No. _____

IN THE SUPREME COURT OF THE UNITED STATES

BRANDY BAIN JENNINGS,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CAPITAL CASE

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June 14, 2023

CAPITAL CASE

QUESTIONS PRESENTED

This Court has interpreted the prejudice standard of *Strickland v. Washington* to require that postconviction courts engage with, and do not discount unreasonably, mitigating evidence which was available at trial but not presented to the jury or sentencing court. However, courts continue to discount mitigating evidence presented in postconviction by declaring that it would undercut mitigation presented at trial. Even where the mitigation presented at trial was afforded minimal weight, postconviction courts continue to treat as non-mitigating the types of evidence this Court has consistently deemed to be mitigating, because the newly presented mitigation might be a "double-edged sword."

The Petitioner here presents the question:

> Whether the Eleventh Circuit's analysis of ineffective assistance of counsel claims fails to protect the Sixth Amendment right to effective assistance of counsel and the Fourteenth Amendment right to due process announced in *Strickland v. Washington*, when it denies relief based on the assertion that substantial postconviction mitigation would have undercut the minimal mitigation presented at trial, which the sentencing court deemed to be of minimal weight?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Brandy Bain Jennings, a death–sentenced Florida prisoner, was the Defendant/Petitioner/Appellant in state court proceedings and the Petitioner/Appellant in federal court proceedings.

Respondent, the Secretary of the Florida Department of Corrections, was the Respondent/Appellee in federal proceedings. The State of Florida was the Petitioner/Appellant in state court proceedings.

STATEMENT OF RELATED CASES

Per Supreme Court Rule 14.1 (b) (iii), the following cases relate to this petition:

Underlying Trial Proceedings

Initial Trial Proceedings:
Circuit Court of the Twentieth Judicial Circuit, Collier County, Florida
State of Florida v. Brandy Bain Jennings, Case No. 95-2284CFA
Judgement Entered: December 2, 1996

Direct Appeal:
Florida Supreme Court, Case No. SC60-89550
Jennings v. State, 718 So. 2d 144 (Fla. 1998)
Decided: September 10, 1998

Petition for Writ of Certiorari on Direct Appeal:
United States Supreme Court, Case No. 98-9152
Jennings v. Florida, 527 U.S. 1042 (Fla. 1999)
Certiorari Denied: June 24, 1999

State Collateral Proceedings

Initial Postconviction Proceeding:
Circuit Court of the Twentieth Judicial Circuit, Collier County, Florida
State of Florida v. Brandy Bain Jennings, Case No. 95-2284CFA
Judgement Entered: January 31, 2011 (denying postconviction relief)

Initial Postconviction Appeal:
Florida Supreme Court, Case No. SC11-1016
Jennings v. State, 123 So. 3d 1101 (Fla. 2013)
Affirmed: June 23, 2013

State Petition for Writ of Habeas Corpus:
Florida Supreme Court, Case No. SC11-1031
Jennings v. State, 123 So. 3d 1101 (Fla. 2013)
Denied: June 23, 2013

Successive Postconviction Proceeding I:
Circuit Court of the Twentieth Judicial Circuit, Collier County, Florida
State of Florida v. Brandy Bain Jennings, Case No. 95-2284CFA
Judgement Entered: April 4, 2017 (denying postconviction relief)

Successive Postconviction Appeal:
Florida Supreme Court, Case No. SC17-938
Jennings v. State, 237 So. 3d 909 (Fla. 2018)
Affirmed: January 29, 2018

Successive Postconviction Proceeding II:
Circuit Court of the Twentieth Judicial Circuit, Collier County, Florida
State of Florida v. Brandy Bain Jennings, Case No. 95-2284CFA
Judgement Entered: April 13, 2018 (denying postconviction relief)

Federal Habeas Corpus Proceedings

Federal Petition for Writ of Habeas Corpus Proceeding:
United States District Court, Middle District of Florida
Brandy Jennings v. Sec'y, Fla. Dept. of Corrs., Case No. 08:13-cv-751
Petition Denied: December 1, 2020

Federal Habeas Corpus Appeal:
Eleventh Circuit Court of Appeals, Case. No. 21-11591
Jennings v. Sec'y, Fla. Dep't of Corr., 55 F.4th 1277 (11th Cir. 2022)
Affirmed: December 13, 2022

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Brandy Bain Jennings prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Eleventh Circuit.

CITATIONS TO OPINION BELOW

The Court of Appeals for the Eleventh Circuit's opinion that is the subject of this Petition is cited as *Jennings v. Sec'y, Fla. Dep't of Corr.*, 55 F.4th 1277 (11th Cir. 2022), and is found in the accompanying Appendix as "Appendix A." The Court of Appeals for the Eleventh Circuit's order denying Jennings's motion for rehearing is unreported and is found in the accompanying Appendix as "Appendix B." The United States District Court for the Middle District of Florida's order denying Jennings's petition for writ of habeas corpus is unreported and is found in the accompanying Appendix as "Appendix C." The Florida Supreme Court's opinion affirming the denial of postconviction relief, *Jennings v. State*, 123 So. 3d 1101 (Fla. 2013), is found in the accompanying Appendix as "Appendix D." The Florida Supreme Court opinion affirming sentence of death on direct appeal, *Jennings v. State*, 718 So. 2d 144 (Fla. 1998), is found in the accompanying Appendix as "Appendix E."

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit on the basis of 28 U.S.C. § 1254(1). The Court of Appeals issued its decision on December 13, 2022, and denied Petitioner's timely Petition for Rehearing and/or Rehearing En Banc on February 14, 2023. Counsel sought an additional time for the filing of this Petition, which was granted up to and including June 14, 2023. This petition is timely filed.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed ... [and] to be confronted with the witnesses against him, to have compulsory process of obtaining witnesses in his favor, and to have the assistance of counsel.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall ... deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

The Circuit Court for the Twentieth Judicial Circuit, in and for Collier County, Florida, sitting in Pinellas County, Florida, entered the judgments of conviction and sentences, including sentences of death, at issue in this case.

Dorothy Siddle, Vicki Smith, and Jason Wiggins were killed during an early morning robbery of a Cracker Barrel Restaurant in Naples, Florida, on November 15, 1995. Mr. Jennings (age twenty–six) and Jason Graves (age eighteen), both of whom had previously worked at the Cracker Barrel and knew the victims, were apprehended and jailed approximately three weeks later in Las Vegas, Nevada.

A Collier County grand jury returned indictments charging Mr. Jennings and Mr. Graves each with three counts of premeditated murder and one count of robbery. The State initially sought death for both defendants. The Office of the Public Defender was appointed to represent Mr. Jennings. Graves obtained private counsel. The State agreed to waive the death penalty for Graves in exchange for his withdrawal of motions for continuance of his trial. (R. 326)

a. Trial Proceedings

After moving for a change of venue, Mr. Jennings was tried by jury in Clearwater, Florida and convicted on all counts. (R. 619; 835)

A one–day[1] penalty phase proceeding was held the following day. (R. 845–963) Trial counsel presented character evidence from 5 of Mr. Jennings's friends

[1] The transcript of the mitigation presentation is only 38 pages, much of which is legal argument.

that "he was good with children, got along with everybody, and was basically a nonviolent, big–brother type who was happy–go–lucky, fun–loving, playful, laid back, and likeable." *Jennings*, 718 So. 2d at 147. Trial counsel presented no expert witnesses or any witnesses with knowledge of Mr. Jennings's childhood or development.

The jury recommended death for each murder count by a vote of 10–to–2. (R. 622; 957) The court found 3 aggravating circumstances: 1) the murders were committed while Jennings was engaged or was an accomplice in the commission of the crime of robbery; 2) the crimes were committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; and 3) the crimes were committed in a cold and calculated and premeditated manner without any pretense of moral or legal justification. The trial court did not specify what weight he assigned to each aggravating factor.

In mitigation, the trial court found that Mr. Jennings had no significant history of prior criminal activity, to which he assigned "some weight." The trial court found and gave "substantial weight" to Mr. Jennings's cooperation with law enforcement. The court found and gave "some weight" to Mr. Jennings's family background and deprived childhood, the disparate sentences received by his codefendant, his positive personality traits enabling the formation of strong, caring relationships with peers, and his capacity to care for and be mutually loved by children. (R. 788–790) The court found, but gave "little weight" to, Mr. Jennings's good employment history, his loving relationship with his mother, and his

exemplary courtroom behavior. (R. 789)[2] The trial court sentenced Mr. Jennings to death on each first-degree murder count and to life in prison for the robbery count. (R. 793)

The Florida Supreme Court affirmed the convictions and sentences on direct appeal. *Jennings v. State*, 718 So. 2d 144 (Fla. 1998) , *cert. denied*, *Jennings v. Florida*, 119 S. Ct. 2407 (June 24, 1999).

b. State Postconviction Proceedings

Mr. Jennings timely filed a motion for postconviction relief with request for leave to amend pursuant to Florida Rule of Criminal Procedure 3.851. (PCR. 38–73) He subsequently filed an amended motion to vacate. (PCR. 2289–2409) The Honorable Frederick R. Hardt granted an evidentiary hearing on several claims, including Claim III as to whether trial counsel was ineffective at penalty phase for failing to obtain an adequate mental health evaluation; and CLAIM IV as to whether trial counsel was ineffective for failing to investigate and prepare mitigation evidence. (Order, PCR. 2549, 2571)

At the postconviction hearing, Attorney Thomas Osteen testified that he represented Mr. Jennings at trial and co-counsel, Adam Sapenoff, had no prior capital case experience and did not participate in the penalty phase "other than being present." (PCR. 2900) Mr. Osteen requested the appointment of mental health

[2] The court rejected the statutory mitigators that Mr. Jennings was an accomplice in the capital felonies committed by another and his participation was relatively minor, and that he acted under extreme duress or under the substantial domination of another person. (R. 784–790)

experts to assist him. The court appointed Dr. Masterson, a psychologist, and Dr. Wald, a psychiatrist. (PCR. 2878) When moving for Dr. Wald's appointment, Mr. Osteen requested only that an expert be appointed to determine whether Mr. Jennings "may be incompetent to proceed or may have been insane at the time of the offense." The motion made no mention of an evaluation for mitigation. (PCR. 2885) The judge appointed Dr. Wald "to examine the defendant and then make reports to defense counsel as I may direct." (PCR. 2884) Dr. Wald's report indicates that he was "appointed to assist the defendant," but does not indicate whether he was to conduct a competency/sanity evaluation or an evaluation for the purposes of mitigation. (PCR. 2883; Defense Exhibit 9) Dr. Wald was not provided with any school or medical records because Mr. Osteen made no effort to obtain them. (PCR. 2982)

Mr. Osteen's mitigation investigation included talking to Mr. Jennings's mother, Tawny Jennings, at her home or by telephone two or three different times (PCR. 2895), and speaking with some of his adult friends. From Tawny Jennings, Mr. Osteen learned that Mr. Jennings was raised by his mother, with whom he had a close, loving relationship. He also learned that Mr. Jennings had "not much" education and was from a low socio-economic background. He learned nothing about any history of sexual abuse and incest in the Jennings family. (PCR. 2896)

Based on his investigation, Mr. Osteen believed that:

> If there was one thing Mr. Jennings had, he had a mother. A good one.

(PCR. 2819)

From Mr. Jennings's adult friends, Mr. Osteen learned that Mr. Jennings had a "spotty" employment record. (PCR. 2894) Mr. Osteen did not obtain any of Mr. Jennings's employment records. Mr. Osteen did not obtain any medical or school records. (PCR. 2892) Mr. Osteen did not talk to any of Mr. Jennings's relatives except for his mother. (PCR. 2893) Mr. Osteen did not speak to any of Mr. Jennings's friends from out of State or anyone else who would have had information about Mr. Jennings's childhood. (PCR. 2893)

Mr. Osteen's investigator, Ed Neary, was a retired New York police officer and the Chief Investigator for the Public Defender's Office. Mr. Osteen had no knowledge of whether Mr. Neary had any mental health training or expertise. (PCR. 2902) Mr. Neary contacted one out-of-state witness, Heather Johnson, by written correspondence. Mr. Neary requested that Ms. Johnson provide "any good word that you can give concerning our client Mr. Jennings." (PCR. 2934) However, nobody ever spoke with Ms. Johnson (PCR. 2893)

Mr. Osteen's theory of the defense for the penalty phase was that, because Drs. Wald and Masterson would not be helpful, he would rely on Mr. Jennings's mother and friends "to make as many good statements about the defendant as they could. He had no prior record." (PCR. 2898) Mr. Osteen felt that the mother was a good witness who loved her son and elicited some sympathy from the jury. (PCR. 2921)

Patricia Scudder, Mr. Jennings's cousin, testified at the postconviction hearing that she knew Mr. Jennings when he was a child up until age 14 when they

lived in Oregon. (PCR. 2786) Between the ages of 6 and 12, Brandy and his mother lived at the Buccaneer Motel. (PCR. 2795) On several occasions, Brandy and Tawny lived with Mrs. Scudder for weeks at a time.

Mrs. Scudder explained that Tawny's home was a "disaster" -- messy to the extent that there were used tampons left lying around. (PCR. 2788) The bed was covered with clothes so Brandy had to sleep with Tawny on a hide-a-bed in living room. At one time, Brandy lived with his grandparents and his mother in a trailer. Another time they were living in an apartment with piles of dirty dishes and dog feces on floor. (PCR. 2790)

Tawny had a series of "fly-by" boyfriends. One boyfriend named Frank was jealous of Mr. Jennings and ostracized him. (PCR. 2791) Frank and Tawny drank constantly and Tawny took pain pills. Mrs. Scudder recalled that Mr. Jennings was named "Brandy" because Tawny was drunk on brandy when she got pregnant. (PCR. 2792)

Mrs. Scudder testified that Brandy was not allowed to play with other children because Tawny was overprotective of him. Brandy was breastfed until he was 4 or 5 years old, and he would ask Tawny to breast-feed him. (PCR. 2793) Mrs. Scudder explained that Tawny "used" Brandy and showed him no love. (PCR. 2792) Tawny did not provide a nurturing environment and neglected to provide Brandy with proper food. Brandy was overweight, but because he ate nothing but junk food. (PCR. 2792)

Mrs. Scudder testified that George "Sonny" Jennings, Mr. Jennings's uncle, was a child molester. (PCR. 2800) Walter J. Crume, another uncle by marriage, also was a child molester. Crume ran the Buccaneer Motel and often watched over Brandy when Tawny was out. (PCR. 2795-2796) Tawny knew that Crume was a child molester but would leave Brandy alone with Crume anyway. (PCR. 2800)

On one occasion, three men stayed overnight with Tawny while Brandy was at home. The next morning, Mrs. Scudder walked in to find Tawny and one of the men in bed, naked, with Brandy at the foot of the bed. (PCR. 2799)

Lloyd Scudder, Patricia's husband of 35 years, testified that he knew Brandy when he was aged 5 to 14. (PCR. 2814) Mr. Scudder testified that "Sonny" molested Mrs. Scudder, and Walter Crume molested the Scudders' son. (PCR. 2815) Mr. Scudder recalled that Tawny had a sexual relationship with her step-nephew, Bob Gifford, who would call her to meet up. (PCR. 2817) Tawny smoked marijuana, used pills and always complained of being in pain. (PCR. 2818) Mr. Scudder corroborated the fact that Tawny breastfed Brandy until he was 5 years old. (PCR. 2818)

Mr. Scudder testified that Tawny had no money and did not maintain a job. Other than relying on welfare, the only way she got money was "probably hooking" or she would get "a hold of truck drivers." (PCR. 2821) When she did have money, Tawny spent it on herself and her boyfriends. (PCR. 2821)

Heather Johnson testified that she was a close friend of Mr. Jennings after he moved to Florida. Mr. Jennings lived with the McBride family and with his mother at the Wonderland Motel, a run-down motel in North Fort Myers. (PCR. 2831) Mr.

Jennings expressed resentment and frustration with his mother yet was protective of her. Ms. Johnson described Tawny as hard and cold, and their relationship as contentious. Tawny was demanding and tough and Brandy always wanted to please his mom. (PCR. 2829) Ms. Johnson also explained how Mr. Jennings quit school to help his mom because she was always ill or disabled. (PCR. 2831) She also recalled that Ms. Jennings was tough "hard – there wasn't a lot of warmth there . . . She was tough. She was scary. She would intimidate me." (PCR. 2829)

Ms. Johnson described Mr. Jennings as bright, but not good at articulating what upset him. While impulsive and a little immature, Mr. Jennings was gentle natured and reserved. Ms. Johnson felt that Mr. Jennings was very protective of her, and he made her feel safe. (PCR. 2831) He was not a leader and did not have dominant personality. (PCR. 2831-2832)

Bruce Martin testified that he lived with, Mr. Jennings, Kevin McBride, McBride's father, and half-brothers when he was 16 to 17 years old. Later, Mr. Martin lived with Mr. Jennings for approximately five years.

Mr. Martin recalled their excessive drug and alcohol abuse around that time. They regularly went to bars and house parties. Mr. Jennings drank nearly every day, and anything he could put his hands on: beer, liquor, or wine. Mr. Jennings used marijuana -- as much as 3 to 4 joints a day, every day -- in addition to his drinking. (PCR. 3143) He also used "acid" when he could get it, usually about once a week, and they would go to collect mushrooms about once a month. Mr. Jennings

would use 8 mushrooms at a time, which is a lot. Basically, if Mr. Jennings had access to drugs, he would use them. (PCR. 3144)

Kevin McBride, Bruce Martin's half-brother, testified that he also met Mr. Jennings in the late 1980's when Mr. Jennings was about 15 years old. Mr. McBride described Tawny Jennings as "a drinker." (PCR. 3122) Mr. McBride recalled that Mr. Jennings was not happy with his mother at times. Mr. Jennings lived with McBride family for 6 months because it was a better place to stay than his mother's home. (PCR. 3122) Mr. Jennings and his mother were always moving among different motels. Mr. McBride felt that Tawny was "unstable," "rough around the edges," and "wanted to have her own fun." (PCR. 3124)

Mr. McBride testified that he saw Mr. Jennings on regular basis and they drank as often as possible, about every day. He also testified that Mr. Jennings used marijuana almost daily while drinking, smoking one joint after another. (PCR. 3126-2127) Mr. Jennings also used acid whenever he could get it, and used mushrooms when he had access to them. (PCR. 3126-3127) Mr. McBride noted that Tawny knew about her son's drinking but did nothing to stop it. He recognized that Mr. Jennings and his mother were more like friends than mother and son, and they drank together. (PCR. 3130)

Thomas Hyde, M.D., Ph.D., a behavioral neurologist, testified that he evaluated Mr. Jennings on March 15, 2000 and again on April 15, 2010. Dr. Hyde conducted a behavioral neurological interview with background history, development, medical history, neurological exam of cognitive function, cranial nerve

function, motor, sensory coordination and gait. (PCR. 2844) He also reviewed background materials including medical records and some school records, and interviewed Mr. Jennings's mother. Between 8 months and 2 years of age, Mr. Jennings suffered 15 to 20 febrile convulsions and was given Phenobarbital. (PCR. 2848) Mr. Jennings also suffered a number of closed head injuries. (PCR. 2849) At around 2 years of age, Mr. Jennings suffered a concussion which required overnight hospitalization. Mr. Jennings suffered other concussions as well. Dr. Hyde recommended a neuropsychological evaluation. (PCR. 2850)

Hyman Eisenstein, Ph.D., a clinical psychologist and neuropsychologist, conducted a full neuropsychological evaluation of Mr. Jennings in 2000, including tests of brain function, motor measures, language functioning, intelligence and memory. He also reviewed background materials including school records, employment records and previous doctors' reports, and conducted an interview. Neuropsychological testing revealed discrepancies indicate brain dysregulation (PCR. 2995), difficulty with inhibition and soft neurological signs.

Dr. Eisenstein testified that Mr. Jennings reported a substantial amount of alcohol and substance abuse and a number of head injuries. Mr. Jennings drank alcohol at an early age, even as toddler, and used marijuana, to the extent that he sought treatment at Charter Glades Hospital. At Charter Glades, Mr. Jennings was diagnosed as depressive alcoholic, but the condition went untreated because he could not afford it. (PCR. 3031)

Mr. Jennings medical records indicate that at age 3 or 4, he was treated after being hit in the head by a 2x4 and kicked in the head by pony. Hospital records indicate head injury with concussion, multiple treatments for high fevers, febrile seizures, and convulsions from age 6 months to 2 years. (PCR. 3032-3034) At 14 or 15 years of age, Mr. Jennings was hit by a student and required 23 stitches. At 16, Mr. Jennings ran into brick wall and was involved in a motorcycle accident. (PCR. 3039)

Based on his 2000 evaluation, Dr. Eisenstein opined that Mr. Jennings functions at high IQ level but had problems with academic abilities. (PCR. 2040-2042)

Dr. Eisenstein evaluated Mr. Jennings again in April, 2010. (PCR. 3042) In addition to the previous background materials, Dr. Eisenstein reviewed additional school records obtained by postconviction counsel, the sworn statement of Mr. Jennings's co-defendant, and employment records. (PCR. 3043) Dr. Eisenstein and Mr. Jennings discussed the crime, the victims, Mr. Jennings's employment history, his inability to control himself, his early sexual experiences, and his relationship with mother and step-fathers. (PCR. 2044) At this second evaluation, Dr. Eisenstein spent 10 hours over 2 days with Mr. Jennings. Dr. Eisenstein also spoke with Mr. Jennings's mother, his friend Heather Johnson, Dr. Faye Sultan, Dr. Tom Hyde, and Dr. Masterson. (PCR. 3045) Dr. Eisenstein also performed additional neuropsychological tests.

Dr. Eisenstein opined that Mr. Jennings suffers from undiagnosed Attention Deficit Hyperactivity Disorder. As a result, he has difficulty with motivation, impulsivity, and is easily bored. Mr. Jennings seeks instant gratification and has difficulty with logical thinking, bad judgment, and trouble sleeping. Mr. Jennings was and is significantly depressed, and has self-medicated with drugs and alcohol from an early age.

Dr. Eisenstein reached two clinical diagnoses as defined by the Diagnostic and Statistical Manual of Mental Disorders: 1) Gifted Learning Disability, a reading disorder (315.00), and 2) Intermittent Explosive Disorder (312.341), the failure to resist aggressive impulses that result in serious assaultive acts or destruction of property. Dr. Eisenstein based that opinion on Mr. Jennings's history of aggressive behavior in childhood, fights in adulthood, disproportionate responses and depression. He opined that Mr. Jennings is a recovered alcoholic through incarceration.

Dr. Eisenstein further opined that Mr. Jennings's capacity to appreciate criminality of his conduct was substantially impaired due to his learning disability, which had a tragic effect on Mr. Jennings on a personal level. Because of his learning disability, Mr. Jennings was unable to capitalize on his intelligence and reach his potential. (PCR. 2690) This set in motion Mr. Jennings's substance abuse and depression and resulted in poor impulse control and poor judgment. Mr. Jennings's frustration led to aggression and hostility.

Faye Sultan, Ph.D., testified that she is a clinical psychologist with expertise in the effects of early abuse on personality. Dr. Sultan evaluated Mr. Jennings and conducted an extensive social history investigation. Dr. Sultan reviewed Mr. Jennings's school records, employment records, a petition of independency, legal documents concerning sex offenders and offenses in the Jennings family and Mr. Jennings's sworn statement to police. (PCR. 3072-3075)

Dr. Sultan met in person with Mr. Jennings's mother for two hours and conducted telephonic interviews with several family members including Alice Clark (Tawny's older sister), Sherman Jennings (Tawny's older brother), Lois Lara (Brandy's first cousin), Patricia Scudder, and friend Tasha Van Brocklin. (PCR. 3078-3081)

From these sources, Dr. Sultan learned that Mr. Jennings's grew up in extreme poverty and neglect. Sexual exploitation was pervasive in his family. (PCR. 3082) Mr. Jennings's grandfather was "overtly sexual." (PCR. 3082) George Jennings, Mr. Jennings's maternal uncle had raped Mr. Jennings's mother. George would pay a quarter to Mr. Jennings and his cousins to sit in his lap (PCR. 3102) and Mr. Jennings often did. (PCR. 3083) Mr. Jennings was also sexually exploited at the age of 12 by a 30-year-old woman. (PCR. 3102) Walter Crume, who ran the Buccaneer Motel where Mr. Jennings and his mother lived, married into the family and molested many of the children. (PCR. 3083) Mr. Jennings grew up knowing that his mother had been violently raped by George Jennings and believes that George

might actually be his natural father. (PCR. 3107) Mr. Jennings's mother was also raped by her brother.

Dr. Sultan explained that Mr. Jennings's mother, Tawny, is "quite mentally ill." (PCR.29) Tawny's statements were inconsistent, and some were clearly false. Tawny's emotions were dysregulated and sometimes inappropriate to subject matter. She was "all over the place" emotionally. (PCR.29) She would laugh or cry without having to do with the subject matter of the conversation, and her emotions were extreme. (PCR. 3086) Ms. Jennings wanted to talk at length about her own sexual exploitation by her brother. (PCR. 3088)

Dr. Sultan opined that Tawny's attachment to Brandy was quite abnormal, and she behaved very oddly with him. (PCR. 3086) She nursed Brandy until the age of five or six, and her brother wondered if she was receiving sexual gratification from this. (PCR. 3086) Tawny moved so frequently that Mr. Jennings had attended 14 different schools before the sixth grade. (PCR. 3103)

Based on her observations of Ms. Jennings and interviews of others who knew her, Dr. Sultan believes that Ms. Jennings had very little parenting skill and was unable to provide adequate parental supervision or adequate encouragement and support. Ms. Jennings was sexually traumatized and received no treatment for it, and she was poorly parented herself. (PCR. 3098) She introduced Mr. Jennings to marijuana as a teenager, and laughed about giving him beer when he was a baby. (PCR. 3098) She could not control her own impulses. (PCR. 3098)

According to Dr. Sultan, Ms. Jennings was simply not an adequate parent. (PCR. 3091) Dr. Sultan explained the effect of such events and this environment has on children. (PCR. 3084) Dr. Sultan also spoke to impact on a child who knows that his mother was sexually abused by family members. (PCR. 3099)

In addition to the social history investigation, Dr. Sultan administered limited testing. The MMPI-II was not of particular significance, but indicated that Mr. Jennings was likely to be serious substance abuser, which Dr. Sultan considered obvious. Mr. Jennings is extroverted, with a rigid personality, easily frustrated, and has difficulty controlling his anger. (PCR. 3089)

Dr. Sultan testified that Mr. Jennings meets the DSM-IV diagnostic criteria for Intermittent Explosive Disorder. (PCR. 3092) As she explained, this is a subcategory of Impulse Control Disorder, where an individual behaviorally has aggressive, violent, or vulgar reactions that are out of proportion to an incident that may have occurred. (PCR. 3093) Research indicates that this kind of impulsive aggression is related to abnormal brain mechanisms that would inhibit motor activity. (PCR. 3093) Abused children who have violence or impulsivity modeled for them tend to act out. This is consistent with Mr. Jennings's history. (PCR. 3094)

Dr. Sultan opined that "Mr. Jennings is quite a damaged person" who operated in the world "in a highly dysfunctional way." (PCR. 3096) Mr. Jennings suffered from excessive and prolonged substance abuse beginning in pre-adolescence, leading to behavioral and emotional deficits in young adulthood. (PCR. 3097) This, combined with exposure to sexually exploitive, neglectful and

impoverished environment, predictably leads to impulse control problems, attention problems, concentration problems, occupational and social difficulties, a propensity for criminal behavior, and an inability to regulate one's own emotions. (PCR. 3098)

The circuit court denied relief. Mr. Jennings appealed to the Florida Supreme Court which affirmed the denial of relief and denied a writ of habeas corpus. *Jennings v. State*, 123 So. 3d 1101 (Fla. 2013).

c. Federal Habeas Corpus Proceedings

Mr. Jennings timely petitioned for a writ of habeas corpus in the United States District Court, Middle District of Florida. Mr. Jennings argued, *inter alia*, that he received ineffective assistance of counsel at the penalty phase of his trial because counsel failed to investigate and present available mitigating evidence.[3]

The district court denied all relief and denied a certificate of appealability. Mr. Jennings moved to alter and amend which was also denied.

d. Eleventh Circuit Court of Appeals

Mr. Jennings timely sought a Certificate of Appealability in the Eleventh Circuit Court of Appeals as to two issues. The Eleventh Circuit granted a Certificate of Appealability limited to the one issue:

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[3] While Mr. Jennings's petition was pending, this Court decided *Hurst v. Florida*, holding that Florida's death penalty scheme under which Mr. Jennings was sentenced is unconstitutional because "a jury, not a judge, [must] find each fact necessary to impose a sentence of death." 136 S. Ct. 616, 619 (2016). Mr. Jennings sought to stay proceedings in order to exhaust remedies in state court, which was granted. Upon resolution of the state court proceedings, Mr. Jennings filed a Notice of Denial of Certiorari and Request For 45 Days to Amend Petition for Writ of Habeas Corpus which was granted.

> Whether the district court erred in denying Jennings's claim that his trial counsel rendered ineffective assistance in the penalty phase of his capital trial by failing to conduct further investigation into Jennings's childhood and background.

The Court of Appeals affirmed the denial of habeas corpus relief. The court did not address the performance prong of *Strickland* because "the Florida Supreme Court's determination that Jennings failed to establish prejudice was not contrary to, or an unreasonable application of, *Strickland* or based on an unreasonable determination of the facts." *Jennings v. Sec'y, Fla. Dep't of Corr.*, 55 F.4th 1277, 1281 (11th Cir. 2022). The court concluded that "given the facts of this case, it was not unreasonable for the state court to conclude that Jennings was not prejudiced by counsel's failure to present the mitigation evidence in question during the penalty phase," and "much of the mitigation evidence would have constituted a double-edged sword." *Id.*, at 1294.

This Petition follows.

REASONS FOR GRANTING THE WRIT

This Court decided long ago that "an individualized decision is essential in capital cases," finding that there is a "need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual . . . ." *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978). ". . . [C]onsider[ing] the defendant as a human being before deciding whether to impose the ultimate sanction operates as a shield against arbitrary execution and enforces our abiding judgment that an offender's

circumstances, apart from his crime, are relevant to his appropriate punishment." *Boyde v. California*, 494 U.S. 370, 386-87 (1990) (Marshal, J., dissenting).

In order to establish that trial counsel was constitutionally ineffective, a defendant must make a showing that counsel rendered deficient performance resulting in prejudice to the defendant. *Strickland v. Washington*, 466 U.S. 668 (1984); *see also Wiggins v. Smith*, 123 S. Ct. 2527 (2003). To establish deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. While wide deference is given to counsel's choices as to how to proceed in matters of strategy and preparation, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has to duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 690-91.

Prejudice is shown, and relief is necessary, when the defendant establishes "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is probability sufficient to undermine confidence in the outcome." *Id.* at 694. "[T]he question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695.

The search for that reasonable probability must be conducted in a particular manner. Courts must "engage with [mitigating evidence]," *Porter v. McCollum*, 130 S. Ct. 447, 454 (2009), in considering whether that evidence might have added up to something that would have mattered to the jury. Courts have a "'[] duty to search for constitutional error with painstaking care [which] is never more exacting than it is in a capital case.'" *Kyles v. Whitley*, 514 U.S. 419, 422 (1995). In performing the duty to search with painstaking care for a constitutional violation by engaging with mitigating evidence, courts must "'speculate' as to the effect" of the mitigating evidence of the jury. *Sears v. Upton*, 130 S. Ct. 3266, 3266-67 (2010). The *Porter/Kyles/Sears* conception of prejudice analyses requires courts to engage with mitigating evidence and painstakingly search for a constitutional violation by speculating as to how the particular mitigating evidence might have changed the outcome of the penalty phase. If it might have changed the outcome, it does not matter that it might also not have. *See Rompilla v. Beard*, 545 U.S. 374, 393 (2005) ("although we suppose it is possible that a jury could have heard [the non-presented mitigation] and still have decided on the death penalty, that is not the test."). In other words, it reverses the inquiry to ask *whether the mitigating evidence might not have mattered?* rather than asking *is there a reasonable probability it might have?*

Courts must painstakingly search for constitutional violations, not painstakingly explain them away by speculating as to how a jury might have viewed them negatively. That is this Court's conception of *Strickland* prejudice.

However, courts often find that "[a]n ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword." *Reed v. State*, 875 So. 2d 415, 437 (Fla. 2004). The Eleventh Circuit has ruled that

> [t]he Supreme Court of Florida . . . concluded that Evans could not establish prejudice under *Strickland* because the mitigation evidence was a "double-edged sword," *Evans*, 946 So. 2d at 13 (quoting *Reed*, 875 So. 2d at 437), that "would likely have been more harmful than helpful," *id*. That conclusion was reasonable in the light of recent decisions of the Supreme Court holding that prejudice had not been established when evidence offered in mitigation was not clearly mitigating or would have opened the door to powerful rebuttal evidence, *see Cullen v. Pinholster*, --- U.S. ---, 131 S. Ct. 1388 (2011); *Wong v. Belmontes*, 558 U.S. 15, 130 S. Ct. 383 (2009), as well as our several decisions holding that it is reasonable to conclude that a defendant was not prejudiced when his mitigation evidence "was a two-edged sword or would have opened the door to damaging evidence," *Ponticelli*, 690 F.3d at 1296 (quoting *Cummings*, 588 F.3d at 1367).

Evans v. Sec'y, Dept. of Corr., 703 F.3d 1316, 1327 (11th Cir. 2013). And this Court has ruled that evidence may be of "questionable mitigating value" if calling a witness to testify about it "would have opened the door to rebuttal by a state [witness]" that would have been harmful to the defendant's case. *Cullen v. Pinholster*, 131 S. Ct. 1388, 1410 (2011) (citing *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) for the proposition that "mitigating evidence can be a 'two-edged sword.'").

However, there is no way to distinguish cases in which mitigating evidence may be devalued and discounted as a double-edged sword from cases in which it may not. This is especially so in cases, such as this one, where the courts diminish

compelling mitigation in favor of mitigation which the trial court determined was of minimal weight.

Here, the Eleventh Circuit, like the state court, dismissed Mr. Jennings's mitigation case because

> [T]here is a significant probability that much of the omitted mitigation evidence when combined with that adduced at trial, would have undermined some of the mitigating factors that the trial court found—namely, that (1) Jennings had no significant prior criminal history (Jennings's only statutory mitigating factor), (2) he had a close, loving relationship with his mother, and (3) he had "positive personality traits enabling the formation of strong, caring relationships with peers.

Jennings, 55 F.4th at 1294.

However, the court failed to consider the fact that the trial judge assigned only minimal *weight* to the mitigating factors it found.[4] In *Porter*, this Court found the Florida Supreme Court was "unreasonable to conclude that Porter's military service would be reduced to 'inconsequential proportions,' simply because the jury would also have learned that Porter went AWOL on more than one occasion" because "[t]he evidence that he was AWOL is consistent with this theory of mitigation and does not impeach or diminish the evidence of his service." 130 S. Ct. at 455 (footnotes and citation omitted). *Porter* is an example of when it is unreasonable to discount mitigating evidence by viewing it as a double-edged sword,

[4] To the "no significant prior criminal history," the judge assigned only "some weight." To Mr. Jennings's "loving relationship with his mother" and "positive personality traits enabling the formation of strong, caring relationships with peers" the court assigned only "little weight." (R. 789)

but it does not provide a clear standard that courts can apply going forward, and courts are foundering in their attempts to reconcile this Court's *Strickland* prejudice rulings.

The question has become *when it is reasonable to discount mitigating evidence as a double-edged sword and when is it unreasonable?* It is hard to fathom how the details of Mr. Jennings's background, which the jury and trial judge never heard, would have undercut the paltry mitigation presented at trial, especially when the trial court gave so little weight to the mitigation it found. Mr. Jennings grew up under conditions which can only be described as deplorable. Tawny Jennings, far from being a good mother as trial counsel believed, was actually "quite mentally ill" and unfit as a parent. (PCR. 3086) Her attachment to Mr. Jennings was quite abnormal, and she behaved very oddly with him. (PCR. 29) When Brandy and Tawny were not living in motels, they were essentially homeless. They would live with the Scudders for weeks at a time or in his grandparents' trailer. They moved so often that, by 6th grade, Brandy had attended 14 schools.

When they did have their own apartment, Tawny's mental illness and neglect had them living in abject squalor, with dog feces on floor, piles of dirty dishes, and used tampons lying around. (PCR. 2790) For much of his childhood, Brandy didn't even have a bed to sleep in because of Tawny's hoarding behavior. (PCR. 2795)

Ms. Jennings personal life was as chaotic as her home. "fly–by" boy friends were dismissive and jealous, chronic drinkers and drug addicts. (PCR. 2791) Ms. Jennings had no money and did not maintain a job. Other than relying on welfare,

the only way she got money was "probably hooking" or she would get "a hold of truck drivers." (PCR. 2821) When she did have money, Ms. Jennings spent it on herself and her boyfriends rather than providing even the basics for her child. Indeed, Brandy ate nothing but junk food. (PCR. 2794)

Sexual abuse was rampant in the Jennings's family. George "Sonny" Jennings, Brandy Jennings's uncle, was a child molester (PCR. 2796) and molested Patricia Scudder. (PCR. 2815). Walter J. Crume, another uncle, ran the Buccaneer Motel and often watched over Brandy when Tawny was out. He was also a child molester (PCR. 2795–2796) who preyed on the Scudders's son. (PCR. 2815) Tawny left Brandy with Crume even though she knew that Crume molested children. (PCR. 2800)

Young Brandy was repeatedly exposed to inappropriate sexual behavior by adults, including his own mother. Mr. Jennings's grandfather was "overtly sexual." (PCR. 50) George Jennings, Mr. Jennings's maternal uncle, was known by the family to be a rapist and would entice young Brandy and his cousins to sit on his lap for money. Mr. Jennings was also sexually exploited at the age of 12 by a 30–year–old woman. Mr. Jennings grew up knowing that his mother had been violently raped by George Jennings, and believes that George might actually be his natural father. (PCR. 50) Mr. Jennings's mother was also raped by her brother. Tawny nursed Brandy until the age of five or six, and her brother wondered if she was receiving sexual gratification from this. (PCR. 29)

Dr. Sultan explained that this kind of chaos and exploitation results in failure of the child's mind to develop normally, neurologically or emotionally. "Those children are quite impulsive, sometimes aggressive, over sexualized themselves, often substance abusers to the extreme." (PCR. 27) Further, "[t]here's a body of literature that has to do with witnessing sexual violence and being told of sexual violence at an inappropriate age . . . We know that even the telling of such stories produce[s] significant emotional distress in children because they're simply not prepared – in a brain development sense, for the kind of information. (PCR. 42)

Mr. Jennings exhibited excessive alcohol and substance abuse as an adult. While living with the McBrides, Mr. Jennings drank nearly every day, and anything he could put his hands on: beer, liquor, or wine. Mr. Jennings could drink an 18-pack of beer by himself and down a fifth of liquor. This was regular behavior for him. In addition to excessive alcohol use, Mr. Jennings used marijuana, mushrooms, and acid as often as he could get them.

Mr. Jennings's history of alcohol and substance abuse began when he was just a toddler. Mr. Jennings was diagnosed as chronic drug abuser and depressive alcoholic as a young adult but, due to financial constraints, he was unable to get treatment. Mr. Jennings suffers from undiagnosed Attention Deficit Hyperactivity Disorder which manifests in his difficulty with motivation, impulsivity, and boredom. As a result, Mr. Jennings seeks instant gratification and has difficulty with logical thinking, bad judgment, and trouble sleeping. Mr. Jennings was and is significantly depressed, and has self–medicated with drugs and alcohol from an

early age. Mr. Jennings's substance abuse and depression and resulted in poor impulse control and poor judgment. Mr. Jennings's frustration led to aggression and hostility.

Mr. Jennings suffered from excessive and prolonged substance abuse beginning in pre–adolescence, leading to behavioral and emotional deficits in young adulthood. (PCR. 40) This, combined with exposure to sexually exploitive, neglectful and impoverished environment, predictably leads to impulse control problems, attention problems, concentration problems, occupation and social difficulties, a propensity for criminal behavior and an inability to regulate one's own emotions.

In postconviction, Mr. Jennings presented a wealth of mitigating information was available had trial counsel conducted a reasonable investigation. Witnesses were available to provide compelling mitigation testimony of Mr. Jennings's deplorable upbringing and to assist mental health experts in understanding and explaining Mr. Jennings's mental health conditions.

While the jury knew something of Mr. Jennings's history, they knew nothing about his childhood experiences and the effects they had on his development. Had trial counsel properly investigated and presented the available evidence, the sentencing judge and jury would have had a greater appreciation for these aspects of his conduct and character. The evidence presented in postconviction is substantially weighty compared with the mitigation found by the trial court. It cannot be dismissed as merely "a double-edged sword."

This Court has "certainly [] never held that counsel's effort to present *some*

mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant. *Sears*, 130 S. Ct. at 3266 (emphasis in original). Likewise, the fact that some mitigating evidence was mentioned at the guilt phase does not foreclose consideration of whether a juror might have found compelling the extensive diagnoses testified to in postconviction.

The Eleventh Circuits finding that the additional mitigation may have undercut the mitigation presented at trial is entirely incompatible with this Court's conception of *Strickland* prejudice.

CONCLUSION

This Court should grant a writ of certiorari and review the decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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