UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ROBERT IRA PEEDE,

Petitioner,

v. CASE NO. 6:08-cv-732-Orl-22KRS

ATTORNEY GENERAL, STATE OF FLORIDA, et al.,

Respondents.

ORDER

This case is before the Court on the Petition for Habeas Corpus Relief (Doc. No. 1) filed by Robert Ira Peede. Pursuant to the instructions of the Court, Respondents filed a Response to Petition for Writ of Habeas Corpus (Doc. No. 18). Thereafter, Petitioner filed a Reply to the Response (Doc. No. 21). As discussed hereinafter, the habeas petition is granted in part and denied in part.

I. STATEMENT OF FACTS

The facts adduced at trial, as set forth by the Supreme Court of Florida, are as follows:

> Intent on getting Darla[1] to come back to North Carolina with him to act as a decoy to lure his former wife Geraldine and her boyfriend Calvin Wagner to a motel where he could kill them, Peede, on March 30, 1983, traveled from Hillsboro, North Carolina, to Jacksonville, Florida, on his motorcycle. He sold his motorcycle near Ormond Beach, took a cab to the airport, and flew to Miami. He attempted to call Darla at her daughter's

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[1] Darla Peede, the victim, was Petitioner's third wife.

residence several times, each time speaking with Darla's daughter Tanya because Darla was not at home. At 5:15 p.m., he called back and spoke with Darla who agreed to pick him up at the airport. Prior to leaving for the airport, however, Darla left very strict instructions with Tanya to call the police if she was not back by midnight and to give them the license plate number of her car because she may have been forced into the car. She was afraid of being taken back to North Carolina and being put with the other people he had threatened to kill. She gave Tanya the telephone numbers of Geraldine and the police in Hillsboro, North Carolina. She left her residence with only her purse and took no other belongings that would evidence her intention not to return home that evening. Although she would normally call Tanya if she were going somewhere and not coming back for the evening, Tanya received no such call.

According to Peede, when Darla picked him up at the airport, she informed him that she planned to go back to her apartment and then to the beach the next day. He then directed her to drive north on Interstate 95, but, after gassing up Darla's car, they mistakenly got on the turnpike heading for Orlando. As they left the Miami area and the song "Swinging" came on the radio, Peede took his lock-blade knife and inflicted a superficial cut in Darla's side. In his confession, Peede described his belief that Darla and Geraldine had mutually advertised for sexual partners in a nationally publicized, pictorial "Swinger" magazine which he had seen while imprisoned in California.

Peede said that on the way to Orlando they stopped and picked up a hitchhiker who drove the car while they had intercourse in the backseat. The hitchhiker was dropped off in Orlando and Peede drove east on I-4 toward Daytona Beach. As they drove, the conversation again returned to the subject of Peede's belief that Geraldine and Darla had advertised in "Swinger" magazine. Approximately five to six miles outside of Orlando, Peede stopped the car on the shoulder of the road, jumped into the backseat, and, with his lock-blade hunting knife, stabbed Darla in the throat which resulted in her bleeding to death within five to fifteen minutes. Still determined to get back to North Carolina to kill Geraldine and Calvin, he proceeded up I-95. He left Darla's body in a wooded area in Camden, Georgia, and he threw the murder weapon out of the car window on his way to North Carolina. When he returned to his home in Hillsboro, North Carolina, he decided that he would kill Geraldine and Calvin while they were on their way to work. He loaded his shotgun and placed it beside

the door. Before he could carry out his plan, the police arrived, and he was arrested. Darla's heavily bloodstained car was parked at his residence. In addition to his lengthier confession to the authorities, Peede wrote out and had witnessed the following short confession:

> My name is Robert Peede, on March 31, 1983, I killed my wife Darla, by stabbing her in the neck with a Puma folding knife. This occurred on Hwy. 4 (interstate) about six miles east of Orlando Fla., in the back seat of Darla's 71 Buick.
>
> I ask for the death penalty in this crime, to be carried out as soon as possible.
>
> Robert Peede
>
> D.O.B. 6-30-44

Darla's body was found in the woods. She had a stab wound in the throat area which continued into the chest and into the superior vena cavae, a second stab wound nine inches below her shoulder in her side, and bruising on various parts of her legs and arms which the medical examiner characterized as defensive bruising. The contusions on her wrists evidenced a struggle.

Peede v. State, 474 So. 2d 808, 809-10 (Fla. 1985) (footnote added) ("*Peede I*").

II. PROCEDURAL HISTORY

Petitioner was charged by indictment with one count of first-degree murder. A jury trial was conducted, after which Petitioner was found guilty as charged. A penalty proceeding was conducted, and the jury recommended by a vote of eleven to one that the trial court impose the death penalty upon Petitioner. Thereafter, following the jury's recommendation, the trial judge imposed a sentence of death, finding three aggravating circumstances - (1) Petitioner had previously been convicted of two felonies involving the

use or threat of violence to another person, (2) Petitioner committed the murder while engaged in the commission of kidnaping, and (3) the offense was committed in a cold, calculated, and premeditated manner ("CCP") - and one statutory mitigating circumstance - Petitioner was under the influence of extreme mental or emotional disturbance at the time of the murder.

On direct appeal, Petitioner raised approximately eight claims. The Supreme Court of Florida reversed the trial court's finding of the CCP aggravator but affirmed Petitioner's conviction and sentence. *Peede I*, 474 So. 2d at 817-18. Petitioner filed a petition for writ of certiorari with the Supreme Court of the United States, which was denied. *Peede v. Florida*, 477 U.S. 909 (1986).

Petitioner filed a state postconviction motion pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. The state trial court summarily denied the motion, and Petitioner appealed. The Supreme Court of Florida affirmed in part and reversed for the trial court to conduct an evidentiary hearing on some of Petitioner's claims. *Peede v State*, 748 So. 2d 253 (Fla. 1999) ("*Peede II*"). After the evidentiary hearing, the trial court denied the remaining claims. Petitioner appealed, and the Supreme Court of Florida affirmed. *Peede v. State*, 955 So. 2d 480 (Fla. 2007) ("*Peede III*"). Petitioner further filed a state petition for writ of habeas corpus in the Supreme Court of Florida, which was denied. *Id*.

After filing the instant petition for writ of habeas corpus, Petitioner filed a

successive motion for postconviction relief in the state court. (Ex. O-8.) The instant case initially was stayed pending resolution of the motion. (Doc. No. 25.) The Court subsequently reopened the case on reconsideration. (Doc. No. 31.) Thereafter, the Supreme Court of Florida affirmed the state trial court's denial of Petitioner's successive Rule 3.850 motion. *Peede v. State*, 94 So. 3d 500 (Fla. 2012).

III. GOVERNING LEGAL PRINCIPLES

Because Petitioner filed his petition after April 24, 1996, this case is governed by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Penry v. Johnson*, 532 U.S. 782, 792 (2001); *Henderson v. Campbell*, 353 F.3d 880, 889-90 (11th Cir. 2003). The AEDPA "establishes a more deferential standard of review of state habeas judgments," *Fugate v. Head*, 261 F.3d 1206, 1215 (11th Cir. 2001), in order to "prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002); *see also Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (recognizing that the federal habeas court's evaluation of state-court rulings is highly deferential and that state-court decisions must be given the benefit of the doubt).

A. Standard of Review under the AEDPA

Pursuant to the AEDPA, habeas relief may not be granted with respect to a claim adjudicated on the merits in state court unless the adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as

> determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The phrase "clearly established Federal law," encompasses only the holdings of the Supreme Court "as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000); *see also Schwab v. Crosby*, 451 F.3d 1308, 1324 (11th Cir. 2006) (stating that the federal law relevant to this analysis is the Supreme Court precedent "in existence at the time the conviction became final").

"[S]ection 2254(d)(1) provides two separate bases for reviewing state court decisions; the 'contrary to' and 'unreasonable application' clauses articulate independent considerations a federal court must consider." *Maharaj v. Sec'y, Dep't of Corr.*, 432 F.3d 1292, 1308 (11th Cir. 2005). The meaning of the clauses was discussed by the Eleventh Circuit Court of Appeals in *Parker v. Head*, 244 F.3d 831, 835 (11th Cir. 2001):

> Under the "contrary to" clause, a federal court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the United States Supreme Court] on a question of law or if the state court decides a case differently than [the United States Supreme Court] has on a set of materially indistinguishable facts. Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the United States Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case.

If the federal court concludes that the state court applied federal law incorrectly, habeas relief is appropriate only if that application was "objectively unreasonable." *Id.*

Finally, under § 2254(d)(2), a federal court may grant a writ of habeas corpus if the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." A determination of a factual issue made by a state court, however, shall be presumed correct, and the habeas petitioner shall have the burden of rebutting the presumption of correctness by clear and convincing evidence. *See Parker*, 244 F.3d at 835-36; 28 U.S.C. § 2254(e)(1).

B. Standard for Ineffective Assistance of Counsel

The Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668 (1984), established a two-part test for determining whether a convicted person is entitled to relief on the ground that his counsel rendered ineffective assistance: (1) whether counsel's performance was deficient and "fell below an objective standard of reasonableness"; and (2) whether the deficient performance prejudiced the defense.[2] *Id*. at 687-88. A court must adhere to a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id*. at 689-90. "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id*. at 690; *Gates v. Zant*, 863 F.2d 1492, 1497 (11th Cir. 1989).

[2]In *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993), the Supreme Court clarified that the prejudice prong of the test does not focus solely on mere outcome determination; rather, to establish prejudice, a criminal defendant must show that counsel's deficient representation rendered the result of the trial fundamentally unfair or unreliable.

As observed by the Eleventh Circuit Court of Appeals, the test for ineffective assistance of counsel:

> has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial. Courts also should at the start presume effectiveness and should always avoid second guessing with the benefit of hindsight. *Strickland* encourages reviewing courts to allow lawyers broad discretion to represent their clients by pursuing their own strategy. We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.

White v. Singletary, 972 F.2d 1218, 1220-21 (11th Cir. 1992) (citation omitted). Under those rules and presumptions, "the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between." *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994).

Additionally, it is well established that a defendant has the right to effective counsel on appeal. *Alvord v. Wainwright*, 725 F.2d 1282, 1291 (11th Cir. 1984). The Eleventh Circuit Court of Appeals has applied the United States Supreme Court's test for ineffective assistance at trial to guide its analysis of ineffective assistance of appellate counsel claims. *Heath v. Jones*, 941 F.2d 1126, 1130 (11th Cir. 1991); *Matire v. Wainwright*, 811 F.2d 1430, 1435 (11th Cir. 1987). Thus, in order to establish ineffective assistance of appellate counsel, Petitioner must show (1) that counsel's performance was deficient and "fell below an objective standard of reasonableness" and (2) that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687-88.

C. Exhaustion and Procedural Default

One procedural requirement set forth in the AEDPA precludes federal courts, absent exceptional circumstances, from granting habeas relief unless the petitioner has exhausted all means of available relief under state law. 28 U.S.C. § 2254(b); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842-43 (1999); *Picard v. Connor*, 404 U.S. 270, 275 (1971). Specifically, the AEDPA provides, in pertinent part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that–
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> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B) (i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1). Thus, a federal court must dismiss those claims or portions of claims that have been denied on adequate and independent procedural grounds under state law. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991), *holding modified by Martinez v. Ryan*, 132 S. Ct. 1309 (2012). In addition, a federal habeas court is precluded from considering claims that are not exhausted but would clearly be barred if returned to state court. *Id*. at 735 n.1 (stating that if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred, there is a

procedural default for federal habeas purposes regardless of the decision of the last state court to which the petitioner actually presented his claims).

In order to satisfy the exhaustion requirement, a state petitioner must "fairly presen[t] federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (citing *Picard*, 404 U.S. at 275-76) (internal quotation marks omitted). The Supreme Court of the United States has observed that "Congress surely meant that exhaustion be serious and meaningful." *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992). Furthermore, the Court explained:

> [c]omity concerns dictate that the requirement of exhaustion is not satisfied by the mere statement of a federal claim in state court. Just as the State must afford the petitioner a full and fair hearing on his federal claim, so must the petitioner afford the State a full and fair opportunity to address and resolve the claims on the merits.

Id.; *see also Henderson v. Campbell*, 353 F.3d 880, 898 n.25 (11th Cir. 2003) ("Both the legal theory and the facts on which the federal claim rests must be substantially the same for it to be the substantial equivalent of the properly exhausted claim.").

Procedural default will be excused only in two narrow circumstances. First, a petitioner may obtain federal review of a procedurally defaulted claim if he can show both "cause" for the default and actual "prejudice" resulting from the default. *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999). "To establish 'cause' for procedural default, a petitioner must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in the state court." *Wright v. Hopper*, 169 F.3d 695,

703 (11th Cir. 1999). To establish "prejudice," a petitioner must show that there is at least a reasonable probability that the result of the proceeding would have been different. *Henderson*, 353 F.3d at 892 (citations omitted).

The second exception, known as the "fundamental miscarriage of justice," only occurs in an extraordinary case, where a "constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. 478, 496 (1986). Actual innocence means factual innocence, not legal insufficiency. *Bousley v. United States*, 523 U.S. 614, 623 (1998). To meet this standard, a petitioner must "show that it is more likely than not that no reasonable juror would have convicted him" of the underlying offense. *Schlup v. Delo*, 513 U.S. 298, 327 (1995). In addition, "'[t]o be credible,' a claim of actual innocence must be based on [new] reliable evidence not presented at trial." *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schlup*, 513 U.S. at 324).

IV. ANALYSIS

A. Claim I

Petitioner alleges that his absence from critical stages of his trial violated his Sixth, Eighth, and Fourteenth Amendment rights. Specifically, Petitioner asserts: 1) that his rights were violated when he was forcibly removed from the courtroom for a short period after he caused a disruption during the cross-examination of a witness, and 2) that his waiver of his right to be present at trial was invalid because it was not knowing,

intelligent and voluntary. (Doc. No. 4 at 3-5). Petitioner raised these issues in his direct appeal. This Court will address each argument in turn.

First, Petitioner contends that the trial court erred when it removed him from the courtroom during the cross -xamination of Geraldine Peede, Petitioner's ex-wife, because "[t]he court did not have the discretion to evict the defendant without warning from his own capital trial for such a trivial and respectful violation of courtroom decorum." (Doc. No. 4 at 4.) Petitioner claims that the trial judge should have either admonished him to conduct himself properly or obtained Petitioner's waiver of his right to be present. *Id*.

On appeal, the Supreme Court of Florida found "no reversible error in the removal of Peede from the courtroom for the brief period of the completion of the cross examination of Geraldine." *Peede I*, 474 So. 2d at 815. A review of the record and applicable federal case law supports the state court's conclusion.

During *voir dire*, Petitioner asked to be excused from attending trial. The trial court informed him that it was in his best interests to be involved in the trial and denied the request. (Ex. A-2 at 253-54.) During trial, Petitioner, through his attorneys, informed the court that he did not wish for his step-daughters to be cross-examined by the defense. (Ex. A-4 at 605.) Defense counsel told the court that "if we proceeded to cross examine the [step-daughter], [it] would create, cause [Petitioner] to be somewhat disruptive." *Id.* at 605. Before cross-examination of Petitioner's ex-wife, Petitioner

stated that he wanted it to be in the record that he did not want her cross-examined. *Id*. at 631. Petitioner's counsel proceeded to cross-examine the witness but was interrupted by Petitioner who stated:

> Your Honor, excuse me. Ladies and gentlemen of the jury, I apologize. I apologize for what I'm saying or interrupting the Court. I don't want the witness cross examined. Going against my, what I need or what I want. And the people are not representing, they're not doing anything I want them to do. They're going against everything that I want done. I don't want this woman cross examined.

Id. at 632-33. At this point, Petitioner was escorted from the courtroom, and the court noted that "because of his disruptions or interruptions of the procedures, [Petitioner] has been taken out of the courtroom." *Id*. at 633. Petitioner was returned to the courtroom after the conclusion of his ex-wife's cross-examination. *Id*. at 638.

A criminal defendant has the right under the Sixth Amendment to be present in the courtroom during his trial. *Illinois v. Allen*, 397 U.S. 337, 338 (1970). However, a defendant may lose that right if he

> insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.

Id. at 343.

In the instant case, the trial judge found that Petitioner's behavior was disruptive enough that his brief removal from the courtroom was necessary. Notably, the trial

court had been warned by defense counsel that Petitioner would become disruptive if his step-daughters were subjected to cross-examination. Subsequently, when counsel began cross examination of Petitioner's ex-wife, Petitioner warned the court that he did not want her cross-examined and made an outburst during her cross-examination. As such, Petitioner's behavior disrupted the courtroom proceedings, and Petitioner's brief removal from the courtroom was not constitutional error. *Allen*, 397 U.S. at 343; *see also Norde v. Keane,* 294 F.3d 401, 413 (2d Cir. 2002) (defendant not denied his right to be present when removed from courtroom after twice interrupting jury selection process with "objections"); *United States v. Kizer*, 569 F.2d 504, 506-07 (9th Cir. 1978) (defendant was properly removed from courtroom when, after receiving warning, she continued to speak out, interrupting prosecutor's final argument to jury).

Moreover, even if Petitioner's removal from the courtroom was error, the error was harmless. *See Rushen v. Spain,* 464 U.S. 114, 118-19 n. 2 (1983) ("[T]he right to be present during all critical stages of the proceedings . . . [is] subject to harmless error analysis[.]"). Under a harmless error analysis, habeas corpus relief is granted only if the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 622 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). Petitioner was returned to the courtroom immediately after the cross and re-direct examinations of Geraldine Peede were completed. Removal of Petitioner for this brief period allowed his defense attorneys to effectively cross-

examine one of the State's witnesses. When viewed in context of the whole trial, the absence of Petitioner for this brief period did not have a substantial and injurious effect or influence in determining the jury's verdict; thus it was harmless error.

Next, Petitioner alleges that the waiver of his right to attend trial was not knowing, intelligent, and voluntary because the trial court never informed him of the specific rights he was giving up. Specifically, Petitioner argues that the court should have informed him that he was waiving his rights to: 1) confront witnesses against him; 2) to participate in his own defense; and 3) to testify on his own behalf.

The Supreme Court of Florida, applying *Illinois v. Allen*, determined that Petitioner's waiver was knowing and voluntary:

> Peede made it very clear that he did not want to be in the courtroom and that he would physically resist any effort to bring him back into the courtroom. Such conduct on Peede's part would have prejudiced him in the eyes of the jury. A defendant, even in a capital case, should not be forced to this extreme before he is allowed to voluntarily absent himself from the presence of the court.
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> In this case, the trial court took every precaution to ensure that Peede's waiver was knowing and voluntary and not due to illness or coercion of any nature. It carefully instructed the jury as to Peede's absence so as to avoid any prejudice to Peede for his having made the voluntary decision to absent himself from the courtroom. We find that the trial court did not exceed its authority or abuse its discretion.

Peede I, 474 So. 2d at 815. After reviewing the record, this Court cannot say that the state court's determination that Petitioner's waiver was knowing and voluntary was unreasonable. *See Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) ("The question under

AEDPA is not whether a federal court believes that state court's determination was incorrect, but whether that determination was unreasonable - a substantially higher threshold."). Furthermore, Petitioner has not shown that the state court proceedings 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. 28 U.S.C. § 2254(d).

When Petitioner was returned to the courtroom after the conclusion of his ex-wife's testimony, he once again requested the trial judge to allow him to be absent from the trial proceedings because he did not feel well.[3] (Ex. A-4 at 662-63.) The judge told Petitioner that, if he was still unwell after lunch, he may make arrangements for his absence. *Id*. at 663. Upon returning from lunch, defense counsel told the court that Petitioner refused to attend trial. *Id*. at 664-65. The court noted that Petitioner had told corrections officers, the bailiff, and his defense counsel that he would physically resist being brought into court. *Id*. at 667.

The trial judge then moved the proceedings to the Orange County jail in order to determine whether Petitioner's waiver of his right to be present at trial was knowing, voluntary, and intelligent and uninfluenced by illness. The following colloquy transpired:

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[3]Petitioner told the court that "when they come to get me if I feel like I do now, going to have to bring me down on a stretcher because I'm not going to get out of bed." (Ex. A-4 at 663.)

THE COURT: Mr. Peede, we need to talk to you a little bit about the remainder of your trial.

I've talked to your attorneys, in particular, Mr. DuRocher, indicated you are, don't want to participate anymore in the trial in the courtroom. I wanted to make sure this is a voluntary action on your part. And I want to make sure you understand or I understand that you, indeed, do not wish to participate further.

MR. PEEDE: Yes, sir. You know, when I talked to you down in the courtroom I was trying to tell you then I wouldn't be back.

THE COURT: Are you feeling ill? Or is it just a matter you'd rather not be in the trial?

MR. PEEDE: At first I was feeling ill health wise, but, you know, after I had eaten and all, I feel okay health wise; just mentally I can't handle it, I, I just --

THE COURT: Can't handle further participation in the trial you mean?

MR. PEEDE: I don't mean any disrespect to my lawyers or to you or to anybody else.

The whole, you know, the whole thing went against my wishes. And it's just mentally messing with me so bad that I [sic] rather not be any part of it. I [sic] rather be away from it.

THE COURT: I want you to understand you are waiving your right to be present at all times during the Court proceedings?

MR. PEEDE: Yes, sir, that's fine. That's what I'd like.

THE COURT: You say you're not feeling ill at this time? This is just a decision you're making because it's your desire?

MR. PEEDE: Yes, sir.

THE COURT: Have you been taking any medication or anything else that would interfere with your ability to make clear and intelligent decisions?

MR. PEEDE: I was on medication until the day the trial started or the day that was, the jury was being picked. And then I was taken off of it.

THE COURT: What type of medication was it?

MR. PEEDE: I really didn't know what it was.

THE COURT: Sedative?

MR. PEEDE: At first it was something for depression, and then it was something to relax and sleep.

THE COURT: But you haven't had anything that would affect your ability to think clearly or make decisions?

MR. PEEDE: I don't think so.

THE COURT: Anyone threatened you in any way or offered anything to you to have you not participate any further in this trial?

MR. PEEDE: No, sir.

THE COURT: Has anyone consulted with you at all about this decision? Or is it simply a decision you're making on your own?

MR. PEEDE: It's my own decision.

THE COURT: Sum it up by saying you'd rather be in your cell while this is going on?

MR. PEEDE: Yes, sir.

THE COURT: I'll respect your request in that regard.

MR. REIS: [prosecutor] Ask the Court to ask him one other question, whether or not he wishes for his attorneys to continue the proceedings on his behalf in view of his unhappiness with apparently the strategy that's- -

MS. SEDGWICK: [prosecutor] I think a more proper way, if a short recess of a couple of hours- -

> THE COURT: Do you think if we adjourn court for a while and start back up again your thinking would be different about this?
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> MR. PEEDE: I had rather the trial continue on since the people are here from the other states, and, you know, going to be time consuming and the financial part and all on the State and all, I rather you go ahead and try the matter and get it over with.
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> THE COURT: Any indication you might be feeling different about this either tomorrow or the next day?
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> MR. PEEDE: No, sir, I rather you just go ahead and try it.
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> THE COURT: Mr. DuRocher and Mr. Bronson [defense attorneys] would be proceeding to- -
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> MR. PEEDE: Yes, sir, I realize.
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> THE COURT: -- to defend you even though you're not there. Is that your desire? Do you want them to continue on?
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> MR. PEEDE: Yes, sir, I feel they've started the trial, they should finish it.
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> THE COURT: Anything further? Thank you, Mr. Peede. You'll be taken back to your cell.

Id. at 669-673. Petitioner's defense counsel, noting that the trial court "went to great lengths to question [Petitioner] on the voluntariness of this waiver", requested a mistrial or, alternatively, a jury instruction to explain Petitioner's absence. *Id.* at 674. Furthermore, defense counsel stated that, because he would not be present, Petitioner would not be able "to participate in his defense, he will not be able to consult with his attorneys, provide any advice or input into his representation." *Id.* The trial court denied counsel's motion for a mistrial but agreed to instruct the jury not to consider

Petitioner's absence in any way as an indication of disrespect to the Court or jury or counsel. The trial court made specific findings for the record:

> [F]rom the opportunity I had to see and talk to Mr. Peede in the jail facility, I'm satisfied that his decision not to be present for further proceedings in this case is a consideration or a decision that's made after weighing the consequences; it's a free and voluntary decision on his part, and it's not prompted by any illness that he may have or any outside factors being exerted upon him.
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> He has indicated on two or three prior occasions during the jury selection process and the trial proceedings in this case that he simply does not wish to be present any further.
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> There is no indication this is a temporary desire on his part or that a continuance would lead to a different decision, or if the case were continued for a while he would change his mind.
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> [He] has indicated he does realize the trial will go forward without his presence, and he does understand that. . . .
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> Mr. Peede does realize that his attorneys will continue acting on his behalf during these proceedings.
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> I'm going to be denying the request [for] a mistrial [to] be declared, because the natural consequences of such a ruling, when considered overall, would be that any individual accused before the Court in a trial would be able to successfully block his prosecution simply by saying he doesn't wish to be present. And that would be the effect of granting a mistrial.
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> Under the circumstances that we have in this case, the Court is satisfied that Mr. Peede simply does not wish to be here, and that it's a conscious decision being made on his part with full appreciation of the consequences.

Id. at 675-76. Finally, the trial court cautioned the jury that Petitioner's absence should not be held against him because it constituted an exercise of his right to not be present at

trial. *Id.* at 678-79.

Whether a waiver is knowing and intelligent is determined by the particular facts and circumstances of the case, "including the background, experience, and conduct of the accused." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Petitioner asserts that the state court failed to explicitly enumerate the rights he was giving up by absenting himself from trial. However, Petitioner has not pointed to clearly established federal law that requires the court to explicitly warn a defendant of every possible consequence of his choice to absent himself from trial. The trial court informed Petitioner that he was waiving his right to be present at all times during the court proceedings, and it is axiomatic that, if not present, Petitioner would be unable to confront witnesses against him and to otherwise participate in his defense.

Equally unavailing is Petitioner's assertion that the court failed to obtain his waiver of his right to testify. Although it is well established that a criminal defendant has a constitutional right to testify at trial, a trial court has no *sua sponte* duty to explain to a criminal defendant that he has a right to testify or to conduct an on the record inquiry into whether a defendant has waived the right knowingly, voluntarily, and intelligently. *Rock v. Arkansas*, 483 U.S. 44, 49 (1987); *United States v. Van der Walker*, 141 F.3d 1451, 1452 (11th Cir. 1998). Furthermore, it is the responsibility of defense counsel, not the court, to advise the defendant of his right to testify. *United States v. Teague*, 953 F.2d 1525, 1534 (11th Cir. 1992). The *Teague* court noted that "it would be inappropriate to require the

trial court to discuss this choice with the defendant. Such a requirement would unnecessarily intrude into the attorney-client relationship and could unintentionally influence the defendant in his or her choice."[4] *Id.* at 1533 n.8.

Petitioner next alleges that his waiver was not intelligent because he was mentally ill. Petitioner further asserts that his waiver was involuntary because the state court failed to properly address his request to represent himself.[5]

Petitioner cites no clearly established federal law indicating that mental illness is dispositive when determining the validity of a waiver of the right to be present at trial. Such law does not appear to exist. In the context of waiver of other constitutional rights, courts have determined that mental illness is a factor the trial court must consider when ruling on the validity of a waiver. *Cooper v. Griffin*, 455 F.2d 1142 (5th Cir. 1972) ("The Supreme Court has repeatedly emphasized that mental deficiency, age, and lack of familiarity with the criminal process are important factors to be considered in determining whether there has been a waiver of constitutional rights."). Those cases have emphasized that mental impairment is only a factor to be weighed and is not

[4]An ineffective assistance of counsel claim is the appropriate manner for a criminal defendant to raise an alleged violation of his right to testify. *Teague*, 953 F.2d at 1534. Petitioner has not raised such a claim. However, assuming he had raised a claim of ineffective assistance, it is clear from the record that defense counsel discussed with Petitioner his ongoing absence and lack of participation in the trial (Ex. A-4 at 846, 848), and Petitioner has not shown he was prejudiced.

[5]To the extent Petitioner is arguing that the trial court erred by not allowing him to represent himself, the argument will be addressed under claim two *infra*.

dispositive. *Colorado v. Connelly*, 479 U.S. 157, 164 (1986) ("[C]ourts have found the mental condition of the defendant a . . . significant factor in the voluntariness calculus. But this fact does not justify a conclusion that a defendant's mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional voluntariness."); *see also United States v. Gaddy*, 894 F.2d 1307 (11th Cir. 1990) (defendant's waiver of *Miranda* was knowing and intelligent, notwithstanding his mental illness*); Dunkins v. Thigpen*, 854 F.2d 394 (11th Cir. 1988) (mental retardation by itself does not prevent a defendant from voluntarily and intelligently waiving *Miranda* rights).

The record indicates that the trial court inquired of and considered Petitioner's mental health when determining whether he voluntarily waived participation at trial. The trial court inquired as to whether Petitioner was on any medication that would affect his ability to think clearly or to make decisions, and Petitioner indicated that he was not. Furthermore, as discussed more fully in claim five, prior to trial Dr. Robert Kirkland evaluated Petitioner and determined that he was competent to proceed to trial. As such, given the totality of the circumstances, the Court cannot conclude that the state court failed to consider Petitioner's mental health, and Petitioner's argument that mental illness rendered his waiver of the right to be present at trial involuntary is unavailing. Accordingly, claim one is denied pursuant to 28 U.S.C. § 2254(d).

B. Claim Two

Petitioner alleges that the trial court erred when it denied Petitioner his right to self-representation. Specifically, Petitioner asserts that 1) the court did not make the proper inquiries pursuant to *Faretta v. California,* 422 U.S. 806 (1975) (Doc. No. 4 at 1); and 2) even if the trial court conducted a proper *Faretta* inquiry, the trial court should have permitted Petitioner to represent himself (Doc. No. 4 at 9).

Petitioner raised these issues on direct appeal, and the Supreme Court of Florida denied relief on the ground that Petitioner had not made an unequivocal request to represent himself. *Peede I*, 474 So. 2d at 815-16. The court reasoned that Petitioner did not clearly and unequivocally make a request for self-representation:

> The record demonstrates that Peede's request to represent himself did not arise from any wish to conduct his entire trial in a particular manner but rather arose from a dispute with his counsel as to whether they should seek a continuance in order to obtain psychiatric examinations of him and to interview a number of witnesses residing in other southern states. These things counsel felt were necessary to the defense. Peede's main objection was that he did not want a continuance because he wanted to go forward with his trial and get it over with. After hearing, the trial court concluded that Peede's acting as his own counsel would not secure him a fair trial at that point in time. Convinced that Peede's main objection to counsel was the continuance, the trial court determined that no unequivocal waiver had taken place and decided that the continuance was clearly warranted in order to prepare a sufficient defense.

Peede I, 474 So. 2d at 815-16.

In *Faretta*, the Court held that a defendant has a right under the Sixth and Fourteenth Amendments to proceed without counsel if he *clearly and unequivocally* asks

to do so. 422 U.S. at 806. The Court concluded, however, that because the right recognized in *Faretta* entails a concomitant waiver of the right to counsel, defendants are permitted to exercise the right of self-representation only if the waiver of the right to counsel is knowing and intelligent. *Id.* at 835. Once the right to self-representation has been asserted clearly and unequivocally, a trial court is required to conduct an inquiry to determine whether the criminal defendant's decision to represent himself is knowing, intelligent, and voluntary. *Stano v. Duggar*, 921 F.2d 1125, 1144 (11th Cir. 1991). Therefore, a trial court must first determine whether a defendant made an unequivocal request for self-representation, and, if he did not, a *Faretta* hearing is not necessary.

In the instant case, the state court's determination that Petitioner's request was not unequivocal is a factual finding entitled to a presumption of correctness by this Court unless rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). The record supports the state court's finding that Petitioner did not make an unequivocal request to represent himself. Consequently, Petitioner has failed to rebut the state court's finding.

It is clear from the record that Petitioner's request to dismiss defense counsel was an attempt to circumvent counsel's request for a continuance rather than an unequivocal expression of his desire to represent himself. *See* Ex. A-10 at 1431, 1437. The trial court properly questioned Petitioner extensively regarding his reasons for seeking dismissal of counsel, his knowledge of the case, the witnesses to be questioned, his educational level, and his legal knowledge. *See* Ex. A-10 at 1440-41. Petitioner's answers to the trial

court's questions did not demonstrate an unequivocal desire to represent himself; rather they demonstrated a disinterest in the trial proceedings and showed only that Petitioner objected to counsel's request for a continuance because Petitioner wanted to "get it over with." *Id.* at 1438. Moreover, Petitioner's reliance on counsel when presenting his request to the court indicates ambivalence regarding his desire for self-representation. *See, e.g., Cross v. United States*, 893 F.2d 1287 (11th Cir. 1990) (record evidenced that defendant, though stating that he wished to represent himself at trial, did not actually wish to proceed *pro se* – therefore, request not unequivocal). Federal courts have held that a trial court may deny a request for self-representation when the request is made for the purposes of manipulation because, in such cases, the request is not clear and unequivocal. *See United States v. Bush*, 404 F.3d 263, 271-72 (4th Cir. 2005) (denial of motion for self-representation warranted because request was manipulative); *United States v. Frazier-El,* 204 F.3d 553, 560 (4th Cir. 2000) (A trial court must be permitted to distinguish between a manipulative effort to present particular arguments and a sincere desire to dispense with the benefits of counsel); *United States v. Cash*, 47 F.3d 1083 (11th Cir. 1995) (whether defendant is trying to manipulate the events of trial is a relevant factor in determining waiver). In light of the record, the Court concludes that Petitioner did not unequivocally invoke his right to self-representation so as to warrant a *Farretta* hearing. *See, e.g., Brown v. Wainwright*, 665 F.2d 607, 610 (5th Cir. 1982) (noting that a trial court should not quickly infer that a defendant unskilled in the law has waived

counsel and opted to conduct his own defense; instead, the trial court has a duty to evaluate the circumstances of a request to determine whether it is an unequivocal one).

Even had Petitioner unequivocally asserted a right to self-representation, Petitioner's conduct after the initial request demonstrates that he waived that right. The right to self-representation may be waived through a defendant's subsequent conduct indicating that he is vacillating on the issue or that he has abandoned his request altogether. *Chapman v. United States*, 553 F.2d 886, 893 n.12 (5th Cir. 1977); *see also United States v. Bennett*, 539 F.2d 45 (10th Cir. 1976); *United States v. Montgomery*, 529 F.2d 1404 (10th Cir. 1976). Although a defendant need not "continually renew his request to represent himself even after it is conclusively denied by the trial judge", he must pursue the matter diligently. *Brown*, 665 F.2d at 612; *see also Raulerson v. Wainwright*, 732 F.2d 803, 809 (11th Cir. 1984). Petitioner never demonstrated a continuing desire to conduct his own defense. When presented with an opportunity to renew his request for self-representation prior to voir dire, Petitioner declined to do so, and in fact, indicated that he wanted counsel to represent him. *See* Ex. A-1 at 37-38. Furthermore, during trial, Petitioner reiterated his desire for counsel to complete the trial even though he declined to attend. (Ex. A-4 at 672-73.) Petitioner's expressed desire for counsel was a clear abandonment of his initial request for self-representation. Consequently, Petitioner has failed to demonstrate that the state court's denial of this claim was contrary to, or an unreasonable application of, clearly established federal law or based on an unreasonable

determination of the facts in light of the evidence presented at the state court proceedings. Accordingly, claim two is denied pursuant to 28 U.S.C. § 2254(d).

C. Claim Three

Petitioner asserts that counsel rendered ineffective assistance during the penalty phase of his trial. In support of this claim, Petitioner argues generally that counsel failed to (1) investigate and call witnesses to testify concerning Petitioner's childhood and mental health history, (2) obtain and provide background information and records to the mental health expert, and (3) review and provide materials regarding Petitioner's prior felony convictions and incarceration in California to the mental health expert.

Petitioner raised this claim in his Rule 3.850 motion, and the state court conducted a hearing on the claim after which it denied relief. The Supreme Court of Florida affirmed the state trial court's decision. *See Peede III*, 955 So. 2d at 489-94. In concluding that counsel's performance was not deficient, the state court reasoned that Petitioner failed to assist counsel by providing background information; nevertheless, counsel employed an investigator and interviewed Petitioner's family and friends. *Id.* at 493. As to counsel's failure to provide Dr. Kirkland with sufficient background information to allow him to adequately evaluate Petitioner, the state court determined that Dr. Kirkland was able to provide favorable testimony for the defense based solely on his two interviews of Petitioner. *Id.* The state court concluded, therefore, that counsel's performance, although imperfect, was adequate to meet the requirements of

Strickland. *Id.* at 493.

The state court further determined that even if counsel was deficient, Petitioner failed to establish prejudice. The state court reasoned:

> the proffered mitigation developed in the evidentiary hearing would have been countered by the substantial negative aspects of Peede's character and past brought out by the mitigation witnesses and by the established aggravators in this case. Additionally, Peede has not demonstrated prejudice by Dr. Kirkland's lack of background information because Dr. Kirkland's essential views would not have changed, and further, the mitigator of extreme mental or emotional disturbance was considered by the trial court due to Dr. Kirkland's testimony. In fact, the experts at the evidentiary hearing essentially agreed with many of Dr. Kirkland's main findings. Although this Court found that the CCP aggravator was not supported by the evidence, the trial court found two other substantial aggravators based on Peede having been previously convicted of two felony crimes involving the use or threat of violence, one of these crimes being second-degree murder, and the murder being committed in the commission of kidnapping. In sum, we find no error by the trial court in concluding that Peede has not demonstrated prejudice, and we affirm the trial court's denial of this claim.

Id. at 494.

To determine whether counsel's performance was lacking at the penalty phase, courts must consider "'whether counsel reasonably investigated possible mitigating factors and made a reasonable effort to present mitigating evidence to the sentencing court.'" *Stewart v. Sec'y, Dep't of Corr.*, 476 F.3d 1193, 1209 (11th Cir. 2007) (quoting *Henyard v. McDonough*, 459 F.3d 1217, 1242 (11th Cir. 2006)). "[C]ounsel's decision not to investigate and develop favorable evidence must be reasonable and fall within the range of professionally competent assistance. Strategic choices to forego further

investigation into an issue are not deficient when a reasonable professional judgment based on a sufficient initial inquiry supports the decision to terminate the investigation." *Lynd v. Terry*, 470 F. 3d 1308, 1316-17 (11th Cir. 2006) (citing *Strickland*, 466 U.S. at 690-91). Counsel is deficient when he or she "'totally fails to inquire into the defendant's past or present behavior or life history' in a capital case. . . ." *Lynd*, 470 F.3d at 1317 (quoting *Housel v. Head*, 238 F.3d 1289, 1294 (11th Cir. 2001)); *see also Jackson v. Herring*, 42 F.3d 1350, 1367 (11th Cir. 1995) (holding representation is deficient when counsel does not conduct sufficient investigation to formulate an adequate life profile of a defendant).

"To determine prejudice from the unreasonable failure to investigate and present favorable and/or mitigating evidence, '[federal courts] reweigh the evidence in aggravation against the totality of available mitigating evidence.'" *Ward v. Hall*, 592 F.3d 1144, 1165 (11th Cir. 2010) (quoting *Wiggins v. Smith,* 539 U.S. 510, 534 (2003)). The Court must "evaluate the totality of the available mitigation evidence – both that presented at trial and at the collateral proceedings." *Id.* (citing *Williams,* 529 U.S. at 397-98).

i. Penalty Phase Evidence

During the penalty phase, the State presented evidence of Petitioner's prior felony convictions involving the use or threat of violence: 1978 convictions for second degree murder and assault with a deadly weapon in California. (Ex. A-6 at 927-29, 934.) John Anderson ("Anderson"), the prosecutor from the California case, testified that the circumstances surrounding the convictions stemmed from an altercation in a bar between

Petitioner and the victims. *Id*. at 931. Petitioner shot one victim in the head and torso, killing him, and shot the other victim in the shoulder. *Id*. at 932. Anderson noted that friends and relatives submitted letters concerning Petitioner's sentencing that were part of the court record in the California case. *Id.* at 935-36. On cross-examination, Joseph DuRocher ("DuRocher"), one of Petitioner's attorneys, elicited testimony from Anderson that one of the arguments advanced by Petitioner in defense of the convictions was that he was coming to the assistance of a woman who was being ejected from the bar. *Id.* at 938. DuRocher also asked Anderson if the letters from Petitioner's family and friends were considered by the court in imposing Petitioner's sentence, and Anderson confirmed that they were. *Id*.

Austin Backus ("Backus"), an eyewitness to the California shootings, testified that he observed two men involved in a fight outside a bar during which one of the men hit the other one with a pool stick and then ran away. *Id*. at 941. While the individual who had been hit with the pool stick remained on the ground in front of the bar, another individual came out of the bar to offer assistance to the man. *Id*. at 942. Several seconds later, a van came around the corner of the bar, slowed almost to a stop, and the driver of the van fired approximately six shots. *Id*. at 943.

Defense counsel called Dr. Robert Kirkland as a witness. Dr. Kirkland, a psychiatrist who had been practicing more than twenty years, testified that he evaluated Petitioner on two occasions. *Id*. at 949. Dr. Kirkland opined that when Petitioner

murdered Darla Peede, he was under the influence of extreme mental and emotional disturbance. *Id*. at 950. In reaching his opinion, Dr. Kirkland indicated that he considered both of his interviews with Petitioner and Petitioner's personal history regarding his health, life and life style, marriages, successes and failures, and previous problems, particularly in relation to his second and third wives. *Id*. at 950-51. Dr. Kirkland noted that sleep deprivation was a factor in Darla Peede's murder as Petitioner had been without sleep for two days at the time of the offense. *Id*. at 951. When asked if Petitioner had any recognizable mental illness, Dr. Kirkland responded:

> I felt, and I continue to feel, that Mr. Peede has certain, certain type of character structure that his maybe in lay terms, he's sort of a tough guy, macho, explosive at times.
>
> But I was most impressed with certain rather strong paranoid elements that developed into a scenario involving two wives, and which I think played a large part in Darla's death.

Id. at 951-52. On cross-examination, the prosecutor questioned Dr. Kirkland regarding how he reached his assessment. *Id*. at 954-55. Dr. Kirkland stated that his first meeting with Petitioner lasted an hour and thirty minutes and his second meeting lasted approximately forty minutes. *Id*. at 954. Dr. Kirkland indicated that he (1) did not interview anyone who had known Petitioner concerning his day-to-day behavior, (2) did not speak with any witnesses regarding Petitioner's behavior during or after the murder in California, and (3) did not review any medical records or records from the California case. *Id*. at 954. Dr. Kirkland said that he only considered information given to him by

Petitioner. *Id*. Dr. Kirkland testified that Petitioner's paranoia related to his idea that Darla Peede was posing in swinger magazines. *Id*. at 955. Dr. Kirkland opined that Petitioner was able to appreciate the consequences of his actions at the time of the murder. *Id*. at 956.

DuRocher offered thirteen letters into evidence from Petitioner's friends and family members. The letters generally indicated that Petitioner was courteous and considerate, came from a good family, and requested mercy. (Ex. A-11.) One letter also noted that Petitioner had health problems as a child. *Id*.

In closing argument, the prosecutor noted that Dr. Kirkland's opinion was reached based solely on his examination of Petitioner. *Id*. at 962. DuRocher argued that the jury should consider as mitigation (1) the thirteen letters asking for mercy, (2) Petitioner was suffering from a serious mental disturbance at the time of the offense, (3) Petitioner is a father who provided for his children, (4) Petitioner had an unhappy life and unhappy marital relationship, and (5) Petitioner's parents were deceased. *Id*. at 965-67. DuRocher stated that Dr. Kirkland could not examine Petitioner's records from mental hospitals and other such records because they did not exist. *Id*. at 965-66.

ii. Rule 3.850 Evidentiary Hearing

At the Rule 3.850 evidentiary hearing, Nancy Wagoner ("Wagoner"), Petitioner's aunt, testified about his childhood. (Ex. E-14 at 222.) Wagoner indicated that Petitioner, who was an only child, had a severe skin condition as a child that caused

blistering and impeded his ability to walk. *Id*. at 234-35. She further stated that Petitioner suffered from scoliosis at the age of twelve, which required him to wear braces. *Id*. at 243. Wagoner testified that Petitioner's mother spanked him sometimes when he would make mistakes on his homework, but Wagoner said Petitioner's mother did not beat him. *Id*. at 238. According to Wagoner, Petitioner married his first wife at the age of sixteen and the couple had a baby shortly thereafter. *Id*. at 244-46. Petitioner's first wife left him approximately one year after they married, and Petitioner subsequently married Geraldine Peede and had two children with her. *Id*. at 245-46. Wagoner testified that Petitioner's mother committed suicide, and Petitioner blamed himself for her death. *Id*. at 248-49. Wagoner said that Petitioner changed after his mother's death, and approximately one year after she died, he moved to California. *Id*. at 250-51.

After Petitioner was convicted of second-degree murder and assault in California, Wagoner visited Petitioner at which time he was crying and told her to leave because "they were going to kill" her. *Id*. at 252. Wagoner further indicated that Petitioner gave her a magazine which he thought contained a picture of Geraldine Peede posing nude. *Id*. at 253. Wagoner testified that Petitioner caused her to fall when he pushed her during an argument shortly before he murdered Darla Peede. *Id*. at 256. Finally, Wagoner stated that she had been willing to testify at Petitioner's trial, but no one asked her to do so. She also noted that Petitioner had a great aunt who was mentally ill. *Id*. at 257.

John Bell ("Bell"), a childhood friend of Petitioner, was called as a witness. During Bell's testimony, Petitioner accused him of sleeping with Geraldine and fathering Petitioner's youngest son. *Id*. at 273-76. After Bell exited the courtroom, Petitioner told the court that he would like to have a gun and for Bell to return. *Id*. at 274. Petitioner subsequently waived his appearance from the hearing and told the court that he was completely opposed to what counsel was doing. *Id*. at 277-89. Bell then testified that Petitioner did not have a lot of friends as a child and was teased as a result of his skin condition. *Id*. at 291-92. Bell said that Petitioner had a bad temper growing up, would get very angry, and had outbursts over a variety of issues. *Id*. at 295. Bell testified that in 1981, Petitioner, who was behaving wildly, falsely accused him of sleeping with Geraldine Peede, causing Bell to be cautious of Petitioner. *Id.* at 296-97, 303, 306. Bell indicated that after Darla Peede's murder, he did not want to be associated with Petitioner and laid low. *Id*. at 308.

Michael Brown ("Brown"), Petitioner's cousin, testified that he, Petitioner, and another cousin, were very close as children and spent summers together. *Id*. at 311-12. Brown stated that Petitioner suffered from blisters that prevented him from playing sports. *Id*. at 313. Brown said that as a teenager, Petitioner was overly aggressive with women and would get mad and make disparaging remarks if they spurned his advances. *Id*. at 315. Brown further recounted instances not involving women in which Petitioner became angry and acted aggressively and irrationally. *Id*. at 315-317, 319-20. Petitioner

also falsely accused Brown of sleeping with Geraldine Peede. *Id.* at 320. Brown indicated that he was never contacted by Petitioner's attorneys prior to his trial and had he been contacted, he would have been willing to testify. *Id*. at 321.

DuRocher testified that he began representing Petitioner in late 1983, along with Theotis Bronson ("Bronson"), who had been representing Petitioner throughout the case. (Ex. E-15 at 378-84.) DuRocher and Bronson conveyed a plea offer of life imprisonment to Petitioner, which he rejected. *Id*. at 383-84. Thereafter, Bronson served as lead counsel. *Id.* at 384-85. DuRocher indicated that an investigator contacted, interviewed, and took statements from individuals prior to DuRocher entering the case. *Id.* at 385. DuRocher stated that Petitioner was the most difficult client he ever represented and did not assist counsel during the trial. *Id*. at 397, 399.

DuRocher handled the penalty phase of the trial. Although he knew that preparation for the penalty phase should have begun when the case was received, DuRocher testified that he had not prepared for Petitioner's penalty phase prior to trial. *Id*. at 391-93, 405. Instead, after the guilt phase and two weeks before the penalty phase, the defense contacted Dr. Kirkland to evaluate Petitioner for the purpose of developing mitigation evidence. *Id*. at 394, 401-02. DuRocher did not furnish Dr. Kirkland with any background records, police reports, or names of witnesses to assist in his evaluation of Petitioner, nor did he provide the investigator with names of any specific individuals to locate. *Id*. at 394, 402-03.

DuRocher testified that he knew of the prior California convictions but did not recall reviewing the police report regarding the case. *Id*. at 407, 457. More specifically, DuRocher did not recall seeing the 1978 statements of John Bell, Eleanor Bell, or Richard Bateman, Petitioner's friends, which were part of the California police report. *Id*. at 408-09. DuRocher recalled communicating with one of Petitioner's uncles and Nancy Wagoner and learning that Petitioner had a normal upbringing. *Id*. at 410, 432. DuRocher indicated that the defense was trying to overcome the aggravating circumstance of the prior murder but that they could not come up with much evidence to do so. *Id*.

DuRocher conceded that at the time of the penalty phase, he did not know of Petitioner's skin condition, scoliosis, discipline by his mother, alcohol and drug abuse, mother's suicide, or feeling of responsibility for her death. *Id*. at 411-12. However, notes contained in the file referenced the suicide of Petitioner's mother. *Id*. at 443-44. DuRocher indicated that they were not able to find witnesses to show Petitioner's deteriorating mental status and that such witnesses would have been highly relevant. *Id*. at 444. DuRocher noted that at the time Petitioner was tried, presenting evidence other than statutory mitigation was novel. *Id*. at 434.

Bronson testified that he had never tried a death penalty case prior to Petitioner's case. *Id*. at 451. Bronson stated that he did not recall seeing the California police report, but he knew about the offense and that Petitioner asserted a claim of self-defense. *Id.* at

457. Like DuRocher, Bronson could not recall seeing the 1978 statements of John Bell, Eleanor Bell, or Richard Bateman. *Id*. at 458. Bronson indicated that Petitioner wanted the case to proceed to trial quickly, resisted counsel's efforts to prepare the case, and maintained he wanted to be executed. *Id*. at 459. Bronson stated that he brought DuRocher into the case to assist him in obtaining information from Petitioner that could be used in mitigation because Petitioner would not communicate such information to him. *Id*. at 462. Bronson knew, however, from Nancy Wagoner about the suicide of Petitioner's mother and that it had impacted Petitioner. *Id*. at 473-74. Bronson also recalled that in July 1983, the investigator spoke with, and prepared a statement from, Delmar Brown, Petitioner's uncle, wherein Brown said that Petitioner appeared to have mental problems starting around the time of the murder in California, but he never received any treatment.[6] *Id*. at 482. Bronson stated that he did not know about Petitioner's skin condition as a child. *Id*. at 471. Bronson did not recall what information, if any, he provided to Dr. Kirkland, including information that Petitioner was described as having several or split personalities and that his mother had committed suicide. *Id*. at 469-70, 492-93. Bronson said that Petitioner never specifically forbade

[6] The investigator's note reflects that Delmar Brown was leery of speaking to the investigator and made the investigator promise he would not tell Petitioner what he had said. (Doc. No. 23 at 163.) Delmar Brown told the investigator that he thought Petitioner had mental problems which began when he killed a man in California, but he could not give any specifics concerning Petitioner's actions because he had not seen Petitioner often in the preceding years. *Id.*

him from presenting evidence during the penalty phase. *Id*. at 472.

Dr. Faye Sultan, a clinical psychologist, testified that she interviewed Petitioner on three occasions, spoke to numerous friends and family members of Petitioner and two of the attorneys associated with the California case, and read the California police report and interview notes from 1987. (Ex. E-19 at 587-91.) Dr. Sultan stated that Petitioner told her that he felt responsible for his mother's suicide in 1977 and said he was not the same after her death. *Id*. at 605. Petitioner believed that Darla Peede had posed in a swinger magazine with Geraldine Peede and was having sex with other men. *Id*. at 609-16. Shortly before Darla Peede's murder, he became violent towards her and began to drink and smoke marijuana heavily, which made him very paranoid. *Id*. at 609-12.

Dr. Sultan noted that she interviewed Wagoner, who told her that Petitioner had two family members who were psychologically impaired and that Petitioner's mother and father were alcoholics. *Id*. at 620-21. Dr. Sultan stated that prior to his California convictions, Petitioner went home to North Carolina and his relatives described him as violent and out of touch with reality. *Id*. at 623. Dr. Sultan testified that Petitioner said that he told his California attorneys that he thought he was going crazy, but he did not receive any psychiatric treatment while incarcerated. *Id*. at 608-09. She further noted that Wagoner's description of Petitioner while in prison in California was evidence of his deteriorating psychological condition. *Id.* at 622.

Dr. Sultan testified that if Dr. Kirkland did not review collateral information, then

his evaluation of Petitioner was deficient. *Id*. at 634-35. Dr. Sultan diagnosed Petitioner with Delusional Disorder, Jealous Type and Paranoid Personality Disorder. *Id*. at 639-52. As explained by Dr. Sultan, her diagnosis of Paranoid Personality Disorder was premised on:

> [A]ll of his relatives, the people that I've talked with, and [Petitioner] himself, have said that from the early days of his adulthood, late adolescence, [Petitioner] has been suspicious, has wondered about the motives of other people, has been easily agitated, has been easy to anger, has frequently, acting out of his belief that other people are going to hurt him, done unusual, aggressive acts, done unusual, self-mutilating acts. It's a pretty consistent picture, I think.

Id. at 653. She stated that Petitioner was paranoid at the time of the California murder. *Id*. at 670, 693; Ex. E-20 at 748.

On cross-examination, Dr. Sultan admitted that Dr. Kirkland described Petitioner as suffering from paranoid disorder. Ex. E-19 at 664-65. Dr. Sultan believed that Petitioner qualified for the statutory mitigators of (1) inability to conform his behavior to the law and (2) the murder was committed while under the influence of extreme mental or emotional disturbance. *Id*. at 657-59. Dr. Sultan indicated that non-statutory mitigation included Petitioner's poor self-esteem, struggle with depression, substance abuse, childhood illnesses, emotional and physical abuse as a child, his mother's suicide, and extreme remorse. *Id*. at 661-64.

Dr. Brad Fisher, a clinical psychologist, testified that he evaluated Petitioner in 2000 to determine his competency and in 2003 to determine his overall psychological

condition. (Ex. E-20 at 777-79.) Dr. Fisher diagnosed Petitioner as suffering from "a Delusional Disorder of a paranoid jealous type. . . ." *Id*. at 784, 820. Dr. Fisher indicated that he felt Dr. Kirkland's testimony was deficient because although he discussed Petitioner's paranoia and delusion, he did not explain how they related to the crime. *Id*. at 790-91. Dr. Fisher concluded that Petitioner was delusional at the time of the murder and that both statutory mental health mitigators of extreme emotional disturbance and inability to conform conduct applied. *Id*. at 787, 197. Dr. Fisher stated that the background information Petitioner provided was reliable except for the area in which he was delusional. *Id*. at 806. Dr. Fisher further noted that there was no indication that Petitioner suffered from schizophrenia, despite a reference to such a diagnosis while Petitioner was incarcerated in California. *Id.* at 817. Dr. Fisher also stated that Petitioner may have been suffering from some delusional thinking when he shot the people in California, but he did not know because the shootings in California were "a very different event" from Petitioner's loss of contact with reality during Darla Peede's murder. *Id*. at 798-99.

Dr. Sidney Merin, a psychologist called by the State, testified that Petitioner would not allow Dr. Merin to examine him. (Ex. E-21 at 875-83.) However, Dr. Merin reviewed numerous records and diagnosed Petitioner with a Paranoid Personality Disorder with borderline antisocial features. *Id*. at 892. Dr. Merin indicated that Petitioner did not suffer from a delusional disorder and opined that Petitioner knew the

wrongfulness of his actions when he murdered Darla Peede and was capable of conforming his behavior to the requirements of the law. *Id*. at 893-900. Dr. Merin indicated that the murder in California did not have anything to do with delusions, but the California incident supported his conclusion that Petitioner suffered from Paranoid Personality Disorder. *Id*. at 904-06. Dr. Merin further noted that there was no evidence that Petitioner was schizophrenic. *Id*. at 894. Dr. Merin disagreed with Dr. Kirkland's finding of the emotional distress mitigator because

> [t]o experience severe and emotional distress that would prompt an individual to kill somebody else, this mental and emotional distress would have to be beyond, over and above, the normal behavior of this individual, so-called normal behavior. . . . [Petitioner] had always been this type of individual, an angry, aggressive individual who was unsatisfied with a lot of things.

Id. at 907-08. Dr. Merin testified that in 1984 it would have been typical for a psychiatrist to interview the client, take his or her history, and do a mental health status examination, as Dr. Kirkland did. *Id*. at 911-12. Dr. Merin further stated that no manual existed in 1984 that gave the parameters for what constituted an adequate examination. *Id*. at 925. Dr. Merin agreed, however, that Dr. Kirkland did not explain to the jury the events of Petitioner's background, including the suicide of Petitioner's mother and his skin condition. *Id.* at 946-47. Dr. Merin disagreed with Dr. Kirkland's finding of a statutory mitigator but stated Dr. Kirkland's diagnosis that Petitioner had a paranoid disorder was consistent with his diagnosis. *Id*. at 912-13.

Dr. David Frank, a psychiatrist called by the State, testified that he interviewed

Petitioner three times and spent approximately nine hours with him. *Id*. at 957-62. Dr. Frank diagnosed Petitioner with Delusional Disorder, Jealous Type, and a personality disorder with antisocial and borderline features or traits. *Id.* at 967-68. Dr. Frank opined that neither mental illness prevented Petitioner from knowing the wrongfulness of his actions. *Id*. at 969-70. In support of his opinion, Dr. Frank relied on the facts that Petitioner tried to take Darla Peede to the hospital, tried to hide her body, and was afraid of being caught. *Id*. Dr. Frank believed that the statutory mitigator that the murder was committed while Petitioner was under extreme mental and emotional disturbance applied but did not believe that the statutory mitigator of inability to conform his behavior to the law applied. (Ex. E-22 at 986-87, 992.) Dr. Frank stated that he did not observe any evidence of Paranoid Personality Disorder. *Id*. at 1002-04. Dr. Frank also noted that the DSM III, which was used in 1984, included a paranoid disorder, which is now called a delusional disorder. *Id*. at 1010.

iii. Consideration of Claim

Petitioner maintains that had counsel adequately investigated and provided background evidence to Dr. Kirkland or called witnesses to testify regarding his background, then the jury could have considered mitigation evidence that (1) Petitioner suffered a severe skin condition and scoliosis as a child, (2) Petitioner suffered physical abuse as a child, (3) his mental health began to deteriorate after his mother committed suicide, (4) he was suffering from a mental illness at the time he committed the prior

felony convictions in California, (5) at the time of the murder he was unable to conform his conduct to the law based on his mental impairment (statutory mitigator), and (6) at the time of the murder he was under the influence of extreme emotional and mental disturbance (statutory mitigator). Petitioner contends that the state court's denial of this claim is contrary to, or an unreasonable application of, *Strickland*, and its progenies - *Wiggins v. Smith*, 539 U.S. 510 (2003) and *Rompilla v. Beard*, 545 U.S. 374 (2005).

As explained by the Eleventh Circuit,

> "Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult." *Id.* at 788. "Where the highly deferential standards mandated by *Strickland* and AEDPA both apply, they combine to produce a doubly deferential form of review that asks only whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Downs v. Sec'y, Fla. Dep't of Corr.*, 738 F.3d 240, 258 (11th Cir. 2013) (quotation marks omitted), *pet. for cert. filed,* No. 13–1356 (U.S. May 8, 2014). "The question is not whether a federal court believes the state court's determination under the *Strickland* standard was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Knowles,* 556 U.S. at 123, 129 S. Ct. at 1420 (quotation marks omitted). If there is "any reasonable argument that counsel satisfied *Strickland*'s deferential standard," then a federal court may not disturb a state court decision denying the claim. *Richter,* 131 S. Ct. at 788.

Mendoza v. Sec'y, Fla. Dep't of Corr., 761 F.3d 1213, 1236 (11th Cir. 2014). Furthermore, when the petitioner asserts that his trial counsel "should have done something more, [federal courts] first look at what the lawyer did in fact." *Id.* at 1237 (quoting *Bishop v. Warden, GDCP,* 726 F.3d 1243, 1257 (11th Cir. 2013)). To determine whether a reasonable probability exists that the petitioner would have received a different sentence absent

counsel's performance, "a reviewing court must '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.'" *Debruce v. Comm., Ala. Dep't of Corr.,* 758 F3d 1263, 1267 (11th Cir. 2014) (quoting *Porter v. McCollum*, 558 U.S. 30, 41 (2009)).

The Eleventh Circuit has noted that "*Williams*, *Wiggins*, *Rompilla,* and *Porter* . . . do not provide separate standards and rules governing attorney competence; rather, they provide illustrative 'application[s] of the principles elucidated in *Strickland* to a novel set of facts.'" *Anderson v. Sec'y, Fla. Dep't of Corr*., 752 F.3d 881,903 (11th Cir. 2014) (quoting *Newland v. Hall*, 527 F.3d 1162, 1197 (11th Cir. 2008)). Therefore, these cases are relevant only to the extent they might show that "counsel, confronted with circumstances like those presented at the time and place of [the petitioner's] trial, failed to adhere to the standard of reasonable representation." *Id*. at 904.

In *Rompilla*, the Court determined that counsels' performance was constitutionally deficient because they failed to examine the record in petitioner's prior felony cases, which would have revealed life history mitigation evidence. 545 U.S. at 383. Counsel's duty to review the prior felony case stemmed from their knowledge the prosecutor would use the petitioner's history of felony convictions and violence as an aggravator in support of the death penalty. *Id.* "Thus, *Rompilla* stands for the proposition that a reasonably competent counsel will investigate a prior felony conviction it knows the prosecution will

rely upon in seeking the death penalty." *Blankenship v. Hall*, 542 F.3d 1253, 1277 (11th Cir. 2008).

Wiggins involved a case in which counsel failed to consider possible mitigation strategies despite being on notice of their existence. Counsel received a one-page description of the petitioner's personal history in the presentence report, which included reference to the petitioner's "misery as a youth" and described his background as "disgusting." *Wiggins,* 539 U.S. at 523 (internal quotation marks omitted). Counsel further had a record from the department of social services which indicated that the petitioner's mother "was a chronic alcoholic," the petitioner "was shuttled from foster home to foster home," and "on at least one occasion, [the petitioner's] mother left him and his siblings alone for days without food." *Id.* at 525. Counsel did not investigate these leads although "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses." *Id.*

The record in this case demonstrates that prior to the penalty phase either defense counsel or an investigator had spoken to Petitioner, Delmar Brown, and Nancy Wagoner about Petitioner's background. From these individuals, information was obtained that Petitioner's mother had committed suicide, her death had a significant impact on Petitioner, his family questioned his mental condition as early as the time of his California convictions, and Petitioner felt he had a split personality. *See, e.g.,* App E-30 at 163-64,

180, 190. Although defense counsel was aware that the California convictions would be offered as an aggravating factor, defense counsel did not review the statements of John Bell, Eleanor Bell, or Richard Bateman contained in the California police report, in which they noted *inter alia* the suicide of Petitioner's mother, a change in his personality/mental health, and his skin condition and scoliosis as a child. *See, e.g.*, E-30 at 68, 74, 82. Moreover, there is no indication that counsel provided any records, statements, or information they had obtained concerning Petitioner's background to Dr. Kirkland. Thus, counsel either knew or should have known that Petitioner suffered from childhood illnesses, his mother's suicide substantially impacted him, and his mental health was in question prior to the California offenses.

Had counsel provided this information to Dr. Kirkland or called witnesses to testify regarding Petitioner's family history, childhood, and behavior prior to, and after, the California convictions, the jury would have heard substantially more mitigation evidence than was presented at the penalty phase. The jury would have heard that Petitioner's parents were alcoholics and that Petitioner's childhood illnesses impacted his ability to participate in childhood activities and to develop social relationships. Evidence further could have been presented in mitigation of the California murder, namely that the shooting was indicative of Petitioner's diagnosis of Paranoid Personality Disorder as opined by Dr. Sultan (Petitioner's expert witness) and Dr. Merin (the State's expert witness).

The Supreme Court of Florida concluded that counsel was not deficient in part because Dr. Kirkland was able to provide favorable testimony for Petitioner without the benefit of this evidence. This determination, however, ignores the fact that the prosecution attacked Dr. Kirkland's testimony because his opinion was premised solely on the information self-reported by Petitioner during their two brief meetings. (Ex. A-6 at 953-54.) The prosecution undermined the credibility of Dr. Kirkland's opinion based on his failure to review any records or interview anyone to ascertain Petitioner's behavior before or after Darla Peede's murder. *Id.* Moreover, although Petitioner was a difficult client, he did not prohibit counsel from presenting mitigation evidence at the penalty phase or from providing relevant records and statements to Dr. Kirkland. The Court concludes that the Supreme Court of Florida's determination that counsel did not render deficient performance is an unreasonable application of *Strickland* as illustrated by *Rompilla*.

Turning to the prejudice analysis, in concluding no prejudice resulted, the Supreme Court of Florida determined (1) the mitigation evidence presented at the evidentiary hearing would have been countered by negative aspects of Petitioner's character as brought out by the mitigation witnesses, (2) Dr. Kirkland's essential views would not have changed based on additional background information and Dr. Kirkland was still able to find the extreme mental or emotional disturbance mitigator, and (3) two substantial aggravators were found by the trial court.

Although negative aspects of Petitioner's character, such as his volatile temper and violent behavior, would have been presented had counsel called Wagoner, Bell, and Brown as witnesses, this evidence seemingly would have supported Drs. Sultan and Merin's diagnosis that Petitioner suffered from a Paranoid Personality Disorder and Drs. Fisher, Sultan, and Frank's diagnosis that he suffered from Delusional Disorder. For instance, when Bell testified, Petitioner became irate and subsequently stated he would like to shoot Bell. Petitioner's behavior, however, was the result of his delusion that Bell and others, including Petitioner's family members, had slept with Geraldine Peede. Further, Brown's testimony that Petitioner became angry and acted aggressively and irrationally could have been viewed as indicative of Paranoid Personality Disorder or Delusional Disorder. Consequently, even though negative aspects of Petitioner's character would have been admitted if these witnesses had testified at the penalty phase, this evidence largely would have supported the mental health experts' testimony and not countered the mitigation evidence. Moreover, Dr. Kirkland actually commented on similar negative characteristics of Petitioner at the penalty phase when he said that Petitioner "has certain, certain type of character structure that . . . he's sort of a tough guy, macho, explosive at times." Thus, the jury had already been presented with some of these negative characteristics without any possible medical explanation for their existence.

With respect to Dr. Kirkland's testimony, the Court agrees that there is no

indication that the additional evidence would have changed his opinion that Petitioner suffered from paranoia regarding the infidelity of his wives, which was consistent with the other mental health experts' diagnoses of Delusional Disorder. Nevertheless, had these witnesses testified or had the content of their statements or the statements contained in the California case file been provided to Dr. Kirkland, he could have determined that Petitioner also suffered from Paranoid Personality Disorder. Additionally, Dr. Kirkland would have been apprised that Petitioner's family had a history of mental illness and that Petitioner's mental health had been in deterioration since his mother's suicide. Notably, Dr. Kirkland could have offered an opinion regarding Petitioner's mental health at the time of the California murder. Like Dr. Merin and Dr. Sultan's testimony, such evidence likely would have mitigated, and thus presumably lessened the weight attributed to, one of the two aggravators.

The total mitigation evidence after the evidentiary hearing included that Petitioner suffered from childhood illnesses, his parents were alcoholics, his mental health began to deteriorate after his mother's suicide, he suffered from Paranoid Personality Disorder and Delusional Disorder, he had a family history of mental illness, and he was behaving bizarrely prior to, and after, the California murder. Petitioner's post-conviction experts opined that Petitioner qualified for the statutory mitigator that he was unable to conform his conduct to the requirements of the law at the time of the offense. In contrast, the State's expert witnesses determined that Petitioner did not qualify for this statutory

mitigator. Even discounting this statutory mitigator, however, one statutory mitigator was found to apply, the extreme mental or emotional disturbance mitigator. Had the aforementioned additional mitigation evidence been presented, a reasonable probability exists that the jury would have determined that the prior violent felony aggravator (California convictions) was mitigated, and thus warranted less weight. When considered with the remaining aggravator, that the murder occurred during the commission of a kidnapping, the aggravators were balanced or outweighed by the total mitigation evidence. In short, "[t]his is not a case in which the new evidence would barely have altered the sentencing profile presented to the sentencing judge." *Porter*, 558 U.S. at 41 (internal quotation marks omitted). Instead, if the additional mitigation witnesses had testified about Petitioner's background or had such information been provided to Dr. Kirkland, it would have enabled counsel to present a different picture of Petitioner than the one created by the sole mitigation witness, Dr. Kirkland, who testified at the penalty phase. Reweighing the evidence in aggravation against the totality of available mitigating evidence, the Court concludes that a reasonable probability exists that Petitioner would have received a different sentence absent counsels' failure to investigate and present additional mitigation evidence. Consequently, the Supreme Court of Florida's denial of this claim was an unreasonable application of *Strickland*. Accordingly, habeas relief is granted as to claim three.

D. Claim Four

Petitioner contends that he was denied an adequate mental health examination in violation of *Ake v. Oklahoma*, 470 U.S. 68 (1985).[7] Petitioner raised this claim in his Rule 3.850 motion, and the state trial court denied the claim after an evidentiary hearing. The Supreme Court of Florida affirmed the trial court's ruling, reasoning:

> The circuit court found that Dr. Kirkland's evaluations were appropriate and met the requirements of *Ake*. We find that Peede's claim is without merit. Defense counsel sought the appointment of Dr. Kirkland to evaluate Peede's mental health and competency because he believed Dr. Kirkland was the preeminent forensic psychiatrist in the area in the late 1970s and 1980s. Defense counsel DuRocher testified at the evidentiary hearing that Dr. Kirkland first evaluated Peede for competency long before the State offered Peede a plea deal, and defense counsel Bronson stated that Dr. Kirkland's first report turned up helpful issues for the penalty phase. Although it is true that Dr. Kirkland did not have available to him Peede's records or other background information the evidentiary hearing experts had at their disposal, Dr. Kirkland arrived at conclusions similar to the current experts' findings. For example, Dr. Kirkland testified to the existence of the extreme emotional disturbance statutory mitigator during the penalty phase. Dr. Sultan testified during the evidentiary hearing that Peede fit both the extreme emotional disturbance mitigator and the inability to conform behavior mitigator, but admitted that her findings were similar to Dr. Kirkland's. Dr. Fisher also admitted that Dr. Kirkland's reports contained findings and observations similar to Dr. Fisher's own conclusions.
>
> We have consistently held that a mental health investigation is not rendered inadequate "merely because the defendant has now secured the testimony of a more favorable mental health expert." *Asay*, 769 So. 2d at 986 (citing *Jones v. State*, 732 So. 2d 313, 320 (Fla. 1999); *Rose v. State*, 617 So. 2d 291, 294 (Fla.1993)). Obviously, defense counsel sought Dr. Kirkland's

[7] To the extent claim four alleges that counsel rendered ineffective assistance by failing to provide Dr. Kirkland with background information, this claim is addressed in claim three *supra*.

> appointment because of Dr. Kirkland's reputation. However, there is no guarantee in such a situation that the expert will develop only favorable opinions. In essence, Dr. Kirkland's evaluation produced a "mixed bag" of favorable and unfavorable opinions, but that is always the risk. Finally, as the circuit court noted in its order:
>
> > [I]t appears that much of the difference between Dr. Kirkland's conclusions and those of the current defense experts is semantic. As explained by Dr. David Frank, testifying for the State, the earlier version of the Diagnostic and Statistical Manual (or "D[SM] III") references a "paranoid disorder" that is now referred to in the current version of the Manual (the "DSM-IV-TR") as a "delusional disorder." Therefore, although Dr. Kirkland did not label his diagnosis as a "delusional disorder," it appears that this was simply because he quite appropriately used the term ("paranoia") recognized by the then-current diagnostic manual.
> >
> > In short, we find no abuse of discretion or error in the trial court's ultimate conclusion that the mental health evaluations of Dr. Kirkland were adequate under *Ake*.

Peede III, 955 So. 2d at 495-96.

Pursuant to *Ake*, "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one." 470 U.S. at 74. However, "the State's obligation [does] not go beyond providing the defense with the assistance of one competent psychiatric expert. . . . [A] defendant's constitutional right [does] not include the authority 'to choose a psychiatrist of his personal liking or to receive funds to hire his own.'" *Grayson v. Thompson,* 257 F.3d 1194, 1231 (11th Cir. 2001) (quoting *Ake*, 470 U.S.

at 82-83). The Eleventh Circuit has held that "*Ake* is a due process doctrine, . . . which requires the petitioner in all but the most unusual circumstances to show that he requested from the trial court something in the way of mental health expert assistance that the trial court refused to give him." *Provenzano v. Singletary*, 148 F.3d 1327, 1333-34 (11th Cir. 1998) (citing *Clisby v. Jones*, 960 F.3d 925, 934 (11th Cir. 1992), for the proposition that "Petitioner's claim of a due process violation collapses as soon as one seeks to identify the trial court's ruling that purportedly rendered petitioner's trial fundamentally unfair.").

In the instant case, Petitioner was provided with all that he requested from the trial court in terms of a mental health expert. In fact, DuRocher testified that at the time of Petitioner's trial Dr. Kirkland was recognized as one of the preeminent psychiatrists in the field of forensic psychiatry. (Ex. E-15 at 403.) Dr. Kirkland met with Petitioner on two occasions for a total of approximately two hours. (Ex. A-6 at 954.) Although Dr. Kirkland relied only on Petitioner's self-reporting of his life history to make his assessment, the Court cannot conclude that such action rendered him incompetent so as to violate the requirements of *Ake*.

First, Dr. Merin testified that in 1984 it would have been typical for a psychiatrist to interview the client, take his or her history, and do a mental health status examination, as Dr. Kirkland did. (Ex. E-21 at 911-12.) Furthermore, Dr. Fisher stated that the background information Petitioner provided was reliable except for the area in which he

was delusional, *i.e.*, his perception regarding Geraldine and Darla Peede's infidelity and activities. (Ex. E-20 at 806.) Most importantly, Dr. Kirkland diagnosed Petitioner with a paranoid disorder and testified that he qualified for the statutory mitigator that he was under extreme mental or emotional distress at the time of the murder. As a result, the trial court found the statutory mitigator was applicable. The Court notes that pursuant to the diagnostic standards in place in 1984, Dr. Kirkland's diagnosis was similar to those offered by Dr. Merin, Dr. Sultan, Dr. Fisher, and Dr. Frank in 2004. The fact that Dr. Sultan and Dr. Fisher testified that another statutory mitigator applied, an opinion disputed by Dr. Merin and Dr. Frank, does not render Dr. Kirkland incompetent. *See, e.g., Davis v. Singletary*, 853 F. Supp. 1492, 1538 (M.D. Fla. 1994) ("[S]ubsequent diagnoses more favorable to Petitioner's current legal status do not render unreliable those supplied at the time of trial."). In sum, the Court concludes that Petitioner has failed to demonstrate that the state court's denial of this claim is contrary to, or an unreasonable application of, clearly established federal law, and claim four is denied pursuant to Section 2254(d).

E. Claim Five

Petitioner asserts that counsel rendered ineffective assistance by failing to argue that Petitioner was not competent to proceed to trial. In support of this claim, Petitioner maintains that based on his behavior during the trial, which included him wearing his jail attire and paperclips on his ear, writing an "X" between his eyes, directing

counsel not to question witnesses, and absenting himself from the trial, counsel should have requested additional competency evaluations. Petitioner raised this claim in his Rule 3.850 motion, and the state trial court denied relief after an evidentiary hearing.

In affirming the trial court, the Supreme Court of Florida reasoned:

> Trial counsel DuRocher testified that he never had a client as difficult as Peede, but trial counsel Bronson testified that he never thought Peede was insane or delusional. Dr. Kirkland was first appointed to evaluate Peede's competency prior to trial in 1983. He found that Peede had a paranoid disorder but was not incompetent to stand trial. The original trial judge, Michael Cycmanick, testified at the evidentiary hearing that Peede appeared to be acting freely, voluntarily, and with a clear head when he decided to absent himself from trial. Judge Cycmanick had been involved with competency issues many times before Peede's trial both as a judge and as a defense attorney.
>
> The defense experts at the postconviction evidentiary hearing testified that Peede's delusional disorder was narrowly circumscribed to his belief that his former wives were not faithful to him, and that Peede knew right from wrong. Dr. Fisher testified that Peede only freezes when the subject of the murder comes up. Further, Dr. Merin, the State's expert, specifically testified that Peede was competent to stand trial.
>
> Based on this evidence, we conclude the trial court properly denied this claim after determining that the issue had been addressed in the earlier trial proceedings, and after the evidentiary hearing on this issue. Furthermore, based on this finding, there was no error in the determination that Peede's counsel was not ineffective in presenting the issue of competency to the original trial court.

Peede III, 955 So. 2d at 497-98.

"The due process clause prohibits the trial or guilty plea conviction of a person who is mentally incompetent." *Sheley v. Singletary*, 955 F.2d 1434, 1437 (11th Cir. 1992) (citing *Fallada v. Dugger*, 819 F.2d 1564, 1568 (11th Cir. 1987)). "The legal test for mental

competency is whether, at the time of trial and sentencing, the petitioner had 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and whether he had 'a rational as well as factual understanding of the proceedings against him.'" *Adams v. Wainwright*, 764 F.2d 1356, 1360 (11th Cir. 1985) (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960)).

A petitioner seeking federal habeas relief on the grounds of incompetency bears a heavy burden. *Sheley*, 955 F.2d at 1438. "The standard is: '[c]ourts in habeas corpus proceedings should not consider claims of mental incompetence to stand trial where the facts are not sufficient to positively, unequivocally, and clearly generate a real, substantial, and legitimate doubt as to the mental capacity of the petitioner.'" *Id.* (quoting *Reese v. Wainwright*, 600 F.2d 1085, 1091 (5th Cir. 1979)). To establish prejudice resulting from counsel's failure to investigate and pursue a claim of incompetency, the defendant must demonstrate that "a real, substantial, and legitimate doubt" existed concerning his mental competency at the time of his trial. *Adams*, 764 F.2d at 1367; *see also Oats v. Singletary,* 141 F.3d 1018, 1025 (11th Cir. 1998) (concluding that the defendant failed to demonstrate prejudice concerning his claim that counsel was ineffective for failing to adequately argue he was incompetent to proceed because the defendant failed to demonstrate that "there [was] a reasonable probability that the trial judge would have determined that [he] was incompetent to stand trial").

It is clear that prior to trial, Petitioner was evaluated by Dr. Kirkland and found to

be competent. Further, at the Rule 3.850 evidentiary hearing, defense counsel testified regarding Petitioner's behavior prior to, and during, trial. DuRocher testified that Petitioner was the most difficult client that he recalled ever representing. (Ex. E-15 at 397.) DuRocher stated that Petitioner was manipulative and did not assist defense counsel during his trial. *Id*. at 399-400. DuRocher qualified his statement, however, by noting that Petitioner had the ability to assist counsel with his defense but refused to do so. *Id*.

Likewise, Bronson testified that Petitioner was unwilling to assist in the preparation of a defense, always admitted his guilt, and indicated he wanted to be executed. *Id*. at 459-61. Bronson requested a competency evaluation prior to trial in order to cover all bases. *Id*. at 461. Dr. Kirkland evaluated Petitioner and determined that he was competent to proceed to trial. At the Rule 3.850 hearing, Dr. Merin testified that Petitioner was competent at the time of his trial. (Ex. E-21 at 907.) Similarly, Dr. Frank testified that there was no evidence that Petitioner was incompetent at the time of trial. *Id*. at 978.

In light of Dr. Kirkland's finding that Petitioner was competent to proceed to trial, defense counsel's testimony concerning Petitioner's ability to assist during the trial, and Drs. Merin and Frank's testimony concerning Petitioner's competency, this Court concludes that the facts are not sufficient to positively, unequivocally, and clearly generate a real, substantial, and legitimate doubt as to Petitioner's mental capacity at the

time of trial. As such, Petitioner has not established he was prejudiced by trial counsel's failure to raise the issue of Petitioner's competency. The state court's finding that Petitioner failed to demonstrate that he was incompetent is a factual finding entitled to a presumption of correctness. *See, e.g., Oats*, 141 F.3d at 1025 (citing *Demosthenes v. Baal*, 495 U.S. 731, 735 (1990); and *Maggio v. Fulford*, 462 U.S. 111, 117 (1983)). Accordingly, claim five is denied pursuant to Section 2254(d).

F. Claims Six and Seven

In claim six, Petitioner asserts that the State withheld exculpatory evidence in violation of *Brady v. Maryland*.[8] Specifically, Petitioner contends that the State failed to provide defense counsel with Darla Peede's December 6, 1982, diary entry and the police report and statements from Petitioner's prior felony convictions in California. Likewise, in claim seven, Petitioner contends that counsel rendered ineffective assistance during the guilt phase by failing to obtain and use the diary and the documents from Petitioner's prior California case.

Petitioner raised these claims in his Rule 3.850 motion, and the state trial court denied them after an evidentiary hearing. The Supreme Court of Florida affirmed the trial court as follows:

> This Court held in Peede's initial postconviction appeal that the record did not disclose whether the State had possession of Darla's diary in its files or whether Peede had access to it, and that an evidentiary hearing was warranted on the issue. *Peede II*, 748 So. 2d at 257-58. However, at

[8] 373 U.S. 83 (1963).

the evidentiary hearing, the prosecutor testified that the parties in this case participated in full reciprocal discovery. She testified that defense counsel Bronson was made aware of the diary and had examined it. The prosecutor asked Bronson if he wanted a copy of the diary, and he said no because he did not think it was admissible, and the prosecutor agreed. While defense counsel DuRocher had no memory of seeing the diary prior to preparing for the evidentiary hearing, defense counsel Bronson testified that he was aware of the substance of the information that was contained in the diary generally, although he could not recall seeing a written diary. Under these circumstances there is record evidence to support the conclusion of the trial court that the diary and its contents were disclosed to the defense and, hence, no *Brady* violation occurred.

* * *

Concerning statements from witnesses to the California crime, the prosecutor testified at the evidentiary hearing that she received documents related to the case and tracked down eyewitnesses and Peede's defense attorney in the case. She also stated that any information the prosecution received would have been given to the defense pursuant to discovery. The prosecutor testified that she had numerous discussions with defense counsel Bronson about how the jury would react to a prior murder conviction, and that Bronson was aware the prosecution intended to use the conviction in trial.

Defense counsel DuRocher testified that the defense "knew of the California homicide. I think we'd even had some conversation with the lead investigator there." He also admitted that a statement from a witness taken by the same detective that took other witness statements in California was in the Public Defender file for the case. Defense counsel Bronson testified that he was aware of the information surrounding the California shooting, and recalled reading a number of reports.

"There is no *Brady* violation where the information is equally accessible to the defense and the prosecution, or where the defense either had the information or could have obtained it through the exercise of reasonable diligence." *Provenzano v. State*, 616 So. 2d 428, 430 (Fla. 1993) (citing *Hegwood v. State*, 575 So. 2d 170, 172 (Fla. 1991); *James v. State*, 453 So. 2d 786, 790 (Fla. 1984)). It is apparent that this rule applies to the California police reports of Peede's involvement in a homicide in that state. Therefore, we affirm the circuit court's finding of no *Brady* violation.[FN4]

> FN4. Peede argues that, to the extent this Court finds that defense counsel had available the information that was in the State's possession, his counsel was ineffective during the guilt phase of his trial, and confidence in the outcome of the trial is undermined. However, even if Peede were able to prove that his counsel had Darla's diary and the documents from the California shooting, we conclude that he did not meet the deficient performance and prejudice prongs of *Strickland*. The diary's contents were of questionable relevance and their admissibility was questionable, and highlighting records from a previous murder conviction would obviously be questionable strategy during the guilt phase of a trial. *See Occhicone*, 768 So. 2d at 1048 ("[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct.").

Peede III, 955 So. 2d at 496-97.

To prevail on a claim brought under *Brady*, Petitioner must demonstrate the following:

> (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

United States v. Meros, 866 F.2d 1304, 1308 (11th Cir. 1989). As the Supreme Court of the United States has decreed, "evidence is 'material' under *Brady*, and the failure to disclose it justifies setting aside a conviction, only where there exists a 'reasonable probability' that had the evidence been disclosed the result at trial would have been different." *Wood*

v. Bartholomew, 516 U.S. 1, 5 (1995). "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *United States v. Agurs*, 427 U.S. 97, 109-110 (1976). Further, "*Brady* does not require the government to turn over information which, with any reasonable diligence, the defendant can obtain himself." *Jarrell v. Balkcom*, 735 F.2d 1242, 1258 (11th Cir. 1984) (quotation omitted).

Petitioner has failed to demonstrate that he is entitled to relief pursuant to *Brady*. First, the Court notes that defense counsel may have reviewed Darla Peede's December 26, 1983, diary prior to trial. As noted by the state court, the prosecutor testified that she allowed Bronson to review the diary, and he told her he did not want a copy of it because he did not think it was admissible. (Ex. E-14 at 352-53.) On the other hand, Bronson testified that he did not recall seeing the diary prior to trial. *Id*. at 455. Bronson admitted, however, that he knew the substance of the information that was contained in the diary, *i.e.,* that Darla Peede loved Petitioner and was hoping to reconcile with him. *Id*. Thus, in light of this evidence, the Court finds that Petitioner has failed to prove by clear and convincing evidence that the state court's finding that the diary was disclosed to the defense was an unreasonable finding of fact.

Nevertheless, even assuming the diary was not disclosed to defense counsel prior to trial, Petitioner has not demonstrated that a reasonable probability exists that had the diary been disclosed, the result at trial would have been different. As noted by the state

court, the admissibility of the diary was questionable given that it was written several months before the murder. *See Wood*, 516 U.S. at 6-8 (concluding that no *Brady* violation occurred in part because the evidence was not admissible); *Spaziano v. Singletary*, 36 F.3d 1028, 1044 (11th Cir. 1994) (noting that "[a] reasonable probability of a different result is possible only if the suppressed information is itself admissible evidence or would have led to admissible evidence."). Further, the evidence presented at trial indicated that Darla Peede went to the airport voluntarily to pick-up Petitioner. After she picked-up Petitioner, however, they did not return to her home despite the fact that Darla Peede had not taken any belongings for a trip. More importantly, Tanya Bullis, Darla Peede's daughter, testified that her mother told her to call the police if she did not return by midnight from the airport, Ex. A-4 at 599-600. Petitioner admitted to the police that he stabbed Darla Peede in the side as they were leaving Miami. *Id*. at 722. Thus, to the extent that the diary entry may have indicated Darla Peede wanted to reconcile with Petitioner and demonstrated that she voluntarily went to the airport to get him, the diary does not refute the evidence that Darla Peede did not willingly leave Miami to travel to North Carolina with Petitioner. For these reasons, the Court concludes that Petitioner has not established either deficient performance or prejudice based on counsel's failure to use the diary during the guilt phase of the trial.

Likewise, Petitioner has not shown that the prosecution violated *Brady* by failing to turn over the police report and statements contained in Petitioner's criminal case from

California. Although DuRocher did not recall seeing the police report and statements from the California case, he knew about the prior offenses. (Ex. E-15 at 407-08.) Bronson did not know if he received the police report, but he knew that Petitioner had asserted that he acted in self-defense and Bronson recalled reading a number of reports from the California case. *Id.* at 457. Thus, the police report and the statements contained in the case file were readily available to defense counsel, and counsel in fact had reviewed some of the documents in the file. As such, with reasonable diligence, Petitioner could have obtained these documents, and no *Brady* violation occurred.

Additionally, Petitioner has not demonstrated that counsel rendered ineffective assistance by failing to use these documents during the guilt phase of the trial. As found by the state court, it is not clear how the use of the records from a previous murder would be sound strategy during the guilt phase. Further, Petitioner cannot demonstrate that had counsel used these documents during the guilt phase, a reasonable probability exists that he would not have been found guilty of first degree murder.[9] Accordingly, claims six and seven are denied pursuant to Section 2254(d).

G. Claim Eight

Petitioner alleges that his due process rights were violated by the trial court's admission of collateral crimes evidence. Petitioner argues that the state court erred by

[9]To the extent claim seven alleges that counsel rendered ineffective assistance by failing to obtain and use the California case documents in relation to the penalty phase, this claim is discussed *supra* in claim three.

allowing evidence at trial regarding his plan to kill his ex-wife and her boyfriend and by allowing the prosecutor to refer to this evidence during her closing argument. Specifically, Petitioner maintains that the trial court erroneously allowed (1) Tanya Bullis to testify that Darla Peede had told her that she was afraid Petitioner would try to kill her along with Geraldine Peede and Calvin Wagner; (2) Rebecca Keniston, Darla Peede's other daughter, to testify that the victim was worried Petitioner was going to kill Geraldine Peede and "a male person"; (3) Geraldine Peede to testify regarding threatening statements Petitioner had made to her; (4) Special Agent Kent Wilson to testify concerning statements Petitioner made to him concerning his plans to kill Geraldine Peede and Calvin Wagner after he killed Darla Peede, including using Darla Peede as a lure; and (5) Detective Ross Frederick to testify that a loaded shotgun was confiscated from Petitioner's residence. Petitioner also argues that the trial court erred by allowing pornographic magazines and photographs to be admitted into evidence.

As an initial matter, the Court notes that this claim, with the exception of the portion of the claim concerning Tanya Bullis' testimony, was raised in the state court as one of ineffective assistance of appellate counsel for failing to raise these issues on appeal. Thus, to the extent this claim is raised as a claim of trial court error, it has not been exhausted and is procedurally barred. *See Cohens v. Sec'y, Fla. Dep't of Corr.*, 279 F. App'x 749, 750 (11th Cir. 2008). Petitioner has not established either cause or prejudice that would excuse the default nor has he shown the applicability of the actual innocence

exception. As such, the claim of trial court error is procedurally barred. The Court will address the claim as it was presented in the state court.

To prevail on a claim for ineffective assistance of appellate counsel, a defendant must show that (1) appellate counsel's performance was deficient, and (2) but for counsel's deficient performance he would have prevailed on appeal. *Shere v. Sec'y, Fla. Dep't of Corr.*, 537 F.3d 1304, 1310 (11th Cir. 2008). In denying this claim, the Supreme Court of Florida determined that the challenged testimony was admissible pursuant to state law. *See Peede III*, 955 So. 2d at 498-502. In Florida, "similar fact" evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity. *Robertson v. State*, 829 So. 2d 901, 907 (Fla. 2002). Evidence of the other crimes should not be made the feature of the trial. *Bryan v. State*, 533 So. 2d 744, 746 (Fla. 1988). The admission of collateral crime evidence is within the discretion of the trial court, and its determination shall not be disturbed absent an abuse of discretion. *See Sexton v. State*, 697 So. 2d 833, 837 (Fla. 1997). Discretion is abused only where no reasonable person would take the view adopted by the trial court. *Huff v. State*, 569 So. 2d 1247, 1249 (Fla. 1990).

The Supreme Court of Florida provided a thorough analysis under state law of each piece of contested evidence. First, the state court determined that Tanya Bullis'

testimony was admissible because "the victim's mental state was at issue regarding the elements of the kidnapping which formed the basis for the State's felony murder theory." *Peede I*, 474 So. 2d at 816. Therefore, because the victim's mental state was at issue, evidence regarding the victim's concern over Petitioner's threats to Geraldine Peede and Calvin Wagner was properly admitted. As such, appellate counsel was not ineffective for failing to raise the issue on appeal.

With respect to Rebecca Keniston's testimony, the Supreme Court of Florida determined that the issue was not preserved because counsel only objected to her testimony based on double hearsay. *Peede III*, 955 So. 2d at 499. Under Florida law, "to be cognizable on appeal, [an argument] must be the specific contention asserted as legal ground for the objection, exception, or motion below." *F.B. v. State*, 852 So. 2d 226, 229 (Fla. 2003). Failure to contemporaneously object to improper evidence "renders the claim procedurally barred absent fundamental error." *Sexton v. State*, 775 So. 2d 923, 932 (Fla. 2000).

In this case, Petitioner filed a pretrial motion in limine which merely requested an order "prohibiting the prosecuting attorney from questioning any prospective witness about statements [Petitioner] may have made concerning his intent to kill persons in North Carolina." (Ex. A-7 at 1102). The motion, however, lacked the requisite specificity to preserve a claim on appeal. Moreover, Petitioner did not obtain a definitive ruling in advance of trial from the court on any specific evidence or testimony regarding

Petitioner's plans to murder Geraldine Peede and Calvin Wagner, which would have made a contemporaneous objection on the exclusion of evidence unnecessary. *See* § 90.104(1)(b), Fla. Stat. (a party need not renew an objection or offer of proof to preserve a claim of error for appeal if the court has made a definitive ruling on the record admitting or excluding evidence, either at or before trial). Because the state court determined that this issue was not preserved as it relates to Rebecca Keniston's testimony, appellate counsel was not ineffective for failing to raise the claim on direct appeal as it would have been barred from review.

As to the admissibility of Geraldine Peede's testimony regarding threats made by Petitioner against her and Calvin Wagner, the Supreme Court of Florida determined that the evidence of the uncharged planned murders of Geraldine Peede and Calvin Wagner was inseparable from the crime for which Petitioner was tried. *Peede III*, 955 So. 2d at 500. The court further determined that the testimony helped describe the motive for kidnapping the victim, which was part of Petitioner's plan to murder Geraldine Peede and Calvin Wagner. *Id*. Similarly, the court reasoned that Special Agent Kent Wilson's testimony regarding Petitioner's statements about killing Geraldine Peede and Calvin Wagner was also admissible because they were inextricably intertwined with Darla Peede's murder and helped establish the context in which the homicide took place. *Id*. The state court determined that Detective Ross Fredericks' testimony regarding the shotgun he confiscated from Petitioner's residence was admissible because it fit with the

rest of the story of the murder and also served as evidence of consciousness of guilt. *Id.*

Florida law allows the admission of evidence of uncharged crimes which are inseparable from the crime charged, or evidence which is inextricably intertwined with the crime charged, because it is a relevant and inseparable part of the act which is in issue and is necessary to adequately describe the offense. *Griffin v. State*, 639 So. 2d 966, 968 (Fla. 1994); *see also Hunter v. State*, 660 So. 2d 244, 251 (Fla. 1995) (collateral crime evidence may be admitted to establish the entire context from which a criminal action occurred). Furthermore, collateral crime evidence may be used to prove motive or to corroborate a confession. *See Thompson v. State*, 565 So. 2d 1311, 1315 (Fla. 1990) (evidence admissible to corroborate out-of-court confession); *Williams v. State*, 110 So. 2d 654, 659 (Fla. 1959) (evidence admissible if relevant to show motive). Additionally, Florida courts have repeatedly approved the admission of highly prejudicial evidence, including evidence of the defendant's commission of other murders, when sufficient probative value has been shown. *See Fotopoulos v. State*, 608 So. 2d 784 (Fla. 1992); *Wuornos v. State*, 644 So. 2d 1000, 1007 (Fla. 1994) (relevance of six similar murders committed by Wuornos "clearly outweighs prejudice" of their admission). Based on Florida law, Petitioner has failed to show that the trial court abused its discretion in admitting the testimony of Geraldine Peede, Special Agent Williams, or Detective Fredericks. Consequently, appellate counsel was not ineffective for failing to challenge the admission of her testimony on appeal.

With respect to the admission of the nude photographs, the Supreme Court of Florida determined that the photographs formed the motive for Petitioner's plan to murder Geraldine Peede and Calvin Wagner and were relevant because they corroborated Petitioner's confession to police. *Peede III*, 955 So. 2d at 502. The court concluded, therefore, that the trial court did not abuse its discretion by admitting the photographs, and appellate counsel could not be deemed ineffective for failing to raise the issue on appeal. *Id.* A review of the record supports the state court's conclusion.

Petitioner confessed that his motive for wanting to kill Geraldine Peede and Calvin Wagner was that they posed nude with Darla Peede in swinger magazines. (Ex. A-4 at 722.) Thus, the photographs and magazines were relevant to corroborate Petitioner's statement to police. Petitioner has not shown that the photographs were irrelevant, but instead argues that the photographs were prejudicial. However, as noted previously, under Florida law, even highly prejudicial evidence may be admitted when sufficient probative value has been shown. *See Fotopoulos*, 608 So. 2d 784; *Thompson*, 565 So. 2d at 1315. Petitioner has not demonstrated that the photographs lacked probative value so as to be inadmissible, and appellate counsel was not ineffective for failing to raise this argument.

Finally, Petitioner has not demonstrated that the prosecutor improperly made Petitioner's plan to kill Geraldine Peede and Calvin Wagner a feature of her closing argument and the trial so as to warrant relief. Pursuant to Florida law, uncharged crime

evidence should not be allowed to become a feature of the trial. *See Morrow v. State*, 931 So. 2d 1021 (Fla. 3d DCA 2006); *Williams v. State*, 117 So. 2d 473, 475 (Fla. 1960) (collateral crimes evidence becomes a feature of the trial when inquiry regarding the collateral crimes transcends the bounds of relevancy to the charge being tried and the prosecution devolves from development of facts pertinent to the main issue of guilt or innocence into an assault on the character of the defendant). "To warrant reversal of a verdict[,] prosecutorial misconduct must be so pronounced and persistent that it permeates the entire atmosphere of the trial." *United States v. Thomas*, 8 F.3d 1552, 1561 (11th Cir. 1993) (citing *United States v. McLain*, 823 F.2d 1457, 1462 (11th Cir. 1987)). "Specifically, a prosecutor's remark during closing argument must be both improper and prejudicial to a substantial right of the defendant." *Id.* (citing *United States v. Bascaro*, 742 F.2d 1335, 1353 (11th Cir. 1984)).

In her closing argument, the prosecutor did refer to Petitioner's plan to kill Geraldine Peede and Calvin Wagner. Nevertheless, these references were necessary to piece together the sequence of events leading up to the murder. The prosecution stressed that Darla Peede had been kidnapped by Petitioner for the purpose of luring Geraldine Peede and Calvin Wagner into the open so Petitioner could kill them. The prosecution also referred to the collateral crimes evidence, especially the collection of photographs, to refute Petitioner's assertions that Darla Peede's murder had not been premeditated. (Ex. A-5 at 886); *see Zack v. State*, 753 So. 2d 9, 17 (Fla. 2000) (collateral

crimes evidence not a feature of the trial when necessary to rebut defenses presented and to piece together the sequence of events leading up to a murder). The prosecutor's references to collateral crimes evidence was relevant and was not excessive under the circumstances of the case. Therefore, appellate counsel was not ineffective for failing to raise the issue on direct appeal. In sum, the state court's denial of this claim was neither contrary to, nor an unreasonable application of, federal law, and claim eight is denied pursuant to Section 2254(d).

I. Claim Nine

Petitioner alleges that the Supreme Court of Florida erred when it upheld Petitioner's death sentence after it struck the cold, calculated and premeditated ("CCP") aggravator. (Doc. No. 1 at 61.) Petitioner raised this issue on direct appeal, and the Supreme Court of Florida rejected the claim stating:

> Finally, Peede contends that the trial court erred in finding the aggravating circumstance that the murder of Darla was cold, calculated, and premeditated without any pretense of moral justification. Although we find the evidence of premeditation is sufficient to support a finding of premeditated murder, there was no showing of the heightened premeditation, calculation, or planning that must be proven to support a finding of the aggravating factor that Darla's murder was cold, calculated, and premeditated. The record supports the conclusion that Peede intended to take Darla back to North Carolina as a lure to get Geraldine and Calvin to come to a location where he could kill them. It does not establish that he planned from the beginning to murder her once he had completed his plan in North Carolina. By prematurely murdering her at the time he did, he eliminated his bait.
>
> Even absent this circumstance, however, we know that the result of the trial court's weighing process would not be different because it expressly held

> that the one marginal mitigating circumstance that it found was outweighed by the single aggravating circumstance standing alone of the defendant's previous convictions of two felony crimes involving the use or threat of violence to some other person. We hold that the death sentence was properly imposed by the trial court.

Peede I, 474 So. 2d at 817-18.

In an amended motion for post-conviction relief, Petitioner argued that the Supreme Court of Florida's harmless error analysis was inadequate. (Ex. C-5 at 448-612.) The argument was rejected by the lower court as an unauthorized amendment with only minimal explanation.[10] (Ex. C at 648.) Petitioner appealed the trial court's ruling, and the Supreme Court of Florida affirmed the state court's denial of the claim. *See Peede II*, 748 So. 2d at 255-56. In affirming this claim, the Supreme Court of Florida determined that the trial judge found this issue procedurally barred or improperly pled. *Id*. at 255.

In the instant case, Petitioner contends that the Supreme Court of Florida's review of the death sentence in this case violated *Clemons v. Mississippi*, 494 U.S. 738 (1990), because the court failed to provide a detailed explanation based on the record justifying upholding Petitioner's death sentence. (Doc. No. 4 at 71-72.) Petitioner also contends

[10] The trial court stated: "This claim has been replaced in an unauthorized amendment filed by Defendant with a claim that Florida's Supreme Court failed to conduct a harmless error analysis of this case properly. Obviously, the Supreme Court's holding is the law of the case and cannot be countermanded by a lower court. Moreover, any deficiency in the 'cold, calculated and premeditated' jury instruction was harmless error." (Ex. C-6 at 648).

that the court should have considered evidence of statutory and non-statutory mitigation that was, or should have been, developed in post-conviction proceedings[11] and that "the state court's refusal to conduct a constitutional harmful error analysis imposes the death penalty arbitrarily on Mr. Peede." (Doc. No. 4 at 72).

To the extent Petitioner relies on *Clemons,* the Supreme Court of Florida's 1985 decision in *Peede I* was before *Clemons* was issued. Consequently, the state court's decision did not violate "clearly established Federal law." 28 U.S.C. § 2254(d)(1); *see also Wright v. Sec'y, Fla. Dep't of Corr.,* 761 F.3d 1256, 1285 n.35 (11th Cir. 2014). Accordingly, claim nine is denied pursuant to Section 2254(d).

V. CONCLUSION

The Court finds that Petitioner is entitled to habeas relief as to claim three. None of the remaining claims raised in the instant petition have merit or require a hearing in this Court. Any of Petitioner's allegations not specifically addressed herein are determined to be without merit. The Court determines that the petition is conditionally granted as to claim three and is denied as to the remaining claims.

VI. CERTIFICATE OF APPEALABILITY

This Court should grant an application for certificate of appealability only if the

[11]Petitioner states that "[t]he state court's harmless error analysis failed to consider the effect of the striking of the cold, calculated and premeditated aggravator in light of the State's *Brady* violations, Mr. Peede's counsel's deficient performance in the penalty phase and Dr. Kirkland's inadequate mental health examination [and] is arbitrary and contrary to federal law."

Petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Lamarca v. Sec'y Dep't of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009). When a district court dismisses a federal habeas petition on procedural grounds without reaching the underlying constitutional claim, a certificate of appealability should issue only when a petitioner shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id*; *Lamarca*, 568 F.3d at 934. However, a prisoner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

Petitioner has not demonstrated that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. Moreover, petitioner cannot show that jurists of reason would find this Court's procedural rulings debatable. Petitioner has failed to make a substantial showing of the denial of a constitutional right. The Court will deny Petitioner a certificate of appealability.

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The Petition for Writ of Habeas Corpus filed by Robert Ira Peede (Doc. No. 1) is **GRANTED in part and DENIED in part**.

2. The Court determines that claims one, two, and four through nine are without merit. Habeas relief is **DENIED with prejudice** with regard to these claims.

3. The writ of habeas corpus will be conditionally **GRANTED** with regard to claim three, for the reasons discussed above, within **NINETY (90) DAYS** from the date of this Order, unless the State of Florida initiates new sentencing proceedings in state court consistent with the law.

4. The Clerk of the Court shall enter judgment accordingly and is directed to close this case.

DONE AND ORDERED in Orlando, Florida, this 26th day of February, 2015.

ANNE C. CONWAY
United States District Judge

Copies to:
Counsel of Record