IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-12366-H

JASON A. LENZ,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Appellant's motion for a certificate of appealability ("COA") is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

/s/ Gerald B. Tjoflat
UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Lenz v. Secretary, Fla. Dep't of Corr., Appeal No. 18-12366

Alva, Marlene M. - Judge

Bondi, Pamela Jo - Attorney General

Burden, George D. E. - Assistant Public Defender

A.C. – Minor victim

Feliciani, Gino - Assistant State Attorney

Fitzgibbons, Mary Elizabeth - private counsel

Goldrine, Emma – mother of A.C.

Jacobus, Bruce W. - Judge

Lawson, C. Alan - Judge

Monaco, David A. - Judge

Nelson, Debra S. - Judge

Palmer, William D. - Judge

Purdy, James S. - Public Defender

Sharp, G. Kendall - Judge

Smith, Thomas B. – Judge

Wallis, F. Rand – Judge

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JASON LENZ,

Petitioner/Appellant,

v.

SECRETARY, FLORIDA DEPT. OF CORRECTIONS, et al.

Respondents/Appellees.

Case: 18-12366D

From: 6:16-cv-1466 (M.D. Fla.)

MOTION FOR CERTIFICATE OF APPEALABILITY

Petitioner/Appellant Jason Lenz ("Mr. Lenz"), a Florida inmate, requests this Court to issue a certificate of appealability ("COA") for review of the denial of his Section 2254 petition. Mr. Lenz was convicted of first degree murder and felony child abuse in a second trial, after the first jury deadlocked 10-2. Mr. Lenz seeks review of the following issue: whether the District Court erred in denying Mr. Lenz's claim of ineffective assistance of counsel, where trial counsel failed to investigate and retain experts to rebut the testimony of Dr. Predrag Bulic, the state's expert who testified that only child abuse could have caused the victim's death.

Facts

In January 2010, a 10-2 deadlocked jury failed to convict Petitioner Jason Lenz of charges arising from the death of his girlfriend's three-year old son ("AJC"). Mr. Lenz was convicted and sentenced at his second trial.

This case is about the source of AJC's injuries, which occurred when he was home alone with Mr. Lenz. Mr. Lenz was involved with AJC's mother ("Goldrine"). AJC and Goldrine lived with Mr. Lenz and his mother ("Peggy"). On January 24, 2009, Mr. Lenz and his mother dropped off AJC's mother ("Goldrine") at work and took AJC back to their home. Ms. Lenz left the house at around three P.M. Around 9:30 P.M., Ms. Lenz and Goldrine returned home. (D.E 11-5, at 680-81).

Goldrine kept clothing in a closet in AJC's bedroom. That night, Mr. Lenz laid out her nightwear in their bedroom, and Goldrine therefore did not enter AJC's bedroom. Mr. Lenz had done this three or four times in the six months they lived together. (D.E 11-5, at 680-82). Around 9 A.M. the following morning, Goldrine began to wake AJC up, but Mr. Lenz told her to let him sleep. An hour or so later, after Goldrine, Mr. Lenz, and his grandmother had breakfast, Goldrine went to wake up AJC and discovered his body. (D.E 11-5, at 685-86).

Mr. Lenz initially denied having any idea what could have caused AJC's death. (D.E. 11-5, at 883-978). He later agreed to a voluntary sworn interview.

(D.E. 11-4, at 56). After police confronted him with the autopsy reports (Id. at 92-106), Mr. Lenz confessed that, around 6:30 he had slipped and fallen, causing AJC to strike his head on the ground. (Id. at 108-09). Later in the interview, while speaking with Goldrine, he explained that he had tripped on her slippers. (Id. at 140). At trial, Mr. Lenz further explained that he thought he had stepped on his cat, Bandit, causing him to overreact and lose his balance. (D.E. 11-5, at 1564).

Thus, Mr. Lenz maintains that he fell while carrying AJC. The state contends, through the testimony of its expert Predrag Bulic, M.D., that an accidental fall of less than ten feet could not have caused AJC's death. Expert testimony introduced during state postconviction proceedings demonstrates that Mr. Bulic erred gravely by failing to consider factors such as forward motion at the time of the fall, and the thickness and composition of the carpet. In fact, biomechanical expert Dr. James Ipser reported this to trial counsel, who did not follow up. (D.E. 11-7, at 2). Moreover, the testimony of forensic pathologist Dr. Willey demonstrated that Dr. Bulic's autopsy procedures were suspiciously incomplete and unreliable.[1] Counsel did not investigate or discover the unreliability of the autopsy before trial despite his serious questions about Bulic's competency. (D.E. 11-7, at 7, 11-12).

[1] Dr. Predrag Bulic was subsequently disciplined for misconduct in connection with the autopsy of Michelle O'Connell. *See*, *e.g.*, http://www.nytimes.com/projects/2013/two-gunshots/index.html.

Mr. Lenz by all accounts enjoyed a loving relationship with AJC, evidence of which deadlocked the first jury. At the first trial, the state produced Williams[2] rule evidence that Mr. Lenz had a bad temper, and had caused at least one indentation in the wall by punching it after he and Goldrine had an argument. This allowed counsel to rebut with favorable evidence of Mr. Lenz's character indicating that "frankly, he loved the child more than the child's mother." (D.E. 11-6, at 912). The evidence also proved that the incidents of "alleged abuse really weren't caused by him but were typical child's play, because they were all pretty well documented." (Id. at 913). After the trial, a juror e-mailed Mr. Hornsby to explain that this evidence had led to the two holdout votes to acquit, because those jurors "were convinced that he loved the child and that there's no way he could have done this." (Id. at 912).

Trial counsel later explained that "the second trial came around so quickly [in February 2010], and with my wife being pregnant . . . the trial almost bankrupted me." (D.E. 11-6, at 919). In his own words, the state "cut [counsel] off at the knees" by withdrawing its notice of intent to use the Williams rule evidence, in turn precluding counsel from presenting that favorable character evidence. (Id. at 913; see also D.E. 11-1, at 244 (requesting order precluding introduction of evidence of good conduct by Mr. Lenz); D.E. 11-5, at 621 (granting

[2] Williams v. Florida, 110 So. 2d 654 (Fla. 1959).

motion after argument on first day of trial)). Nevertheless, trial counsel did not revisit his decision to rely exclusively on cross-examination of Dr. Bulic instead of presenting his own witness.

Argument on Appeal

The state postconviction court rejected Mr. Lenz's claims, concluding that trial counsel made a reasonable strategic decision to forego expert witnesses because Dr. Bulic's supervisors would have then have testified in support of Bulic's conclusion. (D.E. 11-6, at 693). However, the record clearly demonstrates that trial counsel did not make any decision with respect to the changed circumstances in the second trial. Additionally, trial counsel failed to make a reasonable investigation into Dr. Ipser's expected testimony after he opined that Mr. Lenz's account was consistent with AJC's injuries, so no decision on whether to call him could have been reasonable. And by failing to effectively use Dr. Ipser or a forensic pathologist like Dr. Willey during trial preparation, trial counsel unreasonably failed to prepare to cross-examine Bulic with, for example, Bulic's deviation from accepted autopsy practice and consequent unreliability of his conclusion that AJC had choked on a hot dog at the time of his injury rather than regurgitating it later. (D.E. 11-6, at 836, 849-52, 887-94).

Indeed, counsel did not even provide Dr. Ipser with the autopsy report itself. (Id. at 900). His consultations with three other doctors (Drs. Dezfulian, Shuman,

and Nelson) were limited to their professional evaluation of Mr. Lenz's explanation of the injuries, not the adequacy of Bulic's autopsy. (D.E. 11-6, at 934-35; D.E. 11-7, at 1). The state court was wrong to conclude that counsel had thereby conducted an adequate investigation. (D.E. 11-6, at 694). The state court was also wrong to conclude that the doctors would have contradicted Mr. Lenz's testimony that the AJC was not in respiratory distress after the fall. (Id.). Their testimony would have supported the argument that AJC regurgitated the hot dog in his sleep, a possibility Dr. Bulic wrongly claimed that his shoddy medical work had ruled out.

As argued more fully in the reply below, reasonable jurists could conclude that the state court made an unreasonable finding of fact, or unreasonably applied Strickland. Mr. Lenz's case warrants a certificate of appealability and full briefing.

Respectfully Submitted,

/s/Gray R. Proctor
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CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send a notice of electronic filing to counsel of record.

/s/Gray R. Proctor

CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 1221 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii). It complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/Gray R. Proctor

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JASON A. LENZ,

Petitioner,

v. **Case No: 6:16-cv-1466-Orl-18TBS**

SECRETARY, DEPARTMENT OF CORRECTIONS and ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents.
_____/

ORDER

This case is before the Court on Petitioner Jason A. Lenz's Petition for Writ of Habeas Corpus ("Petition," Doc. 1) filed by counsel pursuant to 28 U.S.C. § 2254. Respondents filed a Response to the Petition ("Response," Doc. 11) in accordance with this Court's instructions. Petitioner filed a Reply to the Response ("Reply," Doc. 18).

Petitioner asserts nine grounds for relief.[1] For the following reasons, the Petition is denied.

I. PROCEDURAL HISTORY

A jury found Petitioner guilty of first-degree felony murder (Count One) and aggravated child abuse (Count Two).[2] (Doc. 11-4 at 287-88.) The trial court sentenced Petitioner to life in

[1] Petitioner pled some grounds together in the Petition and did not label them sequentially as grounds one through nine. Instead, Petitioner labeled his grounds as he did in his state post-conviction proceeding. The Court will label the grounds as pled sequentially beginning with ground one without consideration of the label assigned to the ground in the state court proceeding. For instance, Petitioner's first ground that he labels as ground two will be referred to as ground one and his second ground that he labels as ground three will be referred to as ground two in this Order.

[2] Petitioner's first trial ended in a mistrial because the jury was unable to reach a verdict.

prison for Count One and to a concurrent thirty-year term of imprisonment for Count Two. (*Id.* at 294.) Petitioner appealed, and the Fifth District Court of Appeal of Florida ("Fifth DCA") affirmed *per curiam*. (Doc. 11-6 at 357.)

Petitioner, through counsel, filed a motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. (*Id.* at 362-408.) The state court denied some of the claims and held an evidentiary hearing on two claims after which it denied those claims. (Doc. 11-6 at 413-21, 689-95.) Petitioner appealed, and the Fifth DCA affirmed *per curiam*. (Doc. 11-7 at 137.)

II. LEGAL STANDARDS

A. Standard Of Review Under The Antiterrorism Effective Death Penalty Act ("AEDPA")

Pursuant to the AEDPA, federal 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 of the United States "as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

"[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 for 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.

Even 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.[3] *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-

[3]In *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993), the Supreme Court of the United States 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.

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).

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).

III. ANALYSIS

A. Ground One

Petitioner contends counsel rendered ineffective assistance by failing to call Melinda Lenz-Carroll ("Carroll"), Petitioner's sister, to testify at trial. (Doc. 1at 14.) In support of this argument, Petitioner maintains that Carroll could have testified that the divot on the wall above the victim's bed predated the death of the victim and was no larger after the victim's death. (*Id.* at 14-18.)

Petitioner raised this ground in his Rule 3.850 motion. The state court denied relief pursuant to *Strickland* after an evidentiary hearing. (Doc. 11-6 at 691-93.) The state court concluded that prejudice did not result from counsel's failure to call Carroll as a witness. (*Id.* at

692-93.) The state court noted that the victim's mother testified that the divot was present months before the victim's death and she was not certain if the divot was bigger after the victim's death. (*Id.*) The state court further noted that the State presented evidence that the victim's injuries were caused by his head being struck against a hard, flat surface in the house, not necessarily the wall with the divot. (*Id.*) The state court reasoned, therefore, that Carroll's testimony regarding the divot would have had minimal impeachment value. (*Id.*) The Fifth DCA affirmed *per curiam*. (Doc. 11-7 at 137.)

Petitioner has not established that the state court's denial of this ground is contrary to, or an unreasonable application of, *Strickland*. The victim's mother and Petitioner testified at trial that the divot in the wall predated the victim's death. (Doc. 11-5 at 698, 765.) Although the victim's mother testified the divot *could* have been a little bigger after the offenses, she admitted that she was not sure about the size of the divot prior to the date of the offenses and was not sure it was bigger after the victim's death. (*Id.* at 698, 766.) More importantly, the State presented evidence that the victim's complex skull fracture and severe brain injuries were caused by blunt force trauma to a hard flat surface, which encompassed other surfaces besides the wall containing the divot. (Doc. 11-5 at 698, 1120-21, 1351-52, 1355.) Moreover, the State argued in closing that the victim's injuries resulted from blunt force trauma of the victim's head against a hard flat surface, *i.e.*, "a floor, a wall, a countertop, some hard flat surface." (*Id.* at 1676.) In other words, the State did not rely solely on the divot or argue that the only possible explanation for the victim's injuries was from being slammed against the wall where the divot was. For all these reasons, a reasonable probability does not exist that the outcome of the trial would have been different but for counsel's failure to call Carroll to testify. Accordingly, ground one is denied pursuant to § 2254(d).

B. Ground Two

Petitioner asserts counsel rendered ineffective assistance by failing to investigate and call experts to testify. (Doc. 1at 18.) In support of this ground, Petitioner complains that counsel failed to investigate experts, such as a forensic pathologist and biomechanical expert, and failed to call such experts to testify to refute Dr. Bulic's testimony. (*Id.* at 18-26.) Petitioner notes that Dr. Willey, a forensic pathologist, could have testified that Dr. Bulic failed to sample the victim's brain, perform an immunohistochemistry, and take samples of the injuries to the victim's lips, bruises, dura, eyes, or right lung. (Doc. 1 at 20-21.) Petitioner further notes that counsel failed to share with Dr. Ipser, a biomechanical expert, that the victim had a prior brain injury to allow Dr. Ipser to calculate the force needed to cause the child's brain to "rebleed". Petitioner also argues that Dr. Ipser could have testified that a short fall, as described by Petitioner, could not be ruled out as the cause of death. (*Id.* at 21-22, 24-25.)

Petitioner raised this ground in his Rule 3.850 motion. The state court denied relief after an evidentiary hearing. (Doc.11-6 at 693-95.) After considering the testimony of counsel, Dr. Ipser, and Dr. Willey, the state court concluded that counsel made a reasonable strategic decision after a substantial investigation not to call Dr. Ipser as a witness and was not deficient for failing to call Dr. Willey. (*Id.*) The state court reasoned that counsel made a reasonable decision not to call Dr. Ipser to testify after the prosecutor notified him that the State would call Dr. Alexander and Dr. Herman, one of whom was a nationally renowned child abuse expert, to testify if the defense called Dr. Ipser as a witness. (*Id.* at 693-94.) The state court noted counsel's concern that Dr. Alexander and Dr. Herman's testimony would have contradicted Petitioner's testimony that the victim was not in persistent respiratory distress, thereby undercutting Petitioner's explanation of what happened. (*Id.*) The state court further noted that counsel contacted three medical experts,

including two forensic pathologists, who concurred with Dr. Bulic's assessment that the short fall described by Petitioner would not have caused the victim's death. (*Id.* at 694.) The state court reasoned that counsel's strategy was to create reasonable doubt by discrediting Dr. Bulic's testimony, which included getting Dr. Bulic to admit that a short fall as described by Petitioner could not be ruled out as a possible cause of the injuries to the victim. (*Id.* at 693-94.)

Petitioner has not established that the state court's denial of this ground is contrary to, or an unreasonable application of, *Strickland.* "The question of whether an attorney's actions were actually the product of a tactical or strategic decision is an issue of fact, and a state court's decision concerning that issue is presumptively correct.'" *Ferrell v. Hall*, 640 F.3d 1199, 1223 (11th Cir. 2011) (quoting *Provenzano v. Singletary,* 148 F.3d 1327, 1330 (11th Cir. 1998)). "'[T]he question of whether the strategic or tactical decision is reasonable enough to fall within the wide range of professional competence is an issue of law not one of fact.'" *Id.* (quoting *Provenzano,* 148 F.3d at 1330). Counsel's strategic choices made after thorough investigation of the law and facts "are virtually unchallengeable." *Strickland,* 466 U.S. at 690. "'Which witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that [federal courts] will seldom, if ever, second guess.'" *Ledford v. Warden, Georgia Diagnostic & Classification Prison*, 818 F.3d 600, 647 (11th Cir. 2016) (quoting *Waters v. Thomas,* 46 F.3d 1506, 1512 (11th Cir. 1995)).

Counsel testified that prior to trial, he consulted with a pediatric care surgeon and two forensic pathologists, all of whom opined that the victim's injuries could not have occurred as a result of the events alleged by Petitioner. (Doc. 11-6 at 921-23.) Counsel said that all of the experts concurred with Dr. Bulic's assessment of the cause of the victim's injuries but disagreed with his opinion that the child would have behaved normally after a piece of hotdog lodged in his lung. (*Id.*

at 923-27.) The experts with whom counsel consulted also noted that the victim appeared to have a prior brain injury that could have exacerbated the victim's injuries. (Doc. 11-7 at 5-6.) Counsel, however, was concerned that such evidence would have suggested prior abuse. (*Id.* at 6-7.) Counsel retained Dr. Ipser, a biomechanical expert, to evaluate the victim's injuries in relation to Petitioner's account of the incident and deposed Dr. Herman and Dr. Alexander, experts the State intended to call if the defense called Dr. Ipser. (Doc. Nos. 11-6 at 923-27; 11-7 at 1-2.)

Counsel testified that he believed Dr. Bulic's testimony was helpful to the defense in that (1) Dr. Bulic agreed that Petitioner's explanation would have been the second most likely explanation for the child's injuries, and (2) Dr. Bulic, unlike any of the other experts, indicated that the victim would have been able to operate normally after getting a hotdog in his lung. (*Id.* at 925-26, 929.) Counsel was concerned that if called as witnesses, Dr. Alexander and Dr. Herman would have concurred with Dr. Bulic's assessment that the injuries were not caused by a fall and undermined Dr. Bulic's (1) opinion that the victim could have operated normally in contradiction to Petitioner's version of events, and (2) passive agreement that the injuries possibly could have been caused by a fall. (Doc. Nos. 11-6 at 926-27; 11-7 at 9.) Consequently, counsel made a strategic decision not to call Dr. Ipser after discussing the issue with Petitioner, who did not object. (Doc. Nos. 11-6 at 927-28; 11-7 at 2-3, 14.) Counsel also chose not to call the other experts he had consulted because they concurred with Dr. Bulic's assessment of the cause of the victim's injuries and he thought Dr. Bulic's testimony was the most beneficial to the defense of all the experts. (Doc. 11-7 at 1, 14.)

From the evidence presented, counsel conducted a thorough investigation. He contacted multiple experts to obtain their opinion of the cause of the victim's injuries/death and the likelihood of Petitioner's explanation of the incident. Counsel further deposed the State's experts and found

Dr. Bulic, the State's trial witness, to be the most favorable expert to the defense, even including the experts with whom he had consulted. Counsel made a reasonable decision after his investigation not to call any experts, including Dr. Ipser, because *inter alia* the State would have called Dr. Alexander and Dr. Herman in rebuttal, which counsel believed would have been detrimental to the defense. Furthermore, counsel was aware that some experts believed that the victim had a prior brain injury that could have exacerbated his injuries. Nevertheless, counsel made a strategic decision not to call these witnesses, noting his concern that prior injury was suggestive of prior abuse and that the experts agreed with Dr. Bulic's opinion that the victim's injuries could not have been sustained by the version of events provided by Petitioner. In sum, a reasonable attorney having considered the various expert opinions could have determined that the best option for the defense was not to call experts to refute Dr. Bulic's testimony but instead to use Dr. Bulic's testimony to argue reasonable doubt.[4] *See, e.g., Castillo v. Sec'y, Fla. Dep't of Corr.*, 722 F.3d 1281, 1285 n.2 (11th Cir. 2013) ("The relevant question under *Strickland*'s performance prong, which calls for an objective inquiry, is whether any reasonable lawyer could have elected not to

[4] The Court further notes that Dr. Ipser testified that Petitioner would have had to have been moving faster than five miles per hour, not the normal rate of three to four miles an hour, when he dropped the child to get outside the safe zone for the injuries to possibly have been caused by the fall described by Petitioner. (Doc. 11-6 at 892, 897-98.) Petitioner did not indicate that he was walking fast with the victim when he fell. In addition, Dr. Willey, although indicating that Petitioner's version of events was plausible, opined that it was not investigated thoroughly. (Doc. 11-6 at 843.) Nevertheless, Dr. Willey admitted that "severe injury or fatality from short distance falls is very uncommon[.]" (*Id.* at 867.) Contrary to Dr. Willey's opinion otherwise, counsel thoroughly investigated the plausibility of Petitioner's version of events by consulting multiple experts. Counsel cannot be deemed deficient simply because Petitioner subsequently secured a more favorable expert opinion. *See, e.g., McClain v. Hall*, 552 F.3d 1245, 1253 (11th Cir. 2008) ("That [petitioner] later secured a more favorable opinion of an expert than the opinion of [the doctor who testified at the penalty phase] does not mean that trial counsel's failure to obtain that expert testimony constituted deficient performance.").

object for strategic or tactical reasons, even if the actual defense counsel was not subjectively motivated by those reasons."). Accordingly, ground two is denied pursuant to § 2254(d).

C. Ground Three

Petitioner asserts counsel rendered ineffective assistance by failing to adequately cross-examine Dr. Bulic. (Doc. 1 at 26-27.) In support of this ground, Petitioner notes that counsel did not cross-examine Dr. Bulic regarding whether he "did a correct autopsy," including his failure to (1) "make any preparations of bruises for microscopic examination to determine their age since . . . the bruises may have pre-dated the day of the fatal injury." (*Id.* at 28.) Petitioner further complains that counsel failed to consult with experts to allow him to question Dr. Bulic regarding the effect of the victim's use of Advil, which can cause bleeding. (*Id.*)

Petitioner raised this ground in his Rule 3.850 motion. The state court denied relief pursuant to *Strickland*. (Doc. 11-6 at 691-93.) The state court reasoned that counsel extensively challenged Dr. Bulic's qualifications and conclusions, impeaching him several times and causing him to concede that a short distance fall, such as described by Petitioner, plausibly could have caused the injuries to the victim, albeit it was unlikely. (*Id.*) The state court concluded that additional cross-examination would not have changed the outcome of the proceeding. (*Id.*) The Fifth DCA affirmed *per curiam*. (Doc. 11-7 at 137.)

Petitioner has not established that the state court's denial of this ground is contrary to, or an unreasonable application of, *Strickland*. Counsel conducted a thorough cross-examination of Dr. Bulic in which he impeached Dr. Bulic regarding inconsistencies in his testimony and got him to admit that the injuries suffered by the victim could have happened from a fall of six feet if the speed was sufficient to increase the force. *See* Doc. 11-5 at 1366-1464, 1528-41. Furthermore, Dr. Bulic conducted a microscopic examination of the victim's brain. (*Id.* at 1351.) To the extent

counsel did not cross-examine Dr. Bulic regarding his failure to make microscopic preparations of any bruises on the victim, even assuming counsel had done so, these additional questions would not have impacted or negated the evidence presented that the victim suffered a complex skull fracture and severe brain injury. In addition, Dr. Bulic testified that the victim's toxicology report was negative for pain relievers such as ibuprofen or acetaminophen. (*Id.* at 1336-37.) Furthermore, the possible impact of the use of such medications on the bleeding in the victim's brain would not have explained or refuted the complex skull fracture suffered by the victim. In sum, Petitioner has not demonstrated that counsel's cross-examination of Dr. Bulic was deficient or that a reasonable probability exists that the outcome of the trial would have been different had counsel further cross-examined Dr. Bulic. Accordingly, ground three is denied.

D. Ground Four

Petitioner contends counsel rendered ineffective assistance by conceding his guilt and misconduct. (Doc. 1 at 29-32.) According to Petitioner, counsel "conceded guilt and other misconduct during opening and/or closing without his prior knowledge or authorization." (*Id.* at 29.)

Petitioner raised this ground in his Rule 3.850 motion. The state court denied relief pursuant to *Strickland.* (Doc. 11-6 at 414-15.) The state court concluded that prejudice did not result *inter alia* because the jury convicted Petitioner of first-degree felony murder. (*Id.* at 414-15, 689-90.) The Fifth DCA affirmed *per curiam.* (Doc. 11-7 at 137.)

The state court's denial of this ground is not contrary to, or an unreasonable application of, *Strickland.* Counsel did not explicitly concede Petitioner's guilt to the lesser-offense of manslaughter. Counsel stated in opening that from the evidence that would be presented, at most the jury would have to decide whether Petitioner was culpably negligent, *i.e.,* acted in complete

gross disregard as required for manslaughter, or was just negligent. (Doc. 11-5 at 664-65.) Similarly, in closing argument, counsel argued that Petitioner did not intentionally hurt the victim although he may have acted negligently by dropping the victim and failing to call 911 after he did so. (Doc. 11-6 at 15-58.)

Considering closing argument in full, counsel essentially argued that Petitioner did not act intentionally, the evidence did not support a guilty verdict for first-degree murder, the jury's focus should be on the manslaughter charge, and Petitioner, while perhaps negligent, was not culpably negligent because in similar situations in the past when the victim had fallen and hit his head, he and the victim's mother had not called 911. (Doc. 11-6 at 13-58.) Furthermore, although counsel did not discuss this strategy with Petitioner prior to closing argument, Petitioner affirmed that he was satisfied with counsel's closing argument. (*Id.* at 97-98.) Consequently, Petitioner has not demonstrated that counsel's performance was deficient or that a reasonable probability exists that the outcome of the trial would have been different but for counsel's statements. Accordingly, ground four is denied pursuant to § 2254(d).

E. Ground Five and Six

Petitioner maintains that counsel rendered ineffective assistance by "failing to timely disclose discovery, misadvice, [sic] and failure to advise of plea offer." (Doc. 1 at 32.) In support of these grounds, Petitioner contends that counsel failed to timely communicate the autopsy report and a plea offer to him and misadvised him not to accept the State's plea offers. (*Id.*) According to Petitioner, counsel failed to convey one of the State's plea offers to him and improperly advised him that at worst, he would be convicted of manslaughter and receive a fifteen-year sentence. (*Id.*)

Petitioner contends he would have accepted the State's plea offer of eighteen years if advised of the offer and would have accepted the other offers if properly advised.[5] (*Id.* at 33.)

Petitioner raised these grounds in his Rule 3.850 motion. The state court denied relief pursuant to *Lafler v. Cooper*, 566 U.S. 156 (2012). (Doc. 11-6 at 417-18.) The state court reasoned that Petitioner was aware of the autopsy results, which triggered his admission to police that he dropped the victim, prior to his interview with law enforcement preceding his first trial. (*Id.* at 417.) Nevertheless, prior to his first trial, Petitioner rejected a twenty-year plea offer to second degree murder and counsel advised the state court that Petitioner would not accept any plea that encompassed more than a five-year prison sentence. (*Id.*) The state court further reasoned that Petitioner had heard Dr. Bulic's testimony from the first trial and knew exactly what the autopsy report indicated and the strength of the evidence against him before rejecting an offer to plead guilty to manslaughter in exchange for a fifteen-year sentence prior to his second trial. (*Id.*) The state court noted that Petitioner had not asserted that counsel told him he could not be convicted of first-degree murder as a matter of law, Petitioner knew the maximum sentence he faced if convicted at trial, and Petitioner should have known he could be convicted of first-degree murder given that he was not acquitted after the first trial. (*Id.* at 418.) In sum, the state court concluded that Petitioner failed to demonstrate he would have entered a plea if (1) the eighteen–year plea offer had been conveyed ,or (2) regardless of counsel's advice because Petitioner was unwilling to accept a sentence of more than five years. (*Id.* at 417-18.) The Fifth DCA affirmed *per curiam*. (Doc. 11-7 at 137.)

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[5] Although Petitioner fails to specify in the Petition which plea offer counsel failed to convey, it appears from his Rule 3.850 motion that he maintained counsel failed to convey the eighteen-year plea offer. *See* Doc. 11-6 at 397. Petitioner further asserted in his Rule 3.850 motion that he rejected a fifteen-year plea offer because counsel advised him that at most, he would be convicted of manslaughter and sentenced to fifteen years. (*Id.*)

"As a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Missouri v. Frye*, 566 U.S. 133, 145 (2012). Likewise, the Sixth Amendment right to effective assistance of counsel extends to plea negotiations. *Lafler*, 566 U.S. at 162. Therefore, "[i]f a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it." *Id.* at 168. The two-part test enunciated in *Strickland* applies to claims that counsel was ineffective during plea negotiations. *See id.* at 163 (recognizing that *Strickland*'s two-part test applies to federal habeas petitioner's claim that counsel was ineffective for advising him to reject a plea offer). With respect to the prejudice inquiry in the context of a foregone guilty plea, defendants must demonstrate:

> a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.

Frye, 566 U.S. at 147.

The state court's denial of this ground is not contrary to, or an unreasonable application of, clearly established federal law. Petitioner knew the autopsy results when he spoke to police prior to his first trial. *See* Doc. 11-6 at 589-93. However, before his first trial, despite knowing the maximum sentence to which he was subject if convicted, Petitioner rejected a plea offer of twenty-years to second-degree murder. (*Id.* at 586-88.) At that time, counsel advised the court that Petitioner was unwilling to accept any offer requiring more than a five-year term of imprisonment. (*Id.* at 586.) The jury failed to reach a verdict in the first trial, resulting in a mistrial. (*Id.* at 911.) Therefore, Petitioner clearly knew, prior to his second trial, the State's evidence against him,

including the autopsy results, and that some of the jurors believed him to be guilty of first-degree felony murder.[6] Nevertheless, prior to his second trial, Petitioner rejected a plea offer of fifteen-years to aggravated manslaughter. (Doc. 11-6 at 594-95.)

Although counsel believed that a jury would not convict Petitioner of first-degree felony murder, Petitioner does not assert that counsel told him he could not be convicted of first-degree murder as a matter of law. Simply because counsel could not predict how the jury would view the evidence does not equate to ineffective assistance of counsel in advising Petitioner about the plea offer. *See Turner v. Calderon*, 281 F.3d 851, 881 (9th Cir. 2002) ("Counsel cannot be required to accurately predict what the jury or court might find, but he can be required to give the defendant the tools he needs to make an intelligent decision."). "Trial counsel was not constitutionally defective because he lacked a crystal ball." *Id.*

More importantly, Petitioner never disavowed counsel's representation prior to his first trial that he was unwilling to accept any plea offer requiring more than a five-year sentence. In light of Petitioner's unwillingness to accept a plea offer with a sentence greater than five years before his first trial when he was facing a life sentence if convicted, the state court's determination that Petitioner was unwilling to accept anything more than five years after knowing that the jury was unable to reach a verdict in the first trial is not unreasonable. In other words, Petitioner has not established that a reasonable probability exists that he would have accepted any of the plea offers, all of which required sentences of substantially more than five years, even assuming counsel failed to convey an eighteen-year plea offer or improperly said Petitioner would only be convicted of manslaughter and receive a fifteen-year sentence. Accordingly, grounds five and six are denied

[6] Counsel indicated that a juror from the first trial told him that two of the jurors had believed Petitioner was not guilty. (Doc. 11-6 at 912.)

pursuant to § 2254(d).

F. Grounds Seven and Eight

In ground seven, Petitioner contends that counsel failed to submit the State's case to meaningful adversarial testing as required by *United States v. Cronic,* 466 U.S. 648, 659 (1984). (Doc. 1 at 35.) In ground eight, Petitioner further asserts that trial counsel was ineffective due to cumulative error. (*Id.* at 36.)

Petitioner raised these grounds in the state court. The state court found ground seven to be procedurally barred from review because it should have been raised on direct appeal.[7] (Doc. 11-6 at 421.) The state court denied ground eight because there was no attorney error to accumulate. (*Id.*) The Fifth DCA affirmed *per curiam.* (Doc. 11-7 at 137.)

The Supreme Court of the United States had held that prejudice is presumed in certain circumstances, including where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Bell v. Cone*, 535 U.S. 685, 696 (2002) (quoting *Cronic*, 466 U.S. at 659). "The Supreme Court has not directly addressed the applicability of the cumulative error doctrine in the context of an ineffective assistance of counsel claim." *Forrest v. Fla. Dep't of Corr.*, 342 F. App'x 560, 564 (11th Cir. 2009). The Supreme Court has held, however, in relation to a claim of ineffective assistance of counsel, that "'there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt.'" *Id.* (quoting *United States v. Cronic,* 466 U.S. 648, 659 n. 26 (1984)).

[7] Ground seven would be procedurally barred from review in this Court in light of the state court's ruling. However, Respondents failed to argue that this ground is procedurally barred. Consequently, the Court must address the ground on the merits.

Review of the record establishes that, contrary to Petitioner's argument otherwise, counsel subjected the prosecution's case to meaningful adversarial testing. Counsel deposed witnesses, conferred with experts, thoroughly cross-examined the State's witnesses, called witnesses for the defense, and vehemently argued that the evidence failed to demonstrate that Petitioner intentionally hurt the victim. Thus, ground seven is denied.

Likewise, Petitioner has not demonstrated that counsel rendered ineffective assistance in any of his grounds. Consequently, Petitioner's claim of cumulative error fails. *See*, e.g., *Borden v. Allen,* 646 F.3d 785, 823 (11th Cir. 2011) ("Because Borden has not sufficiently pled facts that would establish prejudice—cumulative or otherwise—we decline to elaborate further on [a cumulative-effect ineffective assistance of counsel claim] for fear of issuing an advisory opinion on a hypothetical issue."). Accordingly, ground eight is denied pursuant to § 2254(d).

G. Ground Nine

Petitioner complains that the state court erred in denying his motions to supplement his Rule 3.850 motion and his motion for rehearing after the evidentiary hearing. (Doc. 1 at 36-37.) The state court denied Petitioner's motion to supplement his ineffective assistance of counsel claim that counsel conceded guilt, reasoning *inter alia* that Petitioner was raising a new claim and it was untimely. (Doc. 11-6 at 689-90.) The state court denied Petitioner's motion to supplement his ineffective assistance of counsel claim premised on rejection of the plea offers because the court's denial of the claim was not predicated on the advice counsel gave Petitioner, but instead on Petitioner's refusal to accept a plea requiring substantial prison time. (*Id.* at 691.) The state court summarily denied the motion for rehearing. (*Id.* at 755.)

Petitioner summarily argued on appeal that the state court erred in denying his motion for reconsideration. (Doc. 11-7 at 82-83.) Petitioner further argued that the state court erred in finding

his motion to supplement the ineffective assistance of counsel claim that counsel conceded guilt to be untimely. (*Id.*) Petitioner, however, did not argue on appeal that the state court erred n denying his motion to supplement his ineffective assistance of counsel claim premised on the rejection of the plea offers. *See id.* at 81-83. The Fifth DCA affirmed *per curiam.* (*Id.* at 137.)

The Eleventh Circuit Court of Appeals "has repeatedly held defects in state collateral proceedings do not provide a basis for habeas relief." *Carroll v. Sec'y, Dep't of Corr.*, 574 F.3d 1354, 1365 (11th Cir. 2009). This ground is essentially a claim that the state court collateral proceedings were defective. Therefore, Petitioner's contention that his state post-conviction proceeding was inadequate because the state court failed to follow its own procedural rules is not a cognizable habeas claim. *See, e.g., Spradley v. Dugger,* 825 F.2d 1566, 1567 (11th Cir. 1987) (holding that the state trial court's alleged errors in the Rule 3.850 proceedings did not undermine the validity of the petitioner's conviction; therefore, the claim went to issues unrelated to the cause of the petitioner's detention and did not state a basis for habeas relief).

Alternatively, to the extent ground nine is cognizable, it is procedurally barred from review and otherwise denied pursuant to § 2254(d). The state court found Petitioner's first motion to supplement to be untimely. Furthermore, Petitioner did not appeal the denial of his second motion to supplement. Thus, these claims are unexhausted. Petitioner has not established an exception to the procedural default to overcome his failure to exhaust these claims. Therefore, these claims are procedurally barred from review. Finally, Petitioner has not established that the state court's denial of his motion for rehearing is contrary to, or an unreasonable application of, federal law. As discussed *supra*, the state court's denial of Petitioner's grounds was not contrary to, or an unreasonable application of, *Strickland.* Accordingly, this ground is denied.

Any of Petitioner's allegations not specifically addressed herein have been found to be without merit.

IV. CERTIFICATE OF APPEALABILITY

This Court should grant an application for certificate of appealability only if the 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 demonstrates "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 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. Thus, the Court will deny Petitioner a certificate of appealability.

Accordingly, it is hereby **ORDERED** and **ADJUDGED:**

1. The Petition (Doc. 1) is **DENIED**, and this case is **DISMISSED with prejudice**.
2. Petitioner is **DENIED** a Certificate of Appealability.

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

DONE and **ORDERED** in Orlando, Florida on May 7, 2018.

G. KENDALL SHARP
SENIOR UNITED STATES DISTRICT JUDGE

Copies furnished to:
OrlP-1
Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JASON LENZ,

Petitioner,

v. CASE NO: 6:16-CV-01466

SECRETARY, DOC, et. al.,

Respondents.

REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

Mr. Lenz, through counsel, now replies to the response to his habeas petition.

I. Facts

Jason Lenz challenges his jury convictions for first degree felony murder and aggravated child abuse. In January 2010, a 10-2 deadlocked jury failed to convict Petitioner Jason Lenz of charges arising from the death of his girlfriend's three-year old son ("AJC"). Trial counsel later explained that "the second trial came around so quickly [in February 2010], and with my wife being pregnant . . . the trial almost bankrupted me." (D.E. 11-6, at 919).

In essence, this case is about the source of AJC's injuries, which occurred when he was home alone with Mr. Lenz. Mr. Lenz maintains that he fell while carrying AJC. The state contends that an accidental fall could not have caused AJC's death. At the first trial, Mr. Lenz was able to introduce evidence of his loving relationship with AJC to rebut the state's evidence of Mr. Lenz's temper. Before the second trial, the state indicated that it would not introduce evidence of his temper, instead focusing only on the events on the day of AJC's death. On the morning of trial, the court granted the state's motion to exclude the favorable character evidence. Trial counsel went on to lose a very winnable battle of experts by declining to even take the field.

A. Uncontested facts: events immediately before and after AJC's death.

Certain facts are clearly established. Mr. Lenz was involved with AJC's mother ("Goldrine"). AJC and Goldrine lived with Mr. Lenz and his mother ("Peggy"). On January 24, 2009, Mr. Lenz and his mother dropped off AJC's mother ("Goldrine") at work and took AJC back to their home. Ms. Lenz left the house at around three P.M. Around 9:30 P.M., Ms. Lenz and Goldrine returned home. (D.E 11-5, at 680-81).

Goldrine kept clothing in a closet in AJC's bedroom. That night, Mr. Lenz laid out her nightwear in their bedroom, and Goldrine therefore did not enter AJC's bedroom. Mr. Lenz had done this three or four times in the six months they lived together. (D.E 11-5, at 680-82). Around 9 A.M. the following morning, Goldrine began to wake AJC up, but Mr. Lenz told her to let him sleep. An hour or so later, after Goldrine, Mr. Lenz, and his grandmother had breakfast, Goldrine went to wake up AJC and discovered his body. (D.E 11-5, at 685-86). Paramedic Joshua Wolf testified that rigor mortis had already set in. (D.E. 11-5, at 24).

Law enforcement began an investigation that day.

B. Contested facts: Mr. Lenz's statements versus the state's theories.

The trial was about what occurred while AJC was in Mr. Lenz's custody. Mr. Lenz's position was memorialized in investigative interviews, while the state relied on the autopsy and analysis of the medical examiner, Dr. Predrag Bulic.

Mr. Lenz initially denied having any idea what could have caused AJC's death. (D.E. 11-5, at 883-978). He later agreed to a voluntary sworn interview. (D.E. 11-4, at 56). Mr. Lenz recounted the events prior to the accident: after his mother left, he made corn dogs for AJC, who watched television until Mr. Lenz put him to bed around 6:30. (Id. at 58-66). Around seven o'clock, he gave AJC a sippy cup of chocolate milk, and AJC fell asleep. (Id. at 67). Mr. Lenz

had given him children's pain reliever because he complained of a headache. (Id. at 66). After police confronted him with the autopsy reports (Id. at 92-106), Mr. Lenz confessed that, around 6:30 he had slipped and fallen, causing AJC to strike his head on the ground. (Id. at 108-09). Later in the interview, while speaking with Goldrine, he explained that he had tripped on her slippers. (Id. at 140).

Mr. Lenz told police that he thought AJC's back had absorbed the fall. (Id. at 115). After it occurred, he comforted AJC for about 10 minutes as he cried. (Id. at 109). AJC was bleeding from his mouth, and he spit up some of the corn dogs. (Id. at 110). He then laid AJC in his bed, in the same position he was eventually found. (Id. at 111). AJC told him good night before Mr. Lenz left, and then Mr. Lenz watched the rest of the basketball game. (Id. at 112). Around eight p.m., Mr. Lenz observed that AJC was snoring. (Id. at 113).

At trial, Mr. Lenz further explained that he thought he had stepped on his cat, Bandit, causing him to overreact and lose his balance. (D.E. 11-5, at 1564).

The state, on the other hand, proceeded as though Mr. Lenz either threw AJC into a wall or struck him with enough force to fracture his skull. This was based on Dr. Bulic's autopsy and analysis of the physical evidence.

C. Physical evidence: the divot and the body.

There were only two pieces of physical evidence: AJC's body and a divot in the wall above his bed. Police recovered a strand of AJC's hair from the divot. (D.E. 11-5, at 1110). The divot was already there months before AJC died. (D.E 11-5, at 680-81 (Goldrine)). There were other indentations throughout the house. (Id. at 699).

AJC's body demonstrated severe trauma to the skull. The medical examiner, Dr. Predrag Bulic, [1] explained his findings in a deposition taken on May 14, 2009. (D.E. 11-4, at 189). There were marks on the lips and nose that were consistent with recent rough handling or striking of AJC. (Id. at 205-10). AJC suffered a fracture and subgaleal hemorrhage on the left side of his head. (Id. at 210). These injuries were usually caused by blunt force trauma, such as a car accident or a fall. (Id. at 211). The impact would have to be severe, but there was no pattern on AJC's skin to indicate what he struck. (Id. at 216). According to Dr. Bulic, there were "experiments in the literature" that conclusively proved that any fall would have to be from a distance of greater than 10 feet. (Id. at 212, 228).

Dr. Bulic felt that striking with a fist would not likely have caused AJC's injuries. (Id. at 236). He found it most likely that AJC's head had been slammed against the wall into the divot. (Id. at 237). He did not, however, find any transfer of drywall material into AJC's hair, which he would have expected. (Id. at 237-38). Nevertheless, he did not believe that the injuries were consistent with AJC being dropped while being carried to bed, either before or after police informed him of Mr. Lenz's account. (Id. at 224-25). Although Mr. Lenz's benign explanation was the next most likely scenario, only a fall of greater than ten feet could result in the complex fracture AJC suffered. (Id. at 230). In fact, Dr. Bulic felt the injuries were more consistent with impact onto a softer surface like a carpet than directly onto a hard surface. (Id. at 239).

[1] If the Court permits Mr. Lenz to expand the record, he would introduce evidence that Dr. Bulic was recently disciplined for misconduct in the Michelle O'Connell case. See, e.g., https://historiccity.com/2017/staugustine/news/florida/panel-finds-oconnell-medical-examiners-broke-state-laws-67572. It appears that Mr. Bulic's inconsistent state-friendly testimony in the second trial (relative to this deposition) was not a mistake, but part of a pattern of returning results favorable to law enforcement.

Dr. Bulic also observed two small abrasions on the left side of AJC's upper back, along with a large bruise on the left side of the lower back and a smaller one on the right side. (Id. at 218). On AJC's right arm was a single bruise below the elbow; on the left, several small ones. Either could have been caused by play or accident as well as by being grabbed. (Id. at 220-22). Ultimately there was no pattern. (Id at 229).

Dr. Bulic also found a bit of hot dog in AJC's lung. The lack of stomach acid led him to rule out regurgitation and aspiration as a cause. (Id. at 233). He felt that the piece of food had gone into the lung while AJC was eating. (Id. at 235).

Dr. Bulic explained that children can "still run around and play" with such an obstruction in their lungs. (Id. at 235).

D. Trial Counsel's investigation of potential defense experts.

Mr. Lenz was declared indigent for the purposes of costs, including medical and bio-mechanics experts. (D.E. 11-1, at 98-99). In preparing for trial, counsel reached out to several potential expert witnesses, explaining Mr. Lenz's defense and providing the autopsy report and other discovery. (D.E. 11-6, at 934). First, a fraternity brother who was a pediatric surgeon reviewed the autopsy and indicated that it did not support Mr. Lenz's version of events. (D.E. 11-6, at 921). Colleagues at the public defender's office recommended Dr. Shuman, a medical examiner, who reviewed the case. Dr. Shuman agreed that Mr. Lenz's version of events seemed unlikely, but referred counsel to Dr. Steven Nelson. (Id.). Dr. Nelson, in turn, concurred with the others. (Id. at 922). The doctors did, however, observe that a weakness in the child's skull may have increased the severity of the injury. (Id.). Ultimately, "they said that those weren't major enough" to lead to a different conclusion. (Id. at 922, 935).

Additionally, trial counsel reached out to a biomechanical expert, Dr. Ipser, who "would have agreed from a biomechanical perspective that that sort of a fall on to this carpet surface would have explained for the type of injury that caused to this child's head." (D.E. 11-7, at 2). He did not call Dr. Ipser because the state threatened to call rebuttal witnesses, whom the state had already placed on the witness list. The medical expert witnesses would have supported Dr. Bulic's conclusions.

E. Bad acts evidence at the first and second trials.

The jury deadlocked after the first trial. The state had introduced Williams[2] rule evidence that, *inter alia*, Mr. Lenz had a bad temper, and had caused at least one indentation in the wall by punching it after he and Goldrine had an argument. This allowed counsel to rebut with favorable evidence of Mr. Lenz's character indicating that "frankly, he loved the child more than the child's mother." (D.E. 11-6, at 912). The evidence also proved that the incidents of "alleged abuse really weren't caused by him but were typical child's play, because they were all pretty well documented." (Id. at 913). After the trial, a juror e-mailed Mr. Hornsby to explain that this evidence had led to the two holdout votes to acquit, because those jurors "were convinced that he loved the child and that there's no way he could have done this." (Id. at 912).

Before the second trial, however, the state "cut [Mr. Hornsby] off at the knees" by withdrawing its notice of intent to use the Williams rule evidence, in turn precluding Mr. Hornsby from presenting that favorable character evidence. (Id. at 913; see also D.E. 11-1, at 244 (requesting order precluding introduction of evidence of good conduct by Mr. Lenz); D.E. 11-5, at 621 (granting motion after argument on first day of trial)).

[2] Williams v. Florida, 110 So. 2d 654 (Fla. 1959).

Nevertheless, due to unelicited testimony from Ms. Goldrine the jury did hear that there were holes and dents throughout the house, including one at least one "from Jason punching the wall." (D.E 11-5, at 699). Counsel moved for a mistrial, which led to the jurors being dismissed for the day, and was denied after further argument the next morning. (Id. at 700-45). The court did not permit counsel to introduce evidence of Mr. Lenz's loving relationship with AJC. (Id. at 743-44). Counsel elected to forego any curative instruction, to avoid drawing further attention to the statement. (Id. at 743).

F. Testimony at the second trial.

The state called Goldrine first. She testified that AJC had complained of headaches the week before his death, after bumping his head on a counter. (D.E. 11-5, at 670).

On cross-examination, Goldrine admitted that AJC called Mr. Lenz "dad," and that she and Mr. Lenz had been checking on AJC during the night less frequently, because they were trying to train AJC to sleep through the night. (D.E. 11-5, at 750). She conceded that AJC was a rambunctious child who had hit his head on walls and tables often. (D.E. 11-5, at 751-53, 768). She also agreed that AJC often chased Mr. Lenz's cat, Bandit, around the house and under furniture, sometimes bumping his head. (Id. at 751). Bandit liked to hang out in AJC's room. (Id. at 757). Bandit was bigger than, but the same color as, Goldrine's boots. (Id. at 801).

When AJC hit his head, she "would tell him to shake it off." (Id. at 752). About two weeks before his death, AJC hit his head hard enough to cause swelling. (Id. at 753). She gave AJC children's pain reliever and chocolate milk to wash it down. (Id. at 753, 809). AJC liked the taste, and continued to complain about headaches until his death. (Id. at 754, 797, 799). Goldrine believed that sometimes AJC just wanted the pain reliever, and did not have a headache. (Id.).

AJC's health had improved since he started living with Mr. Lenz, who took special care to see that he ate. (Id. at 813-140). She also explained that Mr. Lenz was a thoughtful, mellow person, and that AJC was a light sleeper who probably would have woken up if she had had to retrieve her clothes from his room. (Id. at 754-56, 772). Mr. Lenz had also said before that AJC should be allowed to sleep in, and the weekend before AJC had slept until around eleven a.m. (Id. at 780-83). When she returned home, she and Mr. Lenz had a normal night together. (Id. at 785-88).

She could not say whether the indentation above AJC's bed had grown larger. (Id. at 766). She agreed that a divot caused by AJ spinning around and falling in the living room had been spackled over. (Id. at 767). Counsel asked about the dent Mr. Lenz caused by punching the wall. Goldrine explained that they were arguing when Mr. Lenz walked away and punched the wall. Mr. Lenz then came back to her, and when she ignored him, he "tapped his forehead" or "headbutted" her. (Id. at 772-73). He had never struck her any other time, and Mr. Lenz was not drinking during the argument. (Id. at 774-75).

AJC's injuries were not visible when she attempted to awake him. (Id. at 616).

Lieutenant Kevin Brubaker was used to introduce the audiotape and transcript of Mr. Lenz's first interview with the police. (Id. at 848-51). Defense counsel published them to the jury. (Id. at 883-978). Counsel then published an excerpt from the end of the statement, featuring Mr. Lenz explaining to Goldrine that an accident had occurred. (Id. at 992-96).

Crime scene analyst John Ohlson was used to introduce various items of evidence, including the hairs collected from the divot above AJC's bed. (Id. at 1037).

Dr. Bulic testified inconsistently with his deposition at times. (Id. at 1319-1541). He characterized the lip injuries as "highly suspicious for abuse." (Id. at 1328). He characterized

the bruises on AJC's arms as "classic fingertip contusion, meaning the child was grabbed by hand and one of the fingers left an imprint on the skin." (Id. at 1334-35). A toxicology screen did not show the presence of pain relievers. (Id. at 1336-37). AJC's right lung was blocked by a piece of hot dog. (Id. at 1341). Dr. Bulic blamed the presence of the hot dog on mishandling, not regurgitation and aspiration. (Id. at 1359).

On cross-examination, it became evident that Dr. Bulic had altered his testimony in the state's favor. He admitted that he had changed his position from the deposition on whether striking AJC could have caused the lip injuries. (Id. at 1383-85). He was also confronted with his changed position on whether AJC had "most likely" struck his head on carpet. (Id. at 1422-26). Similarly, he was impeached on his inconsistent testimony on whether AJC could have continued to move and play with his right bronchus obstructed by the hot dog. (Id. at 1454-59). Finally, Dr. Bulic contradicted his deposition by claiming not to know whether AJC would have drywall in his hair if he had struck the wall. (Id. at 1540).

Dr. Bulic opined that the skull injuries were the sort associated with a car crash, a fall from a height of more than ten feet, or abuse. (Id. at 1352-53). They could not have occurred from a fall of six feet. (Id. at 1355, 1363). The kind of fall Mr. Lenz described would have resulted in only mild injuries. (Id. at 1466-67). AJC would have lost consciousness and entered a coma immediately after. (Id. at 1357-59). In his opinion, the death was a homicide. (Id. at 1364).

However, on cross-examination Dr. Bulic admitted that anything resulting in additional force could render a six-foot fall as damaging as a ten-foot fall. (Id. at 1409). The injuries indicated that AJC had struck a hard, unyielding object. (Id. at 1414). When asked whether he'd used any authority relevant to biomechanical analysis, Dr. Bulic explained "Those are boring

articles, so I don't read that." (Id. at 1541).

Counsel cross-examined Dr. Bulic using articles he'd relied on to generate his opinion. (Id. at 1431; see also D.E. 11-4, at 146-72 (articles)). Dr. Bulic was confronted with a case study in which a child suffered similar injuries after a fall from two or three feet, due to angular velocity caused from the starting position in a rocking chair. (D.E. 11-5, at 1432-33). He admitted that he had not accounted for initial velocity in AJC's case. (Id. at 1434). Another article around 285 injuries, and found that injuries like AJC's were more often accidental than inflicted. (Id. at 1447-48). Different portions of those articles were consistent with the state's theory, however, and were used to rehabilitate Dr. Bulic as to certain issues. (Id. at 1491-1524).

Finally, counsel called Mr. Lenz to testify. He testified consistently with his second statement to police. He denied striking AJC. (Id. at 1554). He explained that had not wanted to believe that a fall could have caused AJC's death, and that the media presence on his lawn brought the then-current Casey Anthony case to mind. (Id. at 1579). The absence of visible injuries led him to hope that he had not been responsible for the death. (Id. at 1605, 1624).

The jury convicted Mr. Lenz, who faced a mandatory life sentence.

G. Mr. Lenz's motion for postconviction relief.

Mr. Lenz was granted an evidentiary hearing on counsel's failure to call a biomechanical expert, and his failure to call Mr. Lenz's sister to testify that the divot had not grown. (D.E. 11-6, at 415, 421, 689). Dr. Willey, a forensic pathologist, testified that Dr. Bulic improperly failed to determine the age of the collateral injuries; moreover, he had not preserved the primary notes, and the autopsy report appeared to include reproductions of the left lung, rather than the blocked right lung. (Id. at 836). Dr. Bulic's autopsy procedures were far from complete. (Id. at 849). In fact, Dr. Bulic did not sample enough of AJC's lung to say with any confidence that the food

fragments could not have resulted from regurgitation. (Id. at 849). He also failed to sample the eyes. (Id. at 865). He had failed to construct a reliable differential diagnosis that addressed the possible causes of death. (Id. at 844-45).

Nevertheless, Dr. Willey could say with confidence that the blocked lung Dr. Bulic reported could have aggravated or even caused some of the hemorrhaging. (Id. at 840-41). Moreover, due to other factors such as force and material strength, "the distance of the fall is just completely immaterial" to the degree of injury. (Id. at 842). Mr. Lenz's explanation was plausible, and should have been investigated further through a re-creation by a biomechanical engineer. (Id. at 843, 848). AJC vomiting was consistent with a head injury. (Id. at 934-35). If counsel had retained him, or any other forensic pathologist, Dr. Bulic would have been asked the correct questions on cross-examination to illustrate the plausibility of Mr. Lenz's report. (Id. at 850-52). He was also "struck by" the inconsistencies between Dr. Bulic's deposition and his subsequent testimony. (Id. at 853).

Dr. James Ipser, a professor emeritus of physics at University of Florida consulted by trial counsel, described the "head injury criterion index" tool. (Id. at 886). He testified that one could not simply approach injuries like AJC's as though a child were dropped from the height he was held. (Id. at 887-888). Mr. Lenz walking at five miles per hour could have generated enough force for AJC's injuries. (Id. at 891-92). Dr. Ipser reported these findings to trial counsel, who never spoke with him again. (Id. at 892). If he had, Dr. Ipser would have explained that he had assumed that the carpet could compress to a depth of zero; in that case, AJC's head would have been "stopped over a shorter distance," rendering the amount of force "correspondingly greater." (Id. at 894).

Trial counsel had not given Dr. Ipser the autopsy report, just a narrative explanation of the events. (Id. at 901). He explained that a concrete floor was under the carpet and pad. (Id. at 905).

Trial counsel Richard Hornsby testified that he was concerned that Dr. Bulic's superiors would appear if he called any experts. (Id. at 926-27). He did not revisit the issue after the mistrial because 'the medical issue hadn't changed." (Id. at 928). At the first trial, cross-examining Dr. Bulic with learned treatises "became a cluster" because Dr. Bulic did not recognize the authors at experts. (Id. at 929-30). He had more success at the second trial, but "for every article there was a section in the article that went against me." (Id. at 930). He had provided Dr. Shuman and Dr. Nelson with copies of the discovery, but only gave Dr. Ipser a carpet fragment and Mr. Lenz's version of events. (Id. at 934-35). Dr. Ipser had nevertheless agreed that Mr. Lenz's account was plausible. (D.E. 11-7, at 1-2).

Trial counsel explained that at the first trial, the state had introduced evidence that Mr. Lenz had a short temper, and that the proposed experts would have described prior injuries that would have been consistent with prior abuse. (Id. at 6-7). However, he admitted that if the state attempted to tie Mr. Lenz to prior instances of abuse, it might have opened the door to rebuttal with the powerful evidence of Mr. Lenz's loving relationship with AJC. If that were true, he "would say I screwed up." (Id. at 7).

Trial counsel had concerns about Dr. Bulic's competency. (Id. at 11-12). Nevertheless, he did not ask any expert whether Dr. Bulic had conducted the autopsy properly. (Id. at 7). He was satisfied that Dr. Bulic would provide the best testimony in support of Mr. Lenz's account, because Dr. Bulic alone believed that AJC might not have exhibited visible signs of distress after aspirating a chunk of corn dog. (Id. at 14).

Counsel was aware that Mr. Lenz's sister, Ms. Carroll-Lenz, would testify that the divot was not larger after AJC's death. He characterized his failure to call her as a "brain fart" rather than any reasoned decision. (D.E. 11-6, at 933). Accordingly, the trial court found counsel's representation deficient with respect to her testimony. However, it did not find that prejudice could have arisen from the failure to call her. (Id. at 692).

As for counsel's failure to call a biomechanical engineer or forensic pathologist, the court ruled it a reasonable strategic decision to conclude that the state's uncalled witnesses, who were expected to support Dr. Bulic (except for the favorable testimony on the effect of lung blockage), would result in a negative net effect. (Id. at 693-94).

In connection with the motion for rehearing (Id. at 734-46), Mr. Lenz submitted the affidavit of James Ipser, Ph.D., who explained that he may have reached a different conclusion if he had known AJC had been treated with ibuprofen, which can cause internal bleeding. (D.E. 11-6, at 725-26). He also filed an affidavit from Dr. Edward Willey, who stated that Dr. Bulic failed to properly examine the alleged bruises, and to account for ingestion of ibuprofen. (Id. at 728-30). Trial counsel averred that he had not investigate the role ibuprofen could have played or disclosed its presence to experts. (Id. at 732-33). The motion was denied without explanation. (Id. at 755).

The Fifth District Court of Appeal affirmed in an unreasoned opinion. (D.E. 11-7, at 288).

II. Legal Standards.

Florida courts rejected Mr. Lenz's uncalled witness claim on the merits. Therefore, this Court may grant relief if the state court decision was "contrary to" or "an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United

States." The court may also grant relief if the decision 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).

Although § 2254(d)(1) requires deference to the state court's conclusions of law, it does not require a federal court "to defer to the opinion of every reasonable state judge on the content of federal law." Wilkerson vs. Taylor, 529 U.S. 362, 389 (2000). "If after carefully weighing all of the reasons for accepting a state court's judgment, a federal court is convinced that a prisoner's custody . . . violates the Constitution, that independent judgment should prevail." Id.

Rompilla v. Beard illustrates the standard for effective assistance in researching claims and defenses. 545 U.S. 374 (2005). In Rompilla, the Supreme Court explained that attorneys have an obligation to defer strategic decisions until after they investigate and understand the relevant evidence. See also Sears v. Upton, 130 S. Ct. 3259, 3265 (2010) (per curiam) (explaining that a strategy can be deficient with respect to a particular defendant even when "reasonable in the abstract"); cf. Wood v. Allen, 130 S. Ct. 841 (2010) (affirming Eleventh Circuit's denial of habeas relief where the state showed that counsel's decision not to present an expert's report at sentencing, some of which was adverse to the defendant, was based on reasoned consideration and rejection of alternatives). When an investigation is constitutionally deficient, postconviction courts must consider whether all of the newly discovered evidence establishes that the defendant was thereby prejudiced. Sears, 130 S. Ct. at 3267.

Ineffective assistance of counsel occurs when "specific errors of counsel undermined the reliability of the finding of guilt." United States v. Cronic, 466 U.S. 648, 659 n. 26 (1984). "An error of counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland v. Washington,

466 U.S. 668, 691 (1984). Thus, in addition to deficient performance, a habeas petitioner must show that that counsel's error was reasonably likely to have caused a conviction to occur. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

III. Analysis.

Although there are other problems with Mr. Lenz's trial alleged in the petition, counsel's unreasonable failure to research available experts most clearly undermined any reliable determination of guilt.

A. Prejudice.

It is simpler to begin with prejudice, which the state court did not consider and this Court addresses *de novo*. Ferrell v. Hall, 640 F.3d 1199, 1224 (11th Cir. 2011). If trial counsel had called Dr. Ipser, at the very least the jury would have heard that Dr. Bulic was wrong about the ten-foot fall threshold for AJC's injuries. This would have given them a basis to conclude that AJC's death was not caused by abuse. A forensic pathologist could have alerted the jury to Dr. Bulic's deficient autopsy, and the lack of any basis to conclude that the hot dog chunk had not been regurgitated and aspirated

Respondent has not produced the depositions of the State's other possible experts, Dr. Herman and Dr. Alexander. Nevertheless, even if they would have supported Dr. Bulic, there is no basis in the record to conclude that they would have contradicted Dr. Ipser's analysis of the physics of Mr. Lenz's account. In fact, they would have been competent to do so.

Meanwhile, Dr. Bulic would still testify that AJC's blocked bronchus might not have been apparent. For Drs. Herman and Alexander to contradict Dr. Bulic would undermine his competency on other points. Moreover, a pathologist would have allowed the jury to question whether AJC had even been conscious when he aspirated the corn dog.

Even if not called, a properly used biomechanical expert and forensic pathologist would have enabled trial counsel to adequately cross examine Dr. Bulic, establishing in detail the problems with his methods and conclusions.

Prejudice need not be shown beyond a reasonable doubt, or even by a "'more likely than not'" standard; the defendant need only "establish 'a probability sufficient to undermine confidence in the outcome.'" Porter v. McCollum, 558 U.S. 30, 44 (2009) (quoting Strickland, 466 U.S. at 693-94). The jury only heard expert testimony that the fragment of hot dog had gone directly into AJC's throat, and that he had not fallen from any less than ten feet. If they had understood the weakness of Dr. Bulic's conclusions – and especially if an expert had testified to any physical possibility that Mr. Lenz could have tripped while holding AJC, or that AJC had regurgitated and then aspirated the hot dog fragment while unconscious – they could have rationally evaluated Mr. Lenz's version of events.

B. Deficiency.

The deficiency analysis involves more factors, but ultimately is no less clear. Trial counsel's investigation of experts was unreasonable. His decision to eschew their assistance in preparing for trial, and to refrain from calling them as witnesses, therefore did not qualify as a strategic decision. Moreover, there could be no reasonable basis to not use or call the experts available.

First, trial counsel failed to reconsider the importance of expert testimony after learning that the State would not present any character evidence. He could not reasonably have expected to introduce any evidence of Mr. Lenz's good relationship with AJC in a trial that was to be concerned only with the events that caused the injury. The jury would hear that Mr. Lenz's account was not physically possible.

In searching for experts, trial counsel failed to provide Dr. Ipser with discovery materials. Nevertheless, trial counsel knew that Dr. Ipser would have established that AJC's injuries were physically possible from a fall of less than ten feet. This would have supported the single most important part of Mr. Lenz's account: that no abuse occurred, only an accidental fall. There could be no reasonable explanation for counsel's decision not to investigate any further. This unreasonable failure to investigate precluded any reasonable strategic decision on Dr. Ipser.

Moreover, although the state had threatened to call additional witnesses to support Dr. Bulic, they did not list any biomechanical engineer as a possible witness. Dr. Ipser's testimony would have contradicted the cumulative testimony of any additional medical witnesses, who would have been out of their area of expertise. Even a reasoned strategic decision to forego Dr. Ipser's testimony at trial would have been unreasonable.

The state's witnesses would have contradicted the one favorable aspect of Dr. Bulic's testimony: that AJC might not have been in visible respiratory distress after Mr. Lenz struck him while he was eating his corn dogs. In context, Dr. Bulic's representation that a child with a similar blockage could run and play was of little to no use because it had resulted from abuse. If the state made good on its threat to call additional witnesses, their disagreement on this point could only have highlighted Dr. Bulic's questionable methods and conclusions. On the other hand, Dr. Willey or any other forensic pathologist to review Dr. Bulic's work would have pointed

out the deficiencies in the autopsy, including the lack of any basis to conclude that AJC could not have choked on regurgitated matter while unconscious.

Trial counsel also reasoned that the additional experts might characterize previous injuries as consistent with abuse. However, evidence of prior abuse would have opened the door to rebuttal evidence of Mr. Lenz's relationship with AJC, the lack of which trial counsel felt had cut him off at the knees. The transcript of the evidentiary hearing indicates that counsel did not consider this possibility.

Trial counsel also failed to apprise any of the experts that AJC had been consuming blood-thinning pain relievers for two weeks. If he had, they could have testified that AJC's injuries could have been caused by a lesser degree of force than would otherwise be required.

On this record, to conclude that trial counsel made a considered, reasonable strategic decision with respect to potential experts would be an unreasonable application of Strickland, an unreasonable finding of fact, or both.

Accordingly, Mr. Lenz asks this Court to GRANT the petition for writ of habeas corpus.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 20, 2017, the foregoing document was electronically filed with the Clerk of the Court using CM/ECF and is being served on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Gray Proctor
Gray R. Proctor, Esq.

IN THE CIRCUIT COURT FOR THE EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR SEMINOLE COUNTY, FLORIDA

CASE NO. 09-CF-0416-A

STATE OF FLORIDA,

Plaintiff,

vs.

JASON ARTHUR LENZ,

Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF

The Defendant was originally indicted for first-degree felony murder and aggravated child abuse (causing great bodily harm). He was tried on those charges from January 11-16, 2011. The jury was unable to reach a verdict on either count, so the trial court declared a mistrial and set the case for retrial to begin February 8, 2011. While awaiting the retrial, the State filed an information adding a third count, aggravated manslaughter of a child. The trial on all three counts was held from February 8-15, 2011 and the Defendant was convicted of counts one and two and sentenced to life and thirty years in prison, respectively.[1] The judgments and sentences were affirmed without opinion by the Fifth District Court of Appeal. *Lenz v. State*, 88 So. 3d 174 (Fla. 5th DCA 2012).

On April 9, 2013, the Defendant filed his "Motion for Post-Conviction Relief" in which he raised ten grounds of ineffective assistance of counsel. On November 25, 2013, this Court summarily denied grounds 1 and 4-10 and directed the State Attorney's Office to respond to grounds 2-3. The State filed its response on December 12, 2013. The State urged this Court to deny those two grounds, but this Court found that the claims were legally sufficient and were not conclusively refuted by the record. Therefore, these claims were presented at an evidentiary hearing, ultimately held on January 22, 2015.

While the case was awaiting the evidentiary hearing, the Defendant filed two pleadings, each titled "Motion for Leave to Supplement Motion for Post-Conviction Relief and/or Other Relief." The first, filed on November 4, 2014, requested leave to amend ground one of the original motion to assert that the jury instruction deviated from the standard instructions, reducing counsel's strategy to a complete concession of guilt and causing jury confusion.[2] However, the first claim of the Defendant's motion was

[1] Because manslaughter was a lesser-included offense of murder, the Court dismissed count three before it was submitted to the jury.

[2] The motion is not an amended 3.850, it merely proffers the grounds that counsel intends to add.

that counsel's strategy in arguing that the Defendant was guilty at most of manslaughter was tactically unreasonable, but not because of the jury instruction. This Court found that counsel merely conceded to the actions to which the Defendant had admitted and that the concessions did not amount to a guilty plea. Thus, this request to amend the claim based upon the allegedly faulty jury instruction is not an amendment of the earlier claim; it proffers an entirely new substantive claim. Since the Defendant's conviction became final on February 1, 2012, this new substantive claim would be untimely. *See* Fla. R. Crim. P. 3.850(b). It cannot be deemed to be newly-discovered evidence because the alleged error was present on the face of the court record and, therefore, could have been discovered through the exercise of due diligence. As such, the Defendant is not entitled to supplement the motion. *See Richardson v. State*, 890 So. 2d 1197, 1198 (Fla. 5th DCA 2005).

Even so, the proffered claim would not entitle the Defendant to relief. While the Defendant asserts that the trial court deviated from the standard jury instruction for battery, the trial court actually read, verbatim, the Standard Jury Instruction relating to aggravated child abuse. *See* Fla. Std. Jury Instr. (Crim.) 16.1. As collateral counsel concedes, "standard jury instructions are presumed correct." *Freeman v. State*, 761 So. 2d 1055, 1071 (Fla. 2000). Thus, there could be no ineffectiveness here because the Court did read the standard jury instruction for the charged crime.

Furthermore, counsel was not ineffective for making his argument in light of the standard aggravated child abuse instruction. In light of the incompletely incorporated battery instruction, the sentence structure as to element one of aggravated child abuse is ambiguous. However, it did not lessen the State's burden of proof or broaden counsel's concession to certain elements into a de facto guilty plea. Any error created by the latent ambiguity in the instruction was preserved. (See excerpt of trial transcript, attached as Exhibit A). This issue should have been raised on direct appeal and therefore it cannot be relitigated by the filing of a motion under Fla. R. Crim. P. 3.850. *See Medina v. State*, 573 So. 2d 293 (Fla. 1990).

Finally, there was no prejudice, even if there was an error in the instruction. In order to be convicted of aggravated child abuse, element two required the State to prove beyond a reasonable doubt that "Jason Arthur Lenz in committing the battery *intentionally or knowingly caused* [redacted] great bodily harm, permanent disability, or permanent disfigurement." (See excerpt of trial transcript, attached as Exhibit B) (*emphasis added*). Thus, if the jury accepted trial counsel's limited concession that the Defendant negligently dropped the child and the child suffered bodily harm as a result, it would only support a finding that the State proved element one but would not permit such a finding as to element two. In order for the jury to have convicted the Defendant, it implicitly found that the great bodily harm, permanent disability, or permanent disfigurement was intentionally or knowing caused.

The January 22, 2015 request for leave to amend proffers an amendment to ground six of the initial motion. That claim addresses trial counsel's ineffectiveness in advising the Defendant whether to accept or reject the State's plea offer. The requested expansion of the ground relies upon trial counsel's testimony at the evidentiary hearing that he advised the Defendant that he would never be convicted of first-degree murder. The issue raised in the original motion was that the Defendant "state[d] that he would have entered the fifteen year plea offer had counsel not told him that he would only be convicted of manslaughter." The summary denial was not based upon counsel's advice, but on the basis that the Defendant repeatedly and adamantly refused to consider any plea with substantial prison time. Trial counsel's statement made at the evidentiary hearing would not add any material facts to the Court's consideration of that ground on its merits in the November 25, 2013 order. The statement by counsel was not as absolute as the Defendant indicates. Trial counsel stated that based upon the testimony and outcome of the first trial and the feedback from two jurors seated at that trial, he was very confident that the Defendant would not be convicted of first-degree murder. Counsel did not testify that the Defendant could not, as a matter of law, be convicted of murder. Therefore, while the Defendant is technically able to amend his motion at this time, the proffered amendment will not alter the Court's ruling.

As to the claims fully presented at the evidentiary hearing, those claims pertained to trial counsel's failure to present witnesses. In claim two, the Defendant asserts that counsel should have called two of the Defendant's family members to testify. In claim three, the Defendant alleges that counsel should have presented expert witnesses to support his claim that the injuries could have been consistent with the version of the facts presented by the Defendant.

The Defendant asserts that trial counsel should have called Peggy Lenz, the Defendant's mother, to testify in the second trial. She would have testified that a divot in the wall, which was a heavy focus of the first trial, predated the child's injuries. Counsel made the strategic decision not to call Ms. Lenz because in the first trial, she candidly stated that she would lie to protect her son. Counsel believed that her testimony would be materially impeached by that concession, and that her testimony would be more likely to harm the case than it would help it. Counsel did not recall whether he got the Defendant's specific agreement not to call Ms. Lenz, but he knows that the Defendant did not expressly object to his decision not to call Ms. Lenz to testify. Trial counsel's strategic decision was reasonable, and therefore counsel was not ineffective in electing not to call Ms. Lenz to testify on her son's behalf.

Counsel did not recall any specific consideration with regard to calling the Defendant's sister, Melinda Lenz Carroll, to testify about the divot in the wall. Trial counsel knew about the Defendant's sister, but he could not provide an explanation as to why he did not call her to testify that the divot predated the alleged abuse and had not changed in size or appearance. She was present and available to testify at the trial. In that this case was largely dependent on the credibility of the witnesses, the failure to

call Ms. Carroll absent some valid rationale, should be deemed deficient as set forth in the first prong on *Strickland.*

The question then becomes whether the failure to call Ms. Carroll was prejudicial. Upon a review of her testimony and the trial record, this Court determines that her testimony would not have changed the result of the trial. The State presented some testimony and evidence relating to this divot, including a photograph and a cutting of the portion of the drywall containing the divot. The victim's mother, [redacted] testified that the divot was present prior to January 25, 2009. She believed that it might have been bigger after [redacted] was injured, but she could not say so with certainty. (See excerpts of trial transcript, attached as Exhibit C and D). Of course, Ms. Carroll's testimony might have cleared up this ambiguity in [redacted]'s testimony.

However, despite the Defendant's assertions in the motion and at the evidentiary hearing, Ms. Carroll's evidence was largely immaterial to the ultimate question of the Defendant's guilt or innocence. Her testimony does not negate any element of the offense,[3] substantially impeach any witness,[4] or provide substantial evidence supporting a reasonable hypothesis of innocence.[5] The child's head could have been hit into the divot without increasing its circumference, or by making it only slightly bigger, which could explain why [redacted]., who lived in the house, thought it looked bigger, but Ms. Carroll, who only visited monthly, would not have noticed the slight difference. Thus, it does not negate the State's inference that [redacted] was killed when the Defendant hit his head into the wall at the divot site. Also, the State provided an alternative theory – that the child's head could have been struck against another hard, flat surface in the house. (See excerpt of trial transcript, attached as Exhibit E). Ms. Carroll's testimony would not counter that theory. [redacted]'s testimony was equivocal about the size of the divot, so Ms. Carroll's testimony would only have minimal impeachment value. Finally, her testimony does not support the Defendant's theory that the child was injured when the Defendant dropped him onto the carpet.

> [T]he analysis that a judge must perform [when a defendant alleges ineffectiveness based upon the failure to call a witness] is similar to the analysis required when a defendant alleges newly discovered evidence. *See Jones v. State,* 709 So.2d 512 (Fla.1998) (requiring judge considering whether newly discovered evidence is likely to produce acquittal on retrial to consider whether evidence is admissible, weight to be accorded to evidence based upon whether evidence goes to merits of case, whether evidence is cumulative, and materiality and relevance of evidence and any inconsistencies presented by it). That is, the judge is not examining simply whether he or she believes the evidence presented as opposed to contradictory evidence presented at trial, but whether the nature of the evidence is such that a reasonable jury may have believed it.

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[3] *See Bulley v. State*, 900 So. 2d 596 (Fla. 2d DCA 2004).
[4] *See Armstrong v. State*, 806 So. 2d 547 (Fla. 2dDCA 2001).
[5] *See Meus v. State*, 968 So. 2d 706, 713 (Fla. 2d DCA 2007).

Light v. State, 796 So. 2d 610, 617 (Fla. 2d DCA 2001). The evidence of the size of the divot had been presented to the jury and the State offered a credible alternative theory, so this testimony does not undermine the Court's confidence in the verdict. *See Carmona v. State*, 814 So. 2d 481, 482-83 (Fla. 5th DCA 2002), *citing Hill v. State*, 788 So. 2d 315, 319 (Fla. 1st DCA 2001). Thus, while this Court has no reason to disbelieve Ms. Carroll's testimony, when it is viewed within the totality of the record, this Court finds that the Defendant has not established that the result of the trial would have been different had this testimony been presented.

The Defendant's third claim asserts that trial counsel was ineffective for failing to present testimony from a biomechanical engineer, such as Dr. James Reed Ipser, and a forensic pathologist, such as Dr. Edward Willey. The Defendant alleges that had this been done, he would have presented such expert testimony to rebut Dr. Bulic's conclusions about the cause of the child's injuries.

Dr. Ipser testified at the evidentiary hearing. Dr. Ipser had been retained by counsel before the trial to analyze the Defendant's description of events. He used a methodology to create an "HIC" score,[6] which is a federal guideline developed to assess the dangers of a head impact. Dr. Ipser analyzed [redacted] injuries to determine if they were consistent with the Defendant's version of events. According to the Defendant, he was carrying the child on his shoulder, which is about five feet off the ground, and the child landed on a carpeted surface. Dr. Ipser had been provided photographs of the room and the carpet, as well as the injuries, but at the time Dr. Ipser had not been provided physical cuttings of the flooring. Dr. Ipser concluded that this five foot drop, standing alone, would not have caused the resultant injuries. Therefore, it would have required some additional forward momentum to render the injuries consistent with the Defendant's version of the incident. To make the HIC score go outside the "safe range," the Defendant's pace upon impact would have to be more than 5 miles per hour. To achieve this speed, the Defendant would have either been walking at a much faster than normal clip or even jogging, or the child could have been thrown into the surface. Thus, he opined that the Defendant's explanation was inconsistent with the injuries based upon the available evidence. However, Dr. Ipser testified at the evidentiary hearing that the actual compression factor of the carpet could have substantially altered the result, but it is unclear if that qualifier was ever conveyed to trial counsel. Dr. Ipser does not know why he was not called to testify at trial because there was no further communication between him and trial counsel after the initial results were provided.

Trial counsel testified that the State would have called Dr. Randall Alexander, a well known expert in child abuse, and Dr. Marie Hermann, Dr. Bulic's supervisor, to testify in opposition to Dr. Ipser

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[6] "HIC" in an acronym for head injury criterion index. This index, created by the government, assess the probability of head injuries after an impact. It provides probabilities, not certainties, so a "safe" score does not mean that injuries could not occur, nor does a "danger" score mean that the impact will necessarily result in such injuries.

at trial. Counsel had deposed Dr. Alexander and Dr. Hermann, both of whom would have concurred with Dr. Bulic on all material matters other than the effects of the lung blockage. Also, trial counsel did contact multiple medical expert witnesses upon being retained. He first spoke with a friend, Dr. Cameron Dezfulian, who is a pediatric care surgeon in Miami. Dr. Dezfulian did not believe that the Defendant's explanation of events was credible, but he opined that the injuries were consistent with Dr. Bulic's assessment. Trial counsel then contacted Dr. Marc Shuman, a forensic pathologist practicing in south Florida. Dr. Shuman also concurred with Dr. Bulic's conclusions. Dr. Shuman referred trial counsel to Dr. Stephen Nelson in Winter Haven. Dr. Nelson, another forensic pathologist, also agreed with Dr. Bulic's report. While all three doctors expressed disagreement with Dr. Bulic's opinion relating to the piece of food in the child's lung, each of the doctors rejected the Defendant's explanation of how the injuries occurred. Since the Defendant testified that the child was not in persistent respiratory distress, any of these doctors would have undercut the Defendant's explanation. Dr. Bulic was the only expert of the six that trial counsel spoke to before trial who would have corroborated this aspect of the Defendant's explanation. All six agreed that the ultimate cause of death was not a short fall as described by the Defendant. Thus, the decision not to call expert medical-forensic witnesses was a reasonable strategy made after an adequate and substantial investigation.

Trial counsel's strategy not to call Dr. Ipser was also reasonable. He believed that the net result of calling Dr. Ipser would have been negative because it would have resulted in the State calling Dr. Alexander and Dr. Hermann. The overarching trial strategy was to create reasonable doubt by virtue of discrediting Dr. Bulic. Trial counsel felt this strategy had a strong possibility of success at the second trial because he felt that Dr. Bulic's testimony was rejected by jurors in large part during the first trial. He was able to get Dr. Bulic to concede that a short fall, as described by the Defendant, could not be ruled out as the cause of the injuries and death. While Dr. Ipser would have corroborated this testimony, it would have resulted in two witnesses, one a nationally-renowned child abuse expert, testifying that Dr. Bulic's assessment of the cause of the injuries was correct. Causing these witnesses to be called would have completely rehabilitated Dr. Bulic. The Defendant was aware of this strategic decision, and while trial counsel does not remember whether the Defendant expressly agreed, the Defendant did not object. This Court concludes that trial counsel weighed the benefits and drawbacks of Dr. Ipser's expected testimony and made a reasonable strategic judgment not to call him as a witness. *See Franqui v. State*, 965 So. 2d 22, 31 (Fla. 2007) (recognizing that "trial counsel is granted great latitude in decisions regarding the use of expert witnesses").

The Defendant also presented testimony of Dr. Edward Willey. Dr. Willey testified that he had reviewed Dr. Bulic's deposition testimony, testimony from both trials, and the autopsy report, including certain slides from the autopsy. Dr. Willey criticized Dr. Bulic's work in many respects. Dr. Bulic did

not take samples that could have established the age of some of the child's injuries. Dr. Willey agreed that the cause of death was a traumatic injury to the brain, but he would not say how the injury occurred. Dr. Willey believes that the lack of oxygen caused by the blockage in the lung could have been a contributory cause of death because it could have exacerbated the child's distress. A subdural or subarachnoid hemorrhage could have been aggravated by the blockage, but the blockage would not have caused the hemorrhages, which were the results of external trauma. Dr. Willey believes that the height of a fall is largely immaterial, rather it is the surface, velocity, and the rate of deceleration that dictate the type and severity of a person's injuries. Dr. Willey would not assess the credibility of the Defendant's explanation without obtaining a biomechanical recreation of events, and he criticized Dr. Bulic's conclusion made without first consulting a biomechanical engineer. On cross-examination, Dr. Willey conceded that Dr. Bulic was impeached using several reputable articles of medical literature which indicated that short distance falls could be lethal, although such outcomes are rare. He also recognized that the State was not permitted to rehabilitate Dr. Bulic by referencing other medical literature that contained contradictory findings. Trial counsel is not ineffective simply because collateral counsel has discovered a witness who is willing to give more favorable testimony. *See Banks v. State*, 842 So. 2d 788, 790-92 (Fla. 2003); *Rose v. State*, 617 So. 2d 291, 295 (Fla. 1993).

ORDERED AND ADJUDGED:

1. The Defendant's Motions for Leave to Supplement Motion for Post-Conviction Relief and/or Other Relief, filed on November 4, 2014 and January 22, 2015, are hereby **denied**.
2. The Defendant's Motion for Post-Conviction Relief is hereby **denied** as to grounds 2-3.
3. The "Order Requesting the State Attorney Response to Grounds Two and Three and Denying Remaining Grounds of Defendant's Motion for Post-Conviction Relief," dated November 25, 2013, is hereby reaffirmed and incorporated into this Order.
4. The Defendant has 30 days from the date of this Order in which to file an appeal.

DONE AND ORDERED in chambers at Sanford, Seminole County, Florida this 10th day of March, 2015.

MARLENE M. ALVA, Circuit Judge

I hereby certify that copies of the foregoing have been furnished by mail this 10th day of March, 2015, to:

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MARYANNE MORSE, Clerk of Courts

By: T. Burnett
DEPUTY CLERK