No. 17-7853
IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2017

CHADWICK WILLACY,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE ELEVENTH CIRCUIT COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTION PRESENTED

As re-stated by Respondent:

Should certiorari review be denied because the petition does not present a reviewable claim, does not conflict with the decision of any state or federal court, and merely asks this court to second-guess the considered decision of the Eleventh Circuit regarding whether: (1) Willacy failed to present the issue about a juror's actual bias to the state court, leaving the issue unexhausted; (2) the Eleventh Circuit conducted a threshold inquiry into the underlying merits of the two claims which were denied COA; and the Eleventh Circuit and the Florida Supreme Court correctly applied the AEDPA and Strickland standards in determining if Willacy had met the demands of Strickland?

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The decision which Petitioner seeks discretionary review of is Willacy v. Secretary for Dept. of Corrections, 703 Fed.Appx. 744 (11th Cir.2017) on July 12, 2017.

JURISDICTION

Petitioner, Chadwick Willacy, is seeking jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE AND FACTS

The Florida Supreme Court reviewed Willacy's case three times on appeal. See Willacy v. State, 640 So.2d 1079 (Fla. 1994)(hereinafter Willacy I), Willacy v. State, 696 So. 2d 693 (Fla. 1997) (hereinafter Willacy II), and Willacy v. State, 967 So. 2d 131, (Fla. 2007) (hereinafter Willacy III). The Florida Supreme Court summarized the factual and procedural history below in Willacy III as follows:

> On September 5, 1990, Marlys Sather returned home unexpectedly to find Willacy, her next-door neighbor, burglarizing her house. Willacy bludgeoned Sather and bound her ankles with wire and duct tape. He choked and strangled her with a cord with a force so intense that a portion of her skull was dislodged. Willacy then obtained Sather's ATM pin number, her ATM card, and the keys to her car; drove to her bank; and withdrew money out of her account. Willacy hid Sather's car around the block while he made trips to and from the house. He placed stolen items on Sather's porch for later retrieval, took a significant amount of property from Sather's house to his house, and then drove the car to

Lynbrook Plaza where he left it and jogged back to Sather's home. Upon his return, Willacy disabled the smoke detectors, doused Sather with gasoline he had taken from the garage, placed a fan from the guest room at her feet to provide more oxygen for the fire, and struck several matches as he set her on fire.

When Sather failed to return to work after lunch, her employer notified the Sather family of her absence. Sather's son-in-law went to her home and found shotgun and several electronic items lying on the back porch. Inside the home, he found Sather's body. Medical testimony established that her death was caused by inhalation of smoke from her burning body.

Law enforcement officers conducted an investigation into Sather's murder, uncovering a large amount of evidence linking Willacy to the murder. Willacy's fingerprints were found on the fan at Sather's feet, the gas can, and a tape rewinder at Sather's house. Witnesses reported seeing a man matching Willacy's description near Sather's house and driving Sather's car on the day of the murder. Further, Willacy's girlfriend, Marisa Walcott, telephoned law enforcement officers after discovering a woman's check register in Willacy's wastebasket. Law enforcement officers recognized the check register as belonging to Sather and subsequently arrested Willacy. While executing a search warrant on Willacy's home, law enforcement agents uncovered some of Sather's property, as well as several articles of clothing containing blood consistent with Sather's blood type.

Willacy was charged by indictment with first-degree premeditated murder, burglary, robbery, and arson. Judge Theron Yawn presided over the trial. On October 17, 1991, the jury convicted Willacy on all four counts. Following the penalty phase, the jury recommended death by a vote of nine to three, and Judge Yawn sentenced Willacy to death.FN2

> FN2. Judge Yawn found four aggravating factors: the murder was committed (1) while engaged in the commission of arson; (2) for pecuniary gain; (3) in an especially heinous, atrocious, or cruel manner; and (4) to avoid arrest. The sole statutory mitigating

> factor was Willacy's lack of prior criminal activity, and the two nonstatutory mitigating factors were Willacy's history of nonviolence and his attempts at self-improvement while in jail.

Willacy appealed to this Court but subsequently moved for temporary relinquishment of jurisdiction in order for the trial court to hold an evidentiary hearing on his motion for a new trial. In his motion for a new trial, Willacy claimed that juror Clark, the foreman of Willacy's trial in 1991, was under prosecution for grand theft. Jurisdiction was relinquished and on October 12, 1992, Judge Yawn conducted a hearing on Willacy's motion. Among the witnesses at the hearing, the court heard testimony from Willacy's trial counsel, the prosecutors in his case, and juror Clark. The prosecutors testified that they became aware of Clark's status during Willacy's trial and immediately informed Willacy's trial counsel. Willacy's trial counsel denied receiving this information during trial. Following the hearing, Judge Yawn issued an order denying Willacy's motion for a new trial, finding that the State informed Willacy's trial counsel of Clark's status during trial.

During oral argument on direct appeal, the parties thoroughly debated the issue of juror Clark's eligibility.FN3 Willacy's counsel asserted that Clark was under prosecution and, therefore, statutorily ineligible to serve as a juror until he entered into a pretrial intervention (PTI) agreement. According to Willacy's counsel, because Clark did not sign a PTI contract until after Willacy's trial, Clark was disqualified. The State countered that Clark was eligible to serve because he was approved for PTI prior to Willacy's trial. Alternatively, the State argued that because Willacy's trial counsel failed to object to Clark during trial, the matter was waived. This Court affirmed the convictions but vacated the death sentence and remanded the case for a new penalty phase based on Willacy's claim that the trial court did not give defense counsel an opportunity to rehabilitate a juror who said she was opposed to the death penalty. Willacy I, 640 So. 2d at 1082. As to the controversy regarding juror Clark, this Court held:

FN3. The eight issues raised on direct appeal were: (1) the court committed reversible error when it refused the defense an opportunity to rehabilitate a prospective juror; (2) a prospective juror was improperly challenged based on his race; (3) the jury foreman was ineligible to serve; (4) the court improperly found that Willacy's statements were voluntarily made; (5) the killing was not committed to avoid arrest; (6) the killing was not heinous, atrocious, or cruel; (7) the court improperly weighed the mitigating and aggravating factors; and (8) death is an inappropriate penalty. Willacy I, 640 So. 2d at 1081 n. 2.

Since Clark was not under prosecution, Willacy's motion for a new trial was properly denied. Moreover, during the trial the State informed Willacy's counsel of Clark's status and his counsel voiced no objection. By failing to make a timely objection, Willacy waived the claim he now seeks to assert. We affirm the trial court's decision. *Willacy I*, 640 So. 2d at 1083.

At resentencing, Willacy was represented by new counsel and Judge Yawn again presided. The Statepresented evidence of the crime and testimony of Sather's son and two daughters. Willacy presented the testimony of relatives and friends. The court followed the jury's eleven-to-one recommendation and sentenced Willacy to death, finding five aggravating factors,FN4 no statutory mitigating factors, and thirty-one nonstatutory mitigating factors of little weight.FN5 On direct appeal after resentencing, Willacy raised eleven issues.FN6 This Court denied each of those claims and affirmed Willacy's death sentence. *Willacy II*, 696 So. 2d at 694.

FN4. The five aggravating factors were: (1) the murder was committed in the course of a felony; (2) the murder was committed to avoid lawful arrest; (3) the murder was committed for pecuniary gain; (4) the murder was especially heinous, atrocious, or cruel (HAC); and (5) the murder was committed in a cold, calculated, and premeditated manner (CCP).

FN5. The nonstatutory mitigating factors were that Willacy (1)-(3) exhibited kindness, compassion, and concern for others; (4) enjoyed the love and affection of his family; (5)-(6) enjoyed the respect and admiration of his peers and his family; (7) demonstrated a desire and a willingness to help others; (8)-(9) was a leader and a role model to his peers; (10) maintained strong ties to his family; (11) exhibited appropriate demeanor and behavior during the resentencing hearing; (12) exhibited love for his family; (13)-(14) was a good and loyal friend and a good and obedient son; (15) was unselfish; (16) contributed to the lives of others; (17) showed the proper respect for his elders; (18)-(19)
demonstrated honesty and responsibility; (20)was a hard worker; and (21) voluntarily sought help for his drug problem. While in school, Willacy (22) enjoyed the respect and confidence of his teachers and coaches; (23) did not experience any academic or disciplinary problems; (24) was a disciplined and dedicated member of his high school track team; (25) demonstrated a willingness to help his teammates and otherwise be a team player; (26) was the captain of his high school track team and enjoyed numerous honors in connection with his talents as a runner; (27) had no history of previous violent conduct; and (28) had a good upbringing without serious disciplinary problems. Judge Yawn also considered (29)-(30) any other aspect of Willacy's character or background; and (31) any other factor deemed appropriate.

FN6. The eleven issues Willacy raised on direct appeal after resentencing were: (1) the denial of Willacy's motion for recusal of the judge; (2) the admission of inflammatory evidence; (3) the finding that the murder was heinous, atrocious, or cruel (HAC); (4) the finding that the murder was committed to evade arrest; (5) the finding that the murder was committed for pecuniary gain; (6) the finding that the

> murder was committed in a cold, calculated, and premeditated manner (CCP); (7) the proportionality of the death sentence; (8) the admission of victim impact evidence; (9) the refusal to strike jurors for cause; (10) cumulative error; and (11) the constitutionality of the death penalty statute.

On May 11, 1998, Willacy filed a motion to vacate judgment of conviction and sentence pursuant to Florida Rule of Criminal Procedure 3.850 with special request for leave to amend. On March 18, 2002, Willacy filed an amended motion for postconviction relief in which he raised thirty-one issues. Seventeen of Willacy's claims were summarily denied by order on September 24, 2003.FN7 An evidentiary hearing was granted on Willacy's remaining fourteen claims.FN8 The evidentiary hearing was held on December 3 through 5 and 19, 2003, and February 16, 2004. On November 23, 2004, the trial court issued an order denying the remaining fourteen claims. Willacy timely filed this appeal.

> FN7. Willacy's claims that were summarily denied included: (3) Willacy was denied a fair trial due to the State's failure to inform the court of juror Clark's statutory ineligibility; (4) counsel was ineffective for waiving the appointment of independent counsel to litigate the facts and circumstances regarding juror Clark's pending felony charges; (5) counsel was ineffective for failing to fully present to the trial court during the hearing on October 12, 1992, all aspects of the pretrial intervention program and juror Clark's status as pending prosecution at the time of his jury service; (6) counsel was ineffective for failing to object to juror Clark's ineligibility to serve as a juror; (8) the trial court applied an incorrect standard of review or law in denying Willacy's motion for a new trial; (9) Willacy was denied a fair trial due to juror misconduct; (11) counsel was ineffective for failing to timely move to disqualify Judge Yawn from presiding over the second penalty phase proceeding; (12) the trial court erred by failing to follow the procedure outlined in *Spencer v. State*, 615 So. 2d

688 (Fla. 1993), in resentencing Willacy in 1995; (14) jurors were not sworn prior to voir dire in the original trial as required by Florida Rule of Criminal Procedure 3.300(a); (15) counsel was ineffective for failure to object to the trial court's failure to swear the jury prior to voir dire in the original trial; (16) the trial court erred in concluding that there was probable cause for Willacy's arrest and search of his home; (20) the trial court erred in failing to properly instruct the jury during the 1995 penalty phase proceeding on the distinction between regular premeditation and the higher standard of cold, calculated, and premeditated murder; (26) the indictment violated the Sixth Amendment and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), because it failed to include aggravating circumstances; (27) Florida's death penalty statute is unconstitutional under the Sixth Amendment and *Apprendi* because the jury was not instructed that they must unanimously find beyond a reasonable doubt any aggravating circumstance; (28) the trial court's failure to instruct the jury that they must unanimously find that the aggravating circumstances outweigh the mitigating circumstances in order to recommend a death sentence violated the Sixth Amendment and *Apprendi*; (29) the trial court's failure to require a unanimous binding jury verdict as to the death penalty was unconstitutional under Apprendi; (30) lethal injection and Florida's procedures implementing lethal injection constitute cruel or unusual punishment in violation of the Eighth Amendment and article I, section 17 of the Florida Constitution.

FN8. These claims all pertained to the ineffectiveness of trial counsel: (1) failure to raise an independent act defense; (2) failure to investigate potentially exculpatory evidence; (7) failure to inquire of juror Clark during voir dire regarding his eligibility to serve; (10) failure to prepare fully and adequately for

> trial by retaining a fingerprint or crime scene expert; (13) failure to seek to disqualify the trial judge based on the trial court's use of a sentencing order which had been prepared prior to the Spencer hearing; (17) failure to object to evidence introduced at trial; (18) failure to request a jury instruction on felony murder and the law of principals; (19) failure to request an *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), jury instruction; (21) failure to present evidence of a statutory mitigating circumstance pursuant to section 921.141(6)(f), Florida Statutes (Supp.1990); (22) failure to present statutory mitigating circumstances pursuant to section 921.141(6)(b), Florida Statutes (Supp.1990); (23) failure to present statutory mitigating circumstances pursuant to section 921.141(6)(h), Florida Statutes (Supp.1990); (24) failure to present mental health testimony to rebut the State's claim that the murder was committed in a cold, calculated, and premeditated manner; (25) waiver of the presentencing investigation report; and (31) cumulative error.

II. 3.850 MOTION FOR POSTCONVICTION RELIEF

Willacy appeals the denial of his motion for postconviction relief, raising seven issues: (1) the trial court erred in denying an evidentiary hearing on claims 4, 6, and 15 of his motion for postconviction relief; (2) counsel was ineffective for failing to assert the independent act defense; (3) counsel was ineffective for failing to move to recuse the trial judge at the resentencing proceeding; (4) counsel was ineffective for failing to investigate and present evidence of statutory and nonstatutory mitigating factors; (5) counsel was ineffective for failing to inquire regarding juror Clark's status; (6) the trial court erred in failing to retroactively apply this Court's decision in *Lowrey v. State*, 705 So. 2d 1367 (Fla. 1998); and (7) the trial court erred in denying Willacy's motion for postconviction DNA testing.

. . . .

III. PETITION FOR WRIT OF HABEAS CORPUS

In his petition for writ of habeas corpus, Willacy raises seven issues: (1) appellate counsel was ineffective for failing to raise on direct appeal lack of probable cause to arrest Willacy or to search Willacy's residence; (2) Willacy was denied his constitutional right to a fair trial by having a juror who was pending prosecution serve as the foreman on his jury; (3) appellate counsel was ineffective for failing to raise on direct appeal the fundamental error resulting from the trial court's failure to swear prospective jurors; (4) appellate counsel was ineffective for failing to argue that the jury was improperly instructed as to the aggravating circumstance of cold, calculated, and premeditated (CCP); (5) Willacy was sentenced to death in violation of *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); (6) death by lethal injection violates article I, section 17 of the Florida Constitution and the Eighth Amendment of the United States Constitution; and (7) Willacy's Eighth Amendment right against cruel and unusual punishment may be violated as he may be incompetent at the time of execution. Issues (2), (5), (6), and (7) are either without merit or not yet ripe for review and need not be discussed in detail.FN14

> FN14. Because this Court determined on direct appeal that juror Clark was eligible to serve on Willacy's jury, issue (2) is without merit. Issue (3) is essentially the same as claim 15 of Willacy's motion for postconviction relief and was already disposed of above. Willacy's *Ring* claim fails because Ring does not apply retroactively. *See Schriro v. Summerlin*, 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004); *Johnson v. State*, 904 So.2d 400 (Fla. 2005). Also without merit is Willacy's claim challenging Florida's procedure of execution by lethal injection. *See Sims v. State*, 754 So. 2d 657, 668 (Fla. 2000). Finally, Willacy's claim that he may be incompetent at the time of execution is not yet ripe for review. *See Robinson v. State*, 913 So. 2d 514, 524 n. 9 (Fla. 2005).

Willacy III, 967 So. 2d 135-138, 145-146.

Willacy also filed a successive state habeas petition on September 29, 2009 which was denied by the Florida Supreme Court on March 19, 2010.

Prior to Willacy's September 29, 2009, successive state habeas petition, Willacy had filed a federal habeas petition in the United States District Court, Middle District of Florida on April 22, 2008. Willacy's federal habeas petition was held in abeyance while the district court allowed him to exhaust additional constitutional claims in state court. After the resolution of his successive state habeas petition, Willacy filed an amended federal habeas petition on June 16, 2013. On July 18, 2014, the district court issued an order denying the amended petition and declined to issue a certificate of appealability ("COA"). Willacy filed a motion to alter or amend judgement and/or for reconsideration of the denial of a COA on August 14, 2014. The district court denied Willacy's motion, but the Eleventh Circuit granted a COA as to three issues. That court later denied relief.

REASONS WHY THE WRIT SHOULD BE DENIED

I

CERTIORARI REVIEW SHOULD BE DENIED BECAUSE THE PETITION DOES NOT PRESENT A REVIEWABLE CLAIM, DOES NOT CONFLICT WITH THE DECISION OF ANY STATE OR FEDERAL COURT, AND MERELY ASKS THIS COURT TO SECOND-GUESS THE CONSIDERED DECISION OF THE ELEVENTH CIRCUIT REGARDING AN UNEXHAUSTED ISSUE OF JUROR BIAS.

In his first claim, Willacy asserts that he was denied his constitutional right to a fair and impartial jury because a juror, Edward Clark, failed to answer his jury eligibility questions accurately and "shared the same prosecutor" who tried Willacy's case. He also contends that his trial counsel was ineffective for failing to adequately inquire into Clark's background during voir dire. He argues that the Eleventh Circuit failed to consider that he had made a federal constitutional claim under this issue and, instead, had only considered the state statutory element of the issue. Cave asks this Court to conduct a new factual determination rather than giving the state court's factual determination the deference that is required under AEDPA. The issue of a constitutional violation based on actual juror bias is unexhausted and cannot provide an avenue for relief. Finally, Willacy cites no law or case which is in conflict with the decision of the Eleventh Circuit. Consequently, this petition should be denied.

Certiorari review is not a matter of right, but of judicial discretion. It is granted only for compelling reasons. Rule 10 of the Rules of the Supreme Court of the United States identifies the relevant considerations in determining the propriety of certiorari review:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Willacy does not cite any decision from any court of appeals on this issue and there is no conflict between the Eleventh Circuit's decision and that of any other circuit. He merely asserts that the circuit court erred in saying that the district court applied the proper standard under AEDPA, then proceeds to reargue his position in the underlying petition, and launches into the merits of the underlying issue. He makes

no attempt to explain how any potential error in the actual ruling below merits this Court's certiorari review.

On appeal from the district court's denial of habeas relief, the Eleventh Circuit fully reviewed the factual findings and legal rational made by the state court. That court stated:

> **B. Motion for New Trial**
>
> Following his conviction and first death sentence, Willacy moved for a new trial. As relevant to this appeal, Willacy asserted that he was denied a fair trial because the State failed to disclose that jury foreman Clark was at the time of the trial under prosecution. Testimony adduced at an evidentiary hearing showed that Clark had been arrested approximately eight months before trial and charged with grand theft. His case was submitted for a pretrial intervention program ("PTI") coordinated by Christopher White, the lead prosecutor on Willacy's case. Clark was accepted into PTI five days before jury selection began in Willacy's case but did not receive notice of his acceptance into PTI until after he was seated as a juror.[4] White had knowledge of Clark's participation in the program during Willacy's trial but failed to inform the trial judge.
>
> > 4 Clark signed an agreement to participate in the program in exchange for a term of probation after Willacy was convicted.
>
> Florida law at the time of Willacy's trial provided that "[n]o person who is under prosecution for any crime ... shall be qualified to serve as a juror." Fla. Stat. § 40.013(1) (1991). Willacy argued:
>
> > [T]he state had a legal obligation to inform the court as well as the defense upon learning this information. However, the state only made a half-hearted and ineffective effort to inform the defense, they failed to follow up on the information to confirm it, and they *totally failed to inform the court.* The result of these defaults was to deprive defendant of a lawfully constituted jury, requiring a new

trial.

Memorandum of Law in Support of Defendant's Motion for New Trial, R. 3656 (emphasis added). In support, Willacy cited several cases concerning a party's right to a fair trial, including three addressing a criminal defendant's Sixth Amendment fair trial right.[5] The trial court denied the motion for new trial.

> 5 We reject the State's contention and the district court's conclusion that Willacy's fair trial claim is procedurally barred from our review. The district court found that this claim was barred because "it was raised on direct appeal and decided adversely to Petitioner," and "[i]t does not appear that Petitioner raised this claim in his appeal of the denial of his motion for postconviction relief." Doc. 84 at 21. But the district court's own finding demonstrates why Willacy's claim is properly before this Court.
>
> A petitioner must give the state courts "one full opportunity to resolve [his claim] by invoking one complete round of the State's established appellate review process." *See O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999). In so doing, the petitioner must "fairly present" his claim to the state courts. *Mason v. Allen*, 605 F.3d 1114, 1119 (11th Cir. 2010). Willacy has done both.
>
> Willacy fairly presented his claim that the State violated his right to a fair trial by asserting in his motion for new trial and direct appeal to the Florida Supreme Court that the State's failure to inform the trial court of Clark's status was error and by citing and discussing Sixth Amendment fair trial case law. Although Willacy's arguments throughout this direct review process were less refined than they are now, we conclude that a "reasonable reader would understand the claim's particular legal basis and specific factual foundation" to be the same here as in the state courts. *Pope v. Sec'y, Dep't of Corr.*, 680 F.3d 1271, 1286 (11th Cir. 2012) (alterations and internal quotation marks omitted). Indeed, the state postconviction trial court understood the

claim Willacy asserted on direct review to be based on his "right to a fair trial," the same right he has asserted in federal court. Order Denying in Part Defendant's Amended Motion for Postconviction Relief at 3, 5.

Willacy thus gave the state courts "one full opportunity" to address and resolve his claim that his right to a fair trial was violated when the State failed to notify the trial court of Clark's status. *Boerckel*, 526 U.S. at 845, 119 S.Ct. 1728. Nothing more was required. *See id.* To exhaust a claim, a petitioner does not have "to ask the state for collateral relief, based on the same evidence and issues already decided by direct review." *Id.* at 844, 119 S.Ct. 1728. In any event, the State expressly waived any exhaustion defense in its pleadings to the district court. See Response to Amended Petition, Doc. 75 at 25 ("Petitioner has exhausted each of the 12 issues raised in the habeas petition. To the extent Petitioner may not have exhausted any part of a claim, Respondents waive exhaustion and note that any such claim would be procedurally defaulted."). A "state's explicit waiver of [the exhaustion] defense before the district court forecloses it being asserted here." *Dorsey v. Chapman*, 262 F.3d 1181, 1187 (11th Cir. 2001).

Willacy fairly presented his fair trial claim to the state courts throughout one full round of state appellate review. Thus, his claim is not subject to a procedural bar.

C. First Direct Appeal

The Florida Supreme Court affirmed the denial of Willacy's motion for new trial, concluding, as to juror Clark: "Willacy mistakenly equates Clark's placement in the Pretrial Intervention Program with prosecution. Pretrial intervention is merely an alternative to prosecution. Since Clark was not under prosecution, Willacy's motion for a new trial was properly denied." *Willacy I*, 640 So.2d at 1082–83 (citation and internal quotation marks omitted). Nevertheless, because the trial court erroneously denied the defense an opportunity to rehabilitate a prospective juror when the juror expressed concern about recommending the death penalty, the Florida Supreme Court vacated Willacy's death sentence and remanded for a new sentencing hearing. *Id.* at 1082.

....

A. Fair Trial and Guilt Phase Ineffective Assistance of Counsel Claims

[1]Two of the claims in Willacy's certificate of appealability—his fair trial claim and his guilt phase ineffective assistance of counsel claim—are founded on the same assertion: that jury foreman Clark was under prosecution during Willacy's trial and therefore was ineligible to serve as a juror under Florida law. See Fla. Stat. § 40.013(1) (1991). Based on this assertion, Willacy contends that the State's failure to bring the fact of Clark's prosecution to the attention of the trial court resulted in the deprivation of his right to a fair trial. And, Willacy argues, in failing to question Clark effectively during voir dire to reveal this pending prosecution, trial counsel rendered ineffective assistance in violation of Willacy's right to counsel. Both of these claims must fail: the Florida Supreme Court determined that Clark was not under prosecution within the meaning of Florida law, and "[w]e are not at liberty to challenge" that conclusion. *Cargill v. Turpin*, 120 F.3d 1366, 1381 (11th Cir. 1997).

The Supreme Court has warned that "it is not the province of a federal habeas court to reexamine state court determinations on state law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 67–70, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) (concluding that a federal due process claim based on the alleged improper admission of evidence must fail when that evidence was in fact properly admitted under state law). Here, the Florida Supreme Court dismissed Willacy's argument that Clark's placement in PTI was equivalent to prosecution under Florida law, holding that "[p]retrial intervention is merely an alternative to prosecution," and "Clark was not under prosecution." *Willacy I*, 640 So.2d at 1082–83 (internal quotation marks omitted). Under *Estelle*, we cannot disturb the Florida Supreme Court's determination.

The Florida Supreme Court's conclusion that Clark was not under prosecution precludes relief on Willacy's fair trial and guilt phase ineffective assistance of counsel claims. Willacy's fair trial claim based on Clark's status is foreclosed because under Florida law Clark was eligible to serve on the jury (and not considered to harbor a

potential for bias).7 Willacy's ineffective assistance of counsel claim based on Clark's status also fails because more effective voir dire would not have revealed Clark's ineligibility to serve as a juror. *See Bolender*, 16 F.3d at 1573 ("[T]he failure to raise nonmeritorious issues does not constitute ineffective assistance.").

> 7 Although the Florida Supreme Court's determination that Clark was not under prosecution does not necessarily foreclose any argument that Clark was biased, *see Estelle*, 502 U.S. at 68, 112 S.Ct. 475, it forecloses Willacy's claim for relief. This is because Willacy did not meaningfully argue in state or federal district court that Clark was unconstitutionally biased notwithstanding his eligibility to serve. As our precedent makes clear, juror eligibility does not necessarily end the bias inquiry. See *Rogers v. McMullen*, 673 F.2d 1185, 1188 (11th Cir. 1982). An eligible juror may still have "actual or implied" bias such that his empanelment would result in an unconstitutional conviction. *See United States v. Wood*, 299 U.S. 123, 133, 57 S.Ct. 177, 81 L.Ed. 78 (1936) ("The bias of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as [a] matter of law."). But Clark's eligibility ends the inquiry in this case. At best, Willacy made passing references to the notion of actual or implied bias, but even those references were tethered to Clark's alleged ineligibility to serve as a juror as a matter of state law. This was insufficient to put the state courts and the district court on notice of any argument that Clark, despite being eligible, was a biased juror. *See Butts v. GDCP Warden*, 850 F.3d 1201, 1208 (11th Cir. 2017) ("Passing references are not enough to present and preserve an issue."). Indeed, for this reason, Willacy lacks a certificate of appealability on any claim that Clark was biased notwithstanding his eligibility to serve.

Accordingly, we affirm the denial of relief on both of these claims.

Willacy v. Secretary, Florida Department of Corrections, 703 Fed.Appx. 746-747, 751-52 (11th Cir. 2017). That court correctly cited and applied this Court's precedence and interpretation of AEDPA. Willacy cites to no state or federal case that conflicts with the decision of the Circuit Court -- this claim is insufficient, on its face, to justify the exercise of this Court's certiorari jurisdiction. See, Rule 10, Rules of the Supreme Court of the United States.

Furthermore, this Court should decline to exercise its certiorari jurisdiction because, in order to examine the specific issue in this case, it would be necessary for this Court to engage in a fact-intensive review. That is inappropriate for certiorari review. The law is well-settled that this Court does not grant a certiorari "to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925); Texas v. Mead, 465 U.S. 1041 (1984). This Court is "consistent in not granting the certiorari except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties." Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955). See also Bartlett v. Stephenson, 535 U.S. 1301, 1304 (2002) (issues with few, if any, ramifications beyond the presenting case do not satisfy any of the criteria for exercise of certiorari jurisdiction).

In this petition, Willacy is arguing that Clark was biased, not the claim he presented to the Florida courts. The Eleventh Circuit properly found that Willacy

could not argue this in his federal habeas petition that his federal constitutional right to an unbiased juror was violated where he failed to fully present that argument to the state court. Citing federal cases in a brief does not mean that he presented the argument that Clark was actually biased to the Florida Supreme Court. Doorbal v. State, 983 So.2d 464, 482 (Fla. 2008); Bryant v. State, 901 So.2d 810, 827-28 (Fla. 2005); Duest v. State, 555 So.2d 849, 852 (Fla. 1990). When he appealed the denial of a new trial to the Florida Supreme Court he did so on the basis that Clark was ineligible under state law to serve as a juror, which was the basis for the motion in the first place. The Florida Supreme Court found:

> In his final voir dire challenge, Willacy claims that Clark was under prosecution when selected as a juror and seating him violated section 40.013(1), Florida Statutes (1991).7 We disagree. Willacy mistakenly equates Clark's placement in the Pretrial Intervention Program with prosecution. Pretrial intervention is "merely an alternative to prosecution." *Cleveland v. State*, 417 So.2d 653, 654 (Fla.1982). Since Clark was not under prosecution, Willacy's motion for a new trial was properly denied. Moreover, during the trial the State informed Willacy's counsel of Clark's status and his counsel voiced no objection. By failing to make a timely objection, Willacy waived the claim he now seeks to assert. We affirm the trial court's decision.

Willacy I, 640 So. 2d at 1082–83 (footnote omitted). The issue in state court was clearly restricted to the interpretation of a state statute and the Eleventh Circuit's denial of relief was proper under AEDPA. Certiorari should be denied.

II

THERE IS NO BASIS FOR CERTIORARI REVIEW OF THE ELEVENTH CIRCUIT COURT OF APPEAL'S DECISION DENYING A CERTIFICATE OF APPEALABILITY.

In the next claim, Willacy maintains that the Eleventh Circuit failed to conduct a threshold inquiry into the underlying merits of two of his claims for which the court denied a certificate of appealability ("COA"). The two claims were that the state court failed to grant a new trial on the basis of juror Clark's arrest, discussed above, and that his trial counsel was ineffective for failing to object to the seating of Clark on the jury. He argues that since the Eleventh Circuit simply denied the request for a COA without discussion, that it failed to consider the underlying merits of the two claims. Willacy is incorrect and the petition should be denied.

This Court has held that jurisdiction exists to entertain certiorari petitions challenging the denial of a COA by the circuit courts. Hohn v. United States, 524 U.S. 236, 253 (1998) (holding Supreme Court "has jurisdiction under § 1254(1) to review denials of applications for certificates of appealability by a circuit judge or a panel of a court of appeals."). Although the failure to meet the considerations in Rule 10 is not controlling, this Court has noted that cases which have not divided the federal or state courts or presented important, unsettled questions of federal law do not usually merit certiorari review. Rockford Life Insurance Co. v. Illinois

Department of Revenue, 482 U.S. 182, 184, n. 3 (1987). As no compelling reason for review has been offered under Rule 10, certiorari should be denied.

Congress mandates that a prisoner seeking collateral relief under 28 U.S.C. §2254 does not have an automatic right to appeal a district court's denial or dismissal of his federal petition. Instead, the petitioner must first seek and obtain a COA. Miller-El v. Cockrell, 537 U.S. 322, 327 (2003). A COA may be granted only where there is "a substantial showing of the denial of a constitutional right," 28 U.S.C. §2253(c)(2), which this Court has interpreted to require that the "petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000); *see also Miller-El v. Cockrell*, 537 U.S. 322, 326 (2003) (observing that to be entitled to a COA a petitioner must show that "jurists of reason could disagree with the district court's resolution of his constitutional claim or that jurists could conclude that issues presented are adequate to deserve encouragement to proceed further."). The decision to grant a COA requires a threshold inquiry into the underlying merit of the claims. Miller-El, 537 U.S. at 327 (citing Slack, 529 U.S. at 481). This Court has maintained that issuance of "a COA must not be *pro forma* or a matter of course." Miller-El, 537 U.S. at 337. The petitioner must actually prove that he meets the above standard before a COA can issue. Id. at 337-38. The Eleventh Circuit's denial of the certificate on Willacy's

two claims was proper. Reasonable jurists would not disagree, thus, Willacy deserves no encouragement to pursue the matter further.

As discussed in the first claim, the Florida Supreme Court held that Clark was not ineligible to sit as a juror under Florida law. The trial court had denied the motion for a new trial properly under the relevant statute and the Florida Supreme Court affirmed that denial. Willacy's assertions that Clark was indeed ineligible are wrong. Since Clark was eligible to serve, the denial of the motion for a new trial was appropriate. Willacy I, 640 So.2d at 1083. As noted by the Eleventh Circuit, federal courts cannot interfere with a state court's interpretation of state law. Estelle v. McGuire, 502 U.S. 62, 67-70, 112 S.Ct. 475 (1991). It was clear on the record and in the district court's order denying relief that Willacy could never prevail on this particular claim and the denial of the COA was correct.

The same is also true for the second claim involving the ineffective assistance of counsel claim regarding juror Clark. If there was no basis to object to Clark serving, then counsel could not be ineffective for not objecting to him based on being ineligible. Bolender v. Singletary, 16 F.3d 1547, 1573 (11th Cir. 1994). The record establishes that the district court addressed each of Willacy's claims raised in his federal habeas petition. Willacy challenges the resolution reached by the state and federal courts in rejecting his Strickland claim. Mere disagreement is not a basis for the exercise of this Court's certiorari jurisdiction.

III

THE ELEVENTH CIRCUIT PROPERLY ANALYZED THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM UNDER THIS COURT'S PRECEDENT.

In his final claim, Willacy argues that both the Eleventh Circuit and the Florida Supreme Court unreasonably applied the Strickland standards in analyzing his penalty phase ineffective assistance of counsel claims. He says that both courts committed the type of error addressed in Porter v. McCollum, 130 S.Ct. 447, 454 (2009) by unreasonably discounting the mitigation evidence presented in the evidentiary hearing in the post-conviction litigation.

The Eleventh Circuit recounted the record and analyzed the issue as follows:

> **D. Resentencing Proceedings**
>
> At the sentencing phase at issue here, the State called a number of witnesses to testify to explain to the new jury the crime and the evidence linking Willacy to it. *See Willacy II*, 696 So.2d at 694. The State also presented the testimony of Sather's son and two daughters to illustrate for the jury the impact of her death. Each of Sather's adult children testified to the close relationship Sather shared with her children and grandchildren and to the grief and loss they had experienced as a result of the murder.
>
> Defense counsel presented nine witnesses in mitigation, all friends and family of Willacy's. The witnesses, who all knew Willacy as a child, testified to his positive traits—namely, that he was a considerate, respectful, thoughtful, and well-liked child and adolescent. Several of these witnesses also testified that Willacy had a drug problem: he became addicted to crack cocaine in high school and sought treatment, although he later relapsed. Willacy's younger sister Heather and two of his childhood friends testified that Willacy enjoyed a strong relationship with his family. But Willacy's mother

and father told the jury that his father, Colin Willacy, was "very hard" on his children. Ex. G–19 at 2826 (testimony of Audrey Willacy); *id.* at 2836 (testimony of Colin Willacy). Colin testified that he "inflicted corporal punishment if ... Chad were to do anything, and never once would Chad in any way respond ... in a violent way." *Id.* at 2837.

After hearing this testimony, the jury recommended a death sentence by a vote of 11 to 1. *Willacy III*, 967 So.2d at 136. The trial judge found five aggravating circumstances: the homicide was (1) committed in the course of a felony; (2) committed to avoid lawful arrest; (3) committed for pecuniary gain; (4) especially heinous, atrocious, or cruel ("HAC"); and (5) committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification ("CCP"). *See id.* at 136 n.4. The judge found no statutory mitigating factors and 31 nonstatutory mitigating factors, all of which it found carried little weight. *See id.* at 136 & n.5 (listing nonstatutory mitigating factors). After weighing these factors, the judge adopted the jury's recommendation and imposed a death sentence.

E. Second Direct Appeal and State Postconviction Proceedings

The Florida Supreme Court affirmed Willacy's death sentence on direct appeal. *Willacy II*, 696 So.2d 693 (Fla. 1997), *cert. denied*, 522 U.S. 970, 118 S.Ct. 419, 139 L.Ed.2d 321 (1997). Willacy then initiated state postconviction proceedings, in which, as relevant here, he asserted that counsel from the guilt phase of his trial, Kurt Erlenbach, rendered ineffective assistance in failing to conduct adequate voir dire of jury foreman Clark; and counsel from the guilt phase of his trial, James Kontos, rendered ineffective assistance in failing to investigate and present an adequate case in mitigation of the death penalty. The trial court conducted an evidentiary hearing on both of these claims.

...

B. Penalty Phase Ineffective Assistance of Counsel Claim

[2]Willacy asserts that his trial counsel was ineffective in failing to investigate and present evidence about his history of childhood physical abuse and mental health problems during the penalty phase and that there is a reasonable probability that, had the jury heard that evidence, it would have recommended a sentence other than death.

Under *Strickland*, a defendant has a Sixth Amendment right to effective assistance of trial counsel. 466 U.S. at 686, 104 S.Ct. 2052. Counsel renders ineffective assistance, warranting vacatur of a conviction or sentence, when his performance falls "below an objective standard of reasonableness," taking into account prevailing professional norms, and when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688, 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052.

We assume for present purposes that Willacy's trial counsel rendered deficient performance in failing to investigate and present a sufficient case in mitigation. *See Castillo v. Fla., Sec'y of DOC*, 722 F.3d 1281, 1283–84 (11th Cir. 2013) (making "simplifying assumptions in favor of the petitioner" to facilitate the Court's analysis, including assuming deficient performance and addressing *Strickland*'s prejudice prong only). Thus, we must decide whether counsel's deficient performance prejudiced Willacy in the penalty phase of his trial, considering in addition to the testimony counsel actually elicited at the penalty phase the childhood abuse and mental health evidence adduced at the postconviction evidentiary hearing.

Applying AEDPA's deferential standard of review, we conclude that the Florida Supreme Court reasonably determined that Willacy suffered no prejudice from his counsel's failure to present mitigation testimony regarding his history of physical abuse, substance abuse, and other mental health problems. The physical abuse Willacy witnessed and suffered indisputably is mitigating. *See Wiggins v. Smith*, 539 U.S. 510, 534–35, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (considering evidence of physical abuse petitioner suffered to be mitigating). But the mental health evidence adduced at Willacy's postconviction hearing presented a double-edged sword that could have harmed Willacy's case for a life sentence as much or more than it would have helped.

We have said—just as the Florida Supreme Court said in Willacy's case—that Antisocial Personality Disorder is "a trait most jurors tend to look disfavorably upon." *Suggs v. McNeil*, 609 F.3d 1218, 1231 (11th Cir. 2010) (internal quotation marks omitted); *see Willacy III*,

967 So.2d at 144. Indeed, we have elaborated that evidence of Antisocial Personality Disorder "is not mitigating but damaging." Suggs, 609 F.3d at 1231 (internal quotation marks omitted); *see Evans v. Sec'y, Dep't of Corr.*, 703 F.3d 1316, 1327 (11th Cir. 2013) (en banc) (characterizing evidence of antisocial tendencies as amongst "the strongest possible evidence in rebuttal" of mitigating mental health evidence). And "evidence of behavioral problems while attending school may be potentially damaging and unfavorable." *Evans*, 703 F.3d at 1329 (internal quotation marks omitted).

We also have observed that "evidence of a defendant's drug addiction ... is often a 'two-edged sword': while providing a mitigating factor, such details may alienate the jury and offer little reason to lessen the sentence." *Pace v. McNeil*, 556 F.3d 1211, 1224 (11th Cir. 2009) (holding that counsel's failure to introduce evidence of petitioner's crack addiction in the months leading up to the murder did not constitute ineffective assistance). Indeed, evidence of drug and alcohol abuse, "alone and in combination with the evidence that" a defendant was acutely intoxicated at the time of the murder "could [cause] some jurors to vote in favor of death" by supplying the jury "an independent basis for moral judgment." *Suggs*, 609 F.3d at 1231 (internal quotation marks omitted).

When we consider this new mitigating evidence (much of which could have been more harmful than helpful) together with the mitigation evidence presented at trial—that Willacy was considerate, respectful, thoughtful, and well-liked as a child and adolescent, had a close (if fraught) bond with his family, and sought treatment for his drug addiction—and weigh it against the evidence in aggravation, we conclude that the Florida Supreme Court's no-prejudice determination was based a reasonable application of *Strickland.*

Furthermore, "[t]his is not a case where the weight of the aggravating circumstances or the evidence supporting them was weak." *Sochor v. Sec'y, Dep't of Corr.*, 685 F.3d 1016, 1030 (11th Cir. 2012) (internal quotation marks omitted). After the jury recommended a death sentence, the trial judge found that the prosecution proved five aggravating circumstances, including CCP and HAC. The Florida courts consistently have recognized "that CCP and HAC are two of the weightiest aggravators in Florida's statutory sentencing scheme."

Brown v. State, 143 So.3d 392, 405 (Fla. 2014). The evidence adduced at Willacy's postconviction evidentiary hearing would not have reduced the impact of these powerful aggravators sufficiently to undermine our confidence in the outcome of his penalty phase proceedings.

Evidence elicited at the postconviction hearing would not have mitigated the strength of the HAC aggravator, which " 'pertains more to the nature of the killing and the surrounding circumstances' " than the petitioner's mental state. *Hardwick v. Sec'y, Fla. Dep't of Corr.*, 803 F.3d 541, 561 (11th Cir. 2015) (quoting *Stano v. State*, 460 So.2d 890, 893 (Fla. 1984)). And the weight of the HAC aggravator was extremely strong in this case. The State introduced evidence to the jury that Sather was bludgeoned, bound by the ankles with wire and duct tape, and choked and strangled with a cord with a force so intense that a small portion of her skull was dislodged. She was left in this condition—alive—for some time while Willacy plundered her home. Ultimately, Willacy burned Sather alive, and she died from smoke inhalation from her own burning body. The jury saw graphic photographs that demonstrated the extent of Sather's injuries as a result of Willacy's brutal attack.

The abuse Willacy witnessed and suffered8 might have shifted somewhat the balance between the remaining aggravators (including the strong CCP aggravator) and mitigating factors in this case. And if the jury had credited Dr. Riebsame's testimony, Willacy's extreme mental or emotional disturbance might have mitigated to some extent the strength of the CCP aggravator. Nevertheless, considering the "extremely aggravated" nature of the murder, we cannot say that any shift would have been so great as to permit us to set aside the Florida Supreme Court's conclusion that the new evidence was insufficient to give rise to a reasonable probability of a sentence other than death. *Crawford v. Head*, 311 F.3d 1288, 1320–22 (11th Cir. 2002) (concluding that "there was no reasonable probability that" evidence that a petitioner grew up with an alcoholic and abusive father, "while ... mitigating, ... would have convinced the jury to impose life rather than death in light of the extremely aggravated nature of the crime involved"). Thus, we conclude that the Florida Supreme Court's determination that Willacy cannot show prejudice withstands our

> deferential review under AEDPA, and we affirm the denial of relief on his penalty phase ineffective assistance of counsel claim.

Willacy v. Secretary, 703 Fed.Appx. at 748-49, 752-54 (Footnote omitted). . That court correctly cited and applied this Court's precedence and interpretation of AEDPA. Willacy simply disagrees with the court's conclusions and reargues the issue as he did below. Further, he cites to no state or federal case that conflicts with the decision of the Circuit Court -- this claim is insufficient, on its face, to justify the exercise of this Court's certiorari jurisdiction. See, Rule 10, Rules of the Supreme Court of the United States.

The law is well-settled that this Court does not grant a certiorari "to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925); Texas v. Mead, 465 U.S. 1041 (1984). This Court is "consistent in not granting the certiorari except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties." Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955).

The record fully supports the Florida Supreme Court factual determinations. That court found:

> **(3) Counsel's Failure to Investigate and Present Mitigating Evidence**
>
> Willacy next claims that trial counsel was ineffective for failing to investigate and present evidence of statutory and nonstatutory mitigating factors. In particular, Willacy claims that counsel failed to present evidence that (1) Willacy was suffering from Attention Deficit Hyperactivity Disorder (ADHD);12 (2) Willacy was under the

influence of extreme mental or emotional disturbance;13 (3) *143 Willacy was physically abused by his father during childhood and adolescence; and (4) Willacy was in a drug-induced psychosis at the time of the homicide. The postconviction trial court held (1) that Kontos was not ineffective in failing to present testimony of mental illness or ADHD; (2) that Kontos was not ineffective for failing to present evidence of physical abuse by Willacy's father; and (3) that Willacy presented no evidence that he was under the influence of cocaine at the time of the murder.

"Under *Strickland*, 'counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" *Marshall v. State*, 854 So.2d 1235, 1247 (Fla.2003) (quoting *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052); see also *Carroll v. State*, 815 So.2d 601, 614 -615 (Fla.2002) (same). This Court has stated:

> In evaluating claims that counsel was ineffective for failing to present mitigating evidence, ... [t]he principal concern ... is not whether a case was made for mitigation but whether the "investigation supporting counsel's decision not to introduce mitigating evidence ... was itself reasonable " from counsel's perspective at the time the decision was made.

Holland v. State, 916 So.2d 750, 757 (Fla.2005) (quoting *Wiggins v. Smith*, 539 U.S. 510, 523, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)), cert. denied, 547 U.S. 1078, 126 S.Ct. 1790, 164 L.Ed.2d 531 (2006). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Wiggins v. Smith,* 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (quoting *Strickland v. Washington*, 466 U.S. 668, 690-91, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* at 521-22, 123 S.Ct. 2527 (quoting *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052).

At resentencing, Willacy's counsel, James Kontos, sought to portray Willacy as a life worth saving and, therefore, avoided presenting evidence that Willacy was a sociopath. Kontos called a

number of witnesses who testified to Willacy's good deeds. The postconviction trial court found that this was sound strategy, noting that humanizing a defendant is an accepted strategy that falls within the broad range of reasonably competent performance under prevailing professional standards. See Haliburton v. Singletary, 691 So.2d 466, 471 (Fla.1997); Bryan v. Dugger, 641 So.2d 61, 64 (Fla.1994). The postconviction trial court also stated that any mental mitigation evidence would have opened the door to aggravating facts, such as testimony about Willacy's threat to kill a teacher, setting a school bulletin board on fire, setting squirrels on fire, and running squirrels over with a lawnmower, and descriptions by a school principal of Willacy as incorrigible and needing counseling. The court further stated that the facts of the case show a deliberate, methodical process, not the activities of someone under the influence of an extreme emotional disturbance or cocaine intoxication, who is unable to conform his conduct to the requirements of the law. Also, the court noted that there was overwhelming evidence of Willacy's guilt of first-degree premeditated murder, and there was substantial, compelling aggravation found by the jury and the trial court. In addition, the *144 postconviction trial court pointed out that, throughout the penalty phase in 1991 and the resentencing in 1995, Willacy and his family members, while under oath, repeatedly denied that Willacy was physical abused as a child.

The postconviction trial court's findings are supported by competent, substantial evidence. Kontos conducted a reasonable investigation into Willacy's mental condition and family history and made a reasonable strategic choice to forego presentation of negative mitigation evidence. First, Kontos consulted with psychologist Dr. William Riebsame prior to trial. Dr. Riebsame told Kontos that, based on preliminary testing, Willacy might be a sociopath or psychopath. As a result, Kontos decided not to employ Dr. Riebsame or allow him to proceed further to see if that diagnosis was accurate. Kontos believed that the jury would not be receptive to a depiction of Willacy as antisocial, sociopathic, or psychopathic. Dr. Riebsame testified at resentencing that Willacy met the diagnosis for ADHD, Antisocial Personality Disorder, and probably cocaine intoxication and cocaine withdrawal. However, Dr. Riebsame stated that Willacy's ability to appreciate the criminality of his conduct was not impaired, and that Willacy's ability to conform his conduct to the law was impaired but not substantially. Further, because Willacy and his family concealed

his childhood abuse, Kontos was unable to discover it. Thus, the postconviction trial court properly concluded that Kontos's performance was not deficient based on a failure to further investigate Willacy's family and mental health background.

Also, Willacy has not shown prejudice because presenting this mitigating evidence "would likely have been more harmful than helpful." *Evans v. State*, 946 So.2d 1, 13 (Fla.2006); *Burger v. Kemp*, 483 U.S. 776, 794, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987) (concluding counsel's limited investigation was reasonable because he interviewed all witnesses brought to his attention, discovering little that was helpful and much that was harmful); *Darden v. Wainwright*, 477 U.S. 168, 186, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (concluding that counsel engaged in extensive preparation and that the decision to present a mitigation case would have resulted in the jury hearing evidence that petitioner had been convicted of violent crimes and spent much of his life in jail); *see Griffin v. State*, 866 So.2d 1, 9 (Fla.2003) ("Trial counsel is not deficient where he makes a reasonable strategic decision to not present mental mitigation testimony during the penalty phase because it could open the door to other damaging testimony."). In *Reed v. State*, 875 So.2d 415 (Fla.2004), we stated:

> [E]ven if [defense] counsel had ... investigated further, the testimony that could have been presented was just as likely to have resulted in aggravation against rather than mitigation for [the defendant].
>
> An ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword.

Id. at 436-37. "Furthermore, this Court has acknowledged in the past that antisocial personality disorder is 'a trait most jurors tend to look disfavorably upon.'" *Id.* at 437 (quoting *Freeman v. State*, 852 So.2d 216, 224 (Fla.2003)). Thus, there is no reasonable probability that the outcome of the proceeding would have been different if Kontos had chosen to focus on Willacy's abuse and mental health issues rather than on the positive aspects of Willacy's life. Accordingly, counsel was not ineffective for failing to present this evidence.

Willacy III, 967 So. 2d at 142–44. The record clearly provides competent, substantial evidence supporting the state courts' denial of relief on this issue.

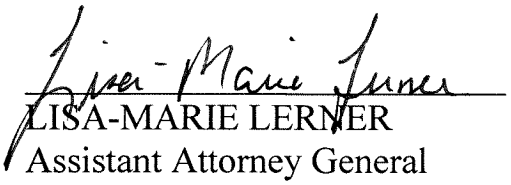
The state court's factual determination and decision were reasonable under either (d)(2) or (e)'s standards. The state court's decision rested upon its determination that Willacy failed to prove either prejudice or deficient performance in his presentation of mitigation. The state courts, district court, and the Eleventh Circuit recognized the controlling legal standards and correctly applied those standards to these specific facts, finding the claims to be without merit. Because the State courts, and the federal courts in turn, applied the proper controlling law, their decision was not contrary to, or an unreasonable application of, federal law. Consequently, and pursuant to the standards set forth in 28 U.S.C. §2254(d), Willacy is not entitled habeas relief. This petition should be denied.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent respectfully requests that this Honorable Court deny Petitioner's request for certiorari review.

Respectfully submitted,

PAMELA JO BONDI
Attorney General



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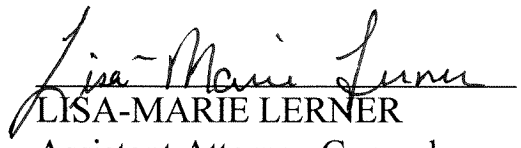
CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Linda McDermott, 20301 Grande Oak Blvd., Suite 116-61, Estero, FL 33928, this 28th day of March, 2018.



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