

SUPREME COURT OF FLORIDA

Steven Richard Taylor v. State of Florida; Steven Richard Taylor v. Walter A. McNeil

62 So. 3d 1101 (Fla. 2011) · No. Nos. SC09-1382, SC10-143 · Decided February 10, 2011

SUMMARY

The Supreme Court of Florida affirmed the denial of Steven Richard Taylor’s amended motion for postconviction relief under Florida Rule of Criminal Procedure 3.850 and denied his petition for writ of habeas corpus. The court rejected claims involving amendment of the postconviction pleadings, ineffective assistance of trial counsel concerning DNA evidence and other trial issues, and alleged Brady and Giglio violations.

CASE DETAILS

|                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
|-----------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Supreme Court of Florida                                                                                                                                                                                                                                                                                                                                                                                                                             |
| WRITING FOR THE COURT | Chief Justice Canady; Justice Pariente; Justice Lewis; Justice Quince; Justice Polston; Justice Labarga; Justice Perry                                                                                                                                                                                                                                                                                                                               |
| JURISDICTION          | Florida                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| DECIDED               | February 10, 2011                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| DOCKET                | Nos. SC09-1382, SC10-143                                                                                                                                                                                                                                                                                                                                                                                                                             |
| DISPOSITION           | affirmed                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| PROCEDURAL POSTURE    | Taylor appealed the denial of his amended motion for postconviction relief under Florida Rule of Criminal Procedure 3.850 and separately petitioned for a writ of habeas corpus alleging ineffective assistance of appellate counsel.                                                                                                                                                                                                                |
| STANDARD OF REVIEW    | The applicability of the procedural rules was reviewed de novo. The denial of a motion to amend a Rule 3.850 motion was reviewed for abuse of discretion. Ineffective-assistance claims presented mixed questions of law and fact: factual findings supported by competent, substantial evidence were given deference, while legal conclusions were reviewed de novo. Credibility and evidentiary-weight determinations were reviewed deferentially. |
| PRECEDENTIAL VALUE    | published precedential opinion                                                                                                                                                                                                                                                                                                                                                                                                                       |
| PARTIES               | Steven Richard Taylor v. State of Florida                                                                                                                                                                                                                                                                                                                                                                                                            |

## TOPICS

state post-conviction relief

ineffective assistance

habeas corpus

evidence

appellate procedure

## PRACTICE AREAS

state post-conviction relief

capital criminal procedure

ineffective assistance of counsel

habeas corpus

criminal evidence

## QUESTIONS PRESENTED

1. Whether Taylor's postconviction motion was governed by Florida Rule of Criminal Procedure 3.850 or Rule 3.851.
2. Whether the postconviction court abused its discretion by striking portions of Taylor's closing memorandum and denying his motion to amend.
3. Whether trial counsel was ineffective under Strickland for failing to request a Frye hearing, object to or present expert testimony concerning DNA evidence, pursue a continuance, request a Richardson hearing, investigate a purported second blouse, or object to prosecutorial comments.
4. Whether alleged nondisclosure of DNA protocols, reports, bench notes, and the identity of Shirley Zeigler established Brady or Giglio violations.
5. Whether the recanted testimony of Taylor's former cellmate constituted newly discovered evidence warranting a new trial.
6. Whether appellate counsel was ineffective for failing to challenge the absence of a sua sponte Frye hearing or prosecutorial comments and jury instructions concerning the presumption of innocence.

## HOLDINGS

1. Because Taylor's initial shell motion was filed before October 1, 2001, and remained pending on that date, his amended postconviction motion was governed by Florida Rule of Criminal Procedure 3.850 rather than Rule 3.851.
2. The postconviction court did not abuse its discretion in denying Taylor's motion to amend because the arguments in the closing memorandum merely refined and expanded claims already presented, and the court addressed the claims as they would have appeared in the amended motion.
3. Taylor failed to establish either deficient performance or prejudice under Strickland for his claims concerning DNA evidence, the continuance, a Richardson hearing, the purported white blouse, or prosecutorial comments.
4. Taylor failed to establish a Brady or Giglio violation based on the alleged late or incomplete disclosure of DNA protocols, reports, bench notes, or Shirley Zeigler's identity.
5. Taylor was not entitled to a new trial because the postconviction court found his former cellmate's recanted testimony not credible.
6. Appellate counsel was not ineffective for failing to argue that the trial court should have ordered a Frye hearing sua sponte or for failing to challenge the presumption-of-innocence comments and jury

instruction.

## KEY QUOTATIONS

*“The standard of review for a trial court’s determination regarding a motion to amend a rule 3.850 motion is whether there was an abuse of discretion.”* (at 1109)

*“Accordingly, as a matter of law, the trial court here did not err in failing to conduct a Frye hearing sua sponte.”* (at 1118)

## FACTUAL BACKGROUND

Taylor is an inmate under sentence of death for a capital murder conviction. In postconviction proceedings, he challenged the trial’s DNA evidence, asserted ineffective assistance of trial and appellate counsel, raised Brady and Giglio claims concerning DNA materials and a witness, and relied on a former cellmate’s recantation. The postconviction court conducted a limited evidentiary hearing and rejected the claims, including findings that the defense DNA expert was not credible, that the witness recantation was unreliable, and that no separate white blouse existed.

## PROCEDURAL HISTORY

Taylor was convicted of capital murder and sentenced to death. He filed a shell postconviction motion in 1995, amended it in 2003, 2004, and 2005, and received a limited evidentiary hearing in 2007. The postconviction court denied the Rule 3.850 motion on June 22, 2009, granted the State’s motion to strike Taylor’s closing memorandum, and denied his motion to amend. The Supreme Court of Florida affirmed the denial of postconviction relief and denied habeas relief.

## DISPOSITION

affirmed

## CASES CITED

- Taylor v. State, 630 So. 2d 1038, 1039-41 (Fla. 1993)
- GTC, Inc. v. Edgar, 967 So. 2d 781, 785 (Fla. 2007)
- BellSouth Telecomm., Inc. v. Meeks, 863 So. 2d 287, 289 (Fla. 2003)
- Gore v. State, 964 So. 2d 1257, 1261 & n.1 (Fla. 2007)
- Allen v. Butterworth, 756 So. 2d 52 (Fla. 2000)
- Huff v. State, 762 So. 2d 476, 481 (Fla. 2000)
- Walton v. State, 3 So. 3d 1000, 1012 (Fla. 2009)
- Pagan v. State, 29 So. 3d 938, 948-49 (Fla. 2009)
- Strickland v. Washington, 466 U.S. 668, 689-91 (1984)
- Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986)
- Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000)

- *Wiggins v. Smith*, 539 U.S. 510, 523, 527, 533 (2003)
- *Armstrong v. State*, 862 So. 2d 705, 713 (Fla. 2003)
- *Nelms v. State*, 596 So. 2d 441, 442 (Fla. 1992)
- *Stevens v. State*, 552 So. 2d 1082, 1085 (Fla. 1989)
- *Reaves v. State*, 826 So. 2d 932, 939 n.10 (Fla. 2002)
- *Sinclair v. State*, 657 So. 2d 1138, 1140 (Fla. 1995)
- *State v. Hall*, 509 So. 2d 1093 (Fla. 1987)
- *Lowe v. State*, 2 So. 3d 21, 30 (Fla. 2008)
- *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997)
- *Dailey v. State*, 965 So. 2d 38, 44 (Fla. 2007)
- *Belcher v. State*, 961 So. 2d 239, 246 (Fla. 2007)
- *Brady v. Maryland*, 373 U.S. 83, 87 (1963)
- *Hurst v. State*, 18 So. 3d 975, 988, 992 (Fla. 2009)
- *Strickler v. Greene*, 527 U.S. 263, 281-82, 290 (1999)
- *Provenzano v. State*, 616 So. 2d 428, 430 (Fla. 1993)
- *Guzman v. State*, 868 So. 2d 498, 506-07 (Fla. 2003)
- *Smith v. State*, 931 So. 2d 790, 796 (Fla. 2006)
- *Major v. State*, 979 So. 2d 243, 244 (Fla. 3d DCA 2007)
- *Celestine v. State*, 717 So. 2d 205, 206 (Fla. 5th DCA 1998)
- *Ferrell v. State*, 29 So. 3d 959, 980 (Fla. 2010)
- *Archer v. State*, 934 So. 2d 1187, 1196 (Fla. 2006)
- *Freeman v. State*, 761 So. 2d 1055, 1061, 1069 (Fla. 2000)
- *Kennedy v. State*, 547 So. 2d 912 (Fla. 1989)
- *Pope v. Wainwright*, 496 So. 2d 798, 800 (Fla. 1986)
- *Thompson v. State*, 759 So. 2d 650, 660 (Fla. 2000)
- *Knight v. State*, 394 So. 2d 997, 1001 (Fla. 1981)
- *Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000)
- *Williamson v. Dugger*, 651 So. 2d 84, 86 (Fla. 1994)
- *McDonald v. State*, 743 So. 2d 501, 506 (Fla. 1999)
- *Hadden v. State*, 690 So. 2d 573, 580 (Fla. 1997)
- *Archer v. State*, 673 So. 2d 17, 21 (Fla. 1996)
- *Zack v. State*, 911 So. 2d 1190, 1201 (Fla. 2005)
- *Hayes v. State*, 660 So. 2d 257 (Fla. 1995)
- *Walls v. State*, 926 So. 2d 1156, 1180 (Fla. 2006)
- *State v. Delva*, 575 So. 2d 643, 644-45 (Fla. 1991)
- *Brown v. State*, 124 So. 2d 481, 484 (Fla. 1960)
- *Stewart v. State*, 420 So. 2d 862, 863 (Fla. 1982)

## OPINION

### PER CURIAM.

62 So.3d 1101 (2011) Steven Richard TAYLOR, Appellant, v. STATE of Florida, Appellee. Steven Richard Taylor, Petitioner, v. Walter A. McNeil, etc., Respondent. Nos. SC09-1382, SC10-143. Supreme Court of Florida. February 10, 2011. Rehearing Denied April 7, 2011. \*1106 Michael P. Reiter, Venice, FL, for Appellant/Petitioner. Pamela Jo Bondi, Attorney General, and Stephen R. White, Assistant Attorney General, Tallahassee, FL, for Appellee/Respondent.

PER CURIAM. Steven Richard Taylor appeals the denial of his amended motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. Through his postconviction motion, Taylor challenges his capital murder conviction and sentence of death. Taylor has also filed a petition for writ of habeas corpus, through which he alleges ineffective assistance of appellate counsel due to counsel's failure to raise several issues on direct appeal.

We have jurisdiction. See art. V, § 3(b)(1), (9), Fla. Const. For the reasons discussed below, we affirm the trial court's denial of his rule 3.850 motion and deny relief on his petition for writ of habeas corpus. FACTS AND PROCEDURAL HISTORY Taylor is an inmate under sentence of death. Through our prior opinion addressing Taylor's direct appeal, we have detailed the facts and procedural background surrounding the offense.

See Taylor v. State, 630 So.2d 1038, 1039-41 (Fla. 1993). The case currently under review is Taylor's first postconviction proceeding before this Court. On November 1, 1995, Taylor filed a "shell" motion to vacate his judgment of conviction and sentence. Amendments to the initial motion were filed on June 23, 2003, and May 13, 2004.

The final amended motion for postconviction relief was filed on May 23, 2005. In his final amended motion, Taylor raised twenty-one claims.[1] The postconviction court held a Huff[2] hearing on December 13, \*1107 2005, and on June 21, 2006.

The postconviction court issued an order granting an evidentiary hearing on a limited number of those claims, which was held on August 6 and August 7, 2007. During the evidentiary hearing, the defense presented the testimony of (1) the current State Attorney for the Fourth Judicial Circuit who served as lead prosecutor at the initial trial; (2) an assistant state attorney who served as counsel at the initial trial and was serving as lead counsel in postconviction litigation; (3) Taylor's counsel during the initial trial; (4) the second chair counsel for Taylor at the initial trial; (5) Taylor's first postconviction attorney; (6) a police officer who testified at the initial trial; (7) an office employee of the Duval County Clerk of Courts who processed evidence at the time of the initial trial; (8) Shirley Zeigler (a former Florida Department of Law Enforcement (FDLE) DNA analyst); (9) Dr. Randell Libby (DNA expert); and (10) Timothy Cowart (Taylor's former cellmate, who testified against Taylor at the initial trial).

The State presented Dr. James Pollock (the DNA expert who testified for the State at the initial trial) and also the assistant state attorney who was initially presented by Taylor. To challenge the DNA evidence presented against Taylor at trial, the defense presented Dr. Libby to address alleged problems associated with Dr. Pollock's State testing procedures.

Dr. Libby testified that the FBI DNA testing protocol utilizes five to eight probes, but Dr. Pollock's State testing only utilized four. Further, Dr. Libby opined that three of the four probes utilized by Dr. Pollock were inconclusive. One reason Dr. Libby used as a predicate for concluding that the probes were inconclusive was due to differences in the calculated lengths reports created by Dr. Pollock and Shirley Zeigler.

The defense also presented Shirley Zeigler, who worked as a Florida Department of Law Enforcement (FDLE) analyst at the time the DNA evidence was processed. Zeigler's initials were found on the calculated fragment report that was used by Dr. Pollock at Taylor's initial trial. Zeigler testified that she would have found two of the probes utilized by Dr. Pollock to be inconclusive, but did not disagree with Dr. Pollock's ultimate findings.

Of additional note, during the evidentiary hearing, a police officer noted that, at trial, he testified that one of the exhibits collected from the scene represented a white blouse. On cross-examination, however, the officer indicated that he did not remember the specific color of the blouse he collected on the day he completed his report. Further, Timothy Cowart was also presented as a witness at the evidentiary hearing to recant some of his testimony that he had previously presented during the initial trial.

On October 5, 2007, the State filed a Motion to Strike and Objection to Defendant's Written Closing Argument and Memorandum of Law. Taylor filed his Response to the State's Motion with an accompanying Motion to Amend the Pleadings to Conform with the Evidence.

On June 22, 2009, the postconviction court denied Taylor's rule 3.850 motion. On June 26, 2009, the postconviction court filed an order granting the State's motion to strike and denying Taylor's motion to amend. This appeal followed. ANALYSIS Motion to Amend Taylor first asserts that the trial court erred in granting the State's motion to strike and denying his motion to amend.

In his final amended motion for postconviction relief, Taylor raised a number of \*1108 challenges with regard to the DNA evidence presented against him at trial. After the postconviction evidentiary hearing, Taylor filed a closing memorandum in the trial court, which also asserted a number of challenges to the DNA evidence presented at trial.

The State subsequently filed a motion to strike portions of Taylor's closing memorandum that were allegedly not covered in his postconviction motion. The trial court did not rule on the State's motion to strike until after it entered its order denying postconviction relief.

In a two page Order on Pending Motions, the trial court simply held: "Based upon the pleadings and consistent with the Court's Order Denying Defendant's Motion for Post Conviction relief... [t]he State's Motion to Strike and Objection to Defendant's Written Closing Argument and Memorandum of Law is GRANTED.... [and] [t]he Defendant's Motion to Amend the Pleadings to Conform with the Evidence is DENIED."

In his first claim on appeal, Taylor asserts that his closing memorandum did not raise any new claims, but even if it did, the trial court abused its discretion by failing to adhere to Florida Rule of Criminal Procedure 3.850 and Florida Rule of Civil Procedure 1.190(b).

First, we must determine whether Taylor's amended motion for postconviction relief is governed by Florida Rule of Criminal Procedure 3.850 or 3.851. The question of which rules of procedure are applicable is a question of law that is reviewed de novo. See *GTC, Inc. v. Edgar*, 967 So.2d 781, 785 (Fla.2007) ("Generally speaking, statutory interpretation is a question of law subject to de novo review.") (citing *BellSouth Telecomm., Inc. v. Meeks*, 863 So.2d 287, 289 (Fla.2003)).

Rule 3.851(a) provides: This rule shall apply to all motions and petitions for any type of postconviction or collateral relief brought by a prisoner in state custody who has been sentenced to death and whose conviction and death sentence have been affirmed on direct appeal. It shall apply to all postconviction motions filed on or after October 1, 2001, by prisoners who are under sentence of death.

Motions pending on that date are governed by the version of this rule in effect immediately prior to that date. (Emphasis supplied.) Taylor's initial motion to vacate judgment and sentence, which was a "shell motion," was filed on November 1, 1995. That motion was still pending on October 1, 2001, and is thus governed by "the version of this rule in effect immediately prior to that date," which, here, is rule 3.850.

Fla. R.Crim.P. 3.851(a). Further, the applicability of rule 3.850 is consistent with this Court's decision in *Gore v. State*, 964 So.2d 1257 (Fla.2007). In that case, Gore's initial postconviction motion was filed pursuant to rule 3.850 on September 28, 1999, but his amended postconviction motion was filed on January 7, 2002, after amendment of the rules. See *Gore*, 964 So.2d at 1261 n. 1.

This Court held that rule 3.850, not rule 3.851, applied. See *id.* at 1261. Here the initial motion for postconviction relief was filed prior to the enactment of rule 3.851, and an amended motion was filed after that date. Taylor's amended motion for postconviction relief is therefore governed by rule 3.850, not rule 3.851 as held in *Gore*. Rule 3.850, however, is silent with regard to amendments to postconviction motions.

Taylor asserts that Florida Rule of Civil Procedure 1.190 is applicable here because in *Allen v. Butterworth*, 756 So.2d 52 (Fla.2000), this Court acknowledged that postconviction cases are

quasi-civil in nature. Taylor's argument, however, completely disregards this Court's decision in \*1109 Huff v. State, 762 So.2d 476 (Fla.2000).

In Huff, this Court explicitly stated that "[t]he standard of review for a trial court's determination regarding a motion to amend a rule 3.850 motion is whether there was an abuse of discretion." 762 So.2d at 481 (citing McConn v. State, 708 So.2d 308, 310 (Fla. 2d DCA 1998)).

Accordingly, because Taylor's motion for postconviction relief is governed by rule 3.850, this Court only reviews the denial of Taylor's motion to amend for an abuse of discretion. See Walton v. State, 3 So.3d 1000, 1012 (Fla.2009) (citing Huff v. State, 762 So.2d 476, 481 (Fla.2000)).

Here, the trial court did not abuse its discretion in denying Taylor's motion to amend. The arguments asserted by Taylor in his closing memorandum to the trial court were merely refinements and expansions upon arguments that had already been raised in his amended motion for postconviction relief.

The trial court meticulously analyzed each of Taylor's challenges to the DNA evidence, even as articulated by Taylor in his closing memorandum. The trial court actually addressed each of Taylor's claims as they would have appeared in his amended motion, and therefore, we need not reach the issue of whether the trial court's denial of Taylor's motion to amend was an abuse of discretion.

Accordingly, we deny relief on this claim. Ineffective Assistance of Counsel Standard of Review In Pagan v. State, 29 So.3d 938, 948-49 (Fla.2009), this Court provided the appropriate standard of review for ineffective assistance of counsel claims: Following the United States Supreme Court's decision in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), this Court has held that for ineffective assistance of counsel claims to be successful, two requirements must be satisfied: First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards.

Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined. A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied.

Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986) (citations omitted). Where this Court previously has rejected a substantive claim on the merits, counsel cannot be deemed ineffective for failing to make a meritless argument. See Heath v. State, 3 So.3d 1017, 1033 (Fla.2009).

Because both prongs of the Strickland test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the trial court's factual findings that are

supported by competent, substantial evidence, but reviewing the trial court's legal conclusions de novo. See *Sochor v. State*, 883 So.2d 766, 771-72 (Fla.2004). There is a strong presumption that trial counsel's performance was not ineffective.

See *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689, 104 S.Ct. 2052.

The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action *might* be considered sound trial strategy." *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* In *Occhicone v. State*, 768 So.2d 1037, 1048 (Fla.2000), this Court held that "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct."

With respect to the investigation and presentation of mitigation evidence, the Supreme Court observed in *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), that "Strickland does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing.

Nor does Strickland require defense counsel to present mitigating evidence at sentencing in every case." *Id.* at 533, 123 S.Ct. 2527. Rather, in deciding whether trial counsel exercised reasonable professional judgment with regard to the investigation and presentation of mitigation evidence, a reviewing court must focus on whether the investigation resulting in counsel's decision not to introduce certain mitigation evidence was itself reasonable.

*Id.* at 523, 123 S.Ct. 2527; *Strickland*, 466 U.S. at 690-91, 104 S.Ct. 2052. When making this assessment, "a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527, 123 S.Ct. 2527. An attorney can almost always be second-guessed for not doing more.

However, this is not the standard by which counsel's performance is to be evaluated under Strickland. Deficient performance involves "particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards." *Maxwell*, 490 So.2d at 932. DNA Evidence Taylor asserts that trial counsel was ineffective for (1) failing to request a Frye[3] hearing; (2) failing to object to admission of DNA evidence and to Dr. Pollock's testimony about DNA; (3) failing to provide any expert testimony to support trial counsel's attack on the DNA evidence; (4) withdrawing a

previously filed motion for continuance; (5) failing to request a Richardson[4] hearing when Zeigler's name was revealed for the first time at trial; (6) failing to develop the theory of a second blouse; and (7) failing to object to improper prosecutorial comments.

As further discussed below, we conclude that Taylor has failed to satisfy his burden to demonstrate ineffectiveness for any of these claims. 1) Failure to Request a Frye Hearing The postconviction court correctly found that trial counsel was not ineffective for failing to request a Frye hearing to challenge DNA evidence.

As the postconviction court noted in its final order, this Court has held that any refinements or additions to the Frye analysis which have evolved since the trial in this case was conducted cannot be retroactively applied \*1111 in evaluating the effectiveness of trial counsel's performance. See *Armstrong v. State*, 862 So.2d 705, 713 (Fla.2003).

The bulk of Taylor's argument relies on case law that developed after the conclusion of the trial. This Court has made clear that trial counsel "cannot be held ineffective for failing to anticipate the change in the law." *Nelms v. State*, 596 So.2d 441, 442 (Fla. 1992) (citing *Stevens v. State*, 552 So.2d 1082, 1085 (Fla.1989)).

We conclude that the decision by trial counsel not to request a Frye hearing was reasonable. The only authority presented by Taylor during postconviction that both challenged the use of DNA evidence and existed at the time of the trial are academic articles and isolated, nonbinding decisions. While this evidence certainly could have been presented at trial, it was not essential for counsel to be determined to be effective.

Further, none of the authority referred to by Taylor was binding on the trial court. Trial counsel's omission of the specific authority referred to by Taylor on postconviction was reasonable and cannot be considered "outside the broad range of reasonably competent performance under prevailing professional standards." *Pagan*, 29 So.3d at 948 (quoting *Maxwell*, 490 So.2d at 932).

Taylor therefore fails under the deficiency prong, and it is not necessary for us to address the prejudice prong of *Strickland* for this claim. See *Reaves v. State*, 826 So.2d 932, 939 n. 10 (Fla.2002) (quoting *Strickland*, 466 U.S. at 697, 104 S.Ct. 2052 ("[T]here is no reason for a court deciding an ineffective assistance claim... to address both components of the inquiry if the defendant makes an insufficient showing on one.")).

2) Failure to Object to Admission of DNA Evidence and Failure to Object to Dr. Pollock's Testimony About DNA Taylor asserts that trial counsel was ineffective for failing to raise specific objections with regard to both the DNA evidence generally and Dr. Pollock's testimony. A review of the final order of the postconviction court reveals that the trial court articulated specific instances where trial counsel did challenge the DNA evidence.

Further, although trial counsel did not present a DNA expert at trial who had been hired to assist the defense as a witness, trial counsel did testify that he had multiple conversations with the expert and was prepared to address the DNA evidence at trial. Counsel stated, "My feeling and my level of comfort after talking about this with [the DNA expert] was very good."

Here, a review of the record and the final order of the postconviction court reveals that trial counsel's alleged failure to object with regard to the DNA evidence, especially when viewed in unison with the vigorous cross-examine of Dr. Pollock, was reasonable. Trial counsel's failure to make specific objections appears to be the product of an overall strategy, and therefore his allegation of omission of certain specific objections does not amount to deficient performance.

See *Occhicone v. State*, 768 So.2d 1037, 1048 (Fla.2000) ("[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct."). Taylor fails to satisfy the deficiency prong of Strickland, and, therefore, we need not address the prejudice prong of Strickland for this claim.

See *Reaves*, 826 So.2d at 939. 3) Failure to provide any expert testimony to support trial counsel's attack on the DNA evidence Taylor asserts that trial counsel was ineffective for failing to present the defense's DNA expert to testify at trial. \*1112 At the evidentiary hearing, when asked why he had not presented the defense expert as a witness, trial counsel responded that he was comfortable in cross-examining Dr. Pollock.

Trial counsel therefore made a strategic decision not to call the expert. As noted above, conduct that appears to be the product of an overall strategy will not satisfy the deficiency prong of Strickland. See *Occhicone v. State*, 768 So.2d at 1048. 4) Withdrawing motion for continuance Taylor next asserts that trial counsel was ineffective for withdrawing his motion for continuance days before trial, even though the motion indicated that his DNA expert had not completed his review of the records.

In response to inquiring as to why he did not pursue the continuance, defense trial counsel responded that his DNA expert informed him prior to trial that in the expert's opinion, the DNA testing was properly completed and that he did not have any major complaints with the DNA testing or DNA evidence. Trial counsel therefore appeared to make a strategic decision not to proceed further with the motion for a continuance because the expert's testimony would have been detrimental to the defense, and his withdrawal of the motion does not constitute deficient performance as required by Strickland.

See *Occhicone*, 768 So.2d at 1048. 5) Failure to request Richardson hearing when Zeigler's name was revealed at trial Taylor asserts that trial counsel was ineffective for failing to request a Richardson hearing when Zeigler's name was revealed for the first time at trial.

First, Taylor fails to establish any deficient performance stemming from trial counsel's failure to request a Richardson hearing. As articulated by this Court in *Sinclair v. State*, 657 So.2d 1138, 1140 (Fla.1995): [W]hen the State violates a discovery rule, the trial court has discretion to determine whether the violation resulted in harm or prejudice to the defendant, but this discretion can be properly exercised only after adequate inquiry into all the surrounding circumstances.

*State v. Hall*, 509 So.2d 1093 (Fla.1987). In making such an inquiry, the trial judge must first determine whether a discovery violation occurred. If a violation is found, the court must assess whether the State's discovery violation was inadvertent or willful, whether the violation was trivial or substantial, and most importantly, what affect it had on the defendant's ability to prepare for trial.

(Emphasis supplied.) Here, the State had provided defense trial counsel with the calculated fragment report upon which Zeigler's initials appeared. Trial counsel was therefore aware of Zeigler's existence, and although trial counsel may not have known Zeigler's full name, the State certainly did not inadvertently or willfully conceal her identity. Trial counsel, therefore, cannot be said to have been deficient in failing to request a Richardson hearing when such a hearing was not appropriate under the circumstances.

Even if trial counsel's failure did amount to deficient performance, Taylor has failed to establish any prejudice. The record reveals that although Zeigler testified during postconviction proceedings that there were differences between her report and that of Dr. Pollock, she did not disagree with Dr. Pollock's ultimate findings.

Accordingly, any potential error in failing to request a Richardson hearing was harmless. Taylor therefore fails to meet his burden under the prejudice prong of *Strickland*. Taylor has failed to establish either of the two prongs required by \*1113 *Strickland*, so relief is not warranted for this claim. 6) Blouse Taylor next asserts that the trial court erred in denying relief on his claim that trial counsel was ineffective for failing to develop the theory of a second, white blouse.

This claim is based upon an officer testifying at trial that he handled a white blouse, as opposed to the green blouse that was involved with the underlying murder. The crux of Taylor's ineffective assistance of counsel claim, therefore, hinges on the existence of a phantom white blouse.

The trial court clearly examined the record, processed the evidence revealed during the evidentiary hearing, and made a factual determination that "it was the green blouse that the witnesses were referring to in their testimony and which was entered into evidence at trial." This Court will defer to the factual findings of the trial court on this issue as this Court does not substitute its judgment for that of the trial court on questions of the credibility of witnesses and the appropriate weight to be given to the evidence.

See *Lowe v. State*, 2 So.3d 21, 30 (Fla.2008) (citing *Blanco v. State*, 702 So.2d 1250, 1252 (Fla.1997)). Competent, substantial evidence exists to support the trial court's finding that there is not, nor has there ever been, a phantom white blouse.

Accordingly, trial counsel cannot be said to have been deficient for failing to develop a theory revolving around the existence of such a blouse, nor can Taylor be said to have been prejudiced if no such blouse existed. This claim is a red herring and does not warrant relief. 7) Improper Prosecutorial Comments Taylor next challenges trial counsel's failure to object to the following statement made by the prosecutor during closing arguments: You will recall that during our opening statements I was somewhat careful not to overstate the evidence because during your opening statements there is, as the court points out, a presumption of innocence.

And the presumption of innocence does not leave the defendant until evidence has been presented that wipes away that presumption. There is no longer a presumption of innocence as evidence has been presented.... The trial court properly relied on this Court's decision in *Dailey v. State*, 965 So.2d 38, 44 (Fla.2007), where we stated: "Regarding the prosecutor's statements concerning Dailey's presumption of innocence, we agree with the trial court that when read in context, the comments appear to be a statement by the prosecutor of her belief that the State satisfied its burden of proof.

Therefore, counsel's failure to object was not deficient." *Dailey*, 965 So.2d at 44 (emphasis supplied). Here, the prosecutor prefaced his allegedly improper statement with a reiteration that the presumption of innocence exists. Further, the prosecutor stated that the presumption is not removed "until evidence has been presented that wipes away that presumption."

Viewed in context, the comment in question was not improper, and counsel's failure to object cannot amount to deficient performance. See *Dailey*, 965 So.2d at 44. Further, the finding of the trial court is consistent with this Court's decision in *Belcher v. State*, 961 So.2d 239, 246 (Fla.2007).

In that case, the prosecutor, during voir dire, asked: "Do you understand that does not mean he is innocent? It means he is presumed to be innocent until you hear the evidence to the contrary? Can all of you agree with that?" This Court stated: "The transcripts indicate \*1114 that the prosecutor was merely explaining the presumption of innocence to prospective jurors.

In addition, as the lower court concluded, we do not see a proper basis for defense counsel to object." The comments in *Belcher* are similar to those made by the prosecutor here. "Where this Court previously has rejected a substantive claim on the merits, counsel cannot be deemed ineffective for failing to make a meritless argument." *Pagan*, 29 So.3d at 949 (citing *Heath v. State*, 3 So.3d 1017, 1033 (Fla.2009)).

Accordingly, we deny relief on this claim. Brady<sup>[5]</sup>and Giglio<sup>[6]</sup>Claims Standard of Review Pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the State is required to disclose material information within its possession or control that is favorable to the defense. See *Pagan*, 29 So.3d at 946.

To demonstrate a Brady violation, a defendant has the burden to establish (1) that favorable evidence, either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced. See *Hurst v. State*, 18 So.3d 975, 988 (Fla.2009) (citing *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct.

1936, 144 L.Ed.2d 286 (1999)). This Court has explained that "[t]here is no Brady violation where the information is equally accessible to the defense and the prosecution, or where the defense... had the information." *Provenzano v. State*, 616 So.2d 428, 430 (Fla. 1993) (citing *Hegwood v. State*, 575 So.2d 170, 172 (Fla. 1991); *James v. State*, 453 So.2d 786, 790 (Fla.1984)).

Questions of whether evidence is exculpatory or impeaching and whether the State suppressed evidence are questions of fact, and the trial court's determinations of such questions will not be disturbed if they are supported by competent, substantial evidence. See *Way v. State*, 760 So.2d 903, 911 (Fla.2000).

To satisfy the materiality prong of Brady, a defendant must prove that there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Guzman v. State*, 868 So.2d 498, 506 (Fla.2003) (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct.

3375, 87 L.Ed.2d 481 (1985) (plurality opinion)). In other words, the question is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Smith v. State*, 931 So.2d 790, 796 (Fla.2006) (quoting *Strickler*, 527 U.S. at 290, 119 S.Ct. 1936). A claim pursuant to *Giglio v. United States*, 405 U.S. 150, 92 S.Ct.

763, 31 L.Ed.2d 104 (1972), alleges that a prosecutor knowingly presented false testimony against the defendant. See *Green v. State*, 975 So.2d 1090, 1106 (Fla.2008). To demonstrate a Giglio violation, a defendant must prove that (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence was material.

See *San Martin v. State*, 995 So.2d 247, 254 (Fla.2008). If the defendant establishes that a prosecutor has knowingly presented false testimony, the burden then shifts to the State to prove that there is not any reasonable possibility that the false testimony could have affected the

judgment of the jury. See *Guzman*, 868 \*1115 So.2d at 506 (citing *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct.

2392, 49 L.Ed.2d 342 (1976)). While materiality is a component of both a Giglio and Brady claim, the Giglio standard of materiality is more defense friendly. See *Guzman*, 868 So.2d at 507. For both Brady and Giglio claims, as with any other postconviction claim, the defendant ultimately carries the burden of establishing a prima facie case based upon a legally valid claim.

See *Freeman v. State*, 761 So.2d 1055, 1061 (Fla.2000). Mere conclusory allegations are not sufficient to meet this burden. See *id.* (citing *Kennedy v. State*, 547 So.2d 912 (Fla.1989)). DNA Evidence Taylor asserts that critical documents and witness names were either not provided to the defense or provided late. Those documents and names include: (1) FBI/FDLE protocols; (2) calculated fragment length reports, summaries, and bench notes; and (3) the name of Shirley Zeigler.

For the reasons discussed below, we deny relief on each of these allegations. 1) FBI/FDLE Protocols Taylor asserts that the FBI/FDLE protocols, allegedly not provided by the State until postconviction litigation, "established that Dr. Pollock either changed the protocol or violated the protocol in his conclusions."

The only "violation" identified by Taylor, however, is the fact that the FBI protocols utilized five to eight probes, while Dr. Pollock only used four. This "violation," according to the defense's expert, undermined the reliability of the DNA evidence. During the evidentiary hearing, Dr. Pollock acknowledged that he deviated from the FBI protocols.

The only evidence presented by Taylor during the evidentiary hearing that directly challenged Dr. Pollock's ultimate findings, however, was the testimony of Dr. Libby, whom the postconviction court explicitly determined to be unreliable.

Although the postconviction court did not examine this evidence in the context of a Brady or Giglio violation, it still assessed the credibility of Dr. Libby with regard to Dr. Pollock's ultimate findings. The postconviction court considered, and rejected, the relevance of the FBI/FDLE protocols in the ineffective assistance of counsel context. This Court will defer to the factual findings of the postconviction court on this issue as this Court does not substitute its judgment for that of the postconviction court on questions of the credibility of witnesses and the appropriate weight to be given to the evidence.

See *Lowe v. State*, 2 So.3d at 30 (citing *Blanco*, 702 So.2d at 1252). Even if we assume that the State inadvertently failed to disclose these protocols, in light of the trial court's findings of fact, the alleged violations cannot "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Smith*, 931 So.2d at 796 (quoting *Strickler*, 527 U.S. at 290, 119 S.Ct.

1936) (articulating the materiality prong of Brady). Further, there is no reasonable possibility that the allegedly false testimony could have affected the judgment of the jury. See *id.* (articulating the materiality prong of a Giglio claim).

Accordingly, this subclaim fails under the materiality prongs of both Brady and Giglio. 2) Calculated Length Reports, Summaries, and Bench Notes Taylor asserts that the calculated length reports are material because they establish critical differences in lengths of DNA strands calculated by Dr. Pollock compared to those calculated by Shirley \*1116 Zeigler.

In his initial brief to this Court, Taylor acknowledges that "it wasn't until three days before trial that [the defense's DNA expert] received the calculated fragment length reports/summaries and bench notes." Taylor further asserts that trial counsel "was essentially sandbagged into: (1) not calling [the DNA expert] to testify, (2) not having [the DNA expert] present during the trial, (3) withdrawing his Motion for Continuance, (4) being unable to discern what information Shirley Zeigler could supply, and (5) being unable to call her as a witness to impeach Dr. Pollock's trial testimony."

First, because Taylor ultimately asserts a discovery violation before trial, this claim should have been raised pursuant to *Richardson v. State*, 246 So.2d 771 (Fla. 1971), during trial, not in a postconviction motion pursuant to Brady. "Where a defendant fails to timely object to a discovery violation or to request a Richardson hearing, the defendant does not preserve the point for appellate review."

*Major v. State*, 979 So.2d 243, 244 (Fla. 3d DCA 2007) (citing *Celestine v. State*, 717 So.2d 205, 206 (Fla. 5th DCA 1998)). The only cognizable claim here, therefore, is that trial counsel was ineffective for failing to request a Richardson hearing on the alleged discovery violation.

As discussed in the previous section, this claim is also without merit. Second, even if this were a cognizable Brady claim, the evidence is not material. As discussed above, the only evidence presented by Taylor during the evidentiary hearing that challenged the DNA evidence was the testimony of Dr. Libby and Shirley Zeigler. These two witnesses testified with regard to the potential discrepancies in the calculated fragment length reports.

As previously articulated, however, Dr. Libby was found to be not credible by the trial court, and Zeigler did not disagree with the ultimate findings of Dr. Pollock. The alleged violations, therefore, cannot "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Smith*, 931 So.2d at 796 (quoting *Strickler*, 527 U.S. at 290, 119 S.Ct.

1936) (articulating the materiality prong of Brady). Nor is there any reasonable possibility that the allegedly false testimony could have affected the judgment of the jury. See *id.* (articulating the materiality prong of a Giglio claim).

Accordingly, this subclaim fails under the materiality prongs of both Brady and Giglio. 3) Name of Shirley Zeigler Finally, Taylor asserts that the State suppressed the name of Shirley Zeigler, which was allegedly only revealed during the cross-examination of Dr. Pollock. Taylor asserts that Zeigler could have called into question Dr. Pollock's testimony, and had she been called at trial, the defense would have been able to impeach Dr. Pollock's testimony.

First, because Taylor ultimately asserts a discovery violation that was discovered and known during trial, this claim should have been raised pursuant to Richardson at trial, not in a Brady claim at the postconviction stage. See Major, 979 So.2d at 244 (citing Celestine, 717 So.2d at 206).

The only cognizable claim here, therefore, is that trial counsel was ineffective for failing to request a Richardson hearing, which, as previously discussed, is without merit. Second, this is not a valid Brady violation because the State did not suppress the evidence. Taylor admits in his brief that he possessed Zeigler's initials before trial as they were contained on the calculated fragment reports.

Taylor simply accuses the State of failing to identify whom those initials represented. In fact, trial counsel \*1117 was able to specifically identify those initials during the cross-examination of Dr. Pollock. Taylor thus fails to establish that the State suppressed Zeigler's name when it disclosed her initials through discovery. See Ferrell v. State, 29 So.3d 959, 980 (Fla.2010) ("Because the evidence at the evidentiary hearing established that Ferrell's trial counsel was in possession of the information Ferrell alleged had been withheld, this Brady claim must fail.").

Third, even if this were a cognizable Brady or Giglio claim, the evidence is not material. Zeigler testified that despite her disagreement with certain elements of Dr. Pollock's testing procedures, she did not ultimately disagree with his findings. Her testimony, therefore, is unlikely to undermine confidence in the outcome. See Guzman, 868 So.2d at 506 (articulating the materiality prong of a Brady claim).

Nor is there any reasonable possibility that the false testimony could have affected the judgment of the jury. See *id.* (articulating the materiality prong of a Giglio claim). Accordingly, relief is not warranted for this subclaim. Blouse Taylor asserts without argument or analysis that the trial court erred in denying relief on his Brady and Giglio claims related to the blouse.

In his amended motion for postconviction relief, along with his initial brief to this Court, Taylor fails to identify a single piece of evidence that was suppressed by the State or any false testimony that was given by a witness. These claims are therefore conclusory and are denied on that basis. See Freeman, 761 So.2d at 1061 (citing Kennedy, 547 So.2d 912).

Newly Discovered Evidence To obtain a new trial based upon newly discovered evidence, a defendant has the burden to establish two things: (1) the evidence was not known by the trial court, the party, or counsel at the time of trial and the defendant or defense counsel could not have

known of it by the use of diligence; and (2) the newly discovered evidence is of such nature that it would probably produce an acquittal on retrial.

See *Hurst v. State*, 18 So.3d 975, 992 (Fla. 2009) (citing *Jones v. State*, 709 So.2d 512, 521 (Fla.1998)). Here, Taylor asserts that the recanted testimony of Timothy Cowart, Taylor's former cellmate who testified against him during the initial trial, warrants a new trial. This Court has repeatedly held that recantations are "exceedingly unreliable" and that it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true.

See *Archer v. State*, 934 So.2d 1187, 1196 (Fla.2006) (quoting *Armstrong v. State*, 642 So.2d 730, 735 (Fla.1994)). Cowart's recanted testimony is therefore to be reviewed with extreme skepticism. Further, this Court will defer to the factual findings of the trial court on this issue as this Court does not substitute its judgment for that of the trial court on questions of the credibility of witnesses.

See *Lowe*, 2 So.3d at 30 (citing *Blanco*, 702 So.2d at 1252). Here, the trial court determined that the recanted testimony of Cowart was not credible. In light of the trial court's factual determination that Cowart's recanted testimony is not reliable, we deny relief on this claim. Ineffective Assistance of Appellate Counsel Standard of Review Claims of ineffective assistance of appellate counsel are appropriately presented in a petition for writ of habeas corpus.

See *Freeman v. State*, 761 So.2d 1055, 1069 (Fla.2000). Consistent with the Strickland standard, to grant habeas relief \*1118 based on ineffectiveness of appellate counsel, this Court must determine first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.

*Pope v. Wainwright*, 496 So.2d 798, 800 (Fla.1986); see also *Freeman*, 761 So.2d at 1069; *Thompson v. State*, 759 So.2d 650, 660 (Fla.2000). In raising such a claim, "[t]he defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based." *Freeman*, 761 So.2d at 1069; see also *Knight v. State*, 394 So.2d 997, 1001 (Fla.1981).

Claims of ineffective assistance of appellate counsel may not be used to camouflage issues that should have been presented on direct appeal or in a postconviction motion. See *Rutherford v. Moore*, 774 So.2d 637, 643 (Fla.2000). "If a legal issue 'would in all probability have been found to be without merit' had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective."

*Id.* (quoting *Williamson v. Dugger*, 651 So.2d 84, 86 (Fla. 1994)). Analysis Taylor asserts that appellate counsel was ineffective for failing to (1) raise a claim of fundamental error when the trial

court did not order a Frye hearing sua sponte; and (2) argue that the prosecutor's comment on the presumption of innocence violated a fundamental right.

For the reasons discussed below, we deny relief on both of these claims. 1) Failing to request Frye hearing sua sponte This Court has repeatedly held that absent a proper objection from the offended party, it is not an error for a trial court to admit evidence without a Frye hearing. See McDonald v. State, 743 So.2d 501, 506 (Fla.1999) ("McDonald argues the trial court failed to determine the admissibility of the DNA test results and the basis of the statistical comparisons according to the standards enunciated in Frye....

Moreover, in the absence of a proper objection, we find no error in the admission of this evidence.") (citing Hadden v. State, 690 So.2d 573, 580 (Fla.1997)); Hadden, 690 So.2d at 580 ("Unless the party against whom the evidence is being offered makes this specific objection, the trial court will not have committed error in admitting the evidence.") (citing Archer v. State, 673 So.2d 17, 21 (Fla.1996)).

Accordingly, as a matter of law, the trial court here did not err in failing to conduct a Frye hearing sua sponte. Taylor's reliance on Zack v. State, 911 So.2d 1190, 1201 (Fla.2005), is misguided. Nothing in Zack supports Taylor's contention that the trial court should have ordered a Frye hearing sua sponte.

In fact, the trial court explicitly rejected Zack's contention that the "the trial court should have conducted a hearing sua sponte." Id. Further, Zack is distinguishable because the trial, in that case, occurred in 1997, two years after this Court took judicial notice of the reliability of DNA evidence in Hayes v. State, 660 So.2d 257 (Fla.1995).

The trial court did not err in failing to order a Frye hearing sua sponte. Accordingly, appellate counsel cannot be said to be ineffective for failing to raise this issue on appeal. We therefore deny relief on this claim. \*1119 2) Improper prosecutorial comments Taylor's petition challenges the same comment addressed in the ineffective assistance of trial counsel claim.

As articulated previously, this statement was not improper. Accordingly, appellate counsel cannot be deemed to have been ineffective for failing to raise that issue on appeal. See Pagan, 29 So.3d at 949 (citing Heath, 3 So.3d at 1033).

The petition also challenges the following jury instruction: The defendant has entered his plea of not guilty. This means you must presume or believe that the defendant is innocent. This presumption of innocence stays with the defendant as to each material allegation in the charge and through each stage of the trial until that presumption of innocence has been overcome by the evidence to the exclusion of and beyond a reasonable doubt.

Now, to overcome the defendant's presumption of innocence, the State has the burden of proving the following two elements: Number one, that the crime with which the defendant is charged was in fact committed, and two, that the defendant is the person who committed the crime. Jury instructions are subject to the contemporaneous objection rule and, absent an objection at trial, can be raised on appeal only if fundamental error occurred.

See *Walls v. State*, 926 So.2d 1156, 1180 (Fla.2006) (quoting *State v. Delva*, 575 So.2d 643, 644 (Fla.1991)). With regard to what constitutes fundamental error in a jury instruction, this Court has stated: We have explained that for jury instructions to constitute fundamental error, the error must "reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error."

*Delva*, 575 So.2d at 644-45 (quoting *Brown v. State*, 124 So.2d 481, 484 (Fla.1960)). Further, "fundamental error occurs only when the omission is pertinent or material to what the jury must consider in order to convict.' Failing to instruct on an element of the crime over which the record reflects there was no dispute is not fundamental error...." *Id.* at 645 (citation omitted) (quoting *Stewart v. State*, 420 So.2d 862, 863 (Fla.1982)).

*Garzon v. State*, 980 So.2d 1038, 1042 (Fla. 2008). Here, the trial judge appeared to be "merely explaining the presumption of innocence to [the] jurors." *Belcher*, 961 So.2d at 246. Further, the trial judge not only defined what the presumption of innocence means, but also reiterated that the State has the burden to establish the elements of the crime.

Accordingly, the jury instruction does not "reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." See *Garzon*, 980 So.2d at 1042 (quoting *Delva*, 575 So.2d at 644-45).

The jury instruction does not constitute fundamental error, and appellate counsel cannot be deemed ineffective for failing to challenge it on appeal. See *Pagan*, 29 So.3d at 949 (citing *Heath*, 3 So.3d at 1033). Accordingly, we deny relief on this claim. CONCLUSION For the foregoing reasons, we affirm the denial of the rule 3.850 motion by the postconviction court and deny relief on the petition for writ of habeas corpus.

It is so ordered. \*1120 CANADY, C.J., and PARIENTE, LEWIS, QUINCE, POLSTON, LABARGA, and PERRY, JJ., concur. NOTES [1] The claims were as follows: (I) access to records and discovery violations; (II) production violations; (III) failure to produce trial file; (IV) ineffective assistance of counsel (DNA); (V) improper burden shifting through prosecutorial comments and jury instructions during the guilt phase; (VI) ineffective assistance of counsel (related to Timothy Cowart and mental retardation); (VII) improper jury instructions; (VIII) improper jury instructions; (IX) ineffective assistance of counsel (penalty phase); (X) improper weighing of mitigating and aggravating circumstances; (XI) ineffective assistance of counsel

(mental health assistance); (XII) mental retardation; (XIII) challenge to Florida's sentencing scheme; (XIV) improper suggestion of death penalty; (XV) improper burden shifting in penalty phase; (XVI) improper comments to jury; (XVII) challenge to murder in course of a felony aggravating factor instruction; (XVIII) failure to identify mitigating factors; (XIX) improper instruction on aggravating factors; (XX) challenge to method of execution; and (XXI) change in law requires new penalty phase proceeding.

[2] *Huff v. State*, 622 So.2d 982 (Fla. 1993). [3] *Frye v. United States*, 293 F. 1013 (D.C.Cir. 1923)

[4] *Richardson v. State*, 246 So.2d 771 (Fla. 1971). [5] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

[6] *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).