DOCKET NO. _____

OCTOBER TERM 2020

IN THE

SUPREME COURT OF THE UNITED STATES

LEROY POOLER,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

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INDEX TO APPENDIX

302 So.3d 744
Supreme Court of Florida.

Leroy POOLER, Appellant,

v.

STATE of Florida, Appellee.

No. SC18-2024
|
July 2, 2020

Synopsis

Background: Following affirmance of murder conviction and imposition of death penalty, 704 So.2d 1375, and denial of postconviction relief, 980 So.2d 460, defendant filed successive motion for postconviction relief. The Circuit Court, 15th Judicial Circuit, Palm Beach County, Jeffrey Colbath, J., denied the motion. Defendant appealed.

The Supreme Court held that United States Supreme Court's ruling in *Hall v. Florida*, 572 U.S. 701, 134 S.Ct. 1986, 188 L.Ed.2d 1007, that Florida law foreclosing further exploration of capital defendant's intellectual disability if his IQ score was more than 70 was unconstitutional, was not retroactively applicable.

Affirmed.

***745** An Appeal from the Circuit Court in and for Palm Beach County, Jeffrey Colbath, Judge - Case No 501995CF001117AXXXMB

Attorneys and Law Firms

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Ashley Moody, Attorney General, Tallahassee, Florida, and Leslie T. Campbell, Senior Assistant Attorney General, West Palm Beach, Florida, for Appellee

Opinion

PER CURIAM.

Leroy Pooler appeals an order summarily denying his successive motion for postconviction relief, which was filed under Florida Rule of Criminal Procedure 3.851.[1] We affirm the denial of relief.

1 We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.

In 1996, Pooler was convicted of the first-degree murder of his ex-girlfriend, Kim Wright Brown, burglary, and attempted first-degree murder with a firearm. *See Pooler v. State*, 704 So. 2d 1375, 1377 (Fla. 1997). He was sentenced to death for the first-degree murder following a jury's recommendation for death by a vote of nine to three, and on direct appeal, this Court affirmed Pooler's convictions and sentences. *Id.* at 1377, 1381. His sentence of death became final in 1998, when the United States Supreme Court denied certiorari review. *Pooler v. Florida*, 525 U.S. 848, 119 S.Ct. 119, 142 L.Ed.2d 96 (1998). We also affirmed the denial of Pooler's initial postconviction motion. *Pooler v. State*, 980 So. 2d 460, 462 (Fla. 2008).

In 2015, Pooler filed a successive postconviction motion claiming that he is intellectually disabled and entitled to relief based on *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), and *Hall v. Florida*, 572 U.S. 701, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014); a claim seeking relief under *Hurst v. Florida*, —— U.S. ——, 136 S. Ct. 616, 193 L.Ed.2d 504 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016); and a claim seeking relief under an alleged *Hurst*-induced *Caldwell*[2] claim. In October 2018, the circuit court entered an order summarily denying Pooler's successive postconviction motion finding that his intellectual disability claim is time-barred and that Pooler is not entitled to *Hurst* relief.

2 *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

First, Pooler is not entitled to postconviction relief based on his intellectual disability claim. As this Court stated in *Phillips v. State*, 45 Fla. L. Weekly S163, —— So.3d ——, 2020 WL 2569713 (Fla. May 21, 2020), *Hall* does not apply retroactively. Accordingly, we affirm the postconviction court's summary denial of Pooler's intellectual disability claim.

Second, Pooler is not entitled to *Hurst* relief. *See State v. Poole*, 45 Fla. L. Weekly S41, S48, —— So.3d ——, ——, 2020 WL 3116597 (Fla. Jan. 23, 2020) ("The jury in Poole's case unanimously found that, during the course of the first-

degree murder of Noah Scott, Poole committed the crimes of attempted first-degree murder of White, sexual battery of White, armed burglary, and armed robbery. Under this Court's longstanding precedent interpreting *Ring v. Arizona,* [536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)] and under a correct understanding of *Hurst v. Florida*, this satisfied the requirement that a jury unanimously find a statutory aggravating circumstance beyond a reasonable doubt."); *Pooler*, 704 So. 2d at 1377 ("[Pooler] was convicted of burglary and attempted first-degree murder with a firearm."). We also reject Pooler's *Hurst*-induced ***746** *Caldwell* claim. *See Reynolds v. State*, 251 So. 3d 811, 825 (Fla. 2018) (stating that, because it did not violate *Caldwell* to refer to the jury's role as advisory prior to the *Hurst* decisions, "a *Caldwell* claim ... cannot [now] be used to retroactively invalidate the jury instructions that were proper at the time under Florida law").

Accordingly, we affirm the postconviction court's summary denial of Pooler's successive postconviction motion.

It is so ordered.

CANADY, C.J., and POLSTON, LAWSON, MUÑIZ, and COURIEL, JJ., concur.

LABARGA, J., recused.

All Citations

302 So.3d 744, 45 Fla. L. Weekly D1452, 45 Fla. L. Weekly S203

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APPENDIX B

Supreme Court of Florida

TUESDAY, SEPTEMBER 22, 2020

CASE NO.: SC18-2024
Lower Tribunal No(s).:
501995CF001117AXXXMB

LEROY POOLER vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant's Motion for Rehearing and/or Reconsideration is hereby denied.

CANADY, C.J., and POLSTON, LAWSON, MUÑIZ, and COURIEL, JJ., concur.
LABARGA, J., recused.
GROSSHANS, J., did not participate.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

kc
Served:

LESLIE T. CAMPBELL
TODD G. SCHER
HON. SHARON REPAK BOCK, CLERK
HON. JEFFREY J. COLBATH
REID PARKER SCOTT II
ALEATHEA HAYES MCROBERTS

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

STATE OF FLORIDA,

v.

LEROY POOLER,
Defendant.
_____/

CRIMINAL DIVISION: R
CASE NO.: 1995CF001117AXXXMB

ORDER DENYING DEFENDANT'S SECOND AMENDED MOTION TO VACATE JUDGMENTS OF CONVICTIONS AND SENTENCES

THIS CAUSE came before the Court on Defendant Leroy Pooler's ("Defendant") "Second Amended Motion to Vacate Judgments of Convictions and Sentences with Special Request for Leave to Amend" (DE #744), filed pursuant to Florida Rule of Criminal Procedure 3.851 on April 13, 2017. The State filed a Response to Defendant's Second Amended Motion to Vacate Judgments of Convictions and Sentences (DE #745) on May 3, 2017. The Court has carefully examined and considered Defendant's Second Amended Motion, the State's Response, and all arguments presented by counsel, and has reviewed the court file and all applicable case law.

FACTUAL AND PROCEDURAL HISTORY

Defendant was convicted of First Degree Murder with a Firearm for the shooting death of his ex-girlfriend, Kim Wright Brown. He also was convicted of Burglary of a Dwelling while Armed with a Firearm and Attempted First Degree Murder with a Firearm. The facts, as summarized by the Florida Supreme Court, are as follows:

> On January 28, 1995, Carolyn Glass, a long-time acquaintance of Kim Brown, told her that Pooler had said he was going to kill her because if he could not have her, no one else would. (Evidence showed that Kim Brown had begun seeing another man.) Two days later, Pooler knocked on the front door of the apartment where Kim and her younger brother, Alvonza Colson, lived with their mother. Seeing Pooler through the door window, Kim told him that she did not want to see him anymore. Alvonza opened the door halfway and asked Pooler what he wanted but would not let him in. When Pooler brandished a gun, Alvonza let go of the door

and tried to run out the door, but he was shot in the back by Pooler. Pooler pulled Alvonza back into the apartment by his leg. Kim begged Pooler not to kill her brother or her and began vomiting into her hands. She suggested they take Alvonza to the hospital. Pooler originally agreed but then told Alvonza to stay and call himself an ambulance while Pooler left with Kim. However, rather than follow Pooler out the door, Kim shut and locked it behind him. Alvonza told Kim to run out the back door for her life while he stayed in the apartment to call for an ambulance. When he discovered that the telephone wires had been cut, he started for the back door, just as Pooler was breaking in through the front entrance.

Pooler first found Alvonza, who was hiding in an area near the back door, but when he heard Kim yelling for help, he left Alvonza and continued after Kim. When he eventually caught up with her, he struck her in the head with his gun, causing it to discharge. In front of numerous witnesses, he pulled her toward his car as she screamed and begged him not to kill her. When she fought against going in the car, Pooler pulled her back toward the apartment building and shot her several times, pausing once to say, "You want some more?" Kim had been shot a total of five times, including once in the head. Pooler then got into his car and drove away.

The jury recommended death by a vote of nine to three. The trial court found the following aggravators: (1) that the defendant had a prior violent felony conviction (contemporaneous attempted first-degree murder of Alvonza); (2) that the murder was committed during the commission of a burglary; and (3) that the murder was heinous, atrocious, or cruel. The trial court found as statutory mitigation that the crime was committed while Pooler was under the influence of extreme mental or emotional disturbance, but gave that finding little weight. The court found the following proposed statutory mitigators had not been established: (1) the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired; (2) the defendant acted under extreme duress or under the substantial domination of another person; and (3) the defendant's age (he was 47).

As nonstatutory mitigation, the trial court found the defendant's honorable service in the military and good employment record, as well as the fact that he was a good parent, had done specific good deeds, possessed certain good characteristics, and could be sentenced to life without parole or consecutive life sentences. The only mitigator given considerable weight was Pooler's honorable military service; the others were given some to little weight. The trial court expressly rejected as unestablished nonstatutory mitigation that Pooler has a good jail record and an ability to adapt to prison life; that he has low normal intelligence; that he has mental health problems; that he is rehabilitable; that the homicide was the result of a heated domestic dispute; and that he is unlikely to endanger others and will adapt well to prison. Concluding that each of the three aggravators standing alone would outweigh the mitigating evidence, the court sentenced Pooler to death.

Pooler v. State, 704 So. 2d 1375, 1377 (Fla. 1997) (footnote omitted).

On direct appeal, the Florida Supreme Court affirmed Defendant's convictions and death sentence. *Id.* at 1381. Defendant's judgment and sentences became final on October 5, 1998, with the denial of certiorari by the United State Supreme Court. *Pooler v. Florida*, 525 U.S. 848 (1998).

On September 17, 1999, Defendant filed a Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend. The State filed a Response to Defendant's Motion on October 26, 1999, and on October 29, 1999, the Court entered an Order Denying Defendant's Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend and Adopting the State's Response. However, on January 13, 2000, the Court entered an Agreed Order Vacating its denial of Defendant's Motion and granted Defendant leave to file an amended motion. Defendant filed his Amended Motion to Vacate Judgment and Sentence ("First Amended Motion to Vacate") on March 13, 2000, and the State filed its Response to Defendant's [First] Amended Motion to Vacate Judgment and Sentence on May 5, 2000. An evidentiary hearing was granted on several of Defendant's claims, but on September 17, 2000, before the evidentiary hearing was held, Defendant filed a Motion to Stay 3.850 Proceedings based on the Supreme Court's decisions in *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Ring v. Arizona*, 536 U.S. 584 (2002). This Court denied the stay, but granted Defendant a continuance and leave to file a supplemental motion.

Defendant subsequently filed a Supplemental Motion to Vacate Judgment and Sentence ("Supplemental Motion to Vacate") on November 7, 2002, claiming that his conviction and death sentence were obtained in violation of *Ring*. Significantly, Defendant did not raise an *Atkins* claim in his Supplemental Motion to Vacate. The State filed its Response to Defendant's Supplemental Motion to Vacate on June 2, 2003.

While Defendant's First Amended and Supplemental Motions to Vacate were still pending, on November 19, 2003, Defendant filed a Motion to Determine Competency, and Drs. John Spencer and Michael Brannon were appointed to evaluate Defendant and file reports. A competency hearing was held on November 12, 2004, and on November 29, 2004, the Court issued an Order finding Defendant competent to proceed.

The evidentiary hearing on Defendant's First Amended Motion to Vacate was finally held on May 16, 2005, and on November 4, 2005, the Court issued a written Order Denying Defendant's [First] Amended Motion to Vacate Judgment.[1] The Florida Supreme Court affirmed the denial on January 31, 2008. *Pooler v. State*, 980 So. 2d 460, 473 (Fla. 2008). The United States Supreme Court denied certiorari on October 6, 2008. *Pooler v. Florida*, 555 U.S. 911 (2008).

On May 19, 2008, Defendant filed a federal Petition for Writ of Habeas Corpus, which was denied. The Eleventh Circuit Court of Appeals affirmed the denial on December 17, 2012. *Pooler v. Sec'y, Florida Dep't of Corrections*, 702 F.3d 1252 (11th Cir. 2012). The United States Supreme Court denied certiorari on October 7, 2013. *Pooler v. Crews*, 571 U.S. 874 (2013).

On May 26, 2015, Defendant filed a successive Motion to Vacate Judgments of Convictions and Sentences with Special Request for Leave to Amend (DE #699) based on *Atkins v. Virginia, supra,* and *Hall v. Florida*, 134 S. Ct. 1986 (2014). The State filed a Response to Defendant's [Successive] Motion to Vacate Judgments of Convictions and Sentences with Special Request for Leave to Amend (DE #704) on July 15, 2015. Then, following the United States Supreme Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and the Florida Supreme Court's decision upon remand of that case in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), Defendant

[1] The Court's Order also denied the *Ring* claims made in Defendant's Supplemental Motion to Vacate.

filed an Amended Motion to Vacate Judgments of Convictions and Sentences with Special Request to Amend (DE #738), as well as a Motion to Exceed Page Limitation (DE #740), on January 4, 2017. The State filed a Response to Defendant's Amended Motion to Vacate Judgments of Convictions and Sentences (DE #743), but on March 16, 2017, the Court entered an Order (DE #742) denying Defendant's Motion to Exceed Page Limitation, striking Defendant's Amended Motion for exceeding the page limitation contained in Rule 3.851(e)(2), and granting Defendant leave to file a second amended motion that comported with the rule's requirements.

Before the Court now is Defendant's Second Amended Motion to Vacate Judgments of Convictions and Sentences with Special Request for Leave to Amend (DE #744) ("Second Amended Motion to Vacate"), filed on April 13, 2017. The State filed its Response to Defendant's Second Amended Motion to Vacate Judgments of Convictions and Sentences (DE #745) on May 3, 2017. The Court held a hearing on Defendant's Second Amended Motion to Vacate on July 28, 2017.

LEGAL ANALYSIS AND RULING

Florida Rule of Criminal Procedure 3.851 governs the filing of postconviction motions in capital cases. A motion is successive "if a state court has previously ruled on a postconviction motion challenging the same judgment and sentence." Fla. R. Crim. P. 3.851(e)(2). Successive Rule 3.851 motions may be filed outside the one-year time period if the defendant shows that newly discovered evidence has become available or a new constitutional right was made retroactive to his case. Fla. R. Crim. P. 3.851(d)(2). The trial court may deny a successive motion for postconviction relief without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." Fla. R. Crim. P. 3.851(f)(5)(B).

In Defendant's Second Amended Motion to Vacate, he first claims that his death sentence must be vacated because he is ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Hall v. Florida*, 134 S. Ct. 1986 (2014). Defendant then makes a number of arguments as to why his death sentence violates the Sixth and Eighth Amendments under the United States and Florida Supreme Court rulings in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Each of Defendant's claims is addressed in turn.

A. CLAIM ONE: DEFENDANT'S DEATH SENTENCE IS UNCONSTITUTIONAL BECAUSE HE HAS NOT RECEIVED A FAIR OPPORTUNITY TO SHOW THAT THE CONSTITUTION PROHIBITS HIS EXECUTION DUE TO HIS INTELLECTUAL DISABILITY.

Defendant first claims that his death sentence is unconstitutional because he has not had the opportunity to demonstrate that he is intellectually disabled and therefore constitutionally barred from being executed. In 2002, the United States Supreme Court ruled that executions of intellectually disabled[2] defendants constitutes cruel and unusual punishment in violation of the Eighth Amendment, "and that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." *Atkins*, 536 U.S. at 321 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)). The *Atkins* Court declined to adopt a single method of determining which offenders were intellectually disabled and whose executions were therefore prohibited, instead leaving to the states "the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id.* at 317 (internal quotations omitted, alteration original).

Section 921.137, Florida Statutes (2018), thus prohibits the execution of intellectually

[2] Formerly referred to as "mentally retarded." *See Atkins v. Virginia*, 536 U.S. 304, 321 (2002); §§ 921.137, Fla. Stat. (2002), 393.063(24), Fla. Stat. (2018).

disabled defendants. As defined in the statute, "intellectually disabled" means "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18." § 921.137(1), Fla. Stat. (2018). "Significantly subaverage general intellectual functioning" means "performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities." *Id.*[3]

In *Cherry v. State*, 959 So. 2d 702, 714 (Fla. 2007) (*per curiam*), the Florida Supreme Court strictly construed this statutory language to establish a bright-line cutoff of 70 for IQ scores when determining whether a defendant is intellectually disabled and therefore barred from execution. Under the rule announced in *Cherry*, an offender with an IQ score above 70 was deemed not intellectually disabled and was precluded from presenting any additional evidence of intellectual disability. *See, e.g.*, *Nixon v. State*, 2 So. 3d 137, 142–43 (Fla. 2009) (*per curiam*). But in *Hall v. Florida*, 134 S. Ct. 1986, 1994–95 (2014), the United States Supreme Court ruled that the strict cutoff of 70 was unconstitutional because it did not take into account the test's known standard error of measurement[4] and took a defendant's score as conclusive without regard for other evidence of intellectual disability. The Court held that "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id.* at 2001. The Court specified that individuals with an IQ test score "between 70 and 75 or lower"

[3] The statutory language quoted here is substantively identical to that contained in the statute when it was first adopted. *See* § 921.137(1), Fla. Stat. (2001); Ch. 2001-202, § 1, Laws of Fla. (2001).

[4] An IQ test's standard error of measurement is "a statistical fact" that reflects the "inherent imprecision of the test itself" and the "reality that an . . . individual's score is best understood as a range" generally consisting of five points on either side of the recorded score. *Hall v. Florida*, 572 U.S. at 1996 (citations omitted).

fall within this range of error. *Id.* at 2001 (citing *Atkins*, 536 U.S. at 309, n. 5).

Defendant claims that evidence in the record demonstrates that his IQ is within this range. Specifically, he cites to an IQ test performed by Dr. Michael Brannon during previous postconviction proceedings that resulted in an IQ score of 75, further noting that Dr. Brannon's test results were consistent with an IQ test performed while Defendant was in high school on which he also scored a 75.[5] Accordingly, Defendant now argues that *Hall* entitles him to a hearing at which he is given the opportunity "to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Hall*, 134 S. Ct. at 2001.

Although Defendant's sentence became final long before the decision in *Hall* was announced, the Florida Supreme Court determined in *Walls v. State*, 213 So. 3d 340, 346 (Fla. 2016), that the United States Supreme Court's decision in *Hall* should be applied retroactively. However, the Florida Supreme Court has also determined that in order for *Hall* to apply in a given case, the defendant must have raised a timely *Atkins* claim under Florida Rule of Criminal Procedure 3.203. *See, e.g.*, *Walls*, 213 So. 3d at 348 (Pariente, J., concurring). As relevant here, when first adopted in 2004, Rule 3.203(d)(4) provided:

> (C) If a death sentenced prisoner has filed a motion for postconviction relief and that motion has not been ruled on by the circuit court on or before October 1, 2004, the prisoner may amend the motion to include a claim under this rule within 60 days after October 1, 2004.

Amendments to Florida Rule of Criminal Procedure and Florida Rules of Appellate Procedure, 875 So. 2d 563, 570 (Fla. 2004). Rule 3.203(f) further provided (and still does provide) that "[a]

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[5] As Defendant acknowledges, the record in this case also reveals that during a pretrial competency evaluation, Dr. Lawrence Levine administered an IQ test on Defendant that yielded an IQ score of 80. (Tr. 1384:17–19.) Further, Dr. Stephen Alexander, who also performed a competency evaluation at that time, "estimated that Pooler's IQ was between 75 and 85," *Pooler v. State*, 980 So. 2d at 468, but Dr. Alexander acknowledged that this was a "guess[]," and that he did not actually administer an IQ test. (Tr. 1491:25–1429:7.)

claim authorized under this rule is waived if not filed in accord with the time requirements for filing set out in this rule, unless good cause is shown for the failure to comply with the time requirements." *Id.* at 571.

The Florida Supreme Court first affirmed the summary denial of a defendant's post-*Hall Atkins* claim as time-barred in an unpublished order issued in *Rodriguez v. State*, 250 So. 3d 616 (Fla. 2016) (Mem). There, the defendant had not asserted an *Atkins* intellectual disability claim under Rule 3.203 until 2015, following the Supreme Court's decision in *Hall*. *Id.* Pursuant to Rule 3.203(f), the defendant argued he had "good cause" for not raising the claim earlier, and that "only after the United States Supreme Court decided *Hall v. Florida* . . . did he have the basis for asserting an intellectual disability claim." *Id.* (citation omitted). The trial court rejected the defendant's arguments and denied the motion as time-barred, concluding "there was no reason that Rodriguez could not have previously raised a claim of intellectual disability based on *Atkins v. Virginia*." *Id.* The trial court also specifically concluded "that Rodriguez could not have relied on *Cherry v. State*, 959 So. 2d 702 (Fla. 2007), which established the bright-line cut-off of 70 for IQ scores disapproved of in *Hall*, because he never raised an intellectual disability claim after *Atkins* as required by Rule 3.203." *Id.* The Florida Supreme Court explicitly affirmed the trial court's summary denial "for the reasons stated by the trial court." *Id.*

The Florida Supreme Court recently reaffirmed its position on this issue in *Blanco v. State*, 249 So. 3d 536, 537 (Fla. 2018), holding that "a defendant who sought to raise an intellectual disability claim under *Atkins* for the first time in light of *Hall*" was foreclosed from doing so under the time-bar contained within Rule 3.203. (citing *Rodriguez*, 250 So. 3d 616).

In the instant case, Defendant filed his First Amended Motion to Vacate on March 13, 2000. On September 20, 2002, before the Court had issued a final ruling on his Motion, Defendant

filed a motion to stay the postconviction proceedings specifically based on the *Atkins* and *Ring* decisions, and this Court granted him leave to file an amended motion making additional claims based on those decisions. While Defendant filed a Supplemental Motion to Vacate raising an additional claim based on *Ring*, he failed to raise an additional claim based on *Atkins*. Nor did he ever file a separate motion raising his *Atkins* claim under Rule 3.203(d)(3)(C) at any time prior to this Court ruling on his First Amended and Supplemental Motions to Vacate on November 4, 2005. Accordingly, the Court finds Defendant's claim is time-barred.

Defendant argues that he was unable to raise his *Atkins* claim at the time prescribed in Rule 3.203(d)(3)(C) because "[p]rior to the issuance of the decision in *Hall v. Florida*, Pooler had no notice that an IQ score above 70 did not automatically preclude his claim that his intellectual disability rendered his death sentence to be in violation of the Eighth Amendment." The Florida Supreme Court rejected this precise argument in *Rodriguez* and *Blanco*, requiring this Court to do so now. Under *Rodriguez* and *Blanco*, Defendant's failure to raise an *Atkins* claim within the time period prescribed in Rule 3.203(d)(3)(C) constitutes a waiver of that claim under Rule 3.203(f).[6] Accordingly, Claim One of Defendant's Second Amended Motion to Vacate must be denied.

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[6] While this Court is obligated to follow the Florida Supreme Court's precedent on this issue, the Court questions whether that precedent, and specifically, its strict application of the procedural time-bar in cases such as this, is at odds with the United States Supreme Court's rulings in *Atkins* and *Hall*. The Supreme Court made clear in those cases that the issue was not whether an intellectually disabled defendant has a *right* to not be executed, but whether "the Constitution 'places a substantive restriction on the State's power to take the life' of a[n intellectually disabled] offender." *Atkins*, 536 U.S. at 321 (quoting *Ford*, 477 U.S. at 405). The distinction between a substantive right and a substantive bar on state power is significant: a right can be waived by its holder, but a constitutional bar on state power is more absolute.

It is with that distinction in mind this Court has struggled to reconcile *Hall*'s holding with the strict application of Rule 3.203's time-bar required by the Florida Supreme Court in *Rodriguez* and *Blanco*. To be clear, this Court recognizes our justice system has a compelling and constitutional need for finality, and perhaps no more is that true than in cases involving the death penalty. *See, e.g.*, *Witt v. State*, 387 So. 2d 922, 924–27 (Fla. 1980). But if *Atkins* represents a substantive bar

B. CLAIMS TWO, THREE, FOUR, AND FIVE: DEFENDANT'S DEATH SENTENCE VIOLATES THE SIXTH AND EIGHTH AMENDMENTS AND HE IS ENTITLED TO RELIEF UNDER *HURST V. FLORIDA* AND *HURST V. STATE.*

Defendant also claims that his death sentence violates the Sixth and Eighth Amendments under *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Defendant argues that the *Hurst* decisions require a new penalty phase, as well as a re-evaluation of Defendant's previously litigated ineffective assistance of counsel claims. The Court disagrees.

The Florida Supreme Court has made clear that "*Hurst* does not apply retroactively to capital defendants whose sentences were final before the United States Supreme Court issued its opinion in *Ring*." *Mosley v. State*, 209 So. 3d 1248, 1274 (Fla. 2016) (citing *Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016)). This line of demarcation governing the retroactive application of *Hurst* has been repeatedly affirmed by the Florida Supreme Court. *E.g.*, *Hitchcock v. State*, 226 So. 3d 216, 217 (Fla. 2017), *cert. denied*, *Hitchcock v. Florida*, 138 S. Ct. 513 (2017); *Zack v. State*, 228 So. 3d 41, 47–48 (Fla. 2017); *cert. denied*, *Zack v. Florida*, 138 S. Ct. 2653 (2018); *Marshall v.*

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on State power—as both the United States and Florida Supreme Courts have clearly held that it does—how can it ever be "waived" by a defendant? Under this Court's reading of *Atkins* and *Hall*, as well as the majority opinion in *Walls*, the execution of an intellectually disabled person would violate the Eighth Amendment in all cases, not just those in which an intellectually disabled person timely raised the issue. *See also Walls*, 213 So. 3d at 348–49 (Pariente, J., concurring) ("More than fundamental fairness and a clear manifest injustice, the risk of executing a person who is not constitutionally able to be executed, trumps any other considerations this Court looks to when determining if a subsequent decision of the United States Supreme Court should be applied."). That is why this Court finds strict application of a procedural time-bar to prevent an evidentiary hearing in this context so troubling, particularly when, as here, there appears to be evidence in the record that would support at least granting an evidentiary hearing on this issue had Defendant timely filed his claim.

Regardless, while this Court may have concerns about the implications of the precedent described above, that it is duty-bound to follow that precedent this Court has no doubt. *See, e.g.*, *State v. Washington*, 114 So. 3d 182, 184 (Fla. 3d DCA 2012) ("While a lower court is free to disagree and to express its disagreement with an appellate court ruling, it is duty-bound to follow it.").

Jones, 226 So. 3d 211 (2017), *cert. denied Marshall v. Florida*, 138 S. Ct. 2677 (2018); *Pope v. State*, 237 So. 3d 926, 926–927 (Fla. 2018), *cert. denied, Pope v. Florida*, 2018 WL 3647876 (Oct. 9, 2018); *Jennings v. State*, 43 Fla. L. Weekly S427a, 2018 WL 4784074 (Fla. Oct. 4, 2018); *Shere v. State*, No. SC17-1703, 2018 WL 4346801 (Fla. Aug. 31, 2018).

As Defendant's sentence became final on October 5, 1998, nearly four years prior to the United States Supreme Court's decision in *Ring v. Arizona*, Defendant is not entitled to relief based on the United States Supreme Court's decision in *Hurst v. Florida* nor the Florida Supreme Court's decision in *Hurst v. State*. Therefore, Claims Two, Three, and Four of Defendant's Second Amended Motion to Vacate must be denied. Additionally, because the *Hurst* decisions cannot be retroactively applied to Defendant's case, his argument in Claim Five for the reconsideration of all previously litigated postconviction claims must be denied as well. *See, e.g., Zakrzewski v. State*, 43 Fla. L. Weekly S374a, 2018 WL 4496571 (Sept. 20, 2018).

Accordingly, it is hereby

ORDERED and ADJUDGED that Defendant Leroy Pooler's Second Amended Motion to Vacate Judgments of Convictions and Sentences with Special Request for Leave to Amend is **DENIED WITHOUT FURTHER HEARING**. Defendant has thirty (30) days in which to Appeal this Order.

DONE and ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida, this 12 day of October, 2018.

JEFFREY COLBATH
Circuit Judge

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702 F.3d 1252
United States Court of Appeals,
Eleventh Circuit.

Leroy POOLER, Plaintiff–Appellant,
v.
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, Attorney General, State of Florida, Respondents–Appellees.

No. 12–12059.
|
Dec. 17, 2012.
|
Rehearing Denied Jan. 18, 2013.

Synopsis

Background: Following affirmance of his Florida conviction and death sentence, 704 So.2d 1375, death row inmate petitioned for federal habeas corpus relief. The United States District Court for the Southern District of Florida, No. 9:08–cv–80529–KAM, Kenneth A. Marra, J., denied petition. Inmate appealed.

Holdings: The Court of Appeals, Hull, Circuit Judge, held that:

counsel's investigation of mitigating evidence and his strategic decisions fell within range of competent assistance;

counsel's decision to rely on court–appointed mental health experts was reasonable strategy;

counsel reasonably declined to follow up on information about defendant's alcohol use; and

counsel's refusal to present certain evidence at penalty phase did not prejudice defendant.

Affirmed.

Attorneys and Law Firms

***1254** Linda McDermott (Court-Appointed), McClain & McDermott, PA, Wilton Manors, FL, John Paul Abatecola (Court-Appointed), Estero, FL, for Plaintiff–Appellant.

Leslie Teresa Campbell, Atty. General's Office, West Palm Beach, FL, for Respondents–Appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before DUBINA, Chief Judge, and HULL and PRYOR, Circuit Judges.

Opinion

HULL, Circuit Judge:

Florida death row inmate Leroy Pooler appeals the district court's denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. Pooler argues that his trial counsel was constitutionally ineffective in the penalty phase of his murder trial for (1) failing to discover that certain information Pooler himself told counsel about his background was false, and (2) relying on court-appointed competency experts to testify instead of retaining defense experts to investigate mitigation evidence specifically. The Florida state courts denied Pooler's ineffective assistance of counsel claims. After review and oral argument, we conclude, as did the district court, that the state courts' denial of Pooler's claims was not unreasonable. We affirm.

I. BACKGROUND

A. Facts of the Crime

On January 30, 1995, Pooler murdered his ex-girlfriend, Kim Brown, after learning that she had begun seeing another man. Before the murder, Pooler threatened to kill Brown. Two days later, Pooler went to Brown's apartment and shot her five times while she begged Pooler not to kill her. Pooler also shot Brown's younger brother. The Florida Supreme Court summarized the evidence presented at the guilt phase of Pooler's trial:

> On January 28, 1995, Carolyn Glass, a long-time acquaintance of Kim Brown, told her that Pooler had said he was going to kill her because if he could not have her, no one else would.... Two days later, Pooler knocked on the front door of the apartment where Kim and ***1255** her

younger brother, Alvonza Colson, lived with their mother. Seeing Pooler through the door window, Kim told him that she did not want to see him anymore. Alvonza opened the door halfway and asked Pooler what he wanted but would not let him in. When Pooler brandished a gun, Alvonza let go of the door and tried to run out the door, but he was shot in the back by Pooler. Pooler pulled Alvonza back into the apartment by his leg. Kim begged Pooler not to kill her brother or her and began vomiting into her hands. She suggested they take Alvonza to the hospital. Pooler originally agreed but then told Alvonza to stay and call himself an ambulance while Pooler left with Kim. However, rather than follow Pooler out the door, Kim shut and locked it behind him. Alvonza told Kim to run out the back door for her life while he stayed in the apartment to call for an ambulance. When he discovered that the telephone wires had been cut, he started for the back door, just as Pooler was breaking in through the front entrance.

Pooler first found Alvonza, who was hiding in an area near the back door, but when he heard Kim yelling for help, he left Alvonza and continued after Kim. When he eventually caught up with her, he struck her in the head with his gun, causing it to discharge. In front of numerous witnesses, he pulled her toward his car as she screamed and begged him not to kill her. When she fought against going in the car, Pooler pulled her back toward the apartment building and shot her several times, pausing once to say, "You want some more?" Kim had been shot a total of five times, including once in the head. Pooler then got into his car and drove away.

Pooler v. State, 704 So.2d 1375, 1377 (Fla.1997) ("*Pooler I*").

Police arrested Pooler at his home. The State indicted him on charges of first-degree murder, attempted first-degree murder, and armed burglary. The state trial court appointed veteran criminal defense attorney Michael Salnick to represent Pooler.[1]

1 At the time of his appointment to represent Pooler, Salnick had been practicing law for about sixteen years. Salnick had experience handling murder cases and penalty-phase proceedings.

B. Trial Counsel's Investigation of Mitigating Evidence

In May 1995, trial counsel Salnick moved the court for funds to hire an investigator to help prepare for trial, and also specifically to travel to Louisiana—where Pooler grew up and where his family still lived—to interview witnesses "for Phase 2 [i.e., penalty phase] discovery." The state trial court granted the motion, and Salnick retained an experienced private investigator, Marvin Jenne.

Salnick and Jenne had worked together "in almost every significant case" Salnick had in private practice.[2] Salnick instructed Jenne to "find anything and everything" he could about Pooler, whether good or bad. Salnick, as he later testified in postconviction proceedings, wanted to consider anything that would save his client's life.

2 At the time of Pooler's case, Jenne had been an investigator for fifteen years and had worked on five to ten capital cases.

Investigator Jenne's invoice includes entries showing these penalty-phase-related efforts: (1) attending a 2.2 hour meeting with Pooler to discuss "potential family members in Louisiana to be interviewed in Phase II investigation"; (2) sending letters to Pooler's family members in Louisiana; (3) making telephone calls to family members ***1256** Delores Pooler, Darren Warren, and Carolyn Upps; (4) traveling to Baton Rouge, Louisiana for three days to interview Pooler's family members regarding mitigation; (5) sending multiple letters to schools Pooler attended; and (6) attending a 1.9 hour meeting with Pooler to discuss the interviews with Pooler's family members.[3]

3 Jenne's records contain the name and telephone number of Pooler's nephew Brian Warren, who lived in Orlando, Florida. Jenne did not recall whether he ever spoke with Brian Warren.

Pooler told Salnick and Jenne that he graduated high school, had four daughters in Louisiana, and worked for seven years at a moving company. Pooler also reported that he served in the United States Marine Corps during the Vietnam War, re-enlisted after his original period of enlistment, and received an honorable discharge.

Investigator Jenne tried to corroborate all the background information he received from Pooler by talking with other persons. Jenne made telephone calls and sent letters requesting Pooler's school records, but he "was basically told [the records] were not available." Jenne asked Pooler's relatives, including his father, whether Pooler graduated from high school. The relatives said Pooler graduated.

The defense made an effort to obtain Pooler's military records, but the attempt was unsuccessful. Pooler's brother confirmed

that Pooler served in the Marines and was honorably discharged. Jenne asked other relatives about Pooler's military service, and all of them said he served honorably in Vietnam.

Jenne obtained some employment records relating to Pooler's work history in Palm Beach County, Florida. Jenne interviewed two of Pooler's co-workers at the moving company in West Palm Beach, Alice Bradford and Carlton Weeks. Salnick decided Alice Bradford would be the better witness because Weeks, who was Pooler's supervisor, made some comments that Salnick "thought could have been troublesome and if he was deposed and it was further explored there might have been some more negative information that came out."

Weeks stated that Pooler was a "good worker as long as things went totally his way," but Pooler was "aggressive" and had "a chip on his shoulder." Pooler was short-tempered, wanted to take charge on every task he was assigned, and most of his co-workers "did not care to work with him." Because of Pooler's aggressiveness, there was "[a]lways a problem" between him and his co-workers. Pooler "was just narrow minded and hard headed and very aggressive." Pooler got into arguments with co-workers that Weeks had to resolve. Weeks found it difficult to find people to work with Pooler "because of his temperament."

Furthermore, Weeks believed that Pooler "appear[ed] to be a violent person." Pooler owned a gun and sometimes brought it to work. One time, Pooler got into an argument with a co-worker and returned with his gun and was "waving it around threatening people." In fact, Salnick reported that "[o]ne of the things that ran through a lot of stuff that we looked at, was that Mr. Pooler had a violent background, he had been known to carry a gun, chased people, he'd been known to argue, to hit somebody."

The defense team investigated whether Pooler had a drinking problem, which entailed obtaining police reports and interviewing relatives and current and former employers. Salnick discovered before trial that Pooler had gone to the police department a few hours before Brown's murder ***1257** to report a crime. The police report stated that Pooler had been sitting in his car early that morning with a friend of Pooler's girlfriend. Pooler "fell asleep due to intoxication," and when he awoke about two hours later, "his wallet was in his front pocket and $301.00 were missing." Pooler reported the theft occurred about 3:00 am, and he arrived at the police station at 6:43 am.

Pooler told Salnick that the woman who robbed him was a prostitute. Salnick did not want the jury to be aware of Pooler's time spent with a prostitute a few hours before he murdered his ex-girlfriend, stating later that "[t]here is no way I would have done that. I just didn't think it was appropriate."[4]

4 Moreover, Salnick chose not to pursue a voluntary intoxication defense in the guilt phase because Pooler told Salnick he did "not want a defense that is going to admit that he committed the crime."

C. Pretrial Competency Hearing

In November 1995, the state trial court held a hearing to determine whether Pooler was competent to stand trial. The state trial court appointed clinical neuropsychologist Dr. Laurence S. Levine and psychiatrist Dr. Norman Silversmith to examine Pooler and testify at the competency hearing.

Dr. Levine examined Pooler for six hours. Dr. Levine interviewed Pooler, administered a number of neuropsychological tests, and reviewed Pooler's jail medical records and arrest record. Among the tests Dr. Levine administered was the Wechsler Adult Intelligence Scale–Revised ("WAIS–R"). Pooler's overall score was 80, which was at the bottom of the low-average range. Dr. Levine found no evidence of malingering.

Dr. Levine found Pooler overall to be competent. Dr. Levine also found that Pooler "would be expected to have some difficulties," though not insurmountable ones, in helping his counsel to plan his defense and to challenge the State's witnesses. Pooler's attention functioning "was not terribly impaired but it was not optimum." Additionally, Pooler's vocabulary and reading ability were "far lower than the average range." Thus, Pooler would "require somewhat more support and more explanation." Nevertheless, Dr. Levine opined that Pooler "was a fine subject," "listened carefully to [Levine's] explanation of the evaluation," and "responded very appropriately and intelligently with regard to protecting [his] confidential [legal documents]."

Dr. Levine believed it possible that Pooler had hypothyroidism and psychomotor retardation, which could affect his ability to assist counsel. Dr. Levine recommended that his attorney take time to help explain complex legal issues to Pooler and use simple language in doing so.

Pooler reported no prior psychiatric treatment to Dr. Levine. All Dr. Levine could find in the records he reviewed was treatment for depression following Pooler's arrest for Brown's murder.

Psychiatrist Dr. Norman Silversmith, the second expert to testify at the competency hearing, examined Pooler for about an hour. Dr. Silversmith interviewed Pooler but "did not run any standard clinical psychological tests." Dr. Silversmith's questioning of Pooler included "background information, marital status, school history, work histories, and ... medical history."

Pooler appeared to have no difficulty understanding Dr. Silversmith, had an intact memory, and was not delusional or confused. Pooler's psychological functioning was within normal limits.

***1258** Dr. Silversmith opined that Pooler was competent to stand trial. Although the purpose of Dr. Silversmith's evaluation of Pooler was competency and not "to make a diagnostic impression determination," he nevertheless felt "there was no question that there was a personality or character disorder" present, though he "did not specify whether it would be antisocial or passive dependent." Dr. Silversmith "also indicated that [Pooler had] a mental disorder non-psychotic, unspecified." Dr. Silversmith allowed, though, that "incarceration in and of itself contributes to mental or emotional issues, so it's an unspecified mental disorder." Dr. Silversmith did not make a definitive diagnosis, but he believed Pooler was certainly suffering anxiety and "a certain degree of depression," which "could certainly have suggested an adjustment disorder, adjacent with incarceration." Dr. Silversmith's report noted that Pooler did not "appear to be suffering from any overt mental illness or mental retardation."

At the conclusion of the competency hearing, the state trial court found that Pooler was competent to stand trial.

D. Guilt Phase

The guilt phase of Pooler's trial lasted from January 9 to 17, 1996. The State called victim Alvonza Colson, who described Pooler's shooting him, murdering his sister, and the burglary. Colson identified Pooler as the perpetrator. The State also called witnesses who testified, among other things, that: (1) a week before the murder, Pooler told one of Brown's neighbors that he would kill Brown because he loved her and, if he could not have her, no one else would; (2) bystanders, who knew Pooler, saw him shoot Brown while she begged for her life and heard Pooler yell at Brown while he was doing so, "Bitch, didn't I tell you I [would] kill you?"; (3) Pooler shot Brown and she fell, at which point he turned her over, asked if she "want[ed] some more," and shot her in the head; (4) after Pooler shot Brown, he kicked her body before getting in his car and driving away; and (5) none of Brown's five gunshot wounds were immediately fatal.

The jury convicted Pooler of the first-degree murder of Brown, the attempted first-degree murder of Colson, and the burglary of Brown and Colson's home.

E. Penalty Phase: Defense's Mental Health Testimony in Mitigation

The penalty phase ran from February 2 to 8, 1996. The State put forth no evidence, resting upon the guilt-phase evidence. The defense called, as mitigation witnesses, mental health experts and lay witnesses. The defense wanted to show that Pooler had low intelligence and mental health disturbances and problems, but yet had worked hard and served in the military, including in Vietnam, and should have his life spared.

Neuropsychologist Dr. Levine first testified that he was appointed by the state trial court to evaluate Pooler's competency. Dr. Levine described the evaluation, which included assessments of Pooler's intelligence and cognitive functioning. Pooler's cognitive functioning was "in the low average to mildly impaired range." Pooler's performance IQ results ranged from about 75 to 85. Low average is 80 to 89, and borderline retarded is 70 to 79.

On the WAIS–R intelligence test, Pooler's scores were 81 for verbal IQ, a 79 for performance IQ, and a full-scale IQ of 80. Pooler's scores put him "right on the cusp of the low average to the borderline range." Pooler scored in the borderline range on four of nine WAIS–R subtests. Pooler's reading ability, which was at the third-grade level, "was dramatically impaired."

***1259** Pooler shared with Dr. Levine portions of his educational, military, and job history. Pooler told him that Pooler graduated from high school, served in the military and achieved the rank of sergeant, and held down a job for an extended period of time. To Dr. Levine, this suggested Pooler's intelligence should be in the average range, not low average to borderline, but Dr. Levine found that all of

Pooler's test results were internally consistent, and there was no evidence of malingering.

Dr. Levine also talked about Pooler's mental health. Dr. Levine learned from the jail's medical records that Pooler, after his arrest, "had a significant emotional reaction to whatever it was that was going on." Pooler "had pretty much resolved his mental health issues" by the time Dr. Levine examined him. Dr. Levine noted, though, that Pooler appeared to be "experiencing some depressive symptoms." Dr. Levine's "clinical impression" was that Pooler had some symptoms of depression but "did not meet the criteria for a [depression] diagnosis."

In mitigation, the defense next called psychologist Steve Alexander. Dr. Alexander, also appointed by the court, had evaluated Pooler's competency, too.[5] Dr. Alexander concluded that Pooler was not competent to stand trial.

[5] The record does not reveal when Dr. Alexander was appointed or why he did not testify at the pretrial competency hearing. Salnick did not call Dr. Silversmith, who testified at the competency hearing that Pooler was competent.

Dr. Alexander admitted that Pooler's ability to appreciate the criminality of his conduct, or to conform his conduct to the law's requirements, was not impaired. Dr. Alexander saw no signs of "any long-term mental illness, or personality disorder or disturbance that would have been existing at the time of the shooting."

However, Dr. Alexander believed Pooler was not competent because he did not fully understand the current legal proceedings. Other inmates were telling Pooler incorrect information and Pooler "was grossly misinformed for what appropriate court procedure was and what role he would take in trial." Thus, Pooler "would totally misunderstand the proceedings as they were unfolding, and due to misunderstandings and misperceptions maybe even be disruptive."

Although Dr. Alexander found it "clear in talking to [Pooler that] he's a man of relatively limited intelligence," he did not need to administer an IQ test because Pooler was "not so mentally deficient or retarded that that was the basis of an incompetency." Dr. Alexander estimated Pooler's IQ was between 75 and 85, which was "in the lower low average range ... or the upper end of a borderline."

According to Dr. Alexander, Pooler was gullible and displayed "some gross misperceptions about the legal system and the way it worked." Pooler's incompetence to stand trial was not caused by a mental illness, defect, or disease, "but instead was just a real lack of understanding [and] basically distrust, given his situation, ... being fearful, not knowing who to believe, and then erroneously, given his ... limitations, erroneously placing value and importance on the opinions of other inmates rather than on his attorney."

In mitigation, the defense also called psychiatrist Jude Desormeau, who testified about Pooler's depression, his being on suicide watch in the jail, and being in the jail's mental health unit receiving treatment. Dr. Desormeau examined Pooler in February 1995 after he was referred by the psychiatric nurse at the jail. Pooler was depressed and anxious and had spoken of harming himself, so he was placed on suicide watch.

***1260** Dr. Desormeau concluded Pooler was suffering from "an adjustment disorder with mixed features," making Pooler "very depressed and very anxious and tearful." Dr. Desormeau prescribed a tranquilizer. After seven to ten days, Pooler stabilized and was sent to a different doctor. Pooler was then taken off the tranquilizer.

Psychiatrist Dr. Michael Armstrong, a staff psychiatrist at the jail, also testified about Pooler's depression and adjustment disorder. Dr. Armstrong saw Pooler before he was discharged from the jail's mental health unit into the general population. Pooler was in Dr. Armstrong's mental health transitional unit for about two weeks. At first, Pooler reported both that he was depressed and that he heard a voice calling his name, which began when he came to the jail. By the end of his stay, Pooler "was functioning very well and was ready for the general population."

F. Penalty Phase: Defense's Lay Witnesses

In mitigation, the defense also called Arthur Rock, a deputy sheriff at the jail, who testified Pooler was "a well-behaved inmate." Rock reviewed Pooler's year-long jail file and reported that Pooler had received only one disciplinary write-up that year, with no indication of violence in the incident.

As for Pooler's long-term employment, co-worker Alice Bradford testified that she worked with Pooler at the moving company for the seven years Pooler was employed there. Pooler was reliable and punctual.

Bradford came to know Pooler outside of work because Pooler would help Bradford, who was a single parent, with yard work. Bradford trusted Pooler in her home, and he never did anything inappropriate there. Bradford trusted Pooler around her son. Pooler was very nice, polite, and respectful whenever Bradford saw him. Bradford believed Pooler to have fairly good intelligence, but the work he performed for her was uncomplicated, menial labor.

In mitigation, the defense also called Pooler's family members to testify, specifically his brother, sister, and father. Pooler's brother Henry testified that when he and Pooler grew up, their family was close. The Poolers were a religious family. The family was very supportive of Henry and Pooler. Henry was still close to Pooler and spoke to him on the phone often. Henry said that he could not ask for a better brother, because Pooler was so "free-hearted."

Pooler had four daughters. When they were growing up, Pooler provided for them, took care of them, made sure they went to school, and took them to church.

Henry and Pooler went to school in the 1960s, in segregated schools. Pooler was a pretty good student in high school, as he had to maintain a C average to play on the basketball team.

According to brother Henry, Pooler served more than six years in the United States Marine Corps, including service in Vietnam. Pooler initially served six months in the active reserve, then re-enlisted for six years. After Pooler returned from Vietnam, he "looked like he was off a little bit." Pooler had a bad temper when he returned.

Pooler's sister Carolyn testified that she and Pooler got along well when they were growing up, though it had been awhile since she had seen him. Pooler "was more like a father figure" to Carolyn, watching over her and taking care of her.

Pooler's family were members of the Baptist Church, and they didn't have trouble getting along with one another "like most families will." They were "there for one another, help[ed] one another, whatever the situation may be."

***1261** According to sister Carolyn, Pooler was a "very good father" and a "good provider" for his daughters. Pooler was baptized, prayed a lot, and was "a good person." Carolyn exhorted the jury to "talk to God before you come up with a decision to pass onto Leroy," because she felt Pooler was worthy of "another chance" at God's forgiveness.

Pooler's father Henry Pooler, Sr., also testified. Pooler's father "raised [Pooler] as far as [he] could," and Pooler had never given his father any trouble. Pooler's father told the jury that he loved Pooler and did the best he could for Pooler and his other children.

G. Penalty Phase Closing Argument

In his closing argument, defense counsel Salnick argued, among other things, that he put on the mental health experts to show Pooler had borderline intelligence and some mental health problems. To show reliability of the mental health testimony, Salnick emphasized that Dr. Levine and Dr. Alexander both were court-appointed. Salnick discussed the doctors' findings and argued that the jury could "take into account a mental disturbance, infirmity, problem, intellectual abilities." Salnick argued that when the mental health evidence is combined, it suggests a life imprisonment sentence is appropriate:

> Now, if you start adding those things up and you start with what happened with the suicide watch and the depression, and then you have a doctor that didn't find him incompetent but found him borderline in terms of his intelligence, and you have a doctor who found him incompetent, that tells you that there's some problem here. And I would suggest that from that evidence this problem translates that Leroy Pooler needs the rest of his life in prison, but not to take his life, not here, not here, not in this circumstance.

Salnick pointed out that Pooler was "a 47 year old man with a first grade word level, a third grade reading level." Pooler grew up in segregated schools and did not "get the full benefit of a high school education." Pooler's family members confirmed that, after he returned from Vietnam, "he wasn't the same, he got angry, he was different." That change was significant "because that chain of events ultimately, unfortunately and sadly, gets us right here."

Salnick then recounted the testimony about Pooler's good qualities and argued that, although Brown's murder was "totally inappropriate, totally wrong, totally offensive," it nevertheless represented "one morning out of 47 years." Salnick said that Pooler was "a simple man," "not an intellect," but "a simple man from a hard working background, who for some reason did something way out of his character when this event occurred. This is not the type of a man to be put to death."

H. Jury Recommendation, Sentencing, and Direct Appeal

The jury recommended death by a nine-to-three vote. The state trial court sentenced Pooler to death.

The court found three statutory aggravating factors: (1) a prior violent felony conviction (the attempted first-degree murder of Colson); (2) the murder occurred during the commission of a burglary; and (3) the murder was especially heinous, atrocious, or cruel.

The state trial court found the statutory mitigating factor that Pooler murdered Brown while under the influence of an extreme mental or emotional disturbance, but gave that factor little weight.[6]

6 The state trial court expressly found that the defense had *not* established certain other statutory mitigating circumstances: (1) Pooler's capacity to appreciate the criminality of his conduct or conform to the requirements of the law was not substantially impaired; (2) Pooler did not act under extreme duress or under the substantial domination of another person; and (3) Pooler's age at the time of the murder (47 years old) was not mitigating.

***1262** The state trial court also found the following non-statutory mitigating factors: (1) Pooler served honorably in the military; (2) Pooler had a good employment record; (3) Pooler was a good parent; (4) Pooler had done specific good deeds and had certain good characteristics; and (5) if not given the death penalty, Pooler could receive only life without parole or consecutive life sentences. The state trial court gave Pooler's honorable military service considerable weight and attached either some or little weight to the other non-statutory mitigators.[7]

7 The state trial court expressly rejected as non-statutory mitigating factors the following: (1) Pooler had a good jail record and could adapt well to prison life; (2) Pooler could be rehabilitated; (3) Pooler had low normal intelligence; (4) Pooler had mental health problems; and (5) the murder resulted from a heated domestic dispute and Pooler was unlikely to endanger others in the future.

The state trial court concluded that not only did the statutory aggravating factors far outweigh the mitigators, but also that each of the three aggravating factors standing alone would have outweighed all the mitigating factors.

On direct appeal, the Florida Supreme Court affirmed Pooler's convictions and death sentence. *Pooler I,* 704 So.2d 1375. The United States Supreme Court denied Pooler's certiorari petition. *Pooler v. Florida,* 525 U.S. 848, 119 S.Ct. 119, 142 L.Ed.2d 96 (1998).

I. Rule 3.850 Motion and Supporting Materials

On September 17, 1999, Pooler filed in the Florida trial court (the "3.850 court") a Florida Rule of Criminal Procedure 3.850 motion to vacate his convictions and death sentence. Pooler's 3.850 motion claimed, *inter alia,* that his trial counsel Salnick provided ineffective assistance by failing to adequately investigate and present mitigation evidence in the penalty phase.

Attached to the motion were (1) Pooler's school and military records, and (2) declarations from Pooler's nephews Brian and Darren Warren. Pooler's school records end at 11th grade.[8] The school records indicate that Pooler scored 75 on an IQ test in second grade.

8 The military records indicate that Pooler completed two years of high school and left without graduating.

Pooler's military records show that he: (1) served as a guard and a rifleman in the Vietnam War; (2) was disciplined frequently, including for six instances during a one-year period of being absent without leave; (3) was punished for using disrespectful language to a superior officer and for refusing to obey orders; and (4) was found guilty in a special court-martial for unauthorized absences and sentenced to a reduction in pay grade and two months' confinement with hard labor.[9] Pooler received three basic service medals: the National Defense Service Medal, the Vietnamese Service Medal, and the Vietnamese Campaign Medal.

9 Pooler also received a bad conduct discharge, which the U.S. Navy Court of Military Review reversed on appeal. Pooler ultimately was released from active duty "under honorable conditions."

In their declarations, Pooler's nephews Brian and Darren Warren discussed Pooler's emotional problems after returning from Vietnam, his frequent alcohol abuse, and that he was a good father to his four daughters. Pooler seemed to have flashbacks to his war experiences; became paranoid, ***1263** moody, and short-tempered; and complained that the army "took [his] mind." Pooler "began to use alcohol to the extreme," and by early 1995, Pooler's "recreation consisted of hanging out in the parking lot near [victim Brown's] apartment and drinking large amounts of ... beer and hard

liquor." But Pooler loved his daughters, tried to be a good father to them, and was involved in their lives.

J. 3.850 Evidentiary Hearing

At the 3.850 evidentiary hearing, Pooler called four witnesses: trial counsel Salnick, his investigator Jenne, Detective Francisco Alonso, and psychologist Michael Brannon.[10]

10 The 3.850 court conducted proceedings on Pooler's competency. Pooler's 3.850 counsel stated that he (1) "had difficulties in obtaining information from Mr. Pooler, such as employment history, military history, and educational background," and (2) the information on such subjects that counsel obtained from other sources was "inconsistent at best [with] material gathered from Pooler himself."

The 3.850 court appointed mental health experts Dr. John Spencer and Dr. Michael Brannon to examine Pooler's competency. Both Dr. Spencer and Dr. Brannon found Pooler competent, and after a competency hearing, the 3.850 court found Pooler was competent. Dr. Spencer died shortly before the evidentiary hearing.

Salnick testified about his pretrial mitigation investigation. Salnick "had no problem communicating with Mr. Pooler," whom he characterized as "articulate." Salnick stated that "Pooler may not have been a [Rhodes] scholar but he was extremely street smart, savvy, and understood exactly what was going on." Pooler had "specific recollection of things just prior to the homicide."

Salnick initially had some concerns about whether Pooler was competent, and said, "in a case involving the death penalty you want to look at everything to make sure your client is okay mentally." Nevertheless, Salnick explained:

> I was convinced that Mr. Pooler knew what was going on, and that Mr. Pooler was capable of relaying facts to me, Mr. Pooler[ ] was capable of sharing with me information. He had no trouble giving us witnesses['] names, even on the eve of trial he came up with something, and you go through that information and you, as an attorney, you have to sort out what you are going to use and what you are not going to use.

Salnick noted that mental health issues are common in penalty phase trials. A penalty phase investigation generally includes a mental health evaluation, although it depends on the case. Salnick explained that "every attorney [investigates a client's psychological background in] different ways," and that "[s]ometimes you use competency experts, if you need[ ] them[,] for Phase II; sometimes you hire new experts."

Salnick testified that there were "a bunch" of strategic reasons for not hiring his own mental health experts to testify at Pooler's penalty phase, and instead choosing to call the court-appointed competency experts and the jail personnel. For example, the court-appointed experts had credibility because they supported the defense's position in the penalty phase and were not being paid by the defense team.

Salnick did not hire new doctors to do a penalty phase psychological workup on Pooler because of what he already had gathered. Salnick said, "We had the competency doctors, we had Dr. Desormeau, we had Dr. Armstrong, we had family members, we had a jail employee, we had a co-worker from his employment and we made a strategic decision as to how we were going to proceed with Phase II."

Salnick testified that he and Jenne tried to get Pooler's military records, but were ***1264** unsuccessful. And in any event, had they obtained and presented the military records, it "would have backfired" because Salnick had seen a portion of Pooler's military records in the 3.850 case and "it talks about AWOL, and hitting people, and talks about [Pooler having] not such a stel [l]ar career in the military." Those things were inconsistent with what the defense was trying to show in the penalty phase, which was that Pooler served his country honorably in Vietnam.

Salnick had argued to the jury that Pooler had a good military record "[b]ased exactly on what [Pooler] told [Salnick]." Salnick explained:

> If my client tells me that information and my investigator, who I believe went to Louisiana for a period of time, and that's corroborated by a relative, it seems to me that is consistent with our strategy to show *that this incident was the product of a man who for 15 years had not been arrested, lived a good life and served our country. That was certainly what we decided, and based on it at the time it was certainly reasonable.*

(Emphasis added).

Salnick learned later that what Pooler told Salnick before trial, and what his relatives confirmed—Pooler graduated from high school—was not true. But Salnick testified that because his client told him something and his client's relatives

backed it up, it was "extremely reasonable" to present it to the jury. Salnick "had no reason to disbelieve" his client. Salnick reiterated that although Jenne tried to get the military records, "with Mr. Pooler telling us that he had been in the service and was honorably discharged, with his brother corroborating that, we didn't need any more at that point."

Salnick was aware of the notion that in a penalty phase trial it can be helpful to present evidence of bad circumstances from the defendant's life so that "perhaps the jury may opt to be forgiving and spare his or her life." Salnick believed that in "some cases that's a very good strategy depending upon the information that you have." And in some cases, there are no significant positive aspects of the defendant's life to present. But in Pooler's case, Salnick had positive evidence, and decided "as a matter of strategy" to present a positive story of Pooler's life:

> We had an individual ... [who] served his country in Vietnam, re-upped, raised his daughter[s], always took care of them .... His brother Henry said how he was a good parent, worked, he had a job, graduated from high school, and how he was honorably discharged, how he did live his good life .... Those are the types of things that we thought would be better, so that's—granted, when he was young he had a criminal record but he had 15 years of living, you know, a hard-working productive life; he had one job, I think, for eight years. This is a guy who on that particular day was not the person that he had been for 15 years, and we felt that as a matter of strategy, and a matter of tactic, that's what we wanted to present to the jury. You convicted him. Now let's look at this: He served his country, worked, and took care of his 79–year–old father.

Although during his pretrial investigation Salnick had discovered evidence that Pooler had a bad temper, a violent background, and had been known to argue with people and carry a gun, Salnick "certainly didn't want that to come in" during the penalty phase, for Salnick's plan was "to show the human being that [Pooler] was and could still be if [his] life was spared."

Salnick's investigator Marvin Jenne also described the pretrial investigation. Jenne and Pooler "got along pretty good all the time" and "had a good personal working relationship." Jenne tried to corroborate ***1265** all the background information he received from Pooler by talking with other persons.

Pooler's 3.850 counsel also called West Palm Beach Police Detective Francisco Alonso, who testified that on the day of Brown's murder, at 6:30 a.m., he took a report from Pooler that $301 had been stolen from his wallet. Pooler said he was sitting in his car with a girlfriend's friend, fell asleep, and awoke to find his wallet missing.

Although Detective Alonso's report stated that Pooler had fallen asleep from intoxication before the alleged theft at 3:00 a.m., when Pooler arrived to make the report, he did not appear drunk. Pooler smelled like he [had been] drinking, "smelled like alcohol but he was coherent, he wasn't slurring his speech, he was attentive, and [he] gave [Detective Alonso] the exact ... amount of $301." Detective Alonso saw Pooler drive away from the police station, and would not have let him drive if he had thought Pooler was still intoxicated.

Psychologist Dr. Michael Brannon, Pooler's final 3.850 witness, evaluated Pooler and administered an intelligence test. Pooler received an IQ score of 75, which put him in the borderline range. Dr. Brannon found that Pooler was competent to proceed. Dr. Brannon believed that, in his self-reporting of his background, Pooler was confabulating—that is, not outright lying but filling in the gaps in one's memory with inaccurate information.

Dr. Brannon believed Pooler "had a severe alcohol problem," a "high probability of severe substance dependency," and alcohol dependency disorders. Dr. Brannon summarized his areas of concern: (1) Pooler's IQ, which fell in the borderline range based on current and past testing; (2) Pooler's neuro-psychological deficits, as shown in Dr. Levine's report; (3) Pooler's alcohol dependence and abuse; and (4) the possibility, which more investigation would be needed to confirm, that Pooler had post-traumatic stress disorder ("PTSD") from Vietnam. Pooler "certainly shows extreme traumatic stress-like reactions," but Dr. Brannon did not know whether they rose to the level of PTSD.

K. 3.850 Court's Denial of Pooler's 3.850 Motion

The 3.850 court denied Pooler's 3.850 motion. The 3.850 court found that Salnick conducted a reasonable investigation and that Salnick's strategy at the penalty phase was "to present the defendant in a positive light, that he had been a productive member of society." This strategy was "in direct contrast" with Pooler's 3.850 contention that the defense should have offered less-flattering-to-Pooler evidence at the penalty phase, but "[m]ere disagreement with trial strategy does not amount to a basis for postconviction relief."

The 3.850 court concluded, "It is clear from the evidence presented that trial counsel conducted a reasonable investigation, and when written documentation was not available, [an] alternate means of corroboration was found (i.e., family members)." In light of Salnick's investigation and chosen penalty-phase strategy, and "given the corroboration obtained from family members, the failure to obtain [Pooler's] military and employment records was not prejudicial."

As to the mental health experts, the 3.850 court observed that Salnick "opted to present the testimony" of the experts, Drs. Levine, Desormeau, Armstrong, and Alexander, who evaluated Pooler "for competency purposes and mental health issues for the court and in the jail." Moreover, "information regarding [Pooler's] school, military and employment history was given to the mental health experts," and "jail and medical records as well as the fact ***1266** that there was no prior report of psychiatric treatment were given to the experts." The 3.850 court found that Pooler "failed to meet his burden under *Strickland*."

As to Salnick's not presenting intoxication evidence, the 3.850 court noted that: (1) Salnick successfully used evidence of Pooler's intoxication a week before the murder, when Pooler threatened Brown in his statement to witness Carolyn Glass, to preclude the State from obtaining an instruction on the cold, calculated, and premeditated ("CCP") aggravating circumstance; (2) Salnick reviewed and discussed with Pooler the contents of Detective Alonso's police report regarding the theft of money from Pooler a few hours before the murder, which stated that Pooler fell asleep from intoxication at 3:00 a.m.; (3) the murder occurred between 8:00 and 9:00 a.m., five to six hours after Pooler fell asleep and about two hours after Pooler reported the theft to Detective Alonso; (4) the police report did not indicate Pooler was drunk when he filed the report; (5) Pooler could recall specific details about the day of the murder; and (6) Salnick was aware of the possibility of presenting evidence of intoxication but decided not to do so. The 3.850 court also pointed out Detective Alonso's testimony that Pooler did not appear impaired while filing the report and Detective Alonso knowingly permitted Pooler to drive away from the police station.

In sum, the 3.850 court found that Pooler had failed "to prove that trial counsel did not properly investigate mitigating factors to present to the court and the jury" at the penalty phase. The 3.850 court stated:

> After applying the "highly deferential" scrutiny to counsel's strategic decisions as required by *Strickland*, the court finds that the defendant has failed to prove that his attorney's representation fell below an objective standard of reasonableness and that there was a reasonable probability that the results of the proceeding would have been different but for counsel's strategic decisions.

L. 3.850 Appeal

Pooler appealed the denial of his 3.850 motion to the Florida Supreme Court, which affirmed. *Pooler v. State*, 980 So.2d 460 (Fla.2008) ("*Pooler II*").

The Florida Supreme Court divided Pooler's penalty phase ineffective counsel claim into three sub-parts: (1) failure to investigate and present evidence of Pooler's alcohol abuse or dependency; (2) failure to investigate and present Pooler's school, military, and employment records; and (3) failure to retain mental health experts and provide them with adequate background information. *Id.* at 464.

As to alcohol abuse or dependency, the Florida Supreme Court concluded that Pooler had not shown either deficient performance or prejudice:

> First, Salnick's performance was not deficient.... Salnick conducted a reasonable investigation into Pooler's background. Neither Pooler nor his family indicated to Salnick that he had a substance abuse problem or that he had been drinking at the time of the shooting. However, Salnick discovered that Pooler had been drinking two days before the murder when he threatened to kill Kim Brown. He used this information during the penalty phase to prevent the State from obtaining an instruction on CCP. Further, Salnick testified at the evidentiary hearing that he chose not to introduce Pooler's police report during the penalty phase because it would open the door for the State to cross-examine Pooler regarding the fact that he had been with a prostitute when he passed out drunk and that she stole his money. This was a reasonable tactical decision ***1267** made after a reasonable investigation; therefore, Salnick's performance was not deficient. Moreover, ... none of the evidence introduced by Pooler at the evidentiary hearing shows that he was intoxicated at the time of the murder. Therefore, any alleged failure on Salnick's part to investigate and present it at trial was not prejudicial.

Id. at 466–67 (citation omitted).

As to the school, military, and employment records, the Florida Supreme Court concluded that Salnick's pre-trial investigation was reasonable given that Pooler's family

members corroborated what Pooler self-reported on these subjects:

> Salnick conducted a reasonable investigation. His failure to obtain Pooler's records does not rise to the level of ineffective assistance. Pooler consistently represented to Salnick that he was an average student, graduated from high school, and was honorably discharged from the Marine Corps. To test the validity of Pooler's representations, Salnick's investigator, Marvin Jenne, traveled to Louisiana and interviewed members of Pooler's family. All of the family members Jenne located and interviewed corroborated Pooler's positive representations. Further, Jenne made an attempt, albeit unsuccessful, to obtain Pooler's school records. Based on Pooler's positive representations of himself which were substantiated by his family members, Salnick had no reason to believe Pooler's records would contain anything negative or mitigating. Therefore, he formed a reasonable trial strategy of presenting Pooler in a positive light.

Id. at 467 (citation omitted). Thus, Pooler did not satisfy the deficient performance prong of the ineffective assistance test. *Id.*

The Florida Supreme Court also found that Pooler failed to show prejudice given the mitigating evidence Salnick did introduce, Salnick's trial strategy, and that the additional evidence in these records was a double-edged sword and would have undermined Pooler's other mitigating evidence:

> Moreover, no prejudice resulted from counsel's choice of strategy. At trial, Salnick showed that Pooler had been a productive member of society and crime-free for fifteen years prior to the murder. He presented evidence that Pooler had served honorably in the military in Vietnam, reenlisted, raised a daughter, took care of his relatives, was a good parent, worked at the same job for eight years, and was well liked by his coworkers. Of all the mitigation presented, the trial court gave considerable weight only to Pooler's honorable military service. Had Salnick introduced Pooler's military, school, or employment records, he would have undermined Pooler's only significant mitigation. *See Reed v. State*, 875 So.2d 415, 437 (Fla.2004) ("An ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword."). Furthermore, Pooler's records would not have opened up mitigation leads sufficient to overcome the aggravation found by the trial court. Accordingly, counsel's failure to obtain these records does not undermine confidence in Pooler's death sentence.

Id. at 467–68.

The Florida Supreme Court affirmed the 3.850 court's denial of Pooler's claim about the mental health experts. *Id.* at 469. The Florida Supreme Court concluded that Salnick's performance was reasonable:

> Salnick reasonably relied on Pooler's corroborated representations regarding his scholastic and military background. ***1268** Salnick communicated this information to the experts, and Pooler also gave the experts the same information during their evaluations of him. Furthermore, Salnick testified at the evidentiary hearing that he retained these experts because, given their neutrality, they would be more credible and difficult to impeach. This was a reasonable strategic decision.

Id. (citation omitted). The Florida Supreme Court also concluded that, even assuming Salnick's performance were deficient, Pooler did not show prejudice:

> Even if we assume counsel's decision to forego further testing constituted deficient performance, Pooler failed to establish that any prejudice resulted from it. He presented no evidence that the defense experts were incompetent or that they failed to assist in the evaluation, preparation, and presentation of the defense. Nor did Pooler identify anything of substance that a more in-depth psychoanalysis would have added. [3.850 expert] Dr. Brannon's finding that Pooler had neurological damage from head injuries was already indicated in Dr. Levine's evaluation. Also, Dr. Brannon's determination that Pooler had a borderline retarded IQ of 75 does not constitute a clear indication of actual mental retardation because it is within the range estimated by Dr. Alexander and is not substantially inconsistent with the trial court's finding that Pooler had an IQ of 80. Furthermore, because Pooler did not call any of his trial experts to testify at his postconviction hearing, he failed to demonstrate that they would have changed their opinions had they conducted more in-depth psychological evaluations or been provided with his records. Under these circumstances, a new sentencing proceeding is not mandated.

Id. (citations omitted).

The United States Supreme Court denied Pooler's certiorari petition. *Pooler v. Florida*, 555 U.S. 911, 129 S.Ct. 255, 172 L.Ed.2d 192 (2008).

M. Federal Habeas Proceedings

In May 2008, Pooler filed his 28 U.S.C. § 2254 federal habeas petition, which was denied. The district court concluded, *inter alia,* that the Florida Supreme Court's decision affirming the 3.850 court's denial of Pooler's penalty-phase ineffective counsel claim was not unreasonable, but granted a certificate of appealability ("COA") on that claim. Pooler appealed.

II. STANDARD OF REVIEW

Section 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104–132, 110 Stat. 1214, provides that federal courts may not grant a writ of habeas corpus to a state court prisoner on any claim adjudicated on the merits in state court unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *see Trepal v. Sec'y, Fla. Dep't of Corr.*, 684 F.3d 1088, 1107 (11th Cir.2012). Thus, AEDPA "imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." *Trepal*, 684 F.3d at 1107 (quoting *Hardy v. Cross*, 565 U.S. ——, 132 S.Ct. 490, 491, 181 L.Ed.2d 468 (2011)).

***1269** "We review *de novo* the district court's decision about whether the state court acted contrary to clearly established federal law, unreasonably applied federal law, or made an unreasonable determination of fact." *Johnson v. Upton*, 615 F.3d 1318, 1330 (11th Cir.2010).

III. DISCUSSION

A. *Strickland* Test for Ineffective Counsel Claims

Pooler's ineffective assistance of counsel claim is governed by the Supreme Court's two-pronged test announced in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See Johnson,* 615 F.3d at 1330. Under the *Strickland* test, for a convicted defendant to show that he received constitutionally ineffective assistance of counsel, he must show that (1) his attorney's performance was deficient, and (2) the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. A court need not "address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.* at 697, 104 S.Ct. at 2069.

The performance standard is "objectively reasonable attorney conduct under prevailing professional norms." *Johnson*, 615 F.3d at 1330; *see Strickland*, 466 U.S. at 688, 104 S.Ct. at 2065 ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."). The question is "whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066. In answering this question, we employ a highly deferential review of counsel's conduct, for "we must indulge a strong presumption that counsel's performance was reasonable and that counsel made all significant decisions in the exercise of reasonable professional judgment." *Rhode v. Hall*, 582 F.3d 1273, 1280 (11th Cir.2009) (quoting *Newland v. Hall,* 527 F.3d 1162, 1184 (11th Cir.2008)). In short, Pooler "must establish that no competent counsel would have taken the action that his counsel did take." *Id.* (quoting *Newland*, 527 F.3d at 1184).

Attorneys have a duty to conduct reasonable pretrial investigations. *Strickland*, 466 U.S. at 690–91, 104 S.Ct. at 2066. The *Strickland* Court explained:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Id.

Furthermore, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions," for attorneys—usually, and "quite properly"—base their actions "on information supplied by the defendant." *Id.* at 691, 104 S.Ct. at 2066. "In particular, what investigation decisions are reasonable depends critically" upon information the defendant furnishes to his counsel. *Id.* The Supreme Court in *Strickland* noted that, "when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the

need for further ***1270** investigation may be considerably diminished or eliminated altogether." *Id.* Therefore, "inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions." *Id.*

For prejudice, the standard is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Rose v. McNeil*, 634 F.3d 1224, 1241 (11th Cir.), *cert. denied,* —— U.S. ——, 132 S.Ct. 190, 181 L.Ed.2d 98 (2011) (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068). Because Pooler alleges ineffective assistance in the penalty phase, he must show that "there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 1241–42 (quotation marks and citation omitted).

In assessing prejudice, "we consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweigh it against the evidence in aggravation." *Porter v. McCollum*, 558 U.S. 30, 130 S.Ct. 447, 453–54, 175 L.Ed.2d 398 (2009) (quotation marks and brackets omitted). To satisfy the prejudice prong, the "likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, —— U.S. ——, 131 S.Ct. 770, 792, 178 L.Ed.2d 624 (2011). "Counsel's errors must be so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 787–88 (quotation marks and citation omitted).

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." *Digsby v. McNeil*, 627 F.3d 823, 831 (11th Cir.2010), *cert. denied,* —— U.S. ——, 131 S.Ct. 2936, 180 L.Ed.2d 230 (2011); *see also Richter,* 131 S.Ct. at 788 ("The standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." (citations omitted)). The ultimate question before us is not whether Pooler's trial counsel Salnick's actions were reasonable, but whether "there is any reasonable argument that [Salnick] satisfied *Strickland*'s deferential standard." *Richter,* 131 S.Ct. at 778. If any such reasonable argument exists, then Pooler cannot prevail.

B. Performance: Investigation

Pooler argues that Salnick rendered ineffective assistance during the penalty phase investigation by relying on Pooler's own statements about his background without obtaining the school, military, and employment records that would have shown Pooler's positive statements about his background and achievements were untrue. The Florida Supreme Court rejected this contention and found Salnick's penalty-phase preparation was reasonable under the circumstances. *Pooler II*, 980 So.2d at 467. The Florida Supreme Court's decision is not contrary to, or based on an unreasonable application of, Supreme Court precedent. Nor is it based on an unreasonable determination of the facts.

It was not unreasonable for the Florida Supreme Court to conclude, based on the evidence presented at trial and in the 3.850 proceedings, that Salnick's investigation of mitigating evidence, and his strategic decisions about what evidence to present in the penalty phase, fell within "the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066. The facts show that Salnick, an experienced criminal defense attorney, retained ***1271** Jenne, a veteran investigator, to help with the mitigation search, and Salnick instructed Jenne to find "anything and everything" he could about Pooler. The two men began by speaking with Pooler himself, who furnished them with information and with names of witnesses. According to Salnick, Pooler had no trouble sharing information, and Jenne thought he and Pooler had a "good personal working relationship."

Nevertheless, Salnick and Jenne did not simply take Pooler's information at face value. They interviewed the witnesses Pooler identified. Jenne testified he knew that criminal defendants often don't tell their attorneys and investigators the full truth, and he made an effort to corroborate all the information Pooler gave him.

Importantly, Salnick and Jenne testified that they tried to get these records Pooler claims they should have obtained. Salnick testified they tried to get Pooler's military records, but were unsuccessful. Jenne testified that he made telephone calls and sent letters requesting Pooler's school records, but he was told they were unavailable. Jenne tried to get Pooler's employment records also, and did get the ones from local employers, but could not obtain the records from Louisiana.

When Salnick and Jenne could not get the requested records, they sought alternative corroboration from Pooler's close relatives, who could reasonably be expected to know the

details of Pooler's background. Only after they obtained that corroboration did they present the evidence at trial.

It was not unreasonable, or contrary to Supreme Court precedent, for the Florida Supreme Court to find that counsel's performance as to these records was not deficient under *Strickland*. Salnick and his investigator Jenne did try to get the corroborating records, and when they could not, they tried to—and did—obtain confirmation through other means. *See Housel v. Head*, 238 F.3d 1289, 1295–96 (11th Cir.2001) (counsel's failure to discover and present evidence of defendant's poor, abusive upbringing was not deficient performance because defendant told counsel there was nothing traumatic in his upbringing, counsel followed up by interviewing defendant's mother and other witnesses, and mother confirmed that upbringing was normal); *see also Stewart v. Sec'y, Dep't of Corr.*, 476 F.3d 1193, 1210–12 (11th Cir.2007) (attorney's performance not unreasonable for not finding, and providing to expert, evidence of defendant's childhood abuse because (1) defendant failed to mention abuse and in fact told attorney "just the opposite," and (2) attorney interviewed a number of family members, none of whom mentioned abuse and all of whom said that defendant's childhood was "harmonious and happy" (brackets omitted)); *Williams v. Head*, 185 F.3d 1223, 1237 (11th Cir.1999) (attorney's performance not unreasonable for not finding evidence of defendant's childhood abuse and mistreatment where defendant himself gave no reason to suspect abuse or mistreatment, and where attorney spoke to defendant's mother and "got nothing from her about [the defendant] having been abused or mistreated"). That the information Pooler gave his counsel—and the confirmation supplied by Pooler's closest relatives—turned out to be false is of no moment, for we do not judge counsel's performance by hindsight. *See Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."). Significantly, Pooler presents *no* evidence, other than the fact that his 3.850 counsel obtained the records ***1272** and trial counsel did not, tending to show that the efforts trial counsel actually made to try to get the records were unreasonably deficient. *See Lambrix v. Singletary*, 72 F.3d 1500, 1505–06 (11th Cir.1996) (rejecting ineffective assistance claim for failure to discover evidence of defendant's childhood abuse and neglect where there was "no indication that [defendant or his] relatives gave counsel reason to believe that such evidence might exist" and there was no "documentary evidence of [defendant's] abuse or neglect *that would have been readily available* to counsel at the time" (emphasis added)).

As noted above, the reasonableness of an attorney's investigative decisions "depends critically" upon information the defendant furnishes to his counsel. *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066. Moreover, "searching for old records can promise less than looking for a needle in a haystack, when a lawyer truly has reason to doubt there is any needle there." *Rompilla v. Beard*, 545 U.S. 374, 389, 125 S.Ct. 2456, 2467, 162 L.Ed.2d 360 (2005).

This is not a case where defense counsel took his client's word on faith, with no attempt at confirmation.[11] *See, e.g., Porter v. McCollum*, 558 U.S. 30, 130 S.Ct. 447, 452–53, 175 L.Ed.2d 398 (2009) (concluding penalty-phase counsel performed deficiently when he had only one short meeting with defendant about mitigating evidence; did not interview any family members; did not obtain any school, medical, or military records; presented almost no mitigating evidence; and left jury hardly knowing anything about defendant).Nor is it a case where counsel ignored evidence in his possession that cast doubt upon his client's story or suggested the need for further investigation. *See Wiggins v. Smith*, 539 U.S. 510, 527, 123 S.Ct. 2527, 2538, 156 L.Ed.2d 471 (2003) (stating that "[i]n 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," and finding that "[i]n light of what the ... records [discovered by counsel] actually revealed, ... counsel chose to abandon their investigation at an unreasonable juncture"); *Middleton v. Dugger*, 849 F.2d 491, 493–94 (11th Cir.1988) (stating attorney's performance was deficient because he "conducted almost no background investigation, despite discussions with [the defendant] concerning the existence of such mitigating evidence").

11 Even if it were, that does not necessarily mean that the Florida Supreme Court's decision finding no deficient performance would be unreasonable. *See, e.g., Callahan v. Campbell*, 427 F.3d 897, 934 (11th Cir.2005) ("Especially when it comes to childhood abuse, information supplied by a petitioner is extremely important in determining whether a lawyer's performance is constitutionally adequate. This Court has already stated in no uncertain terms: 'An attorney does not render ineffective assistance by failing to

> discover and develop evidence of childhood abuse that his client does not mention to him.' " (citations, quotation marks, and brackets omitted)). Pooler, though, citing *Rompilla v. Beard*, 545 U.S. 374, 377, 125 S.Ct. 2456, 2460, 162 L.Ed.2d 360 (2005), contends that "even when the defendant and/or his family suggest that no mitigating evidence is available, defense counsel has an absolute duty to investigate." This argument misconstrues (and goes well beyond) the limited holding of *Rompilla*, which provides that "even when a capital defendant's family members and the defendant himself have suggested that no *mitigating* evidence is available, his lawyer is bound to make reasonable efforts to obtain and review *material that counsel knows the prosecution will probably rely on as evidence of aggravation* at the sentencing phase of trial." *Id.* (emphasis added).

Instead, this is "a case, like *Strickland* itself, in which defense counsel's 'decision not to seek more' mitigating evidence from the defendant's background 'than was already ***1273** in hand' fell 'well within the range of professionally reasonable judgments.' " *Johnson v. Upton*, 615 F.3d 1318, 1338 (11th Cir.2010). It was neither unreasonable nor contrary to existing Supreme Court holdings for the Florida Supreme Court to conclude Salnick's performance was not deficient despite not successfully obtaining Pooler's records to supplement the information given to experts.

C. Performance: Mental Health Experts

Pooler also argues that Salnick's performance was unreasonably deficient because he relied on the court-appointed experts who evaluated Pooler and did not retain other mental health experts to evaluate Pooler. The record reveals that this was a conscious, strategic decision by Salnick, one that the Florida Supreme Court expressly found to be reasonable. *Pooler II*, 980 So.2d at 469. Salnick testified that he had "a bunch" of strategic reasons for choosing to rely, in the penalty phase, on Dr. Levine and Dr. Alexander, including that they would be more credible to the jury because they were hired by the court and not the defense team. Salnick also said that he did not hire a defense mental health expert to do a mitigation-related evaluation because of what he already had for the penalty phase. Salnick believed Dr. Levine's and Dr. Alexander's conclusions dovetailed with his chosen penalty-phase strategy of presenting evidence that would humanize Pooler and portray him as a man who worked hard, served his country, and was good to his family.

Under the particular circumstances here, it was neither unreasonable nor contrary to Supreme Court precedent for the Florida Supreme Court to conclude that a reasonable attorney could have decided, as Salnick did, to rely on the two experts here. Those circumstances include the facts that: (1) trial counsel was already performing a mitigation investigation into Pooler's background, including an inquiry into his medical and psychological history; and (2) well before trial, counsel read the reports from, and heard the competency-hearing testimony of, multiple experts who had evaluated Pooler's then-current mental functioning. And most importantly, nothing in those expert reports during competency proceedings, or in the additional mitigation search Salnick and Jenne performed, suggested a need for mental health experts to look further. *See Newland v. Hall*, 527 F.3d 1162, 1210–14 (11th Cir.2008) (finding no deficient performance in counsel's failure to hire independent mental health expert after (1) court-appointed competency experts evaluated defendant and reported he was not suffering from psychological defect at time of murder, and (2) counsel's observations of defendant showed nothing indicating mental illness). Here, the two experts administered neuropsychological and intelligence tests and reported that Pooler had: (1) a low-average to borderline intelligence level, with an overall IQ around 80; (2) poor reading ability; (3) sub-optimal attention functioning; (4) no prior psychiatric treatment except for the treatment for depression after his arrest; (5) possible hypothyroidism and psychomotor retardation; (6) suffered head trauma 30 years before in a car accident, but with no cognitive or thinking ability changes following it; (7) intact memory function, with no delusions or confusion; (8) no evident symptoms of mental illness; and (9) no signs of long-term mental illness or disturbance existing at the time of Brown's murder.[12] The two ***1274** experts inquired about Pooler's history and background, and Dr. Levine in particular spent about eight hours examining Pooler.

12 Dr. Silversmith believed Pooler had a personality disorder of an unspecified type, either antisocial or passive dependent (although Dr. Alexander saw no sign of a personality disorder), plus an unspecified, non-psychotic mental disorder to which Pooler's pretrial incarceration may have contributed. Thus, this also was not unknown to Salnick.

Armed with Dr. Levine's and Dr. Alexander's reports of Pooler's cognitive functioning and emotional state, and added to what Salnick had learned of Pooler's background (his family life, military service, and regular employment), the Florida Supreme Court could reasonably conclude that Salnick's strategic choice—to eschew further mental health

evaluations and emphasize Pooler's positive qualities—was not constitutionally deficient performance. *See Housel*, 238 F.3d at 1296 (finding no deficient performance in counsel's failure to investigate and present mental health evidence of brain damage and hypoglycemic irritability episodes because (1) counsel reviewed two psychological evaluations that did not suggest a need to investigate further, (2) the defendant never mentioned his hypoglycemia to counsel, (3) counsel knew about defendant's prior head injury but saw nothing unusual in defendant's behavior, and thus, (4) counsel "knew enough about [the defendant's] mental health reasonably to conclude that further investigation would not bear fruit"); *see also Newland*, 527 F.3d at 1213–14.

D. Performance: Alcohol Use

Pooler also argued that Salnick performed unreasonably because he failed to follow up on information about Pooler's nephew Brian Warren and Pooler's alleged use of alcohol on the day of the murder. As to this contention, the Florida Supreme Court decision was likewise reasonable and not contrary to prior holdings of the United States Supreme Court.

Regarding Brian Warren, it is undisputed that Salnick and Jenne interviewed a number of Pooler's relatives, including Pooler's father, brother, and sister, and that Jenne spent three days in Louisiana speaking with persons who knew Pooler.[13] As the Supreme Court has recognized, "there comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties." *Bobby v. Van Hook*, 558 U.S. 4, 130 S.Ct. 13, 19, 175 L.Ed.2d 255 (2009).

13 Jenne may have spoken with Pooler's nephew Darren Warren, too. Jenne's invoice shows a phone call placed to Darren Warren on April 25, 1995. However, Darren Warren's declaration states that he was never contacted by Pooler's defense team. Because Darren Warren did not testify at the 3.850 hearing and Jenne was not asked about the phone call, a factual dispute remains.

Regarding Pooler's alcohol consumption, the record shows that Salnick investigated and was in fact aware of this evidence. Salnick and Jenne interviewed a number of witnesses, including Pooler's relatives and employers, about Pooler's use of alcohol. Salnick obtained the police report about the theft Pooler reported on the day of the murder —which said Pooler "fell asleep due to intoxication"—and spoke to Pooler about it.[14] Pooler told Salnick that the woman who allegedly robbed him was a prostitute, and Salnick did not want to open the door to that fact coming before the jury, stating that "[t]here is no way I would have done that. I just didn't think it was appropriate."

14 Salnick even discussed with Pooler the possibility of plying a voluntary intoxication defense in the guilt phase, but rejected that option because Pooler was adamant that he did not want to use a defense that involved admitting he committed the crimes.

More generally, presenting evidence of Pooler's alcohol use may not have been mitigating in the jury's eyes, and may well have opened the door not only to evidence of Pooler's cavorting with a prostitute ***1275** hours before he brutally killed his ex-girlfriend, but also to the abundant evidence of Pooler's bad temper and propensity to violence when he was drunk. *See Housel*, 238 F.3d at 1298 (stating counsel "could reasonably have decided to avoid using evidence of [defendant]'s intoxication on the night of the offense and his history of substance abuse" because "[e]vidence of drug and alcohol abuse is 'a two-edged sword,' and a lawyer may reasonably decide that it could hurt as much as help the defense" (citation omitted)); *Johnson v. Sec'y, Dep't of Corr.*, 643 F.3d 907, 934–35 (11th Cir.2011) (noting counsel may fail to investigate line of mitigating evidence because of "strategic purpose" of "avoiding the possibility of opening the door to what could be harmful evidence"); *see also Suggs v. McNeil*, 609 F.3d 1218, 1231 (11th Cir.2010) (observing that evidence of alcohol abuse "is often a 'two-edged sword' " that may have caused some jurors to vote for death); *Grayson v. Thompson*, 257 F.3d 1194, 1227 (11th Cir.2001) (concluding alcohol-abuse evidence could have been harmful); *Tompkins v. Moore*, 193 F.3d 1327, 1338 (11th Cir.1999) (same); *Waldrop v. Jones*, 77 F.3d 1308, 1313 (11th Cir.1996) (same). In any event, the alcohol evidence was inconsistent with Salnick's penalty phase strategy of generating a measure of sympathy for Pooler and showing him to be a good friend and family man, a military veteran, and a productive, employed member of society. *See Housel*, 238 F.3d at 1296 (finding reasonable counsel's choice to employ a humanizing penalty phase strategy that emphasized the defendant's "family-friendly side" instead of presenting evidence of his intoxication on the night of the murder).

Accordingly, the Florida Supreme Court's rejection of this allegation of deficient performance, as with the others, was reasonable and consistent with existing Supreme Court precedent.

E. Prejudice

Likewise, Pooler has not met his burden under AEDPA of showing that the Florida Supreme Court's finding that Pooler was not prejudiced was (1) contrary to prior Supreme Court holdings, (2) based on an unreasonable application of prior Supreme Court holdings, or (3) based on an unreasonable determination of the facts in light of the evidence presented in state court.

Much of the 3.850 evidence Pooler claims his trial counsel Salnick should have presented in the penalty phase was not mitigating but aggravating, or else would have opened the door to the introduction of aggravating evidence that would have diluted its impact. *See Reed v. Sec'y, Fla. Dep't of Corr.*, 593 F.3d 1217, 1246 (11th Cir.2010) ("The probability of proposed mitigating evidence opening the door to strong aggravating evidence is an important factor to consider in assessing the reasonable probability of a different sentencing result."); *Wood v. Allen*, 542 F.3d 1281, 1313 (11th Cir.2008), *aff'd,* 558 U.S. 290, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010) ("[W]e have rejected prejudice arguments where mitigation evidence was a 'two-edged sword' or would have opened the door to damaging evidence."); *see also Suggs*, 609 F.3d at 1231–33; *Grayson*, 257 F.3d at 1227–28; *Waldrop*, 77 F.3d at 1313. For example, the school records contain repeated negative comments about Pooler's diligence, conduct, and attendance.[15] The military records show that ***1276** Pooler was frequently disciplined for offenses, mostly absences without leave, and was found guilty in a court-martial for using disrespectful language to a superior officer and for refusing to obey orders and suffered a reduction in rank. And the 3.850 evidence includes numerous instances of Pooler displaying a bad, violent temper: (1) nephew Brian Warren said that Pooler "became violent and had a hard time controlling his temper"; (2) Brian Warren was "actually physically afraid of" Pooler in the time period leading up to Brown's murder, and Darren Warren also said that Pooler's behavior was frightening; and (3) Pooler, while drunk, told Brian Warren he would kill Brown and several times told Brown that he would kill her. Salnick too testified that he had discovered evidence that Pooler had a bad temper, a violent background, and was known to argue with people and carry a gun.[16] Admitting such testimony would have negated Salnick's successful attempt at keeping this harmful information from the jury.

15 Pooler's school records contain notes such as, "Leroy stays out of school too much," "School doesn't seem to interest Leroy," he is "very slow ... [and] plays and talks while in class," he "is very mischievous, stays out of school playing hooky," and he "could do much better."

16 For instance, Pooler's supervisor Carlton Weeks testified that Pooler was ill-tempered and aggressive, that people did not want to work with him, that he seemed to be a violent person, and that Weeks knew of one instance in which Pooler brandished a gun during an argument.

Other 3.850 evidence Pooler claims Salnick should have presented was merely cumulative to evidence Salnick already put on. Brian and Darren Warren testified that Pooler tried to be a good father to his four daughters, but Pooler's other family members testified to that in the penalty phase. Dr. Brannon's testimony (e.g., that Pooler had borderline intelligence, poor reading ability, and neuropsychological deficits) echoed what was already presented through Dr. Levine and/or Pooler's family members.[17] And Pooler's trial counsel already presented evidence of Pooler's military service in Vietnam. "Obviously, a petitioner cannot satisfy the prejudice prong of the *Strickland* test with evidence that is merely cumulative of evidence already presented at trial." *Rose v. McNeil***,** 634 F.3d 1224, 1243 (11th Cir.), *cert. denied,* —— U.S. ——, 132 S.Ct. 190, 181 L.Ed.2d 98 (2011).

17 In fact, notwithstanding Pooler's arguments that Salnick's performance was deficient for not obtaining a mitigation-specific expert evaluation of Pooler, Dr. Brannon conducted such an evaluation and found little that was not already noted by the several competency experts.

What remains when the damaging and cumulative 3.850 evidence is stripped away is fairly weak. In short, when we consider all the evidence—what was presented at trial and in the 3.850 proceeding—we conclude that there is no reasonable probability that Pooler would have received a life sentence instead of death. More to the point, we conclude that the Florida Supreme Court's decision that Pooler did not satisfy *Strickland*'s prejudice prong was not contrary to Supreme Court precedent, did not unreasonably apply Supreme Court precedent, and was not based on an unreasonable determination of the facts in light of the state-court evidence.

F. Pooler's Reliance on *Porter*

We also reject all of Pooler's arguments that are based on *Porter v. McCollum*, 558 U.S. 30, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009). First, we point out that the Supreme Court's 2009 *Porter* decision was after the Florida Supreme Court's 2008 decision in *Pooler II*, and thus *Porter* itself does not constitute

clearly established federal law for § 2254(d) purposes for Pooler's case. Thus, the issue is not whether the Florida Supreme Court's decision in *Pooler II* was contrary to or an unreasonable application of *Porter*, but whether the Supreme Court's decision in *Porter* illustrates ***1277** that the Florida Supreme Court unreasonably applied *Strickland* or some other pre-*Pooler II* holding of the United States Supreme Court.

Second, and in any event, the factual differences between the two cases—as to both the performance and prejudice prongs of the ineffective-counsel analysis—are substantial and numerous. For example, Porter's counsel at the penalty phase called only one witness (Porter's ex-wife) and presented almost no mitigating evidence at all. *Porter,* 130 S.Ct. at 449. The penalty phase evidence "left the jury knowing hardly anything about [Porter] other than the facts of his crimes." *Id.*

By contrast, Pooler's counsel Salnick called four mental health experts (neuropsychologist Levine, psychologist Alexander, and jail psychiatrists Desormeau and Armstrong), jail officer Arthur Rock, Pooler's friend and co-worker Alice Bradford, and three of Pooler's family members (his brother, sister, and father). These witnesses told the jury, among other things, that Pooler: (1) had an IQ around 80, in the low-average to mildly impaired range, and a third-grade reading level; (2) suffered depressive symptoms in jail, but behaved well there; (3) was a reliable and punctual employee of the same employer for seven years; (4) helped Bradford, a single parent, with yard work; (5) was nice, polite, and respectful to Bradford and she trusted him around her son; (6) grew up in a close, supportive, religious family; (7) was a good father to his four daughters; (8) served more than six years in the United States Marine Corps, including service in Vietnam; and (9) had problems, including temper problems, after he returned from Vietnam. The jury heard much that would humanize Pooler, but nevertheless recommended that Pooler receive the death penalty.

Third, *Porter* materially differs from the instant case because in *Porter,* the Supreme Court decided the performance prong *de novo,* without AEDPA deference. *See id.* at 452. And Porter's trial counsel's penalty-phase preparation was plainly deficient. As the Supreme Court noted, Porter's counsel: (1) "had only one short meeting with Porter regarding the penalty phase"; (2) did not interview Porter's family members; (3) did not ever request Porter's school, military, and medical records; (4) ignored avenues of investigation revealed by the court-ordered competency evaluations, which "reported Porter's very few years of regular school, his military service and wounds sustained in combat, and his father's 'over-discipline' "; and (5) told the jury that "Porter was not 'mentally healthy' " but did not present any mental health evidence. *Id.* at 449, 453 (brackets omitted). Here, not only do we have a decision of the Florida Supreme Court on counsel's performance to which we must defer under AEDPA, but the evidence recounted above demonstrates that trial counsel Salnick investigated mitigating evidence much more thoroughly and presented much more of what he found.

Further, as to prejudice, the mitigating evidence adduced in Porter's 3.850 proceedings was far more powerful than that present here. In *Porter*, unlike this case, there was evidence of extensive childhood physical abuse: Porter's father routinely beat Porter's mother in Porter's presence, despite Porter's attempts to protect her, and Porter himself was a "favorite target" of his father's abuse. *Id.* at 449. Porter's father beat Porter and, at least once, shot at him with a gun. *Id.* According to Porter's siblings, Porter's father "was violent every weekend." *Id.* Porter's case also featured expert testimony that Porter had brain damage, which is not present in this case. *Id.* at 451.

Additionally, Porter's 3.850 hearing featured detailed and moving testimony about ***1278** Porter's military service from Porter's company commander. *Id.* at 450. This testimony revealed that: (1) Porter enlisted in the Army at age 17 and served in the Korean War; (2) at the battle of Kunu-ri, Porter's unit fought in bitter cold, with little or no food or sleep through five days of combat, all of which Porter endured while having a gunshot wound in his leg; (3) Porter's unit then "engaged in a 'fierce hand-to-hand fight' " with the enemy before finally receiving permission to withdraw; (4) less than three months later, Porter fought at the battle of Chip'yong-ni, during which Porter's regiment "was cut off from the rest of the Eighth Army and defended itself for two days and two nights under constant fire"; (5) Porter's company was ordered to charge the enemy's defensive positions on high ground, during which the company came under heavy mortar, artillery, and machine gun fire; (6) Porter's company suffered more than 50% casualties in the battle, and Porter himself was wounded again; and (7) for his wartime military service, Porter was awarded two Purple Hearts, the Combat Infantryman Badge, and other decorations, and his unit received the Presidential Unit Citation for its performance at Chip'yong-ni. *Id.* at 449–50.

In contrast, Pooler's 3.850 proceedings produced no evidence of childhood physical abuse and much less detailed evidence of Pooler's wartime service in Vietnam. Pooler's military records did show that he participated in counter-insurgency and combat operations and was awarded three basic service medals. But no one with first-hand knowledge of Pooler's wartime service testified on his behalf either at trial or in the 3.850 proceedings.[18]

18 As to adjustment problems after wartime, the Supreme Court noted that "Porter's expert testified that [Porter's] symptoms would easily warrant a diagnosis of posttraumatic stress disorder." *Porter,* 130 S.Ct. at 450 n. 4. Pooler's 3.850 expert Dr. Brannon, however, could not say whether Pooler's symptoms actually rose to the level of PTSD.

And Pooler's military records show that he was frequently the subject of military discipline. While both Porter and Pooler were disciplined for being absent without leave ("AWOL"), Pooler's infractions were more numerous and serious. Porter went AWOL twice while in Korea—for which he was not punished at all because unauthorized absences in the field were not uncommon occurrences in wartime and sometimes were unintentional—and once back in the United States in order to see his son. *Id.* at 450 & n. 3. Pooler, on the other hand, was found AWOL six times in one year, and was also punished for using disrespectful language to a superior officer and for refusing to obey orders. As the Florida Supreme Court noted in *Pooler II*, "Pooler's military records revealed that he was charged with at least nineteen different offenses on fifteen different occasions between October 1969 and February 1971 and that he was court-martialed for several of these offenses." *Pooler II*, 980 So.2d at 467.

Therefore, *Porter* presented a far more mitigating evidentiary profile than this case does. In *Porter*, the penalty-phase jury heard almost nothing of Porter except his crimes, but could have—and should have—been presented with persuasive evidence of Porter's extensive childhood abuse, his potential brain damage, and his heroic military service under horrific conditions, which left him physically and mentally wounded. In *Pooler*, though, the jury already heard about Pooler's close family life; his low intelligence; his being a good father, friend, and employee; and his voluntary service in the Vietnam War and its negative effect on him. And Pooler's counsel successfully *kept* the jury from ***1279** hearing significant *negative* evidence that was later adduced in the 3.850 proceedings and that is not present in *Porter*: for example, that Pooler was aggressive and short-tempered, that most of his co-workers did not want to work with him, that Pooler was known to carry a gun and brandish it during arguments, that Pooler spent time with a prostitute hours before murdering his ex-girlfriend Brown, that Pooler was frequently disciplined in the Army, that Pooler was an indifferent student, and that Pooler's own family members were afraid of him when he drank, which was frequently.

Simply put, *Porter* does not show that the Florida Supreme Court in *Pooler II* unreasonably applied *Strickland* or any other pre-existing United States Supreme Court holding.[19]

19 Pooler also relies on *Sears v. Upton*, —— U.S. ——, 130 S.Ct. 3259, 177 L.Ed.2d 1025 (2010), but that case is materially different, too. Sears's counsel performed only a cursory mitigation investigation and presented evidence only about the defendant's middle-class upbringing and the potential effect of a death sentence on his family. *Id.* at 3261–62. Counsel failed to discover, or present, *any* evidence about the defendant being abused as a child or his substantial cognitive impairments. *Id.* at 3262–64. And most importantly, the *Sears* Court *did not conclude* that the defendant had satisfied the *Strickland* prejudice prong. *Id.* at 3267. It merely found that the state court misapplied *Strickland* and remanded for further proceedings. *See id.* ("It is for the state court ... to undertake this [*Strickland* prejudice prong] reweighing in the first instance.").

IV. CONCLUSION

For the reasons set forth above, we affirm the district court's denial of Pooler's § 2254 petition.

AFFIRMED.

All Citations

702 F.3d 1252, 23 Fla. L. Weekly Fed. C 1717

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980 So.2d 460
Supreme Court of Florida.

Leroy POOLER, Appellant,
v.
STATE of Florida, Appellee.

No. SC05-2191.
|
Jan. 31, 2008.
|
Rehearing Denied April 17, 2008.

Synopsis

Background: Following affirmance of murder conviction and imposition of death penalty, 704 So.2d 1375, defendant filed motion for postconviction relief. The Circuit Court, Palm Beach County, Jorge Labarga J., denied relief. Defendant appealed.

Holdings: The Supreme Court held that:

counsel's failure to investigate and present voluntary intoxication defense was not deficient assistance;

counsel's failure to present evidence in support of impaired capacity mitigator was not ineffective assistance;

counsel's failure to investigate and present defendant's poor school, military, and employment records as mitigation evidence was not ineffective assistance; and

counsel's retaining as penalty phase mental health experts two court-appointed doctors was not ineffective assistance.

Affirmed.

Attorneys and Law Firms

***462** Matthew D. Bavaro and Bradley M. Collins of Bradley M. Collins, P.A., Fort Lauderdale, FL, for Appellant.

Bill McCollum, Attorney General, Tallahassee, Florida, and Lisa-Marie Lerner and Leslie T. Campbell, Assistant Attorneys General, West Palm Beach, FL, for Appellee.

Opinion

PER CURIAM.

Leroy Pooler appeals an order of the circuit court denying his motion to vacate his first-degree murder conviction and sentence of death. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. For the reasons set forth in this opinion, we affirm the trial court's denial of **Pooler's** motion.

FACTS AND PROCEDURAL HISTORY

On direct appeal, this Court summarized the facts of this case as follows:

> **Leroy Pooler** was convicted of first-degree murder for the shooting death of his ex-girlfriend, Kim Wright Brown. He also was convicted of burglary and attempted first-degree murder with a firearm. The facts supporting these convictions are as follows. On January 28, 1995, Carolyn Glass, a long-time acquaintance of Kim Brown, told her that **Pooler** had said he was going to kill her because if he could not have her, no one else would. (Evidence showed that Kim Brown had begun seeing another man.) Two days later, **Pooler** knocked on the front door of the apartment where Kim and her younger brother, Alvonza Colson, lived with their mother. Seeing **Pooler** through the door window, Kim told him that she did not want to see him anymore. Alvonza opened the door halfway and asked **Pooler** what he wanted but would not let him in. When **Pooler** brandished a gun, Alvonza let go of the door and tried to run out the door, but he was shot in the back by **Pooler**. **Pooler** pulled Alvonza back into the apartment by his leg. Kim begged **Pooler** not to kill her brother or her and began vomiting into her hands. She suggested they take Alvonza to the hospital. **Pooler** originally agreed but then told Alvonza to stay and call himself an ambulance while **Pooler** left with Kim. However, rather than follow **Pooler** out the door, Kim shut and locked it behind him. Alvonza told Kim to run out the back door for her life while he stayed in the apartment to call for an ambulance. When he discovered that the telephone wires had been cut, he started for the back door, just as **Pooler** was breaking in through the front entrance.
>
> **Pooler** first found Alvonza, who was hiding in an area near the back door, but when he heard Kim yelling for help, he left Alvonza and continued after Kim. When he eventually

caught up with her, he struck her in the head with his gun, causing it to discharge. In front of numerous witnesses, he pulled her toward his car as she screamed and begged him not to kill her. When she fought against going in the car, **Pooler** pulled her back toward the apartment building and shot her several times, pausing once to say, "You want some more?" Kim had been shot a total of five times, including once ***463** in the head. **Pooler** then got into his car and drove away.

The jury recommended death by a vote of nine to three. The trial court found the following aggravators: (1) that the defendant had a prior violent felony conviction (contemporaneous attempted first-degree murder of Alvonza); (2) that the murder was committed during the commission of a burglary; and (3) that the murder was heinous, atrocious, or cruel. The trial court found as statutory mitigation that the crime was committed while **Pooler** was under the influence of extreme mental or emotional disturbance, but gave that finding little weight....

As nonstatutory mitigation, the trial court found the defendant's honorable service in the military and good employment record, as well as the fact that he was a good parent, had done specific good deeds, possessed certain good characteristics, and could be sentenced to life without parole or consecutive life sentences. The only mitigator given considerable weight was **Pooler's** honorable military service; the others were given some to little weight.... Concluding that each of the three aggravators standing alone would outweigh the mitigating evidence, the court sentenced **Pooler** to death.

Pooler *v. State,* 704 So.2d 1375, 1377 (Fla.1997). On direct appeal, this Court affirmed **Pooler's** convictions and sentences.[1]

1 On direct appeal, Pooler raised the following issues: (1) the prosecutor made improper comments during voir dire; (2) the trial court failed to instruct the jury on attempted first-degree felony murder; (3) the trial court erred in finding the heinous, atrocious, or cruel (HAC) aggravator; (4) the trial court erred in finding the prior violent felony aggravator; (5) Pooler lacked the capacity to appreciate the criminality of his conduct or to conform his conduct to the law; (6) Pooler was under extreme duress or the substantial domination of another person at the time the murder was committed; (7)-(11) the trial court erred in rejecting the nonstatutory mitigators, including extreme duress, good jail record/ability to adapt to prison life, low-normal intelligence, rehabilitable, and heated domestic dispute; (12) the record on appeal did not contain the presentence investigation (PSI) report relied upon by the trial court in rejecting nonstatutory mitigation; (13) the trial court erred in departing from the sentencing guidelines without issuing a written contemporaneous departure order for the offenses of attempted first-degree murder with a firearm and burglary of a dwelling while armed; (14) Florida's death penalty is unconstitutional; and (15) Pooler's death sentence is disproportionate.

Pooler subsequently filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850, in which he raised sixteen claims.[2] The trial court ***464** held an evidentiary hearing on three of them and subsequently denied relief on all claims.

2 In his postconviction motion, Pooler claimed the following: (1) trial counsel failed to investigate and present a voluntary intoxication defense; (2) trial counsel failed to properly investigate and present mitigation (lack of capacity, age, dull intelligence, mental health problems, intoxication, impoverished background, good jail record, good parent, and remorse); (3) trial counsel failed to investigate and present, and trial court failed to find, mitigation (good jail behavior, low IQ, and age); (4) the sentencing jury was misled by comments and instructions which diluted its sense of responsibility for sentencing; (5) the penalty phase jury instructions shifted the burden to Pooler to prove that death was inappropriate; (6) trial counsel failed to obtain an adequate mental health evaluation and failed to provide the necessary background information to the mental health consultants; (7) Pooler's sentence rests upon an unconstitutionally automatic aggravating circumstance (the felony murder aggravator); (8) the heinous, atrocious, or cruel (HAC) aggravator is vague and overbroad; (9) the cumulative effect of trial counsel errors denied Pooler effective assistance of counsel; (10) the sentencing court erred by failing to properly and timely impose a written sentence of death; (11) the rule prohibiting juror interviews is unconstitutional; (12) trial counsel failed to investigate the forensic evidence or retain a forensic expert; (13) the trial court erred in permitting the State to introduce gruesome photographs; (14) Pooler is innocent of the death penalty; (15) Florida's death penalty statute is unconstitutional because it fails to prevent the arbitrary and capricious imposition of the death penalty; (16) Pooler's convictions and death sentences were obtained in violation of *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

The trial court conducted an evidentiary hearing on claims one, two, and six.

ANALYSIS

Pooler raises two issues on appeal: (A) trial counsel provided constitutionally ineffective assistance; and (B) the trial court erred in summarily denying nine of his postconviction claims. We address these issues in turn.

A. Ineffective Assistance of Counsel

Pooler argues that his trial counsel was constitutionally ineffective for (1) failing to investigate and present a voluntary intoxication defense; (2) failing to investigate and present evidence of alcohol abuse or dependency in support of the impaired capacity mitigator; (3) failing to investigate and present Pooler's school, military, and employment records in mitigation; and (4) failing to retain adequate mental health experts and provide them with the necessary background information to render competent opinions. In *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court established a two-prong standard for determining whether counsel provided constitutionally ineffective assistance. First, a defendant must demonstrate that counsel's performance was deficient by pointing to specific acts or omissions of counsel that are "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687, 104 S.Ct. 2052; *see also Marshall v. State,* 854 So.2d 1235, 1247 (Fla.2003) ("Under *Strickland,* 'counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.' ") (quoting *Strickland,* 466 U.S. at 691, 104 S.Ct. 2052). Second, the defendant must establish prejudice by "show[ing] that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694, 104 S.Ct. 2052. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Id.* Because both prongs of the *Strickland* test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence but reviewing the circuit court's legal conclusions de novo. *See Sochor v. State,* 883 So.2d 766, 771-72 (Fla.2004).

1. Failure to Investigate and Present a Voluntary Intoxication Defense[3]

[3] Although the law has since changed, *see* § 775.051, Fla. Stat. (1999), voluntary intoxication was an available defense to negate specific intent at the time of the killing in this case. *See Gardner v. State,* 480 So.2d 91 (Fla.1985).

Pooler claims that defense counsel, Michael Salnick, was ineffective for failing to investigate and present a voluntary intoxication defense. At the evidentiary hearing, **Pooler** introduced evidence relating to his alcohol use. The evidence included a police report made by **Pooler** two to three hours before the murder alleging that someone stole $301 from him while he was asleep in his vehicle due to intoxication. Detective Frank Alonzo of the ***465** West Palm Beach Police Department, who made the police report, testified that although **Pooler** smelled of alcohol at the time he came to the police department, he did not appear intoxicated, did not slur his speech, and answered all questions. Because **Pooler** did not seem intoxicated, Detective Alonzo did not prevent him from getting into his car and driving after making the report. **Pooler** also presented two handwritten letters authored by his nephews, Brian and Darren Warren, attesting to **Pooler's** alcohol problem. Brian's letter stated, "On the morning of the shooting ... **Leroy** called me [and] told me he knew Kim had been killed but he could not remember what happened. He was very upset and it seemed he was still drunk." Both nephews stated that they would have testified at trial but were not contacted by **Pooler's** defense team. The postconviction trial court denied this claim because the evidence did not support a voluntary intoxication defense and because **Pooler** thwarted any possibility of raising this defense when he refused to admit to shooting Kim Brown.

We affirm the trial court's order. Although the evidence presented at the evidentiary hearing suggests that Pooler may have had a history of alcohol abuse and may have been drinking the night before and soon after the murder, none of the evidence establishes that he was intoxicated at the time of the murder. Indeed, the testimony of Detective Alonzo establishes that Pooler was not intoxicated just a few hours before the murder. Pooler presented no evidence that he became intoxicated between the time he left the police department and the time he arrived at Kim Brown's house. Accordingly, he failed to establish any reasonable basis upon which to assert the affirmative defense of voluntary intoxication. *See Reaves v. State,* 826 So.2d 932, 938-39,

n. 9 (Fla.2002) (holding that in order to successfully assert the defense of voluntary intoxication, the defendant must come forward with evidence of intoxication *at the time of the offense* sufficient to establish that he was unable to form the intent necessary to commit the crime charged).

Moreover, Salnick made a reasonable tactical decision not to pursue a voluntary intoxication defense. *See Rivera v. State,* 717 So.2d 477, 485 (Fla.1998) (holding that trial counsel made a reasonable tactical decision to forego a voluntary intoxication defense because "there was no evidence that Rivera was intoxicated *at the time of the murder* "). Salnick testified that he considered a possible voluntary intoxication defense but chose not to present it because Pooler could recall specific details regarding the day of the murder and because neither Pooler nor any of his family members mentioned that Pooler had a history of alcoholism or that he was intoxicated at the time of the murder.

Additionally, the trial court found, based on competent, substantial evidence, that Pooler refused to participate in any defense that required him to admit that he did the shooting. Counsel was thus prevented from asserting the voluntary intoxication defense. *See Rivera,* 717 So.2d at 485 (holding that counsel's performance was not deficient because "Rivera's unwavering professions of innocence short-circuited any credible voluntary intoxication defense during the guilt phase"); *Rose v. State,* 617 So.2d 291, 294 (Fla.1993) ("When a defendant preempts his attorney's strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made.") (quoting *Mitchell v. Kemp,* 762 F.2d 886, 889 (11th Cir.1985)). Pooler denies that he refused to admit to the killing. However, a memorandum from Salnick to Pooler on the eve of trial confirms that Pooler ultimately rejected a plea deal for a life sentence, refused ***466** to admit to shooting Kim, and directed Salnick to pursue a sufficiency of the evidence strategy. In light of this evidence, we defer to the trial court's factual finding and affirm its conclusion that Salnick was not ineffective in foregoing a voluntary intoxication defense because it would have undermined Pooler's chosen defense strategy. *See Freeman v. State,* 858 So.2d 319, 323 (Fla.2003) (holding that while the performance and prejudice prongs are mixed questions of law and fact subject to a de novo standard, deference is given to the trial court's factual findings which are supported by competent, substantial evidence).

Pooler failed to prove any deficiency in Salnick's performance in regard to this issue. In light of this failure, we need not address the prejudice prong. *See Strickland,* 466 U.S. at 697, 104 S.Ct. 2052 ("[T]here 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."); *Downs v. State,* 740 So.2d 506, 518 n. 19 (Fla.1999) (finding no need to address prejudice prong where defendant failed to establish deficient performance element).

2. Failure to Investigate and Present Evidence of Alcohol Abuse or Dependency in Support of the Impaired Capacity Mitigator

Pooler next argues that counsel was ineffective for failing to investigate and present evidence of his history of alcohol abuse and dependency in support of the impaired capacity mitigator. *See Stewart v. State,* 558 So.2d 416 (Fla.1990). As evidence, Pooler cites the police report he made hours before the murders, the testimony of Detective Alonzo, and the letters from his nephews, Brian and Darren Warren. In addition, Pooler's postconviction expert, Dr. Michael Brannon, testified that he diagnosed Pooler with alcohol dependency disorder and hepatitis C. The postconviction trial court denied this claim because Salnick conducted a reasonable investigation and successfully prevented the State from obtaining an instruction on the cold, calculated, and premeditated (CCP) aggravating circumstance by introducing evidence during the penalty phase that Pooler had been drinking two days before the murder when he threatened to kill Kim Brown.

We affirm the trial court's conclusion. First, Salnick's performance was not deficient. As stated earlier, Salnick conducted a reasonable investigation into Pooler's background. Neither Pooler nor his family indicated to Salnick that he had a substance abuse problem or that he had been drinking at the time of the shooting. However, Salnick discovered that Pooler had been drinking two days before the murder when he threatened to kill Kim Brown. He used this information during the penalty phase to prevent the State from obtaining an instruction on CCP. Further, Salnick testified at the evidentiary hearing that he chose not to introduce Pooler's police report during the penalty phase because it would open the door for the State to cross-examine Pooler regarding the fact that he had been with a prostitute when he passed out drunk and that she stole his money. This was a reasonable tactical decision made after a reasonable investigation; therefore, Salnick's performance was not deficient. *See Occhicone v. State,* 768

So.2d 1037, 1048 (Fla.2000) ("[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct."). Moreover, as discussed earlier, none of the evidence introduced by Pooler at the evidentiary hearing shows ***467** that he was intoxicated at the time of the murder. Therefore, any alleged failure on Salnick's part to investigate and present it at trial was not prejudicial.

3. Failure to Investigate and Present School, Military, and Employment Records in Mitigation

Pooler next claims that Salnick was ineffective for failing to investigate and present his school, military, and employment records in mitigation. According to Pooler, counsel could have used the information contained in these records to mitigate his sentence by showing that Pooler had dull intelligence and a troubled background. At the postconviction evidentiary hearing, Pooler's collateral counsel introduced his military, school, and employment records. Pooler's military records revealed that he was charged with at least nineteen different offenses on fifteen different occasions between October 1969 and February 1971 and that he was court-martialed for several of these offenses. His school records show that he was an average student in early elementary school, but that his grades grew progressively worse each year. Some of Pooler's teachers commented that he was "very slow" and "mischievous," that he "play[s] hooky," "does not attend school regularly," "is not interested in school," "need[s] guidance," and "may get with the wrong crowd easily." Pooler failed multiple grades and ultimately never graduated from high school. In addition, Pooler's employment records indicate that he had been employed as a refuse worker and quit without notice. Notwithstanding Salnick's failure to obtain these records, the postconviction trial court concluded that he conducted a reasonable investigation, noting that when written documentation was not available, Salnick found alternate means to corroborate Pooler's statements regarding his background (i.e., interviews with Pooler's family members).

We affirm the trial court's conclusions. Salnick conducted a reasonable investigation. His failure to obtain Pooler's records does not rise to the level of ineffective assistance. Pooler consistently represented to Salnick that he was an average student, graduated from high school, and was honorably discharged from the Marine Corps. To test the validity of Pooler's representations, Salnick's investigator, Marvin Jenne, traveled to Louisiana and interviewed members of Pooler's family. All of the family members Jenne located and interviewed corroborated Pooler's positive representations. Further, Jenne made an attempt, albeit unsuccessful, to obtain Pooler's school records. Based on Pooler's positive representations of himself which were substantiated by his family members, Salnick had no reason to believe Pooler's records would contain anything negative or mitigating. *See Rompilla v. Beard,* 545 U.S. 374, 383, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) ("[T]he duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste."). Therefore, he formed a reasonable trial strategy of presenting Pooler in a positive light.

Moreover, no prejudice resulted from counsel's choice of strategy. At trial, Salnick showed that Pooler had been a productive member of society and crime-free for fifteen years prior to the murder. He presented evidence that Pooler had served honorably in the military in Vietnam, reenlisted, raised a daughter, took care of his relatives, was a good parent, worked at the same job for eight years, and was well liked by his coworkers. Of all the mitigation presented, the trial court gave considerable weight only to Pooler's honorable ***468** military service. Had Salnick introduced Pooler's military, school, or employment records, he would have undermined Pooler's only significant mitigation. *See Reed v. State,* 875 So.2d 415, 437 (Fla.2004) ("An ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword."). Furthermore, Pooler's records would not have opened up mitigation leads sufficient to overcome the aggravation found by the trial court. Accordingly, counsel's failure to obtain these records does not undermine confidence in Pooler's death sentence.

4. Failure to Retain Adequate Mental Health Experts and Provide Them with the Necessary Background Information to Render Competent Opinions

Pooler next claims that counsel was ineffective for failing to retain adequate mental health experts and provide them with the necessary background information to render competent opinions. Specifically, Pooler argues that counsel rendered ineffective assistance by retaining as penalty phase

mental health experts two court-appointed doctors who evaluated Pooler solely for competency prior to trial and two psychiatrists who treated Pooler while he was in jail.

The record reveals that Drs. Stephen Alexander and Laurence Levine evaluated Pooler for competency prior to trial and testified at his competency hearing. At the pretrial competency hearing, Dr. Alexander questioned Pooler's ability to understand courtroom procedures and to communicate sufficiently with counsel, ultimately concluding that Pooler was not competent to stand trial. He estimated that Pooler's IQ was between 75 and 85 and found that Pooler was not suffering from any undue stress, mental illness, or personality disorder. Dr. Levine also expressed concern regarding Pooler's ability to assist his attorney in preparing a defense and in challenging the State's witnesses. He found Pooler to be of borderline intelligence and noted inconsistencies in the information Pooler gave him versus his test results. However, Dr. Levine ultimately determined that Pooler was competent to stand trial. Based on this testimony, the trial court determined that Pooler had an IQ of 80 and was competent to stand trial.

During the penalty phase, Salnick called Drs. Levine and Alexander as defense mental health experts. They provided the same information regarding the results of their competency evaluations as they did at Pooler's competency hearing. Dr. Alexander further opined that Pooler's capacity to appreciate the criminality of his conduct or to conform to the requirements of the law was not impaired. In addition, Salnick elicited testimony from Drs. Michael Armstrong and Jude Desormeau, who treated Pooler while in jail. Dr. Armstrong testified that Pooler was depressed, complained of hearing a voice in his head, stated that he had no reason to live, and felt like he was going to explode. He diagnosed Pooler as suffering from judgment disorder with emotional features. Dr. Desormeau testified that he examined Pooler while in jail because he was a suicide risk. He was not aware that Pooler claimed to be hearing voices but testified that Pooler was suffering from depression as a result of his murder charge.

At the postconviction evidentiary hearing, Pooler presented the testimony of Dr. Brannon, who tested Pooler for competency prior to the hearing and conducted a forensic mental health evaluation for the purpose of mitigation. Dr. Brannon ultimately concluded that Pooler was competent to proceed. However, Dr. Brannon testified that Pooler had a borderline retarded ***469** IQ of 75 and that he suffered neurological damage from head injuries. Pooler did not call any of his trial experts to testify at the evidentiary hearing. Following the hearing, the postconviction trial court denied this claim, concluding that the expert testimony presented by Salnick met the requirements of *Strickland* and *Ake v. Oklahoma,* 470 U.S. 68, 83, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) (holding that a defendant must have access to a "competent psychiatrist [or other mental health professional] who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense").

We affirm the trial court's denial of this claim. As explained earlier, Salnick reasonably relied on Pooler's corroborated representations regarding his scholastic and military background. *See Wiggins v. Smith,* 539 U.S. 510, 533, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) ("*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing."). Salnick communicated this information to the experts, and Pooler also gave the experts the same information during their evaluations of him. Furthermore, Salnick testified at the evidentiary hearing that he retained these experts because, given their neutrality, they would be more credible and difficult to impeach. This was a reasonable strategic decision. *See Occhicone,* 768 So.2d at 1048.

Even if we assume counsel's decision to forego further testing constituted deficient performance, Pooler failed to establish that any prejudice resulted from it. He presented no evidence that the defense experts were incompetent or that they failed to assist in the evaluation, preparation, and presentation of the defense. *See Jones v. State,* 845 So.2d 55, 67-68 (Fla.2003). Nor did Pooler identify anything of substance that a more in-depth psychoanalysis would have added. Dr. Brannon's finding that Pooler had neurological damage from head injuries was already indicated in Dr. Levine's evaluation. Also, Dr. Brannon's determination that Pooler had a borderline retarded IQ of 75 does not constitute a clear indication of actual mental retardation because it is within the range estimated by Dr. Alexander and is not substantially inconsistent with the trial court's finding that Pooler had an IQ of 80. Furthermore, because Pooler did not call any of his trial experts to testify at his postconviction hearing, he failed to demonstrate that they would have changed their opinions had they conducted more in-depth psychological evaluations or been provided with his records. Under these circumstances, a new sentencing proceeding is not mandated. *See State v. Sireci,* 502 So.2d 1221, 1224 (Fla.1987) ("[A] new sentencing hearing is mandated in cases which entail

psychiatric examinations so grossly insufficient that they ignore clear indications of either mental retardation or organic brain damage.").

B. Summarily Denied Claims

Pooler also asserts that the circuit court erred in summarily denying nine of his postconviction claims. We disagree and affirm the trial court's order. Generally, a defendant is entitled to an evidentiary hearing on a postconviction relief motion unless "(1) the motion, files, and records in the case conclusively show that the [defendant] is entitled to no relief, or (2) the motion or a particular claim is legally insufficient." *Freeman v. State,* 761 So.2d 1055, 1061 (Fla.2000); *accord* Fla. R.Crim. P. 3.850(d).[4] In such a case, ***470** "[t]he defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden." *Freeman,* 761 So.2d at 1061. However, when reviewing a court's summary denial of an initial rule 3.850 motion filed in a capital case, the Court will affirm the ruling only if the State has shown that the motion is legally flawed or that the record conclusively demonstrates that the defendant is entitled to no relief. *See Patton v. State,* 784 So.2d 380, 386 (Fla.2000). This Court must accept Pooler's allegations as true "to the extent they are not refuted by the record." *Peede v. State,* 748 So.2d 253, 257 (Fla.1999). We briefly address each claim.

4 Pooler's amended rule 3.850 motion was filed on March 13, 2000, before the rule was changed. *See generally* Fla. R.Crim. P. 3.851(a) ("This rule ... shall apply to all postconviction motions filed on or after October 1, 2001, by prisoners who are under sentence of death. Motions pending on that date are governed by the version of this rule in effect immediately prior to that date."). Therefore, we analyze Pooler's claims under the summary denial standard set forth in rule 3.850(d).

Age, Low IQ, and Good Jail Behavior Mitigators

Pooler asserts that the postconviction trial court erred in summarily denying his claim that his trial counsel failed to investigate and present, and the trial court failed to find, the age, low IQ, and good jail behavior mitigators. The postconviction trial court summarily denied this claim as procedurally barred because it was raised and rejected by this Court on direct appeal. We affirm the trial court's summary denial of this claim. *See Pooler,* 704 So.2d at 1379-80 (holding that the sentencing court's failure to find these mitigators was either not an abuse of discretion or harmless error); *see also Spencer v. State,* 842 So.2d 52, 60-61 (Fla.2003) (quoting *Smith v. State,* 445 So.2d 323, 325 (Fla.1983) ("Issues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack.")).

1. Misleading Comments and Jury Instructions

Pooler next argues that the postconviction trial court erred in summarily denying his claim that the jury was misled by (1) the trial court's repeated instructions that the jury's sentencing role was merely advisory; (2) the trial court's instructions and the State's argument which, Pooler claims, shifted the burden to Pooler to prove that death was an inappropriate sentence; and (3) the trial court's instructions that Pooler claims were unconstitutionally vague and allowed the jury to consider the murder in the course of a felony aggravator as an automatic aggravator. Pooler also argues that trial counsel was ineffective for failing to object to these comments and instructions. The postconviction trial court summarily denied these claims as both procedurally barred and legally insufficient.

We affirm the trial court's decision. Pooler's claims of prosecutorial misconduct and trial court error should have been raised on direct appeal. *See Rodriguez v. State,* 919 So.2d 1252, 1262 n. 7, 1280 (Fla.2006); *Occhicone,* 768 So.2d at 1040 n. 3. ("[C]laims challenging the validity of jury instructions should be raised on direct appeal, not on motions for postconviction relief."). Similarly, Pooler's claims regarding the adequacy of jury instructions are procedurally barred because they should have been raised on direct appeal. *See Thompson v. State,* 759 So.2d 650, 665 (Fla.2000). We will not consider such procedurally barred claims under the guise of ineffective assistance of counsel. *See Freeman,* 761 So.2d at 1067 (holding that claims that could have been raised on direct appeal cannot be relitigated under the guise of ineffective assistance of counsel). ***471** Moreover, Pooler's ineffectiveness claim for failure to object to these jury instructions is legally insufficient. The instructions were proper and were consistent with the standard jury instruction. *See Rodriguez,* 919 So.2d at 1280-81 (rejecting claims that jury instructions diluted the jury's responsibility for its sentencing role, shifted the burden to the defendant to prove that death was inappropriate, and allowed the jury to consider the murder in the course of

a felony aggravator as an automatic aggravator); *Griffin v. State,* 866 So.2d 1, 14 (Fla.2003) (rejecting claim that the murder in the course of a felony aggravating circumstance allows the jury to consider an automatic aggravator in recommending whether to impose a death sentence); *Sweet v. Moore,* 822 So.2d 1269, 1274 (Fla.2002) (rejecting claim that the standard jury instruction impermissibly shifted the burden to the defense to prove that death was not the appropriate sentence); *see also Cherry v. State,* 781 So.2d 1040, 1054 (Fla.2000) ("[C]ounsel cannot be deemed ineffective for failing to object to proper jury instructions.").

3. Counsel's Failure to Investigate Forensic Evidence and Obtain Proper Forensic Experts

Next, Pooler claims that the trial court erred in summarily denying his claim that trial counsel was ineffective for failing to investigate forensic evidence and for failing to obtain proper forensic experts. Pooler argues that he was prejudiced because a well-informed, independent medical expert could have opined that the victim died instantaneously and, thus, the heinous, atrocious, or cruel (HAC) aggravating factor would not have applied. The trial court summarily denied this claim as legally insufficient because Pooler failed to identify what evidence or expert opinion his trial counsel could have offered to show that the victim's death was instantaneous so as to refute the HAC finding.

We affirm the trial court's conclusion. This claim is legally insufficient because Pooler fails to identify what evidence or expert opinion his trial counsel could have offered to show that the victim's death was instantaneous. Moreover, even if forensic evidence could have shown that the victim's death was instantaneous, we would not strike the HAC aggravator. As we held on direct appeal, "the fear, emotional strain, and terror of the victim during the events leading up to the murder" support the trial court's HAC finding, "even where the victim's death was almost instantaneous." *See Pooler,* 704 So.2d at 1378.

4. Counsel's Failure to Object to the Introduction of Gruesome Photographs

Pooler further asserts that the trial court erred in summarily denying his claim that counsel rendered ineffective assistance by failing to object to the State's introduction of gruesome photographs. The postconviction trial court determined that this claim is legally insufficient because counsel raised a timely, albeit unsuccessful, objection to the admission of the photographs in question.

We affirm the trial court's decision. The record conclusively shows that Salnick's performance was not deficient because he challenged the admission of the photographs by written motion when they were offered into evidence by the State. Even if counsel had failed to sufficiently object, it is clear that no prejudice resulted because the trial court did not abuse its discretion in admitting the photographs. *See Pangburn v. State,* 661 So.2d 1182, 1187 (Fla.1995) ("[T]he admission of photographic evidence is within the trial judge's discretion and a trial judge's ruling on this ***472** issue will not be disturbed on appeal unless there is a clear showing of abuse."). Each photograph depicted a different wound and none appeared particularly gory. *See Rose v. State,* 787 So.2d 786, 794 (Fla.2001) ("[A]utopsy photographs, even when difficult to view, are admissible to the extent that they fairly and accurately establish a material fact and are not unduly prejudicial."); *Czubak v. State,* 570 So.2d 925, 928 (Fla.1990) (holding that photographs are admissible if they are "relevant and not so shocking in nature as to defeat the value of their relevance"); *see also Larkins v. State,* 655 So.2d 95, 98 (Fla.1995) (upholding the admission of photographs where they are relevant to "explain a medical examiner's testimony, to show the manner of death, the location of wounds, and the identity of the victim").

5. Juror Interviews

Next, Pooler argues that the trial court erred in summarily denying his claim that the rule prohibiting juror interviews is unconstitutional. The trial court summarily denied this claim, determining that it was both procedurally barred because it was not raised on direct appeal and meritless because Pooler failed to make a prima facie case of jury misconduct. We agree. This claim is procedurally barred because it should have been raised on direct appeal. *See Rodriguez,* 919 So.2d at 1262 n. 7. It is also legally insufficient as this Court has previously rejected similar constitutional challenges to Florida Rule of Professional Conduct 4-3.5(d)(4). *See Power v. State,* 886 So.2d 952, 957 (Fla.2004); *State v. Duncan,* 894 So.2d 817, 826 & n. 7 (Fla.2004); *Johnson v. State,* 804 So.2d 1218, 1224 (Fla.2001). Moreover, Pooler did not state a prima facie case of jury misconduct. *See Johnson,* 804 So.2d at 1225 ("[J]uror interviews are not permissible unless the moving party has made sworn allegations that, if true, would require

the court to order a new trial because the alleged error was so fundamental and prejudicial as to vitiate the entire proceeding [ ].”). Without more than what was pled, this claim is nothing more than an impermissible fishing expedition after a guilty verdict has been returned. *See Griffin v. State,* 866 So.2d 1, 20 (Fla.2003); *Arbelaez v. State,* 775 So.2d 909, 920 (Fla.2000).

6. Innocent of the Death Penalty

Pooler further contends that the trial court erred when it summarily denied his claim that he is innocent of the death penalty due to a lack of valid aggravating circumstances. The trial court summarily denied this claim because the record revealed that Pooler failed to demonstrate that none of the aggravators apply.

We affirm the trial court's summary denial of this claim. We determined the validity of the prior violent felony and HAC aggravators on direct appeal. *Pooler,* 704 So.2d at 1378-79, 1381. Pooler does not successfully challenge these aggravators in his postconviction motion. Therefore, Pooler fails to present “evidence that an alleged constitutional error implicates *all* of the aggravating factors found to be present by the sentencing body.” *Johnson v. Singletary,* 938 F.2d 1166, 1183 (11th Cir.1991).

7. Florida's Death Penalty is Unconstitutionally Vague

Pooler next asserts that the trial court erred in summarily denying his claim that Florida's capital sentencing scheme is unconstitutionally vague because it fails to provide a standard of proof for determining that the aggravating circumstances outweigh the mitigating circumstances and because the statute does not sufficiently define each aggravating circumstance. The trial court denied this claim as procedurally barred because Pooler unsuccessfully ***473** challenged the constitutionality of Florida's death penalty statute on direct appeal. We affirm the trial court's denial of this claim. *Pooler,* 704 So.2d at 1380-81; *see also Rodriguez,* 919 So.2d at 1262 n. 7 (holding that Rodriguez's claim concerning the constitutionality of the death penalty was procedurally barred because it was raised and rejected on direct appeal); *Muhammad v. State,* 603 So.2d 488, 489 (Fla.1992) (“Issues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack.”).

8. Florida's Death Penalty Statute Violates *Ring*

Pooler further contends that the trial court erred in summarily denying his claim that Florida's death penalty statute is unconstitutional in light of *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). We affirm the trial court's denial of this claim. *See Johnson v. State,* 904 So.2d 400, 412 (Fla.2005).

9. Cumulative Error

Lastly, Pooler argues that the trial court erred in summarily denying his claim that the number and types of error that occurred cumulatively prevented him from receiving a constitutionally adequate trial. This claim is legally insufficient. *See Griffin,* 866 So.2d at 22 (“[W]here individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error must fail.”); *accord Downs v. State,* 740 So.2d 506, 509 n. 5 (Fla.1999).

CONCLUSION

For the foregoing reasons, we affirm the circuit court's order denying Pooler's motion for postconviction relief.

It is so ordered.

LEWIS, C.J., and WELLS, ANSTEAD, PARIENTE, QUINCE, CANTERO, and BELL, JJ., concur.

All Citations

980 So.2d 460, 33 Fla. L. Weekly S81

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704 So.2d 1375
Supreme Court of Florida.

Leroy POOLER, Appellant,
v.
STATE of Florida, Appellee.

No. 87771.
|
Nov. 6, 1997.
|
Rehearing Denied Jan. 23, 1998.

Synopsis
Defendant was convicted of first-degree murder, burglary, and first-degree attempted murder. The Circuit Court, Palm Beach County, Virginia Gay Broome, J., sentenced defendant to death, and he appealed. The Supreme Court held that: (1) prosecutor's comment on meaning of presumption of innocence during voir dire was not improper; (2) contemporaneous conviction prior to sentencing qualified as previous convictions for purposes of sentencing; and (3) death penalty was not disproportionate.

Affirmed.

Shaw, J., concurred as to conviction, and in result only as to sentence.

Anstead, J., concurred in part and dissented in part and filed opinion, in which Kogan, C.J., concurred.

Attorneys and Law Firms

***1376** Michael D. Lebedeker, West Palm Beach, for Appellant.

Robert A. Butterworth, Attorney General, and Sara D. Baggett, Assistant Attorney General, West Palm Beach, for Appellee.

Opinion

PER CURIAM.

We have on appeal the judgment and sentence of the trial court imposing the death penalty upon **Leroy Pooler**. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

***1377** **Leroy Pooler** was convicted of first-degree murder for the shooting death of his ex-girlfriend, Kim Wright Brown. He also was convicted of burglary and attempted first-degree murder with a firearm. The facts supporting these convictions are as follows. On January 28, 1995, Carolyn Glass, a long-time acquaintance of Kim Brown, told her that **Pooler** had said he was going to kill her because if he could not have her, no one else would. (Evidence showed that Kim Brown had begun seeing another man.) Two days later, **Pooler** knocked on the front door of the apartment where Kim and her younger brother, Alvonza Colson, lived with their mother. Seeing **Pooler** through the door window, Kim told him that she did not want to see him anymore. Alvonza opened the door halfway and asked **Pooler** what he wanted but would not let him in. When **Pooler** brandished a gun, Alvonza let go of the door and tried to run out the door, but he was shot in the back by **Pooler**. **Pooler** pulled Alvonza back into the apartment by his leg. Kim begged **Pooler** not to kill her brother or her and began vomiting into her hands. She suggested they take Alvonza to the hospital. **Pooler** originally agreed but then told Alvonza to stay and call himself an ambulance while **Pooler** left with Kim. However, rather than follow **Pooler** out the door, Kim shut and locked it behind him. Alvonza told Kim to run out the back door for her life while he stayed in the apartment to call for an ambulance. When he discovered that the telephone wires had been cut, he started for the back door, just as **Pooler** was breaking in through the front entrance.

Pooler first found Alvonza, who was hiding in an area near the back door, but when he heard Kim yelling for help, he left Alvonza and continued after Kim. When he eventually caught up with her, he struck her in the head with his gun, causing it to discharge. In front of numerous witnesses, he pulled her toward his car as she screamed and begged him not to kill her. When she fought against going in the car, Pooler pulled her back toward the apartment building and shot her several times, pausing once to say, "You want some more?" Kim had been shot a total of five times, including once in the head. Pooler then got into his car and drove away.

The jury recommended death by a vote of nine to three. The trial court found the following aggravators: (1) that the defendant had a prior violent felony conviction (contemporaneous attempted first-degree murder of Alvonza); (2) that the murder was committed during the commission of a burglary; and (3) that the murder was heinous, atrocious, or[1] cruel. The trial court found as statutory

mitigation that the crime was committed while Pooler was under the influence of extreme mental or emotional disturbance, but gave that finding little weight. The court found the following proposed statutory mitigators had not been established: (1) the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired; (2) the defendant acted under extreme duress or under the substantial domination of another person; and (3) the defendant's age (he was 47).

1 The sentencing order uses the conjunction "and."

As nonstatutory mitigation, the trial court found the defendant's honorable service in the military and good employment record, as well as the fact that he was a good parent, had done specific good deeds, possessed certain good characteristics, and could be sentenced to life without parole or consecutive life sentences. The only mitigator given considerable weight was Pooler's honorable military service; the others were given some to little weight. The trial court expressly rejected as unestablished nonstatutory mitigation that Pooler has a good jail record and an ability to adapt to prison life; that he has low normal intelligence; that he has mental health problems; that he is rehabilitable; that the homicide was the result of a heated domestic dispute; and that he is unlikely to endanger others and will adapt well to prison. Concluding that each of the three aggravators standing alone would outweigh the mitigating evidence, the court sentenced Pooler to death.

Pooler raises fifteen issues in this appeal. As his first argument, he contends that the prosecutor made an improper comment ***1378** during voir dire about the presumption of innocence afforded criminal defendants when he said to a prospective juror:

> Now, as we sit here, Mr. Pooler is presumed to be innocent.... That doesn't mean that he is innocent, but you have to presume that.

We disagree with Pooler's characterization of the comment. The prosecutor's statement was not an improper statement of the law, nor did it constitute an expression of the prosecutor's personal belief in Pooler's guilt.

Second, Pooler claims that the trial court erred in failing to instruct the jury on attempted first-degree felony murder in the count charging him with attempted first-degree murder with a firearm. Acknowledging that this Court in *State v. Gray,* 654 So.2d 552 (Fla.1995), held that there is no crime of attempted felony murder in Florida, Pooler nevertheless argues that had the jury been so instructed, his attempted first-degree murder conviction might have been based on that theory, and then that conviction as well as the two aggravators based on that conviction would have been struck down on the basis of *Gray.* First, defense counsel did not request an instruction on attempted felony murder. Thus, the issue is waived. Moreover, the argument makes little sense. Pooler was not entitled to an instruction on a non-existent crime.

Third, Pooler argues that the trial court erred in finding that the murder of Kim Brown was heinous, atrocious, or cruel (HAC). He relies on *Lewis v. State,* 398 So.2d 432, 438 (Fla.1981), in which this Court held that "a murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murders, is as a matter of law not heinous, atrocious or cruel." Pooler contends that the shooting death of Kim Brown was not accompanied by any additional acts that would set it apart from the norm of premeditated murders. In further support of his argument, Pooler also relies on *Bonifay v. State,* 626 So.2d 1310 (Fla.1993), wherein we held that the fact that the shooting victim begged for his life or received multiple gunshot wounds was insufficient to establish the HAC aggravator in the absence of evidence that the defendant intended to cause the victim unnecessary and prolonged suffering. However, we have also held that the fear, emotional strain, and terror of the victim during the events leading up to the murder may be considered in determining whether this aggravator is satisfied, even where the victim's death was almost instantaneous. *James v. State,* 695 So.2d 1229 (Fla.), *petition for cert. filed,* No. 97-6104 (U.S. Sept. 18, 1997); *Preston v. State,* 607 So.2d 404, 409-10 (Fla.1992); *Rivera v. State,* 561 So.2d 536, 540 (Fla.1990); *Adams v. State,* 412 So.2d 850, 857 (Fla.1982). Moreover, the victim's mental state may be evaluated for purposes of this determination in accordance with a common-sense inference from the circumstances. *Swafford v. State,* 533 So.2d 270, 277 (Fla.1988). In this case, the record contains evidence over and above the fact that the victim pleaded for her life and received multiple gunshot wounds. Kim Brown learned of Pooler's threat to kill her some two days before she was killed, giving her ample time to ponder her fate. Any doubt she may have had about the sincerity of Pooler's threat must have been dispelled when he visited her apartment that morning with a gun, forced his way in, and shot her fleeing brother in the back. One need not speculate too much about what was going through Kim Brown's mind during this time, as her fear was such that it caused her to vomit. Even after Kim succeeded in locking Pooler out of the apartment, he

broke his way back in, whereupon she and her brother ran out of the apartment in an effort to escape. Once he caught up with Kim, Pooler struck her in the head with his gun and dragged her to his car as she screamed and begged for him not to kill her. Pooler's final words to her before killing her were, "Bitch, didn't I tell you I'd kill you?" and "You want some more?" We conclude that the circumstances of the victim's death support the trial court's finding that the HAC aggravator had been established.

Pooler's fourth claim is that the trial court erred in finding that the prior violent felony aggravator had been established where the underlying felony (in this case, the attempted murder of Alvonza Colson) was committed contemporaneously with the capital ***1379** felony. However, as Pooler concedes, we have rejected this argument in the past. Contemporaneous convictions prior to sentencing can qualify as previous convictions of violent felony and may be used as aggravating factors in cases where the contemporaneous crimes were committed upon separate victims. *E.g., Windom v. State,* 656 So.2d 432, 439 (Fla.1995); *Zeigler v. State,* 580 So.2d 127, 129 (Fla.1991); *Correll v. State,* 523 So.2d 562, 568 (Fla.1988); *Lucas v. State,* 376 So.2d 1149, 1152-53 (Fla.1979). We therefore find no error.

Fifth, Pooler challenges the trial court's finding that he had not established that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.[2] Our review of the record reveals that it contains competent substantial evidence to support the trial court's rejection of this mitigating circumstance. *See Nibert v. State,* 574 So.2d 1059, 1062 (Fla.1990) (trial court may reject proposed mitigating factor if record contains competent substantial evidence to support rejection). There was no evidence that Pooler's capacity either to appreciate the criminality of his conduct or conform his conduct to the law was impaired at the time of Kim Brown's murder. Although Pooler presented expert testimony that his performance on various intelligence and cognitive tests was below-average to borderline, one of his own experts testified on cross-examination that in his opinion, Pooler's capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law was not impaired. There was also evidence revealing that Pooler was sufficiently intelligent to graduate from high school, receive an honorable discharge after six years of service in the Marine Corps, and hold down the same job for some seven years.

2 § 921.141(6)(f), Fla. Stat. (1995).

Sixth, Pooler asserts that the trial court erred in finding that Pooler had failed to establish that he was under extreme duress or under the substantial domination of another person at the time the murder was committed.[3] In *Toole v. State,* 479 So.2d 731, 734 (Fla.1985), we stated that "duress" refers not to internal pressures but rather to external provocations such as imprisonment or the use of force or threats. There was no evidence presented to support Pooler's assertion that he acted under extreme duress at the time of the murder. The fact that his former girlfriend had been seeing another man, even if it caused Pooler to become distraught, simply does not qualify as external provocation for purposes of this statutory mitigator.

3 § 921.141(6)(e), Fla. Stat. (1995).

The next five claims challenge the trial court's rejection of various nonstatutory mitigators requested by Pooler. In rejecting Pooler's proposed good jail record and demonstrated ability to adapt to prison life, the trial court referred solely to the testimony of Deputy Sheriff Arthur Rack, a classification officer at the Palm Beach County Jail where Pooler was housed prior to and during his trial. Specifically, the trial court relied on Rack's testimony that Pooler's classification file for that year contained a single disciplinary report for threatening another inmate. While the decision as to whether a particular mitigating circumstance is established lies with the judge, there must be competent substantial evidence to support that determination. *Stano v. State,* 460 So.2d 890, 894 (Fla.1984). We agree with Pooler that Rack's testimony regarding the reported threat[4] does not constitute competent substantial evidence to support the trial court's rejection of this particular nonstatutory mitigation. According to Rack, he did not personally investigate the incident and the report was never brought to a hearing or otherwise concluded because of "manpower shortage." Rack further testified that based upon the absence of any other reported incidents in Pooler's file, it could be presumed that he was a well-behaved inmate. Because the trial court based its finding solely on the uninvestigated report, we conclude that it was an abuse of discretion to reject this particular mitigation. However, in rejecting other proposed nonstatutory mitigation, the trial court referred to Pooler's ***1380** presentence investigation (PSI) report, which revealed that Pooler had been arrested about twenty-six times between 1972 and 1994, had served five sentences in Louisiana between 1975 and 1988 for aggravated assault, aggravated assault with a deadly weapon, battery, and resisting an officer, and was placed on probation

for a 1994 aggravated assault charge in Florida. The PSI report not only renders the trial court's above error harmless, but it also constitutes competent substantial evidence to support the trial court's finding that Pooler failed to establish both that he is rehabilitable and that he is unlikely to endanger others and would adapt well to prison. Thus, there was no abuse of discretion as to the rejection of those two proposed mitigating factors.

4 The report was not admitted into evidence.

Pooler also takes issue with the trial court's rejection of his low-normal intelligence as nonstatutory mitigation. The trial court found that this was not established as mitigation because although his I.Q. tested at 80, Pooler's functional level was higher, as evidenced by his education, military service, and employment record. We find no abuse of discretion in the trial court's ruling.

The trial court further found that Pooler had not established that the murder was the result of a heated domestic dispute. Again, we find no abuse of discretion. Although the evidence established that Pooler had had a romantic relationship with Kim Brown, that relationship had ended. Nor was there any evidence the two had been in the middle of a heated dispute at the time of the murder. In any event, the trial court took into account Pooler's subjective view of his relationship with the victim when finding that Pooler was under the influence of extreme mental or emotional disturbance at the time of the murder.

Issue twelve, in which Pooler claims a denial of due process because the record on appeal did not contain the PSI report relied upon by the trial court in rejecting nonstatutory mitigation, is now moot because the record has since been supplemented.

The thirteenth issue we address is Pooler's claim that the trial court erred in departing from the sentencing guidelines for the offenses of attempted first-degree murder with a firearm and burglary of a dwelling while armed without issuing a written contemporaneous departure order. In *Padilla v. State,* 618 So.2d 165, 170 (Fla.1993), we reiterated that a sentencing judge must set forth his or her departure reasons in writing at the time of sentencing and cannot do so after the sentence has been imposed. However, we did not state that these written reasons had to be contained in an order. In this case, the sentencing guidelines scoresheet contained a section entitled "Reasons for Departure," under which the following language was handwritten: "Defendant has an unscored capital murder conviction arising from the same set of circumstances." The sentencing guidelines scoresheet was signed and dated February 23, 1996, the same day that Pooler was sentenced for the noncapital offenses. This was the same reason given orally by the trial judge at Pooler's sentencing. We therefore find no error.

Fourteenth, Pooler challenges the constitutionality of Florida's death penalty on numerous grounds. Specifically, he argues that the death penalty in Florida, both facially and as applied, is unconstitutional for the following reasons: (1) the standard jury instruction for the felony murder aggravator fails to limit the application of the death penalty and creates a presumption of death for felony murders; (2) permitting the jury to find aggravators by majority vote violates article I, sections 9, 16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution; (3) the lack of judicial standards for ensuring competent capital defense representation in cases where the attorney is court-appointed leads to uneven application of the law; (4) the ambiguous role of the trial judge in a capital case (who on the one hand is largely bound by the jury's recommendation but on the other is supposed to be the ultimate sentencer) permits circumvention of constitutional errors because special verdicts are not required where multiple homicide theories are submitted to the jury and because the jury is not required to reveal what aggravating and mitigating circumstances were found; (5) the trial judge was selected by a racially discriminatory ***1381** system (none of Broward County's forty-three circuit judges is black, despite a 13.5% representation in the county's population); (6) appellate review is no longer heightened; (7) the aggravating statutory factors are not interpreted in accordance with the rule of lenity but instead are very broadly interpreted against the defendant; (8) the contemporaneous objection rule institutionalizes disparate application of the law in capital sentencing; (9) the lack of special verdicts makes it impossible for a trial court to know what aggravating and mitigating circumstances the jury found; and (10) electrocution is cruel and unusual punishment in light of evolving standards of decency and the availability of less cruel but equally effective methods of execution. We have previously rejected most of these claims as meritless. *See Hunter v. State,* 660 So.2d 244, 252-53 (Fla.1995) (rejecting claims (1) and (6) above), *cert. denied,* 516 U.S. 1128, 116 S.Ct. 946, 133 L.Ed.2d 871 (1996); *Fotopoulos v. State,* 608 So.2d 784, 794 n. 7 (Fla.1992) (rejecting claims (3), (4), (8), (9), and (10) above). Likewise, we find challenges (2), (5), and (7) to be without merit.

Finally, we address Pooler's claim that the death sentence is disproportionate in this case, where the evidence showed that he and the victim had a domestic relationship. We disagree. We have never approved a per se "domestic dispute" exception to the imposition of the death penalty. As we explained in *Spencer v. State,* 691 So.2d 1062 (Fla.1997), *cert. denied,* 522 U.S. 884, 118 S.Ct. 213, 139 L.Ed.2d 148 (1997), there have been cases involving domestic disputes in which we struck the cold, calculated, and premeditated (CCP) aggravator on the basis that the heated passions involved negated the "cold" element of CCP.[5] However, our reason for reversing the death penalty in those cases was that the striking of that aggravator rendered the death sentence disproportionate in light of the overall circumstances. *E.g., White v. State,* 616 So.2d 21 (Fla.1993); *Santos v. State,* 591 So.2d 160 (Fla.1991); *Douglas v. State,* 575 So.2d 165 (Fla.1991); *Farinas v. State,* 569 So.2d 425 (Fla.1990); *see also Wright v. State,* 688 So.2d 298 (Fla.1996) (finding death sentence disproportionate where aggravating circumstances of prior violent felony and commission during a burglary were all related to defendant's ongoing struggle with the victim and evidence in mitigation was copious); *Nibert,* 574 So.2d 1059 (death sentence vacated as disproportionate in light of all the mitigating evidence that should have been found where sole aggravating circumstance was HAC). Indeed, we have upheld the death penalty as proportionate in a number of cases where the victim had a domestic relationship with the defendant. *See Spencer; Cummings-El v. State,* 684 So.2d 729 (Fla.1996), *cert. denied,* 520 U.S. 1277, 117 S.Ct. 2460, 138 L.Ed.2d 216 (1997); *Henry v. State,* 649 So.2d 1366 (Fla.1994); *Porter v. State,* 564 So.2d 1060 (Fla.1990). In *Spencer,* we affirmed the defendant's death sentence for the murder of his wife where the trial court found the aggravating circumstances of prior violent felony conviction and HAC and a number of mitigating circumstances, both statutory and nonstatutory. In this case, the established mitigation was similar to that in *Spencer* but there was also the additional aggravator that the murder was committed during the commission of a felony. Thus, under the circumstances of this case and in comparison to other death cases, we cannot say that the death sentence is disproportionate.[6]

5 Although the CCP aggravator was not found in this case, the evidence does not even suggest that Kim Brown was killed during a heated domestic dispute or in a sudden fit of rage. To the contrary, Pooler had previously announced to a mutual acquaintance his intention to kill Kim Brown. There was no evidence that there had been *any* exchange of words between Pooler and Kim Brown on the day of the murder.

6 This case is clearly distinguishable from *Farinas v. State,* 569 So.2d 425 (Fla.1990), in which the defendant attacked only the victim. Here, Pooler not only killed the victim but also shot her brother in the back as he was attempting to flee.

The convictions and sentences of **Leroy Pooler** are hereby affirmed.

It is so ordered.

***1382** OVERTON, GRIMES, HARDING and WELLS, JJ., concur.

SHAW, J., concurs as to conviction, and concurs in result only as to sentence.

ANSTEAD, J., concurs in part and dissents in part with an opinion in which KOGAN, C.J., concurs.

ANSTEAD, Justice, concurring in part and dissenting in part.
I differ only with the majority's resolution of the issue of proportionality. On that issue, I would hold that our decision in a case involving virtually identical facts, *Farinas v. State,* 569 So.2d 425 (Fla.1990), mandates the imposition of a life sentence here.

In *Farinas,* the defendant confronted his former girlfriend in a setting similar to that involved herein:

> On November 25, 1985, the victim and her sister drove their father to work. Farinas was waiting outside the home and followed the car. Farinas continued to follow the car after the two women dropped their father off at work and tried several times to force the victim's car off the road, finally succeeding in stopping her vehicle. Farinas then approached the victim's car and expressed anger at the victim for reporting to the police that he was harrassing her and her family.
>
> When the victim's sister urged her to drive away, Farinas leaned into the vehicle and removed the keys from the ignition, ordered the victim out of the vehicle, and guided her by the arm to his car. After returning the keys to the victim's sister, Farinas drove away with the victim in his car despite the pleas of the victim and her sister. When Farinas stopped the car at a stoplight near the Palmetto Expressway,

> the victim jumped out of the car and ran, screaming and waving her arms for help. Farinas also jumped from the car and fired a shot from his pistol which hit the victim in the lower middle back. According to the medical examiner, this injury caused instant paralysis from the waist down. Farinas then approached the victim as she lay face down and, after unjamming his gun three times, fired two shots into the back of her head.
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> ....
>
> ... Evidence introduced at trial established that Farinas ignored the victim's pleas for mercy. The fact that the victim jumped from the car and ran from Farinas while screaming for help indicates that the victim was in frenzied fear for her life. As noted by the trial court, after Farinas paralyzed the victim from the waist down with a gunshot through her spine, he approached her and fired two shots into the back of her head after unjamming the gun three times. The victim was fully conscious during the time he unjammed the gun and was aware of her impending demise from the defendant.

Id. at 427-31. Despite these circumstances, this Court concluded that the death penalty should not be imposed because the defendant acted under the influence of extreme mental or emotional disturbance:

> During the two-month period after the victim moved out of Farinas' home, he continuously called or came to the home of the victim's parents where she was living and would become very upset when not allowed to speak with the victim. He was obsessed with the idea of having the victim return to live with him and was intensely jealous, suspecting that the victim was becoming romantically involved with another man. *See Kampff v. State,* 371 So.2d 1007 (Fla.1979). We find it significant, also, that the record reflects that the murder was the result of a heated, domestic confrontation. *Wilson v. State,* 493 So.2d 1019 (Fla.1986). Therefore, although we sustain the conviction for the first-degree murder of Elsidia Landin and recognize that the trial court properly found two aggravating circumstances to be applicable, we conclude that the death sentence is not proportionately warranted in this case. *Wilson; Ross v. State,* 474 So.2d 1170 (Fla.1985).

Id. at 431. In addition to murder, Farinas was also convicted and sentenced for two other contemporary violent felonies arising from the same incident: armed burglary and armed kidnapping, just as Pooler has been ***1383** convicted of the wounding of the victim's brother here.

Pooler cites to the trial court's refusal to follow our holding in *Farinas* that the circumstance of extreme emotional disturbance is entitled to significant weight. Instead, he notes that the trial court refused to consider the broken personal relationship between the parties on the basis that "women are entitled to the same protection of the law as anyone else." It is apparent that the trial court, in an apparent effort to vindicate women's rights by imposing the death penalty on Pooler, has misconstrued our prior decisions concerning the proper consideration of extreme emotional disturbance in determining an appropriate penalty. *See, e.g., Farinas.*

This Court has emphatically held that there is no "domestic relations" exception to the death penalty. See *Spencer v. State,* 691 So.2d 1062 (Fla.1996). However, just as emphatically, this Court has repeatedly held that the presence of an extreme emotional disturbance in a domestic encounter should be given significant weight; and we have repeatedly noted the prevalence and significance of such disturbances in murders occurring in domestic relations settings. *Wright v. State,* 688 So.2d 298 (Fla.1996); *Wilson v. State,* 493 So.2d 1019 (Fla.1986); *Ross v. State,* 474 So.2d 1170 (Fla.1985); *Kampff v. State,* 371 So.2d 1007 (Fla.1979). Indeed, Justice Rosemary Barkett, Florida's first, and, to date, only woman Supreme Court Justice, has traced this Court's treatment of this issue in great detail:

> I do not suggest that there is an "unrequited love" exception to the death penalty. Nonetheless, this Court consistently has accepted as substantial mitigation the inflamed passions and intense emotions of such situations. In almost every other case where a death sentence arose from a lovers' quarrel or domestic dispute, this Court has found cause to reverse the death sentence, regardless of the number of aggravating circumstances found, the brutality involved, the level of premeditation, or the jury recommendation. *See Blakely v. State,* 561 So.2d 560 (Fla.1990) (death penalty disproportional despite finding of heinous, atrocious, or cruel, and cold, calculated, and premeditated); *Amoros v. State,* 531 So.2d 1256, 1261 (Fla.1988); *Garron v. State,* 528 So.2d 353, 361 (Fla.1988); *Fead v. State,* 512 So.2d 176, 179 (Fla.1987), *receded from on other grounds, Pentecost v. State,* 545 So.2d 861, 863 n. 3 (Fla.1989); *Irizarry v. State,* 496 So.2d 822, 825-26 (Fla.1986); *Wilson v. State,* 493 So.2d 1019, 1023 (Fla.1986); *Ross v. State,* 474 So.2d 1170, 1174 (Fla.1985); *Herzog v. State,* 439 So.2d 1372, 1381 (Fla.1983); *Blair v. State,* 406 So.2d 1103, 1109 (Fla.1981); *Phippen v. State,* 389 So.2d 991 (Fla.1980); *Kampff v. State,* 371 So.2d 1007 (Fla.1979); *Chambers v. State,* 339 So.2d 204 (Fla.1976);

Halliwell v. State, 323 So.2d 557 (Fla.1975); *Tedder v. State,* 322 So.2d 908 (Fla.1975); *cf. Hamilton v. State,* 547 So.2d 630 (Fla.1989) (aggravating circumstances and judgment of guilt reversed, remanded for new trial). The Court has even reversed death sentences where, as in Porter's case, the defendant murdered two people during the same violent outburst. *See Garron; Wilson; Phippen; cf. Hamilton.* Generally when we have affirmed death sentences in analogous situations, we have noted that the defendants had prior, unrelated convictions of violent felonies. *See Hudson v. State,* 538 So.2d 829 (Fla.) (defendant was on community control for sexual battery when he committed the murder), *cert. denied,* 493 U.S. 875, 110 S.Ct. 212, 107 L.Ed.2d 165 (1989); *Lemon v. State,* 456 So.2d 885 (Fla.1984) (defendant committed murder shortly after serving prison sentence for assault with intent to commit first-degree murder), *cert. denied,* 469 U.S. 1230, 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985); *Williams v. State,* 437 So.2d 133 (Fla.1983) (defendant had been convicted of aggravated assault, and was on parole for possession of firearm by a convicted felon, when he committed the murder), *cert. denied,* 466 U.S. 909, 104 S.Ct. 1690, 80 L.Ed.2d 164 (1984); *King v. State,* 436 So.2d 50 (Fla.1983) (defendant had a prior conviction of manslaughter for killing a woman with an axe), *cert. denied,* 466 U.S. 909, 104 S.Ct. 1690, 80 L.Ed.2d 163 (1984). There is no finding that Porter had any ***1384** prior, unrelated violent felony convictions before this case arose.

Porter v. State, 564 So.2d 1060, 1065 (Fla.1990) (Barkett, J., concurring in part and dissenting in part).

This does not mean that spouses, children, siblings, parents or intimate friends are entitled to less protection of the law. It does mean, however, that the extreme mental or emotional breakdowns that often occur in such relationships cannot be ignored or given no weight in determining whether the crime is among the worst of the worst and "the most aggravated and the least mitigated" for which the death penalty is reserved. *State v. Dixon,* 283 So.2d 1 (Fla.1973). As Justice Barkett in *Porter* has previously documented, this Court has invariably concluded that killings occurring under the "inflamed passions and intense emotions of such situations" do not fall into that extreme category, even where "the defendant murdered two people during the same violent outburst."

As noted above, this case is almost identical to *Farinas.* Indeed, the only significant difference in the two cases is that there was *no nonstatutory mitigation* found in *Farinas,* while there is extensive nonstatutory mitigation present here. This mitigation is briefly described by the majority:

> As nonstatutory mitigation, the trial court found the defendant's honorable service in the military and good employment record, as well as the fact that he was a good parent, had done specific good deeds, possessed certain good characteristics, and could be sentenced to life without parole or consecutive life sentences. The only mitigator given considerable weight was Pooler's honorable military service; the others were given some to little weight. The trial court expressly rejected as unestablished nonstatutory mitigation that Pooler has a good jail record and an ability to adapt to prison life; that he has low normal intelligence; that he has mental health problems; that he is rehabilitable; that the homicide was the result of a heated domestic dispute; and that he is unlikely to endanger others and will adapt well to prison.

Majority op. at 1377. Hence, Pooler's plea for a life sentence is supported not only by our prior treatment of similar cases like *Farinas,* but also by the presence of substantial mitigation not found in *Farinas.*

KOGAN, C.J., concurs.

All Citations

704 So.2d 1375, 22 Fla. L. Weekly S697

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