UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 08-14402-CIV-MARTINEZ

PAUL H. EVANS,
Petitioner,

vs.

WALTER A. MCNEIL, Secretary, Florida Department of Corrections,
Respondent.
_____/

ORDER ON EVANS'S PETITION FOR WRIT OF HABEAS CORPUS

THIS CAUSE came before the Court upon Petitioner Paul H. Evans's Petition for Writ of Habeas Corpus (D.E. 1). After careful consideration of Mr. Evans's petition, the State's response to the petition (D.E. 9), the Petitioner's Reply (D.E. 15) and for the reasons set forth below, Mr. Evans's petition for writ of habeas corpus is **GRANTED** in part and **DENIED** in part.

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 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. FN2 They paid for the fair with the quarters stolen from Waddell'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.
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> 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."
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> 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.
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> 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 fo 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 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)

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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 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.

Florida's capital sentencing procedure deprived Evans of due process rights to notice and a jury trial under *Ring* and *Apprendi.*

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–
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> > (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 (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 (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 (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 -
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> (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;
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> (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
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> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
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> (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 (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 (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*, 129 S.Ct. 1769, 1780 (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 (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 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 (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*, 477 U.S. 478 (1986). *See House v. Bell*, 547 U.S. 518 (2006); *Dretke v. Haley*, 541 U.S. 386 (2004). *See also United States v. Frady*, 456 U.S. 152, 168 (1982). Since Mr. Evans has not established cause to excuse his

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[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 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).

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 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

[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.

(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

[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.

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 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 (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 (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.

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[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.

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 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 (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:

> Um, I'm not sure it would. Um, 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. Um, 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 (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. 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?

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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 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.

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.

Q: Correct?

A: Correct.

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

A: Yes, I guess I did.

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

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

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

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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.

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 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 (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 (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

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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.

Supreme Court that there was no "favorable" information to disclose to the defense is not an unreasonable one. Without 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

[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 (1995).

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?
>
> 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 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:

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

> 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 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 (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.'" *Vining v. Sec'y, Dep't. of Corr.*, 610 F.3d 568 (11th Cir. 2010)(citing *Brecht v. Abrahamson*, 507 U.S. 619 (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 (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

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.

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 (1997) (citing 28 U.S.C. § 2254(b)(2)). As this claim

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long he 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).

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.

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.

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

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*, 130 S.Ct. 721 (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

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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).

whether 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 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

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[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).

[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.

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

> 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 (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 I.*, 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 (1984); *Press Enterprise Co. v. Superior Court of Ca.*, 464 U.S. 501 (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 closing the proceedings in violation of a defendant's Sixth Amendment right to a public trial.

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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.

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. 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,

[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.

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 (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 (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 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

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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. Dugger*, 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)).

[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).

> 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 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 (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 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

[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).

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 (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. 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

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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.

> 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 (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*, 536 U.S. at 321. Likewise, Mr. Evans would like the Court to make broaden the holding of *Roper v. Simmons*, 543 U.S. 551 (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 (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 (2004), the Supreme Court 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 (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

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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.

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*, -- U.S. --, 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.

The trial court found the following in aggravation: (1) Evans had committed the

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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).

> 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 (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

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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.

> 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 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

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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.

[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).

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 (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 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

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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.

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, 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 *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 of factors found by the jury. *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 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 (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 (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 (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 (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 *Walto*n 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 (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 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

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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.

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*.

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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*

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 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 (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 may have not

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does apply in Florida and the Florida sentencing statute is unconstitutional.

[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 that jury after it has reported its

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.

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

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

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 in Chambers at Miami, Florida, this 20 day of June, 2011.

JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
All Counsel of Record