

IN THE SUPREME COURT OF FLORIDA

ANTHONY NEAL WASHINGTON

Petitioner,

v.

CASE NO. SC01-872

MICHAEL W. MOORE,

Respondent.

_____ /

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, MICHAEL W. MOORE, by and through the undersigned Assistant Attorney General, and hereby responds to the Petition for Writ of Habeas Corpus filed in the above-styled case. Respondent respectfully submits that the petition should be denied, and states as grounds therefor:

FACTS AND PROCEDURAL HISTORY

The facts of the case were cogently summarized by this Court on Washington's direct appeal. Washington v. State, 653 So. 2d 362, 363-364 (Fla. 1994):

On August 17, 1989, Ms. Alice Berdat, a 102-pound, 93-year-old

woman, was found murdered in her bedroom, having been badly beaten about her face and head. Her body was badly bruised. There were signs that she had been vaginally and anally raped, and she suffered seventeen rib fractures. Death occurred between the hours of 5:51 a.m. and 10:00 a.m.

Michael Darroch, the detective assigned to the case, learned that Anthony Washington was imprisoned at the Largo Community Correctional Work Release Center, located approximately 2.1 miles from Ms. Berdat's home. The Center's records indicated that on the day of the murder, Washington left the Center at 6:00 a.m., returned at 9:17 a.m., and did not work at his job at Cocoa Masonry. On August 31, 1989, Darroch visited Cocoa Masonry where he spoke with several of Washington's co-workers. The co-workers informed Darroch that Washington sold a gold-colored watch to fellow co-worker Robert Leacock. Darroch visited Leacock at his home, recovered the watch, and showed Leacock a single photo of Washington. Leacock identified Washington as the person who sold him the watch, which was later identified as belonging to Ms. Berdat.

On September 5, 1989, Darroch and two police officers interviewed Washington at the Zephyrhills Correctional Center. Washington did not know, nor did the detective tell him, that he was suspected of murdering Ms. Berdat. The interview dealt with an unrelated sexual battery that occurred on August 25, 1989. Darroch read the defendant his rights and obtained hair and blood samples which he said could prove or disprove Washington's guilt in the sexual battery case. When the state sought to use the samples in the Berdat murder case, Washington moved for suppression. His motion was denied by the trial court and on July 16, 1992, a jury convicted him of first-degree murder, burglary with a battery, and sexual battery. The judge overrode the jury's life recommendation and imposed the death sentence. (FN1) Washington appeals his convictions and sentences. (FN2)

FN1. The court found aggravating circumstances of: (1) a capital felony committed by a person under sentence of imprisonment, (2) previous conviction of another felony

involving the use or threat of violence, (3) a capital felony committed while engaged in the crimes of burglary and sexual battery, and (4) heinous, atrocious or cruel. The court found no statutory mitigating circumstances, and found the non-statutory mitigating circumstances of defendant's love for his mother, his high school diploma, and his sports activities during high school.

FN2. The issues raised on appeal are: (1) the state improperly peremptorily excused an African-American prospective juror; (2) the trial court should have suppressed the blood sample; (3) Leacock's identification should have been suppressed; (4) the DNA evidence was improperly admitted; (5) there was insufficient evidence to support Washington's guilt; (6) the heinous, atrocious, or cruel aggravating circumstance was vague; (7) the death sentence was improperly imposed; (8) Washington should not have been sentenced as a habitual violent felony offender; and (9) one of the two written judgments filed is extraneous and must be stricken.

On the direct appeal this Court rejected Washington's claim that the trial court erred in allowing the state to peremptorily challenge a prospective juror without providing a valid race-neutral explanation, rejected his claim that the court erred in denying his motion to suppress the blood sample, and found no error in the trial court's ruling on the identification testimony of witness Leacock. *Id.* at 364-365. As to the final two guilt phase issues this Court opined:

[6][7] In his fourth issue, Washington asserts that the trial court erred in not allowing him to depose Anne Baumstark, the DNA technician, and that the state, by not calling Baumstark as a witness, failed to lay a proper predicate for admission of the DNA test results.

Florida Rule of Criminal Procedure 3.220 states that a defendant may not depose a person that the prosecutor does not, in good faith, intend to call at trial and whose involvement with the case and knowledge of the case is fully set out in a police report or other statement furnished to the defense. The record reflects that the state did not intend to call Baumstark as a witness; that Baumstark submitted an affidavit which stated that she had conducted over 1200 DNA tests, had no specific recollection of Washington's test, and would have to rely on lab notes to discuss the testing procedure. Based on our review of the record, we find that the state satisfied the requirements of rule 3.220. We also find no abuse of discretion in the court's admission of the DNA test results. When previously faced with this issue, we stated that:

In admitting the results of scientific tests and experiments, the reliability of the testing methods is at issue, and the proper predicate to establish that reliability must be laid. If the reliability of a test's results is recognized and accepted among scientists, admitting those results is within a trial court's discretion. When such reliable evidence is offered, "any inquiry into its reliability for purposes of admissibility is only necessary when the opposing party makes a timely request for such an inquiry supported by authorities indicating that there may not be general scientific acceptance of the technique employed."

Robinson v. State, 610 So.2d 1288, 1291 (Fla.1992) (quoting *Correll v. State*, 523 So.2d 562, 567 (Fla.1988)), *cert. denied*, --- U.S. ----, 114 S.Ct. 1205, 127 L.Ed.2d 553 (1994) (citations omitted). The DNA test results were presented through the testimony of FBI Special Agent Dwight Adams, Baumstark's supervisor. Adams testified as to the scientific reliability of the tests, interpreted the DNA test results, worked as a team with Baumstark, and supervised her as she conducted the actual test. Adams' familiarity with the test, his supervision over Baumstark's work, and Baumstark's affidavit laid a proper predicate for admission of the DNA test results.

[8] Contrary to Washington's final guilt phase assertion, the

circumstantial evidence produced by the state was sufficient to allow the issue of Washington's guilt to be submitted to a jury. When the case against the defendant is circumstantial, we have held that:

[T]he burden is on the State to introduce evidence which excludes every reasonable hypothesis except guilt. The State is not required to conclusively rebut every possible variation of events which can be inferred from the evidence but only to introduce competent evidence which is inconsistent with the defendant's theory of events. Once this threshold burden has been met, the question of whether the evidence is sufficient to exclude all reasonable hypotheses of innocence is for the jury to determine.

Atwater v. State, 626 So.2d 1325, 1328 (Fla.1993) (citation omitted), *cert. denied*, --- U.S. ----, 114 S.Ct. 1578, 128 L.Ed.2d 221 (1994). The evidence against Washington included DNA test results that matched his semen with those found at the murder scene; microscopic tests that matched his hair characteristics with hairs found at the murder scene; his possessing and selling the victim's watch; and his proximity to the victim's home. Based on this evidence, the jury had sufficient basis to exclude all reasonable hypotheses of Washington's innocence.

(Id. at 365-366)

The Court then rejected appellate counsel's argument that the HAC aggravating circumstance is vague and arbitrarily and capriciously applied and found no merit in the claim that the trial court improperly imposed the death sentence over the jury's life recommendation in violation of Tedder v. State, 322 So. 2d 908 (Fla. 1975). The Court, however, did agree with appellate counsel that Washington was improperly sentenced as a habitual violent felony offender and agreed that the trial court had

improperly entered two written judgments and ordered one stricken as surplusage. Id.
at 366-367.

ISSUE I

WHETHER APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE FOR FAILING TO ARGUE THE COURT ERRED IN NOT CONDUCTING A FRYE HEARING ON DNA PROBABILITIES

A. Legal Standard

In Rutherford v. Moore, 774 So. 2d 637 (Fla. 2000) this Court summarized the jurisprudence relating to claims of ineffective assistance of appellate counsel. Habeas corpus petitions are the proper vehicle to advance claims of ineffective assistance of appellate counsel, but such claims may not be used to camouflage issues that should have been raised on direct appeal or in a post-conviction motion. Id. at 643; Thompson v. State, 759 So. 2d 650, 660 n. 6 (Fla. 2000); Hardwick v. Dugger, 648 So. 2d 100, 106 (Fla. 1994); Breedlove v. Singletary, 595 So. 2d 8, 10 (Fla. 1992). As in the standard for ineffective trial counsel, the court's ability to grant relief is limited to those situations where the petitioner established first that counsel's performance was deficient because the "omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance" and second that the petitioner was prejudiced because counsel's deficiency "compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." Rutherford at

643 quoting from Thompson, 759 So. 2d at 660; Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995). And 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 his performance ineffective. Williamson v. Dugger, 651 So. 2d 84, 86 (Fla. 1994); Kokal v. Dugger, 718 So. 2d 138, 142 (Fla. 1998); Groover, 656 So. 2d at 425. This is generally true as to issues that would have been found to be procedurally barred had they been raised on direct appeal. Rutherford at 643; Groover, 656 So. 2d at 425; Medina v. Dugger, 586 So. 2d 317, 318 (Fla. 1991). The Rutherford Court then held that counsel was not ineffective for failure to raise on appeal the denial of numerous pretrial motions because many of the underlying substantive claims were without merit - the failure to raise meritless claims does not render counsel’s performance ineffective. Kokal, supra; Williamson, supra; Groover, supra, The Rutherford Court also held that some claims were not preserved for appellate review (e.g. that instructions were inapplicable but not unconstitutionally vague, or if initially asserted as vague were not renewed at the appropriate time or supported by an alternative instruction). Id. at 644. Appellate counsel is not ineffective for failing to raise a claim that would have been rejected on appeal and counsel is not deficient for failing to anticipate a change in the law. Darden v. State, 475 So. 2d 214, 216-17 (Fla. 1985); see also Nelms v. State, 596 So. 2d 441

(Fla. 1992); Stevens v. State, 552 So. 2d 1082, 1085 (Fla. 1989); Lambrix v. Singletary, 641 So. 2d 847 (Fla. 1994).

Additionally the Court considered and rejected a claim in Rutherford that appellate counsel was ineffective for not convincing the Court to rule in his favor on issues actually raised on direct appeal. The Court citing Routly v. Wainwright, 502 So. 2d 901, 903 (Fla. 1987) and Grossman v. Dugger, 708 So. 2d 249, 252 (Fla. 1997) explained that it will not consider a claim on habeas that appellate counsel was ineffective for failing to raise additional arguments in support of the claim on appeal. Id. at 645. The Court declined to fault appellate counsel for failing to investigate and present facts in order to support an issue on appeal since the “appellate record is limited to the record presented to the trial court.” Id. at 646; Finney v. State, 660 So. 2d 674, 684 (Fla. 1995). See also Hall v. Moore, ___ So. 2d ___, 26 Fla. L. Weekly S316 (Fla. 2001).

Rutherford also reiterated that issues that were procedurally barred because not properly raised at trial could not form a basis for finding appellate counsel ineffective absent a showing of fundamental error, i.e. error that “reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.” Id. at 646; Chandler v. State, 702 So. 2d 186, 191 n. 5 (Fla. 1997).

Moreover, appellate counsel cannot be deemed ineffective for failing to raise on appeal a claim of ineffective trial counsel. Id. at 648; Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987).

Finally in Happ v. Moore, ___ So. 2d ___, 26 Fla. L. Weekly S301 (Fla. 2001), this Court ruled that appellate counsel cannot be deemed ineffective for failing to raise issues that are procedurally barred because they were not properly raised during the trial court proceedings; nor can appellate counsel be deemed ineffective for failing to raise non-meritorious claims on appeal, or claims that do not amount to fundamental error. Additionally, appellate counsel cannot be deemed ineffective where record refutes the claim that appellate counsel failed to argue certain points on appeal. The habeas corpus writ may not be used to reargue issues raised and ruled upon because petitioner is dissatisfied with the outcome on direct appeal. Appellate counsel is not required to raise every conceivable claim. And where trial counsel did not preserve the specific arguments now raised in the petition appellate counsel cannot be faulted. Moreover, a petitioner may not reargue the same issue, under the guise of ineffective assistance of appellate counsel, a similar contention urged in the appeal from the denial of a 3.850 motion that trial counsel was ineffective on that issue. Id. at 303. Accord, Atwater v. State/Moore, ___ So. 2d ___, 26 Fla. L. Weekly S395 (Fla. 2001) (Habeas Corpus petitions are not to be used for additional appeal on questions which could

have been, should have been, or were raised on appeal or in a rule 3.850 motion, or on matters that were not objected to at trial); Freeman v. State, 761 So. 2d 1055, 1069 (Fla. 2000) (Ineffective assistance of counsel cannot be argued where the issue was not preserved for appeal or where the appellate attorney chose not to argue the issue as a matter of strategy); Atkins v. Dugger, 541 So. 2d 1165, 1167 (Fla. 1989) (“Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the affect of diluting the impact of the stronger points.”). Clarence Jones v. Moore, ___ So. 2d ___, 26 Fla. L. Weekly S459 (Fla. Case No. SC00-660, July 5, 2001) (appellate counsel not deemed ineffective for failing to argue a variant to an issue argued and decided on direct appeal; nor is appellate counsel ineffective for failing to raise unpreserved claims).

B. The Instant Case

Keeping the foregoing principles in mind we turn now to Washington’s claim. Appellate counsel filed his initial brief on direct appeal on October 20, 1993 following the trial which occurred in July of 1992, and it would stand to reason that he would not be found derelict in failing to anticipate or to cite appellate decisions which were issued after he filed his appellate brief. Indeed, in the instant habeas petition, Washington does not cite a single Florida case in support of this argument that was decided prior

to attorney Moeller's filing of Washington's initial brief. Further, he does not cite a single case holding that counsel's failure to request a Frye¹ hearing on DNA probabilities - either at the trial or appellate levels - constituted ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674 (1984).

Appellate counsel was not deficient in presenting and arguing the nine issues he did urge on direct appeal. After methodically reviewing the facts that had occurred in the pretrial motions and at the guilt and penalty phases, appellate counsel chose to emphasize in Issue IV that the lower court had erred in permitting the state to allow DNA testimony through FBI Special Agent Dwight Adams since he was not the person who actually performed the testing procedures but rather they were done by technician Ann Baumstark, that the lower court had refused to grant appellant's request to compel Baumstark's deposition, and that the defense had established good cause for needing to depose Baumstark. (Appellant's Initial Brief, pp. 44-45). Appellate counsel cited Hill v. State, 535 So. 2d 354 (Fla. 5th DCA 1988), a case emphasizing the need for full and timely discovery when the state seeks to introduce DNA evidence (Initial Brief, p. 46) and argued that he should have had the opportunity to confront Baumstark at trial. Appellate counsel also cited Robinson v. State, 610 So. 2d 1288 (Fla. 1992) for the requirement that a proper predicate must be

¹ Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)

established before the results of scientific tests and experiments may be admitted (Initial Brief, pp. 47-48). As noted, supra, in Respondent's Statement of Facts, this Court rejected appellate counsel's argument and cited Robinson and found Adams' testimony and Baumstark's affidavit laid a proper predicate for admission of the DNA test results:

[6][7] In his fourth issue, Washington asserts that the trial court erred in not allowing him to depose Anne Baumstark, the DNA technician, and that the state, by not calling Baumstark as a witness, failed to lay a proper predicate for admission of the DNA test results. Florida Rule of Criminal Procedure 3.220 states that a defendant may not depose a person that the prosecutor does not, in good faith, intend to call at trial and whose involvement with the case and knowledge of the case is fully set out in a police report or other statement furnished to the defense. The record reflects that the state did not intend to call Baumstark as a witness; that Baumstark submitted an affidavit which stated that she had conducted over 1200 DNA tests, had no specific recollection of Washington's test, and would have to rely on lab notes to discuss the testing procedure. Based on our review of the record, we find that the state satisfied the requirements of rule 3.220. We also find no abuse of discretion in the court's admission of the DNA test results. When previously faced with this issue, we stated that:

In admitting the results of scientific tests and experiments, the reliability of the testing methods is at issue, and the proper predicate to establish that reliability must be laid. If the reliability of a test's results is recognized and accepted among scientists, admitting those results is within a trial court's discretion. When such reliable evidence is offered, "any inquiry into its reliability for purposes of admissibility is only necessary when the opposing party makes a timely request for such an inquiry supported by authorities indicating that there may not be general scientific

acceptance of the technique employed."

Robinson v. State, 610 So.2d 1288, 1291 (Fla.1992) (quoting *Correll v. State*, 523 So.2d 562, 567 (Fla.1988)), *cert. denied*, --- U.S. ---, 114 S.Ct. 1205, 127 L.Ed.2d 553 (1994) (citations omitted). The DNA test results were presented through the testimony of FBI Special Agent Dwight Adams, Baumstark's supervisor. Adams testified as to the scientific reliability of the tests, interpreted the DNA test results, worked as a team with Baumstark, and supervised her as she conducted the actual test. Adams' familiarity with the test, his supervision over Baumstark's work, and Baumstark's affidavit laid a proper predicate for admission of the DNA test results.

(653 So. 2d at 365)

Mr. Moeller clearly acted as a capable advocate on appeal. Current collateral counsel now chooses to second-guess his performance - since it did not achieve a desirable result - by contending that the trial court erred in failing to conduct a Frye hearing. The record on direct appeal reflects that trial counsel had filed a Motion to Compel on or about February 12, 1992 requiring the state to furnish records pertaining to DNA testing (Vol. V, R827-829). On February 28, 1992 the trial court entered its order that the state provide the following information within five days:

1. The identity of the person who performed the DNA analysis;
2. a statement as to how the analysis was performed;
3. an indication of the qualifications of the expert witnesses performing the analysis;
4. the database figures relied upon by the FBI in performing the statistical

probability analysis;

5. an indication as to whether or not there were any problems encountered during the conduct of the DNA analysis in Washington's case;

6. the results and conclusions reached in this analysis and the computations or formulas used in arriving at the results or conclusions.

(Vol. V, R863-864); Appendix B to Petition)

Thereafter, on or about March 17, 1992, trial counsel filed a 2nd Motion to Compel DNA records noting that certain items had been received from the FBI but requesting that other information be compelled from the FBI (Vol. V, R949-951; Appendix A to Petition). The trial court entered an order on April 2, 1992, noting that "the parties have entered certain agreements regarding the request" but ordered the state to furnish the name and identity of each technician performing any portion of the DNA testing (Vol. VI, R1016).

On or about May 15, 1992, trial counsel filed a Motion to Compel, requesting an order that technician Baumstark participate in a defense deposition and the "bench notes" of Baumstark and special agent Dwight Adams (Vol. VI, R1183-85). The court's order of May 22, 1992 indicates that the request for deposition was withdrawn pending receipt of the "bench notes" and the court granted the Motion to Compel on the bench notes (Vol. VI, R1190)(The record also includes the affidavit

of Anne L. Baumstark on May 21, 1992 (R1187-88)).

Thereafter, on or about June 3, trial counsel relying on Fla. R. Crim. P. 3.220 moved to compel the deposition of FBI technician Baumstark. The motion attached the FBI protocol and the National Research Council's report on DNA Technology in Forensic Science (Vol. VII, R1192-1200; R1201-1221; R1222-1277). The trial court's order of June 11, 1992 denied the motion to compel deposition since the state was not intending to call the witness in the trial (Vol. VII, R1279).

On or about July 15, 1992 trial counsel filed a motion in limine seeking to preclude evidence relating to DNA analysis or any conclusions therefrom in the state's case (Vol. VII, R1281-83; Appendix C to Petition). The jury trial took place on July 14-17, 1992 with the Honorable Susan F. Schaeffer presiding (R1979-2754).

On the second day of trial, after Dwight Adams was examined on voir dire by trial counsel McCoun (Vol. XIV, R2472-84), the defense complained they had not been provided information, Judge Schaeffer carefully questioned the state and defense and was informed that the state had furnished all the material previously ordered by the court (R2485-92). When the defense indicated mere dissatisfaction with Judge Downey's earlier ruling and that it was not suggesting the state had violated an earlier court ruling which might necessitate a Richardson hearing, the court ruled that Adams would be permitted to testify (R2492-97). The court noted that at this point the

motion in limine has been denied (R2498). Adams testified (R2499-2522).

C. There is neither deficient performance nor prejudice.

To the extent that petitioner implies at page 13 of his petition that Judge Downey's order of April 28, 1992 (Petitioner's Appendix B) directly followed Washington's February 28, 1992 2nd Motion to Compel DNA Records (Petitioner's Appendix A), it is misleading and the chronology needs clarification. Petitioner filed an initial motion to compel on February 12, 1992 (D.A. R827-829) and the trial court entered an order on that on February 28, 1992 (D.A. R863-864; Petitioner's Appendix B). Thereafter on March 17, 1992 Washington filed a 2nd Motion to Compel DNA Records (D.A. R949-951; Petitioner's Appendix A) and on April 2, 1992 the trial court entered its order granting the motion in part (D.A. R1016) and noting that the parties had entered into certain agreements. Petitioner filed a motion to compel on May 14, 1992 (D.A. R1183-86) and on May 22 the trial court entered its order granting the request for bench notes and noting that the request for deposition was withdrawn pending the receipt of the bench notes (D.A. R1190). On June 3, 1992 the defense filed a Motion to Compel the Deposition of FBI technician Baumstark (D.A. R1193-1299) and on June 11 the trial court denied the motion to compel deposition (D.A. R1279). At the beginning of trial on or about July 14, 1992 defense counsel filed a motion in limine (D.A. R1281-83; Petitioner's Appendix C) and after hearing argument

in which it was established that the state had furnished all the material previously ordered by the court and that the defense only was dissatisfied with Judge Downey's earlier ruling, Judge Schaeffer ruled that Agent Adams would be permitted to testify (D.A. R2485-97). The motion in limine was denied (D.A. R2498).

Respondent would first respectfully submit that contrary to petitioner's assertion, the question pertaining to the trial court's failure to conduct a Frye hearing under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) was not preserved for review and thus appellate counsel could not have been deficient in failing to argue it on direct appeal.

Washington refers (at pages 30-31 of his petition) to the February 25 hearing before Judge Downey (at D.A. R2766 not as mistakenly cited by petitioner as R2468) but that hearing pertained to Washington's initial motion to compel on February 12 and the court ruled at that time to continue the scheduled trial from March 3, 1992 to April 28, 1992 and for the state to provide certain DNA results and conclusions (D.A. R863-864; D.A. R2795-96). Certainly Judge Downey was not on notice that Washington was requesting a Frye hearing on DNA at that time. Moreover, there were subsequent motions and hearings before Judge Downey - Motion to Compel Hearing on March 17, 1992 (D.A. R2800-2810), Hearing on May 20, 1992 (D.A. R2811-17), Hearing on June 9, 1992 on the defense motion to compel Baumstark to appear for

deposition (D.A. R2819-36) - and there was nothing to suggest that the defense was demanding a Frye hearing. Since the court had been advised that the parties “entered certain agreements” (see Order of April 2, 1992, D.A. R1016), the request for Baumstark deposition had been withdrawn pending receipt of bench notes (see Order of May 22, 1992, D.A. R1190), and the court had entered its order on June 11 denying the motion to compel Baumstark deposition (see D.A. R1279), the trial court was not on notice prior to trial of any defense request that a Frye hearing needed to be conducted. As to the presentation of the motion in limine on the day of trial to Judge Schaeffer, the defense confirmed Judge Schaeffer’s inquiry that the basis of the problem was not that Judge Downey wouldn’t have a hearing, just that he had a hearing and denied the motion (D.A. R2007). Trial defense summarized what had previously occurred and Judge Schaeffer indicated she would issue a subpoena for the DNA technician and if the state did not lay a proper predicate it might not get expert testimony in (D.A. R2008-2014). The court indicated that generally DNA is admissible in Florida but the specific ruling on this case was yet to be determined (D.A. R2015). Following some voir dire examination of prospective jurors, trial counsel McCoun stated for the record that they had an assistant-consultant on DNA that might testify after they heard what the FBI fellow said but “as of yesterday we don’t intend to call him. I met with him but we do not intend to call him” (D.A. R2176). Thereafter,

defense counsel reiterated that the FBI indicated that their technicians (like Baumstark) were not available to be deposed and the court repeated that it could not compel the witness to attend and the state had the burden of convincing her that Agent Adams had a sufficient understanding of what was done and that it was done reliably (D.A. R2385-96).

Dwight Adams of the FBI testified and, after voir dire examination by the defense regarding the role of technician Baumstark acting under his supervision (D.A. R2472-2484), Judge Schaeffer ruled that based on the voir dire testimony the witness should be allowed to testify since there was no contention that the state had violated any court order on discovery (D.A. R2489-96). The motion in limine was denied (D.A. R2498). Adams was fully examined on direct and on cross-examination (D.A. R2498-2522).

This Court has repeatedly stated that the trial court does not commit error in failing to determine the admissibility of DNA test results and the basis of the statistical comparisons where defense counsel did not object to the admissibility of the DNA evidence or request a Frye hearing prior to the time the evidence was admitted into evidence. See McDonald v. State, 743 So. 2d 501, 506 (Fla. 1999) citing Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982) (holding specific legal ground for objection, exception or motion must be raised before trial court to be cognizable on appeal);

Hadden v. State, 690 So. 2d 573, 580 (Fla. 1997) (“it is only upon proper objection that the novel scientific evidence is unreliable that a trial court must make this determination. 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”); Kimbrough v. State, 700 So. 2d 634, 637 (Fla. 1997); Correll v. State, 523 So. 2d 562, 567 (Fla. 1988); Robinson v. State, 610 So. 2d 1288, 1291 (Fla. 1992); Archer v. State, 673 So. 2d 17, 21 (Fla. 1996) (finding defendant’s failure to object to a claimed error at trial provided no ruling by the trial judge upon which to base a claim of error on appeal).

Respondent adds that this Court on Washington’s direct appeal cited the Robinson and Correll precedents:

In admitting the results of scientific tests and experiments, the reliability of the testing methods is at issue, and the proper predicate to establish that reliability must be laid. If the reliability of a test's results is recognized and accepted among scientists, admitting those results is within a trial court's discretion. When such reliable evidence is offered, "any inquiry into its reliability for purposes of admissibility is only necessary when the opposing party makes a timely request for such an inquiry supported by authorities indicating that there may not be general scientific acceptance of the technique employed."

Robinson v. State, 610 So.2d 1288, 1291 (Fla.1992) (quoting *Correll v. State*, 523 So.2d 562, 567 (Fla.1988)), *cert. denied*, --- U.S. ----, 114 S.Ct. 1205, 127 L.Ed.2d 553 (1994) (citations omitted). The DNA test

results were presented through the testimony of FBI Special Agent Dwight Adams, Baumstark's supervisor. Adams testified as to the scientific reliability of the tests, interpreted the DNA test results, worked as a team with Baumstark, and supervised her as she conducted the actual test. Adams' familiarity with the test, his supervision over Baumstark's work, and Baumstark's affidavit laid a proper predicate for admission of the DNA test results.

(653 So. 2d at 365)

Since petitioner did not request a Frye hearing but rather only complained for relief that it should be required that technician Baumstark be compelled to appear and testify, appellate counsel cannot be deemed deficient for presenting only that issue preserved for appellate review in the lower court. Rutherford, supra; Hall, supra; Happ, supra.

Appellate counsel did not render deficient performance and Washington has failed to satisfy the second or prejudice prong of Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674 (1984). Appellate counsel was not deficient because the appellate record to which he was confined made no mention of it and unpreserved claims cannot support a claim of appellate counsel's alleged ineffectiveness.

Washington recognizes the unpreserved nature of this point at page 29 of his petition (“Although undersigned counsel concedes that he could find nowhere within the record where trial counsel specifically used the word “Frye” hearing,...”) which is further underscored by the fact that in his concurrent pleading, the brief appealing the

denial of the 3.850 motion, he argues that trial counsel was ineffective at the guilt phase for failing to request a Frye hearing (“Trial counsel failed to request a Frye hearing in either his motions or in his argument on the motions” - Appellant’s Brief, Point II at p. 54). Petitioner nevertheless maintains that the issue should be deemed preserved for appellate review because trial counsel at the February 25, 1992 hearing informed Judge Downey that he intended to file a motion to suppress (D.A. R2766). This hearing pertained to Washington’s initial Motion to Compel on February 12, 1992 (D.A. R827-29) which was granted in part on February 28, 1992 as well as granting a motion to continue the trial (D.A. R863-64). The trial court at that time rescheduled the trial from March 3 to April 28, 1992 (D.A. R863). Obviously appellate counsel reviewing the entirety of the record - including the subsequently filed 2nd Motion to Compel DNA Records on March 17 and order thereon by Judge Downey on April 2 (D.A. R949-51, 1016), the subsequently filed Motion to Compel Baumstark deposition in May of 1992 and order thereon (D.A. R1183-86, 1190) and the June 1992 Motion to Compel Deposition of technician Baumstark and order thereon by Judge Downey (D.A. R1193-2000, 1279) as well as trial counsel’s admission at trial to Judge Schaeffer that he was merely disagreeing with Judge Downey’s earlier ruling (D.A. R2496) and representation to Judge Schaeffer during voir dire selection that he had met with the assistant consultant on the DNA issue “but we do not intend to call him”

(D.A. R2176) - could competently decide that he should not pursue an unpreserved argument and instead present the more compelling contention that it was error not to allow Baumstark to be deposed, which is what he did.

Additionally, appellate counsel is not rendered ineffective by virtue of the fact that his brief filed in October 1993 antedated later state appellate decisions as counsel is not required to accurately predict future decisions. Darden, supra; Nelms, supra; Stevens, supra; Lambrix, supra.

The contention that the issuance of subsequent appellate decisions pertaining to Frye challenges on DNA admissibility demonstrates appellate counsel ineffectiveness is meritless if not indeed frivolous. Petitioner chastises appellate counsel (at Petition, p. 33) for this not being the first case for this Court to address DNA test results. The Constitution does not command counsel be the first to litigate especially an unpreserved claim. Appellate counsel would not have been aided by Hayes v. State, 660 So. 2d 257 (Fla.1995) since footnote 1 of the opinion notes that the admissibility of evidence concerning the statistical likelihood that someone other than defendant has a DNA pattern that matches DNA taken from the crime scene was not at issue. Hayes unlike the instant case relied on a technique deemed inconclusive by the National Research Council. Id. at 264. And Hayes recognized the validity of the theory underlying RFLP analysis (the method used here). Id. at 263.

Petitioner cites Vargas v. State, 640 So. 2d 1139 (Fla. 1st DCA 1994) quashed on other grounds, 667 So. 2d 175 (Fla. 1995) which held that the method by which FDLE arrived at population frequencies of one in thirty million and one in sixty million is not generally accepted in the relevant scientific community and those population frequencies are not admissible. But the Vargas Court added that it is possible to calculate more conservatively the population frequencies. 640 So. 2d at 1150-51. In the instant case Special Agent Adams testified that the likelihood of finding another unrelated individual chosen at random would be approximately 1 in 195,000 individuals (D.A. R2509), that the conservative nature of their approach would offset any sub-population difficulties that might arise (D.A. R2520). He added that using the current black population data the likelihood now of selecting a black individual at random having a DNA profile like that of Washington would be approximately 1 in 400,000 (D.A. R2522).

Even if the deficiency prong could be satisfied, the prejudice prong is not. In his prejudice argument, Washington asserts three points: (1) that DNA carries a large impact upon a jury and he cites Thorp v. State, 777 So. 2d 385 (Fla. 2001); (2) that the sufficiency of the evidence argument was diminished and (3) the issue relating to technician Baumstark was diminished by this Court's finding that Adams' testimony was sufficient.

As to the first contention, Thorp is of no utility. There, the Court found prejudicial error in failing to exclude his blood samples and resulting DNA evidence obtained from those samples because of several critical and substantial misstatements set out in the affidavit, the falsity of which were known to the police officer affiant. With the misstated facts redacted, the remaining factual allegations did not establish probable cause to believe Thorp committed the murder and it was an abuse of discretion by the trial court in denying the motion to suppress. One of the state experts related that the statistical probability of finding a male unrelated to Thorp who matched both RFLP and PCR DNA test results would be about one in 3.6 billion. This Court concluded the suppression issue error was not harmless error because of the “conclusive nature of the DNA evidence” and it was “the only physical evidence placing Thorp at the scene of the crime” Id. at 394. In the instant case, not only was DNA used - with a more conservative statistical probability - but also hair evidence, appellant’s proximity to the scene and his possession of the victim’s watch the next day, all converge to prove Washington’s guilt.

As to the second contention, it is frivolous to contend the evidence was insufficient “because this Court listed the DNA evidence first” (Petition, p. 39). Moreover, the DNA evidence would not have been inadmissible. At most, petitioner might only receive a different statistical probability which would not yield a different

result at trial.

As to the third contention, there is no reason to believe that the Court would alter its prior opinion regarding Adams' supervision of technician Baumstark and that the testimony laid a proper predicate for the admission of DNA test results.

In summary, appellate counsel did not render deficient performance since the error urged here - his failure to argue that the trial court erred in not holding a Frye hearing on the statistical prong of DNA - had not been preserved for appellate review and to make that contention ab initio on appeal would have been unsuccessful. Furthermore, appellate counsel ably did argue issues that had been preserved in the trial court and his failure to achieve a desired result does not render his performance insufficient under Strickland as the Constitution does not compel that counsel assert every conceivable issue. Finally, even assuming arguendo that appellate counsel could be deemed deficient in failing to assert unpreserved error on appeal, Washington may not obtain relief because of the failure to demonstrate prejudice, i.e. that his deficiency compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. Rutherford, supra. The expert witness at trial gave very conservative figures in his opinion, the DNA evidence would not have been inadmissible and other evidence remains to support the conclusion of his guilt

(proximity to scene, similar hairs found at the scene of the crime and Washington's possession and sale of the murder victim's watch the next day).

The petition for writ of habeas corpus relief on this point must be denied.

ISSUE II

WHETHER THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS DEFENDANT MAY BE INCOMPETENT AT THE TIME OF EXECUTION

Petitioner recognizes that this issue is not ripe. This Court has recently disposed of the identical claim in Hall v. Moore, ___ So. 2d ___, 26 Fla. L. Weekly S316 (Fla. 2001). This Court concluded:

Hall next argues that it would violate the Eighth Amendment's prohibition against cruel and unusual punishment to execute Hall, who may be incompetent at the time of execution. Hall concedes that this issue is premature and that he cannot legally raise the issue of his competency to be executed until after a death warrant is issued. We agree and find this claim to be without merit.

(Id. at 317)

Hall is controlling. Petitioner is not entitled to relief.

WHEREFORE, Respondent respectfully requests that this Honorable Court
DENY the Petition for Writ of Habeas Corpus filed in this case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. LANDRY
Assistant Attorney General
Florida Bar No. 0134101
2002 North Lois Avenue, Suite 700
Westwood Center
Tampa, Florida 33607
Phone:(813) 801-0600
Fax: (813) 356-1292

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Ruck Paul DeMinico, Assistant CCRC, Office of the Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136, this _____ day of July, 2001.

COUNSEL FOR RESPONDENT

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

COUNSEL FOR RESPONDENT