**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION**

**Case No. 11-60957-Civ-COOKE**

ROBERT RIMMER,

Petitioner,

vs.

MICHAEL D. CREWS,[1] Secretary,
Florida Department of Corrections,

Respondent.
_____/

**ORDER ON PETITION FOR WRIT OF HABEAS CORPUS**

In this habeas corpus proceeding, brought pursuant to 28 U.S.C. § 2254, Robert Rimmer seeks to overturn the death sentence imposed on him for his role in the 1998 murders of Bradley Krause and Aaron Knight. Mr. Rimmer contends that his Sixth, Eighth, and Fourteenth Amendment rights were violated because: (i) his counsel was ineffective at the guilt phase of his trial due to a failure to use available evidence, to investigate, to challenge the State's case, and to make proper objections and argument; (ii) his counsel was also ineffective at the penalty phase of his trial due to a failure to adequately investigate and prepare mitigation evidence and challenge the State's case; (iii) he was denied due process because the State withheld material and exculpatory evidence and presented misleading evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); (iv) counsel was operating under a conflict of interest in deprivation of Mr. Rimmer's Sixth Amendment rights; (v) the trial court erred in allowing an unduly suggestive eyewitness identification to be admitted; (vi) the State excluded a member of a racial minority from the jury panel in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986); (vii) the trial court erred in

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

admitting rebuttal testimony in the form of a lay opinion, and that the trial court erred in denying a motion for mistrial after the prosecutor referred to Mr. Rimmer's exercise of his right to remain silent; (viii) the trial court erred by utilizing the "and/or" conjunction between the names of Mr. Rimmer and his co-defendant in the jury instructions in violation of the Fifth and Fourteenth Amendments; and (ix) appellate counsel was ineffective for failing to raise the "and/or" issue on direct appeal. After oral argument and a thorough review of Mr. Rimmer's state court proceedings and the relevant legal authorities, Mr. Rimmer's Petition for Writ of Habeas Corpus is **DENIED**.

## I. THE UNDERLYING FACTS AND PROCEDURAL HISTORY

On direct appeal, the Florida Supreme Court summarized the basic facts as follows:

> Appellant and codefendant Kevin Parker were jointly tried and convicted of two counts of first-degree murder, armed robbery, armed kidnaping, attempted armed robbery, and aggravated assault for the robbery and murders that occurred at the Audio Logic car stereo store in Wilton Manners, Florida. The facts in this case reveal that on May 2, 1998, appellant Robert Rimmer and possibly two others, including co-felon Kevin Parker, robbed Audio Logic, during which Rimmer shot and killed two people.FN1 The two employees, Bradley Krause and Aaron Knight, who were in the installation bay area of the store, were told to lie face down on the floor and their hands were duct-taped behind their backs. Two customers, Joe Moore and Louis Rosario, were also told to lie face down on the floor and their hands were then bound by duct tape. According to eyewitness Moore, appellant stopped him as he was leaving the store, showed him a gun tucked into the waistband of his pants, and ordered Moore to go back inside the store. Rosario, who was outside smoking a cigarette when the robbery began, also had been ordered to go inside the store, but he did not see the person who had told him to go inside. Personal items were taken from Knight, Krause, and Moore, including Moore's wallet and cellular telephone. During this episode, appellant was armed with a Vikale .380 caliber semiautomatic weapon.
>
> FN1. The State argued that a third man was also involved but he was never located.
>
> While this was taking place, another victim, Kimberly Davis Burke ("Davis"), FN2 was sitting in the waiting room of the store with her two-year-old daughter. While there, she had observed a purplish Ford Probe and a Kia Sephia drive up to the store. The Kia Sephia stopped in front of the store and co-felon Parker got out. He entered the store through the front door, looked

> inside a display case that was in the waiting room, spoke briefly with Davis and her daughter, and then exited through one of the doors that led to the bay area. Soon thereafter, Davis noticed appellant in the installation area. He then entered the waiting room and told Davis that her boyfriend Moore was looking for her. When Davis walked into the bay area of the store and observed the four men lying on the floor, she immediately understood what was happening and sat down, placing her daughter on her lap. Although appellant told Davis not to look, she observed appellant and two other individuals load stereo equipment into the Ford Probe, which was parked in the bay area.
>
> FN2. The record reflects that this witness was referred to as Kimberly Davis, Kimberly Davis Burke, and Kimberly Burke.
>
> At one point, appellant asked victim Knight for the keys to the cash register. He also asked if anyone owned a weapon. Knight told appellant that he had a gun, which he kept in a desk drawer in the store. Appellant retrieved the gun, a Walther PPK. Appellant also asked the two employees if there were any surveillance cameras, and if so, where the tapes were kept. The employees told appellant that the store did not have any surveillance cameras.
>
> When the men finished loading the Ford Probe, appellant told Davis to move away because "he didn't want this to get on her." The victims heard appellant start to drive the car out of the bay area and then stop. Appellant returned to the bay area and said to Knight, "You know me." Knight responded that he did not. Appellant then said, "You do remember me" and walked up to Knight, placed the pistol to the back of his head and shot him. At the sound of the gunshot, Moore jumped to his feet. Appellant pointed the gun at him and told him to lie back down. Appellant then walked over to Krause and shot him in the back of the head. Appellant then thanked the three remaining victims for their cooperation and told them to have a nice day. According to the surviving victims, the entire episode lasted fifteen to twenty minutes.
>
> Knight died instantly. Krause, who was still alive when the police arrived, was taken to the hospital where he later died. According to the medical examiner, although Krause did not die instantly, he would have lost consciousness upon being shot. The police recovered a spent projectile fragment and shell casings from the scene of the crime, which were later identified as .380 caliber components. According to the State's firearm expert, the projectile fragment and shell casings came from the gun used by the assailant.

*Rimmer v. State*, 825 So. 2d 304, 308-11 (Fla. 2002). After a separate sentencing hearing, the jury, by a 9-3 vote, recommended that Mr. Rimmer be sentenced to death. The trial court

sentenced Mr. Rimmer to death in accordance with this recommendation. The trial court found six aggravating factors: (1) the murders were committed by a person convicted of a felony and under a sentence of imprisonment; (2) the defendant was previously convicted of another capital felony and a felony involving use or threat of violence to the person; (3) the murders were committed while the defendant was engaged in a robbery and kidnaping; (4) the murders were committed for the purpose of avoiding or preventing lawful arrest; (5) the murders were especially heinous, atrocious, or cruel (HAC); and (6) the murders were cold, calculated, and premeditated (CCP). The trial court only gave moderate weight to the HAC and murder in the course of a felony aggravators; the court gave great weight to the remaining four aggravators. The trial court found no statutory mitigators, but found several nonstatutory mitigators: (1) Mr. Rimmer's family background (very little weight); (2) Mr. Rimmer is an excellent employee (some weight); (3) Mr. Rimmer has helped and ministered to others (minimal weight); (4) Mr. Rimmer is a kind, loving father (not much weight); and (5) Mr. Rimmer suffers from a schizoaffective disorder (little weight). Mr. Rimmer appealed, but the Florida Supreme Court affirmed the conviction and sentence. *Id.* Mr. Rimmer filed a petition for writ of certiorari with the United States Supreme Court, which was denied on November 18, 2002. *Rimmer v. Florida*, 537 U.S. 1034 (2002).

Mr. Rimmer sought post-conviction relief in the Florida courts under Rule 3.851 of the Florida Rules of Criminal Procedure. Mr. Rimmer raised the following claims in his original and amended postconviction motions: (1) deprivation of due process and equal protection because he has been denied access to files and records that are in the custody of certain state agencies; (2) the application of new rule 3.851 deprived Mr. Rimmer of due process and equal protection; (3) Mr. Rimmer's inability to interview jurors to determine whether juror misconduct occurred violated his constitutional rights; (4) Mr. Rimmer's convictions are unreliable because trial counsel failed to adequately investigate and prepare a defense and to adequately challenge the State's case; (5) Mr. Rimmer's sentencing phase was unreliable because trial counsel failed to adequately investigate and prepare mitigating evidence and to adequately challenge the State's case; (6) Mr. Rimmer's right to effective counsel was violated because of trial counsel's conflict of interest; (7) trial counsel was ineffective for failing to object to improper prosecutorial argument; (8) Mr. Rimmer was

deprived of his rights under *Ake v. Oklahoma*, 470 U.S. 68 (1985); (9) the State withheld material and exculpatory evidence and violated Mr. Rimmer's constitutional rights; (10) Mr. Rimmer is insane, and therefore, unconstitutional to execute him; (11) Mr. Rimmer's death sentence is unconstitutional because it improperly shifts the burden to the defense and because the trial court employed a presumption of death in sentencing him, and trial counsel was ineffective for failing to make this argument; (12) Mr. Rimmer is innocent of first-degree murder, and there was insufficient evidence to convict him; (13) *Ring* (*Ring v. Arizona*, 536 U.S. 584 (2002)) claim; (14) Florida's methods of execution constitute cruel and unusual punishment; and (15) hearsay admitted at trial deprived Mr. Rimmer of a full and fair trial, and counsel was ineffective for failing to object to such hearsay. *See Rimmer*, 59 So. 3d at 773. The circuit court held a *Huff*[2] hearing to determine whether the claims Mr. Rimmer raised in his Rule 3.851 motion required an evidentiary hearing. Following the *Huff* hearing, the court granted an evidentiary hearing on the following six claims: (4) Mr. Rimmer's convictions are unreliable because trial counsel failed to adequately investigate and prepare a defense and to adequately challenge the State's case; (5) Mr. Rimmer's sentencing phase was unreliable because trial counsel failed to adequately investigate and prepare mitigating evidence and to adequately challenge the State's case; (6) Mr. Rimmer's right to effective counsel was violated because of trial counsel's conflict of interest; (8) Mr. Rimmer was deprived of his rights under *Ake v. Oklahoma*; (9) the State withheld material and exculpatory evidence and violated Mr. Rimmer's constitutional rights (*Brady* claim); and (11) penalty phase counsel was ineffective for failing to argue the unconstitutionality of Mr. Rimmer's death sentence. Following the evidentiary hearing, the court issued an order that denied postconviction relief. On appeal, the Florida Supreme Court affirmed and also simultaneously denied Mr. Rimmer's state petition for writ of habeas corpus.[3] *See Rimmer v.*

---

[2] *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

[3] Mr. Rimmer contended that appellate counsel was ineffective for failing to challenge the following: (1) the testimony of a witness for the State; (2) the trial court's denial of the motion to sever defendants; (3) a comment made by the prosecutor; (4) the trial court's denial of motions for mistrial; (5) the presence of the conjunction "and/or" in the jury instructions; (6) and the consideration of certain aggravating factors. *Rimmer*, 59 So. 3d at 786.

*State*, 59 So. 3d 763 (Fla. 2011).

In May of 2011, Mr. Rimmer filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The State filed its answer and memorandum of law on November 28, 2011, and Mr. Rimmer filed a reply memorandum in February of 2012. The parties appeared for oral argument on November 7, 2012.

## II. MR. RIMMER'S CLAIMS AND APPLICABLE STANDARDS

The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 110 Stat. 1214 (1996) (codified at various provisions in Title 28 of the U.S. Code), governs Mr. Rimmer's habeas corpus petition. The AEDPA significantly changed the standards of review that federal courts apply in habeas corpus proceedings. Habeas corpus relief is available only if the state court's adjudication of a claim on its merit "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(1)-(2). This is an "exacting standard." *Maharaj v. Sec'y, Dep't. of Corr.,* 432 F.3d 1292, 1308 (11th Cir. 2005).

A state court decision is "contrary to" Supreme Court precedent if it "arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law" or "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at [an] [opposite] result." *Williams v. Taylor,* 529 U.S. 362, 405 (2000) (opinion of O'Connor, J., for a majority of the Court). In other words, the "contrary to" prong means that "the state court's decision must be substantially different from the relevant precedent of [the Supreme] Court." *Id.*

When a state court identifies the correct legal principle, but purportedly applies it incorrectly to the facts before it, a federal habeas court "should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 409; *see also Wiggins v. Smith,* 539 U.S. 510, 520-21 (2003). Such an application is "unreasonable" pursuant to § 2254(d)(1). An "objectively unreasonable application of federal law is different from an incorrect application of federal law." *Woodford v. Visciotti,* 537 U.S. 19, 24-

25 (2002). An "unreasonable application" can also occur if a state court "unreasonably extends, or unreasonably declines to extend, a legal principle from Supreme Court case law to a new context." *Putman v. Head,* 268 F.3d 1223, 1241 (11th Cir. 2001).

Habeas relief may be granted pursuant to § 2254(d)(2) if the state court's determination of the facts was unreasonable. "A state court's determination of the facts, however, is entitled to deference" under § 2254(e)(1). *See Maharaj,* 432 F.3d at 1309. This means that a federal habeas court must presume that findings of fact by a state court are correct and a habeas petitioner must rebut that presumption by clear and convincing evidence. *See Hunter v. Sec'y, Dep't. of Corr.,* 395 F.3d 1196, 1200 (11th Cir. 2005).

Finally, where a federal court would "deny relief under a de novo review standard, relief must be denied under the much narrower AEDPA standard." *Jefferson v. Fountain,* 382 F.3d 1286, 1295 n.5 (11th Cir. 2004). Even if I believed the Florida Supreme Court's determination to be incorrect, under AEDPA deference, that alone is not enough to grant habeas relief. I must also find that "there is no possibility fair-minded jurists could disagree that the state court's decision conflicts with [United States Supreme Court] precedents." *Harrison v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 783 (2011). In other words, to obtain habeas corpus relief from a federal court, a state prisoner must show that the state court's ruling on the claim presented was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement. *See id.*

## III. TIMELINESS OF MR. RIMMER'S PETITION

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

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of State court. The limitation period shall run from the latest of -
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

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

In most cases, including the present case, the limitation period begins to run on the date on which the judgment became final. The Eleventh Circuit has decided that the judgment becomes "final" within the meaning of § 2244(d)(1)(A) as follows: (1) "if the prisoner files a timely petition for certiorari, the judgment becomes 'final' on the date on which the Supreme Court issues a decision on the merits or denies certiorari, or (2) the judgment becomes 'final' on the date on which the defendant's time for filing such a petition expires." *Bond v. Moore*, 309 F.3d 770, 773-74 (11th Cir. 2002). The State has not argued that the petition is untimely, and following a review of the record, this is correct – Mr. Rimmer's Petition was timely filed. Therefore, I proceed on the merits.

## IV. ANALYSIS

Mr. Rimmer argues nine claims for federal habeas relief. I address each claim.

### A. Ineffective Assistance of Counsel at the Guilt Phase

Mr. Rimmer argues his counsel's conduct was deficient and prejudicial to him in four specific instances. ([DE 1] at 43-57). During the guilt phase of his trial, Mr. Rimmer was represented by Richard Garfield, Esq. Mr. Rimmer first asserts that his counsel was ineffective because he failed to pursue critical, available information to support his defense. The critical information was: (I) vision records and lay testimony, (ii) evidence to rebut

Officer Kelley's testimony, and (iii) an expert in eyewitness identification. Mr. Rimmer's second sub-claim is that counsel was ineffective for failing to investigate or present evidence of other suspects. Mr. Rimmer's third sub-claim is that his counsel was ineffective for failing to review and present his employment records, which would have rehabilitated Mr. Rimmer's wife's testimony and would have bolstered the defense theory of misidentification. Finally, Mr. Rimmer contends that counsel was ineffective for failing to object and assert the marital privilege during the cross examination of Mr. Rimmer's wife regarding communications she had with her husband about the case.

1. *Strickland v. Washington* Standard

*Strickland v. Washington*, 466 U.S. 668 (1984), as well as the deferential standards of the AEDPA, governs Mr. Rimmer's claim. In *Strickland*, the United States Supreme Court set forth the two-prong test that a convicted defendant must meet to demonstrate that his or her counsel rendered ineffective assistance. First, a defendant "must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. Second, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The Court defines a "reasonable probability" as one "sufficient to undermine confidence in the outcome." *Id*. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id*. at 693.

Mr. Rimmer can satisfy the "unreasonable application" prong of § 2254(d)(1) only by showing that "there was no reasonable basis" for the Florida Supreme Court's decision. *Id.* at 784. "[A] habeas court must determine what arguments or theories ... could have supporte[d] the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Id.* In *Harrington v. Ritcher*, the Supreme Court wrote "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington*, 131 S. Ct. at

784–85 (emphasis added) (citations omitted).

There is no dispute that the clearly established federal law applicable here is *Strickland v. Washington*.

> In *Strickland*, this Court made clear that "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation ... [but] simply to ensure that criminal defendants receive a fair trial." 466 U.S., at 689, 104 S. Ct. 2052. Thus, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.*, at 686, 104 S. Ct. 2052 (emphasis added). The Court acknowledged that "[t]here are countless ways to provide effective assistance in any given case," and that "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Id.*, at 689, 104 S. Ct. 2052.

*Cullen v. Pinholster*, 131 S. Ct. 1388, 1403 (2011). As this is a *Strickland* claim analyzed under the deferential lens of § 2254(d), my review of the Florida Supreme Court's decision is "doubly deferential." *Knowles v. Mirzayance*, 556 U.S. 111, 112 (2009). After a thorough review of the state court record, I conclude that Mr. Rimmer has not met the high threshold required for federal habeas relief.

2. Failure to Review and Present Additional Misidentification Evidence

At trial, Mr. Rimmer's defense was misidentification. Here, Mr. Rimmer alleges that there was readily available evidence to support his theory of defense at trial and his counsel "failed to utilize it." ([DE 1] at 44). At trial, counsel argued that Mr. Rimmer wore glasses all of the time because he was "legally blind without correction." (*Id.*). Mr. Rimmer argues that this information was essential to his defense because neither one of the eyewitnesses described the gunman as wearing glasses. The State attempted to disprove the defense's theory of misidentification by presenting evidence that Mr. Rimmer did not wear glasses at the time of a previous arrest in March of 1998. While Mr. Rimmer did present testimony of his visual impairment at trial, he now argues that counsel's performance was deficient because there was additional evidence readily available in his Department of Corrections medical files that would have "corroborated the expert testimony about Mr. Rimmer's eyesight and explained why Mr. Rimmer did not wear contact lenses." ([DE 1] at 44). He

also asserts that counsel's performance was deficient for failing to put on an expert witness to rebut Officer Kelley's testimony. Officer Kelly compared his own vision to Mr. Rimmer's vision. He inferred that if he could see without glasses then so could Mr. Rimmer. Mr. Rimmer asserts that this constituted ineffective assistance of counsel because the most damming testimony at trial was the eyewitness identification of Mr. Rimmer as being the shooter. Neither of the eye witnesses identified Mr. Rimmer as wearing glasses on the day of the murders. In post-conviction, Mr. Rimmer provided an expert who would have testified as to the unreliability of eyewitness identifications to show that his counsel was deficient for failing to call an expert witness at trial. The State responds that the Florida Supreme Court's decision was not contrary to or an unreasonable application of *Strickland*. I agree.

3. Failure to present corroboration of visual impairment

Mr. Rimmer first made this claim in his Rule 3.851 motion. The trial court conducted an evidentiary hearing, at which defense counsel testified. The State argues that counsel testified that he made a strategic decision to not introduce Mr. Rimmer's DOC records. The State also asserts that counsel thoroughly challenged the eyewitness identifications both pre-trial and before the jury.[4] Mr. Rimmer replies that the State's arguments are flawed because trial counsel admitted that he made his strategic decision "prior to even reviewing the records," and, therefore, counsel cannot claim any strategy in deciding not to use them. ([DE 17] at 8). Moreover, Mr. Rimmer replies that the State ignores the fact that trial counsel could have moved those records into evidence as medical records and sought to preclude the jury from hearing that they were from a prior incarceration. Mr. Rimmer also argues that trial counsel did not properly challenge the eyewitnesses' numerous, critical inconsistencies and was unaware of other facts that reduce the reliability of the identifications.

The AEDPA governs this claim, and the opinion of the Florida Supreme Court is operative. The Florida Supreme Court denied this claim finding that it was without merit.

[4] While the State acknowledged that Mr. Rimmer argued in the instant petition that his counsel failed "(*Ibib*) to rebut or address Officer Kelly's testimony about his own vision," the State failed to respond to this argument in the Response filed with the Court. (*See* [DE 12] at 47-64).

> Rimmer, who contends that he must wear prescription eyeglasses in order to see properly, argues that counsel was ineffective because he failed to use Rimmer's DOC medical records in aid of his defense that he was not the shooter. Rimmer states that he is unable to wear contacts because of corneal ulcers, and argues that the DOC records would have aided his defense by demonstrating his dependence upon prescription glasses and enhancing trial testimony that the shooter did not wear glasses.
>
> At the evidentiary hearing, counsel testified that he did not want to use Rimmer's DOC records to support the misidentification defense because doing so would have alerted the jury to the fact that Rimmer previously spent time in prison. In its order denying postconviction relief, the circuit court concluded that counsel's failure to use the DOC records did not amount to deficient performance. The court noted that rather than make the jury aware of Rimmer's prison record, counsel chose to introduce more recent testimony about Rimmer's eyesight through two witnesses. One of these witnesses was an optician who filled an eyeglasses prescription for Rimmer less than three months before the murders, and the other witness was an optometrist who had examined Rimmer's vision and testified that Rimmer required corrective lenses in order to see properly. The optometrist testified that Rimmer's eyesight was 20/400 and that Rimmer was legally blind without corrected vision. Without corrected vision, the optometrist said, Rimmer would have to squint and get close to an object to see it, and also would be unable to drive without getting into an accident. The court concluded that counsel's decision to introduce the testimony of these witnesses instead of the DOC records was a well-reasoned decision. Competent, substantial evidence in the record supports the court's findings, and we agree with the circuit court's conclusion that counsel's performance was not deficient. Therefore, we find no merit in Rimmer's claim.

*Rimmer*, 59 So. 3d at 776-78.

In order to obtain relief, Mr. Rimmer must show that this determination was an objectively unreasonable application of clearly established federal law which is different from an incorrect application of federal law. Otherwise, Mr. Rimmer must show that this determination was an unreasonable factual determination in light of the evidence presented in the state court proceeding. He has not done so. I have reviewed the record from both the trial and the postconviction proceedings and find that Mr. Rimmer has failed to carry the heavy burden the AEDPA requires.

As a threshold matter, the Florida Supreme Court properly identified the governing

law to be the two-prong approach of *Strickland v. Washington*, which requires the defendant to show deficiency and prejudice. Moreover, the record supports that the Florida Supreme Court reasonably applied that clearly established federal law to the facts in Mr. Rimmer's case, and made reasonable determinations.

First, Mr. Rimmer contends that his counsel was ineffective for failing to have his DOC medical records admitted into evidence. Mr. Rimmer contends that these records would have shown that his vision is such that he is unable to wear contact lenses. At the postconviction evidentiary hearing, guilt phase counsel testified. Counsel testified that he believed the best evidence of Mr. Rimmer's eyesight was the most recent eye exams performed in 1998, rather than the corrections records from years prior. ([DE 13, Ex.C., SPCR.5] at 612). He also testified that for "obvious tactical reasons" he did not want to introduce evidence of Mr. Rimmer's prior prison records. While different lawyers may have chosen a different strategy, that alone, does not make Mr. Garfield's performance deficient. "In judging the defense's investigation, as in applying *Strickland* generally, hindsight is discounted by pegging adequacy to 'counsel's perspective at the time' investigative decisions are made, and by giving a 'heavy measure of deference to counsel's judgments.'" *Rompilla v. Beard,* 545 U.S. 374, 380-81 (2005)(citations omitted). The Eleventh Circuit reviews an attorney's performance with deference, and looks not for "what is prudent or appropriate, but only what is constitutionally compelled." *Hardwick*, 320 F.3d at 1161 (citing *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000)) (*en banc*) (When assessing a lawyer's performance, "[c]ourts must indulge the strong presumption that counsel's performance was reasonable and that counsel made all significant decisions in the exercise of reasonable professional judgment."). Considering the standard for reviewing these types of claims and the AEDPA deference as required by statute, I cannot say based on the record before me that the Florida Supreme Court's determination on deficiency was an unreasonable determination of clearly established federal law.

4. Failure to rebut Officer Kelly

Second, at the evidentiary hearing, postconviction counsel for Mr. Rimmer did not ask Mr. Garfield about his failure to present an expert witness to rebut Officer Kelly's

testimony regarding his and Mr. Rimmer's vision. Rather, postconviction counsel sought to prove this sub-claim with the testimony of Dr. Darrell Teppler. ([DE 13, Ex. C, SPCR. 2] at 244). The Florida Supreme Court did not make a *Strickland* deficiency determination but denied this sub-claim on prejudice grounds.

> Next, Rimmer argues that trial counsel was ineffective for failing to rebut the testimony of Officer Kelley. Kelley was one of the officers involved in the high-speed chase that led to Rimmer's arrest on May 10, 1998, and he was originally called as a State witness to testify about that pursuit. However, the State recalled Kelley as a rebuttal witness in order to counter the testimony offered by the defense regarding Rimmer's eyesight. The State used Kelley, whose uncorrected vision was 20/300, to testify that although objects and people appeared blurry without his eyeglasses, he could still see them. Thus, the inference that the State hoped the jury would draw was that because the vision-impaired Kelley could see without his eyeglasses, so could Rimmer.
>
> Defense counsel contemporaneously objected to Kelley's testimony and moved for a mistrial that was denied by the trial court. On direct appeal, this Court concluded that the admission of Kelley's rebuttal testimony was erroneous, but that in light of the evidence of Rimmer's guilt, there was "no reasonable possibility that the erroneous admission ... contributed to the verdict." *Rimmer*, 825 So. 2d at 322 (*citing State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla.1986)).
>
> At the evidentiary hearing, Rimmer introduced the testimony of Dr. Darrell Teppler, who stated that Kelley's testimony about his own eyesight could have led the jury to make an erroneous conclusion about Rimmer's eyesight. Rimmer now argues that the failure to use testimony like that of Dr. Teppler to rebut Kelley's testimony amounted to ineffective assistance of counsel. Because we have determined that the admission of Kelley's rebuttal testimony was harmless error, Rimmer cannot demonstrate prejudice under the second prong of *Strickland*. *See, e.g., Cox v. State*, 966 So. 2d 337, 347–48 (Fla.2007). Therefore, Rimmer is not entitled to relief.FN9
>
> > FN9. Moreover, we reject Rimmer's argument that the State committed an act of prosecutorial misconduct by placing Officer Kelley on the stand during rebuttal.

*Rimmer*, 59 So. 3d at 777-78. Essentially, the court reasoned that if the error of Officer Kelly's testimony was harmless, then Mr. Rimmer was not prejudiced even if his counsel had been deficient for failing to call a rebuttal expert. I do not find this determination

unreasonable.

The analysis does not cease here. In order to grant Mr. Rimmer federal habeas relief, I must determine that the Florida Supreme Court's ruling was an "unreasonable application" of clearly established federal law under the standard set forth in 28 U.S.C. § 2254(d)(1). "[T]he Florida courts apply the more petitioner-friendly *Chapman* standard of whether the constitutional error is "harmless beyond a reasonable doubt." *See Pittman v. State*, 90 So. 3d 794 (Fla. 2011); *Guzman v. State*, 868 So. 2d 498, 507–08 (Fla. 2003)." *Trepal v. Sec'y, Dep't. of Corr.*, 684 F.3d 1088, 1111 (11th Cir. 2012). "The standard *Chapman* set for harmlessness of constitutional trial error was whether the reviewing court was "able to declare a belief that [the error] was harmless beyond a reasonable doubt." *Id.* at 1112. Accordingly, I must first consider if the state court's application of the *Chapman v. California,* 386 U.S. 18 (1967) harmless error standard on direct review was "objectively unreasonable."

On direct appeal, the Florida Supreme Court made certain factual findings when analyzing errors for harmlessness. It found that "[t]hree of the surviving witnesses saw or heard [Mr. Rimmer] kill the victims" with two of them having "identified Rimmer as the shooter." *Rimmer*, 825 So. 2d at 322. The court also found that during the car chase prior to Mr. Rimmer's arrest, he threw Mr. Moore's wallet and two firearms from the car, "all of which tied him to the murder." *Id.* Finally, the court also determined that the videotape from a storage facility showed Mr. Rimmer renting "the storage unit that housed the stolen electronic equipment which had [Mr. Rimmer] and [Mr. Parker's] fingerprints on them." *Id.* I may not grant habeas relief unless the factual determinations of the Florida Supreme Court are unreasonable. 28 U.S.C. § 2254(d)(2).

Having reviewed the state court's order, I take issue with only one of the factual findings. The Florida Supreme Court supported its affirmance with the fact that "three surviving witnesses saw or heard [Mr. Rimmer] kill the victims." This fact is not supported by the record. The three surviving victims were Joe Moore, Kimberly Davis, and Luis Rosario. While it is true that Mr. Moore and Ms. Davis both identified Mr. Rimmer as the shooter, Mr. Rosario did not. Mr. Rosario did not identify Mr. Rimmer during the line-up,

the hearing on the motion to suppress, or during trial. The factual finding that Mr. Rosario "saw or heard" *Mr. Rimmer* kill the victims has no basis in fact. While Mr. Rosario heard *someone* shoot the victims, he has never identified that person as *Mr. Rimmer*. ([DE 13, Ex. A, R.7] at 776). As this simple fact is not even debatable, I do not accept this factual finding as correct.

However, the remaining factual determinations are reasonable. Yet, this does not require that I find these facts to have the significance that the Florida Supreme Court appeared to assign to them when it determined that the trial error was harmless.[5]

At trial, Mr. Rimmer's defense was one of misidentification. Mr. Rimmer's theory of defense was that while he was later in possession of stolen goods and was involved in the re-sale/storage of those goods, he was not present at the time of the robbery. Mr. Rimmer asserted that he was simply involved after the fact. In his opening statement, Mr. Rimmer stated his defense "in this case is [that] Robert Rimmer did not commit those crimes and he was not present at the Audio Logic store on May 2nd, 1998." ([DE 13, Ex. A, R.5] at 549). In support of his defense theory, Mr. Rimmer relied on the fact that he was legally blind without the aid of glasses. None of the eyewitnesses identified the shooter as wearing glasses; therefore, he argued, these two eyewitnesses had misidentified him as the shooter. The issue of whether or not Mr. Rimmer wore glasses was central to his defense. When it was time for opening statements, defense counsel made a strategic decision that he would introduce evidence of Mr. Rimmer's prior arrest record because it "reflects that he was, wore glasses back on March 26th of '98. . ." ([DE 13, Ex. A, R.5] at 545). He later argued that on his March 1998 booking sheet, it stated that he wore glasses. In disputing the State's evidence, Mr. Rimmer asserted that the individuals asked to appear in the live line-up were asked specifically "not to wear glasses." (*Id.*). Mr. Rimmer planned to put forth an expert witness who would testify that he is "legally blind and that basically what you would see from 40 feet he would have to be one foot away to see if he were not wearing his glasses."

[5] For example, the fact that Mr. Rimmer threw Mr. Moore's wallet and two firearms from the car and was seen renting the storage facilities which housed the stolen goods is not new. These facts were conceded at trial. Indeed, Mr. Rimmer admitted to those facts but argued that those facts, in and of themselves, do not prove that he was the shooter or even present at the scene. This is a true statement. These two facts standing alone, without the eyewitness identifications, would not likely have established a first degree murder charge.

(*Id.* at 558).

The relevant question is, was Mr. Rimmer prejudiced when his counsel failed to retain a rebuttal expert? To answer that question, I focus on the nature of the testimony given during the trial. At trial, the State called Officer Kelley in rebuttal. When defense counsel objected, the court overruled the objection because "[i]t has probative value with respect to what someone who has an acuity of 0 of 2300 could see." ([DE 13, Ex. A, R.12] at 1389). Officer Kelley, who had previously testified during the State's case in chief, testified on rebuttal that while he has uncorrected 2300 vision in each eye, he has previously driven a car without having an accident. (*Id.* at 1404-05). The prosecutor then held up a series of objects from different distances asking if the officer could read the words and/or simply see the object even if only as a blurry figure. Finally, the prosecutor laid down on the floor of the courtroom approximately five or six feet away from the officer, asked the officer to point his forefinger at the prosecutor's head and then at his feet to show that someone with 2300 vision could distinguish between a person's feet and head when that person was lying five feet away. (*Id.* at 1406-07).

While this testimony standing alone certainly appears damaging to Mr. Rimmer's defense, prior to Officer Kelley's testimony, the defense called Dr. Ralph J. Brucejolly to testify. Dr. Brucejolly is an optometrist who had once examined Mr. Rimmer. ([DE 13, Ex. A, R. 11] at 1320). Dr. Brucejolly testified that without glasses "one can presume that [Mr. Rimmer is] legally blind." On cross-examination, the prosecutor asked a series of questions regarding Mr. Rimmer's ability to *see* versus *see clearly* and then concluded the cross examination by laying down on the floor approximately five feet away and inquiring as to whether Mr. Rimmer would be able to see him. Dr. Brucejolly responded:

> A: Yes. He can see you.
>
> Q: Would he be able to make out my head portion as opposed to the feet portion of my body?
>
> A: Yes, he would.

(*Id.* at 1329). This is essentially the same testimony erroneously given by Officer Kelley in

rebuttal.[6] Therefore, Mr. Rimmer is unable to show prejudice for failing to call a rebuttal expert when his own expert testified similarly on direct examination. Accordingly, Mr. Rimmer has not shown prejudice.[7]

Moreover, at trial, counsel for Mr. Rimmer objected on more than one occasion to Officer Kelley's testimony. The court overruled counsel's objections. In order for me to grant habeas relief, I would have to find, among other things, that having a rebuttal expert to rebut Officer Kelley's testimony even though the rebuttal expert would have testified in direct contradiction to Dr. Brucejolly (the defense expert at trial) would have resulted in a reasonable probability that the outcome at trial would have been different. This argument is unsound. Even if Mr. Rimmer accomplished that task, I would also have to find the Florida Supreme Court's determination unreasonable. Based on the record before me, the decision of the Florida Supreme Court was not an unreasonable one.

5. Failure to call eyewitness expert

Finally, Mr. Rimmer argues that his counsel was deficient for failing to call an eyewitness identification expert. In postconviction, Mr. Garfield testified that he extensively litigated the eyewitness identifications and that an eyewitness identification expert was unnecessary because the "flaws in the identification procedure were eminently presentable." (*Id.* at 695). On appeal, the Florida Supreme Court agreed and rejected Mr. Rimmer's claim.

> Additionally, Rimmer argues that counsel was ineffective for failing to obtain an expert who would challenge the eyewitnesses' identifications. At the evidentiary hearing, Rimmer's expert testified that eyewitness identifications are generally unreliable, especially in stressful situations. The trial court rejected this claim of ineffective assistance of counsel and noted that counsel "continually challenged the identification of the Defendant prior to and during trial." Because counsel conducted an effective cross-examination of the

[6] I do not discount the potential for heightened credibility because Officer Kelley is a law enforcement officer. However, as his testimony corroborates that of Mr. Rimmer's expert, I do not find that it effects the result here.

[7] At oral argument, counsel for Mr. Rimmer argued that this claim was more than just the officer's testimony but also the "demonstration" that the officer and the prosecutor engaged in before the jury. However, this is his ineffective assistance of counsel for failing to call a rebuttal expert claim. This is not a claim of trial court error for allowing Officer Kelley to testify in the first instance.

> eyewitnesses and consistently attacked the eyewitness identifications and the process of making those identifications, Rimmer has not demonstrated that he was prejudiced by counsel's failure to obtain an eyewitness identification expert. *See Rose v. State*, 617 So. 2d 291, 297 (Fla.1993). Consequently, Rimmer is not entitled to relief.

*Rimmer*, 59 So. 3d at 778. In light of the evidence presented at both the trial and during the postconviction hearing, there is nothing in the record to indicate that counsel's failure to put on a witness to testify as to the unreliability of eyewitnesses prejudiced Mr. Rimmer. To show prejudice, Mr. Rimmer would need to establish that his counsel's conduct rendered his trial "fundamentally unfair" or that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Devier v. Zant*, 3 F.3d 1445, 1451 (11th Cir. 1993)*; Strickland*, 466 U.S. at 694. Having actively cross-examined and otherwise challenged the veracity of the eyewitness identifications, the Florida Supreme Court's determination that Mr. Rimmer was not prejudiced by not obtaining an expert on eyewitness identifications was reasonable. Habeas relief is denied.

6. Failure to investigate suspects

The Broward County Sheriff's Office lifted 209 identifiable fingerprints from the scene of the crime. Not one of them matched Mr. Rimmer. Mr. Rimmer maintains that counsel was ineffective for failing to conduct a further investigation or present any evidence regarding the identify of other suspects. Counsel also failed to argue or attempt to demonstrate that the State did not follow up on other leads or suspects. ([DE 1] at 52). Mr. Rimmer asserts that he was prejudiced by counsel's deficiency. The Florida Supreme Court affirmed the denial of this claim finding:

> Rimmer also argues that trial counsel was ineffective because he failed to properly investigate other suspects and leads. Rimmer's argument fails because he has not demonstrated prejudice that undermines this Court's confidence in his guilt. Two eyewitnesses, Burke and Moore, identified Rimmer as the person who robbed Audio Logic and shot Krause and Knight. The description that Burke provided to the sketch artist was so consistent with Rimmer's actual appearance that an employee of one of Audio Logic's competitors recognized the person in the sketch as Rimmer. Burke also had an opportunity to view Rimmer in a nonconfrontational mode while sitting in the waiting room before she walked into the installation area and observed the

> robbery taking place. Additionally, at the time of his arrest, Rimmer had just led police on a high-speed chase during which he threw the gun stolen from Audio Logic, one of the victims' wallets, and the murder weapon out of the car. Moreover, Rimmer owned a car of the same make, model, and description that was seen at Audio Logic before and during the robbery. Audio equipment stolen from Audio Logic and bearing Rimmer's fingerprints was found in a storage unit that Rimmer rented just days after the robbery. In light of this overwhelming evidence of guilt, Rimmer cannot demonstrate prejudice. Rimmer is not entitled to relief.

*Id.* at 777-78. The record reflects that during trial, counsel for Mr. Rimmer cross-examined the latent print examiner about the fingerprints taken from the crime scene and elicited that none of those fingerprints matched Mr. Rimmer. ([DE 13, Ex. A, R.10] at 1148). In addition, Detective Lewis testified that there may have been an additional suspect who was never apprehended. During post-conviction proceedings, Mr. Garfield testified that he was aware that there were additional suspects and that he had questioned Detective Lewis, Detective Bigelson, and Detective Howard and he was told that "they don't know why those names were mentioned." ([DE 13, Ex. C, SPCR. 5] at 617). For reasons not entirely clear from his testimony, Mr. Garfield did not pursue this information any further.

I have reviewed the Florida Supreme Court's opinion and agree that Mr. Rimmer has failed to show the requisite prejudice for federal habeas relief. However, I do so for different reasons. At trial, Mr. Rimmer's defense admitted the possession of the stolen property and attempting to sell those items. He maintains that this is entirely consistent with him leading "police on a high-speed chase during which he threw the gun stolen from Audio Logic, one of the victims' wallets, and the murder weapon out of the car" and "[a]udio equipment stolen from Audio Logic and bearing Rimmer's fingerprints was found in a storage unit that Rimmer rented just days after the robbery." *Rimmer,* 59 So. 3d at 777-78. Therefore, I do not agree that these facts provide "overwhelming evidence of guilt" of first degree murder. *Id.* This determination was unreasonable.

However, the remaining facts the court cites in support of its prejudice determination are a reasonable determination of the facts in light of the evidence presented. In particular, the court cited the eyewitness identification and description of Mr. Rimmer given by Ms. Burke. Moreover, all along it was believed that a third person was involved in the robbery

and murder at the Audio Logic. As such, it is not entirely clear that had Mr. Garfield investigated and located another person who was also culpable for the crime that this would have excluded Mr. Rimmer to the extent that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id*. "It is not enough for the defendant to show that the error[ ] had some conceivable effect on the outcome of the proceeding." *Id*. at 693. He must show that there was a reasonable probability that the result would have been different. *See id.* Based on the record, the Florida Supreme Court's determination was reasonable; therefore, Mr. Rimmer has not met this burden. Habeas relief is denied.

7. Failure to review and present employment records

At trial, Mr. Rimmer's wife testified and provided him with an alibi. On cross-examination, the State questioned Mrs. Rimmer about how much Mr. Rimmer earned after taxes. The State wanted this information on the record because it would later argue that Mr. Rimmer had a large amount of cash on him at the time of his arrest. Here, Mr. Rimmer argues that his counsel knew of, and had in his possession, evidence that would have shown that he had cashed out annual leave totaling $2,286.26 in April and May of 1998. Mr. Rimmer also asserts that the prosecutor misrepresented the actual amount of his net income and had counsel prepared and presented this information, he could have rehabilitated Mrs. Rimmer's testimony. ([DE 1] at 56). The Florida Supreme Court denied the claim, finding that Mr. Rimmer had not demonstrated deficiency or prejudice.

> Rimmer's next claim of ineffective assistance of counsel relates to the testimony of his wife, Joanne, who was a witness for the defense. Joanne testified during direct examination that Rimmer had an alibi for the time of the robbery because he left home with his sons that morning to go fishing. She also testified that she, not Rimmer, drove the Ford Probe that morning, and he drove the Oldsmobile. During cross-examination, the State sought to attack her credibility and to use her knowledge of Rimmer's income and monthly expenses to suggest that Rimmer had an inordinate amount of money in his possession at the time of his arrest. Rimmer argues that counsel was ineffective for failing to rehabilitate Joanne's testimony and that as a result, the jury was less likely to believe the alibi she provided.
>
> Here, Rimmer has demonstrated neither deficient performance nor prejudice.

> When asked about his failure to address Joanne's testimony, counsel testified that he did not object because he did not believe that the testimony was inconsistent with the defense theory, and he did not want to bring attention to what he believed was an insignificant issue. The circuit court concluded that counsel's handling of Joanne's testimony was "a matter of reasoned trial strategy and not a deficiency." We find no error in the court's determination that counsel's strategic decision was reasonable.

*Id.* at 778.

The record reflects that the State sought to introduce evidence regarding whether Mr. Rimmer was carrying cash and how much it was but counsel for Mr. Rimmer objected. ([DE 13, Ex.A, R.12] at 1370). Counsel argued that this information was not relevant. The trial court disagreed because he found it "very germane based on the evidence adduced heretofore." *Id.* During the post-conviction hearing, Mr. Garfield testified that when the introduction of this information occurred during cross-examination he decided that the information regarding Mr. Rimmer's payout of annual leave, which he had obtained as part of Mr. Rimmer's employment records, was irrelevant. ([DE 13, Ex. C, SPCR.5] at 602). Counsel concluded that it was irrelevant because part of his defense strategy was that Mr. Rimmer was involved after the fact by selling the stolen merchandise, but he was not involved in the actual murders. Therefore, the fact that he had a large amount of cash at the time of his arrest helped his defense. Counsel determined that it "would have been a mistake to go over it because it would have gave it an importance perhaps in the mind of the jury that wasn't warranted." (*Id.* at 605). Further, counsel did not believe that this testimony discredited or damaged Mrs. Rimmer's credibility because she was "basically corroborating that he's not a wealthy person." (*Id.*).

The record supports the Florida Supreme Court's determination. Counsel for Mr. Rimmer testified that he made a strategic decision. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable,' but those made after 'less than complete investigation' are reasonable only to the extent that reasonable professional judgment supports the limitations on investigation." *Strickland*, 466 U.S. at 690–691. Further, as the *Harrington* decision emphasized, because the deficiency inquiry is governed by AEDPA, the question is not just if counsel's decisions were

reasonable, but whether fairminded jurists could disagree about whether the state court's denial of the ineffective assistance claim was inconsistent with Supreme Court precedent or was based on an unreasonable determination of the facts. *See Harrington*, 131 S. Ct. at 785–86; 28 U.S.C. § 2254(d). If fairminded jurists could reasonably disagree, then habeas relief should be denied. Here, reasonable professional judgment supports counsel's strategy and the state court's denial of this claim. Even if the wisdom of counsel's decision was questionable, fairminded jurists could likewise disagree about the reasonableness of such a strategic decision such that habeas relief must be denied.

8. Failure to assert marital privilege

Finally, Mr. Rimmer contends that his lawyer's failure to object to an inquiry to his wife violated the marital privilege, FLA. STAT. §90.504. This is Mr. Rimmer's final ineffective assistance of counsel sub-claim. During trial, the State asked Mrs. Rimmer about conversations between she and Mr. Rimmer concerning the underlying criminal case. Defense counsel allowed Mrs. Rimmer to answer those privileged questions without objection. ([DE 1] at 57).

To begin, this claim has been the subject of much confusion. In the instant petition, Mr. Rimmer has argued ineffective assistance of trial counsel. In order to be cognizable in federal court, Mr. Rimmer must have exhausted the claim in the state courts. Generally, in Florida, ineffective assistance of counsel claims are properly brought in a Rule 3.851 postconviction motion. *Ellerbee v. State*, 87 So. 3d 730, 739 (Fla. 2012) (denying ineffective assistance of counsel claim without prejudice on direct appeal). Mr. Rimmer did so. ([DE 16, Ex. C, Supp. R. Vol.1] at 56). However, the Florida Supreme Court did not reach the merits of this claim.

In the briefs filed with this Court, Mr. Rimmer contended that "the Florida Supreme Court denied relief on the basis that it had previously found the underlying issue to be without merit." ([DE 1] at 58). The State asserts that the Florida Supreme Court "relied upon its direct appeal determination of no fundamental error to find ineffective assistance was not proven." ([DE 12] at 72). Neither is correct.

On direct appeal, Mr. Rimmer asserted that the trial court erred in failing to declare a mistrial as a result of the prosecutor referring to the defendant's right to remain silent.

Interspersed in that claim were statements about the propriety of the State to have even asked certain questions of Mr. Rimmer's wife because those questioned were privileged. ([DE 16, Ex. A, Supp. R. Vol.1] at 75). While the Florida Supreme Court did not address this argument as a freestanding claim, it did footnote in its opinion on Mr. Rimmer's Fifth Amendment claim that "[a]ppellant's additional ground for reversal, that the comment infringed on the husband-wife privilege, was not preserved for appellate review because he did not object to the State's question on this ground." *Rimmer*, 825 So. 2d at 323, n14. Indeed, the Florida Supreme Court succinctly articulated what later became the basis for Mr. Rimmer's ineffective assistance of counsel claim; counsel's failure to object.

In his Rule 3.851 motion and on appeal from the denial thereof, Mr. Rimmer asserted the claim as a freestanding sub-claim of his broader ineffective assistance of guilt phase counsel claim. However, the Florida Supreme Court misinterpreted this claim.

In the Initial Brief of the Appellant, Mr. Rimmer's claims was as follows:

> ***4. Objections based on Marital Privilege***
>
> At trial, the State questioned Mr. Rimmer's wife about communications she had had with her husband pertaining to the case. Trial counsel failed to object for no strategic reason (2SPC-R. 607). Trial counsel's failure to object was deficient.

([DE 16, Ex. C., Supp. Vol. 1] at 56)(emphasis added). The Florida Supreme Court conflated this claim with Mr. Rimmer's prior claim regarding his right to remain silent.

> Rimmer also argues that counsel's failure to object to certain questions asked by the State constituted ineffective assistance of counsel because the questions were an improper comment on *his right to remain silent*. Rimmer's entire argument on *this issue* consists of the following: "At trial, the State questioned Mr. Rimmer's wife about communications she had had with her husband pertaining to the case. Trial counsel failed to object for no strategic reason. Trial counsel's failure to object was deficient."

*Rimmer*, 59 So. 3d at 778 (emphasis added).[8] However, nowhere in his initial brief does Mr.

[8] The court reached this conclusion despite the fact that it had earlier identified this claim as one where "Rimmer contends that counsel failed to rehabilitate the testimony of Rimmer's wife and *that counsel failed to assert a martial privilege objection.*" *Rimmer*, 59 So. 3d at 776. However, when the court analyzed the merits of the claim, it did not mention the marital privilege anywhere in its opinion. *Id.*

Rimmer argue about his right to remain silent; rather the claim is clearly titled "***Objections based on Marital Privilege.***"[9] While his argument lacks certain detail, the claim does assert a legal argument not addressed on its merit by the Florida Supreme Court; therefore, I review the claim *de novo*. *See Mason v. Allen*, 605 F.3d 1114 (11th Cir. 2010) ("When, however, a claim is properly presented to the state court, but the state court does not adjudicate it on the merits, we review *de novo*. *Cone v. Bell*, --- U.S. ----, 129 S. Ct. 1769, 1784, 173 L.Ed.2d 701 (2009)).''

During the postconviction proceedings, counsel inquired of Mr. Garfield as to why he did not assert the marital privilege. Mr. Garfield testified that he did not assert marital privilege because "there's no marital privilege when there's no communication before the court." He went on to testify that he "decided that my better ground to object was an indirect comment on his right to remain silent." ([DE 13, Ex. C, SPCR. 5] at 608). Counsel asserted that he made a strategic decision. I accept that as a reasonable choice given the circumstances. Review of counsel's conduct is to be highly deferential. *Spaziano v. Singletary*, 36 F.3d 1028, 1039 (11th Cir. 1994). Second-guessing of an attorney's performance is not permitted. *White v. Singletary*, 972 F.2d 1218, 1220 (11th Cir. 1992) ("Courts should at the start presume effectiveness and should always avoid second-guessing with the benefit of hindsight."); *Atkins v. Singletary*, 965 F.2d 952, 958 (11th Cir. 1992).

Moreover, assuming that the questions were objectionable, Mr. Rimmer has not shown that he would have been prejudiced by the failure to assert the marital privilege objection. Prejudice exists if ''there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Rompilla v. Beard,* 545 U.S. 374, 390 (2005) (citations omitted). Mr. Rimmer has failed to show a reasonable probability that the result of his trial would have been different had his counsel

---

[9]In his reply brief, Mr. Rimmer reasserted his argument as follows:

> Mr. Rimmer contends that trial counsel was ineffective in failing to object to the questioning of Mrs. Rimmer and her communications with Mr. Rimmer *based on marital privilege.* Trial counsel had no strategic reason for failing to object (2SPC-R. 607). Had trial counsel objected the State would not have been allowed to elicit the information. Trial counsel's failure to object combined with all of the other deficiencies and errors was prejudicial.

([DE 13, Ex. C, Supp. Vol. 1] at 22).

asserted the marital privilege as to Mrs. Rimmer's testimony. Therefore, even if he could show deficient performance, Mr. Rimmer has failed to satisfy *Strickland*'s prejudice prong. This precludes habeas relief. *See Hall v. Head*, 310 F.3d 683, 699 (11th Cir. 2002) ( "[A]lthough there is evidence in the record to support the district court's finding of deficient performance, we need not and do not 'reach the performance prong of the ineffective assistance test [because we are] convinced that the prejudice prong cannot be satisfied.'"). Mr. Rimmer's requested relief is denied.

**B. Ineffective Assistance of Penalty Phase Counsel**

Mr. Rimmer next asserts that his counsel was ineffective during the penalty phase in two specific areas: (i) failure to conduct a reasonable investigation and (ii) failure to object. Different counsel, Hale Schantz, Esq., represented Mr. Rimmer during the penalty phase of his trial. Mr. Rimmer asserts two sub-claims for habeas relief.

1. Reasonable Investigation

Mr. Rimmer argues that although penalty phase counsel did request the appointment of a mental health expert, once one was appointed, counsel failed to provide the expert with background records or collateral information about Mr. Rimmer. Mr. Rimmer contends that counsel did not confer with the expert about her testimony and how the testing would assist the mitigation phase. Likewise, Mr. Rimmer argues that his counsel failed to contact 22 of the 24 possible mitigation witnesses that he provided to counsel. Finally, Mr. Rimmer argues that counsel failed to review any "background records, including school records, employment records or prison records." (*Id.* at 70). After a review of the evidence presented at trial and at the evidentiary hearing, the Florida Supreme Court found counsel's performance deficient in certain respects. Yet, the Florida Supreme Court denied this claim because:

> However, even if we accept as credible the evidence presented at the evidentiary hearing, Rimmer still has not demonstrated that he was prejudiced by counsel's failure to properly investigate and present this information. In light of the severe aggravation in this case, the possible mitigation presented at the hearing does not undermine our confidence in Rimmer's sentence of death. On direct appeal, this court upheld the trial court's finding of five aggravating circumstances, including that the murders were cold, calculated, and premeditated (CCP). We have said that CCP is

> among the weightiest aggravators in the sentencing scheme. *See McKenzie v. State*, 29 So. 3d 272, 287 (Fla.2010), cert. denied, —— U.S. ——, 131 S. Ct. 116, 178 L.Ed.2d 71 (2010); *Morton v. State*, 995 So. 2d 233, 243 (Fla.2008). In addition to CCP, the trial court found that the murders were committed while Rimmer was under a sentence of imprisonment, Rimmer was previously convicted of a capital felony and a violent felony, the murders were committed during the course of a robbery and kidnapping, and the murders were committed to avoid arrest. Given these aggravating circumstances, we conclude that Rimmer has not demonstrated the requisite prejudice that is necessary to prove that counsel was ineffective under *Strickland*. Because Rimmer has not satisfied his burden under *Strickland*, he is not entitled to relief.

*Rimmer*, 59 So. 3d at 781-82. While the opinion has all the elements of a prejudice analysis, it is not clear to me that the Florida Supreme Court employed the appropriate process. In assessing prejudice, "we consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweigh it against the evidence in aggravation." *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (citing *Williams v. Taylor*, 529 U.S. 362 (2000)). It is unclear from the opinion if this reweighing occurred. Rather, the Florida Supreme Court seemed to weigh the mitigation presented at the evidentiary hearing against the aggravation established at trial. In other words, the court failed to consider the mitigation evidence already adduced at trial in conjunction with the mitigation evidence presented during the evidentiary hearing. After collectively considering the mitigation evidence, the postconviction court must reweigh that collective evidence against the aggravating factors found by the trial court. I find that the Florida Supreme Court likely failed to do so. If so, its determination resulted in an unreasonable application of clearly established federal law.

However, this does not automatically guarantee federal habeas relief because I must still consider the claim *de novo*.[10] "A federal court must then resolve the claim without the deference AEDPA otherwise requires." *Panetti v. Quarterman,* 551 U.S. 930, 953-54 (2007).

[10] Indeed, if this claim fails under a *de novo* standard of review, it likewise would have failed under an AEDPA deferential review. Where a federal court would "deny relief under a *de novo* review standard, relief must be denied under the much narrower AEDPA standard." *Jefferson v. Fountain,* 382 F.3d 1286, 1295 n.5 (11th Cir. 2004).

Having done so, I find that Mr. Rimmer has not shown prejudice.

Mr. Rimmer was convicted of two counts of first-degree murder. He robbed an electronics store, started to exit the property, stopped the car, got out, purposefully walked back to the two employees who were laying face down with their hands behind their back and shot each of them at close range in the back of their heads while four others, including a two-year old child, watched. He then departed by telling the survivors to "Have a nice day."[11] According to the trial court, Mr. Rimmer satisfied five statutory aggravators.[12] During the penalty phase, defense counsel put on several witnesses in an effort to portray Mr. Rimmer in a positive light. Defense counsel also put on a mental health expert and a neuropsychologist.[13] While Mr. Rimmer presented additional mitigation evidence at the evidentiary hearing, I cannot conclude that when re-weighing the initial mitigation in combination with the evidence presented in postconviction against the strong aggravation established during the penalty phase, that Mr. Rimmer had shown prejudice. At the postconviction hearing, Mr. Rimmer presented the testimony of fifteen additional witnesses. The witnesses ranged from mental health experts, family members, friends, co-workers to his mistress. ([DE 16, Ex.C, PCR.36]). The majority of those witnesses testified about Mr. Rimmer's character and his family and work ethic. Perhaps, the most compelling of the testimony was that of his mother and aunt who testified about Mr. Rimmer's childhood. Mr. Rimmer's mother and aunt painted a picture of a violent and abusive upbringing at the hands of his father. (*Id.* at 11). This type of testimony was not given during the penalty phase of Mr. Rimmer's trial and the jury did not have a complete picture of Mr. Rimmer's

---

[11] This is not to suggest that prejudice cannot be established where the crime is particularly cold and calculated. It simply reflects that when evaluating the totality of the available mitigation evidence—both that adduced at trial and the evidence adduced in the postconviction proceeding—and reweighing it against the evidence in aggravation, in this specific instance, Mr. Rimmer did not establish prejudice.

[12] The trial court actually found six aggravating factors but on direct appeal, the Florida Supreme Court reversed the finding as to the heinous, atrocious and cruel aggravator. *Rimmer v. State*, 825 So. 2d 304 (Fla. 2002).

[13] Dr. Walczak testified only during the *Spencer* hearing. In Florida, the parties can present additional evidence before the sentencing judge that the sentencing jury never heard. *See Spencer v. State*, 615 So. 2d 688, 691 (Fla. 1993).

upbringing. However, Mrs. Rimmer did testify at the *Spencer* hearing; therefore, her testimony was before the ultimate sentencer in Florida, the judge. Moreover, when reweighing all the testimony at both the sentencing phase and the postconviction proceedings, I do not find that the addition of this testimony would have created a reasonable probability that the outcome at sentencing would have been a life sentence. A petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. I do not find the mitigation evidence adduced at trial and during postconviction proceedings compelling enough to conclude that it would have outweighed the aggravation such that there was a reasonable probability that Mr. Rimmer would have gotten a life sentence. Habeas relief is denied.

2. Failure to object

Mr. Rimmer asserts that his penalty phase counsel failed to object when the prosecutor engaged in objectionable conduct where the prosecutor: (i) made unsupported claims about one of the victim's fear prior to their death and (ii) wielded the gun from the crime scene during closing argument and pulled the trigger such that the jury could hear the gun "click." (*Id.* at 73). Mr. Rimmer asserts that the cumulative effect of the prosecutor's comments was to infect the trial with unfairness resulting in the deprivation of his due process rights. The Florida Supreme Court affirmed finding the claim to be without merit. In regards to the sub-claim of the fear of the victim prior to the murder, the court found:

> Additionally, although the comment was made while the prosecutor argued HAC, which was reversed on appeal, the comment was also relevant to prove CCP, which this Court upheld. Moreover, Rimmer has not demonstrated that he was prejudiced by the comment. Given the gravity of the aggravating circumstances found by the trial court, our confidence in the outcome has not been undermined, and Rimmer is not entitled to relief.

*Rimmer*, 59 So. 3d at 782. The Florida Supreme Court also rejected Mr. Rimmer's sub-claim regarding the prosecutor's closing argument wherein he held the murder weapon and "clicked" the gun by pulling the trigger in front of the jury, by finding that "we respect the vantage point of the trial court, and we conclude that there was no error. Rimmer is not entitled to relief." *Id.* at 783. The court did not review Mr. Rimmer's cumulative effect

claim. It did not do so because Mr. Rimmer did not argue a cumulative effect claim. Therefore, I cannot review it either.

As this cumulative effect claim was not argued to the Florida Supreme Court on appeal, it is unexhausted and procedurally barred from further review. *Castille v. Peoples*, 489 U.S. 346, 351 (1989) (to exhaust state remedies, a petitioner must fairly present every issue raised in his federal petition to the *state's highest court*). Regardless of the exhaustion and procedural bar findings, this type of claim is not cognizable for federal habeas review except in very limited circumstances. Unless the trial was rendered fundamentally unfair, the Eleventh Circuit Court of Appeals has declined to entertain "cumulative error" claims. *See Cargill v. Turpin*, 120 F.3d 1366, 1386-87 (11th Cir. 1997).

In regards to the two specific comments that Mr. Rimmer argued his counsel was deficient for failing to object to, I do not find the Florida Supreme Court's determination unreasonable. The court reviewed these comments and analyzed them pursuant to state law concluding that counsel was neither deficient[14] nor was Mr. Rimmer prejudiced. The United States Supreme Court has interpreted an "adjudication on the merits" broadly enough to encompass summary adjudications or decisions using the language of state law. As the Eleventh Circuit has noted:

> With these anchors in place, an "adjudication on the merits" is best defined as any state court decision that does not rest solely on a state procedural bar. *See Jason O. Williams v. Allen*, 598 F.3d 778, 796 (11th Cir. 2010) (" 'A decision that does not rest on procedural grounds alone is an adjudication on the merits regardless of the form in which it is expressed.' " (*quoting Blankenship v. Hall*, 542 F.3d 1253, 1271 n. 4 (11th Cir.2008))); *Wright*, 278 F.3d at 1255–56 (same). In *Harrington*, the Supreme Court essentially defined the term as such. The Court wrote: "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." 131 S. Ct. at 784–85 (emphasis added) (citations omitted). FN16 Therefore, unless the state court clearly states that its decision was based solely on a state procedural rule, we will

[14] The court, after acknowledging that this claim was properly brought as one of ineffective assistance of counsel, appears to have analyzed the claim as one of trial error. However, implicit in that determination is that counsel was not deficient because counsel is not deficient for failing to make non-meritorious arguments. As the underlying claim lacks merit, [] counsel cannot be deficient for failing to raise it. *See Owen v. Sec'y for Dep't of Corr.*, 568 F.3d 894, 915 (11th Cir. 2009).

> presume that the state court has rendered an adjudication on the merits when the petitioner's claim "is the same claim rejected" by the state court. *Early*, 537 U.S. at 8, 123 S. Ct. at 364.

*Childers v. Floyd*, 642 F.3d 953, 968-69 (11th Cir. 2011) (footnote omitted). Accordingly, I must apply AEDPA deference to the decision of the Florida Supreme Court. Mindful that this claim is one of ineffective assistance of counsel for failing to object to the prosecutor's comments during closing argument and not one of prosecutorial misconduct, I am unable to conclude that the court's determination regarding prejudice was an unreasonable application of clearly established federal law. To show prejudice, Mr. Rimmer "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The Court defines a "reasonable probability" as one "sufficient to undermine confidence in the outcome." *Id*. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id*. at 693.

Here, the court reviewed the "gravity of the aggravating circumstances found by the trial court" and determined that their "confidence in the outcome has not been undermined." *Rimmer*, 59 So. 3d at 783. This is the appropriate standard to be applied in compliance with clearly established federal law. Having reviewed the evidence in aggravation against the mitigation evidence offered during sentencing, the court determined that Mr. Rimmer was not prejudiced by his counsel's failure to object to the actions of the prosecutor. This was a reasonable application of clearly established federal law. First, there is nothing in the record to suggest that if these objections had been made that they would have been sustained. Moreover, Mr. Rimmer has failed to show that but for these two statements that there is a reasonable probability that his sentence would have been different. Habeas relief is denied.

**C. Due Process Violation Pursuant to Brady v. Maryland**

In his third claim for habeas relief, Mr. Rimmer argues that the State failed to disclose four separate police reports that were material and exculpatory. Mr. Rimmer made this claim on appeal from the denial of his Rule 3.851 motion. The Florida Supreme Court affirmed the postconviction court and found that "the evidence 'does not establish that any

of the reports, not provided to the defense, contained favorable evidence, or did not contain information that the defense already had.'" *Rimmer*, 59 So. 3d at 785. After a recitation of the trial court's findings and applicable law, the Florida Supreme Court concluded "Rimmer has not proven each of the elements required of a successful *Brady* claim. In particular, Rimmer has not shown how the evidence would have been exculpatory or impeaching. Therefore, he is not entitled to relief." *Id.* The Florida Supreme Court's opinion relied heavily on the testimony of trial counsel wherein he stated that he would not have used this information even if it had been available. *Brady v. Maryland* governs Mr. Rimmer's claim.

1. *Brady v. Maryland* Standard

In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court established three criteria a criminal defendant must prove in order to establish a violation of due process resulting from the prosecution's withholding of evidence. Specifically, the defendant alleging a *Brady* violation must demonstrate: (1) that the prosecution suppressed evidence, (2) that the evidence suppressed was favorable to the defendant or exculpatory, and (3) that the evidence suppressed was material. *United States v. Severdija*, 790 F.2d 1556, 1558 (11th Cir. 1986). Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Stewart*, 820 F.2d 370, 374 (11th Cir. 1987) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). This is the standard applied by the Florida Supreme Court to the facts of Mr. Rimmer's claim.[15] Therefore, the question before me is whether or not the Florida Supreme Court's determination that Mr. Rimmer "has not proven each of the elements required of a successful *Brady* claim" was a reasonable one. *Rimmer*, 59 So. 3d at 786.

In Mr. Rimmer's federal habeas Petition, he contends that there were four specific sets of documents that should have been disclosed to defense counsel by the prosecutor. First, there were photographic line-ups that were prepared by FDLE and turned over to Detective Lewis, but were not disclosed to the defense. ("FDLE report") ([DE 1-1 at 107).

[15] The Florida Supreme Court also cited to *Strickler v. Greene*, 527 U.S. 263 (1999) and *Kyles v. Whitley*, 514 U.S. 419 (1995). This too was clearly established federal law at the time of Mr. Rimmer's appeal.

Second, a Palm Beach County Sheriff's report that showed the gun used in the Audio Logic murders was stolen from a "chop-shop" in 1998. ("Palm Beach County police report"). Third, police reports related to a factually similar homicide that occurred in Plantation, Florida a few days before the murders at Audio Logic where Mr. Rimmer's photo was shown to witnesses but not identified as being involved. ("Plantation police report"). Finally, a Wilton Manors' police report regarding two separate investigatory leads regarding faded purple Ford probes which were never followed up on by the police. ("Wilton Manors police report") (*Id.* at 106-09). Mr. Rimmer's defense was one of misidentification. Therefore, he argues that the failure to disclose information that could have aided his defense, both during a motion to suppress and at trial, violates *Brady*.

The Florida Supreme Court found that, "[i]n particular Rimmer has not shown how the evidence would have been exculpatory or impeaching." *Rimmer*, 59 So. 3d at 786. However, even if certain of these documents were in the possession of the State and were exculpatory or impeaching, Mr. Rimmer must also show that the evidence was material.

The Florida Supreme Court's opinion relies heavily on the testimony of trial counsel. Trial counsel stated that he would not have used this information even if it had been available. *Rimmer*, 59 So. 3d at 785. The Florida Supreme Court's order is unclear whether trial counsel's postconviction testimony factored into its analysis determining that the evidence was neither exculpatory or impeaching. In the order, the court found that Mr. Rimmer did not prove "each of the elements" required for a *Brady* claim. To the extent that the court relied on counsel's representations that he "not believe he could have used this information," I do not find that dispositive. I am unaware of any clearly established federal law which relies on the representations of trial counsel (in this case, counsel who has also been alleged to have provided ineffective assistance at trial) during postconviction when determining whether or not the suppressed evidence at issue was exculpatory, impeaching, or material.

However, ultimately, I do not need to decide if the Florida Supreme Court used an incorrect legal standard. Even though I may disagree with the Florida Supreme Court's determination that the documents were not exculpatory or impeaching, a determination for

which I must apply AEDPA deference, since I also find that Mr. Rimmer's claim fails even under a less deferential *de novo* standard, I need not analyze the Florida Supreme Court's determination for reasonableness. "Courts can, however, deny writs of habeas corpus under § 2254 by engaging in *de novo* review when it is unclear whether AEDPA deference applies, because a habeas petitioner will not be entitled to a writ of habeas corpus if his or her claim is rejected on *de novo* review. *See* § 2254(a)." *Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010).

In order to establish materiality under *Brady*, Mr. Rimmer must show a reasonable probability that had the suppressed evidence been disclosed, the jury would have reached a different result. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *See Strickler*, 527 U.S. at 290. Without establishing that essential fact, Mr. Rimmer cannot prevail on this claim. The Supreme Court has explained that the "touchstone of materiality is a 'reasonable probability' of a different result.... The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434. Moreover, materiality "is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Id*. at 434-35. Materiality is to be evaluated in light of the cumulative effect of the undisclosed evidence. *See id*. at 436. Mr. Rimmer's claim fails for various reasons.

At the evidentiary hearing held during post-conviction, the prosecutor, Peter Magrino, Esq. testified. As to the FDLE reports, Mr. Magrino testified that, "I wasn't aware of the Florida Department of Law Enforcement reports, there's no question about that. Otherwise, I would have turned them over." ([DE 13, Ex. C, SPCR. 6] at 783). As to the Plantation Police report, Mr. Magrino testified that he had not seen the reports but he "might have seen the arrest affidavit with regard to that." (*Id.* at 772). As to the Wilton Manors Police report regarding the similar Ford Probes, Mr. Magrino testified that he "recall[ed] providing reports in this case with regard to observations of a vehicle similar to

the defendant's by Wilton Manors PD, and if these reports are in the State's materials then I would say, yes, they would have been forwarded." (*Id.* at 775). Mr. Magrino was not questioned about the Palm Beach County reports regarding the murder weapon as a stolen gun.

Defense counsel also testified at the hearing. Mr. Garfield acknowledged that he had copies of the Wilton Manors police reports in his file. He denied that he had any reports from FDLE or that they were involved in the case. ([DE 13, Ex. C, SPCR.5] at 624). Mr. Garfield also testified that he had not received a copy of the Plantation Police Report and he was unaware that there had been a homicide at Meineke prior to the murders at Audio Logic. (*See id.* at 641). Mr. Garfield did recall the Palm Beach police report regarding the murder weapon.

Therefore, the record shows that as to the Palm Beach police reports and the Wilton Manors reports, the *Brady* material was disclosed and, as such, there can be no violation. *See Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). The remaining two reports are the FDLE report and the Plantation Police report regarding a robbery/murder at the Meineke. I have reviewed both.

The Plantation Police department report was not in Mr. Magrino's possession. It was in the possession of the Plantation Police department. The police department did not provide this document to either the prosecutor or the defendant. However, this does not preclude a finding that *Brady* was violated.

> *Brady* and its progeny made clear that an accused's due process rights are violated when the prosecution fails to disclose exculpatory or impeachment evidence to the defense, regardless of whether the prosecutor himself acted in bad faith or even knew of the evidence. *See Giglio v. United States*, 405 U.S. at 153-54, 92 S. Ct. at 766. Our case law clearly established that an accused's due process rights are violated when the police conceal exculpatory or impeachment evidence. *Freeman v. State of Georgia*, 599 F.2d 65, 69 (5th Cir.1979), *cert. denied*, 444 U.S. 1013, 100 S. Ct. 661, 62 L.Ed.2d 641 (1980).

*McMillian v. Johnson*, 88 F.3d 1554, 1569 (11th Cir. 1996). Nonetheless, Mr. Rimmer is not entitled to habeas relief. The information contained in the report discusses a crime similar to that which Mr. Rimmer was ultimately convicted. The victims of that crime were shown

Mr. Rimmer's photo and none of them identified Mr. Rimmer as the suspect. To be a *Brady* violation, Mr. Rimmer must show that the material that the police department possessed was material and exculpatory or impeachment evidence. He has not done so. It may have assisted Mr. Rimmer's defense to show that there had been a crime of a recent similar nature for which Mr. Rimmer was not a suspect. However, it is not enough given the eyewitness testimony identifying Mr. Rimmer as the shooter at the Audio Logic store to show that the disclosure of the Plantation Police report would have created a reasonable probability of a different result. The remaining report is the FDLE report.

Unlike the other police reports at issue, the FDLE report was specifically prepared at the request of Detective Lewis (the lead detective assigned to Mr. Rimmer's case from the Wilton Manor Police Department). ([DE 13, Ex. C, PCR.54] at 1613). This document included a photo line-up, valuable information regarding the investigation done prior to Mr. Rimmer's arrest, information regarding the execution of the search warrant of the storage facility, an analysis of the video tape that would later be used as evidence at trial, and detailed information regarding other possible suspects to the crime for which Mr. Rimmer was convicted. (*Id.*).

As to the first *Brady* component (evidence favorable to the accused), it is beyond genuine debate that the FDLE report was suppressed evidence and qualifies as evidence advantageous to Mr. Rimmer. The prosecutor himself testified that had he known about it, he would have turned it over to the defense. The document listed the two special agents with the Florida Department of Law Enforcement who went and observed the crime scene. (*Id.* at 1613). It also contained the driver's license photos of a Craig Broughton, Bernard Gilbert and Mangnas St. Louis. These men were selected and included in the photographic line-up shown to the surviving victims. These three men were listed as "subjects suspected of participating in the double homicide." (*Id.* at 1631). There was also notation of a reward being "paid for information which led to the arrest on one suspect." (*Id.* at 1630). The report outlined how the videotapes from the storage rental were enhanced and used as evidence at trial and who enhanced them. (*Id.* at 1636). As FDLE's involvement had been at the request of the lead detective on the case, the State was aware that FDLE was

investigating and this report should have been turned over.

Nonetheless, I find Mr. Rimmer cannot meet the materiality requirement. "There is not a reasonable probability that had this evidence [the FDLE report] been disclosed to the defense, the result of the proceeding would have been different." *See United States v. Bagley*, 473 U.S. 667, 678 (1985) (recognizing that "a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial"). While the report does show that there were initially other suspects and that information may have been useful in Mr. Rimmer's defense of misidentification, the testimony at trial shows that two surviving eyewitnesses testified that they saw Mr. Rimmer shoot and kill the two victims. They also picked Mr. Rimmer out of the line-up prepared by the FDLE and shown in the report. Perhaps, the FDLE report could have impeached certain aspects of Detective Lewis' testimony, but it would not have impeached the surviving eyewitness' testimony. This fact, in combination with Mr. Rimmer's acknowledgment that he was in possession of the proceeds from the robbery and the gun used to commit the murder when he was arrested, is unlikely to have been overcome by the information gained by possessing the FDLE report. While not dispositive, Mr. Rimmer's trial counsel did testify at the evidentiary hearing, that the report did not contain information he did not already know, and had he had known this information it would not have changed his strategy because there was "nothing relevant here." ([DE 13, Ex. C, SPCR .5] at 678). Even though Mr. Rimmer makes a compelling argument for why this information would have been useful in, not only the investigatory stage, but also at trial to impeach and cross-examine the State's witnesses, that alone is not enough to create a reasonable probability of a different result. A review of the record shows that the bulk of the FDLE report is a summary of the information which was later proven at trial. So, there is not a reasonable probability that the information contained in the FDLE report was such that it undermined confidence in the outcome of Mr. Rimmer's trial. Habeas relief is denied.[16]

[16] I acknowledge that *Kyles* requires me to consider the suppressed evidence "collectively, not item by item." 514 U.S. at 435. I have done so. Considering both the Plantation Police Report and the FDLE report en masse, I still find that Mr. Rimmer has not shown that those two reports were

**D. Trial Counsel's Conflict of Interest**

Mr. Rimmer's fourth claim for habeas relief is that he had ineffective assistance of counsel at trial because guilt phase counsel was operating under an actual conflict of interest. Mr. Rimmer bases this argument on a letter that his guilt phase counsel, Mr. Garfield, sent to the lead detective in the case *after* the guilt phase but *before* the penalty phase. Mr. Garfield was not penalty phase counsel. It read as follows:

> Dear Detective Lewis,
>
> Please accept my congratulations for your role in the successful prosecution of Robert Rimmer and Kevin Parker for committing the double homicide and robberies that occurred on May 2, 1998 in the above-referenced matter.
>
> You demonstrated that hard work and diligence are ultimately rewarded. Hopefully the families of the victims and the community of Wilton Manors recognize you for your accomplishments in this case.
>
> Warmest Regards,
>
> Richard Garfield

([DE 1] at 30-31). Counsel for Mr. Rimmer also sent this letter to Police Chief Stephen Kenneth and Mayor John Seiler. ([DE 13, Ex. C, SPCR.5] at 658). At the postconviction evidentiary hearing, Mr. Garfield testified that he "heard later that [Detective Lewis] got Officer of the Month based on [his] letter." (*Id.*). The circuit court was not persuaded that this created a conflict of interest. The Florida Supreme Court affirmed:

> We conclude that Rimmer has not met his burden of " 'identify[ing] specific evidence in the record that suggests that ... [his] interests were impaired or compromised' for the benefit of [his] attorney." *State v. Larzelere*, 979 So. 2d 195, 209 (Fla.2008) (*quoting Herring v. State*, 730 So. 2d 1264, 1267 (Fla.1998)). At the evidentiary hearing, counsel testified at length about the letter, and he stated that he wrote it as an act of good will and was motivated to do so after hearing how the detective was subjected to racist comments during the course of another, unrelated investigation. The circuit court concluded in its order:
>
> > The record also demonstrates that Mr. Garfield was aggressive in challenging work done by Detective Lewis, both at trial, and pretrial.

---

material as defined by *Brady*.

> Mr. Garfield argued pretrial motions to suppress based upon the work done by Detective Lewis. Mr. Garfield cross-examined Detective Lewis during the trial and advanced legal arguments critical of the work done on the case by Detective Lewis.
>
> This Court finds Mr. Garfield's explanation for the letter to be adequate and does not find that there was any conflict of interest that affected the defendant's case.
>
> The court's findings are based on competent, substantial evidence in the record, and Rimmer is not entitled to relief on this claim.

*Rimmer*, 59 So. 3d at 779-80. In response to Mr. Rimmer's federal habeas petition, the State asserts that the court made reasonable determinations of the witness' credibility and a reasonable determination of the facts and law because neither "an actual conflict of interest" nor "a conflict of interest was shown." ([DE 12] at 108). The State asserts that this is true because Mr. Garfield vigorously attacked Detective Lewis during his testimony at the guilt phase of the trial which included multiple motions to suppress key evidence. Therefore, the State concludes, Mr. Rimmer cannot show prejudice. Mr. Rimmer disagrees, relying on *Cuyler v. Sullivan*, 446 U.S. 335 (1980) and *Strickland v. Washington*, 466 U.S. 668 (1984) for the proposition that because an actual conflict of interest existed, he need not demonstrate prejudice in order to show relief. ([DE 1-1] at 30).

A review of the record finds that Mr. Garfield's first explanation for why he wrote such a letter was that it was meant to say "no hard feelings" because Mr. Garfield had vigorously cross-examined the detective at trial. Mr. Garfield further testified that he also wanted to show the detective that "not all of us, you know get painted with the same brush, that there can be room for pleasantry even though the matter was gravely serious." Mr. Garfield felt that this was important because the detective had previously told him a story wherein the detective was called a derogatory name used to denigrate African-Americans during a unrelated armed robbery investigation years prior. ([DE 13, Ex.C, SPCR.5] at 657). Ultimately, Mr. Garfield did not have any problem with writing such a letter because he "felt like [his] role in the case was virtually over." (*Id.* at 658).

To say that when defense counsel sends a congratulatory letter to the lead detective

in a first degree murder case wherein the State is seeking the death penalty, *after* the guilt phase but *before* the penalty phase, was ***ill-advised*** would be generous. The attorney-client attorney relationship is one of trust that should never be soiled with the appearance of impropriety. "Not only are decisions crucial to the defendant's liberty placed in counsel's hands, but the defendant's perception of the fairness of the process, and his willingness to acquiesce in its results, depend upon his confidence in his counsel's dedication, loyalty, and ability." *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 645 (1989) (internal citations omitted). There can be little doubt that this should not have occurred. However, that does not, in and of itself, create an actual conflict of interest such that Mr. Rimmer is not required to establish prejudice.

"We hold that the possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980). Mr. Rimmer has not established an actual conflict of interest. While the Florida Supreme Court's focused its determination on whether the conflict on interest "affected the defendant's case" as opposed to whether the conflict of interest "adversely affected the attorney's performance," the result here is the same. Mr. Rimmer has failed to point to a single specific instance where counsel's trial performance was adversely affected by his subsequent congratulatory letter to the detective other than to argue broadly that counsel "was ineffective for failing to properly challenge the State's case, including his failure to zealously and effectively challenge the work of Detective Lewis."[17] ([DE 1-1] at 32). I find this argument belied by the record. Mr. Garfield did challenge zealously Detective Lewis by filing a motion to suppress based on the Detective's actions during the photo line-up and in-person identifications, and fervently cross-examined the Detective both during the suppression hearing and at trial. Mr. Rimmer offers no specifics to support his claim that Mr. Garfield could have done more when challenging Detective Lewis.

[17] At oral argument, counsel all but conceded this point, as she was unable to point to a single instance with any specificity which would have shown an adversely affected performance on the part of counsel.

> We will not find an actual conflict unless [the defendant] can point to specific instances in the record to suggest an actual conflict or impairment of [her interest]. The defendant must make a factual showing of inconsistent interests and must demonstrate that the attorney made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence that favors an interest in competition with that of the defendant. If [the attorney] did not make such a choice, the conflict remained hypothetical.

*Ferrell v. Hall*, 640 F.3d 1199, 1244 (11th Cir. 2011) (citing *Buenoano*, 74 F.3d at 1086 n.6) (quoting *Smith*, 815 F.2d at 1404 (internal citations and quotation marks omitted)). Given that Mr. Rimmer is unable to show that his counsel failed to act based on a conflict and has not shown the Florida Supreme Court's rejection of his conflict-of-interest claim to be an unreasonable application of the law or facts, he is not entitled to habeas relief. Therefore, habeas relief is denied.

**E. Trial Error in Admission of Identification Testimony**

The most damming evidence against Mr. Rimmer was the surviving victims' eyewitness identification. Mr. Rimmer argues that it was trial court error to admit the identifications because they were unduly suggestive. Mr. Rimmer asserts that the detective investigating the murders told witnesses that Mr. Rimmer had been arrested before the line-up and that the detective alerted each of the eyewitnesses that the other eyewitness had picked Mr. Rimmer in the photo line-up. ([DE 1] at 118-121). Trial counsel moved to suppress the identifications and a hearing was held. Mr. Rimmer's motion was denied. He now asserts that the eyewitnesses' in-court identifications did not rest on the witnesses' independent recollection; rather, they relied on "the illegal live line-up." ([DE 1] at 122). Mr. Rimmer contends that both identifications – pre-trial and at trial – were inadmissible because the "the procedures leading up to an eyewitness identification are so defective as to make the identification constitutionally inadmissible as a matter of law." (*Id.* at 39).

This claim was made on direct appeal of Mr. Rimmer's conviction and sentence. The Florida Supreme Court analyzed this claim as to each of the eyewitnesses. The court denied the claim as to both because the out-of-court identifications were not unnecessarily suggestive. *Rimmer*, 825 So. 2d at 316. Applying state law[18] to witness Moore's

[18] The court cited the standard as:

identification, the court found:

> Appellant does not allege that the other persons in the lineup possessed characteristics different than the appellant, such that appellant would stand out. The fact that appellant was the only person in the physical lineup that had also been in the photo spread does not taint Moore's identification because the physical lineup took place on July 13, 1998, two months after the photo spread, and there is no evidence in the record that Moore re-viewed the photo spread shortly before viewing the physical lineup. In fact, Moore testified at the suppression hearing that he did not speak to anyone who also had viewed the live lineup and that he made his selection based on the robbery incident and not the prior photo identification.

*Rimmer,* 825 So. 2d at 317. While the court initially applied the state law standard to Moore's identification, the Florida Supreme Court applied federal law to witness Davis' identification and found:

> Even if we were to find the procedure employed with regard to Davis was unnecessarily suggestive, it does not appear from the totality of the circumstances that the procedure created a substantial likelihood of misidentification, using the five factors mentioned above. *See Neil*, 409 U.S. at 199-200, 93 S. Ct. 375. First, of the three surviving witnesses, Davis had the best opportunity to view the assailant. She initially saw him in the waiting room of the store and later watched him and another load boxes of stereo equipment into appellant's car. Unlike the other victims, Davis had not been

---

> The test for suppression of an out-of-court identification is two-fold: (1) whether the police used an unnecessarily suggestive procedure to obtain the out-of-court identification; and (2) if so, considering all the circumstances, whether the suggestive procedure gave rise to a substantial likelihood of irreparable misidentification. *See Thomas v. State*, 748 So. 2d 970, 981 (Fla.1999); *Green v. State*, 641 So. 2d 391, 394 (Fla.1994); *Grant v. State*, 390 So. 2d 341, 343 (Fla.1980). The factors to be considered in evaluating the likelihood of misidentification include:
>
> > [T]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

*Grant*, 390 So. 2d at 343 (*quoting Neil v. Biggers*, 409 U.S. 188, 199-200 (1972)). If the procedures used by the police in obtaining the out-of-court identification were not unnecessarily suggestive, however, the court need not consider the second part of the test. *See Thomas*, 748 So. 2d at 981; *Green*, 641 So. 2d at 394; *Grant*, 390 So. 2d at 344.

*Rimmer*, 825 So. 2d at 316.

> forced to lie face down on the floor. Davis later provided a description of the assailant to a police sketch artist, which helped the police obtain appellant's identity. Second, her degree of attention was greater than the other witnesses because, as mentioned above, she was not told to lie face down on the floor. Rather, she was able to observe the appellant for the entire episode, which last approximately twenty minutes. Third, Davis's description appears to be an accurate depiction of appellant, despite the fact that she described the assailant as being much shorter than appellant's actual height. As noted above, Davis provided the sketch artist with a description that permitted the police to obtain the identity of appellant. Appellant does not claim that the sketch does not resemble him. Fourth, Davis selected appellant from the photo spread as one of her choices. Thus, the fact that she also picked another photo does not affect her level of certainty because she claimed that the two photos looked alike. Finally, Davis viewed the photo spread just six days after the robbery. Thus, it appears that Davis's out-of-court identification was reliable.

*Id.* at 318. I have reviewed the testimony at both the suppression hearing and trial. Applying AEDPA deference, Mr. Rimmer has not met the difficult standard that applies to federal habeas petitioners. To begin, an analysis of clearly established federal law requires that Mr. Rimmer show a violation of due process. Then Mr. Rimmer must show that the Florida Supreme Court unreasonably applied clearly established federal law.[19] An eyewitness identification may constitute a due process violation if the identification procedures were "unnecessarily suggestive and conducive to irreparable mistaken identification." *Stovall v. Denno*, 388 U.S. 293, 302 (1967). The "central question" is "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." *Neil v. Biggers*, 409 U.S. 188, 199 (1972). The Supreme Court has identified several factors to consider in evaluating "the likelihood of misidentification," including: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the

[19] Clearly established federal law is not the case law of the lower federal courts, including this Court or the Eleventh Circuit Court of Appeals. Instead, in the habeas context, clearly established federal law 'refers to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state court decision.' " *Putman v. Head*, 268 F.3d 1223, 1241 (11th Cir. 2001) (alteration in original) (*quoting Williams*, 529 U.S. at 362, 120 S. Ct. 1495).

confrontation. *Id.* at 199-200.

Given the foregoing United State Supreme Court precedent, I cannot say that the state court's rejection of Mr. Rimmer's claim is objectively unreasonable in light of the facts in the record. While I do not condone the conduct of the detective during the line-ups, a review of the record shows that Ms. Davis, who had the best opportunity of anyone during the crime to view Mr. Rimmer, gave a sketch artist enough information to sketch a rendition of the defendant within a very brief period of time after the crime occurred; she later picked Mr. Rimmer out of a photo line-up (albeit after she had selected a different individual first); she also picked Mr. Rimmer out of a live line-up and identified him at trial. Further, Mr. Moore's testimony was unequivocal that Mr. Rimmer was the man he saw shoot the victims. Considering the totality of the circumstances, I do not find that the Florida Supreme Court's determination that the identification was reliable to be an unreasonable application of clearly established federal law, nor was the ruling based on an unreasonable determination of the facts. Even if I were to disagree with the Florida Supreme Court's legal determination, habeas relief may be granted only if the state court's determination of the facts was unreasonable. § 2254(d)(2). Applying this standard, Mr. Rimmer's habeas claim fails.

**F. Violation of *Batson v. Kentucky***

During jury selection, the prosecution exercised a peremptory challenge to exclude juror Gwendolyn Sthilaire from the jury panel. According to Mr. Rimmer, because Ms. Sthilaire was a racial minority, defense counsel requested that the State provide a race neutral reason for the exclusion. ([DE 1] at 132). The prosecutor stated that he felt Ms. Sthilaire's inability to answer an inquiry regarding the death penalty concerned him. The prosecutor recited Ms. Sthilaire's answer as being "that's the mystery question." ([DE 1] at 132). The trial judge accepted the State's reasoning and sustained the peremptory challenge. Mr. Rimmer argues here that this was factually incorrect because that was not, in fact, Ms. Sthilaire's response. Mr. Rimmer further agues that, on direct appeal, the Florida Supreme Court added an extra burden to the defense contrary to clearly established federal law. (*Id.* at 132).

The Florida Supreme Court rejected this claim on direct appeal because: (I) Mr. Rimmer's counsel did not object, (ii) this issue was not preserved for appellate review because Mr. Rimmer accepted the jury as selected and did not renew an objection concerning Ms. Sthilaire prior to the jury being sworn thereby abandoning the claim, (iii) Mr. Rimmer also failed to preserve this issue for review because he did not challenge the State's race-neutral reason for the strike – the trial court in this instance cannot be faulted for accepting the facial reason offered by the State, especially where the State's factual assertion went unchallenged by the defense. *See Rimmer*, 825 So. 2d at 321.

The State responds that since the Florida Supreme Court denied this claim because counsel failed to preserve this claim for appellate review, this Court is likewise precluded from review. ([DE 12] at 127). It is argued that the denial by the Florida Supreme Court constitutes "an independent state law ground barring habeas relief and Rimmer has not plead cause and prejudice for the default." (*Id.*). Mr. Rimmer challenges this by arguing that the Florida Supreme Court's determination was objectively unreasonable and its factual findings are rebutted by clear and convincing evidence because "a timely objection to the dismissal of Sthilaire was lodged with a request for a race neutral reason for the State's peremptory challenge." ([DE 1-1] at 133) (footnote omitted).

This claim, as drafted in the instant Petition, is riddled with inaccurate and incomplete statements of fact. Worse, it selectively challenges the decision of the Florida Supreme Court without citing the entire opinion, omitting portions that are not favorable to Mr. Rimmer. The entire claim, or the ability to have brought the claim, is based on the false premise that Mr. Rimmer's counsel objected. He did not. The record is clear that the State moved to peremptorily strike Ms. Sthilaire. At that time, counsel for the *co-defendant Mr. Parker* launched an objection. Mr. Rimmer's counsel did not.

Here, Mr. Rimmer states unequivocally that "the *defense* requested that the State provide a race-neutral reason for the excusal" and "a timely objection to the dismissal of Sthilaire was lodged." ([DE1-1] at 133)(emphasis added). Nowhere in the text of this habeas claim does Mr. Rimmer indicate that "the *defense*" was counsel for Mr. Parker, the co-defendant, and not Mr. Rimmer. This comes despite the Florida Supreme Court

explicitly identifying this fact in its opinion.

> *Parker's attorney* objected and asked for a race-neutral reason for the peremptory strike.FN12
>
> > FN12. Appellant's attorney did not object to the State's peremptory strike. For this reason alone, it appears that this issue is not adequately preserved as to the appellant.

*Rimmer*, 825 So. 2d at 319. (emphasis added). Yet, this crucial detail was absent from his federal habeas pleadings. When the State pointed this fact out in their Response, Mr. Rimmer still declined to address it in his Reply. I find this lack of candor disturbing.

Putting aside the Florida Supreme Court's procedural determination regarding whether or not Mr. Rimmer waived this claim for appellate review, this claim is easily denied under a *de novo* review. *Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010) ("Courts can, however, deny writs of habeas corpus under § 2254 by engaging in *de novo* review when it is unclear whether AEDPA deference applies, because a habeas petitioner will not be entitled to a writ of habeas corpus if his or her claim is rejected on *de novo* review, see § 2254(a)."); *see also Allen v. Sec'y, Dept. of Corr.*, 611 F.3d 740, 753 (11th Cir. 2010).

The Supreme Court has enumerated a three-step process for determining whether a *Batson* violation has occurred:

> First, the defendant must make out a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. Second, once the defendant has made out a prima facie case, the burden shifts to the State to explain adequately the racial exclusion by offering permissible race-neutral justifications for the strikes. Third, if a race-neutral explanation is tendered, the trial court must then decide ... whether the opponent of the strike has proved purposeful racial discrimination.

*Johnson v. California*, 545 U.S. 162, 168 (2005) (internal quotation marks, citations, and footnotes omitted). During jury selection at Mr. Rimmer's (and co-defendant Parker's) trial, the State sought to use one of its peremptory challenges to strike Juror Sthilaire. The following dialogue took place:

> MR. MAGRINO (the prosecutor): Strike Sthilaire.
>
> THE COURT: That would be the State's first peremptory challenge. Chiles is in - -

> MR. WILLIAMS (counsel for co-defendant Parker): Hold on a second. We ask for a race neutral reason, pursuant to Melbourne versus State.
>
> MR. MAGRINO: Judge, first one would be when I asked her with regards to the death penalty, she said that's the mystery question. She didn't have an answer. More importantly, number two, she sat on a case before, was a hung jury.
>
> THE COURT: Court finds those to be race neutral reasons, made in good faith, non-pretextual under Melbourne. Objection will be overruled.

([DE 13, Ex. A - R.4] at 380). This was the extent of the exchange regarding Juror Sthilaire. Taking as true Mr. Rimmer's characterization[20] that Mr. Magrino's statement regarding "the mystery question" was an incorrect statement of the facts, the State offered another valid race-neutral reason for moving to strike this juror. Indeed, the prosecutor stated that his second ground for striking Ms. Sthilaire was more important than the first. The fact that Ms. Sthilaire had prior jury service wherein she was unable to reach a verdict is race neutral and the court was well within its province to determine that Mr. Rimmer did not prove purposeful discrimination.[21]

Here, an objection was raised (albeit not from Mr. Rimmer). The State was required to offer a race neutral reason for the strike. It did so. The court found that those reasons were race neutral, made in good faith and non-pretextual. This precludes a determination that the defendant has proven purposeful discrimination. This is precisely how the process should work under *Batson*. Habeas relief is denied. *See Madison v. Comm., Ala. Dep't. of Corr.,* 677 F.3d 1333 (11th Cir. 2012).

**G. Trial Court Error in Admitting Lay Opinion**

Eyewitness testimony was that the gunman was not wearing glasses. As part of his misidentification defense, Mr. Rimmer called multiple witnesses to attest that he is legally

[20] In response to this claim, the State candidly concedes that the prosecutor took out of context the statement regarding "the mystery." ([DE 12] at 133).

[21] Mr. Rimmer has not asserted, therefore, this Order does not address, any pretextual arguments regarding similarly situated jurors.

blind and requires corrective lenses to see close and to drive. In rebuttal, the State sought to have a police officer having similar eyesight, Kenneth Kelley, testify about his own ability (not that of Mr. Rimmer) to see without corrective lenses. The defense objected. The trial court overruled the objection and allowed the officer to testify.[22] ([DE 1] at 137). Thereafter, the officer testified regarding his own ability to drive and work as a police officer without wearing his prescribed corrective lenses. Mr. Rimmer argued the admission of the testimony was error. In the state court, the court said the admission was error but his claim was denied as harmless error.

In the instant Petition, Mr. Rimmer argues that the Florida Supreme Court's harmless error analysis was "contrary to and an unreasonable application of clearly established federal law. ([DE 1] at 146). The State has responded that because "on direct appeal, Rimmer merely asserted that Kelly's rebuttal testimony was irrelevant under section 90.401, FLA. STAT.; he raised no federal constitutional violation" this claim is unexhausted and procedurally defaulted from federal habeas review. ([DE 12] at 137). The State's argument has merit. "All alleged mistakes in the state trial court which were presented in federal court were raised in state courts in some manner. But, only the claims that were raised as federal constitutional issues before the state courts have been exhausted in the state courts." *Snowden v. Singletary*, 135 F.3d 732, 736 n.4. (11th Cir. 1998). The procedural bar is complicated by the fact that the original claim may have been about whether or not the testimony was relevant according to Florida law, but once the Florida Supreme Court determined that it was, in fact, error, then the focused shifted from the relevancy of the testimony to the harmlessness of that error.

> The State argues, however, and we agree, that even though we find the trial court's ruling to be erroneous, the error is harmless in light of the record in this case. Three surviving witnesses saw or heard appellant kill the victims. Two of them identified Rimmer as the shooter. During the car chase just prior to appellant's arrest, appellant threw Moore's wallet and two firearms from the car, all of which tie him to the murder. A videotape from the storage facility shows appellant renting the storage unit that housed the stolen electronic equipment, which had appellant's and Parker's fingerprints on

[22] The trial court has previously sustained an objection during the State's cases in chief but allowed him to testify on rebuttal because Mr. Rimmer opened the door when he raised his vision as an issue.

> them. Based upon the record before us, we agree with the State that there is no reasonable possibility that the erroneous admission of Officer Kelley's testimony contributed to the verdict. *See State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla.1986).

*Rimmer*, 825 So. 2d at 322. Nonetheless, the threshold question before me is whether Mr. Rimmer properly exhausted his claim on direct appeal such that he did "more than scatter some makeshift needles in the haystack of the state court record.' " *McNair v. Campbell,* 416 F.3d 1291 (11th Cir. 2005) (citing *Kelley*, 377 F.3d at 1345 (quoting *Martens v. Shannon*, 836 F.2d 715, 717 (1st Cir. 1988)). A review of the record shows the following: In his initial brief on direct appeal, this claim was captioned:

> THE TRIAL COURT ERRED IN ALLOWING TESTIMONY FROM POLICE OFFICER KENNETH KELLY REGARDING HIS ABILITY TO SEE WITHOUT PRESCRIPTION EYEGLASSES; THE WITNESS' EYESIGHT WAS NOT RELEVANT TO REBUT TESTIMONY THAT ROBERT RIMMER HAD VISION DEFICIENCIES FOR WHICH HE WORE GLASSES.

The scant substantive argument contained in that section addressed only the Florida statute and a hornbook on evidence. The claim concluded by citing "*State v. Taylor*, 648 So. 2d 701, 704 (Fla. 1995) (relevancy has historically referred to whether the evidence has any logical tendency to prove or disprove a fact.)." ([DE 13, Ex. A] at 73). Admittedly, this is a claim about relevancy under Florida law; therefore, Mr. Rimmer made no reference to federal law. More importantly, Mr. Rimmer never mentioned, much less argued, the federal standard for harmless error and why this error was not harmless. He did not cite *Chapman v. California,* 386 U.S. 18 (1967) or *Brecht v. Abrahamson*, 507 U.S. 619 (1993). In truth, a review of the claim made on direct appeal shows Mr. Rimmer only half-heartedly argued error under state law. As such, this claim is unexhausted for purposes of federal habeas review. To exhaust state remedies, a petitioner must fairly present every issue raised in his federal petition to the *state's highest court*. *Castille v. Peoples*, 489 U.S. 346, 351 (1989) (emphasis added). "When a petitioner fails to properly raise his federal claims in state court, he deprives the State of 'an opportunity to address those claims in the first instance" and frustrates the State's ability to honor his constitutional rights.'" *Cone v. Bell*, 556 U.S.

449, 465 (2009) (internal citations omitted).

Ordinarily, a federal habeas corpus petition that contains unexhausted claims is dismissed pursuant to *Rose v. Lundy*, 455 U.S. 509 (1982), allowing Mr. Rimmer to return to the state forum to present his unexhausted claim or claims. However, such a result in this instance would be futile, since Mr. Rimmer's unexhausted claim is now incapable of exhaustion at the state level and would be procedurally barred under Florida law. Mr. Rimmer has already pursued a direct appeal and filed two Rule 3.851 motions in state court, with the denial of the motions affirmed on appeal.[23] Because there are no procedural avenues remaining available in Florida that would allow Mr. Rimmer to return to the state forum and exhaust the subject claim, the claim is likewise procedurally defaulted from federal review. *Collier v. Jones*, 910 F.2d 770, 773 (11th Cir. 1990) (where dismissal to allow exhaustion of unexhausted claims would be futile due to state procedural bar, claims are procedurally barred in federal court as well).

"A State's procedural rules are of vital importance to the orderly administration of its criminal courts; when a federal court permits them to be readily evaded, it undermines the criminal justice system." *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997) (citing 28 U.S.C. § 2254(b)(2)). Claims that are unexhausted and procedurally defaulted in state court are not reviewable by the court unless the petitioner can demonstrate cause for the default and actual prejudice, *Wainwright v. Sykes*, 433 U.S. 72 (1977), or establish the kind of fundamental miscarriage of justice occasioned by a constitutional violation that resulted in the conviction of a defendant who was "actually innocent," as contemplated in *Murray v. Carrier*, 477 U.S. 478 (1986). *See House v. Bell*, 547 U.S. 518 (2006); *Dretke v. Haley*, 541 U.S. 386 (2004); *see also United States v. Frady*, 456 U.S. 152, 168 (1982). Since Mr. Rimmer has not alleged, let alone established, cause to excuse his default, it need not be determined

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

whether he suffered actual prejudice. *See Glover v. Cain*, 128 F.3d 900, 904 n.5 (5th Cir. 1997). Habeas relief is denied.

**H. Mr. Rimmer's Right to Remain Silent**

In his eighth claim for habeas relief, Mr. Rimmer argues that the prosecution violated his Fifth Amendment right to remain silent when his wife was questioned regarding her conversations with Mr. Rimmer about the crimes. In particular, Mr. Rimmer asserts that this right was violated when the prosecutor asked his wife if "she ever asked her husband 'about the double murder' to which she responded in the negative." ([DE 1] at 146). The Florida Supreme Court found that "the State's question comes very close to infringing on appellant's right to remain silent" but ultimately concluded that "the question coupled with the answer was not fairly susceptible of being interpreted by the jury as a comment on the defendant's failure to testify." *Rimmer*, 825 So. 2d at 323. Mr. Rimmer argues that this determination was "objectively unreasonable." ([DE 1] at 147). I reject this argument.

The Fifth Amendment forbids the Government from suggesting to a jury that a defendant's failure to testify may be taken as evidence of guilt. *See United States v. Thompson*, 422 F.3d 1285, 1298–99 (11th Cir. 2005). In *Doyle v. Ohio*, 426 U.S. 610 (1976), the Supreme Court held that it was fundamentally unfair to simultaneously afford a suspect a constitutional right to silence following arrest and yet allow the implications of that silence to be used against him. In order to determine whether a comment upon a defendant's invocation of his right to silence was impermissible, the Florida Supreme Court must have considered whether the statement was manifestly intended to refer to the defendant's silence, or if it was of such character that a jury would "naturally and necessarily" take it to be a comment on the defendant's silence. *See United States v. Dodd*, 111 F.3d 867, 869 (11th Cir. 1997) (quotation omitted). The defendant bears the burden of establishing the existence of one of the two criteria. *United States v. Carter*, 760 F.2d 1568, 1578 (11th Cir.1985). A court must consider the circumstances under which the statement was made. *United States v. Chastain*, 198 F.3d 1338, 1351 (11th Cir.1999).

Here, the Florida Supreme Court reviewed the two questions at issue which were

asked to Mrs. Rimmer on cross-examination. *Rimmer*, 825 So. 2d at 322-23. They are as follows:

> Q: And there are four weeks in a month, four times three is twelve. Times five, that's about sixty times. In say those numerous times you have spoken with the defendant, you never asked him about this particular case, did you?
>
> * * *
>
> Objection made by counsel and moved for a mistrial.
>
> * * *
>
> MR. MAGRINO: In all those conversations, you never asked him about the double murder?
>
> A: No.

([DE 13, Ex. A, R.12] at 1380). Upon review, the Florida Supreme Court considered the question that was directed to Mrs. Rimmer regarding whether or not she asked her husband about the crime and her answer was "No" in context of the testimony, and determined that it was "not fairly susceptible of being interpreted by the jury as a comment" on Mr. Rimmer's failure to testify. *Rimmer*, 825 So. 2d at 323. This is a reasonable application of clearly established federal law. It was certainly reasonable for the Florida Supreme Court to have determined that the question posed, and the answer given, would not have necessarily been taken to be a comment on Mr. Rimmer right to remain silent by the jury. Habeas relief is denied.

**I. Error in Jury Instructions**

Mr. Rimmer was tried, despite defense counsel's motion to sever, along side his co-defendant during the guilt phase of his trial. Each defendant had a separate sentencing hearing. Mr. Rimmer asserts that the trial court erred when it used "the 'and/or' conjunction between the names of Mr. Rimmer and his codefendant, Kevin Parker, in each of the jury instructions charged." ([DE 1] at 64). Citing law from the district courts of appeal in Florida, Mr. Rimmer argues that the use of the "and/or" conjunction in the jury instructions was known error and his appellate counsel was ineffective for failing to raise

this claim on direct appeal.

This claim for federal habeas relief is an ineffective assistance of appellate counsel claim. Claims of ineffective assistance of appellate counsel are governed by the standard articulated in *Philmore v. McNeil*:

> In assessing an appellate attorney's performance, we are mindful that "the Sixth Amendment does not require appellate advocates to raise every non-frivolous issue." *Id*. at 1130-31. Rather, an effective attorney will weed out weaker arguments, even though they may have merit. *See id.* at 1131. In order to establish prejudice, we must first review the merits of the omitted claim. *See id.* at 1132. Counsel's performance will be deemed prejudicial if we find that "the neglected claim would have a reasonable probability of success on appeal." *Id.*

575 F.3d 1251, 1264-65 (11th Cir. 2009). Mr. Rimmer first raised this claim in his state habeas corpus petition. The Florida Supreme Court, analogizing Mr. Rimmer's claim to a similar claim raised in *Garzon v. State*, 980 So. 2d 1038 (Fla. 2008), denied the claim. Likewise, the court also cited *Hunter v. State*, 8 So. 3d 1052 (Fla.2008).

> In light of the strong evidence that linked Rimmer to the crimes, the use of the principals and multiple defendants instructions, and the use of separate verdict forms, we conclude that Rimmer has not demonstrated that the use of the "and/or" conjunction in the jury instructions constituted fundamental error. *See also Hunter v. State*, 8 So. 3d 1052 (Fla.2008) (holding that under the totality of the circumstances, the use of the "and/or" conjunction, while erroneous, did not constitute fundamental error). As a result, counsel cannot be deemed ineffective, and Rimmer is not entitled to relief.

*Rimmer*, 59 So. 3d at 791. Mr. Rimmer's direct appeal was denied in 2002.

The issue before the Florida Supreme Court was whether Mr. Rimmer's appellate counsel was ineffective for failing to raise a claim of error as to the jury instructions on direct appeal and, if so, whether Mr. Rimmer was prejudiced. Therefore, I find that the use of 2008 precedent by the Florida Supreme Court to analyze Mr. Rimmer's claim that his counsel's performance was deficient in June of 2000 (when his direct appeal was filed) was unreasonable. It is axiomatic that counsel cannot be found deficient for failing to foresee changes in the law. *See, e.g., Spaziano v.* Singletary, 36 F.3d 1028, 1039 (11th Cir.1994) ("We have held many times that '[r]easonably effective representation cannot and does not

include a requirement to make arguments based on predictions of how the law may develop.'") (citations to three other Eleventh Circuit decisions omitted); *Davis v. Singletary*, 119 F.3d 1471, 1476 (11th Cir. 1997) ("[i]t was not professionally deficient for [counsel] to fail to anticipate that the law in Florida would be changed in the future to bar the admission of hypnotically induced testimony."); *see also Pitts v. Cook*, 923 F.2d 1568, 1572-74 (11th Cir. 1991); *Thompson v. Wainwright*, 787 F.2d 1447, 1459 n.8 (11th Cir. 1986) ("defendants are not entitled to an attorney capable of foreseeing the future development of constitutional law"). Nonetheless, even under a *de novo* standard of review, Mr. Rimmer's claim fails.

First, trial counsel did not object to the jury instruction using "and/or" between Mr. Rimmer and Mr. Parker's names. Therefore, in order to raise this claim on appeal in the Florida courts, appellate counsel would have had to argue that the error was fundamental error. *Sochor v. State*, 619 So. 2d 285 (Fla. 1993). However, even if there was fundamental error, this claim was still subject to a harmless error analysis. *Davis v. State*, 804 So. 2d 400, 405 (Fla. Dist. Ct. App. 2001) (citing *Anderson v. State*, 780 So. 2d 1012, 1014 (Fla. Dist. Ct. App. 2001)). After a review of the jury instructions as given, I find that, perhaps, the jury could have been misled by the instructions such that it could have found that Mr. Rimmer was guilty of the elements of the crimes based on the conduct of Mr. Parker. However, because the evidence at trial implicated Mr. Rimmer as the more culpable of the two defendants, the error was harmless or, at least, it would have been reasonable for appellate counsel to have reached that conclusion such that his performance was not deficient for failing to raise it on direct appeal. "Appellate counsel is not ineffective for failing to raise claims reasonably considered to be without merit." *United States v. Nyhuis*, 211 F.3d 1340, 1344 (11th Cir. 2000) (quotation marks omitted).

Even if appellate counsel thought that the instructions were given in error, without an objection to preserve the issue for appeal, appellate counsel would have to conduct and argue a harmless error analysis. It is not deficient for appellate counsel to have considered that argument to have been without merit. Counsel cannot be deemed deficient for failing to raise a nonmeritorious argument. *See DeYoung v. Schofield*, 609 F.3d 1260, 1283 (11th Cir.2010) (observing that in order to ascertain whether appellate counsel was ineffective in

failing to raise, or in inadequately raising, a claim of trial-counsel ineffectiveness, a court must "review the merits of the omitted [or inadequately raised] claims"); *Owen v. Sec'y for Dep't of Corr.*, 568 F.3d 894, 915 (11th Cir.2009) (holding that if issues are without merit, "any deficiencies of [appellate] counsel in failing to raise or adequately pursue them cannot constitute ineffective assistance of counsel"). Habeas relief is denied.

## V. CONCLUSION

For the aforementioned reasons, it is hereby **ORDERED and ADJUDGED** that Robert Rimmer's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 [DE 1] is **DENIED**. All pending motions, if any, are **DENIED** ***as moot***.

A Certificate of Appealability is **GRANTED** as to Claim III: Due Process Violation Pursuant to *Brady v. Maryland:*

> Whether or not the Florida Supreme Court's determination that the FDLE and Palm Beach County police reports were not exculpatory or impeaching was unreasonable and, if so, were those reports material?

The undersigned is persuaded that Mr. Rimmer has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claim or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citation omitted).

The Clerk of the Court shall **CLOSE** this case.

**DONE and ORDERED** in Chambers at Miami, Florida this 29th day of September 2014.

Marcia G. Cooke

MARCIA G. COOKE
United States District Judge

Copies furnished to:
*Counsel of record*