No.

IN THE
Supreme Court of the United States

CHARLES L. TRICE,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, et al.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI

WILLIAM MALLORY KENT
Counsel for Petitioner Trice
Florida Bar No. 0260738
24 North Market Street, Suite 300
Jacksonville, Florida 32202
904-398-8000
904-348-3124 FAX
kent@williamkent.com Email

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APPENDIX

A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14476
Non-Argument Calendar

D.C. Docket No. 8:11-cv-01453-SDM-AEP

CHARLES L. TRICE,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

(March 13, 2019)

Before JILL PRYOR, ANDERSON and HULL, Circuit Judges.

PER CURIAM:

Charles L. Trice, a Florida state prisoner, appeals the district court's denial of his 28 U.S.C. § 2254 federal habeas corpus petition challenging his convictions and total life sentence for first-degree murder, violation of a domestic violence injunction, and burglary with assault. This Court granted a certificate of appealability ("COA") on one issue: whether the state post-conviction court unreasonably applied Griffith v. Kentucky, 479 U.S. 314, 107 S. Ct. 708 (1987), in determining that Trice's convictions were final when the Florida Supreme Court issued Weiand v. State, 732 So. 2d 1044 (Fla. 1999), and in failing to apply Weiand to his case. After careful review, we affirm.

I. STATE TRIAL PROCEEDINGS

A. Murder and Trial Evidence

In 1994, a grand jury indicted Trice, who was a Florida Highway Patrol Trooper, on charges of first-degree murder, violation of a domestic violence injunction, and burglary with assault, all in connection with the killing of his estranged wife, Darla Trice. At his jury trial, it was undisputed that Trice shot and killed Darla with his .357 revolver at their marital residence. At trial, Trice testified, however, that he shot Darla in self-defense after she unexpectedly stabbed him in the chest with a knife and to prevent her from stabbing him again. The state's evidence showed instead that Trice shot Darla because she wanted a divorce

and then stabbed himself to lay the ground work for a self-defense claim in order to get away with the murder.

As background, four months before the shooting, the couple separated, and Trice moved out of their marital home. Trice continued to have access to an office that was attached to the back of the home, which is where he kept his tools, weapons, and other supplies for work. The office had its own exterior door, so Trice could access the room without going through the main house. A domestic violence injunction prohibited Trice from entering the rest of the home but allowed him to access the office through the exterior door.[1] An interior door connected the office to the main house and could be locked from either side.

A week before the shooting, Trice was getting supplies at the Lakewood Florida Highway Patrol office when he made a remark about getting divorced and his wife trying to get everything. After using his co-worker Mary Roundtree's telephone, Trice looked Roundtree in the eye and said, "I ought to just go and kill her." Roundtree thought Trice was serious when he said that and discussed his statement with her family that night. Roundtree, however, did not otherwise report it until after the shooting.

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[1]According to Darla's petition for a temporary injunction, on December 8, 1993, Trice grabbed her hair, pulled her arm behind her, and threw her against the wall in their home. Trice told Darla to leave the house and not take their daughter or else she would leave in a body bag. Trice then got his service revolver and the .357 revolver and went into the bedroom. Darla called a neighbor for help and fled the house. This incident led to the domestic violence injunction.

On the day of the shooting, April 24, 1994, Trice visited their marital house twice. On the first visit, he dropped off the couple's three-year-old daughter, which was customary. Trice returned to the home a second time 30 or 45 minutes later. At trial, it was disputed whether Trice entered the home through the garage door, in violation of the domestic violence injunction, or whether he entered through the exterior office door. Either way, while in his office, Trice and Darla began arguing about the couple's Corvette, which had been a source of several altercations between the two.

At some point during the argument, Trice shot Darla. The evidence showed that Trice's gun was three to 18 inches from Darla's chest when Trice fired it. The bullet traveled through Darla's body on a slightly downward path of about five degrees and, assuming she was standing when shot, Trice held the gun at a slightly downward angle when he fired.

Thereafter, two phone calls were made to 911 from the Trice home, four minutes apart. During the first call, the 911 dispatcher asked about the nature of the emergency but hung up when no one responded. The issue of who made the first call was disputed at trial, whether it was Trice or Darla. Trice made the second call, reporting to the 911 dispatcher that he shot Darla after she stabbed him with a knife.

According to Trice's version of the events, after he told Darla that he was not going to give her back the Corvette, she walked away. Trice then went into the office closet to get some supplies for work. While looking in the closet, Trice heard something behind him, turned around, and Darla stabbed him with a knife in the chest. His legs got weak and he dropped to his knees on the closet floor. Darla was standing at the edge of the doorway, yelling and screaming at him. Darla said that she should have killed him a long time ago. Trice turned to stand up and saw his handgun on the closet shelf. He grabbed the gun to scare Darla, but she came at him again, and he had no choice but to shoot her.

When the first officer arrived on the scene, Trice told him that Darla had stabbed him and that he had to shoot her. The officer noticed a small blood stain on Trice's t-shirt near his left shoulder. Trice led the officer to his office where Darla was lying face up near the closet, bleeding from the gunshot wound. Darla's left arm was extended towards a telephone and the receiver was off the hook. An emergency medical personnel who arrived in the office hung up the telephone and started to treat Darla, but she died a few minutes later. Investigators also found a small paring knife within an inch of Darla's left hand. While the knife had Darla's blood on it, investigators found no fingerprints or any of Trice's blood on it.[2]

[2]The state presented evidence that the paring knife was part of a set of knives found in a knife block in the Trices' kitchen. The paring knife was much smaller than all the other knives

Trice was taken to the hospital and treated for his stab wound. He had a one centimeter wound in his upper left chest that was about four centimeters deep in a downward inward tract. The knife did not penetrate his chest cavity and medical personnel closed the wound with one stitch. The treating doctor could not tell if Trice's wound was self-inflicted or inflicted by someone else.

Sergeant Ken Lane, a Florida Highway Patrol Trooper, visited Trice in the hospital. Lane worked as a homicide investigator and investigated motor vehicle traffic homicides. He met Trice in 1986 and they were friends.

At trial, Lane testified that, while in the hospital, Trice recounted the incident to him. Trice said that he had gone to the house to drop off his daughter and went into the office to look for some supplies. There, Trice and Darla had an argument and she stabbed him. Trice fell to his knees and Darla was standing over him. When she came at him again, he shot her with his firearm. Trice then dropped his gun and stayed against the wall trying to reorganize his thoughts until he heard his daughter running down the hallway. He met her at the office door and took her to the other side of the house. After that, Trice called 911.

The next day, Lane drove Trice from the hospital to the residence. Lane was not investigating the shooting at the time but accompanied Trice through the house.

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in the set. During closing arguments, the state asked the jury why Darla would try to kill Trice with such a small paring knife, rather than with one of the bigger knives.

The two went into the office where Darla's blood was still on the floor. Trice was nonchalant and said, "Boy, she really made a mess in here, didn't she?" Trice also asked Lane how to clean up the blood. At trial, Trice denied making that statement or asking about cleaning the blood.

While in the office, Trice again detailed to Lane what had happened. After hearing Trice's explanation, Lane told him his story was not supported by the blood splatter and the body tissue residue in the room or the bullet's trajectory. For instance, if Trice shot Darla from the closet, why wasn't there any body tissue or blood splatter near the closet? Lane also asked why the bullet did not go straight through Darla into the office wall behind her, instead of striking a window six feet to the left of her body. Trice answered that the bullet might have struck Darla's spine and deflected to the left, but the autopsy showed the bullet went straight through her. Lane admitted, though, that he was not an expert in bloodstain analysis or ballistics. Lane told Trice again that he did not believe his story was lining up with the physical evidence and noted that, based on marks in the carpet, the office furniture appeared to have been moved.

Later, as they were going through the house, Lane asked Trice if the knife wound was self-inflicted because the situation was starting to look consistent with something he had read about before. Trice responded that he did not have the pain tolerance to stab himself. Lane testified that, as the investigation progressed, two

aspects of Trice's story changed from the version he originally told—that he made two trips to the house on the day of the incident and that he made two calls to 911.

At trial, the state's firearm expert also testified that the physical evidence did not match up with Trice's version of the events. Specifically, the firearm expert was asked hypothetically, based on (1) the entrance and exit wounds found on Darla, (2) the stippling pattern on Darla's skin surrounding the wound, and (3) the fact that the bullet did not deflect while traveling through her body, whether it was possible for the shooter to have been on his knees and to have fired the shot into a person standing up. The expert responded that this was not possible. However, on cross-examination, the firearm expert agreed that the stippling pattern found on Darla's skin could be consistent with the shooter being on his way up from his knees, if Darla was also bending over when shot.

B. Castle Doctrine Jury Instruction

Maintaining that he acted in self-defense, Trice persisted in his explanation throughout the trial. As relevant to this appeal, Trice requested a jury instruction on self-defense, including the following instruction, which is commonly referred to as the "castle doctrine" or the privilege of non-retreat from the home. Under Florida law, as an exception to the duty-to-retreat rule, the castle doctrine provides that a defendant has no duty to retreat when attacked in his home:

> If the defendant was attacked in his own home or on his own premises, he had no duty to retreat and had the lawful right to stand

> his ground and meet force with force, even to the extent of using force likely to cause death or great bodily harm, if it was necessary to prevent death or great bodily harm to himself.

Although Trice was not residing in the marital home at the time, he contended that he had a superior legal right to his office, where the shooting occurred, and thus the instruction was proper.

The state trial court refused to give the castle doctrine instruction because both Trice and Darla had the legal right to occupy the office at the time of the shooting. In so ruling, the state trial court relied on State v. Bobbitt, 415 So. 2d 724, 724-26 (Fla. 1982), in which the Florida Supreme Court held that when an assailant and the victim are legal occupants of the same home and neither has the legal right to eject the other, the "castle doctrine" does not apply. Instead, the state trial court gave the instruction applicable in all self-defense cases regarding the duty to retreat:

> The fact that the defendant was wrongfully attacked cannot justify his use of force likely to cause death or great bodily harm if by retreating he could've avoided the need to use that force.
>
> However, if the defendant was placed in a position of imminent danger of death or great bodily harm, and it would've increased his own danger to retreat . . . then his own use of force [that] was likely to cause death or great bodily harm was justifiable.

C. Verdict and Sentence

On June 27, 1995, after hearing testimony from more than 40 witnesses over the course of six days, the jury found Trice guilty on all counts. The state trial

court sentenced Trice to life imprisonment for first-degree murder, time served for violating the domestic violence injunction, and a consecutive life sentence for burglary with assault.

D. Direct Appeal

On direct appeal, Trice raised several issues of trial error, but did not challenge the state trial court's exclusion of the castle doctrine instruction. The Florida Second District Court of Appeal ("Second DCA") affirmed Trice's convictions and sentences and the Florida Supreme Court denied review. See Trice v. State, 719 So. 2d 17 (Fla. Dist. Ct. App. 1998); Trice v. State, 729 So. 2d 396 (Fla. 1999) (table). Trice's petition for a writ of certiorari with the U.S. Supreme Court was denied on June 24, 1999. Trice v. Florida, 527 U.S. 1043, 119 S. Ct. 2410 (1999).

E. 1999 Weiand Modifies 1982 Bobbitt Rule

Meanwhile, on March 11, 1999, the Florida Supreme Court issued its decision in Weiand v. State, which resulted in a substantive change in Florida law regarding the castle doctrine. 732 So. 2d 1044 (Fla. 1999). In Weiand, the Florida Supreme Court considered whether the privilege of non-retreat from the home should apply where a defendant wife killed her co-occupant husband in self-defense, after being physically abused and threatened by him. Id. at 1048. There, the evidence showed that the wife suffered from "battered woman's syndrome"

and shot her husband during a violent argument, despite having apparent opportunities to leave their apartment that night instead. Id. at 1048.

Expressly reconsidering its contrary rule in Bobbitt, the Florida Supreme Court held that "there is no duty to retreat from the residence before resorting to deadly force against a co-occupant or invitee if necessary to prevent death or great bodily harm, although there is a limited duty to retreat within the residence to the extent reasonably possible." Id. at 1051-58. The Florida Supreme Court noted that imposing a duty to retreat from the home may adversely impact victims of domestic violence, and its decision was an evolution of the common law consistent with the evolution of Florida's public policy. Id. at 1053-55.

In its decision, the Florida Supreme Court also adopted an interim standard jury instruction for its new rule:

> If the defendant was attacked in [his/her] own home, or on [his/her] own premises, by a co-occupant [or any other person lawfully on the premises] [he/she] had a duty to retreat to the extent reasonably possible without increasing [his/her] own danger of death or great bodily harm. However, the defendant was not required to flee [his/her] home and had the lawful right to stand [his/her] ground and meet force with force even to the extent of using force likely to cause death or great bodily harm if it was necessary to prevent death or great bodily harm to [himself/herself].

Id. at 1057. It explained that where the non-retreat instruction is applicable, the trial court's jury instructions are incomplete and misleading if the new instruction is not given. Id. at 1056. Lastly, the Florida Supreme Court directed that its

opinion and jury instruction was applicable to all future cases and all cases that were then pending on direct review or not yet final, but was not retroactively applicable to convictions that already were final. Id.

II. STATE POST-CONVICTION PROCEEDINGS

A. Rule 3.850 Motion and Appeal

In 2001, Trice filed a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. Among other things, Trice argued that after the date of his verdict, the Florida Supreme Court revised the castle doctrine in Weiand, such that he had no duty to retreat after being stabbed by co-occupant Darla. Trice contended that the trial court's jury instruction was thus erroneous under the current state of the law, which deprived him of federal due process under the Constitution. The state post-conviction court summarily denied this claim, concluding that Trice was not entitled to relief under Weiand because his case already was final when the Florida Supreme Court issued that decision.

Trice appealed, arguing that his case was not final when Weiand was issued. Rather, his conviction became final only on June 24, 1999, when the U.S. Supreme Court denied his petition for a writ of certiorari, and was therefore still pending on March 11, 1999, when the Florida Supreme Court decided Weiand. Accordingly, Trice contended that the rule announced in Weiand, that he had no duty to retreat, applied to him and he should be retried with the appropriate jury instructions.

In response, the state conceded Trice's convictions were not final prior to the issuance of Weiand. However, it argued that Trice was not entitled to benefit from the modified jury instruction proposed by Weiand because the issue was not preserved by a contemporaneous objection at trial, and Trice's trial counsel could not be ineffective for failing to anticipate a change in the law. The Second DCA affirmed without a written opinion and denied rehearing.

III. FEDERAL HABEAS PROCEEDINGS

Thereafter, in June 2011, Trice filed a counseled § 2254 petition raising several claims, including that the state post-conviction court improperly denied his request to apply Weiand to his case because it erroneously concluded that his case was final when the decision issued. Trice maintained that the substantial change in Florida law regarding the duty to retreat should apply to his case. As such, Trice argued that the state court's denial of this claim violated his federal due process and equal protection rights and was contrary to well-established federal law as determined by the U.S. Supreme Court. As to the latter point, Trice contended that the state court's denial of this claim was contrary to Griffith v. Kentucky, 479 U.S. at 322-23, 328, 107 S. Ct. at 713, 716, in which the Supreme Court held that newly declared constitutional rules of criminal procedure must apply retroactively to all criminal cases pending on direct review in state or federal courts.

The district court denied Trice's § 2254 petition. In relevant part, the district court concluded that, although Trice's case was not final when Weiand was issued, Weiand's privilege of non-retreat was inapplicable to him because he was no longer a co-occupant of the residence with Darla at the time of the shooting. Rather, Trice had been barred from the home by a domestic violence injunction that prohibited him from entering the residence, except through the exterior door into the office. Because, as the jury found, Trice violated the domestic violence injunction when he entered the house, the district court concluded that Trice was a trespasser in the residence, not a co-occupant. The district court concluded, therefore, that any reliance on Weiand by Trice as a co-occupant would necessarily fail. Finally, the district court noted that because Trice neither objected based on Weiand at trial, nor raised the issue on direct appeal, he could not benefit from the change in law.

Trice appealed. This Court granted a COA as to whether the state post-conviction court unreasonably applied Griffith v. Kentucky in determining that Trice's case was final when the Florida Supreme Court issued Weiand and in failing to apply Weiand to his case.

IV. DISCUSSION[3]

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides that, after a state court has adjudicated a claim on the merits, a federal court may grant habeas relief only if the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court," or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d)(1), (2).

The decision of a state court is "contrary to" federal law only if it "contradicts the United States Supreme Court on a settled question of law or holds differently than did that Court on a set of materially indistinguishable facts." Cummings v. Sec'y for Dep't of Corr., 588 F.3d 1331, 1355 (11th Cir. 2009) (internal quotation marks and citations omitted). A federal court making an "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable. Bell v. Cone, 535 U.S. 685, 694, 122 S. Ct. 1843, 1850 (2002).

Because the Florida Second DCA did not explain its reasons for affirming the denial of Trice's post-conviction motion, we must "look through" its decision

[3]We review a district court's denial of a § 2254 petition de novo. Bester v. Warden, 836 F.3d 1331, 1336 (11th Cir. 2016). In an appeal brought by an unsuccessful habeas petitioner, the scope of our review is limited to the issues specified in the COA. Murray v. United States, 145 F.3d 1249, 1251 (11th Cir. 1998).

and presume that it adopted the reasoning of the state trial court, "the last related state-court decision that . . . provide[s] a relevant rationale." See Wilson v. Sellers, 584 U.S. __, __, 138 S. Ct. 1188, 1192 (2018) (explaining that, in the § 2254 context, "the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale [and] presume that the unexplained decision adopted the same reasoning"). The state may rebut this presumption by showing that the unexplained affirmance relied on or most likely relied on different grounds, such as alternative grounds for affirmance that were briefed or argued to the appellate court or were obvious in the record. Id.

The AEDPA imposes a "highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." Renico v. Lett, 559 U.S. 766, 773, 130 S. Ct. 1855, 1862 (2010) (internal quotation marks and citation omitted). Moreover, federal habeas relief is not available for errors of state law. Jamerson v. Sec'y for Dep't of Corr., 410 F.3d 682, 688 (11th Cir. 2005). And because state courts are the ultimate expositors of state law, federal habeas courts are bound by state-court determinations on state-law questions. See Estelle v. McGuire, 502 U.S. 62, 67-68, 112 S. Ct. 475, 480 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."); Mullaney v.

Wilbur, 421 U.S. 684, 691, 95 S. Ct. 1881, 1886 (1975) ("This Court . . . repeatedly has held that state courts are the ultimate expositors of state law, and that we are bound by their constructions except in extreme circumstances[.]") (citation omitted).

A. Application of Griffith v. Kentucky

On appeal, Trice argues that he is entitled to federal habeas relief because the state post-conviction court unreasonably applied Griffith in failing to retroactively apply to his case the change in law announced in Weiand. Based on Weiand, Trice argues that he is entitled to a new trial where the jury should be properly instructed that, for his self-defense claim, he had no duty to retreat from his home. We are not persuaded.

In Griffith, the Supreme Court announced that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." Griffith, 479 U.S. at 328, 107 S. Ct. at 708. A reading of that sentence alone would seem to indicate that Trice does have a claim for federal habeas relief. However, there is an explicit limitation to Griffith's holding—it only applies to new federal constitutional rules.

Specifically, Griffith was concerned with whether Batson v. Kentucky, 476 U.S. 79, 106, S. Ct. 1712 (1986), should apply to "litigation pending on direct state or federal review or not yet final when Batson was decided." Griffith, 479 U.S. at

316, 107 S. Ct. at 709. Thus, it dealt with a change to constitutionally mandated procedures, not a change to state substantive law. In fact, the Court ultimately held that the "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." Id. at 322, 107 S. Ct. at 713 (emphasis added).

We therefore conclude that, while Griffith requires retroactive application of new constitutional rules of criminal procedure to cases pending on direct appeal, it does not require retroactive application of new state substantive law to non-final state convictions. See id. And in Weiand, the Florida Supreme Court only announced a change in state criminal law—broadening the castle doctrine defense under Florida law. Weiand, 732 So. 2d at 1048. Because Griffith does not extend to such state law changes, the case has no application here.

Instead, the legal basis for Trice's contention that Weiand applied to his case rests entirely on Florida law. The Florida Supreme Court, persuaded by the principles underlying Griffith, has held that its decision that announcing a new rule of state law in criminal cases must be given retroactive application by Florida courts in every case pending on direct review or not yet final, provided the defendant timely objected at trial to preserve the issue for appellate review. Smith v. State, 598 So. 2d 1063, 1066 (Fla. 1992). This holding, however, was based solely on the Florida constitution, not federal law and not Griffith. Id. at 1066 n.4

("Although we cite to some federal decisions, we explicitly decide this case on state constitutional grounds."). Consistent with Smith, the Weiand decision itself directs that it should apply to all other non-final Florida cases and does so without citing to any federal law. See Weiand, 732 So. 2d at 1058.

Because the retroactive application of Weiand is controlled entirely by Florida state law, not Griffith, we conclude that Trice's contention that the state post-conviction court unreasonably applied Griffith in denying his claim is meritless. The state court could not have unreasonably applied Griffith because that case is simply not applicable.

B. Federal Habeas Relief Based on State Law Error

Nevertheless, as the state concedes on appeal, the state post-conviction court's rejection of Trice's claim on the ground that his convictions already had become final at the time that Weiand issued was an incorrect application of state law. Under Florida law, Trice's convictions were not final when Weiand was decided because his petition for a writ of certiorari to the U.S. Supreme Court was still pending. See Huff v. State, 569 So. 2d 1247, 1250 (Fla. 1990) (explaining that if the defendant files a petition for writ of certiorari with the U.S. Supreme Court, his conviction and sentence do not become final until the writ is determined for purposes of Rule 3.850). The question we must answer then is whether Trice is

entitled to federal habeas relief based on this state law error. We conclude that he is not.

As an initial matter, since it was obvious that the state post-conviction court's reason for denying this claim was wrong, the state argues on appeal that the Second DCA most likely relied on different alternative grounds in affirming the court's decision. See Wilson, 138 S. Ct. at 1192, 1196 ("[T]he unreasonableness of the lower court's decision itself provides some evidence that makes it less likely the state [appellate] court adopted the same reasoning."). We agree.

The record shows that the state expressly conceded in its briefing to the Second DCA that Trice's convictions were not yet final when Weiand was decided and, therefore, the state post-conviction court's reasoning was faulty. Nonetheless, the state argued that Trice was not entitled to benefit from the change of law announced in Weiand because he did not preserve the issue by making a timely objection at trial. Under Florida law, to benefit from a recent change in law, a defendant must have preserved the issue for appeal by timely objecting at trial. Smith, 598 So. 2d at 1066.

Here, while Trice requested the castle doctrine jury instruction at trial, he specifically argued that the instruction was proper because Darla was not permitted in his office and, thus, he was the sole occupant. He did not argue that Darla was a co-occupant of the office or that the castle doctrine should apply to co-occupants.

In any event, Trice also did not raise any challenge to the state trial court's self-defense instruction on direct appeal. Accordingly, it was reasonable for the Second DCA to determine that Trice could not benefit from Weiand's change of law because he did not adequately preserve the issue. See Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982) ("[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below [in the trial court]."); Reynolds v. State, 934 So. 2d 1128, 1140 (Fla. 2006) (same). We are bound by state-court determinations on state-law questions. See Estelle, 502 U.S. at 67-68, 112 S. Ct. at 480; Mullaney, 421 U.S. at 691, 95 S. Ct. at 1886.

Moreover, the crux of Trice's Weiand claim on appeal is that the state trial court's jury instructions were erroneous under Florida law because the court failed to instruct the jury that he had no duty to retreat from his home. But the fact that a jury instruction "was allegedly incorrect under state law is not a basis for habeas relief" because federal habeas review "is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." See Estelle, 502 U.S. at 68, 71-72, 112 S. Ct. at 480-82. The only question we may address is "whether the ailing instruction itself so infected the entire trial that the resulting conviction violates due process." Id. at 72, 112 S. Ct. at 482. In making that determination, the jury instruction "'may not be judged in artificial isolation,' but

must be considered in the context of the instructions as a whole and the trial record." Id.

Significantly, on appeal, Trice does not make any argument as to that question. He does not argue at all that the allegedly erroneous jury instruction infected his trial in violation of due process. As a result, Trice has abandoned the issue and waived his right to have us consider it. See United States v. Willis, 649 F.3d 1248, 1254 (11th Cir. 2011) ("A party seeking to raise a claim or issue on appeal must plainly and prominently so indicate . . . . Where a party fails to abide by this simple requirement, he has waived his right to have the court consider that argument.") (internal quotation marks and citation omitted); San Martin v. McNeil, 633 F.3d 1257, 1268 n.9 (11th Cir. 2011) (same). Without a federal due process dimension, Trice's claim that the jury instructions were erroneous is not a basis for federal habeas relief.

C. Due Process Violation

Even if Trice did not waive this issue, we are also not persuaded that the state trial court's jury instruction "itself so infected the entire trial that the resulting conviction violates due process." See Estelle, 502 U.S. at 72, 112 S. Ct. at 482. First, it is not entirely clear that Trice would benefit from Weiand's jury instruction based on the castle doctrine because he was not a co-occupant of the residence with Darla at the time of the shooting. Rather, he had moved out of the house and

was in fact barred from entering the main house at all by a domestic violence injunction.

However, assuming without deciding that Trice and Darla were co-occupants of the office at the time of the shooting, we still conclude that the trial court's jury instructions did not "so infuse[] the trial with unfairness as to deny due process of the law." See Estelle, 502 U.S. at 75, 112 S. Ct. at 484. The jury was instructed at trial that, for his self-defense claim, Trice had a duty to retreat before resorting to deadly force, but if Trice was in a position of imminent danger of death or great bodily harm and retreating would increase his own danger, then his use of force was justifiable.

Under Trice's own version of the events though, there was no place for him to physically retreat to without having to go through Darla who was attacking him with a knife and trying to kill him. Trice testified and maintained throughout the entire proceeding that Darla stabbed him while he was in the office closet. He fell to his knees on the closet floor, grabbed his gun from a shelf, and shot Darla in self-defense because she was coming at him again with the knife. The evidence showed that Darla was within three to 18 inches of Trice when he fired the gun and Trice testified that he had no choice but to shoot her to prevent her from stabbing him again. If the jury believed Trice's testimony, then he was not harmed by the jury instruction given because it was impossible for him to retreat at all from

within the closet, let alone retreat from the home, and thus his use of force was justifiable.

Additionally, both the self-defense instruction given by the state trial court and the new instruction set forth in Weiand impose a reasonable duty to retreat. Namely, the Weiand instruction would have provided Trice "had the duty to retreat to the extent reasonably possible without increasing [his] own danger of death or great bodily harm." Weiand, 732 So. 2d at 1057. Likewise, under the trial court's instruction given, Trice's use of force was justified if he was in a position of imminent danger of death or great bodily harm and retreating would increase his own danger. Although worded somewhat differently, these two instructions are consistent insofar as, under both versions, Trice had a duty to retreat unless doing so increased his own danger of imminent death or great bodily harm. To the extent that the jury believed that Darla attacked Trice, but Trice could have reasonably maneuvered around her without increasing his own danger of death or great bodily harm, Trice was not harmed by the instruction given because the jury would have concluded that his use of force was not justifiable under both versions of the instruction.

The main difference between the trial court's self-defense instructions and the Weiand instruction is that, under Weiand, the trial court would have expressly instructed that Trice had no duty to retreat from the home. Id. However, we

conclude that this omission from Trice's trial did not infuse it with unfairness because, according to Trice's testimony, there were no apparent opportunities for him to retreat from the residence during the altercation. Indeed, this case is not like Weiand, where the defendant wife had several opportunities during a violent argument to leave the couple's apartment before shooting her husband. Id. at 1048. Nor was Trice's duty to retreat a feature at his trial, like it was in Weiand, where the prosecutor capitalized on the jury instruction to ask the jury why the defendant wife did not "go out the door?" or "get in the car?" before resorting to violence. Id. at 1054. Rather, here, the state wholesale rejected Trice's story, arguing instead that Trice stabbed himself after he shot Darla in order to manufacture a self-defense claim.

Under these particular factual circumstances, we conclude that even if the trial court's self-defense jury instructions were erroneous under state law, Trice is not entitled to federal habeas relief because the instructions given did not deprive him of due process. See Estelle, 502 U.S. at 72, 112 S. Ct. at 482 ("[I]t must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some [constitutional right]." (internal quotation marks omitted)).

V. CONCLUSION

For the foregoing reasons, we affirm the district court's denial of Trice's § 2254 petition.[4]

AFFIRMED.

[4]Because we affirm the district court's denial of Trice's § 2254 petition for the reasons given, we do not address Trice's arguments on appeal regarding the correctness of the district court's alternative findings that he "entered the residence through the garage" and was thus a trespasser under Florida law.

APPENDIX

B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14476-G

CHARLES L. TRICE,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

ORDER:

Charles L. Trice, a Florida prisoner, moves for a certificate of appealability ("COA") and for leave to file a second-amended COA to appeal the denial of his counseled 28 U.S.C. § 2254 petition for a writ of habeas corpus. He is serving a total life sentence after a jury convicted him in 1995 of: (1) first-degree murder of his estranged wife, Darla Trice ("Ms. Darla"); (2) violation of Ms. Darla's domestic-violence injunction against him; and (3) burglary with assault.

As background, the evidence at trial showed the following. Four months before the shooting, Mr. Trice and Ms. Darla separated and he moved out of the marital home to live with his parents. Ms. Darla obtained a domestic-violence injunction against Mr. Trice, which barred him from entering the main home, but allowed him to access an office that was attached to the back of the home and was accessible through an exterior door. There was also a door connecting

the office and the main home, but that door could only be opened if unlocked from both sides. Mr. Trice, a highway patrol trooper, used the office to work and store his tools and paperwork.

On the day of the shooting, Mr. Trice first visited the marital home to drop off their daughter, which was customary. He returned to the home 30 to 45 minutes later. While inside Mr. Trice's office, he and Ms. Darla began arguing about who would possess a Corvette that he had purchased during the marriage, but that she had been driving, which was a frequent topic of argument. At some point during the argument, he shot and killed Ms. Darla. Two phone calls were made to 911, four minutes apart. The issue of who made the first call was disputed, but Mr. Trice made the second call to report that he shot Ms. Darla when she tried to stab him.

When investigators arrived, they found Ms. Darla near the closet, bleeding from the gunshot wound. She died soon thereafter. Investigators found a small paring knife close to her body, on which they found neither her fingerprints nor blood. They observed that the office phone had been disconnected from the wall. The state's ballistics and reconstruction experts and investigators testified that the physical evidence did not match up with Mr. Trice's version of events. Officers testified that Mr. Trice was emotionless and nonchalant after the shooting. He was transported to the hospital and treated for a stab wound in his chest. While in transport, a paramedic evaluated Mr. Trice and concluded that, based on his rapid pulse, sweatiness, and nervous demeanor, he was suffering from psychogenic shock. His treating physician at the hospital testified that his symptoms were consistent with emotional shock, and that his stab wound was consistent with being inflicted either by himself or another person.

The state argued that Mr. Trice was guilty of first-degree murder based on alternative legal theories of premeditated first-degree murder and felony murder, and the jury was instructed on both theories. In closing, the state argued that Mr. Trice—who had been abusing and

threatening to kill Ms. Darla—left the marital home after the first visit to retrieve his gun, and, upon returning, entered into the main home through the garage with the intent to assault and/or kill Ms. Darla, thereby violating the domestic-violence injunction and committing burglary. The state argued that Ms. Darla attempted to call 911 after Mr. Trice shot her at point-blank range, but that he disconnected the phone. The state argued that Mr. Trice stabbed himself and moved the furniture to create a scene that supported his self-defense claim, and then called 911 from inside the house. The jury returned a guilty verdict, without specifying which theory supported the conviction. Mr. Trice unsuccessfully moved for a judgment of acquittal.

Mr. Trice appealed, and the state appellate court affirmed in part and reversed in part, due to a sentencing error. He moved for reconsideration, which was denied. Both the Florida and United States Supreme Courts denied *certiorari* review, in February 1999 and June 1999, respectively. In June 2011, after unsuccessfully pursuing state habeas relief, he timely filed the instant counseled § 2254 petition, raising 13 grounds. He claimed that the state post-conviction court's denial of each of his claims violated his federal due process and equal protection rights, and was contrary to well-established federal law. He also sought an evidentiary hearing.

As an initial matter, Mr. Trice's motion for leave to file a second-amended COA motion, seeking a COA as to Claims 1-2, 4-7, 10, and 13, is GRANTED. To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). 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). If a state court has adjudicated a claim on the merits, a federal court may grant habeas relief only if the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme

Court," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d)(1), (2); *see also id.* § 2254(e)(1) (providing that a state court's factual determinations are presumed to be correct, and a § 2254 petitioner has the burden of rebutting this presumption by clear and convincing evidence).

Claim 1

In Claim 1, Mr. Trice asserted that the trial court erroneously denied his motion for judgment of acquittal because, while the state had argued, and the jury had been instructed, on alternate theories of premeditated and felony murder, the circumstantial evidence failed to establish first-degree murder under either theory, and the jury's general verdict failed to specify which theory it accepted.

In addition to the testimony and evidence developed above, trial testimony established the following. One of Mr. Trice's coworkers testified that Mr. Trice came to her office a week prior to the shooting, during which he talked about his divorce, made some phone calls, and then said, in a very serious tone, "I ought to just go kill her." One of Ms. Darla's neighbors testified that, on the day of the shooting, she saw Mr. Trice return to the home, enter the opened garage, and approach the door to the main home. She testified that she did not see Mr. Trice go inside of the main home, as a truck in the garage blocked her view, nor did she see him exit the garage.

John Kenneth Lane, a fellow trooper and friend of Mr. Trice who was not involved in the investigation, testified to the following. He accompanied Mr. Trice to the hospital on the night of the shooting. While at the hospital, Mr. Trice told Trooper Lane that he only made one visit to the home that day, to drop off his daughter and pick up equipment from his office. Mr. Trice told him that Ms. Darla had come into his office and they began arguing about the Corvette. Mr. Trice said that, after the argument, she walked out of the office and back into the main home.

Mr. Trice said that he then knelt down to grab the equipment from a closet in his office, but heard a noise behind him, turned around, and saw Ms. Darla right before she stabbed him in the shoulder with a paring knife. He said that she stood over him and cursed at him while he was still on his knees and disoriented from the stabbing. He said that, when she started towards him a second time with the knife, he feared for his life, grabbed his gun from the shelf in the closet, and shot her. He said that he heard his daughter coming towards the office, but stopped her and brought her to the opposite side of the home and then called 911 from the kitchen phone.

Trooper Lane testified that he accompanied Mr. Trice, as a friend, back to the marital home the next day. Mr. Trice re-explained his version of events, pointing to the evidence in the office. Trooper Lane told Mr. Trice that his story did not match up with the locations of Ms. Darla's blood and body-tissue residue—the trail of which started further away from the threshold of the closet—or the bullet that exited her body in a downward trajectory. Additionally, he told Mr. Trice that marks in the carpet suggested that he rearranged the office furniture to support his story. He asked Mr. Trice if the knife wound was self-inflicted, which Mr. Trice denied, reiterating that he had acted in self-defense. Trooper Lane conceded that he was not a ballistics or blood-spatter expert.

Mr. Trice denied all the charges and testified to the following. Despite the separation, he and Ms. Darla got along and only occasionally argued, mostly about the Corvette. He did not physically abuse her and never threatened to kill her. They would often meet in the garage, primarily to exchange their daughter. He had actually made two visits to the home on the day of the shooting. During his first visit, Ms. Darla asked him to come inside the main home so they could talk, but he refused. He had forgotten the keys to his office and told her that he would get his keys and come back so that they could talk inside of his office.

Mr. Trice testified that, when he returned, he may have entered the garage and knocked on the main-home door to notify Ms. Darla that he had arrived, but did not enter the main home. Rather, he went into his office, and both parties unlocked their sides of the connecting door. Ms. Darla entered the office and brought up the Corvette, which caused a brief argument, but then walked away. She returned and stabbed him after he grabbed the equipment from the closet. He heard her say that she should have killed him a long time ago. When she went to stab him a second time, he shot her in fear for his life. It was possible that he was standing, not still kneeling, when he shot her. After the shooting, he called 911, but quickly hung up upon seeing that his daughter had come down from her room. He consoled his daughter and called 911 back. He did not understand why Ms. Darla attacked him, had "mixed" emotions after the shooting, and was worried about himself, Ms. Darla, and their daughter. He tried not to show any emotion after the shooting due to his personality and training as a trooper.

Reasonable jurists would not debate the district court's denial of Claim 1 because a review of the record supports the state court's finding that the motion was properly denied based on "the physical evidence, the conflicts with Mr. Trice's various recitations of events, and the other evidence presented." Mr. Trice argues that we should not give deference to either the state or the district courts' decisions because their denials of Claim 1 were based on the erroneous finding that he was seen entering the marital home through the garage, rather than through his exterior office door. While the district court improperly denied Claim 1 based on this erroneous finding, the state court on direct appeal never articulated that it found such a fact or otherwise relied upon such an assumption. Thus, the state court's determination should still be given deference. *See Reed v. Sec'y, Fla. Dep't of Corr.*, 593 F.3d 1217, 1239 (11th Cir. 2010); 28 U.S.C. § 2254(d)(1)(2), (e)(1).

The Fourteenth Amendment's due process guarantee assures that no criminal conviction shall stand "except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Jackson v. Virginia*, 443 U.S. 307, 316, 319 (1979) (explaining that the inquiry is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt). Sufficiency-of-the-evidence claims are adjudged by the elements defined by state law. *Id.* at 324 n.16. A Florida trial court may grant a defendant's motion for a judgment of acquittal only if it concludes upon the close of the evidence that the evidence is insufficient to warrant a conviction. Fla. R. Crim. P. 3.380(a). Upon a motion for a judgment of acquittal, the trial judge must view the evidence in the light most favorable to the state and determine whether there is competent evidence from which the jury could infer guilt to the exclusion of all other inferences. *Evans v. State*, 177 So. 3d 1219, 1239 (Fla. 2015). So long as the state introduces competent evidence rebutting the defendant's theory of events, it becomes the jury's duty—not the trial court's duty—to determine whether the evidence sufficiently excludes every reasonable hypothesis of innocence beyond a reasonable doubt. *Id.*; *see also Johnson v. Alabama*, 256 F.3d 1156, 1172 (11th Cir. 2001) (explaining that we presume that the jury resolved any conflicting inferences in favor of the prosecution).

Although Mr. Trice argued that he permissibly entered through the exterior office door, Ms. Darla's neighbor did testify that she witnessed him approach the door to the main home through the garage and never saw him exit the garage. Moreover, the jury was entitled to disbelieve Mr. Trice's testimony and instead conclude that he entered through the main home, especially considering that his testimony as to his version of events differed from what he told Trooper Lane and other witnesses. *See United States v. Sharif*, 893 F.2d 1212, 1214 (11th Cir.

1990) (providing that, when a defendant chooses to testify, he runs the risk that the jury will disbelieve him and conclude that the opposite of his testimony is the truth). Therefore, trial testimony supported Mr. Trice's entry through the main home, which constituted an unlawful entry, supporting his conviction for violating the domestic-violence injunction.

Further, the record shows that Mr. Trice told a coworker shortly before the shooting that he ought to kill Ms. Darla, visited the marital home twice in one day, and ultimately shot her with a pre-loaded gun in his office. This evidence shows that he formed the intent to kill her before entering the main home, supporting the burglary-with-assault conviction. *See* Fla. Stat. Ann. § 810.02(1)(a), (2)(a) (providing that a defendant commits Florida burglary when he enters or remains in, of relevance, a dwelling with the intent to commit an offense therein, unless he is licensed or invited to enter or remain, and that burglary is a first-degree felony when the offender assaults or batters a person during its commission). Because Mr. Trice shot Ms. Darla during the commission of the burglary and/or with a fully formed conscious purpose to kill her, sufficient evidence supported the first-degree murder conviction based on both the felony-murder and the premeditated-murder theories. *See id.* § 782.04(1)(a)(1), (1)(a)(2)(e) (providing that a defendant commits Florida first-degree murder when he unlawfully kills another either with a premeditated design, or during the commission of a felony, for example, a burglary); *Bolin v. State*, 117 So.3d 728, 738 (Fla. 2013) (explaining that a defendant's unlawful killing was "premeditated" if he fully formed a conscious purpose to kill, the purpose of which could have been formed merely a moment before the act, but must have existed for long enough to provide him an opportunity to reflect on the nature of the act and its probable result).

Although Mr. Trice claimed that he shot Ms. Darla in self-defense, the state produced conflicting evidence of such a claim. For example, testimony from the ballistics expert, the

reconstruction expert, and Trooper Lane showed that Mr. Trice's version of events did not match the physical evidence, and testimony from various witnesses showed that Ms. Darla was fearful of Mr. Trice. Thus, the state presented competent evidence from which the jury could infer guilt on either the felony-murder or premeditated-murder theory to the exclusion of all other inferences. *See Evans*, 177 So. 3d at 1239; *Finney v. State*, 660 So. 2d 674, 679 (Fla. 1995) (explaining that circumstantial evidence may support a conviction so long as the state presents evidence inconsistent with any reasonable hypothesis of innocence). The fact that the jury returned a general verdict without indicating which first-degree murder theory it adopted is of no matter. *See Griffin v. United States*, 502 U.S. 46, 49 (1991) (holding that a general jury verdict is valid so long as it is legally supported on at least one of the grounds, even though it gives no assurance that the jury actually based the conviction on the valid ground). Accordingly, no COA is warranted as to this claim.

Claims 2, 4, and 10

In Claim 2, Mr. Trice argued that the trial court erroneously admitted unreliable hearsay in his self-defense case to establish the victim's state of mind by allowing the state to call 13 witnesses to testify as to what Ms. Darla had told them about events that occurred throughout their marriage and divorce proceedings. He argued in his reply that the hearsay testimony was cumulative and referred to remote events during their five-year marriage, that Ms. Darla's post-separation, pre-divorce statements likely lacked reliability, and that the court did not allow any testimony to refute that she was in fear of him. In Claim 4, he argued that the trial court erroneously allowed Trooper Lane, a non-expert witness, to opine that Mr. Trice's version of events was inconsistent with the physical evidence—including the location of Ms. Darla's blood and body tissue, and the trajectory of the bullet—which went to the ultimate issue of fact of

whether he shot her in self-defense. In his reply, he argued that blood-spatter and ballistics opinions constitute expert opinion testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and that Trooper Lane was not qualified as an expert. In Claim 10, Mr. Trice argued that counsel ineffectively failed to object to Trooper Lane's testimony and/or call an expert to rebut Trooper Lane's and the state's expert witnesses' conclusory opinion testimonies. He asserted that counsel should have called the reconstruction expert they had hired, who created a reconstruction that would have refuted the state's reconstruction evidence.

Reasonable jurists would not debate the district court's denial of Claims 2, 4, and 10. Federal courts generally are not empowered to correct a state trial court's erroneous evidence rulings, and that habeas relief is warranted only if an error rises to the level of a denial of fundamental fairness, implicating the petitioner's federal due process rights. *Snowden v. Singletary*, 135 F.3d 732, 737 (11th Cir. 1998) (explaining that a defendant is denied fundamental fairness if the improper evidence was material, in that it was a highly significant factor). Mr. Trice has failed to show how any of the state trial court's evidentiary rulings were improper, let alone that they denied fundamental fairness to his trial.

First, as to Claim 2, at trial, numerous state and defense witnesses testified as to the Trices' relationship, including family members, neighbors, coworkers, friends, Ms. Darla's divorce attorney, and Mr. Trice, himself. Some witnesses testified that they observed that the Trices appeared to get along well, whereas some said they argued and fought. Some witnesses testified that Ms. Darla was positive and peaceable, whereas some said she was aggressive and would have emotional outbursts. Several witnesses testified that Ms. Darla told them she was fearful that Mr. Trice would harm her. For example, she told friends and neighbors she and Mr. Trice had been arguing frequently, and she was afraid of him because he had been harassing,

stalking, attacking, abusing, and threatening to kill her. These friends and neighbors conceded they never witnessed Mr. Trice threatening her or heard his side of the story. Defense counsel repeatedly objected on hearsay grounds to the witnesses' testimony as to what Ms. Darla had told them, and the trial court cautioned the jury each time that the testimony was only to be considered as probative of her state of mind, not Mr. Trice's state of mind or his actions. A few witnesses testified that they actually observed Mr. Trice yelling at Ms. Darla, stalking her, and physically intimidating her.

A review of the record and Florida law supports the state appellate court's conclusion on direct appeal as to Claim 2 that Ms. Darla's hearsay statements were admissible to rebut Mr. Trice's claim of self-defense, which he advanced from the beginning of the investigation. *See Stoll v. State*, 762 So. 2d 870, 874-75 (Fla. 2000) (holding that, under Florida law, while a homicide victim's hearsay statements that she was afraid of the defendant are not generally admissible under the state-of-mind exception to the hearsay rule, such statements are relevant and admissible to rebut his claim of self-defense). Mr. Trice argues that the trial court's admission of the hearsay testimony was contrary to *Shepard v. United States*, 290 U.S. 96 (1933), *Michigan v. Bryant*, 131 S. Ct. 1143 (2011), and *Crawford v. Washington*, 541 U.S. 36 (2004), because it went to the direct fact at issue, and he had no opportunity to cross-examine Ms. Darla as to her testimonial statements. However, Mr. Trice has failed to show that Ms. Darla's hearsay statements went to the direct fact at issue or that they were testimonial. Rather, the trial court instructed the jury that the hearsay witnesses' testimonies went to Ms. Darla's state of mind at the time of the shooting and their testimonies show that her statements were made to express her fear of Mr. Trice and to seek help from her friends, not to create a record for trial. *See Bryant*, 562 U.S. at 358 (explaining that the Confrontation Clause

primarily "restricts the introduction of out-of-court statements ... in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial").

Second, a review of the record and Florida law supports the state appellate court's denial of Mr. Trice's motion for reconsideration—highlighting the court's failure to address Claim 4 on direct appeal—because Trooper Lane did not testify as a blood-spatter or ballistics expert, such that he did not need to be qualified as an expert. The trial court also was within its discretion to allow him to testify as a lay witness that Mr. Trice's version of events was inconsistent with such evidence, based on his personal perception of the crime scene and his years of experience as a trooper. *United States v. Myers*, 972 F.2d 1566, 1576-77 (11th Cir. 1992) (holding that the trial court did not abuse its discretion in admitting an officer's lay-opinion testimony that the reddish burn marks on the victim's back were consistent with stun-gun marks because such testimony was based on his personal perception of the victim's back and his years of police-force experience, and, to the extent his opinion lacked a technical and/or medical basis, the defendant had the opportunity to expose such a short-coming on cross-examination); *see also Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co.*, 320 F.3d 1213, 1222 (11th Cir. 2003) (explaining that courts often permit officers to provide lay-opinion testimony based on the particularized knowledge they gain through their position).

Mr. Trice additionally argues in his COA motion that, even if Trooper Lane testified as a lay witness, the court failed to give a proper limiting instruction. However, because Trooper Lane solely testified to his personal observations and knowledge gained through his position as a trooper, no limiting instruction was needed and there was no violation under *Daubert*. *See* 509 U.S. at 588. Finally, Mr. Trice asserts that the state capitalized on Trooper Lane's testimony as if he was an expert and that the probative value of his lay testimony was substantially

outweighed by undue prejudice to Mr. Trice. Without any supporting examples from the record or further explanation, these assertions are too conclusory to warrant habeas relief. *See Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991) (explaining that a petitioner is not entitled to federal habeas relief "when his claims are merely conclusory allegations unsupported by specifics or contentions that in the face of the record are wholly incredible"). Moreover, Trooper Lane specifically testified that he was not an expert, and Mr. Trice has failed to point to any closing statements by the prosecutor asserting or insinuating that Trooper Lane was an expert.

Finally, a review of the record supports the state post-conviction court's denial of Claim 10, upon concluding that defense counsel's strategic decisions not to call its reconstruction expert and to rely on rebuttal of Trooper Lane's testimony, rather than produce blood-spatter and ballistics experts, were reasonable upon consideration of the available alternatives and potential outcomes. To succeed on an ineffective-assistance-of-counsel claim, a defendant must show that (1) his counsel's performance was deficient, and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel is not ineffective for failing to raise nonmeritorious issues. *Chandler v. Moore*, 240 F.3d 907, 917 (11th Cir. 2001).

At the Rule 3.850 evidentiary hearing, Mr. Trice's defense counsel testified that he preferred not to use experts unless necessary to rebut a specific claim made by the state's expert, the state's failure to call a blood-spatter expert in this case would have influenced him not to call such a witness, and he did not find blood-spatter evidence to be scientifically sound or the experts to be credible. The defense had successfully limited the state's use of its ballistics and reconstruction experts, was satisfied with the testimony elicited on cross-examination of each, and specifically chose not to call their own reconstruction expert at trial to avoid the possibility of the court permitting the state to expand its expert's testimony.

Here, because Trooper Lane's testimony was admissible, counsel had no basis upon which to object, such that his failure to do so was not deficient. *Id.* Further, Mr. Trice has failed to show that trial counsel's strategic decisions not to call the reconstruction, blood-spatter, or ballistics experts—to which we are "doubly" deferential—were unreasonable, given the potential consequences of admitting such testimony. *See Harrington v. Richter*, 562 U.S. 86, 105 (2011) (explaining that, when we analyze an ineffective-assistance claim under § 2254(d), our review is "doubly" deferential to counsel's performance, wherein we ask "whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard"); *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995) (explaining that whether counsel calls any witnesses, which witnesses he does call, and when he calls such witnesses are quintessential strategic decisions, which we will seldom, if ever, second guess). Accordingly, no COA is warranted.

Claim 5

In Claim 5, Mr. Trice argued that his counsel ineffectively failed to adequately investigate his defense that the exterior door to his office where the shooting occurred was unlocked, which showed that he permissibly entered through that door, not through the garage and main house, such that he did not commit a burglary or felony murder. He asserted that he had told trial counsel to call Trooper Lane to testify that Mr. Trice showed him that the office door was unlocked, and demonstrated to him that his key could lock and unlock the door, and had notified counsel of a photograph of the door in the unlocked position. Reasonable jurists would not debate the district court's denial of Claim 5 because a review of the record supports the state court's finding that Mr. Trice failed to show that Trooper Lane would have testified as Mr. Trice had alleged and failed to otherwise support his unlocked-door defense, such that counsel's failure to elicit such testimony or evidence was not deficient.

At the Rule 3.850 evidentiary hearing, Trooper Lane testified that he did not remember Mr. Trice using the keys to demonstrate the opening and closing of the exterior office door on the day after the shooting, but that he heard Mr. Trice telling officers that he had entered through the exterior door prior to the shooting. Mr. Trice's defense counsel testified that they understood that the point of entry was a critical issue at trial, they had discussed the point of entry with Mr. Trice before trial, and that, had they known before trial that there were officers with particular knowledge that he had entered through the office's exterior door, they would have called them as witnesses. Defense counsel testified that they remembered seeing the photograph of the unlocked door, but did not think that it was particularly helpful in proving that the door was unlocked at the time of the shooting. Mr. Trice argued that Trooper Lane would have had a better memory at the time of trial and would have recalled that Mr. Trice had demonstrated to him and other officers that the door was still unlocked from the prior day.

Here, the record belies Mr. Trice's claim, as he failed to produce any witnesses to testify that the exterior office door was unlocked. Accordingly, his counsel's failure to call such a non-existent witness was not erroneous. Mr. Trice claims that Trooper Lane would have had a better memory at trial and would have testified favorably as to his unlocked-door defense. However, this claim is merely speculative—especially considering that Trooper Lane did not investigate the case and solely accompanied Mr. Trice to the marital home as a friend—and is insufficient to warrant habeas relief. *See Tejada*, 941 F.2d at 1559. Further, his main claim seems to be that he had told officers that the door was unlocked and that he entered through that door, which the jury nevertheless heard through Mr. Trice's own trial testimony, rather than that the officers had independent knowledge that the door was unlocked and that the unlocked door proved that he had entered through that door. As to the photograph of the unlocked door, there

was no deficient performance in this regard because the photograph of the unlocked door at the time of the investigation did not necessarily show that Mr. Trice had unlocked it in order to enter the office prior to the shooting. *See Strickland*, 466 U.S. at 687, 690. Accordingly, no COA is warranted as to this claim.

Claim 6

In Claim 6, Mr. Trice argued that his counsel ineffectively failed to call a number of witnesses—his divorce attorney, his friend, his neighbor, and two employees from the Corvette dealership—to testify as to his and Ms. Darla's loving post-separation relationship, Ms. Darla's sometimes aggressive behavior, and her state of mind before the shooting, to rebut the state's hearsay witnesses. Reasonable jurists would not debate the district court's denial of Claim 6 because a review of the record supports the state court's finding that Mr. Trice's counsel's failure to call these witnesses was not deficient.

First, Mr. Trice's divorce attorney's testimony would have been based solely on what Mr. Trice had told him as to the nature of the divorce in order to prove that the divorce was amicable, which constituted inadmissible hearsay, and Mr. Trice has failed to show that this testimony either could have been offered for another purpose, or fell under any hearsay exception. *See Cotton v. State*, 763 So. 2d 437, 439 (Fla. 4th Dist. Ct. App. 2000) (providing that, generally, a defendant's attempt to introduce his own exculpatory out-of-court statements for the truth of the matter asserted is inadmissible hearsay). Second, Mr. Trice's friend merely testified that he was close with Mr. Trice, socialized once with Mr. Trice and Ms. Darla before they married, and knew no details about their marriage, none of which was probative of any issue at trial or could have rebutted the state's witnesses' testimonies as to Ms. Darla's state of mind.

Third, Mr. Trice's neighbor's testimony—that, when she saw the Trices in passing on two to three occasions in Mr. Trice's neighborhood, they were not yelling at or acting aggressively towards each other—was not probative on any issue. Because the neighbor's interactions were so brief and infrequent, counsel could have strategically decided that her testimony would not have added much to the defense, and may have had the opposite effect of emphasizing the occasions when they did not interact amicably. Finally, counsel's strategy in not calling the Corvette-dealership employees was reasonable because, while they could have testified as to two of Ms. Darla's outbursts that they witnessed, the testimony of the Corvette-dealership manager, who defense counsel did call at trial, was slightly stronger and did not include the first outburst, which the employees testified was milder in comparison.

Accordingly, Mr. Trice has failed to show that counsel's decision not to call these witnesses was unreasonable. *See Harrington*, 562 U.S. at 105; *States v. Freixas*, 332 F.3d 1314, 1319-20 (11th Cir. 2003) (explaining that a defendant must show that "no competent counsel would have taken the action that his counsel did take" (quotation marks omitted)). While Mr. Trice claimed that counsel should have called cumulative defense witnesses to combat the cumulative state witnesses, counsel's strategic decision against calling repetitive witnesses was not unreasonable, as counsel could have alternatively chosen to focus on other witnesses and/or evidence, and to cut down on an already lengthy trial. Accordingly, no COA is warranted.

Claim 7

In Claim 7, Mr. Trice argued that his counsel ineffectively failed to call a psychiatric expert to explain the effect of shock on his demeanor after the shooting, which would have rebutted the state's argument that his emotionless and nonchalant demeanor showed that he was indifferent as to Ms. Darla's death. He argued that the expert would have testified that his

demeanor indicated that he was in shock and that his training as a law enforcement officer caused him to control his emotions. He claimed that the expert would have testified that one's emotionality during interrogation or at trial had no evidentiary value, and argued that the jury would have weighed the expert's testimony more heavily.

Reasonable jurists would not debate the district court's denial of Claim 7 because a review of the record supports the state court's findings that Mr. Trice's counsel's strategic decision to avoid unnecessarily calling experts was reasonable, and that the testimony of the doctor Mr. Trice called in the Rule 3.850 hearing was insufficient to prove Mr. Trice's claims about his demeanor and the issue of guilt or innocence. Specifically, the doctor testified, as an expert in forensic psychology, that: (1) he did not evaluate Mr. Trice; (2) based on some officer's trial testimonies and Mr. Trice's 911-call, his post-shooting demeanor could have been interpreted as emotive or emotionless; (3) there was no scientific basis for assessing whether a person was guilty based on his demeanor; and (4) law enforcement officers tended to show less emotion than the average person in stressful situations. The doctor agreed that a person in a state of either medical or psychogenic shock could have an emotionless affect, and that emergency medical professionals were in the best position to observe a person's medical condition.

Because the majority of the doctor's testimony as to Mr. Trice's state of shock and demeanor was successfully elicited at trial by other non-expert witnesses—including the paramedic, the treating physician, and Mr. Trice, himself—defense counsel's decision to avoid the costs and preparation involved with hiring an expert and to rely instead on the jury's common sense in inferring that Mr. Trice's outward response to the shooting was not indicative of indifference was not unreasonable. *See Freixas*, 332 F.3d at 1319-20. Mr. Trice points out that no witness testified that he was in medical shock, as opposed to psychogenic shock, however, the

forensic psychologist made no opinion as to whether Mr. Trice had suffered from medical shock, and Mr. Trice fails to explain any material difference between the two. Accordingly, no COA is warranted as to this claim.

Claim 13

In Claim 13, Mr. Trice argued that the state post-conviction court improperly denied his motion for post-conviction relief, requesting to apply a substantial change in the law governing the duty to retreat. He asserted that, after he was convicted and after the Florida Supreme Court denied him *certiorari* review, but while his *certiorari* petition still was pending in the U.S. Supreme Court, the Florida Supreme Court ruled that a co-occupant of a home has no duty to retreat in a self-defense case. In his reply, Mr. Trice argued that the court's instruction to the jury—that any wrongful attack against him could not justify the use of deadly force if he could have avoided such force by retreating—was improper under the new no-duty-to-retreat decision, *Weiand v. State*, 732 So. 2d 1044 (Fla. 1999), as he shot Ms. Darla after she attacked him with a knife in his office, over which he had superior rights. He argued that the state court's denial of the claim was contrary to *Griffith v. Kentucky*, 479 U.S. 314 (1987). In his COA motion, he reiterates that no one saw him enter the main home, and argues that he was a co-occupant because he was lawfully permitted to be in his office, where the shooting occurred.

Reasonable jurists could debate whether the state post-conviction court erred in denying Claim 13 upon concluding that Mr. Trice's case had become final before the non-retroactive *Weiand* decision was issued, and thereby not applying *Weiand* to his case. Here, as the state concedes, Mr. Trice's case was pending when *Weiand* was issued. Moreover, based on the record, it is unclear whether Mr. Trice qualified as a co-occupant or invitee in his office, where the shooting occurred, or whether he might have been a trespasser instead. Because it is unclear

whether Mr. Trice was entitled to the privilege-of-non-retreat instruction under *Weiand*, reasonable jurists could debate the district court's denial of Claim 13. Thus, a COA is GRANTED on the following issue:

> Whether the state post-conviction court unreasonably applied *Griffith v. Kentucky*, 479 U.S. 314 (1987), in determining that Mr. Trice's case was final when the new rule of law in *Weiand v. State*, 732 So. 2d 1044, was issued, and in failing to apply *Weiand* to his case.

As a final matter, the district court did not err in denying Mr. Trice an evidentiary hearing because his claims were able to be resolved without the necessity of a hearing. *See Aron v. United States*, 291 F.3d 708, 715 (11th Cir. 2002).

In light of the above, Mr. Trice's motion for leave to file a second-amended COA motion is GRANTED, and his second-amended COA motion is GRANTED with respect to Claim 13, but DENIED with respect to the remaining claims.

UNITED STATES CIRCUIT JUDGE

APPENDIX

C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CHARLES TRICE,

Applicant,

v. CASE NO. 8:11-cv-1453-T-26AEP

SECRETARY, Department of Corrections,

Respondent.
_____/

ORDER

Charles Trice applies (Doc. 1) under 28 U.S.C. § 2254 for the writ of habeas corpus and challenges his convictions for first degree murder, violation of a domestic violence injunction, and burglary of a dwelling with assault, for which convictions Trice is imprisoned for life. The respondent moved to dismiss the application as time-barred, which motion was denied because Trice's post-conviction counsel's misconduct allowed for equitable tolling under *Holland v. Florida*, 560 U.S. 631 (2010). The respondent filed her response in opposition to the application, which response is supported by seven exhibits ("Exhibit 1-7"). (Doc. 9) The respondent argues (1) that Grounds Two, Three, and Four are not fully exhausted because Trice failed to fairly present the constitutional dimension of these claims to the appellate court and (2) that these unexhausted grounds are procedurally barred from federal review. Trice replies. (Doc. 14) The application is fully briefed and ripe for a decision.

BACKGROUND

Trice was convicted for killing his estranged wife at their marital residence. The couple was separated and Trice was no longer living at the residence at the time of the shooting. However, Trice had access to an office that was attached to the back of the house. The office was accessible through an exterior door that allowed Trice to enter his office without entering the rest of the residence. A domestic violence injunction barred Trice from entering the rest of the residence but allowed him to access the office through the exterior door. Trice was a trooper with the Florida Highway Patrol and kept tools and paperwork for his job in the office. A door connected the office and the rest of the residence; however, that door could be locked from both the residence and the office.

On the day of the shooting Trice visited the residence on two occasions. On the first visit Trice brought the couple's daughter back to the residence after she had spent the day with him. Trice returned a second time later that day and entered the residence through the garage door in violation of the domestic injunction violation. The prosecution used this trespass to charge Trice with felony-murder and burglary with assault.

During the second visit Trice and the victim argued in his office over who would possess the couple's Corvette. The sports car had been a source of several altercations between Trice and the victim. During the altercation Trice shot and killed the victim. After emergency personnel arrived at the scene, Trice was taken to

a hospital and treated for a stab wound to his shoulder. Sgt. Ken Lane, a Florida Highway Patrol Trooper ("Trooper Lane") accompanied Trice to the hospital.

Trooper Lane returned the next day and accompanied Trice back to the residence. Trooper Lane was not conducting an investigation of the shooting but testified that he accompanied Trice as his friend. While at the residence, Trice detailed to Trooper Lane what happened during the shooting. Trice told Trooper Lane that he and the victim were arguing. Trice stated that he was kneeling with his back to the victim retrieving some equipment from the office closet. When he turned around, the victim stabbed him in the shoulder with a paring knife. Trice stated that he was in shock and feared for his life. Trice grabbed his .357 revolver from a shelf and shot the victim at point-blank range. Trice entered the residence, called 911, and took his young daughter to her room.

After hearing Trice's explanation of the shooting, Trooper Lane told him his story was not supported by the blood splatter, the body tissue residue, and the hole-in-the wall created when the slug exited the victim's body. Trooper Lane further noted that — based on the marks in the carpet — the furniture apparently had been rearranged in the office to support Trice's explanation. Maintaining that he acted in self-defense, Trice persisted in this explanation through the trial and the appeal. The forensic evidence supported the prosecutor's theory that Trice stabbed himself with the small paring knife after he shot and killed the victim.

STANDARD OF REVIEW

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs this application. *Wilcox v. Florida Dep't of Corr.*, 158 F.3d 1209, 1210 (11th Cir. 1998), *cert. denied*, 531 U.S. 840 (2000). Section 2254(d), which creates a highly deferential standard for federal court review of a state court adjudication, states in pertinent part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings 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.

In *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000), the Supreme Court interpreted this deferential standard:

> In sum, § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied — the state-court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal Law, as determined by the Supreme Court of the United States" or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state

> court decides a case differently than this 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 this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

"The focus . . . is on whether the state court's application of clearly established federal law is objectively unreasonable, . . . an unreasonable application is different from an incorrect one." *Bell v. Cone*, 535 U.S. 685, 693 (2002). "As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 131 S. Ct. 770, 786–87 (2011). *Accord Brown v. Head*, 272 F.3d 1308, 1313 (11th Cir. 2001) ("It is the objective reasonableness, not the correctness *per se*, of the state court decision that we are to decide."). The phrase "clearly established Federal law" encompasses only the holdings of the United States Supreme Court "as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. at 412.

The purpose of federal review is not to re-try the state case. "The [AEDPA] modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. at 694. A federal court must afford due deference to a state court's decision. "AEDPA prevents defendants — and federal courts — from using federal habeas corpus review as a

vehicle to second-guess the reasonable decisions of state courts." *Renico v. Lett*, 559 U.S. 766, 779 (2010). *See also Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011) ("This is a 'difficult to meet,' . . . and 'highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt' . . . .") (citations omitted).

In a *per curiam* decision without a written opinion, the state appellate court on direct appeal affirmed Trice's convictions and sentence. (Respondent's Exhibit 2) Similarly, in another *per curiam* decision without a written opinion, the state appellate court affirmed the denial of Trice's subsequent Rule 3.850 motion to vacate. (Respondent's Exhibit 6) The state appellate court's *per curiam* affirmances warrant deference under Section 2254(d)(1) because "the summary nature of a state court's decision does not lessen the deference that it is due." *Wright v. Moore*, 278 F.3d 1245, 1254 (11th Cir.), *reh'g and reh'g en banc denied*, 278 F.3d 1245 (2002), *cert. denied sub nom Wright v. Crosby*, 538 U.S. 906 (2003). *See also Richter*, 131 S. Ct. at 784–85 ("When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary."), and *Bishop v. Warden*, 726 F. 3d 1243, 1255–56 (11th Cir. 2013) (describing the difference between an "opinion" or "analysis" and a "decision" or "ruling" and explaining that deference is accorded the state court's "decision" or "ruling" even if there is no "opinion" or "analysis").

As *Pinholster*, 131 S. Ct. at 1398, explains, review of the state court decision is limited to the record that was before the state court:

> We now hold that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. Section 2254(d)(1) refers, in the past tense, to a state-court adjudication that "resulted in" a decision that was contrary to, or "involved" an unreasonable application of, established law. This backward-looking language requires an examination of the state-court decision at the time it was made. It follows that the record under review is limited to the record in existence at that same time, i.e., the record before the state court.

Trice bears the burden of overcoming by clear and convincing evidence a state court factual determination. "[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). This presumption of correctness applies to a finding of fact but not to a mixed determination of law and fact. *Parker v. Head*, 244 F.3d 831, 836 (11th Cir.), *cert. denied*, 534 U.S. 1046 (2001). The state court's rejection of Trice's post-conviction claims warrants deference in this case. (Order Denying Motion for Post-Conviction Relief, Respondent's Exhibit 7)

EXHAUSTION AND PROCEDURAL DEFAULT

An applicant must present each claim to a state court before raising the claim in federal court. "[E]xhaustion of state remedies requires that petitioners 'fairly presen[t]' federal claims to the state courts in order to give the State the 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." *Duncan v.*

Henry, 513 U.S. 364, 365 (1995), *Picard v. Connor*, 404 U.S. 270, 275 (1971). *Accord Rose v. Lundy*, 455 U.S. 509, 518–19 (1982) ("A rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error."), and *Upshaw v. Singletary*, 70 F.3d 576, 578 (11th Cir. 1995) ("[T]he applicant must have fairly apprised the highest court of his state with the appropriate jurisdiction of the federal rights which allegedly were violated."). Also, a petitioner must present to the federal court the same claim presented to the state court. *Picard v. Connor*, 404 U.S. at 275 ("[W]e have required a state prisoner to present the state courts with the same claim he urges upon the federal courts."). "Mere similarity of claims is insufficient to exhaust." *Duncan v. Henry*, 513 U.S. at 366.

An applicant must alert the state court that he is raising a federal claim and not only a state law claim:

> A litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim "federal."

Baldwin v. Reese, 541 U.S. 27, 32 (2004). As a consequence, "[i]t is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." *Anderson v. Harless*, 459 U.S. 4, 6 (1982). *See also Kelley v. Sec'y for Dep't of Corr.*, 377 F.3d 1271, 1345 (11th Cir. 2004) ("The exhaustion doctrine requires a habeas applicant to do more than scatter some makeshift needles in the haystack of the state court record.") (citations omitted).

Finally, presenting a federal claim to a state court without the facts necessary to support the claim is insufficient. *See, e.g., Brown v. Estelle*, 701 F.2d 494, 495 (5th Cir. 1983) ("The exhaustion requirement is not satisfied if a petitioner presents new legal theories or entirely new factual claims in support of the writ before the federal court."). Specifically based on Trice's failure to exhaust, the respondent opposes Grounds Two, Three, and Four.[1]

The respondent argues (1) that on direct appeal Trice summarily briefed the constitutional claims alleged in Grounds Two, Three, and Four but without explaining the manner in which those rights were violated and (2) that Trice's summary constitutional claims in the state court were inadequate to alert the trial court to the specific constitutional violation alleged. Although the respondent is correct that a federal applicant for the writ of habeas corpus must first exhaust the claim in the state court, the respondent's suggestion — as the respondent calls his argument — is not well taken. Although Trice's claims on direct appeal may have lacked the exactness that respondent claims is necessary, the presentation alerted the state court that Trice asserted a constitutional claim. Therefore, the grounds warrant a review on the merits.

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[1] The exhaustion requirement precludes relief based on an unexhausted claim unless the respondent specifically waives the procedural default. "[B]ecause the State did not expressly waive McNair's procedural default in this case, we hold that § 2254(b)(3)['s proscription that the state must expressly waive the exhaustion requirement] applies and that McNair is procedurally barred from raising his extraneous evidence claim." *McNair v. Campbell*, 416 F.3d 1291, 1305 (11th Cir. 2005), *cert. denied*, 547 U.S. 1073 (2006).

INEFFECTIVE ASSISTANCE OF COUNSEL

Trice claims ineffective assistance of counsel, a difficult claim to sustain. "[T]he cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between." *Waters v. Thomas*, 46 F.3d 1506, 1511 (11th Cir. 1995) (*en banc*) (*quoting Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994)). *Sims v. Singletary*, 155 F.3d 1297, 1305 (11th Cir. 1998), explains that *Strickland v. Washington*, 466 U.S. 668 (1984), governs an ineffective assistance of counsel claim:

> The law regarding ineffective assistance of counsel claims is well settled and well documented. In *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the Supreme Court set forth a two-part test for analyzing ineffective assistance of counsel claims. According to *Strickland*, first, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland*, 466 U.S. at 687, 104 S. Ct. 2052.

Strickland requires proof of both deficient performance and consequent prejudice. *Strickland*, 466 U.S. at 697 ("There is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one."); *Sims*, 155 F.3d at 1305 ("When applying *Strickland*, we are free to dispose of ineffectiveness claims on either of its two grounds."). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable

professional judgment." *Strickland*, 466 U.S. at 690. "[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." 466 U.S. at 690. *Strickland* requires that "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." 466 U.S. at 690.

Trice must demonstrate that counsel's alleged error prejudiced the defense because "[a]n error by 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." 466 U.S. at 691–92. To meet this burden, Trice must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694.

Strickland cautions that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." 466 U.S. at 690–91. Trice cannot meet his burden merely by showing that the avenue chosen by counsel proved unsuccessful.

> The test 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 . . . . 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). *Accord Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000) ("To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable . . . . [T]he issue is not what is possible or 'what is prudent or appropriate, but only what is constitutionally compelled.'") (*en banc*) (*quoting Burger v. Kemp*, 483 U.S. 776, 794 (1987)). The required extent of counsel's investigation was addressed recently in *Hittson v. GDCP Warden*, 759 F.3d 1210, 1267 (11th Cir. 2014), *cert. denied sub nom., Hittson v. Chatman*, 135 S. Ct. 2126 (2015):

> [W]e have explained that "no absolute duty exists to investigate particular facts or a certain line of defense." *Chandler*, 218 F.3d at 1317. "[C]ounsel has a duty to make *reasonable* investigations or make a *reasonable* decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691, 104 S. Ct. at 2066 (emphasis added). "[C]ounsel need not always investigate before pursuing or not pursuing a line of defense. Investigation (even a nonexhaustive, preliminary investigation) is not required for counsel reasonably to decline to investigate a line of defense thoroughly." *Chandler*, 218 F.3d at 1318. "In assessing the reasonableness of an attorney's investigation . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527, 123 S. Ct. at 2538.

See also Jones v. Barnes, 463 U.S. 745, 751 (1983) (confirming that counsel has no duty to raise a frivolous claim).

Under 28 U.S.C. § 2254(d), Trice must prove that the state court's decision was "(1) . . . contrary to, or involved an unreasonable application of, clearly

established Federal law, as determined by the Supreme Court of the United States or (2) . . . based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Sustaining a claim of ineffective assistance of counsel is very difficult because "[t]he standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Richter*, 131 S. Ct. at 788. *See also Pinholster*, 131 S. Ct. at 1410 (An applicant must overcome this "'doubly deferential' standard of *Strickland* and the AEDPA."), *Johnson v. Sec'y, Dep't of Corr.*, 643 F.3d 907, 911 (11th Cir. 2011) ("Double deference is doubly difficult for a petitioner to overcome, and it will be a rare case in which an ineffective assistance of counsel claim that was denied on the merits in state court is found to merit relief in a federal habeas proceeding."), and *Pooler v. Sec'y, Dep't of Corr.*, 702 F.3d 1252, 1270 (11th Cir. 2012) ("Because we must view Pooler's ineffective counsel claim — which is governed by the deferential *Strickland* test — through the lens of AEDPA deference, the resulting standard of review is "doubly deferential."), *cert. denied*, 134 S. Ct. 191 (2013).

The state court conducted an evidentiary hearing and denied the claims of ineffective assistance of counsel with the following introduction: "When ineffective assistance of counsel is alleged, the burden is on the person seeking collateral relief to allege the grounds for relief specifically, and to establish whether the grounds for relief resulted in prejudice." (Respondent's Exhibit 5C at 424) Effective assistance of counsel does not mean that a defendant must be afforded errorless counsel or that

future developments in law must be anticipated. *See Meeks v. State*, 382 So. 2d 673 (Fla. 1980). The state post-conviction court determined that Trice failed to meet his burden under *Strickland.* (Respondent's Exhibit 5C at 424) Because the state court correctly recognized that *Strickland* governs each claim of ineffective assistance of counsel, Trice cannot meet the "contrary to" test in Section 2254(d)(1). Trice instead must show that the state court unreasonably applied *Strickland* or unreasonably determined the facts. In determining "reasonableness," a federal application for the writ of habeas corpus authorizes determining only "whether the state habeas court was objectively reasonable in its *Strickland* inquiry," not an independent assessment of whether counsel's actions were reasonable. *Putnam v. Head*, 268 F.3d 1223, 1244, n.17 (11th Cir. 2001), *cert. denied*, 537 U.S. 870 (2002). The presumption of correctness and the highly deferential standard of review requires that the analysis of each claim begin with the state court's analysis.

DISCUSSION

Trice alleges five grounds of trial court error and eight grounds of ineffective assistance of counsel: that the trial court erred by denying his motion for judgment of acquittal (Ground One); that in this "self-defense case" the trial court erred by allowing unreliable hearsay to establish the victim's state of mind (Ground Two); that the trial court erred by refusing to allow Trice to present evidence that, even in the absence of an immediate threat, a battered spouse can become an aggressor (Ground Three); that the trial court erred by allowing a non-expert witness to

opine on the ultimate issue of fact and to usurp the function of the jury (Ground Four); that trial counsel failed to adequately investigate Trice's locked-door defense (Ground Five); that trial counsel failed to call a witness who would have supported an argument that Trice and the victim were friendly before the shooting (Ground Six); that trial counsel failed to call a witness to explain the effect of shock on Trice's demeanor (Ground Seven); that trial counsel misadvised Trice about the admissibility of Trice's record as a law enforcement officer (Ground Eight); that trial counsel failed to recuse the trial judge (Ground Nine); that trial counsel failed to object to Trooper Lane's testimony or to present an expert to rebut Lane's testimony about blood splatter and ballistics (Ground Ten); that trial counsel failed to move for a change of venue (Ground Eleven); that trial counsel failed to preserve specific issues for appeal (Ground Twelve); and that the trial court improperly denied Trice's motion for post-conviction relief based on the denial of a change in the law (Ground Thirteen).

Ground One:

Trice argues that his conviction is erroneous because the jury returned a general verdict. At trial the prosecution argued that Trice was guilty on one of two alternative theories: premeditated first degree murder or felony-murder. The trial judge instructed the jury under both theories. The jury returned a verdict of guilty without specifying which theory supports the conviction. Trice unsuccessfully moved for a judgment of acquittal. Trice argues that insufficient evidence supported a charge of first degree murder because all of the evidence against him was

circumstantial. Trice argues that the trial court's denying his motion for judgment of acquittal violated his constitutional rights under both the Due Process Clause and the Equal Protection Clause.

A general verdict supports a conviction even though the evidence is insufficient to support a conviction on one charged count if the evidence supports a conviction on another charged count. *Clark v. Crosby*, 335 F. 3d 1303, 1309 (11th Cir. 2003) (quoting *Griffin v. United States*, 502 U.S. 46, 43 (1991)). Sufficient evidence was presented at Trice's trial to support the general verdict. A few days before the murder Trice admitted that "maybe he ought kill his wife," and on the day of the murder he twice visited his estranged wife's residence. The first visit was to return his daughter. On the second visit Trice was seen entering the residence through the garage — an unlawful entry that supports Trice's convictions both for violating a domestic violence injunction and for burglary with assault. The felony-murder conviction was based on the burglary with assault. Under *Clark*, sufficient evidence supports the prosecution's felony-murder theory. The trial court's denying Trice's motion for a judgment of acquittal violated no constitutional right. Accordingly, Trice is entitled to no habeas relief on Ground One.

Ground Two:

Trice argues that the trial court erred by allowing hearsay to establish the victim's state of mind. The respondent argues that the trial court allowed the hearsay because the victim's state of mind was relevant to rebut Trice's self-defense claim.

The trial court allowed the testimony of thirteen witnesses who testified about the victim's fear of Trice. (Respondent's Exhibit 2 at 14) The challenged statements were admitted to show the victim's state of mind, specifically, her fear of Trice. The trial court specially instructed the jury that the statements were not evidence of any act by Trice or evidence of Trice's state of mind. The state appellate court affirmed the trial court's decision and found that under Florida law the victim's hearsay statements demonstrate the victim's fear of the defendant and that the statements are admissible to rebut the defendant's asserted self-defense. *See Peterka v. State*, 640 So. 2d 59 (Fla. 1994).

From the moment he called 911 to report the shooting, Trice began claiming that he acted in self-defense. Trice told Trooper Lane, who visited the crime scene with Trice, that the victim attacked him with a knife and that the only choice he had was to shoot the victim to defend his own life. Trice testified at trial that he acted in self-defense because the victim attacked him with a knife. Because Trice raised the self-defense issue at trial, under Florida law the trial court properly allowed the prosecutor to present testimony showing the victim's fear of Trice as rebuttal evidence. *Stoll v. State*, 762 So. 2d 870, 874 (Fla. 2000) (holding that while a victim's hearsay statements in a homicide case that the victim was afraid of the defendant generally are not admissible under the state of mind exception, a victim's state of mind might become relevant if the defendant claims self-defense). Accordingly, Trice is entitled to no habeas relief on Ground Two.

Ground Three:

Trice argues that the trial court erred by refusing to allow evidence that a battered spouse can become an aggressor even in the absence of an immediate threat. Trice wanted to call an expert to support his proposed defense that an individual who was not battered, but imagined she was battered, can become the aggressor even without an apparent and immediate threat. After a pretrial hearing, the trial court denied Trice's request and found no evidence to support the claim that a spouse who imagines that she is abused can suffer from "battered woman syndrome." (Respondent's Exhibit 1C at 377) The appellate court affirmed the trial court's ruling.

Under Section 90.704, Florida Statutes, an expert's opinion must derive from "facts or data . . . of a type reasonably relied upon by experts in the subject to support the opinion expressed." During the pretrial hearing Trice's expert testified that he had "insufficient evidence to state, within the bounds of reasonable psychological probability, that [the victim] was a battered spouse or to determine her state of mind" on the day of death. (Respondent's Exhibit 1C at 382) As a consequence, the trial court found that Trice's expert did not meet the requirements of Section 90.704 because the expert admitted his lack of sufficient facts to support an admissible opinion.

Further, the trial court noted that the proposed testimony was deficient under *Ramirez v. State*, 651 So. 2d 1164, 1167 (Fla. 2d DCA 1995), which requires the

proponent of a scientific opinion to establish that the expert testimony is reliable by proving (Respondent's Exhibit 1C at 375):

> [T]he general acceptance of both the underlying scientific principle and the testing procedure used to apply that principle to the facts of the case at hand. The trial judge has the sole responsibility to determine this question. The general acceptance under the *Frye* test must be established by a preponderance of the evidence.

Relying on both the Florida statute and applicable precedent, the trial court held that Trice's opinion about a victim's imaginary belief that she suffers from "battered woman syndrome" was a novel approach that failed to meet *Ramirez's* general acceptance test. The trial court's ruling was proper, and Trice is entitled to no habeas relief on Ground Three.

Grounds Four and Ten:

Both Ground Four and Ground Ten involve Trooper Lane's testimony about the physical evidence observed by Trooper Lane at the residence the day after the shooting. Because Ground Four and Ground Ten are so closely related, Ground Ten will be considered out of sequence.

In Ground Four Trice contends that the trial court erred by allowing a non-expert witness to usurp the function of the jury by opining on the ultimate issue of fact. Trooper Lane testified at trial that Trice's description of the shooting was inconsistent with the physical evidence. Trooper Lane testified as follows (Respondent's Exhibit 1J at 1070):

> If you shot her from the position there in the closet, why is there no body tissue near the area of the closet? Why did the

> bullet not go straight through her body and — and hit the wall? Um, the bullet exited her body and struck a window approximately six foot [sic] to the left of the body. Um, his response was the bullet possibly had struck her spine and was deflected left.

Trice argues that the prosecution offered no expert opinion on blood splatter or on ballistics and used Trooper Lane's lay testimony — instead of expert testimony — to refute Trice's version of the events that led to the shooting.

The respondent argues (1) that Trooper Lane's testimony was proper because he is an intelligent person whose experience with firearms naturally suggests to him that Trice's description of the shooting did not match with the physical evidence and (2) that the trial court committed no error by allowing Trooper Lane to testify about his conversation with Trice.

In citing the advisory committee notes to Rule 701, Federal Rules of Evidence, *Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co., LTD.*, 320 F. 3d 1213, 1222 (11th Cir. 2003) (brackets original), explains:

> [M]ost courts have permitted [officers] to testify . . . without the necessity of qualifying the witness as [an] . . . expert. Such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business.

Trooper Lane's testimony about his conversation with Trice at the residence was not as an expert on ballistics or blood splatter. Trice's trial counsel had the opportunity to cross-examine Trooper Lane and inquire if he had any expertise in ballistics or blood stain evidence. (Respondent's Exhibit 1J at 1079) Trooper Lane based his

testimony on Trice's explanation of the shooting, not based on an investigation of the death of the victim. Trooper Lane told Trice that the path of the bullet and the lack of body tissue and blood splatter near the closet (where Trice said he shot the victim) was inconsistent with Trice's description of the shooting. Trooper Lane had the experience, personal knowledge, and training to testify that Trice's description of the shooting was inconsistent with the evidence apparent at the crime scene. As a consequence, the trial court did not err in allowing Trooper Lane's testimony. Accordingly, Trice is entitled to no habeas relief on Ground Four.

In Ground Ten Trice argues that trial counsel was ineffective for failing to object to Trooper Lane's testimony and for failing to present an expert in blood splatter or reconstruction to rebut Trooper Lane's testimony. The respondent argues that trial counsel objected to the proffered testimony of Trooper Lane, whose testimony the trial court limited but did not entirely exclude.

Trial counsel testified at the post-conviction hearing that he finds blood splatter experts unreliable and that he carefully limited the testimony of the State's blood splatter expert. (Respondent's Exhibit 5C at 447–448) Trial counsel testified that defense testimony from a blood splatter or reconstruction expert would have invited the prosecutor to expand the testimony of the prosecution's blood splatter expert after trial counsel had successfully limited the prosecutor's expert testimony. The post-conviction court held that not calling a reconstruction expert and not calling a blood splatter expert were permissible and reasonable strategic decisions by trial

counsel. (Respondent's Exhibit 5C at 448) Trial counsel further testified that he felt that cross-examining Trooper Lane and the prosecutor's expert was sufficient.

Based upon the record, trial counsel acted reasonably in not calling a defense expert. Further, Trice was not prejudiced by trial counsel's strategy because had he called an expert, the prosecutor could have presented expert evidence that trial counsel had precluded. Trial counsel's strategy was reasonable. The post-conviction court's finding that trial counsel's strategy was reasonable is supported by the record. Accordingly, Trice is entitled to no habeas relief on Ground Ten.

Ground Five:

Trice claims that trial counsel rendered "inept and unprofessional representation" by failing to investigate his "locked-door" defense. Trice argues that trial counsel failed to investigate whether the exterior door to his office was unlocked at the time of the shooting. Trice believes that an unlocked office door would evidence that he lawfully entered the residence through his exterior office door — as allowed in the domestic violence injunction — and not unlawfully through the garage door. Trice's illegal entrance through the garage door is the basis for his conviction for felony-murder. Trice asserts that he entered his office through the exterior door and his estranged wife entered his office through the residence door and attacked him.

In his post-conviction motion, Trice argued that trial counsel's refusal to ask Trooper Lane whether the exterior entrance to Trice's office was unlocked amounts to ineffective assistance of counsel. However, Trooper Lane's testimony at the

hearing on Trice's post-conviction motion contradicts Trice's claim. Trooper Lane testified that, when talking with sheriff's deputies investigating the crime scene, Trice showed the deputies how he entered and exited his office. Trooper Lane testified Trice had keys in his hand as he showed the deputies the door. Although he could not confirm that Trice used the key to open the office door, Trooper Lane testified that, if the door was unlocked, Trice would not need the key. Questioned further, Trooper Lane testified as follows (Respondent's Exhibit 5D at 645–647):

> Sir, if he was trying to be emphatic with the two detectives that that was the way he gained entrance into the house and this door was unlocked, why wouldn't he walk over to the door, turn the knob and say, it's still unlocked, that's how I came in. Why would he need to have a key for any reason? The door was either open or it was closed, it was locked or unlocked. He certainly wouldn't need a key if it was unlocked.

The post-conviction court found that Trooper Lane's testimony about the locked door would not have helped Trice at trial. As Trooper Lane testified, if the door was unlocked no key was needed to demonstrate how the lock worked — Trice could have easily opened an unlocked door. The post-conviction court concluded that "[b]ecause the testimony which Trooper Lane did offer would not have assisted in the 'door lock' defense, the [c]ourt finds that Defendant has failed to show how his former counsel performed deficiently in failing to elicit such testimony from Trooper Lane during trial."

Trice argues that trial counsel's representation was ineffective by failing to investigate the locked-door defense. However, a tactical decision by trial counsel is ineffective assistance only if not presenting the defense was so patently unreasonable

that no competent attorney would have chosen that strategy. *Adams v. Wainwright*, 709 F. 2d 1443, 1445 (11th Cir. 1983). Because most lawyers do not enjoy the benefit of endless time, boundless energy, and inexhaustible money, an effective and reasonable — even astute — "strategy" can include a decision not to investigate. *Rogers v. Zant*, 13 F.3d 384, 387 (11th Cir. 1994). *Strickland*, 466 U.S. at 691, explains that the ineffectiveness question turns on whether the decision not to pursue a particular investigation was reasonable. *See Atkins v. Singletary*, 965 F. 2d 952, 958 (11th Cir. 1992) (noting that "[a]t some point, a trial lawyer has done enough," and that "[a] lawyer can almost always do something more in every case"); *Gates v. Zant*, 836 F. 2d 1492, 1498 (11th Cir. 1989) (as long as his decision was reasonable under circumstances, counsel may elect to forego a particular line of defense without first investigating it substantially). Given that the testimony of Trooper Lane at the post-conviction hearing controverted Trice's defense, trial counsel's deciding not to pursue the locked-door defense was a reasonable tactical decision. The post-conviction court reasonably determined that trial counsel was not ineffective under *Strickland* because Trice was not prejudiced by trial counsel's strategic or tactical decision. Accordingly, Trice is entitled to no habeas relief on Ground Five.

Ground Six:

Trice contends that trial counsel was ineffective for not calling a witness who would have supported his contention that his relations with the victim were amicable during the several months preceding the shooting. Trice wanted trial counsel to call

as a witness his divorce attorney, who Trice contends would have testified that relations between Trice and his estranged wife were peaceful and that the divorce settlement was amicable. Also, Trice wanted his neighbor to testify. Trice asserts that the neighbor would have testified that the neighbor had seen Trice and his estranged wife in the front yard a few months before the shooting and that the two were tranquil. Additionally, Trice wanted to call two witnesses from a car dealership ("dealership witnesses"). Trice contends the dealership witnesses would have testified that they saw the victim become enraged over the dealership's refusal to release Trice's Corvette to her. Trice argues that possession of the Corvette was the flashpoint that led to the shooting. Finally, Trice wanted to call a friend to testify that the friend had spent time with Trice and his estranged wife and that Trice never directed anger or a threat toward his wife. The respondent argues that trial counsel's decision not to call these witnesses was a reasonable and sound strategy.

The post-conviction court noted that Trice's divorce attorney never spoke to Trice's estranged wife and could recount only what Trice had said. The post-conviction court concluded that Trice "failed to produce evidence that his divorce attorney had admissible relevant testimony which he could have offered at trial if he had been called as a witness." (Respondent's Exhibit 5C at 431) Trial counsel did not call Trice's divorce attorney to testify because no applicable hearsay exception would allow the attorney to testify about the victim's comments.

Trial counsel did not call Trice's neighbor because trial counsel concluded the testimony was unhelpful. Also, trial counsel did not call the dealership witnesses to

testify about the incident over the Corvette because the dealership's service manager testified. At the post-conviction evidentiary hearing, trial counsel said he could not remember exactly why he did not call the dealership witnesses other than he decided that the dealership's service manager was a better witness. (Respondent's Exhibit 5C at 433) After the hearing the post-conviction court held that trial counsel did not call the dealership witnesses because their testimony was less specific than the service manager's testimony. The post-conviction court continued that the dealership witnesses could also testify about a second incident involving the Corvette at which the victim was meek and non-confrontational. Therefore, the dealership witnesses's testimony would not be beneficial to the defense's argument that the Corvette was a flashpoint that would always enrage the victim.

The post-conviction court held as follows (Respondent's Exhibit 5C at 435):

> [T]he court finds that [trial counsel's] decision not to call either of these witnesses was reasonable. Judicial scrutiny of counsel's trial decisions should be afforded great deference. *See Strickland*, 466 U.S. 689. A reasonable strategic decision by counsel does not constitute ineffective assistance of counsel.

Finally, the post-conviction court considered the testimony of Trice's friend. Trice avers that his friend could testify to the good relations between Trice and the victim. However, the friend testified at the post-conviction hearing that he socialized with Trice and the victim on only one occasion before Trice's marriage to the victim. (Respondent's Exhibit 5C, at 435) The post-conviction court found that, because Trice's friend could not testify from personal knowledge of the relations between

Trice and the victim, his testimony was unhelpful. Therefore, the post-conviction court found no error by trial counsel.

A trial attorney's decision not to call a certain witness is a strategic decision that constitutes ineffective assistance only if not presenting the evidence is a patently unreasonable strategy that no competent attorney would choose. *Adams v. Wainwright*, 709 F. 2d 1443, 1445 (11th Cir. 1983). In this instance, trial counsel decided that calling Trice's divorce attorney was not possible because no hearsay exception would allow the testimony. Calling the dealership witnesses would have diminished trial counsel's argument that the victim became enraged over possession of the Corvette because the dealership witnesses would testify that on a similar occasion she was meek and mild-mannered about losing the Corvette. Trial counsel's decision not to call Trice's friend was reasonable because his testimony about Trice's and the victim's relations was based on meeting the victim only once.

After a review of the witnesses and the trial court's rulings, the post-conviction court's holding was not unreasonable. Accordingly, Trice is entitled to no habeas relief on Ground Six.

Ground Seven:

Trice asserts that trial counsel rendered ineffective assistance by not calling an expert to explain how Trice's emotional shock after the shooting and his law enforcement training affected his personality and his demeanor. The respondent argued that trial counsel's decision not to call an expert was reasonable trial strategy.

Officers testified at trial that Trice was emotionless and nonchalant after the shooting. Trice claims trial counsel should have called an expert to testify that Trice's training as a police officer and Trice's shock from the shooting induced a state of indifference. Trial counsel testified at the post-conviction hearing that he did not call an expert because his strategy was to rely on the jurors' common sense.

At the post-conviction evidentiary hearing, trial counsel testified that "he would not have called an expert on the issue of whether [Trice] suffered from a psychogenic shock after he was stabbed." (Respondent's Exhibit 5C, at 439) Trial counsel continued that "it was his preference not to use an expert witness when he could easily demonstrate the same thing by relying on common sense." Trial counsel testified that he had "elicited testimony on cross-examination and from his own witness that [Trice] was in a state of psychogenic shock following the murder." (Respondent's Exhibit 5C at 439–40) Indeed, trial counsel presented the testimony of the first paramedic to observe Trice after the shooting. The paramedic testified on direct examination that Trice had a rapid pulse, was sweaty, was agitated, and was nervous. On cross-examination, the paramedic testified that after the shooting Trice was suffering from psychogenic shock. (Respondent's Exhibit 5C at 440)

The post-conviction court held (1) that trial counsel's preference — to rely on one's common sense rather than complicate matters with an expert — was a strategy used to avoid the unnecessary use of experts; (2) that "instead of theorizing, through expert witnesses, over whether demeanor is indicative of guilt, over whether [Trice's] demeanor was cold or aloof, and whether any conclusion about [Trice] could be

drawn from that demeanor, the defense simply called a witness who described [Trice] as being in a state of shock"; and (3) that trial counsel's strategy of not calling experts unless absolutely necessary was reasonable. Trice's claim concerning trial counsel's failure to call an expert witness fails. In reviewing counsel's performance, a court must avoid using "the distorting effects of hindsight" and must evaluate the reasonableness of counsel's performance "from counsel's perspective at the time." *Strickland,* 104 S. Ct. at 2065. "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." As noted above, a tactical decision by trial counsel is ineffective assistance only if not presenting the defense was so patently unreasonable that no competent attorney would have chosen that strategy. *Adams*, 709 F. 2d at 1445. Contrary to Trice's argument that he needed an expert to inform the jurors that he was suffering from psychogenic shock, trial counsel presented evidence that Trice was suffering from psychogenic shock by calling the paramedic who responded to the scene. Trial counsel's strategy not to call an expert witness did not prejudice Trice because evidence describing his alleged shock was presented to the jurors. The state court reasonably applied *Strickland* in determining that trial counsel's performance was not deficient. Accordingly, Trice is entitled to no habeas relief on Ground Seven.

Ground Eight:

Trice claims he received ineffective assistance of counsel because trial counsel misadvised him by telling him his employment file as a Florida State Trooper was not admissible. At the time of the shooting, Trice had worked for the Florida Highway Patrol (FHP) for fourteen years. Although Trice claims that during his service at FHP he never received a complaint for excessive force or violent behavior, the former in-laws of Trice's ex-girlfriend claim that Trice threatened them — an allegation that appears in Trice's FHP file.

Trial counsel testified at the post-conviction hearing that he did not recall every reason why he did not introduce Trice's FHP file in evidence, but trial counsel testified that he would introduce into evidence only information helpful to Trice. At the evidentiary hearing, portions of Trice's FHP file were read into the record; the FHP file included a report of an encounter between Trice and his ex-girlfriend's former in-laws.

According to the report, Trice's girlfriend rented a residence from her former in-laws. Trice encountered the former in-laws at the rented residence while he was on duty. An argument ensued. Trice allegedly threatened the former in-laws and allegedly attempted to taunt them into an attack so that he could arrest them. Testimony at the post-conviction hearing confirmed that Trice's FHP file was not admitted because of the incident. The post-conviction court's order denying relief quotes trial counsel approvingly (Respondent's Exhibit 5C at 441):

> I'm reasonably confident that given the nature of the allegations [in this case], the nature of the testimony of the witnesses that were going to [be] talking about [the victim's] alleged fears, and what this entry in the record about the allegations that he had been in his girlfriend's house and had a heated confrontation with her parents and became abusive, I would never want to place this before a jury.

After hearing the testimony at the evidentiary hearing, the post-conviction court held that trial counsel's omitting Trice's FHP record did not violate Trice's constitutional right to effective counsel.

Trial counsel's decision to omit Trice's FHP record based on the confrontation with his ex-girlfriend's former in-laws was a conscious and reasonable strategic decision. Testimony at the hearing confirms that trial counsel strategically decided that the detriment from admission of the encounter with Trace's ex-girlfriend's former in-laws negated or, at least, outweighed any benefit Trice might gain by admitting Trice's FHP record. The post-conviction court was objectively reasonable in its application of *Strickland*. Accordingly, Trice is entitled to no habeas relief on Ground Eight.

Ground Nine:

Trice alleges he received ineffective assistance because trial counsel did not move to recuse the judge after allegedly adverse comments by the judge about Trice. The respondent argues both that Trice failed to produce any evidence to support this claim and that trial counsel said he was unaware of any such comments.

In support of his claim Trice states that the trial judge's attendance at a domestic violence seminar the night before the trial was reported in *The Tampa*

Tribune. Trice said his mother-in-law attended the seminar and spoke directly with the trial judge. (Respondent's Exhibit 5C at 444) Trice testified that the trial judge told him at his pre-trial bail hearing that she did not like the way he treated women. He further avers that the trial judge admonished him for crying when the 911 tape was played in open court at his trial. Finally, Trice said the trial judge stated at his sentencing that, as an example to others, she would exceed the guidelines and sentence him to life imprisonment.

Trice had the burden of proof during the state post-conviction proceeding and, under *Bester v. Warden*, 836 F. 3d 1331, 1338 (11th Cir. 2016), he has the burden of establishing prejudice under *Strickland*. None of the allegedly improper comments during the pretrial conference or the sentencing were found in the record, and at the post-conviction evidentiary hearing Trice produced no record of an improper comment by the trial judge. Trice was unable to produce a newspaper article reporting that the trial judge commented about him or that the trial judge attended the domestic violence conference the night before his trial. In fact, Trice's mother-in-law, specifically addressing the domestic violence conference allegation, testified that she was at the domestic violence conference but that she neither saw the trial judge nor spoke with her. Because the evidence presented at the post-conviction hearing refutes his allegations, Trice fails to meet his burden to show that that the post-conviction court unreasonably applied *Strickland*. Accordingly, Trice is entitled to no habeas relief on Ground Nine.

Ground Eleven:

Trice avers that trial counsel rendered ineffective assistance by not moving for a change of venue because his case was a high profile case with unusually extensive media coverage, which potentially biased the jury pool.

During *voir dire* the trial court asked potential jurors whether any of them had heard about the case and whether anyone had formed an opinion about the case. (Respondent's Exhibit 1D at 25) Trial counsel questioned each prospective juror on whether they had seen media reports about the case and whether any had formed an opinion because of those media reports. (Respondent's Exhibit 1G at 503–651) Those who had formed an opinion were excluded from the jury. The post-conviction court held that trial counsel acted reasonably. Without some prejudicial effect, even inordinate widespread publicity fails to warrant a change of venue. *Baldwin v. Johnson*, 152 F. 3d 1304, 1314 (11th Cir. 1998). Trice fails to show how the pretrial publicity prejudiced his case. Trice failed to demonstrate how he was prejudiced by trial counsel's failure to move for a change in venue. Because Trice did not establish prejudice under *Strickland*, the post-conviction court's denial of this claim was reasonable. Trice is entitled to no habeas relief on Ground Eleven.

Ground Twelve:

Trice alleges that trial counsel provided ineffective assistance by not objecting to the police officers' testifying while wearing their uniforms but not appearing in an official capacity. Trice claims the officers' uniforms bestowed on them an extra

credibility. Trice also claims that trial counsel should have objected to the prosecutor's closing argument that suggested that he — as a trained law enforcement officer — was trained to testify in court and should not be believed. The respondent argues that Trice offers neither substantive law nor a procedural rule that supports his contention that an officer testifying in a non-official capacity should not wear a police uniform.

In fact, no law or rule prevents an officer from wearing a uniform while testifying in court, even if not testifying in his official capacity. *See Zaken v. Kelly*, 370 Fed. App'x 982, 987–88 (11th Cir. 2010) (holding that, although the officers were sued in their individual capacity, the fact the defendants were police officers would emerge at trial because the plaintiff alleged the officers' use of excessive force)). Likewise, even if the officers in this case had not worn a uniform, the fact that they were police officers would have emerged. The officers were Trice's colleagues and testified about Trice's threatening statements about the victim, but because a law enforcement officer can wear a uniform while testifying, trial counsel's not objecting was not deficient performance. Any objection was meritless and trial counsel is not deficient for failing to assert a meritless objection.

Further, Trice alleges that "[t]rial counsel failed to object and preserve the [prosecutor's] improper comment during closing argument essentially that Trice was a trained law enforcement officer and was therefore trained to testify and should not be believed." Trice points to no statement by the prosecutor that Trice could not be trusted because of his training as a law enforcement officer. The trial court

rejected this claim because Trice failed to identify with any specificity the argument Trice claims the prosecutor advanced.

The prosecutor's mention of Trice's past employment as a Florida State Trooper would have no prejudicial effect upon the jurors' because Trice's position as a state trooper was already known. Further, while he speculates that the prosecutor's comments attacked his credibility, Trice identifies no objectionable comment. "A convicted defendant making a claim for ineffective assistance of counsel must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland*, 466 U.S. at 690. Trice's contention that trial counsel failed to object to comments that might have attacked Trice's credibility is too general and conclusory. Consequently, trial counsel did not provide ineffective assistance by not objecting to the prosecutor's closing remarks, nor did the post-conviction court err by determining that Trice was provided with effective assistance. Accordingly, Trice is entitled to no habeas relief on Ground Twelve.

Ground Thirteen:

Trice claims that the trial court improperly denied his request to apply a substantial change in the law governing the duty to retreat by a co-occupant of a home in a case of self-defense. Trice argues that under *Weiland v. State*, 732 So. 2d 1044, 1058 (Fla. 1999), a defendant who is attacked in his home by a co-occupant of that home has no duty to retreat before using deadly force in self-defense. *Weiland* applied to future cases and cases that were not final when the decision was issued.

Both the respondent and Trice agree to his entitlement to *Weiland* because his case was not yet final when *Weiland* issued.

Under Florida statutory and common law, a person may use deadly force in self-defense if the person reasonably believes that deadly force is necessary to prevent imminent death or great bodily harm. Fla. Stat. § 776.012. Before *Weiland*, even in a person's home, a person had a limited duty to retreat to prevent the loss of life. *Hedges v. State*, 165 So. 2d 213, 214–15 (Fla. 2d DCA 1964). *Weiland*, 732 So. 2d at 1058, eliminated the duty to retreat in one's own home before resorting to deadly force against a co-occupant or invitee when necessary to prevent death or great bodily harm.[2]

Furthermore, under *Weiland* a person's duty to retreat is inapplicable to Trice because *Weiland* applies to co-occupants of a residence. Trice was no longer a co-occupant of the residence with the victim. Trice had been barred from the residence by a domestic violence injunction that prohibited Trice from entering the residence, except through an exterior door into his office. The evidence at trial showed that Trice violated that injunction and entered the residence through the garage. Any reliance on *Weiland* by Trice as a co-occupant of the residence would necessarily fail because Trice was no longer a co-occupant of the residence. As a consequence, by violating the domestic violence injunction, Trice was a trespasser.

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[2] To benefit from a change in the law based on a Florida supreme court decision, the defendant must timely object at trial if an objection was required to preserve the issue for appellate review. *Smith v. State*, 598 So. 2d 1063, 1066 (Fla. 1992). Trice neither objected based on *Weiland* at trial nor raised *Weiland* on direct appeal.

Therefore, he may not now obtain habeas relief under *Weiland*. Accordingly, Trice is entitled to no habeas relief on Ground Thirteen.

CONCLUSION

To summarize, Trice fails to meet his burden to show that the state court's decisions were either based upon an unreasonable application of controlling Supreme Court precedent or an unreasonable determination of fact. As *Burt v. Titlow*, 134 S. Ct. 10, 15–16 (2013), recognizes, an applicant's burden under Section 2254 is very difficult to meet:

> Recognizing the duty and ability of our state-court colleagues to adjudicate claims of constitutional wrong, AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court. AEDPA requires "a state prisoner [to] show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error . . . beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. [86, 103] (2011). "If this standard is difficult to meet" — and it is — "that is because it was meant to be." *Id.*, at [102]. We will not lightly conclude that a State's criminal justice system has experienced the "extreme malfunctio[n]" for which federal habeas relief is the remedy. *Id.*, at [103] (internal quotation marks omitted).

Accordingly, Trice's application for the writ of habeas corpus (Doc. 1) is **DENIED**. The clerk must enter a judgment against Trice, terminate any pending motions and deadlines, and close this case.

DENIAL OF BOTH A CERTIFICATE OF APPEALABILITY AND LEAVE TO APPEAL *IN FORMA PAUPERIS*

Trice is not entitled to a certificate of appealability ("COA"). A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his application. 28 U.S.C. § 2253(c)(1). Rather, a district court must first issue a COA. Section 2253(c)(2) permits issuing a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." To merit a COA, Trice must show that reasonable jurists would find debatable both the merits of the underlying claims and the procedural issues he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000); *Eagle v. Linahan*, 279 F.3d 926, 935 (11th Cir 2001). Because he fails to show that reasonable jurists would debate either the merits of the claims or the procedural issues, Trice is entitled to neither a COA nor leave to appeal *in forma pauperis*.

Accordingly, a certificate of appealability is **DENIED**. Leave to appeal *in forma pauperis* is **DENIED**. Trice must obtain permission from the circuit court to appeal *in forma pauperis*.

ORDERED in Tampa, Florida, on September 7, 2017.

STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

APPENDIX

D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CHARLES L. TRICE,

Petitioner,

v. **Case No: 8:11-cv-1453-T-23AEP**

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

Respondents.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is hereby entered against Petitioner, Charles Trice.

ELIZABETH M. WARREN,
CLERK

s/A. Guzman, Deputy Clerk

September 7, 2017

CIVIL APPEALS JURISDICTION CHECKLIST

1. **Appealable Orders**: Courts of Appeals have jurisdiction conferred and strictly limited by statute:

   (a) **Appeals from final orders pursuant to 28 U.S.C. Section 1291**: Only final orders and judgments of district courts, or final orders of bankruptcy courts which have been appealed to and fully resolved by a district court under 28 U.S.C. Section 158, generally are appealable. A final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Pitney Bowes, Inc. V. Mestre, 701 F.2d 1365, 1368 (11th Cir. 1983). A magistrate judge's report and recommendation is not final and appealable until judgment thereon is entered by a district court judge. 28 U.S.C. Section 636(c).

   (b) **In cases involving multiple parties or multiple claims**, a judgment as to fewer than all parties or all claims is not a final, appealable decision unless the district court has certified the judgment for immediate review under Fed.R.Civ.P. 54(b), Williams v. Bishop, 732 F.2d 885, 885-86 (11th Cir. 1984). A judgment which resolves all issues except matters, such as attorneys' fees and costs, that are collateral to the merits, is immediately appealable. Budinich v. Becton Dickinson & Co., 486 U.S. 196, 201, 108 S. Ct. 1717, 1721-22, 100 L.Ed.2d 178 (1988); LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 837 (11th Cir. 1998).

   (c) **Appeals pursuant to 28 U.S.C. Section 1292(a)**: Appeals are permitted from orders "granting, continuing, modifying, refusing or dissolving injunctions or refusing to dissolve or modify injunctions..." and from "[i]nterlocutory decrees...determining the rights and liabilities of parties to admiralty cases in which appeals from final decrees are allowed." Interlocutory appeals from orders denying temporary restraining orders are not permitted.

   (d) **Appeals pursuant to 28 U.S.C. Section 1292(b) and Fed.R.App.P.5:** The certification specified in 28 U.S.C. Section 1292(b) must be obtained before a petition for permission to appeal is filed in the Court of Appeals. The district court's denial of a motion for certification is not itself appealable.

   (e) **Appeals pursuant to judicially created exceptions to the finality rule:** Limited exceptions are discussed in cases including, but not limited to: Cohen V. Beneficial Indus. Loan Corp., 337 U.S. 541,546,69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949); Atlantic Fed. Sav. & Loan Ass'n v. Blythe Eastman Paine Webber, Inc., 890 F. 2d 371, 376 (11th Cir. 1989); Gillespie v. United States Steel Corp., 379 U.S. 148, 157, 85 S. Ct. 308, 312, 13 L.Ed.2d 199 (1964).

2. **Time for Filing:** The timely filing of a notice of appeal is mandatory and jurisdictional. Rinaldo v. Corbett, 256 F.3d 1276, 1278 (11th Cir. 2001). In civil cases, Fed.R.App.P.4(a) and (c) set the following time limits:

   (a) **Fed.R.App.P. 4(a)(1)**: A notice of appeal in compliance with the requirements set forth in Fed.R.App.P. 3 must be filed in the district court within 30 days after the entry of the order or judgment appealed from. However, if the United States or an officer or agency thereof is a party, the notice of appeal must be filed in the district court within 60 days after such entry. **THE NOTICE MUST BE RECEIVED AND FILED IN THE DISTRICT COURT NO LATER THAN THE LAST DAY OF THE APPEAL PERIOD - no additional days are provided for mailing.** Special filing provisions for inmates are discussed below.

   (b) **Fed.R.App.P. 4(a)(3)**: "If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later."

   (c) **Fed.R.App.P.4(a)(4)**: If any party makes a timely motion in the district court under the Federal Rules of Civil Procedure of a type specified in this rule, the time for appeal for all parties runs from the date of entry of the order disposing of the last such timely filed motion.

   (d) **Fed.R.App.P.4(a)(5) and 4(a)(6)**: Under certain limited circumstances, the district court may extend the time to file a notice of appeal. Under Rule 4(a)(5), the time may be extended if a motion for an extension is filed within 30 days after expiration of the time otherwise provided to file a notice of appeal, upon a showing of excusable neglect or good cause. Under Rule 4(a)(6), the time may be extended if the district court finds upon motion that a party did not timely receive notice of the entry of the judgment or order, and that no party would be prejudiced by an extension.

   (e) **Fed.R.App.P.4(c)**: If an inmate confined to an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a declaration in compliance with 28 U.S.C. Section 1746 or a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

3. **Format of the notice of appeal**: Form 1, Appendix of Forms to the Federal Rules of Appellate Procedure, is a suitable format. See also Fed.R.App.P. 3(c). A pro se notice of appeal must be signed by the appellant.

4. **Effect of a notice of appeal**: A district court loses jurisdiction (authority) to act after the filing of a timely notice of appeal, except for actions in aid of appellate jurisdiction or to rule on a timely motion of the type specified in Fed.R.App.P. 4(a)(4).

APPENDIX

E

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

CHARLES TRICE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D09-3935

Opinion filed January 26, 2011.

Appeal from the Circuit Court for Hillsborough County; Jack Espinosa, Jr., Ronald N. Ficarrotta, and Gregory P. Holder, Judges.

Deana K. Marshall of Law Office of Deana K. Marshall, P.A., Riverview, and Joseph C. Bodiford of Bodiford Law, P.A., Tampa, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Timothy A. Freeland, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

Affirmed.

VILLANTI, KHOUZAM, and MORRIS, JJ., Concur.

APPENDIX

F

IN THE THIRTEENTH JUDICIAL CIRCUIT COURT
FOR HILLSBOROUGH COUNTY, FLORIDA
Criminal Justice and Trial Division

STATE OF FLORIDA

v.

CHARLES TRICE,
Defendant.
_____/

CASE NUMBER: 94-6839

DIVISION: B

FILED
2004 JAN -7 PM 3:40
HILLSBOROUGH FLORIDA
CIRCUIT CRIMINAL

ORDER DENYING, IN PART, MOTION FOR POST CONVICTION RELIEF AND ORDER TO RESPOND

THIS MATTER is before the Court pursuant to a Mandate issued from the Second District Court of Appeal, dated December 23, 2002, ordering this Court to reconsider the timeliness of Defendant's Motion for Post Conviction Relief, filed on June 20, 2001. The Court, after considering the Motion, the court file, and the record, finds as follows:

On June 20, 2001, Defendant filed a Motion for Post Conviction Relief. On June 20, 2002, the Court entered an Order Denying Motion for Post Conviction Relief. (See Order Denying Motion for Post Conviction Relief, attached). On December 23, 2002, the Second District Court of Appeal issued a Mandate ordering this Court to reconsider the timeliness of Defendant's June 20, 2001 Motion for Post Conviction Relief. (See Mandate and Opinion, attached). Thereafter, on January 16, 2003, in response to the Mandate, this Court entered an Order for Defendant to Supplement Motion for Post Conviction Relief with a copy of the petition that he filed in the United States Supreme Court and any order rendered by the Supreme Court in response to that petition. (See Order for Defendant to Supplement Motion for Post Conviction Relief, attached). In response to the January 16, 2003 Order, Defendant provided the Court with the Petition for Writ of Certiorari filed in the United States Supreme Court on May 19, 1999, and the decision of the United States Supreme Court denying certiorari on June 24, 1999. (See Response to Order for Defendant to Supplement Motion for Post Conviction Relief and Notice of Filing, attached). After reviewing the

aforementioned documents, case file, and record, the Court finds that Defendant's Motion for Post Conviction Relief was timely filed and therefore the Court will address it at this time.

In his Motion, Defendant alleges the following grounds for relief:

1a. Ineffective assistance of counsel for failing to investigate

1b. Misadvice of counsel.

2. Ineffective assistance of counsel for failing to recuse judge.

3. Ineffective assistance of counsel for failing to recuse Office of the State Attorney.

4. Ineffective assistance of counsel for failing to move for change of venue.

5. Ineffective assistance of counsel for failing to preserve issues for appeal.

6. Ineffective assistance of counsel for failing to properly cross-examine witness.

7. Ineffective assistance of counsel for waiving the pre-sentence investigation without giving Defendant an opportunity to review the PSI or comment on its waiver.

8. Change in pertinent law.

In ground 1a, Defendant alleges ineffective assistance of counsel for failure to investigate. First, Defendant contends that counsel was ineffective for failing to anticipate the strength of the prosecution's burglary charge against Defendant, or failed to muster the proper witnesses concerning how Defendant entered his office before his wife attacked him. Defendant claims that counsel, through the testimony of Trooper Ken Lane, could have provided crucial testimony concerning the position of the door locks, whether engaged or not, following the attack. Moreover, Defendant alleges that had counsel properly investigated Trooper Lane, he would have learned that the door the state used to establish the burglary was unlocked. The Court is unable to conclusively refute Defendant's allegation and, as such, the Office of the State Attorney is

ordered to respond to this portion of ground 1a of Defendant's Motion.

Defendant next contends that counsel was ineffective for failing to investigate and/or call defense witnesses to establish that:

(a) There was no domestic violence ever witnessed in this relationship.

(b) The wife carried a gun in her vehicle. The wife witnessed the family strife following her mother's shooting of her father.

As outlined in his Motion, Defendant claims that there were numerous witnesses who could have been called to testify that either the state's witnesses were lying or that Defendant's wife had convincingly lied to them. (See Motion for Post Conviction Relief, pp.48-53, attached). In cases involving claims of ineffective assistance of counsel for failure to investigate and interview witnesses, facially sufficient postconviction motions must include: identity of prospective witnesses; substance of witnesses testimony; and explanation as to how omission of such evidence prejudiced outcome of trial. See Highsmith v. State, 617 So. 2d 825 (Fla. 1st DCA 1993); Tyler v. State, 793 So. 2d 137, 141 (Fla. 2d DCA 2001).

It appears that Defendant meets the Highsmith test. He names the witnesses, states what they would have said at trial, and shows how omission of their testimony prejudiced the outcome of the trial. (See Motion for Post Conviction Relief, pp-48-53, attached). The Court is unable to conclusively refute Defendant's allegation and, as such, the Office of the State Attorney is ordered to respond to this portion of ground 1a of Defendant's Motion.

Next, Defendant contends that counsel was ineffective for failing to fully investigate and present the health problems of the wife, that is the severe postpartum depression, epilepsy, occasional blackouts, and other stress related factors in her life. Defendant claims that the wife's tendency towards explosive impulsive and angry acts should have been explored through her

own mental health care expert(s). Defendant contends that in a case that was argued to be a self-defense shooting, such evidence would have been necessary not only to contradict the "state of mind witnesses," but also to establish the real need for self-defense. The Court is unable to conclusively refute Defendant's allegation and, as such, the Office of the State Attorney is ordered to respond to this portion of ground 1a of Defendant's Motion.

Next, Defendant argues that counsel was ineffective for failing to hire medical experts to explain what shock does to one following a stab wound. Defendant claims that an expert should have been called to explain to the jury that this was not a cold, calculated man, but in fact, a person who suffered a trauma, a person who had witnessed a death, and a person who had been in shock. The Court is unable to conclusively refute Defendant's allegation and, as such, the Office of the State Attorney is ordered to respond to this portion of ground 1a of Defendant's Motion.

Finally, Defendant contends that counsel was ineffective for limiting testimony concerning Mrs. Trice's volatile experts. Defendant contends that the State argued that Mrs. Trice was not capable of such a violent outburst, yet there was evidence of her violent outbursts which counsel chose not to explore. The Court is unable to conclusively refute Defendant's allegation and, as such, the Office of the State Attorney is ordered to respond to this portion of ground 1a of Defendant's Motion.

In ground 1b, Defendant alleges ineffective assistance of counsel for misadvising Defendant that the court would not allow in evidence establishing that in his 14 years of law enforcement experience, he never had to use force or had an 'excessive use of force' report written up against him, as such evidence amounted to character evidence. Defendant claims that the testimony of law enforcement officers, Lane, Linton, Dixon, Pedrick, and Cook, would have

provided valuable rebuttal evidence against the state's insistence that Defendant was a dangerous, violent person. The Court is unable to conclusively refute Defendant's allegation and, as such, the Office of the State Attorney is ordered to respond to ground 1b of Defendant's Motion.

In ground 2, Defendant alleges ineffective assistance of counsel for failing to recuse the trial judge. Defendant contends that counsel was ineffective for failing to recuse the trial judge because on the night before trial, the trial judge had attended a banquet/conference where the focal issue would be domestic violence. Moreover, in support of his claim, Defendant submits the following:

(1) his mother-in-law attended the conference.

(2) his mother-in-law had discussions with the trial judge.

(3) the judge spoke out against domestic violence and was quoted in the newspaper.

(4) Mr. Trice's case was specifically discussed at the conference and later reported in the newspaper.

(5) At a prior hearing wherein the state sought to revoke Defendant's pre-trial release, the judge obviously reluctantly set bail following the indictment and allowed Defendant to remain at large on existing bond, lamenting, 'I have to give him bond.' The judge told him, in front of his attorneys, 'Mr. Trice, I don't like the way you treat women.'

(6) Prior to and during the trial, some of the judge's rulings seemed to reflect a predisposition against Defendant. It was obvious at times that in the judge's mind, Defendant was guilty of domestic violence.

(a) When the 911 tape was played in court, Defendant was grief stricken. The judge angrily ordered the jury removed from the courtroom and severely admonished Defendant for the emotional breakdown

possibly witnessed by the jury. However, when numerous prosecution witnesses became teary-eyed, or wept during their testimony, the same judge proffered sympathy and tissues, in full view of the jury.

(b) At the time of sentencing, following an entirely circumstantial case, the judge announced she was making an example of Defendant. The judge went outside the guidelines and imposed a consecutive life sentence.

The Court is unable to conclusively refute Defendant's allegation and, as such, the Office of the State Attorney is ordered to respond to ground 2 of Defendant's Motion.

In ground 3, Defendant alleges ineffective assistance of counsel for failure to recuse the Office of the State Attorney. As grounds for recusal, Defendant contends that Defendant had worked with and had previously provided testimony for cases handled by the State Attorney's Office. Moreover, Defendant contends that Defendant's wife upon going to the State Attorney's Office to drop domestic violence charges made statements admitting that Defendant had not physically harmed her and, as such, there were witnesses whose testimony could have raised questions about the validity of the domestic violence theory from the very office prosecuting Defendant. The Court is unable to conclusively refute Defendant's allegation and, as such, the Office of the State Attorney is ordered to respond to ground 3 of Defendant's Motion.

In ground 4, Defendant alleges ineffective assistance of counsel for failing to move for a change of venue. Defendant contends that due to the nature of the proceedings, it is inconceivable that the prospective jurors could set aside the extra judicial information gleaned from the media and not let the hysteria taint and invade their thoughts concerning this familial shooting.

A trial counsel's failure to move for a change of venue does not necessarily constitute ineffective assistance of counsel. See Wike v. State, 813 So. 2d 12 (Fla. 2002). "When applying the prejudice prong [of *Strickland*] to claim that defense counsel was ineffective for failing to move for a change of venue, the defendant must, at a minimum, 'bring forth evidence demonstrating that there is a reasonable probability that the trial court would have, or at least should have, granted a motion for change of venue, if [defense] counsel had presented such a motion to the court.'" Griffin v. State, 2003 WL 22207901 (Fla. Sept. 25, 2003). A trial court, in exercising its discretion regarding a change of venue, must make a two-pronged analysis evaluating: (1) the extent and nature of any pretrial publicity; and (2) the difficulty encountered in actually selecting a jury. See Rolling v. State, 695 So. 2d 278 (Fla. 1997).

In the instant action, members of the venire who responded that they had heard about the case indicated that they had not formed any opinion about the case when asked by the court. (See Trial Transcript Voir Dire (I), pp. 25-26, attached). Moreover, the court then allowed individual voir dire of the venire members as to their specific knowledge of the case. (See Trial Transcript, Voir Dire vol. (IV), pp. 503-595, attached). Three venire members were struck for cause based on their answers as to what they had heard about the instant case, they would not be able to give Defendant a fair trial. (See Trial Transcript, Voir Dire, vol.(IV), pp. 595-654, attached). Defendant fails to meet the second prong of the Strickland test in that he fails to demonstrate any reasonable probability that the court would have granted defense's motion. As such, no relief is warranted on ground 4 of Defendant's Motion.

In ground 5, Defendant alleges ineffective assistance of counsel for failing to preserve the following crucial issues for appeal:

A: When Defendant broke down during the playing of the 911 tapes. It was the first time since his wife's death that he had heard the tape. Audible in the replay was his wife, moaning. The judge angrily ordered the jurors removed from the courtroom and then severely admonished Defendant about his visible emotions. The attorneys made no motion for mistrial, nor did they raise the issue of recusal.

B. When state-of-mind witnesses were testifying and crying, the judge, in the presence of the jury, was handing them tissues. No motion for mistrial was made, nor did the attorneys move to recuse the judge.

C. When Harry Lee Coe entered the courtroom as the decedent's family was praying two rows from the jurors and sat with the family, putting his arm around them, the attorneys made no motion for mistrial.

D. Two witnesses, Robert and Darlene King, were husband and wife, and deputy sheriffs, were presented as state of mind witnesses by the prosecutor and not as law enforcement officers. They were allowed without objection to testify in uniform about something that had nothing to do with a law enforcement officer's role.

E. When, during closing argument, the prosecutor directly expressed her opinion regarding the credibility, or the lack thereof, of Defendant's testimony, and thereby his guilt. Unchallenged, the prosecutor mocked Defendant by showing how his testimony was very convincing, but adding words to the effect that Defendant is a trained law enforcement officer and, therefore, trained to testify. No objection was lodged and no motion for mistrial filed.

"The failure to preserve a potentially reversible error for appeal has been found to constitute ineffective assistance of counsel, sufficient to support a rule 3.850 motion." Ellington v. State, 841 So. 2d 646 (Fla. 2d DCA 2003). The Court is unable to conclusively refute Defendant's allegation and, as such, the Office of the State Attorney is ordered to respond to ground 5 of Defendant's Motion.

In ground 6, Defendant alleges ineffective assistance of counsel for failing to cross examine the doctor who testified about Defendant's wound, but never examined him. Defendant contends that based upon the uncross-examined testimony of the doctor, the prosecution was allowed unfettered comment that Defendant had received only one stitch from a minor scratch that was self-inflicted.

The record reflects that on the defense's cross-examination of Dr. Margaret Keeler, the emergency room attending physician, she testified as follows regarding the stab wound on Defendant:

Q: Dr. Keeler, if I understand your testimony correctly, you ended up by saying this wound that you found on Charles Trice is consistent with him being stabbed by another person; isn't that true?

A: That's true.

Q: And you can't give any opinion otherwise, within the bounds of reasonable medical probability; can you, Doctor?

A: I'm not sure I understand what you're asking me.

Q: Can you say, within the bounds of reasonable medical probability, that this wound was inflicted by Charles Trice on himself?

A: No. I couldn't say that.

Q: And what you're saying here today is, is that this wound is - -if I understand your testimony right - - -this wound is consistent with him being stabbed by another person; isn't that right?

A: That was part of what I said, yes.

Q: Right. And there's nothing inconsistent about this wound with him having been stabbed by another person, is there?

A: No.

(See Trial Transcript, vol. V, pp. 778-779, attached). Contrary to Defendant's assertion, Dr. Keeler was adequately cross-examined by counsel concerning the nature of Defendant's stab wound. Moreover, as Dr. Keeler's above testimony shows, the prosecution was not allowed unfettered testimony that the wound was self-inflicted. Defendant fails to meet the first prong of the Strickland test and, as such, no relief is warranted as to this portion of ground 6.

Moreover, Defendant alleges ineffective assistance of counsel for failing to strike the testimony of Sergeant Lane who was allowed to testify as to his opinion as to ballistics and blood splatter analysis, areas in which he was not an expert. The Court is unable to conclusively refute Defendant's allegation and, as such, the Office of the State Attorney is ordered to respond to this portion of ground 6 of Defendant's Motion.

Additionally, Defendant alleges ineffective assistance of counsel for waiving and/or agreeing not to use important defense expert witnesses, who through computer enhancement analysis, would have corroborated Defendant's version of how the shooting took place. The Court is unable to conclusively refute Defendant's allegation and, as such, the Office of the State Attorney is ordered to respond to this portion of ground 6.

In ground 7, Defendant alleges ineffective assistance of counsel for failing to allow Defendant an opportunity to review the Pre-Sentence Investigation (PSI) or comment on its waiver. The Court is unable to conclusively refute Defendant's allegation and, as such, the Office of the State Attorney is ordered to respond to ground 7 of Defendant's Motion.

In ground 8, Defendant alleges that since the date of the verdict, there has been a significant change in law in the "castle doctrine" concerning the defense of self-defense against a co-inhabitant in one's own home. Defendant claims that the revised castle doctrine as expressed in Weiland v. State, 732 So. 2d 1044 (Fla. 1999) would have benefitted his case.

However, in Weiland, the Florida Supreme Court held that the opinion and jury instruction would not apply retroactively to convictions that had become final. Id. at 1058. As such, no relief is warranted on ground 8 of Defendant's Motion.

It is therefore **ORDERED AND ADJUDGED** that the Office of the State Attorney **SHALL RESPOND** to grounds 1a, 1b, 2, 3, 5, 6 (in part), and 7 Defendant's Motion within thirty (30) days from the date of this Order and that grounds 4, 6 (in part) and 8 of Defendant's Motion are hereby **DENIED.**

Defendant is advised that he may not appeal until such time as a final order has been issued.

DONE AND ORDERED in chambers in Hillsborough County Florida, this 29th day of December, 2003.

JACK ESPINOSA Jr., Circuit Judge

Attachments:

Order Denying Motion for Post Conviction Relief
Mandate and Opinion
Order for Defendant to Supplement Motion for Post Conviction Relief
Response to Order for Defendant to Supplement Motion for Post Conviction Relief and Notice of Filing
Excerpts from Trial Transcript
Motion for Post Conviction Relief