IN THE
SUPREME COURT OF THE UNITED STATES
No_____

JOSE FUENTES
Petitioner

v.

STATE OF FLORIDA
Respondent

APPENDIX

APPENDIX
A

F2
A

(B)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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February 12, 2021

Clerk - Southern District of Florida
U.S. District Court
400 N MIAMI AVE
MIAMI, FL 33128-1810

Appeal Number: 20-13181-A
Case Style: Jose Fuentes v. Secretary, Department of Corr., et al
District Court Docket No: 1:18-cv-22620-DPG

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Denise E. O'Guin, A
Phone #: (404) 335-6188

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-13181-A

JOSE FUENTES,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

ORDER:

Jose Fuentes is a Florida prisoner serving a life sentence for the first-degree murder of his wife and mother-in-law. He seeks a certificate of appealability ("COA") to appeal the district court's denial of his *pro se* 28 U.S.C. § 2254 petition. In order to obtain a COA, Fuentes must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). He satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation marks omitted). He has failed to make the requisite showing.

In Claims 1 through 3, Fuentes argued that counsel failed to call Dr. Manuel Garcia, Lorenza Cunningham, and Joe Manny Castro. The state court reasonably rejected these claims

because (1) Dr. Garcia last saw Fuentes 11 months before the murders and could not testify to his mental state during the relevant period; (2) Cunningham's testimony would have been cumulative and potentially harmful; and (3) Castro's testimony would have been cumulative. Reasonable jurists would not debate these rulings.

In Claims 4 and 8, Fuentes argued that trial and appellate counsel failed to challenge the trial court's decision to allow a non-English-speaking juror to remain on the jury. The state and district courts reasonably rejected these claims because the trial court and the parties questioned the juror several times throughout three days of jury selection and were satisfied with her command of the English language.

In Claim 5, Fuentes argued that trial counsel failed to object to the state's misconduct in threatening to call his son to identify the victims; he was forced to stipulate to the identity of the victims; and by stipulating, counsel was prevented from cross-examining the medical examiner. The state court reasonably rejected this claim because there is no evidence that the state threatened to call Fuentes' son or that Fuentes was forced to stipulate. Moreover, counsel did not cross-examine the medical examiner because the victims' cause of death was not at issue.

In Claim 6, Fuentes argued that trial and appellate counsel failed to challenge the trial court's decision to allow the state to introduce a competency question at trial. Reasonable jurists would not debate the denial of this claim because, given the defense's evidence on sanity, the state was entitled to ask Dr. Heather Holmes questions about the MCMI and MMPI-2 tests, never mentioned Fuentes' competency, and only asked Dr. Holmes whether she felt that he had faked certain answers.

In Claim 7, Fuentes argued that appellate counsel failed to raise an argument that the state failed to prove premeditation. Reasonable jurists would not debate the denial of this claim, as the

evidence was sufficient. Moreover, the jury was not required to accept the defense expert's testimony regarding Fuentes' sanity. His own expert could only say that he might have been insane. Thus, the issues of premeditation and the experts' credibility were properly submitted to the jury.

In Claim 9, Fuentes argued that appellate counsel failed to challenge the trial court's refusal to discharge trial counsel. The trial court conducted an adequate *Nelson v. State*, 274 So. 2d 256 (Dist. Ct. App. 1973) inquiry at both pretrial hearings and reasonably concluded that counsel had not rendered ineffective assistance. Accordingly, appellate counsel had no basis to argue that the trial court had violated Fuentes' constitutional rights, and reasonable jurists would not debate the denial of this claim.

In Claim 10, Fuentes argued that appellate counsel failed to challenge the trial court's denial of his motion for mistrial based on his sister's testimony regarding his infidelity. Reasonable jurists would not debate the denial of this claim because the testimony was probative, and the testimony was brief and insignificant in light of other testimony about Fuentes' behavior.

In Claim 11, Fuentes argued that appellate counsel failed to argue that the trial court erred in granting the state's motion to exclude testimony that mental illness ran in his family. Testimony regarding the mental health of various family members does not fall within a hearsay exception under Florida law, and Fuentes' family members were not qualified to give such an opinion. In any event, the trial court's exclusion of this testimony was grounded in state hearsay rules, for which Fuentes is not entitled to federal habeas relief, absent a constitutional violation. *See Estelle v. McGuire*, 502 U.S. 62, 67 (1991).

In Claim 12, Fuentes argued that the courtroom bailiff's unsupervised communications with the jurors required reversal of his convictions. Reasonable jurists would not debate the district

court's denial of this claim, as the courtroom bailiff's communications did not relate to the substance of the trial or affect the jury's deliberations. *See* Fla. Stat. § 918.07.

Accordingly, Fuentes' COA motion is DENIED.

/s/ Adalberto Jordan
UNITED STATES CIRCUIT JUDGE

APPENDIX
B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-13181-A

JOSE FUENTES,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

Before: JORDAN and NEWSOM, Circuit Judges.

BY THE COURT:

Jose Fuentes has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's February 12, 2021, order denying his motion for a certificate of appealability in his underlying 28 U.S.C. § 2254 petition. Upon review, Fuentes's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

APPENDIX C

U.S. District Court - Southern District of Florida

Jose Fuentes B10274
South Bay Correctional Facility
Inmate Mail/Parcels
600 U S Highway 27 South
South Bay, FL 33493-2233

Case: 1:18-cv-22620-DPG #34 2 pages Thu Oct 15 0:01:14 2020

IMPORTANT: REDACTION REQUIREMENTS AND PRIVACY POLICY

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- Home Address: city and state only (for criminal cases only).

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For additional information, refer to Fed. R. Civ. P. 5.2 and Fed. R. Crim. P. 49.1. Also see the CM/ECF Administrative Procedures located on the Court's website www.flsd.uscourts.gov.

IMPORTANT: REQUIREMENT TO MAINTAIN CURRENT MAILING ADDRESS AND CONTACT INFORMATION

Pursuant to Administrative Order 2005-38, parties appearing pro se and counsel appearing pro hac vice must file, in each pending case, a notice of change of mailing address or contact information whenever such a change occurs. If court notices sent via the U.S. mail are returned as undeliverable TWICE in a case, notices will no longer be sent to that party until a current mailing address is provided.

IMPORTANT: ADDITIONAL TIME TO RESPOND FOR NON-ELECTRONIC SERVICE

Additional days to respond may be available to parties serviced by non-electronic means. See Fed.R.Civ.P.6(d), Fed.R.Crim.P.45(c) and Local Rule 7.1(c)(1)(A). Parties are advised that the response deadlines automatically calculated in CMECF do NOT account for and may NOT be accurate when service is by mail. Parties may NOT rely on response times calculated in CMECF, which are only a general guide, and must calculate response deadlines themselves.

See reverse side

Subject:Activity in Case 1:18-cv-22620-DPG Fuentes v. Department of Corrections, et al Order on Motion for Leave to Appeal in forma pauperis
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U.S. District Court
Southern District of Florida

Notice of Electronic Filing
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Case Name: Fuentes v. Department of Corrections, et al
Case Number: 1:18-cv-22620-DPG

Filer:

WARNING: CASE CLOSED on 07/22/2020

Document Number: 34

34(No document attached)

Docket Text:
PAPERLESS ORDER granting Petitioner's Motion to Proceed <I>In Forma Paueris</I> on Appeal [33]. On June 29, 2020, Magistrate Judge Reid issued her Report and Recommendation in this matter, recommending that the Court deny Petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 [23]. Petitioner failed to timely file objections and, on July 22, 2020, the Court, finding no clear error with Judge Reid's recommendation, adopted the Report and denied the petition [24]. Petitioner later moved for an extension of time to file objections. The Court granted the motion for extension of time and noted that it would consider Petitioner's objections as a motion for reconsideration [26]. On August 25, 2020, Petitioner filed his objections [29]. That same day, Petitioner filed a Notice of Appeal [30]. As a result, the Court cannot address Petitioner's objections. However, because Petitioner has established that he cannot pay the cost of an appeal and because the appeal appears to be taken in good faith, the Court grants Petitioner's request to proceed <I>in forma pauperis</I> on appeal. Signed by Judge Darrin P. Gayles (hs01)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 18-22620-CIV-GAYLES/REID

JOSE FUENTES,

Petitioner,

v.

MARK S. INCH,[1]

Respondent.

_____/

ORDER ON REPORT OF MAGISTRATE JUDGE

THIS CAUSE comes before the Court on Magistrate Judge Lisette Reid's Report of Magistrate Judge (the "Report") [ECF No. 23]. Petitioner Jose Fuentes ("Petitioner") filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his conviction and sentence following a jury verdict in the Circuit Court of the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida. [ECF No. 1]. The matter was referred to Magistrate Judge Reid [ECF No. 3, 18]. Judge Reid's Report recommends that the Court deny the petition because Petitioner is not entitled to relief on the merits. Petitioner has failed to timely object to the Report.

A district court may accept, reject, or modify a magistrate judge's report and recommendation. 28 U.S.C. § 636(b)(1). Those portions of the report and recommendation to which objection is made are accorded *de novo* review, if those objections "pinpoint the specific findings that the party disagrees with." *United States v. Schultz*, 565 F.3d 1353, 1360 (11th Cir. 2009); *see also* Fed. R. Civ. P. 72(b)(3). Any portions of the report and recommendation to which *no* specific objection is made are reviewed only for clear error. *Liberty Am. Ins. Grp., Inc. v. WestPoint Underwriters,*

[1] Although Petitioner originally named Julie Jones as the Respondent, Mark S. Inch is the current Secretary of the Florida Department of Correction and, therefore, the proper respondent in this proceeding.

L.L.C., 199 F. Supp. 2d 1271, 1276 (M.D. Fla. 2001); *accord Macort v. Prem, Inc.*, 208 F. App'x 781, 784 (11th Cir. 2006).

The Court, having reviewed the Report for clear error, agrees with Judge Reid's well-reasoned analysis and findings. Accordingly, after careful consideration, it is **ORDERED AND ADJUDGED** as follows:

(1) Judge Reid's Report [ECF No. 23] is **AFFIRMED AND ADOPTED** and incorporated into this Order by reference;

(2) The Petition for Writ of Habeas Corpus [ECF No. 1] is **DENIED**;

(3) No certificate of appealability shall issue; and

(4) This case shall be **CLOSED** and all pending motions are **DENIED** as moot.

DONE AND ORDERED in Chambers at Miami, Florida, this 22nd day of July, 2020.

DARRIN P. GAYLES
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 18-CV-22620-GAYLES
MAGISTRATE JUDGE REID

JOSE FUENTES,

Petitioner,

v.

JULIE JONES,[1]

Respondent.
_____/

REPORT OF MAGISTRATE JUDGE

The *pro se* Petitioner, **Jose Fuentes**, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, attacking his convictions and sentences entered following a jury verdict in Miami-Dade County Circuit Court, **case no. F06010270**.

This Cause has been referred to the Undersigned for consideration and report, pursuant to 28 U.S.C. § 636(b)(1)(B), (c); S.D. Fla. Admin. Order 2019-02; and the Rules Governing Habeas Corpus Petitions in the United States District Courts.

For its consideration of the petition [ECF No. 1] the Court has received the state's response to this Court's order to show cause, along with a supporting

[1] Julie Jones is no longer the Secretary of the Department of Corrections. Mark S. Inch is now the proper respondent in this proceeding. Inch should, therefore, "automatically" be substituted as a party under Federal Rules of Civil Procedure 25(d)(1). The Clerk is directed to docket and change the designation of the Respondent.

appendix [ECF Nos. 15, 16, 17]; and Petitioner's reply [ECF No. 19].

Construing the arguments liberally as afforded *pro se* litigants, pursuant to *Haines v. Kerner*, 404 U.S. 519, 520 (1972), Petitioner raises the following grounds:

Claim 1: Ineffective assistance of trial counsel for failing to call psychologist Dr. Manuel Garcia to testify. [ECF No. 1 at 5-6].

Claim 2: Ineffective assistance of trial counsel for failing to call next door neighbor, Ms. Cunningham, to testify. [ECF No. 1 at 6-7].

Claim 3: Ineffective assistance of trial counsel for failing to call next door neighbor, Mr. Joe Castro, to testify. [ECF No. 1 at 8].

Claims 4 & 8: Ineffective assistance of trial counsel for failing to object when the court allowed a non-English-speaking individual to join the jury and ineffective assistance of appellate counsel for failing to raise this issue on appeal. [ECF No. 1 at 9-10, 15-16].

Claim 5: Ineffective assistance of trial counsel for failing to object to prosecutorial misconduct in calling the Petitioner's fifteen-year-old son to testify. [ECF No. 1 at 11-12].

Claim 6: Ineffective assistance of appellate counsel for failing to raise on appeal that the trial court erred in allowing the state to introduce a competency question at trial. [ECF No. 1 at 12-13].

Claim 7: Ineffective assistance of appellate counsel for failing to raise on appeal that the trial court erred in denying defense counsel's motion for judgment of acquittal. [ECF No. 1 at 14-15].

Claim 9: Ineffective assistance of appellate counsel for failing to raise on appeal that the trial court erred in allowing Alfred Williams to remain as defense counsel. [ECF No. 1 at 16-17].

Claim 10: Ineffective assistance of appellate counsel for failing to raise on appeal that the trial court erred in admitting testimony regarding Petitioner's infidelity. [ECF No. 1 at 17-18].

Claim 11: Ineffective assistance of appellate counsel for failing to raise on appeal a claim based on the family history hearsay exception. [ECF No. 1 at 19].

Claim 12: The bailiff's unsupervised communications with the jury required reversal of the conviction. [ECF No. 1 at 20].

After reviewing the pleadings, for the reasons stated in this Report, the Undersigned recommends that the petition be denied because Petitioner is not entitled to relief on the merits.

II. Factual and Procedural History

Charges

On April 19, 2006, the state charged Petitioner by indictment with first degree murder of Balkis Cisneros (Count 1) and Viera Cisneros (Count 2) on March 30, 2006, in violation of Fla. Stat. §§ 782.04(1) and 775.087. [ECF No. 16-2 at 23-25].

Trial

The parties did not dispute that Petitioner shot and killed his wife and mother-in-law. Petitioner presented an insanity defense.

The following evidence was introduced at trial. [ECF No. 17, Trial Transcripts]. Around 6:00p.m. on March 30, 2006, police officers responded to a 911 call. [T. 1278-79]. The caller lived near Petitioner and explained that he approached her and stated that he had done something wrong. [T. 1863]. The caller had heard a shot and saw a lady on the ground and said that Petitioner was bloody and crazy. [T. 1275]. Another neighbor called 911, saying that someone just shot his

"wife or somebody" three times and that someone had blood on his hands and a gun. [*Id.*].

Petitioner himself stepped out of his garage and waved down an officer. [T. 1281-82]. Petitioner told the officer that he shot his wife and mother-in-law. [T. 1285-86]. Each victim died as a result of multiple gunshot wounds. [T. 1486, 1496-97, 1505]. Petitioner's gunshot residue kit results were "positive for primer residue." [T. 1095]. When officers found Petitioner outside his residence after the shootings, he was covered in blood. [T. 1106].

The state introduced evidence regarding a troubled relationship between Petitioner and his wife. This evidence included Petitioner's own statement to the police. [T. 1125]. Petitioner's brother testified that Petitioner stated multiple times that he wanted to kill his wife. [T. 1330-31]. Petitioner's son testified that a few months before the shootings, Petitioner took him to a lake, showed him a gun, and helped him fire a shot into the water. [T. 1393, 1403-05]. At that time, Petitioner said it was really dangerous to have a gun because someday Petitioner might shoot his wife. [T. 1405].

At the scene of the crime, an officer heard Petitioner say, "God why did I run out of bullets." [T. 898]. The police also found a note, apparently written by Petitioner, which stated: "This was not due to jealousy." [T. 1083]. The note referenced his wife and her mother as belonging to a society of witches and followers

of Santeria who worshipped Satan and who were trying to kill him. [*Id.*].

During formal questioning by the police, Petitioner said that before the shooting, his wife told him he should leave and never return and that he should not try to see their children. [T. 1125-26]. On the day of the shooting, Petitioner picked up his children at school and drove them to his sister's house. [T. 1126-27]. Next, he spoke to his wife by phone and she refused to discuss their problems. [T. 1127]. When he told her he would see her later, she responded that was "just too bad." [*Id.*]. The comment upset him and he decided to drive home to speak to his wife. [*Id.*]. He took his gun to make her listen to him. [T. 1128].

He parked at a distance from the house in order to surprise his wife. [T. 1128]. His gun was tucked in his waistband. [*Id.*]. When he entered the house, the two victims were there and his wife refused to talk to him. [T. 1128-29]. He took out the gun and shot his mother-in-law, who fell to the ground. [T. 1129]. His wife started running to the door and he shot her several times. [*Id.*]. He claimed that he then put the gun to his head and pulled the trigger, but no bullets remained. [*Id.*]. He went outside and asked a neighbor to call the police, telling the neighbor that he had done something crazy. [T. 1129-30]. He threw the gun into the garage and waited for the police. [*Id.*].

The defense case included family members who discussed Petitioner's history of mental health problems. Petitioner's father believed Petitioner was mentally ill

and took him to see a psychiatrist many times. [T. 1533-34]. Petitioner's brother testified that Petitioner seemed to have lost contact with the real world, and Petitioner believed there were evil forces trying to destroy him and his family. [T. 1546-47]. Petitioner believed his mother and mother-in-law had placed a curse on him and were out to destroy the entire family. [T. 1551]. The brother tried, without success, to get Petitioner to admit he was mentally ill and to see a psychiatrist. [T. 1549].

Petitioner testified on his own behalf as follows. Petitioner did not know what he was doing when he shot the victims, did not understand the consequences, and did not know his actions were wrong. [T. 1633]. He was taking various medications, including psychotropic medications, at the time. [T. 1634]. He realized he suffered from mental illness since 2004 and had been hospitalized several times. [T. 1643-44]. He believed his wife and her mother were practicing Santeria and were trying to kill him with witchcraft. [T. 1653]. Petitioner further believed the victims were devils. [*Id.*].

As to the shooting itself, Petitioner remembered dropping his children off at his sister's house and speaking to his wife on the phone. [T. 1659-61]. The next thing he knew, he was crying in his truck. [*Id.*]. Petitioner did not recall why he drove to his house and/or anything related to the shootings. [*Id.*]. When he spoke to Detective Williams at the scene, he tried to appear as normal as possible to hide his mental

illness because he was embarrassed. [T. 1663-65]. On cross-examination, Petitioner admitted killing his wife but said that he did not know how many shots he fired. [T. 1730-31].

Clinical and forensic psychologist Heather Holmes interviewed and evaluated Petitioner's mental condition on seven separate occasions between his arrest and the trial. [T. 1837-41]. She diagnosed him as suffering from a major depressive disorder and a moderate and recurrent paranoid personality disorder. [T. 1841]. His condition had improved since she started seeing him due to medication. [T. 1843]. She concluded that Petitioner clearly suffered from a mental illness at the time of the shootings. [T. 1849]. He had a delusional fear that his wife was trying to kill him. [T. 1849]. Those delusions could have prevented him from knowing the difference between right and wrong. [T. 1850]. In her opinion, at the time of the shootings, Petitioner might have met the legal criteria for insanity. [T. 1849].

The state called Dr. Enrique Suarez as an expert witness. [T. 1940-41]. Dr. Suarez practiced clinical, forensic, and neuropsychology. [*Id.*]. Suarez concluded that Petitioner did suffer from a mental illness at the time of the shootings, but he did not believe that the illness caused a serious degree of impairment. [T. 1985-86]. In his opinion, Petitioner was sane at the time of the shootings. [*Id.*]. Petitioner knew what he was doing and knew it was wrong. [T. 1985].

Verdict/Sentencing

The jury found Petitioner guilty of both counts as charged. [ECF No. 16-3, at 174-77]. The jury made express findings that Petitioner possessed and discharged a firearm as to each count. [*Id.*]. The trial court adjudicated Petitioner guilty and sentenced Petitioner to life as to each count. [ECF No. 16-3 at 178-83].

Direct Appeal

Petitioner appealed in Florida's Third District Court of Appeal ("Third DCA"). [ECF No. 16-6 at 1-5]. Petitioner argued that the bailiff's unsupervised communications with the jury required reversal of the conviction. [ECF No. 16-6 at 6-41]. Petitioner raises this same argument here under Claim 12. [ECF No. 1 at 20]. On October 9, 2013, the Third DCA *per curiam* affirmed without written opinion in *Fuentes v. State*, 124 So. 3d 930 (Fla. 3d DCA 2013). Rehearing denied on November 14, 2013 and mandate issued December 2, 2013. [ECF No. 16-6 at 1-4].

Motion to Correct Sentence in Trial Court

On August 4, 2014, Petitioner filed a Rule 3.800(a) motion to correct sentence. [ECF No. 16-7 at 1-4]. On January 13, 2015, the trial court issued an order denying the motion. [ECF No. 16-7 at 14-45]. Petitioner did not appeal.

Rule 3.850 Post-Conviction Motion

On February 12, 2015, Petitioner filed a motion for post-conviction relief pursuant to Fla. R. Crim. P. 3.850 in the trial court. [ECF No. 16-8 at 1-49]. Petitioner alleged his trial counsel was ineffective for failing (1) to call psychologist

Dr. Manuel Garcia to testify; (2) to call next door neighbor, Ms. Cunningham, to testify; (3) to call next door neighbor, Mr. Joe Castro, to testify; (4) to object when the court allowed a non-English-speaking individual to join the jury; and (6) to object to prosecutorial misconduct in threatening to call the Petitioner's fifteen-year-old son to testify to the identity of the murdered victims; and (8) to argue that the trial court erred in allowing the state to introduce a competency question at trial. [ECF No. 16-8 at 1-49]. Petitioner raises these claims in the instant proceedings; however, he also alleges that appellate counsel was ineffective in connection with the competency question issue. *See* [ECF No. 1 at 5-16]. After the state filed a response [ECF 16-9 at 5-13], the trial court denied the motion in a lengthy written order, addressing each claim on the merits. [ECF No. 16-9 at 87-96].

Petitioner appealed, arguing that the trial court erred in denying Claims 1-6 and 8. [ECF No. 16-10 at 1-56]. The Third DCA *per curiam* affirmed without written opinion in *Fuentes v. State*, 199 So. 3d 272 (Fla. 3d DCA 2016). Mandate issued September 19, 2016. [ECF No. 16-10 at 104]. Subsequently, the Third DCA denied Petitioner's motion for leave to file a motion for rehearing in excess of the page limits. [ECF No. 16-10 at 105-07]. Petitioner did not file another motion for rehearing.

Petition for Writ of Habeas Corpus in the Third DCA

On December 2, 2015, Petitioner filed a petition for writ of habeas corpus in

the Third DCA where he alleged appellate counsel was ineffective for failing to raise on direct appeal that (1) the trial court erred in allowing the state to introduce a competency question at trial (2) the trial court erred in allowing a non-English-speaking individual to join the jury; (3) the trial court erred in allowing Alfred Williams to remain as defense counsel; (4) the trial court erred in admitting testimony regarding Petitioner's infidelity; (5) the trial court abused its discretion in rejecting the claim based on the family history hearsay exception; (7) the trial court erred in denying defense counsel's motion for judgment of acquittal. [ECF No. 16-11 at 3-61]. Petitioner raises these claims in the instant proceedings. *See* [ECF No. 1 at 12-18]. The state filed a response. [ECF No. 16-11 at 62-11]. The Third DCA issued an order denying the petition. [ECF No. 16-11 at 112]. Petitioner filed a motion for rehearing, which the Third DCA denied. [ECF No. 16-11 at 113-35].

Second Motion to Correct Illegal Sentence in Trial Court

On March 14, 2017, Petitioner filed another Rule 3.800(a) motion to correct illegal sentence in the trial court, arguing that the verdict form was defective. [ECF No. 16-12 at 1-6]. The trial court denied the motion. [ECF No. 16-12 at 11-14]. Petitioner appealed. [ECF No. 16-12 at 15-17]. The Third DCA *per curiam* affirmed without written opinion. *Fuentes v. State*, 246 So. 3d 1230(Fla. 3d DCA 2018). Petitioner filed a motion for rehearing. [ECF No. 16-12 at 34-35]. The Third DCA denied rehearing. [ECF No. 16-12 at 36]. Mandate issued June 29, 2018. [ECF No.

16-12 at 37].

28 U.S.C. § 2254 Petition

Petitioner next came to this court filing a § 2254 petition on June 26, 2018. [ECF No. 1]. The state filed a response to this court's order to show cause, with supporting exhibits. [ECF Nos. 15, 16, 17]. The state concedes that the petition is timely. [ECF No. 15 at 19-20]. The state does not argue that Petitioner failed to exhaust the claims and addresses the merits of each substantive claim. [*Id.* at 24-96].

III. Governing Legal Principles

This Court's review of a state prisoner's federal petition for habeas corpus is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996). "The purpose of [the] AEDPA is to ensure that federal habeas relief functions as a guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction." *Ledford v. Warden, GDCP*, 818 F.3d 600, 642 (11th Cir. 2016) (quoting *Greene v. Fisher*, 565 U.S. 34, 38 (2011)). In fact, federal habeas corpus review of final state court decisions is "'greatly circumscribed' and 'highly deferential.'" *Id.* at 642 (quoting *Hill v. Humphrey*, 662 F.3d 1335, 1343 (11th Cir. 2011)), and is generally limited to the record that was before the state court that adjudicated the claim on the merits. *See Cullen v. Pinholster*, 563 U.S. 170, 182 (2011).

The federal habeas court is first tasked with identifying the last state court

decision, if any, that adjudicated the claim on the merits. *See Marshall v. Sec'y, Fla. Dep't of Corr.*, 828 F.3d 1277, 1285 (11th Cir. 2016). The state court is not required to issue an opinion explaining its rationale, because even the summary rejection of a claim, without explanation, qualifies as an adjudication on the merits which warrants deference. *See Harrington v. Richter*, 562 U.S. 86, 100 (2011); *Ferguson v. Culliver*, 527 F.3d 1144, 1146 (11th Cir. 2008). *See also Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018); *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2558 (2018).

Where the claim was "adjudicated on the merits" in the state forum, § 2254(d) prohibits relitigation of the claim unless the state court's decision was (1) "**contrary to**, or involved **an unreasonable application of**, clearly established Federal law,[2] as determined by the Supreme Court of the United States;" or, (2) "based on an **unreasonable determination** of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d); *Harrington*, 562 U.S. at 97-98. *See also Williams v. Taylor*, 529 U.S. 362, 413 (2000). When relying on § 2254(d)(2), a federal court can grant relief if the state court rendered an **erroneous factual determination**. *Tharpe v. Warden*, 834 F.3d 1323, 1337 (11th Cir. 2016).

Because the "AEDPA erects a formidable barrier to federal habeas relief for

[2]"Clearly established Federal law" consists of the governing legal principles, rather than the dicta, set forth in the decisions of the Supreme Court at the time the state court issues its decision. *White v. Woodall*, 572 U.S. 415, 419 (2014); *Carey v. Musladin*, 549 U.S. 70, 74 (2006) (citing *Williams v. Taylor*, 529 U.S. 362, 412 (2000)).

prisoners whose claims have been adjudicated in state court," *Burt v. Titlow*, 571 U.S. 12, 20 (2013), federal courts may "grant habeas relief only when a state court blundered in a manner so 'well understood and comprehended in existing law' and 'was so lacking in justification' that 'there is no possibility fairminded jurists could disagree.'" *Tharpe*, 834 F.3d at 1338 (11th Cir. 2016) (quoting *Harrington*, 562 U.S. at 102). This standard is intentionally difficult to meet. *Harrington*, 562 U.S. at 102.

Petitioner alleges **ineffective assistance of counsel**. The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the assistance of counsel during criminal proceedings against them. *Strickland v. Washington*, 466 U.S. 668, 684–85 (1984). When assessing counsel's performance under *Strickland*, the court employs a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690.

To prevail on a claim of ineffective assistance of counsel, Petitioner must demonstrate that: (1) his or her counsel's **performance was deficient**, i.e., the performance fell below an objective standard of reasonableness; and, (2) he or she suffered **prejudice** as a result of that deficiency. *Strickland*, 466 U.S. at 687-88.

To establish **deficient performance**, Petitioner must show that, in light of all the circumstances, counsel's performance was outside the wide range of professional competence. *Strickland, supra. See also Cummings v. Sec'y for Dep't of Corr.*, 588

F.3d 1331, 1356 (11th Cir. 2009). The review of counsel's performance should focus on "not what is possible or what is prudent or appropriate but only [on] what is constitutionally compelled." *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000) (*en banc*) (quoting *Burger v. Kemp*, 483 U.S. 776, 794 (1987)).

Regarding the **prejudice** component, the Supreme Court has explained "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

A court need not address both prongs of *Strickland* if the defendant makes an insufficient showing on one of the prongs. *Id.* at 697. Further, counsel is not ineffective for failing to raise non-meritorious issues. *Chandler*, 240 F.3d at 917. Nor is counsel required to present every non-frivolous argument. *Dell v. United States*, 710 F.3d 1267, 1282 (11th Cir. 2013).

Furthermore, a § 2254 Petitioner must provide factual support for his or her contentions regarding counsel's performance. *Smith v. White*, 815 F.2d 1401, 1406–07 (11th Cir.1987). Bare, conclusory allegations of ineffective assistance are insufficient to satisfy the *Strickland* test. *See Boyd v. Comm'r, Ala. Dep't of Corr.*, 697 F.3d 1320, 1333–34 (11th Cir. 2012).

Petitioner also alleges **ineffective assistance of appellate counsel**. In order to establish ineffective assistance of appellate counsel, the petitioner must show

"(1) appellate counsel's performance was deficient, and (2) but for counsel's deficient performance he would have prevailed on appeal." *Shere v. Sec'y, Fla. Dep't of Corr.*, 537 F.3d 1304 1304, 1310 (11th Cir. 2008) (citing *Smith v. Robbins*, 528 U.S. 259, 285-86 (2000); *Strickland*, 466 U.S. 668 (1984)).

IV. Discussion

Under **Claim 1**, Petitioner alleges that trial counsel was ineffective in failing to call his personal psychologist Dr. Manuel Garcia to testify. [ECF No. 1 at 5-6]. Under **Claim 2**, Petitioner alleges trial counsel was ineffective for failing to call next door neighbor, Ms. Lorenza Cunningham, to testify. [ECF No. 1 at 6-7]. Under **Claim 3**, Petitioner alleges trial counsel was ineffective for failing to call next door neighbor, Mr. Joe Manny Castro, to testify. [ECF No. 1 at 8].

Federal habeas corpus petitioners asserting claims of ineffective assistance, based on counsel's **failure to call a witness** (either a lay witness or an expert witness), must satisfy the prejudice prong of *Strickland* by naming the witness, demonstrating the witness was available to testify and would have done so, setting out the content of the witness' proposed testimony, and showing the testimony would have been favorable to a particular defense. *Woodfox v. Cain*, 609 F.3d 774, 808 (5th Cir. 2010). *See also Reed v. Sec'y, Fla. Dep't of Corr.*, 767 F.3d 1252, 1262 (11th Cir. 2014) (holding federal habeas petitioner who failed to show an uncalled witness was available to testify at the time of trial failed to satisfy prejudice prong

of *Strickland*).

"A decision whether to call a particular witness is generally a question of trial strategy that should seldom be second guessed." *Conklin v. Schofield*, 366 F.3d 1191, 1204 (11th Cir. 2004). *See also Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995). A petitioner cannot maintain an ineffective assistance of counsel claim "simply by pointing to additional evidence that could have been presented." *Van Poyck v. Fla. Dep't of Corr.*, 290 F.3d 1318, 1324 (11th Cir. 2002).

Dr. Manuel Garcia

As a preliminary matter, the record reflects that defense counsel attempted to locate Dr. Garcia, without success. During a pre-trial hearing, defense counsel informed the court that counsel had obtained Petitioner's medical records which indicated that Dr. Garcia treated Petitioner at a facility called CHI, but that Dr. Garcia no longer worked there. [ECF No. 16-5 at 12-13].

Petitioner alleges that Dr. Garcia, who was treating Petitioner's mental illness prior to the shooting, "would have changed the outcome of the trial in Petitioner's favor had he testified that Petitioner was insane, which there was a 99% possibility that he would have said, yes, the Petitioner was insane." [ECF No. 1 at 5].

"The legal test of insanity in Florida in criminal cases has long been the 'M'Naghten Rule.'" *Diaz v. State*, 945 So. 2d 1136, 1152 (Fla. 2006) (receded from on other grounds in *Darling v. State*, 45 So. 3d 444 (Fla. 2010)). Pursuant to this

rule, "an accused is not criminally responsible if, at the time of the alleged crime, the defendant, by reason of a mental disease or defect, (1) does not know of the nature or consequences of his or her act; or (2) is unable to distinguish right from wrong." *Id.* Furthermore, "[a] defendant can be found not guilty by reason of insanity if he or she commits an unlawful act, but by reason of a mental infirmity, disease, or defect is unable to understand the nature and quality of his or her act, or its consequences, or is incapable of distinguishing right from wrong at the time of the incident." *Id.*

According to the Dr. Garcia's medical records, which Petitioner attached to his Rule 3.850 motion and his § 2254 petition, Dr. Garcia treated Petitioner for depression in October of 2004 and April of 2005. [ECF No. 1-1 at 6-7]. Petitioner testified at trial that the last time he was treated at CHI was on April 12, 2005, eleven months prior to the homicide that occurred on March 30, 2006. [T. 1731]. Petitioner's own expert, who examined him soon after March 30, 2006 to determine his mental state at that time, could not state with certainty that Petitioner was insane at the time he committed the offense. [ECF No. 16-9 at 42-50, Holmes Report]. Because Dr. Garcia did not see Petitioner for at least eleven months prior to the murder Dr. Garcia could not have testified to Petitioner's mental state at the time of the murder.

Petitioner has not demonstrated that had Dr. Garcia testified he would have

offered favorable, much less exculpatory testimony. Petitioner's allegations are, at best, speculative. Further, Petitioner cannot maintain an ineffective assistance of counsel claim simply by pointing to additional evidence that could have been presented. *Wainwright v. Fla. Dep't of Corr.*, 290 F.3d 1318, 1324 (11th Cir. 2002).

Lorenza Cunningham

Petitioner alleges that Ms. Cunningham's deposition testimony illustrates that she would have provided trial testimony in support of his insanity defense. [ECF No. 1 at 6-7]. He specifically points to her stating "Witchcraft" when asked whether she knew why he committed the crimes. [*Id.*]. He also notes that she testified to never observing Petitioner hitting his wife or being "overly jealous." [*Id.*].

Ms. Cunningham testified to the following during her deposition. [ECF No. 16-9 at 52-76]. On the day of the crime, she went outside to look for her granddaughter when she saw Petitioner in the street with bloody hands. [*Id.* at 63]. She asked him whether he had seen her granddaughter and he said, she is down the street. [*Id.*]. She next observed a police car pull up and Petitioner put his hands up. [*Id.* at 66]. She asked Petitioner why he shot the victims and he responded, "they were performing witchcraft on me." [*Id.* at 68]. Ms. Cunningham also noted that Petitioner was acting normally in the immediate aftermath of the crimes. [*Id.* at 65, 71].

Petitioner testified at trial that when he exited the scene of the murders, he

told a neighbor that he believed the victims were performing witchcraft on him. [T. 1827]. In addition, Dr. Holmes testified for the defense that Petitioner asserted after the crimes that he killed the victims to protect from witchcraft. [T. 1860-61, 1885, 1888].

Ms. Cunningham's testimony regarding witchcraft would have been cumulative to testimony of Petitioner and Dr. Holmes. Furthermore, Ms. Cunningham's testimony that Petitioner seemed normal right after the crimes took place, would have undermined Petitioner's insanity defense. Defense counsel made a reasonable strategic decision not to call Ms. Cunningham as a witness. It is well settled that "strategic 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." *Patton v. State*, 878 So. 2d 368, 373 (Fla. 2004) (quoting *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000)). Strategic choices made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable. *Strickland*, 466 U.S. at 690-91. Because Ms. Cunningham's testimony was cumulative to testimony presented to the jury and may have actually undermined Petitioner's insanity defense, Petitioner cannot establish that the outcome of the trial would have been different had she testified.

Joe Manny Castro

Petitioner notes that he testified at trial that as he walked up to his house, he carried a candle that had the face of Jesus, which was talking to him as it turned "wicked." [ECF No. 1 at 8-9]. Petitioner argues that Joe Castro would have corroborated this testimony because Castro gave a statement to the police in which he asserted that he observed Petitioner walking towards his house with a candle in his hand. [*Id.*].

Castro's testimony would have also been cumulative. Detective Williams testified that a neighbor observed Petitioner walking towards his house holding a candle. [T. 1151]. Even if Castro did testify to observing Petitioner holding a candle, this would not alter the outcome as Castro could not testify to Petitioner's state of mind at the time. As a result, Petitioner cannot establish prejudice under *Strickland*.

In light of the foregoing, the trial court's rejection of Claims 1, 2, and 3, affirmed by the appellate court, is not contrary to or an unreasonable application of federal constitutional principles. As such, it should not be disturbed here. *See Williams*, 529 U.S. at 413.

Under **Claim 4**, Petitioner alleges trial counsel was ineffective for failing to object when the court allowed a non-English-speaking individual, Ms. Rodriguez, to join the jury. Petitioner also argues that the individual who would have replaced Ms. Rodriguez on the jury would have found Petitioner not guilty. [ECF No. 1 at 9-10]. Under **Claim 8**, Petitioner alleges appellate counsel was ineffective in failing to

raise this issue on appeal. [*Id.* at 15-16].

In the Rule 3.850 proceedings, the trial court relied on *Cook v. State*, 542 So. 2d 964 (Fla. 1989) in rejecting Petitioner's claim. The defendant in *Cook* argued on direct appeal that the trial court erred in denying for cause challenges to two prospective jurors "who had expressed their inability to fully comprehend the English language." *Cook*, 542 So. 2d at 966. After reviewing the colloquies between the jurors, counsel, and the court, the Florida Supreme Court rejected the claim, noting "[t]here is hardly any area of the law in which the trial judge is given more discretion than in ruling on challenges of jurors for cause." *Id.* at 969. During voir dire, the jurors about which defendants complained either asserted their lack of understanding or appeared to have, on one occasion, misunderstood something. *Id.* Upon observing that in South Florida large numbers of individuals are of Hispanic origin and "do not use textbook English grammar," the supreme court explained that "it is the ability to understand English rather than to speak it perfectly which is important." *Id.* In the case at hand, after an extensive colloquy, the trial court was satisfied that the two jurors had an adequate comprehension of English to serve fairly on the jury. *Id.* at 970. The supreme court held it was not in a position to reject the trial court's conclusion. *Id. See also Pagan v. State*, 29 So. 3d 938, 958 (Fla.2009) (holding that in Florida, a "juror can be excluded based on his or her inability to understand English.") (citing *Cook*, 542 So. 2d at 970).

Similarly, in federal court, "[a] juror that is unable to read, write, speak, and understand English may be appropriately stricken for cause." *United States v. Pineda*, 743 F.3d 213, 217 (7th Cir. 2014) (citing *United States v. De La Paz–Rentas*, 613 F.3d 18, 24 (1st Cir. 2010) (upholding the constitutionality of the requirement [under 28 U.S.C. § 1865] that individuals must understand and be literate in English to serve on a federal jury)). *See also United States v. Rouco*, 765 F.2d 983, 988 n. 3 (11th Cir. 1985) ("The Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861–1877 (1982) provides that a person shall not be deemed qualified for service on a grand or petit jury unless he or she is able 'to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form . . . [or] is [] able to speak the English language.'").

In this case, Petitioner takes issue with Juror Maria Rodriguez. [ECF No. 1 at 9-10]. When initially questioned, she was asked about her employment, and she responded, in English: "That's the name of the company," "the only name," "I really don't know." [T. 366]. Upon further questioning, she responded that she was "fine and you?" [T. 522]. She referred to her husband as having a "physical" disability. [*Id.*]. She responded "no" to a question regarding hospitalization of friends, without asserting any lack of understanding of a lengthy question. [T. 727]. She responded the same as to a question about domestic violence. [T. 772]. She also responded to

the following questions without any problems:

Q. Where do you get your News?
A. TV.
Q. What station.
A. Anyone.
Q. Anyone?
A. A.O.L.

[T. 772].

She was selected as a juror. Before being sworn, but after three days of jury selection, Ms. Rodriguez went to the courtroom deputy and claimed that she did not speak English. [T. 832]. The prosecutor, defense counsel, and the court all agreed that her claim appeared to be pre-textual as an excuse for not wanting to remain on the jury. [T. 832-34]. The trial court further clarified and placed on the record that the juror had spoken perfect English to the courtroom deputy about procedural issues, thus confirming the court's suspicions that the juror had originally used language as an excuse not to serve. [T. 908].

Even if defense counsel objected, there is no basis for concluding that the court would have stricken Ms. Rodriguez. The court and attorneys had already observed Ms. Rodriguez throughout jury selection and were all satisfied that she had a good command of the English language. When asked how she got her news, she did not name a Spanish-language source. Furthermore, Petitioner's argument that the individual who would have replaced Ms. Rodriguez on the jury would have found Petitioner not guilty is purely speculative and not a valid basis to grant federal

habeas relief.

Petitioner's claim that appellate counsel was ineffective in failing to raise this issue on direct appeal also fails. Trial counsel was not ineffective in failing to raise a meritless objection. *Chandler*, 240 F.3d at 917. It follows that appellate counsel was also not ineffective in failing to raise this meritless argument on direct appeal. *See Shere*, 537 F.3d at 1310. Furthermore, the record demonstrates that Ms. Rodriguez did have a good understanding of the English language. Under *Cook*, 542 So. 2d at 969, the trial court has a high level of discretion in making a determination regarding whether a potential juror understands English. It is unlikely that the appellate court would have rejected the trial court's decision in this case, even assuming appellate counsel raised the issue. As a result, Petitioner cannot establish prejudice under *Strickland*.

The state courts' rejection of the arguments raised here under Claims 4 and 8 was not contrary to or an unreasonable application of federal constitutional principles. As such, it should not be disturbed here. *See Williams*, 529 U.S. at 413.

Under **Claim 5**, Petitioner alleges trial counsel was ineffective for failing to object to prosecutorial misconduct in threatening to call the Petitioner's **fifteen-year-old son** to testify to the identity of the victims. [ECF No. 1 at 11-12]. Petitioner argues he was forced to enter a stipulation confirming the identity of the two victims as his wife and mother-in-law "that weakened his case substantially." [*Id.*]. He

claims the prosecutor threatened to put Petitioner's son and/or Petitioner's sister on the stand and show them gory photographs of the victims in order to identify of the victims. [*Id.*]. Petitioner further asserts that defense counsel provided ineffective assistance in allowing Petitioner to agree to enter the stipulation to prevent the prosecutor from subjecting his son and his sister to psychological trauma. [*Id.*]. Lastly, Petitioner argues that in entering the stipulation, defense counsel was prevented from cross-examining the medical examiner. [*Id.*].

Petitioner's arguments are refuted by the record. At the outset of an October 31, 2011 pre-trial hearing, Petitioner was placed under oath. [ECF No. 16-5 at 41]. The prosecutor inquired whether the defense would stipulate to "legal ID." [*Id.* at 86-87]. Defense counsel then concurred with Petitioner about this issue. [*Id.*] The trial court advised Petitioner that a stipulation could be used to avoid having a person, such as a family member, identify the victims on the basis of photographs. [*Id.* at 87-88]. After expressly noting the decision to stipulate was a strategic decision that lawyers make, the trial court inquired whether defense counsel adequately explained the situation to Petitioner. [*Id.*]. After Petitioner responded that counsel had conferred with him on this issue, defense counsel stated that they agreed to stipulate. [*Id.*].

The issue again arose during the trial. The trial court read the following stipulation into the record:

> In this case, the State and Defense have stipulated to what is known as the legal identification of the victim. This means that Belkis Cisneros is the person who died and was autopsied under Dade County Medical Case Number 2006-00856 and Viera Cisneros is the person who died and was autopsied under Dade County Medical Examiner Case Number 2006-00853.

[T. 1468]. Petitioner acknowledged, under oath, that he had read and signed the stipulation. [*Id.*]. Petitioner answered in the affirmative when the trial court asked whether Petitioner "underst[ood] that the reasons that your attorneys would advise you to the stipulation is that it's a trial strategy so they don't have to bring in your son . . . or your sister . . . and say, this is a picture, they have to show a picture." [T. 1468-69]. Petitioner and defense counsel informed the court that Petitioner did not want his son to see the photos. [T. 1469]. The trial court noted that someone other than Petitioner's son could make the identification as follows: "I just wanted you to understand that the point of this is so that no family member has to look at a picture of your deceased wife and deceased mother-in-law." [T. 1470]. Petitioner said that he understood and agreed. [*Id.*].

The decision to enter a stipulation as to a matter of fact, to avoid having the state prove the fact before a jury, is for the lawyer and not the client. *See Poole v. United States*, 832 F.2d 561 (11th Cir. 1987). It is well settled that "strategic 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." *Patton v. State*, 878 So. 2d 368, 373 (Fla. 2004)

(*quoting Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000)). Strategic choices made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable. *Strickland*, 466 U.S. at 690-91.

Petitioner's claim that the prosecutor improperly coerced him to enter the stipulation is refuted by the record. Petitioner stated under oath at the pre-trial hearing and at trial that he wanted to enter the stipulation and that he understood that, if he refused to stipulate, someone other than his young son could make the identification. He cannot now challenge prior sworn testimony.

Petitioner's claim that by entering the stipulation his counsel was prohibited from cross-examining the medical examiner. Nothing in the record supports this argument. Defense counsel made a strategic decision not to cross-examine the medical examiner because the cause of death was not at issue. Petitioner cannot establish that counsel's failure to object to his entering the stipulation would have changed the outcome at trial. *See Strickland.*

The state trial court's rejection of this argument in the Rule 3.850 proceedings, affirmed on appeal, was not contrary to or an unreasonable application of federal constitutional principles. As such, it should not be disturbed here. *See Williams*, 529 U.S. at 413.

Under **Claim 6**, Petitioner alleges appellate counsel was ineffective for failing to raise on appeal that the trial court erred in allowing the state to introduce a

competency question at trial. [ECF No. 1 at 12-13]. Specifically, Petitioner takes issue with the prosecutor's cross-examination of defense expert Dr. Holmes on the issue of malingering. [*Id.*].

At a pre-trial hearing, the state moved to preclude Dr. Holmes, who had evaluated Petitioner for insanity and competency, from referring to her competency evaluation of Petitioner because it might confuse the jury. [ECF No. 16-5 at 47-48]. Defense counsel argued, and the prosecutor acknowledged, that when Dr. Holmes conducted the insanity evaluation, she may have relied on information obtained from her prior competency evaluation. [*Id.*]. The trial court deferred ruling, concluding that the issue required greater consideration of specific facts. [*Id.* at 56].

At trial, defense counsel asked Dr. Holmes on direct examination how many times she evaluated Petitioner, whether she evaluated him for insanity, which tests she performed on him, about her diagnosis of him, about her review of his medical records, and about her interviews with his family members. [T. 1839-49]. Defense counsel also asked Dr. Holmes about her administration of several tests, including the MCMI and MMPI-2. [T. 1840]. When Dr. Holmes stated she listened to the state's cross-examination of Petitioner, defense counsel asked about its significance in terms of her diagnosis. [T. 1849]. Dr. Holmes felt "there was a possibility that he might have been, met the legal criteria for sanity" and "clearly he had some severe mental illness at that time." [*Id.*]. Dr. Holmes also indicated that her conclusions did

not change even though Petitioner testified that he had been less than truthful with Dr. Holmes. [T. 1849-50].

On cross-examination, the state discussed the concept of malingering, as well as the notion that an accused may malinger for his benefit. [T. 1853-54]. Dr. Holmes said Petitioner knew the purpose of their meeting in May 2007. [T. 1855-56]. She met with him a total of seven times over the years. [T. 1856]. The state next asked Dr. Holmes about the MCMI and MMPI-2 tests. [T. 1888]. Dr. Holmes explained that because she felt it was possible that Petitioner had not answered truthfully on the MCMI test, she decided to administer the MMPI-2 test. [T. 1890-91]. She explained that both tests have a built-in validity scale and she did not do a separate test for malingering. [T. 1891].

At this point, the court granted the prosecutor's request for a sidebar conference.

> **The Court**: Let the record reflect that all four lawyers are sidebar.
>
> **Prosecutor**: Judge, I'm going to ask her now, she talked about how on one of her meetings with the Defendant was for competency, and I'm not using the word. When she met with the Defendant the second time, she thought he was faking as to a particular answer.
>
> **The Court**: Okay
>
> **Prosecutor**: Judge, I just want to let everyone know I'm not using the word competency or ask[ing] what it was about it, but the fact that he had told her that he did know, and she told him I think you are feigning. So, I'm going to ask her one time, he knew, and you thought he was faking, because it relates to that, I wanted to come sidebar.

The Court: So she's not confused, because I imagine Mr. Williams instructed her, maybe to make it easier you can just say, you know, I know that you and he met on such date and he gave you an answer on a topic.

Prosecutor: That's exactly how my questions are.

Defense counsel: For the record, I object to the relevance, this has nothing to do with sanity.

The Court: No, I agree with what you're saying. If [the prosecutor] was going to -- then I would sustain, but she's going to show that the doctor found that an answer to a question, one time he said one thing and another time another thing. She confronted him and said I thought you're feigning or faking. I'm going to allow it.

Prosecutor: Okay.

(Thereupon, the sidebar discussion had outside the presence of the jury concluded after which the proceedings continued as follows:)

Prosecutor: Dr. Homes I just want to point out something about your April 7, '07 meeting with the defendant.

Dr. Holmes: Okay.

Prosecutor: Without going into specifics of the subject matter, you had thought that at that meeting he has been feigning regarding certain questions, correct? . . . You thought he had been feigning regarding a certain question, right?

Dr. Holmes: Yes.

Prosecutor: And that was because when you met him on April 20th, he was not able to tell you certain things, right?

Dr. Holmes: Right.

Prosecutor: And that he had been able to tell you those things

previously when you met with him in May?

Dr. Holmes: Correct. There was intervention of medication or introduction in between so theoretically speaking –

Prosecutor: He should have been better?

Dr. Holmes: Correct.

Prosecutor: Okay. And that's why you thought he was feigning?

Dr. Holmes: On that particular question, yes.

Prosecutor: And is feigning the same as what we talked before like faking it?

Dr. Holmes: Yes.

[T. 1892-95].

Pursuant to Fla. R. Crim. P. 3.211(d) and *Erickson v. State*, 565 So. 2d 328 (Fla. 4th DCA 1990), evidence elicited during competency proceedings is limited to the determination of competency and may not be used for other purposes. However, this rule is subject to exceptions. Specifically, a "defendant waives this provision by using the report, or portions thereof, in any proceeding for any other purpose, in which case disclosure and use of the report, or any portion thereof, shall be governed by applicable rules of criminal procedure." Fla. R. Crim. P. 3.211(d)(2). In *Erickson*, 565 So. 2d at 331, the court noted that this waiver can occur when "the defendant first opens the door to such inquiry by his own presentation." *See also Dennis v. State*, 817 So. 2d 741, 753 (Fla. 2002); *Jackson v. State*, 947 So. 2d 480, 484 (Fla.

3d DCA 2006); *Ramirez v. State*, 739 So. 2d 568, 579 (Fla. 1999).

Dr. Holmes relied on MCMI and MMPI-2 tests in evaluating Petitioner for insanity and for competency. Defense counsel questioned Dr. Holmes about these tests on direct examination. As a result, the state was entitled to ask questions about the tests on cross-examination. Petitioner's claim that Dr. Holmes was forced to discuss competency on cross-examination is refuted by the record. The prosecutor never mentioned Petitioner's competency to stand trial and instead only asked whether Dr. Holmes felt that Petitioner was "faking" his mental problems. Appellate counsel was not ineffective in failing to raise this meritless argument on direct appeal. *See Shere*, 537 F.3d at 1310; *Chandler*, 240 F.3d at 917.

In light of the foregoing, the Third DCA's rejection of this argument, in denying the petition for writ of habeas corpus, was not contrary to or an unreasonable application of federal constitutional principles. As such, it should not be disturbed here. *See Williams*, 529 U.S. at 413.

Under **Claim 7**, Petitioner alleges appellate counsel was ineffective for failing to raise on appeal that the trial court erred in denying defense counsel's motion for judgment of acquittal. [ECF No. 1 at 14-15].

A federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was

objectively unreasonable." *Cavazos v. Smith*, 565 U.S. 1, 4 (2011) (citing *Renico v. Lett*, 559 U.S. 766, 773 (2010)). In *Cavazos*, the Supreme Court emphasized that the governing standard of review is articulated in *Jackson v. Virginia*, 443 U.S. 307 (1979).

Under *Jackson*, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319. "The standard for weighing the constitutional sufficiency of the evidence is a limited one. It is not required that the evidence rule out every hypothesis except that of guilt beyond a reasonable doubt." *Martin v. Alabama*, 730 F.2d 721, 724 (11th Cir. 1984) (internal citations omitted). This Court must defer to the jury's objectively reasonable resolution. In *Coleman v. Johnson*, 566 U.S. 650, 656 (2012), the Supreme Court explained that the only question when reviewing the state court's ruling under *Jackson* is "whether the finding was so insupportable as to fall below the threshold of bare rationality." Such a determination is entitled to deference under the AEDPA. *Id.*

As will be recalled, the state charged Petitioner with first-degree murder of in violation of Fla. Stat. §§ 782.04(1) and 775.087. [ECF No. 16-2 at 23-25]. Section 782.04(1)(a)1 defines first-degree murder as "[t]he unlawful killing of a human being: When perpetrated from a premeditated design to effect the death of the person

killed or any human being." Premeditation, under Florida law, is defined as "more than a mere intent to kill; it is a fully formed conscious purpose to kill. The purpose may be formed a moment before the act but must exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act." *Wilson v. State*, 493 So. 2d 1019, 1021 (Fla. 1986). "Premeditation may be established by circumstantial evidence." *Woods v. State*, 733 So. 2d 980, 985 (Fla. 1999). "Such evidence of premeditation includes 'the nature of the weapon used, the presence of absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted.'" *Id.* (quoting *Spencer v. State*, 645 So. 2d 377, 381 (Fla. 1994)). Premeditation has been found to exist based on multiple gunshot wounds or stab wounds. *Buckner v. State*, 714 So. 2d 384 (Fla. 1998); *Boyd v. State*, 910 So. 2d 167 (Fla. 2005).

The state presented evidence that Petitioner intentionally brought a gun with him when he confronted his wife and mother in law, Petitioner fired the weapon multiple times, Petitioner and his wife had a rocky relationship, and Petitioner left his children with his sister before going to the scene of the crime. [T. 1126-30]. The state also presented sufficient evidence to submit the sanity issue to the jury. Petitioner's own expert could only say Petitioner "might" have been insane at the time of the offense. [T. 1849]. The state played a 911 tape for the jury with a caller

who lived near Petitioner and who explained that Petitioner approached her and stated that he had done something wrong. [T. 1863].

The state's evidence was sufficient for a jury to properly find evidence of premeditation. Moreover, the jury was not required to accept the defense expert's testimony regarding Petitioner's sanity. Questions of an expert's credibility are for a jury. *See Wuornos v. State*, 644 So.2d 1000, 1010 (Fla.1994).

Having reviewed the record, the evidence in this case was more than sufficient to support the Petitioner's conviction under Fla. Stat. §§ 782.04(1) and 775.087. Thus, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319. This Court must defer to the jury's judgment as to the weight and credibility of the evidence. *See Wilcox v. Ford*, 813 F.2d 1140, 1143 (11th Cir. 1987) (citing *Jackson*, 443 U.S. at 326). Even if there was some evidence which gave support to Petitioner's theory of innocence, such a fact does not warrant habeas corpus relief. *See Gibson v. Collins*, 947 F.2d 780, 786 (5th Cir. 1991).

In light of the foregoing, the Third DCA's rejection of this argument, in denying the petition for writ of habeas corpus, was not contrary to or an unreasonable application of federal constitutional principles. As such, it should not be disturbed here. *See Williams*, 529 U.S. at 413.

Under **Claim 9**, Petitioner alleges appellate counsel was ineffective for failing

to raise on appeal that the trial court erred in allowing Alfred Williams to remain as defense counsel. [ECF No. 1 at 16-17].

In Florida, when a defendant alleges prior to trial that counsel is not rendering effective assistance, the trial court is required to adhere to the procedures spelled out in *Nelson v. State*, 274 So. 2d 256 (Fla. 4th DCA 1973) (approved by supreme court in *Hardwick v. State*, 521 So. 2d 1071 (Fla. 1988)). The Fourth DCA held:

> If incompetency of counsel is assigned by the defendant as the reason, or a reason, the trial judge should make a sufficient inquiry of the defendant and his appointed counsel to determine whether or not there is reasonable cause to believe that the court-appointed counsel is not rendering effective assistance to the defendant. If reasonable cause for such belief appears, the court should make a finding to that effect on the record and appoint a substitute attorney who should be allowed adequate time to prepare the defense. If no reasonable basis appears for a finding of ineffective representation, the trial court should so state on the record and advise the defendant that if he discharges his original counsel the State may not thereafter be required to appoint a substitute.

Nelson, 274 So. 2d at 258-59. See also *Marti v. State*, 756 So. 2d 224, 228 (Fla. 3d DCA 2000); *Weaver v. State*, 894 So. 2d 178 (Fla. 2004); *Milkey v. State*, 16 So. 3d 172, 174-75 (Fla. 2d DCA 2009).

The trial court conducted a pre-trial hearing on September 3, 2010. [ECF No. 16-5 at 1-37]. Defense counsel indicated Petitioner wanted to hire another attorney, refused to speak with him, and had filed a bar complaint against counsel, which had been dismissed. [*Id.* at 3-4]. The court spoke at length with Petitioner about his concerns. According to Petitioner, defense counsel said he thought they were going

to lose the case and had not sat down with him to discuss moving to dismiss the charges. [*Id.* at 5, 11]. Petitioner explained he did not want his attorney to think he was guilty and wanted defense counsel to contact each doctor who treated Petitioner's mental illness. [*Id.* at 18, 25-28]. Defense counsel informed the court that he had met with Petitioner ten to twenty times and discussed calling various witnesses, he was exploring an insanity defense, and one of the doctors who treated Petitioner could only testify regarding competency, rather than insanity. [*Id.* at 30-3]. Defense counsel ultimately said, "I could move to withdraw," and the court responded that it would not accept the motion. [*Id.* at 34-35]. The court noted counsel had made strategic and tactical decisions and asked Petitioner to speak to his attorney. [*Id.* at 35-36]. He agreed to talk to him. [*Id.* at 36]. The court concluded its *Nelson* inquiry, noting it found "absolutely no evidence that [defense counsel] has provided ineffective assistance of counsel and the client is now saying he will speak to [defense counsel] and there is no reason or cause to believe [defense counsel] is rendering ineffective assistance of counsel." [*Id.*].

At a December 14, 2010 pre-trial hearing, defense counsel indicated he had gone to meet with Petitioner a "couple of times," but Petitioner was "non-responsive." [*Id.* at 95]. He also indicated Petitioner had given him a list of witnesses that Petitioner wanted counsel to call. [*Id.*] Some of those witnesses were "controversial," including Petitioner's young son. [*Id.* at 96]. Defense counsel also

indicated some of the other witnesses "have either moved [away] or maybe [Petitioner] misremembers the names." [*Id.*]. Petitioner's father informed the trial court that the family was trying to hire private counsel. [*Id.* at 97-98]. The court stated it would not be resetting the trial date. [*Id.* at 99-100]. Petitioner said he did not want to "go to trial with a lawyer I don't feel good with. I have never had a good relationship with him." [*Id.* at 101]. Petitioner gave counsel a list of names to call as witnesses, but counsel just had excuses. [*Id.* at 101-02]. Upon noting it was holding its fourth *Nelson* inquiry in Petitioner's case, the court asked Petitioner about his specific complaints. [*Id.* at 102]. Petitioner stated defense counsel could not find a psychologist who treated Petitioner before the incident, Dr. Manuel Garcia. [*Id.* at 102-03]. Defense counsel explained he attempted to locate Dr. Garcia, without success. However, counsel did successfully subpoena Dr. Garcia's medical records. [*Id.* at 103-04]. Furthermore, at Petitioner's request, defense counsel listed Dr. Anthony Fiana and Dr. Nunez as potential defense witnesses. [*Id.* at 108].

Upon noting that it had made a *Nelson* inquiry, the court concluded that defense counsel was not ineffective, as he was doing his best to represent Petitioner and trying to track down people who were "no longer at locations that they were at say 15 years ago," and defense counsel was using an investigator as well as a mental health expert in preparing for Petitioner's trial. [*Id.* at 117]. When Petitioner insisted counsel had not done a good job and "that he doesn't have faith in this case," the

court responded that counsel had filed a notice of insanity, listed a doctor as a defense witness, and deposed the state's doctor. [*Id.* at 118]. The court also noted defense counsel was continuing to look for the other doctors. [*Id.* at 118-19].

Review of the above record supports the conclusion that the trial court conducted an adequate *Nelson* inquiry at both pre-trial hearings and reasonably concluded that defense counsel had not rendered ineffective assistance. *See Weaver*, 894 So. 2d at 191 (citing *Nelson*, 274 So. 2d at 258-59 (Fla. 4th DCA 1973)). Even assuming appellate counsel had raised this issue on appeal, Petitioner cannot establish that the appellate court would have concluded that the *Nelson* inquiry inadequately safeguarded Petitioner's rights. *See Weaver*, 894 So. 2d at 192. Because the record refutes Petitioner's argument that he would have prevailed on this issue on appeal, his appellate counsel did not provide ineffective assistance of counsel. *See Shere*, 537 F.3d at 1310.

In light of the foregoing, the Third DCA's rejection of this argument, in denying the petition for writ of habeas corpus, was not contrary to or an unreasonable application of federal constitutional principles. As such, it should not be disturbed here. *See Williams*, 529 U.S. at 413.

Under **Claim 10**, Petitioner alleges appellate counsel was ineffective for failing to raise on appeal that the trial court erred in admitting testimony regarding Petitioner's infidelity and in denying a motion for mistrial based on that evidence.

[ECF No. 1 at 17-18].

The state filed a pre-trial motion to preclude the defense from introducing evidence of the prior bad acts of the victim, Petitioner's late wife. [ECF No. 16-2 at 39-41]. The court heard argument on this motion at a hearing during which the prosecutor explained that the state sought to exclude a portion of Petitioner's statement to the police in which Petitioner claimed that his deceased wife had hit him on several occasions. [ECF No. 16-5 at 65]. Defense counsel countered that under the rule of completeness, the entire statement should be admitted at trial. [*Id.* at 63-64]. The trial court ruled in favor of the state. [*Id.* at 71-72].

At trial, during the state's direct examination of Petitioner's sister, Laura Rodriguez, she testified regarding the marital problems between Petitioner and his deceased wife. Rodriguez testified regarding prior break-ups due to Petitioner's infidelity. [T. 1424-25]. Defense counsel objected, describing the testimony as inadmissible "bad character" evidence. [*Id.*]. In so doing, defense counsel referred to the state's pre-trial motion to exclude references to the victim's prior bad acts. [*Id.*]. The state countered that Ms. Rodriguez's testimony related to the rocky relationship between the Petitioner and his wife and went to motive for the murder. [T. 1427-28]. The trial court overruled the objection. [T. 1429]. Defense counsel did not move for a mistrial. *See* [*Id.*].

As a preliminary matter, to the extent Petitioner argues that the evidence

regarding his infidelity was inadmissible in light of the trial court's decision to grant the state's motion in limine, his argument fails. The motion in limine was not related to Petitioner's prior bad acts and, instead, referred to the prior bad acts of the victim.

In Florida, evidence of prior bad acts is governed by the *Williams* Rule. *See Williams v. State*, 110 So. 2d 654 (Fla. 1959). Errors of state evidentiary law are not a basis for federal habeas relief unless they result in constitutional error. *See Taylor v. Sec'y, Fla. Dep't of Corr.*, 760 F.3d 1284, 1295 (11th Cir. 2014) ("[F]ederal courts will not generally review state trial courts' evidentiary determinations."). Habeas relief is warranted only when the error "so infused the trial with unfairness as to deny due process of law." *Id.* (citation omitted). Moreover, such trial court errors are subject to the harmless error analysis and will not be the basis of federal habeas relief unless the error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993).

In Florida state courts, relevant evidence of prior bad acts is admissible at trial when it does not go to prove the "bad character" or "criminal propensity" of the defendant but is used to show motive, intent, knowledge, modus operandi, or lack of mistake. *Williams*, 110 So. 2d 654. Evidence of another crime is only admissible when the evidence has some relevancy to the trial at hand. *Akers v. State*, 352 So. 2d 97 (Fla. 4th DCA 1977). The *Williams* Rule, codified in Fla. Stat. § 90.404, is substantially similar to Federal Rule of Evidence 404. Under Fla. Stat. § 90.404(2),

evidence of other crimes, wrongs, or acts is admissible when relevant as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but is inadmissible when the evidence is relevant solely to prove bad character or propensity. *See Williams*, 110 So. 2d at 662.

When the court denies the defendant's objection to exclude *Williams* rule evidence, defense counsel may move for a mistrial. A ruling on a motion for a mistrial is within the sound discretion of the trial court and should be "granted only when it is necessary to ensure that the defendant receives a fair trial." *Gore v. State*, 784 So. 2d 418, 427 (Fla. 2001) (quoting *Goodwin v. State,* 751 So.2d 537, 547 (Fla.1999)).

In this case, the evidence of Petitioner's break-ups with his wife was relevant to both the motive for the killing and the premeditation element of first-degree murder. *See Williams*, 110 So. 2d 654. Furthermore, Rodriguez's testimony regarding Petitioner's relationship with his late wife was relevant to the issues at trial. *See Akers*, 352 So. 2d 97. In giving a statement to the police after the murders, Petitioner made the nature of their marital relationship a critical factor. Petitioner recounted his tumultuous relationship with his wife, her verbal abusiveness, her statements that he should leave and never return, and her statements that he should avoid their children. [T. 1125-26]. When he attempted to resolve their issues over the phone, she refused to engage with him. [T. 1126]. As a result, he decided to

confront his wife, after first arming himself with his gun. [T. 1127]. When she still refused to talk to him, he shot both his wife and her mother. [T. 1128-29]. In light of the foregoing, the trial court did not abuse its discretion in overruling defense counsel's objection to Ms. Rodriguez's testimony regarding Petitioner's infidelity. Even assuming defense counsel had moved for a mistrial, it is highly unlikely that the trial court would have granted the motion.

Because the record refutes Petitioner's argument that he would have prevailed on this issue on appeal, his appellate counsel did not provide ineffective assistance of counsel in failing to raise a meritless issue. *See Shere*, 537 F.3d at 1310.

In light of the foregoing, the Third DCA's rejection of this argument, in denying the petition for writ of habeas corpus, was not contrary to or an unreasonable application of federal constitutional principles. As such, it should not be disturbed here. *See Williams*, 529 U.S. at 413.

Under **Claim 11**, Petitioner alleges appellate counsel was ineffective for failing to raise on appeal that the trial court erred in granting the state's motion to exclude family history evidence. [ECF No. 1 at 19].

The state filed a pre-trial motion in limine to exclude as inadmissible hearsay, testimony from Petitioner's sister that an uncle and cousin were both diagnosed with bipolar disorder and that Petitioner's grandfather may have had mental health issues. [ECF No. 16-2 at 36-38]. The state also argued the testimony was irrelevant because

Petitioner's mental health issues were unrelated to those of his family members. [*Id.*]. At a pre-trial hearing on the motion, the parties did not dispute that defense expert Dr. Holmes did not rely on the family history in evaluating the Petitioner. [ECF No. 16-5 at 58]. Defense counsel argued that "oral family history" should be admissible under the "written family history" hearsay exception. [*Id.* at 59]. Upon concluding that testimony regarding family members' mental health problems was inadmissible, the trial court granted the state's motion. [*Id.* at 60].

Florida law includes a family history exception to the hearsay rule. Specifically,

> Statement of personal or family history. – A statement concerning the declarant's own birth, adoption, marriage, divorce, parentage, ancestry, or other similar fact of personal or family history, including relationship by blood, adoption, or marriage, even though the declarant had no means of acquiring personal knowledge of the matter stated.

Fla. Stat. § 90.804(2)(d). Mental health history of family members is not included in the statutory definition of admissible family history. Furthermore, the mental health of Petitioner's family members was not relevant to his insanity defense. The test for the admissibility of evidence is relevance. *See* Fla. Stat. § 90.402. Relevant evidence is defined by statute as "evidence tending to prove or disprove a material fact." Fla. Stat. § 90.401.

The trial court's conclusion that vague testimony regarding the mental health of various family members was inadmissible was proper under the state evidentiary

law as it did not constitute a statement of family history and was not relevant to the issues at trial. *See* Fla. Stat. §§ 90.804(2)(d), 90.402, 90.401. Even assuming the trial court's decision was improper, errors of state evidentiary law are not a basis for federal habeas relief unless they result in constitutional error. *See Taylor*, 760 F.3d at 1295. Because the record refutes Petitioner's argument that he would have prevailed on this issue on appeal, his appellate counsel did not provide ineffective assistance of counsel. *See Shere*, 537 F.3d at 1310.

In light of the foregoing, the Third DCA's rejection of this argument, in denying the petition for writ of habeas corpus, was not contrary to or an unreasonable application of federal constitutional principles. As such, it should not be disturbed here. *See Williams*, 529 U.S. at 413.

Under **Claim 12**, the Petitioner alleges that the bailiff's unsupervised communications with the jury required reversal of the conviction. [ECF No. 1 at 20].

After closing arguments, when the court instructed the jury regarding the limited use of cellphones for emergency situations, the court stated: "Here's what I don't mean . . . someone from your family calling you, to say, what time are you coming? When are you going to be home today, at 5:00 or 5:30?" [T. 2213]. The court further instructed the jurors to hand the bailiff a note for any questions, indicating "but for that, there is no more conversation." [T. 2215].

The jury exited the courtroom to begin deliberations at 1:55 p.m. [T. 2217].

During the deliberations, one of the jurors, Ms. Thompson, sought and obtained permission to go outside. [T. 2228]. The court sent the jury a note, directing them "to suspend the deliberations while she was gone." [*Id.*].

The following proceedings then took place outside the presence of the jury:

> **The Court**: Then, what happened is that when [the bailiff] went in, to escort her through, other people wanted to just get fresh air.
>
> **Prosecutor**: Could we take, like a jury field trip outside?
>
> **The Court**: Yes.
>
> **Prosecutor**: You signed the permission slip?
>
> **The Court**: Somewhere in there, once they did that, my recollection of what [the bailiff] told me, they started asking like what time do we stay, you know. [The bailiff] said, because he knows, generally, when we do trials, you know, we generally stay away. We have been again staying in court, you know. And he wasn't so precise. But, you know, they were like oh, you know, like dinner, like 5:00, 5:30. He's like again, how long we stay, okay. That was the end of that. So, that's my understanding of what happened. Now, I want [the bailiff] to put on the record the other things, with regard to Ms. Thompson, just so you all know.
>
> **The Bailiff**: Judge, I was outside with Ms. Thompson and three jurors. Ms. Thompson asked me for a glass of ice. I went inside, to get the ice. And I came back outside. I noticed Ms. Thompson was teary eyed. I asked her if the ice was for her drink. She said no, it was for, to rub her temple. It seemed, I don't know, if it was a headache. I don't know if she's having an anxiety attack. But she was crying. There were tears. I asked her, if she was okay. She said that, I'll be fine, don't worry about it. And I brought it to the court's attention.

[T. 2229-30]. The court asked the attorneys whether they wanted to question Ms. Thompson. [T. 2231]. Defense counsel responded, "I'm not overly concerned. You

know, I'm not overly concerned about Ms. Thompson, in all honesty." [T. 2232]. The court and the attorneys then engaged in discussions about whether Ms. Thompson was doing well. [T. 2232-34].

The court next questioned Petitioner, who stated that he agreed with defense counsel and did not want the court to question Ms. Thompson. [T. 2234-35]. Petitioner also affirmatively stated he wanted Ms. Thompson to remain on the jury. [T. 2235].

While the parties were discussing what time the court should dismiss the jury and what time to start deliberations in the morning, the jury sent the court a note at 5:18 p.m. indicating that it had reached a verdict. [T. 2245-46]. The court read the verdict in open court at 5:23 p.m. [T. 2245-46].

Pursuant to Florida law,

> When the jury is committed to the charge of an officer, the officer shall be admonished by the court to keep the jurors together in the place specified and not to permit any person to communicate with them on any subject except with the permission of the court given in open court in the presence of the defendant or the defendant's counsel. The officer shall not communicate with the jurors on any subject connected with the trial and shall return the jurors to court as directed by the court.

Fla. Stat. § 918.07.

In this case, the bailiff did not communicate with the jurors on "any subject connected with the trial." Instead, the bailiff informed the jury that the judge typically dismissed jurors around 5:30 p.m. The bailiff also brought a juror some

water and asked if she was okay. Furthermore, the bailiff obtained after-the-fact permission from the court in the presence of the Petitioner and defense counsel to engage in the limited communications with the jurors described above. The trial court expressly asked Petitioner whether he had a problem with the bailiff's comments to the jury, and Petitioner said he did not. Petitioner cannot establish that but for defense counsel's failure to object to the bailiff's interactions with the jurors, the outcome would have been different. *See Strickland*. Trial counsel was not ineffective in failing to raise this meritless objection. *Chandler*, 240 F.3d at 917. It follows that appellate counsel was also not ineffective in failing to raise this meritless argument on direct appeal. *See Shere*, 537 F.3d at 1310.

The state appellate court's rejection of this argument on direct appeal was not contrary to or an unreasonable application of federal constitutional principles. As such, it should not be disturbed here. *See Williams*, 529 U.S. at 413.

VI. Cautionary Instruction Re *Clisby* Rule

Finally, this Court has considered all of Petitioner's claims for relief, and arguments in support. *See Dupree v. Warden*, 715 F.3d 1295, 1298 (11th Cir. 2013) (citing *Clisby v. Jones*, 960 F.2d 925 (11th Cir. 1992)). For all of his claims, Petitioner has failed to demonstrate how the state courts' denial of the claims, to the extent they were considered on the merits in the state forum, were contrary to, or the product of an unreasonable application of, clearly established federal law. To the

extent they were not considered in the state forum, as discussed in this Report, none of the claims individually, nor the claims cumulatively, warrant relief. Thus, to the extent a precise argument, subsumed within any of the foregoing grounds for relief, was not specifically addressed here or in the state forum, all arguments and claims were considered and found to be devoid of merit, even if not discussed in detail here.

VII. Evidentiary Hearing

In a habeas corpus proceeding, the burden is on the petitioner to establish the need for a federal evidentiary hearing. *See Chavez v. Sec'y, Fla. Dep't of Corr.*, 647 F.3d 1057, 1060 (11th Cir. 2011). To determine whether an evidentiary hearing is needed, the question is whether the alleged facts, when taken as true, are not refuted by the record and may entitle a petitioner to relief. *Schriro v. Landrigan,* 550 U.S. 465, 474 (2007); *Jones v. Sec'y, Fla. Dep't of Corr.*, 834 F.3d 1299, 1318-19 (11th Cir. 2016). The pertinent facts of this case are fully developed in the record before the Court. Because this Court can "adequately assess [petitioner's] claim[s] without further factual development," *Turner v. Crosby*, 339 F.3d 1247, 1275 (11th Cir. 2003), an evidentiary hearing is not required.

VIII. Certificate of Appealability

A prisoner seeking to appeal a district court's final order denying his or her petition for writ of habeas corpus has no absolute entitlement to appeal but must obtain a certificate of appealability ("COA"). *See* 28 U.S.C. § 2253(c)(1); *Harbison*

v. Bell, 556 U.S. 180, 183 (2009). This Court should issue a certificate of appealability only if the petitioner makes "a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2). Where a district court has rejected a petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Upon consideration of the record, this court should deny a certificate of appealability. Notwithstanding, if petitioner does not agree, Petitioner may bring this argument to the attention of the district judge in objections.

IX. Conclusion

Based upon the foregoing, it is recommended that:

1. the federal habeas petition be DENIED;
2. a certificate of appealability be DENIED; and,
3. the case CLOSED.

Objections to this report may be filed with the District Court Judge within fourteen days of receipt of a copy of the report. Failure to file timely objections shall bar petitioner from a *de novo* determination by the District Court Judge of an issue covered in this report and shall bar the parties from attacking on appeal factual findings accepted or adopted by the District Court Judge, except upon grounds of plain error or manifest injustice. *See* 28 U.S.C. § 636(b)(1); *RTC v. Hallmark*

Builders, Inc., 996 F.2d 1144, 1149 (11th Cir. 1993).

SIGNED this 29th day of June, 2020.

UNITED STATES MAGISTRATE JUDGE

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APPENDIX D

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IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT

IN AND FOR MIAMI-DADE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,
vs.

JOSE FUENTES,
Defendant

Case No. F06-10270
Section No.
Judge Tunis

ORDER DENYING DEFENDANT'S PRO SE MOTION FOR POST CONVICTION RELIEF

THIS CAUSE having come before this Court on the Defendant, Jose Fuentes', Pro Se Motion for Post Conviction Relief and this Court having reviewed the motion, the State's response thereto, the court files and records in this case, and being otherwise fully advised in the premises therein, hereby denies the Defendant's Motion on the following grounds:

Procedural History

The Defendant was charged by indictment with two counts of First Degree Murder; convicted after a jury trial on November 14, 2011 and sentenced to two (2) life in prison sentences, to be served consecutively. The Defendant took a direct appeal but his conviction and sentence was affirmed by the Third District Court of Appeals and a mandate filed on December 2, 2013. The Defendant subsequently filed a Motion to Modify or Reduce Sentence, which was denied on December 9, 2013. The Defendant subsequently filed a Motion to Correct Illegal Sentence which was denied on December 4, 2014. The Defendant now files the instant motion for Post- Conviction Relief pursuant to Fla. Rule 3.850.

Ground One

The Defendant alleges in ground one that defense counsel was ineffective for failing to subpoena and call to testify his personal psychologist, Dr. Manuel Garcia. The Defendant alleges that he saw Dr. Garcia prior to the homicide and that the doctor would have been able to testify as to the Defendant's mental health condition leading up to the homicide. The Defendant is correct, in that during one of the numerous *Nelson* inquiries held by the Court, defense counsel indicated that after receiving the Defendant's medical records by consent of the Defendant that he was attempting to locate Dr. Garcia. (See State's Exhibit A, Transcript of Nelson Inquiry/Hearing, December 14, 2010).

However, the Defendant has failed to state how he was prejudiced by not having Dr. Garcia's testimony at trial. Dr. Holmes, the defense expert hired for purposes of determining insanity, indicated in her report that she reviewed all hospital records (See State's Exhibit B, Dr. Holmes report). Furthermore, any and all testimony regarding Dr. Garcia's findings that the Defendant was depressed came out through numerous other witnesses. Dr. Suarez, the State's expert, regularly referred to the records that he reviewed from the various hospitals and clinics that the Defendant visited, including CHI, where Dr. Garcia saw him. (See Trial Transcript, pages 1940-2050) Dr. Holmes also testified as to the review of Dr. Garcia's records, their findings and their impact on her opinion. (See Trial Transcript, pages 1837-1922) The Defendant himself testified about his numerous visits to CHI. (See Trial Transcript, pages 1726-1732).

The Defendant also fails to state with specificity how Dr. Garcia's testimony would have altered the outcome of the trial. The Defendant's own expert, Dr. Holmes, could not opine with complete certainty that the Defendant was insane at the time of the offense. (See State's Exhibit B, Holmes Report, and Trial Testimony, Dr. Holmes). Moreover, the Defendant himself admits that the last time he was seen at CHI, and not necessarily by Dr. Garcia, was on April 12, 2005 (See Trial Transcript, page 1731), a full eleven (11) months prior to the homicide that occurred on March 30, 2006. Lastly, the Defendant's motion is legally insufficient and fails to support the proposition that the outcome at trial would have been altered solely by the Dr. Garcia's testimony, without any affidavit or report stating that Dr. Garcia would have found him insane at the time of the offense. Any other opinion offered by Dr. Garcia would have been irrelevant to the proceedings and thus not admissible at trial. Defendant fails to meet the standard under *Strickland v. Washington*, 466 US 668, 687 (1984) of demonstrating both deficient performance and prejudice, and as such, ground one is denied.

Ground Two

The Defendant alleges in ground two that counsel was ineffective for failing to call the Defendant's neighbor, Ms. Lorenza Cunningham, to testify. The Defendant asserts that because Ms. Cunningham saw him immediately after the homicide, her testimony would have caused the jury to find him not guilty by reason of insanity.

Lorenza Cunnngham was a listed State witness. She testified in deposition that she went outside to look for her granddaughter and that's when she saw the Defendant with bloody hands (See State's Exhibit C- Deposition Lorenza Cunningham). She indicated that she asked if the Defendant had seen her granddaughter, and that he told her that she was running down the street. (See State's Exhibit C, Deposition Lorenza Cunningham, pages 12-15) She then saw a police car pull up and that the Defendant put his hands up. She could overhear the Defendant saying that the revolver was on the couch. Before the Defendant got into the police car, she asked the Defendant why he did what he did and his answered " They were performing witchcraft on me. " (See State's Exhibit C, page 17).

The Defendant fails to state how he was prejudiced by defense counsel's failure to call Ms. Cunningham since the testimony about telling her about witchcraft came out through the Defendant's own testimony. (See Trial Transcript, page 1827). Moreover, Ms. Cunningham was asked in her deposition, by defense counsel, if the Defendant appeared to be acting normal, not strange, and not confused and she advised that he was. (Exhibit C, pages 14 and 20). Moreover, the Defendant's assertion that he killed his wife and mother-in-law due to witchcraft was repeatedly testified to and presented to the jury during the testimony of both Dr. Holmes and Dr. Suarez. (See Trial Transcripts of Dr. Holmes and Dr. Suarez, respectively, previously cited).

The Defendant also fails to state with any specificity how the testimony of Ms. Cunningham would have altered the outcome of the trial. As previously outlined in ground one, the Defendant's own expert, Dr. Holmes, was not completely sure, based on review of materials including a conversation with this witness, that the Defendant was insane at the time of the offense. In light of that testimony, coupled with the testimony of the State's expert, Dr. Suarez, and in conjunction with the remainder of the overwhelming testimony in the case, the Defendant has failed to show that there is a reasonable probability that the testimony of Lorenza Cunningham would have altered the outcome of the trial. As such, ground two is denied.

Ground Three

The Defendant asserts in ground three that counsel was ineffective for failing to investigate and depose the Defendant's other neighbor, Joemany Castro. The Defendant asserts that Mr. Castro had exculpatory material that was relevant to the Defendant's mental illness. Mr. Castro provided a sworn statement to police. He indicated that he knew the Defendant for years and that on the day of the homicide he saw the Defendant walking towards his house and across the street, with a tall catholic candle. (See State's Exhibit D, sworn statement Joemany Castro, pages 3,5). He also reported hearing gunshots subsequently and returned to the Defendant's home to find the Defendant telling a police officer that he had killed his wife. (See State's Exhibit D, page 6).

First, Defendant incorrectly identifies Mr. Castro's statement as exculpatory. If anything, Mr. Castro's statement is inculpatory as it would have contributed to the Defendant's guilt. Moreover, the Defendant speaks about walking to the house holding a candle during his testimony. (See Trial Transcript, pages 1793-1794). The fact that the Defendant was walking to his house with a candle, the testimony that he asserts in his motion he wanted elicited, is not, on its own, probative of the Defendant's mental health.

The Defendant claimed at trial that the Jesus face on the candle had turned wicked (See Trial Transcript pages 1828-1830). However, there is no evidence, nor any provided in Defendant's motion, that Mr. Castro knew that was what the Defendant was allegedly thinking. In fact, Mr. Castro indicates in his sworn statement that he had no conversation with the Defendant when he saw him across the street with the candle. (See State's Exhibit D, page 4-5). As such, the Defendant has failed to prove how Mr. Castro's testimony would have been significant or probative enough to have overcome all the other evidence previously cited, and cause the jury to return a different verdict. As such ground three is denied.

Ground Four

The Defendant asserts in ground four that counsel was ineffective for failing to object to a juror who claimed she didn't speak English. Juror #31, Maria Rodriguez, went to the Court's bailiff, after having been selected as a juror, but previous to being sworn, after three days of jury selection, and

claimed that she did not speak English. Both the State and the Defense, as well as the Court, agreed that this appeared to be pre-textual as an excuse for not wanting to remain on the jury. (See Trial Transcript Page 832-834). She had been asked questions by the Court, the State and the Defense and was appropriately responsive on all those occasions. (See Trial Transcript pages 366, 522, 727, 772). The Court further clarified and placed on the record that the juror had spoken perfect English to her bailiff about procedural issues thus confirming the suspicions that the juror had originally used language as an excuse not to serve. (See Trial Transcript page 908). See *Cook v. State* , 542 So.2d 964 (1989), which held no error in the trial court refusing to strike two jurors who claimed to not speak English, since voir dire transcripts suggested both spoke English fine.

The Defendant asserts that the juror who would have replaced Ms. Rodriguez had she been stricken would have probably found the Defendant not guilty. The Defendant supports this with absolutely no factual assertion. Moreover, Juror Rodriguez was polled at the end of the trial, after the jury returned their unanimous verdict and she agreed that the verdict of guilty was her verdict. (See Trial Transcript, page 2249). Lastly, in light of the Defendant's assertion that this is fundamental error, this is a claim that Defendant should have and could have raised on direct appeal, which he failed to do. As such, ground four is denied.

Ground Five

The Defendant asserts in ground five that counsel was ineffective for failing to object to the prosecutor's false statement during closing argument. The Defendant alleges that defense counsel should have objected and moved for a mistrial because the State argued that the Defendant committed the homicide out of jealousy, and misstated what the note that the Defendant left said. First, the note that the Defendant refers to was put into evidence as State's Exhibit 92 so the jury was able to see for itself what the note said. (See Trial Transcript, page 1437). Second, any comment by either party to the document during argument would be cured by the juror's actually ability to read the document in evidence for themselves. Moreover, the Court reminded the jurors that what either the State or Defense said in closing was not evidence. (See Trial Transcript, page 2075). Lastly, Defendant fails to state how but for the prosecutor's comment, a jury could have possibly found him either not guilty or not

guilty by reason of insanity, despite the overwhelming evidence of guilt as well as the lack of evidence as to insanity, as already cited in this motion. As such, ground five is denied.

Ground Six

The Defendant asserts in ground six that counsel was ineffective for failing to raise an objection to the prosecutor's misconduct in seeking a stipulation as to the legal identity of the victims. The Defendant asserts that this was fundamental error. In addition, the Defendant asserts that counsel was ineffective for failing to seek out other alternatives for establishing legal identity.

First, the stipulation was first raised at the beginning of the trial, during which time the Defendant had an opportunity to speak with his attorneys. Both the Defendant and his counsel agreed that there would be a stipulation during the trial as to legal identity of the victims. (See Trial Transcript, page 50-51). Then, at the time the State sought to enter the stipulation, a full colloquy of the Defendant took place. (See Trial Transcript, pages 1467-1470). During that time, the Court explained that it was up to the State to prove legal identity. (See Trial Transcript, pages 1467-1470). The Court explained that his son, or his sister, both of whom had previously testified, could be called to identify the victims. The Defendant did not want his son to see the pictures, and said that he was agreeing to the stipulation based on this. (See Trial Transcript, pages 1467-1470). The record is completely devoid of any mention that legal identity was going to be solely established by the Defendant's son, thereby supporting the Defendant's argument in his motion that he was coerced into signing the stipulation, or in the alternative, any misconduct on behalf of the prosecutor.

In addition, defense counsel went on to indicate to the Court, after the court explained to the Defendant for a second time that a family member could be used to establish legal identity, that the defense was not challenging the medical examiner's testimony whatsoever. (See Trial Transcript page 1470-1471). This would support a strategic decision to enter into a stipulation. Moreover, the decision to enter into a stipulation as to a matter of fact, to avoid having it proven before a jury, is for the lawyer and not the client. See *Poole V.* US, 832 F.2d 561 (11th Cir. 1987). As such, ground six is denied.

Ground Seven

The Defendant asserts in ground seven that counsel was ineffective for failing to object to incomplete jury instructions in that the manslaughter instruction should have been followed by the firearm enhancement language just like the murder counts. However, this would have been illegal as Fla. Stat. 775.087 requires that the firearm enhancements be identified only as to designated crimes of which manslaughter is not one. Therefore even had defense counsel asked for this, the Court would have denied this request. As such, defense counsel was not ineffective for failing to request something illegal and this ground is denied.

Ground Eight

The Defendant asserts in ground eight that counsel was ineffective for failing to object to the prosecutor's questioning of the defense expert about material from her competency reports, despite no mention of the word competency. While the Defendant's motion is completely devoid of a) the actual question that the prosecutor asked regarding competency and b) any explanation as to how an objection to the prosecutor's questions would have altered the outcome of the trial, a factual explanation is required.

The State raised the issue of competency versus insanity during its Motions in Limine. Because the defense expert, Dr. Holmes, had evaluated the Defendant five times for competency and two times for sanity, the State was concerned that the jury would be prejudiced by hearing about the competency evaluations, since competency was not relevant at the trial. (See Trial Transcript pages 10-20). Dr. Holmes testified on direct examination that she had seen the Defendant multiple times and in order not to use the word "competency", she testified that some of the times that she had seen him were court ordered and that some were for purposes of sanity evaluation. (See Trial Transcript, pages 1839-1843) She was allowed to explain the testing that she had completed, even if though some of the testing took place during the evaluations for competency but was not allowed and did not refer to the word "competency." (See Trial Transcript, pages 1839-43). The State then sought to cross examine Dr. Holmes on two points: 1) that the Defendant was malingering based on one of the tests given during a competency evaluation and 2) that the Defendant gave inconsistent answers when describing what he

thought competency was. The State went sidebar to explain to the Court and inform the parties how the question was to be asked so as to not raise any concerns and the Defense agreed. Dr. Holmes was then asked on cross examination about the Defendant feigning his answers. (See Transcript, pages 1890-1895).

The Defendant's objection in this motion, hidden as a claim of ineffective assistance, is that the changing of his answers to the doctor was a direct comment on his credibility or lack thereof. That this not only may have influenced the doctor's opinions, and the jurors, could conceivably be true. However, the Defendant placed his credibility at issue, not only by testifying as a witness in the case, but by affirmatively relying on an insanity defense. As such, any questions asked were proper. Ground eight does not rise to the level of a claim of ineffective assistance of counsel and is denied.

Ground Nine

The Defendant asserts in ground nine that counsel was ineffective for failing to object to the State not being truthful with the Court about its motion to have Dr. Suarez remain in the courtroom for the Defendant's testimony. Once again, the Defendant's claim is devoid of any explanation of deficiency let alone prejudice. However, for purposes of a clean record, a factual summary follows.

Prior to the Defendant taking the stand, the State motioned the Court, ore tenus, requesting that Dr. Suarez, the State's expert be allowed to sit in on the Defendant's testimony, citing *Srausser v. State.* The defense objected, despite acknowledging that this was a discretionary decision for the Court. (See Trial Transcript pages 1615-1626) The defense also attempted to distinguish the situation in Court from the *Strausser* case. (See Trial Transcript pages 1615-1626). As such, Defendant has no claim of ineffective assistance. It would seem that Defendant is asserting that the State was disingenuous with the Court when it said that it had a " motion", because in fact nothing written was filed, and that this was what defense counsel should have objected to. However, the record is devoid of the State indicating that it was going to supplement the record with a written motion. The record supports the

State telling the Court that it had a "motion", made ore tenus, as is the customary practice. As such, ground nine does not rise to the level of ineffective assistance of counsel and is denied.

Ground 10

The Defendant asserts in ground ten that counsel was ineffective for failing to file a motion to suppress his pre Miranda statements to the police. The Defendant asserts that prior to being in police custody and upon arrival of the first responding office, Police Officer Armando Leon, the defendant spontaneously told him "I did something bad." (See Trial Transcript, page 1282-1287). A review of the transcript clearly indicates that the Defendant was not in custody at the time that he made these statements to Officer Leon. (See Trial Transcript, page 1282-1287) The Defendant was on the street outside his home, while Officer Leon was in his car and Officer Leon didn't know that the Defendant was involved in the homicide. As such, there was no basis for a Motion to Suppress. As such counsel could not be held to be ineffective and ground ten is denied.

Ground 11

The Defendant asserts in ground eleven that defense counsel was ineffective for failing to cite case law to support his argument that the 10/20/Life firearm enhancement is not applicable to First Degree Murder. Defense counsel could not cite case law for the Court, because there is none to cite, since Fla. Stat. 775.087 (2) (a) lists murder as one of the enumerated felonies that qualifies for the firearm enhancement. As such, while counsel was trying to be proactive for the benefit of the defendant, he was legally prohibited from his request. As such, he was not ineffective for failing to have case law, since it did not exist in light of the Fla. Stat. and as such, ground eleven is stricken.

ORDERED AND ADJUDGED that the Defendant's Motion is hereby **DENIED**.

The Defendant, Jose Fuentes, is hereby notified that he has the right to appeal this order to the District Court of Appeal of Florida, Third District within thirty (30) days of the signing and filing of this order.

The Clerk of this Court is hereby ordered to send a copy of this Order to the Defendant, Jose Fuentes, DC#B10274, Charlotte Correctional Institution, 33123 Oil Well Road, Punta Gorda, FL 33955.

In the event that the Defendant takes an appeal of this order, the Clerk of this Court is hereby ordered to transport, as part of this order, to the appellate court the following:

1. Defendant's Motion.
2. The State's response, including Exhibits A, B, C and D.
3. This order including the State's Exhibits and attaching in CD form the entire trial transcript.

DONE AND ORDERED at Miami, Miami-Dade County, Florida, this the 8th day of February, 2016.

I CERTIFY that a copy of this order has been furnished to the MOVANT, Jose Fuentes by mail this _____ day of FEB 09 2016, 20____.

CIRCUIT AND COUNTY COURTS CLERK Deputy Clerk IN GOD WE TRUST DADE COUNTY, FLORIDA

DAVA J. TUNIS

CIRCUIT JUDGE

STATE OF FLORIDA, COUNTY OF MIAMI-DADE
I HEREBY CERTIFY that the foregoing is a true and correct copy of the original on file in this office
FEB 09 2016 AD 20____
HARVEY RUVIN, Clerk of Circuit and County Courts
Deputy Clerk

CIRCUIT AND COUNTY COURTS CLERK IN GOD WE TRUST MIAMI-DADE COUNTY, FLORIDA

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IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CRIMINAL DIVISION	ORDER DENYING DEFENDANT'S PRO SE MOTION: FOR LEAVE OF COURT TO FILE A REPLY TO THE STATE'S RESPONSE TO DEFENDANT'S 3.850 MOTION filed: 2/17/16	CASE NUMBER: F06010270

FILED FOR RECORD
2016 MAR 29 PM 1:49
CIRCUIT & COUNTY COURTS
CLERK

THE STATE OF FLORIDA VS.

JOSE RAMON FUENTES

PLAINTIFF DEFENDANT

CLOCK IN

THIS CAUSE HAVING COME BEFORE the Court upon the Defendant's Pro Se Motion and the Court having examined the said Motion and the Motion being insufficient to support the relief prayed, IT IS THEREUPON,

CONSIDERED, ORDERED AND ADJUDGED that the above Pro Se Motion filed by the above prisoner be, and the same is hereby DENIED. WITHOUT A HEARING

The movant is advised that he/she has the right to appeal within thirty (30) days of the rendition of this order.

DONE AND ORDERED IN Open Court at Miami-Dade County, Florida, this 17th day of March, 2016.

JUDGE DAVA J TUNIS F060

I CERTIFY that a copy hereof has been furnished to the Movant, JOSE RAMON FUENTES, by mail this MAR 2 9 2016

Harvey Ruvin, Clerk

BY: _____ 137407
Deputy Clerk

CIRCUIT AND COUNTY COURTS
CLERK
IN GOD WE TRUST
DADE COUNTY, FLORIDA

STATE OF FLORIDA, COUNTY OF DADE
I HEREBY CERTIFY that the foregoing is a true and correct copy of the original on file in this office
MAR 2 9 2016 AD 20
HARVEY RUVIN, Clerk of Circuit and County Courts
Deputy Clerk 137407

CLK/CT 775 REV. 4/03 RH 03/21/2016

Clerk's web address: www.miami-dadeclerk.com

LG.

APPENDIX
E

Third District Court of Appeal

State of Florida

Opinion filed August 24, 2016.
Not final until disposition of timely filed motion for rehearing.

No. 3D16-0764
Lower Tribunal No. 06-10270

Jose Fuentes,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal under Florida Rule of Appellate Procedure 9.141(b)(2) from the Circuit Court for Miami-Dade County, Dava J. Tunis, Judge.

Jose Fuentes, in proper person.

Pamela Jo Bondi, Attorney General, for appellee.

Before SUAREZ, C.J., and ROTHENBERG and FERNANDEZ, JJ.

PER CURIAM.

Affirmed.

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M A N D A T E

from

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
THIRD DISTRICT

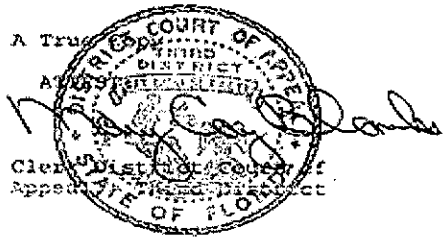
This cause having been brought to the Court by appeal, and after due consideration the Court having issued its opinion;

YOU ARE HEREBY COMMANDED that such further proceedings be had in said cause as may be in accordance with the opinion of this Court, and with the rules of procedure and laws of the State of Florida.

WITNESS the Honorable Richard J. Suarez, Chief Judge of the District Court of Appeal of the State of Florida, Third District, and seal of the said Court at Miami, Florida on this day.

DATE: September 19, 2016
CASE NO.: **16-0764**
COUNTY OF ORIGIN: **Dade**
T.C. CASE NO.: **06-10270**

STYLE: **JOSE FUENTES** **v.** **THE STATE OF FLORIDA**



ORIGINAL TO: Miami-Dade Clerk

cc: Office Of Attorney General Jose Fuentes

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APPENDIX F

108
F

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JUNE 21, 2016

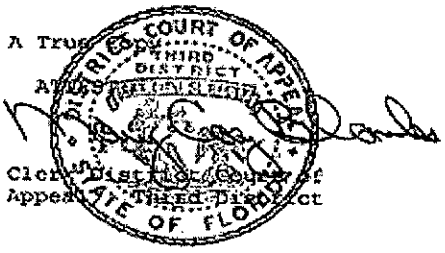
JOSE FUENTES,
Appellant(s)/Petitioner(s),
vs.
THE STATE OF FLORIDA,
Appellee(s)/Respondent(s),

CASE NO.: 3D15-2795

L.T. NO.: 06-10270

Based on our review of the record and the excellent and very thorough response filed by the Assistant Attorney General, we deny the petition.

ROTHENBERG, SALTER and LOGUE, JJ., concur.



cc: Jose Fuentes
Hon. Dava J. Tunis
Jay E. Silver
Office Of Attorney General

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IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

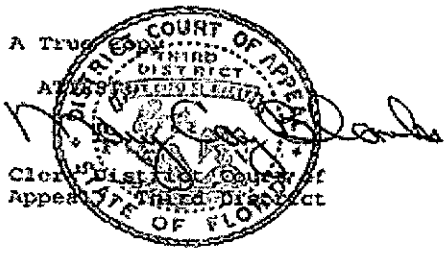
OCTOBER 27, 2016

JOSE FUENTES,
Appellant(s)/Petitioner(s),
vs.
THE STATE OF FLORIDA,
Appellee(s)/Respondent(s),

CASE NO.: 3D**15-2795**

L.T. NO.: 06-10270

Upon consideration, petitioner's pro se motion for rehearing is hereby denied. ROTHENBERG, SALTER and LOGUE, JJ., concur. Petitioner's pro se motion for rehearing en banc is denied.



cc: Jay E. Silver Office Of Attorney General Jose Fuentes

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APPENDIX
G

Third District Court of Appeal

State of Florida, July Term, A.D., 2013

Opinion filed October 9, 2013.
Not final until disposition of timely filed motion for rehearing.

No. 3D11-3048
Lower Tribunal No. 06-10270

Jose Fuentes,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Dava J. Tunis, Judge.

Carlos J. Martinez, Public Defender, and Howard K. Blumberg, Assistant Public Defender, for appellant.

Pamela Jo Bondi, Attorney General, and Jay E. Silver, Assistant Attorney General, for appellee.

Before LAGOA, EMAS and FERNANDEZ, JJ.

PER CURIAM.

Affirmed.