's argument because "[t]he question did not call for prejudgment of the case and did not amount to asking the venire to prejudge the credibility of a witness, but rather it was asked to determine the possible bias of any member of the jury venire which might affect the fairness of the trial." *Id.*

In this case, the State's case against Evans strongly depended upon the jury believing the testimony of Waddell, who made a plea bargain. Therefore, it was proper for the State to inquire into whether any of the potential jurors would harbor any biases against a witness who had accepted a plea bargain. Moreover, when several of the potential jurors asked the State specific questions regarding the plea bargain, the State did not bolster Waddell's credibility, but instead explained that the jury should wait to view the evidence in the case. Therefore, we conclude that the trial court did not

abuse its discretion in allowing the State to question jurors about possible bias during voir dire.

7. Motion for Statement of Particulars

Evans next asserts that the trial court erred in denying his motion for a statement of particulars. At trial, Evans' motion for statement of particulars sought to commit the State to either a theory that Evans was the shooter or that he was the principal, arguing that the State should not be allowed to present alternative theories that Evans was the shooter or a principal. Specifically, Evans contended that the State "must specify which theory of prosecution it intends to proceed under to obtain a conviction for First Degree Murder in order to permit the Defendant to properly prepare and present a defense." The trial court denied the motion.

The State's theory of the case was that, in fact, Evans was the shooter and the trial court so found in its sentencing order. Evans does not contend on appeal that there was not substantial competent evidence to support the conclusion that Evans was the shooter. During closing argument, the State did argue: "Six of you may agree that he is the actual shooter. Six of you may agree he's a principal. Under either theory he is guilty of first degree murder." Evans did not object to this statement nor did he request a jury instruction or special verdict form that would have required jury unanimity on whether he was the shooter or the principal.

On appeal, Evans raises for the first time that the State's use, in a capital case, of two mutually exclusive factual theories so that the jury may be

divided as to the elements of the crime violates both the state and federal constitutions based on the United States Supreme Court's decisions in *Schad v. Arizona,* 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991), and *Richardson v. United States,* 526 U.S. 813, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999). We conclude that this claim was not preserved.

8. Guilt Phase Closing Argument

Evans claims that the State made several improper comments during its guilt phase closing argument. Although Evans concedes that defense counsel did not object to most of the alleged improper comments, Evans contends that the cumulative effect of the objected-to and unobjected-to comments deprived Evans of a fair penalty phase hearing.

As for the objected-to comments, Evans argues that the State impermissibly commented upon facts not in evidence at several points during closing argument. However, Evans only objected to the following argument by the State regarding what occurred during the shooting:

> Alan gets shot in the back. He turns and begins to fall. Look at his feet. If you stand him right back up, he's back in front of the entertainment center. He falls up against the loveseat. The shooter, as he's coming up at Alan falling, shoots again, hits him on the top of the head. There's a substance here (indicating) consistent with blood. Alan falls. The shooter comes out from that corner-

Evans objected to the prosecutor's depiction of the murder and the trial court overruled the objection. We conclude that the State's comments constituted reasonable inferences from the evidence presented at trial. At trial, Dr. Michael Bell testified that although the cause of death was multiple gunshots, in particular two gunshots to the head, he could not determine which gunshot occurred first. However, there was testimony indicating that the substance on the loveseat was consistent with blood. Moreover, given the positioning of the body, the prosecution's theory of the bullet entries appears to be a logical inference.

With regard to the unobjected-to statements made by the State regarding facts not in evidence, we conclude that the majority of the State's comments constituted permissible inferences from the evidence presented at trial. Having carefully reviewed the entire closing argument in light of the unobjected-to arguments that Evans contends were improper, we reject Evans' claim that any of these errors, either by themselves or collectively, rise to the level of fundamental error. Moreover, reviewing both the objected-to and unobjected-to errors, we conclude that the Evans is not entitled to a new guilt phase proceeding, as he was not deprived of a fair guilt phase proceeding. Accordingly, we deny relief on Evans' closing argument claims.

PENALTY PHASE ISSUES

1. Closing Argument Errors

Evans asserts that the State made four improper arguments during its penalty phase closing

argument. However, Evans failed to object to any of the arguments the State made during its closing. We find Evans' claims barred because they were not preserved for appellate review, *see Fernandez v. State,* 730 So.2d 277, 282 (Fla. 1999), and we find that none of the alleged errors-either by themselves or cumulatively-rise to the level of fundamental error.

2. Mitigating Evidence

Evans claims that the trial court erred in rejecting Evans' immaturity and artistic ability as nonstatutory mitigation in this case. The trial court's sentencing order provides in pertinent part:

> 9) The defendant was immature at the time of the homicide.
>
> The defendant has failed to establish that he was in fact immature at the time of the murder. This court does not give this any weight.
>
> ....
>
> 13) The defendant has artistic ability.

The defendant presented drawings he made in jail to show the defendant's positive prognosis for prison life. This court does not recognize this as a mitigating factor and gives it no weight.

As this Court recently explained in *Merck v. State,* 763 So.2d 295, 298 (Fla. 2000):

> The trial court, in considering mitigating evidence, must determine whether the facts alleged in mitigation are supported by the

> evidence. A trial court is obligated to find and weigh all valid mitigating evidence available in the record at the conclusion of the penalty phase. Evidence is mitigating if, in fairness or in the totality of the defendant's life or character, it may be considered as extenuating or reducing the degree of moral culpability for the crime committed.

(Citations omitted.) With regards to Evans' alleged immaturity, no testimony on this potential mitigator was presented during the penalty phase. Moreover, the trial court expressly addressed Evans' maturity in its sentencing order in considering Evans' age as a statutory mitigator, stating:

> The defendant was nineteen years old at the time of the murder. The defendant was legally an adult. The defendant was the "mastermind" in planning, organizing, and carrying out the murder of Alan Pfeiffer. The defendant was living on his own with his co-conspirators, Donna Waddell and Sarah Thomas, when the murder was planned and carried out. Dr. Gregory Landrum testified that the defendant was functioning on an above average intelligence level. The defendant planned, prepared, and shot the victim in a manner consistent with a mature adult. The defendant committed the killing like a professional executioner, leaving no finger prints or physical evidence that could connect him to the murder scene. This court has considered

the mitigating circumstance and gives it little weight.

We conclude that the trial court's determination that Evans failed to establish that he was immature at the time of the murder is supported by competent, substantial evidence. *See Alston v. State,* 723 So.2d 148, 162 (Fla. 1998).

With regard to Evans' artistic ability, the record establishes that Evans satisfied his burden of demonstrating that he has artistic ability by a preponderance of the evidence. Both Evans' mother and Dr. Laurence Levine testified during the penalty phase that Evans was a good artist, and there was no testimony to rebut this fact. The trial court's sentencing order reflects that although it found evidence that Evans had artistic ability, it concluded that this was not a relevant mitigating factor. Trial courts have recognized that artistic ability may be considered a valid mitigating factor in deciding whether the death penalty is appropriate. *See Freeman v. State,* 761 So.2d 1055, 1060 (Fla. 2000); *Buckner v. State,* 714 So.2d 384, 387 n. 3 (Fla. 1998); *Thompson v. State,* 647 So.2d 824, 826 n. 2 (Fla. 1994); *Mann v. State,* 603 So.2d 1141, 1142 (Fla. 1992).

However, in *Bogle v. State,* 655 So.2d 1103, 1109 (Fla. 1995), the Court rejected a defendant's claim that the trial judge failed to consider his artistic ability and capacity for employment as valid mitigation, noting that "[t]he fact that the trial judge did not specifically list Bogle's artistic talent and capacity for employment in mitigation is insufficient

to overrule the trial judge's imposition of the death penalty given the minor weight that would be afforded to those factors." We conclude that, even assuming the trial court should have considered Evans' artistic ability as a mitigating circumstance, it is likely that the mitigator would have been assigned little weight. *Cf. Freeman v. State,* 563 So.2d 73, 74-77 (Fla. 1990) (recognizing that artistic ability is "not [a] compelling" nonstatutory mitigator). Given the likelihood that the mitigator would have been assigned little weight, given the fact that the trial court engaged in a careful weighing of much more significant mitigation and given the aggravators found to exist by the trial court, we conclude that the any error in failing to weigh this mitigator is harmless beyond a reasonable doubt. Thus, we reject this claim.

5. Proportionality

In Evans' next claim, he asserts that the death penalty in this case is disproportionate given the fact that Connie received a life sentence for her involvement in the murder. Evans essentially argues that because Connie was as culpable, if not more culpable, than he was, the death penalty is inappropriate in this case. Moreover, Evans asserts that, as compared to other cases, the death sentence is disproportionate in this case.

We have recognized that disparate treatment of a codefendant renders punishment disproportional if the codefendant is equally culpable. *See Larzelere v. State,* 676 So.2d 394, 406 (Fla. 1996) (citing *Downs v. State,* 572 So.2d 895 (Fla. 1990)). However, disparate

treatment of a codefendant "is justified when the defendant is the more culpable participant in the crime." *Larzelere,* 676 So.2d at 407.

In this case, the trial court considered the relative culpability of Connie and Evans and made the following findings:

> Connie Pfeiffer, the co-defendant, was tried after the defendant's penalty phase and the jury advisory sentence of death. During her penalty phase, the jury rendered an advisory sentence of life in prison without the possibility of parole for twenty-five years. On May 18, 1999, the court sentenced her to life in prison without the possibility of parole for twenty-five years. A co-defendant's life sentence is a factor which the trial court can consider in mitigation of a sentence of death for a defendant. *Gordon v. State,* 704 So.2d 107 (Fla. 1997). The defendant argues that both he and the co-defendant are equally culpable for the death of Alan Pfeiffer and that the defendant should also receive a sentence of life in prison without the possibility of parole for twenty-five years. *However, the evidence at trial established that the defendant was the one who fired the three fatal shots while waiting inside the trailer in the darkness for Alan Pfeiffer to arrive home from work. The defendant was more than the mere hired gun. He was the "mastermind" behind the planning and carrying out the murder plan as well as establishing the alibi for the participants. The*

> *defendant selected the weapon to be used for the murder and arranged to steal it from the Waddell home. The defendant disposed of any evidence connecting him to the murder scene. The evidence has established that the defendant was more culpable than the co-defendant.* The court gives this mitigating circumstance moderate weight.

(Emphasis supplied.) We have carefully reviewed the record in this case and conclude that the trial court's finding that Evans was more culpable than Connie is supported by competent substantial evidence. Therefore, the fact that Connie received a life sentence as a result of a jury recommendation of life does not alone render the death penalty disproportionate.

Although we are mindful that Connie received a life sentence and certainly had the greatest motive in seeing the victim murdered, we cannot ignore the fact that Evans was both the shooter and planner of the actual details of the murder. We are further cognizant of Evans' youthful age of nineteen, but also note that Evans had above-average intelligence. Despite the trial court's finding that Evans had a history of mental illness, there was no connection made between Evans' past mental health history and the murder. Neither expert testified to any diagnosis of any mental illness or organic brain damage. In fact, the defense did not argue either statutory mental mitigators-that the capital felony was committed while Evans was under the influence of an extreme mental or emotional disturbance or that

his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. Thus, we conclude that the imposition of the death penalty in this case is proportionate with other cases in which the triggerman of a contract killing was sentenced to death. *See McDonald v. State,* 743 So.2d 501, 506-07 (Fla. 1999); *Gordon v. State,* 704 So.2d 107, 117 (Fla. 1997); *Bonifay v. State,* 680 So.2d 413, 417-18 (Fla. 1996); *Kelley v. State,* 486 So.2d 578, 586 (Fla. 1986) (Overton, J., specially concurring).[10]

CONCLUSION

Accordingly, we affirm Evans' conviction and death sentence for first-degree murder.

It is so ordered.

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[10] In Evans' remaining points on appeal, he asserts that the trial court erred in imposing the death penalty because the jury made no unanimous findings of fact as to death eligibility. We have previously rejected that argument in *Mills v. Moore,* 786 So.2d 532, 536-37 (Fla. 2001), *cert. denied,* 532 U.S. 1015, 121 S.Ct. 1752, 149 L.Ed.2d 673 (2001). Additionally, Evans claims that the imposition of the pecuniary gain and CCP aggravators constitutes impermissible doubling in the context of a murder-for-hire. However, we also have rejected this argument. *See Larzelere v. State,* 676 So.2d 394, 406 (Fla. 1996) (holding that "the aggravating circumstance of committed for financial gain was based on the evidence that appellant killed her husband to collect life insurance; the factor of CCP was based on evidence that she meticulously staged her husband's murder to look as though it were committed during a robbery").

Appendix H

	IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT IN AND FOR INDIAN RIVER COUNTY, FLORIDA
STATE OF FLORIDA	CASE NO. 97-754 CFA.
vs.	MURDER IN THE FIRST DEGREE
PAUL H. EVANS _____/	

SENTENCING ORDER

The Defendant, PAUL H. EVANS, was tried for the murder of Alan F. Pfeiffer from February 1, 1999 through February 11, 1999. On February 11, 1999, the jury returned a verdict finding the defendant guilty of First Degree Murder of Alan F. Pfeiffer. By stipulation, the jury reconvened on February 12, 1999, and a penalty phase proceeding was held. On that date, the jury recommended that the death sentence be imposed by a vote of nine to three. On March 8, 1999, both the state and defense were given an opportunity to present additional evidence to the court. The defense presented additional evidence. At the same hearing, the Defendant was given an

opportunity to be heard regarding his sentence, and he read a statement to the court. Additional arguments regarding the Defendant's sentence were made by both sides.

The co-defendant, Connie Pfeiffer, was subsequently tried for the murder of Alan F. Pfeiffer. The jury returned a verdict finding the co-defendant guilty of First Degree Murder of Alan F. Pfeiffer and recommended that a life sentence without the possibility of parole for twenty-five years be imposed by the court. On May 18, 1999, the court sentenced the co-defendant to life in prison without the possibility of parole for twenty-five years. The court then set an additional sentencing hearing on June 10, 1999 in this case to allow the defendant and state an opportunity to present legal argument whether the co-defendant's sentence should be considered as a mitigating circumstance. A stipulated motion was submitted to the court requesting that the defendant and state be allowed to submit written argument on this issue in lieu of a hearing. The court granted the motion and the court subsequently received and reviewed memorandum of law on this issue from the defendant and state. Final sentencing was set for this date, June 16, 1999.

This Court has heard the evidence and arguments presented at both the guilt phase and penalty phase of the trial, has reviewed the additional argument and any evidence presented at the sentencing hearing of March 8, 1999, and has had the benefit of memorandum from the defendant and state both for and against the sentence of death and addressing the

issue of the co-defendant's sentence as a mitigating circumstance. This Court now finds as follows:

A. AGGRAVATING FACTORS PRESENTED

1. The capital felony was committed for pecuniary gain.

In order to establish this aggravating circumstance, the state must prove beyond a reasonable doubt that the murder was motivated, at least in part, by a desire to obtain money, property or other financial gain. *Finney v. State*, 660 So.2d 674 (Fla. 1995). The state introduced evidence during the guilt phase of the trial establishing that Connie Pfeiffer was attempting to hire someone to murder her husband, Alan Pfeiffer. Leo Cordary, who was a neighbor of the Pfeiffers, testified that a number of weeks before the murder Connie Pfeiffer had asked him to find someone to take care of Alan Pfeiffer. Mr. Cordary told her that he knew some people that could beat him up. Connie Pfeiffer told him that would not do and wanted Alan Pfeiffer taken care of. She offered Mr. Cordary a sum of money and her Pontiac Fiero as payment for the job. Mr. Cordary declined Connie Pfeiffer's offer. Connie Pfeiffer had also asked Geneva McAlpin whether she knew anyone who had someone killed for money. Ms. McAlpin had worked next door to Connie Pfeiffer and they would occasionally eat lunch together. Connie Pfeiffer also told a co-worker, Susan Cairns, that she did not want to get a divorce from Alan Pfeiffer because she would lose everything and that there were other ways to get rid of Alan Pfieffer.

The state also introduced evidence from co-defendant, Donna Waddell, and co-conspirator, Sarah Thomas, which further corroborated that Connie Pfeiffer was trying to hire someone to kill Alan Pfeiffer. Donna Waddell and Sarah Thomas both testified that the murder of Alan Pfeiffer was a killing for hire set up by Connie Pfeiffer and carried out by the defendant with their assistance. The evidence presented in the guilt phase established that the defendant was given money by Connie Pfeiffer to purchase a knife to murder Alan Pfeiffer. The Defendant was also given a television, VCR, and a camcorder prior to the murder as partial payment. Connie Pfeiffer was the beneficiary in excess of $100,000.00 of life insurance proceeds on Alan Pfeiffer. She had promised a portion of those proceeds to the Defendant to commit the murder. The Defendant had offered money to Donna Waddell to pay off the balance she owed for her truck in return for her assistance in carrying out the planned murder. The evidence presented during the guilt phase clearly established that the defendant's only motivation to kill Alan Pfeiffer was for pecuniary gain.

This aggravating circumstance was proved beyond a reasonable doubt and was given great weight by this court.

The defense argues that this aggravating factor should be given less weight than compared to a case where payment was actually made prior to the homicide and was the motivating factor for the killing. However, the state has established that the

defendant's only motivation for the murder was pecuniary gain. The defendant did profit from the murder by receiving a television, VCR, and camcorder as a down payment from Connie Pfeiffer prior to the murder. The fact that the defendant later disposed of these items is not material to application of this aggravating factor in light of the evidence presented that he had received the items from Connie Pfeiffer as partial payment for the murder. *Porter v State*, 429 So.2d 293 (Fla. 1983). The defendant was also promised a portion of the proceeds from the life insurance polices that Connie Pfeiffer would collect upon her husband's death.

2. The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

The state presented evidence during the guilt phase that established the defendant deliberately planned and carried out the execution style murder of Alan Pfeiffer at the request of Connie Pfeiffer and with the assistance of Donna Waddell and Sarah Thomas. The defendant originally planned to purchase a knife to murder Alan Pfeiffer but later changed the plan to include the use of a gun. The defendant then went with Donna Waddell to her parent's home and broke in to steal a gun and ammunition to use in the murder. The defendant even test-fired the weapon to make sure it was operating properly. The defendant planned an alibi for all the participants to attend the Firefighter's Fair so they would be seen there the night of the

murder. Earlier on the day of the murder, the defendant, Connie Pfeiffer, Donna Waddell, and Sarah Thomas went to the trailer and moved items near the door to make it look like a burglary was taking place at the time of the murder. The defendant was wearing gloves so his finger prints would not be found at the murder scene. Later that evening, the defendant had Donna Waddell and Sarah Thomas drop him off near Alan Pfeiffer's trailer where he entered the trailer through a door that had been previously unlocked for him. The lights in the ceiling fan were disabled and the stereo was turned on to a level that was loud enough to drown out the sound of gunshots. The defendant then waited inside the trailer in the darkness to murder Alan Pfeiffer upon his arrival. A call was made by Connie Pfeiffer to Alan Pfeiffer at his place of employment to insure that he would arrive home within a certain time frame. When Alan Pfeiffer arrived home the defendant shot him three times. Twice in the head and once in the lower back. There were no signs of a struggle. The defendant then left the residence to return to his rendezvous point to be picked up by Donna Waddell and Sarah Thomas and return to the fair to finish establishing the alibi. The .defendant later tossed the gun into a canal along State Road 60 in western Indian River County. The gun was never recovered. The defendant successfully destroyed and concealed evidence to avoid detection by the police. The record reflects proof beyond a reasonable doubt that the defendant's decision to murder Alan Pfeiffer was the product of cool and calm reflection, a careful plan or prearranged design;

with heightened premeditation, and no pretense of moral or legal justification. *Jackson v. State*, 648 So.2d 85 (Fla. 1994).

This aggravating circumstance was proved beyond a reasonable doubt and was given great weight by this court.

B. MITIGATING CIRCUMSTANCES PRESENTED

The court asked the defendant to include in his sentencing memorandum all mitigating circumstances he believed had been presented in either the guilt phase or penalty phase of this trial. Some of the mitigating circumstances provided by the defendant were repetitious and this court has combined several of them as set forth below. This court addresses each item as follows:

1. Statutory mitigating circumstances:

a) The age of the defendant at the time of the crime.

There is no per se rule which pinpoints a particular age as an automatic factor in mitigation. The propriety of a finding with respect to this circumstance depends upon the evidence adduced at trial and at the sentencing hearing. The defendant was nineteen years old at the time of the murder. The defendant was legally an adult. The defendant was the "mastermind" in planning, organizing, and carrying out the murder of Alan Pfeiffer. The defendant was living on his own with his co-conspirators, Donna Waddell and Sarah Thomas, when the murder was planned and carried out. Dr.

Gregory Landrum testified that the defendant was functioning on an above average intelligence level. The defendant planned, prepared and shot the victim in a manner consistent with a mature adult. The defendant committed the killing like a professional executioner, leaving no finger prints or physical evidence that could connect him to the murder scene. This court has considered the mitigating circumstance and gives it little weight.

b) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

1) The defendant has been a good jail inmate for the past twenty months with no disciplinary reports while incarcerated in the Indian River County Jail awaiting trial.

Good conduct can be a mitigating circumstance. The defendant presented two corrections officers from the Indian River County Jail. They testified that the defendant has not had any altercations with either corrections personnel or other inmates for the past twenty months while in jail. They also presented evidence that the defendant has not received any disciplinary reports while in jail. This court has considered the mitigating circumstance and gives it little weight.

2) The defendant exhibited a good attitude and conduct awaiting trial and his behavior at trial was acceptable.

This court notes for the record that the defendant was no problem for either this court, his lawyers, or the bailiffs during his pretrial hearings and subsequent trials. This court has considered the mitigating circumstance and gives it little weight.

3) The defendant had a difficult childhood.

Both the defendant's mother and father testified that the defendant was very young when both parents had to begin working different shifts. The defendant rarely had the company of both parents at the same time. The defendant was often left in the custody of babysitters. This is a very common occurrence in many family settings when both parents are forced or choose to pursue employment simultaneously. This court has considered the mitigating circumstance and gives it little weight.

4) The defendant was raised without a father.

The defendant presented evidence that his biological parents separated at an early age. He had to grow up without a male role model in the home. This situation was further complicated by the fact that his mother had to work long hours to provide her family with food, shelter, and clothing again leaving the defendant in the custody of babysitters. This court has considered this mitigating circumstance and gives it little weight.

5) The defendant is the product of a broken home.

The defendant presented evidence that the defendant's family life when his parents were together was in turmoil due to the constant conflict between his parents. This court has considered the mitigating circumstance and gives it little weight.

6) The defendant was a product of a dysfunctional family.

This mitigating circumstance is inclusive of the mitigating circumstances set forth above which include the defendant being a product of a broken home, the defendant having a difficult childhood, and the defendant being raised without a father. These mitigating circumstances were previously addressed.

7) The defendant suffered great trauma during his childhood.

Evidence was also presented that the defendant did suffer a childhood trauma at the age of twelve when he was involved in the shooting of his eight year old brother resulting in death. This occurred while the children were home alone due to their mother working. As a result of this incident the defendant was placed in several residential mental health facilities over the next several years. This court has considered the mitigating circumstance and gives it moderate weight.

8) The defendant suffered from hyperactivity. The defendant has a prior psychiatric history. The defendant has a history of hospitalization for mental illness.

The defendant presented evidence that he suffered from Attention Deficit Disorder while

growing up. He was prescribed Ritalin at an early age. The defendant was placed into several mental health facilities at the age of twelve following the death of his brother described above. This court has considered the mitigating circumstance and gives it moderate weight.

9) The defendant was immature at the time of the homicide.

The defendant has failed to establish that he was in fact immature at the time of the murder. This court does not give this any weight.

10) The defendant is the father of two young girls.

The defendant presented evidence that he has fathered two children. Certainly in considering this defendant's family background, one must consider other family members such as the defendant's own children. However, no evidence was presented to show that he has played any significant role in the lives of either child or that he provided regular support for them. This court has considered the mitigating circumstance and gives it very little weight.

11) The defendant believes in God.

The defendant presented evidence that while in jail, he initiated contact with a representative of the Jehovah Witness Church and has continued that contact. The defendant's assertion of faith is very difficult if not impossible to qualify by this court. This court has considered the mitigating circumstance and gives it very little weight.

12) The defendant will adjust well to life in prison. The defendant is unlikely to be a danger to others while serving a life sentence.

The defendant presented evidence through the testimony of Dr. Landrum and Dr. Levine that based upon their evaluations the defendant's prognosis for good behavior in the structured environment of prison is excellent. However, both experts acknowledged that the defendant had previously been placed into structured environments as a form of discipline when he was younger. The defendant stayed in one of these facilities for a period of approximately one year. During his stay there were numerous disciplinary incidents many involving threats of violence or acts of violence directed at other residents of the facility. This court has considered the mitigating circumstance and gives very little weight.

13) The defendant has artistic ability.

The defendant presented drawings he made in jail to show the defendant's positive prognosis for prison life. This court does not recognize this as a mitigating circumstance and gives it no weight.

14) The defendant loves his family. The defendant's family loves him.

The defendant's biological parents both testified that they love the defendant and they believe the defendant loves them. The court has considered the mitigating circumstance and gives it very little weight.

15) Connie Pfeiffer, the co-defendant, received a sentence of life in prison without the possibility of parole for 25 years.

Connie Pfeiffer, the co-defendant, was tried after the defendant's penalty phase and jury advisory sentence of death. During her penalty phase, the jury rendered an advisory sentence of life in prison without the possibility of parole for twenty-five years. On May 18, 1999 the court sentenced her to life in prison without the possibility of parole for twenty-five years. A co-defendant's life sentence is a factor which the trial court can consider in mitigation of a sentence of death for a defendant. Gordon v. State, 704 So.2d 107 (Fla. 1997). The defendant argues that both he and the co-defendant are equally culpable for the death of Alan Pfeiffer and that the defendant should also receive a sentence of life in prison without the possibility of parole for twenty-five years. However, the evidence at trial established that the defendant was the one who fired the three fatal shots while waiting inside the trailer in the darkness for Alan Pfeiffer to arrive home from work. The defendant was more than the mere hired gun. He was the "mastermind" behind the planning and carrying out the murder plan as well as establishing the alibi for the participants. The defendant selected the weapon to be used for the murder and arranged to steal if from the Waddell home. The defendant disposed of any evidence connecting him to the murder scene. The evidence has established that the defendant was more culpable than the co-defendant. The court gives this mitigating circumstance moderate weight.

The court has very carefully considered and weighed the aggravating and mitigating circumstances found to exist in this case. The court finds, as did the jury, that the aggravating circumstances present in this case outweigh the mitigating circumstances. It is therefore;

ORDERED AN ADJUDGED that the defendant, PAUL HAWTHORNE EVANS, is hereby sentenced to death for the murder of Alan Pfeiffer. The defendant is hereby remanded to the custody of the Department of Corrections of the State of Florida for execution of this sentence as provided by law.

MAY GOD HAVE MERCY ON YOUR SOUL.

DONE AND ORDERED in Chambers at Vero Beach, Indian River County, Florida this 16th day of June, 1999.

/s/_____

ROBERT A. HAWLEY

Circuit Judge

Copies furnished to:
Office of the State Attorney
Office of the Public Defender

Appendix I

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

John Ley
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

December 18, 2012

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 11-14498-P
Case Style: Paul Evans v. Secretary, FL DOC, et al
District Court Docket No: 2:08-cv-14402-JEM

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

JOHN LEY, Clerk of Court

Reply to: Jenifer L. Tubbs
Phone #: 404-335-6166

REHG-1 Ltr Order Petition Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 11-14498-P

PAUL H. EVANS,

Petitioner - Appellee
Cross Appellant,

Versus

SECRETARY, FLORIDA DEPARTMENT
OF CORRECTIONS, ATTORNEY GENERAL,
STATE OF FLORIDA,

Respondents - Appellants
Cross Appellees.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITIONS FOR REHEARING EN BANC

BEFORE: CARNES, MARCUS and PRYOR, Circuit Judges

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc(Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT

/ss/
UNITED STATES CIRCUIT JUDGE

ORD-42

Appendix J

Statutory Provisions Involved

28 U.S.C. § 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from

reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court

proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate

State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

Fla. Stat. Ann. § 775.082 (1991) Penalties

(1) A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure

set forth in §§ 921. 141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.

(2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1).

(3) A person who has been convicted of any other designated felony may be punished as follows:

(a) For a life felony committed prior to October 1, 1983, by a term of imprisonment for life or for a term of years not less than 30 and, for a life felony committed on or after October 1, 1983, by a term of imprisonment for life or by a term of imprisonment not exceeding 40 years;

(b) For a felony of the first degree, by a term of imprisonment not exceeding 30 years or, when specifically provided by statute, by imprisonment for a term of years not exceeding life imprisonment;

(c) For a felony of the second degree, by a term of imprisonment not exceeding 15 years;

(d) For a felony of the third degree, by a term of imprisonment not exceeding 5 years.

CR01

(4) A person who has been convicted of a designated misdemeanor may be sentenced as follows:

(a) For a misdemeanor of the first degree, by a definite term of imprisonment not exceeding 1 year;

(b) For a misdemeanor of the second degree, by a definite term of imprisonment not exceeding 60 days.

(5) Any person who has been convicted of a noncriminal violation may not be sentenced to a term of imprisonment nor to any other punishment more severe than a fine, forfeiture, or other civil penalty, except as provided in chapter 316 or by ordinance of any city or county.

CR02

(6) Nothing in this section shall be construed to alter the operation of any statute of this state authorizing a trial court, in its discretion, to impose a sentence of imprisonment for an indeterminate period within minimum and maximum limits as provided by law, except as provided in subsection (1).

(7) This section does not deprive the court of any authority conferred by law to decree a forfeiture of property, suspend or cancel a license, remove a person from office, or impose any other civil penalty. Such a judgment or order may be included in the sentence.

Fla. Stat. Ann. § 921.141 (1991) Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

(1) Separate proceedings on issue of penalty.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel

shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of sentence of death.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be

supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) Review of judgment and sentence.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson,

burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his official duties.

(k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.

CR01

(6) Mitigating circumstances.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

(7) Applicability. This section does not apply to a person convicted or adjudicated guilty of a capital drug trafficking felony under s. 893.135.