No. _____

IN THE SUPREME COURT OF THE UNITED STATES

BRANDY BAIN JENNINGS,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

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

VOLUME I of II

CAPITAL CASE

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APPENDIX A

[PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 21-11591

BRANDY BAIN JENNINGS,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 2:13-cv-00751-SPC-MRM

Before JORDAN, BRANCH, and BRASHER, Circuit Judges.

BRANCH, Circuit Judge:

Brandy Bain Jennings is a Florida prisoner serving three death sentences for the 1995 murders of Dorothy Siddle, Vicki Smith, and Jason Wiggins during a robbery at the Cracker Barrel where Jennings formerly worked.[1] After pursuing a direct appeal and postconviction relief in the Florida state courts, Jennings filed a federal habeas petition under 28 U.S.C. § 2254, alleging, in relevant part, that his counsel rendered constitutionally ineffective assistance during the penalty phase. After the district court denied Jennings's § 2254 petition on the merits, we granted a certificate of appealability ("COA") on one issue: "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."

After review and with the benefit of oral argument, we conclude that the Florida Supreme Court's decision that Jennings failed to establish prejudice was not contrary to, or an unreasonable application of, clearly established federal law, and we affirm on that ground.

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[1] Jennings is also serving 15 years' imprisonment for the robbery.

I. Background

A. Guilt Phase of the Trial

In 1995, a Florida grand jury indicted Jennings and codefendant Jason Graves with three counts of premeditated murder and one count of robbery.[2] Public Defenders Tom Osteen and Adam Sapenoff were appointed to represent Jennings. The trial took place in October 1996. The Florida Supreme Court summarized the facts of this case as follows:

> Dorothy Siddle, Vicki Smith, and Jason Wiggins, all of whom worked at the Cracker Barrel Restaurant in Naples, were killed during an early morning robbery of the restaurant on November 15, 1995. Upon arriving on the scene, police found the bodies of all three victims lying in pools of blood on the freezer floor with their throats slashed. Victim Siddle's hands were bound behind her back with electrical tape; Smith and Wiggins both had electrical tape around their respective left wrists, but the tape appeared to have come loose from their right wrists.
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> Police also found bloody shoe prints leading from the freezer, through the kitchen, and into the office,

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[2] Graves was 18 years' old at the time of the crimes, and the State agreed to waive the death penalty in Graves's case in exchange for his waiver of a motion for a continuance to allow him more time to prepare for a capital trial. Graves was convicted on all charges in a separate proceeding and sentenced to the only available sentence—life imprisonment.

blood spots in and around the kitchen sink, and an opened office safe surrounded by plastic containers and cash. Outside, leading away from the back of the restaurant, police found scattered bills and coins, shoe tracks, a Buck knife, a Buck knife case, a pair of blood-stained gloves, and a Daisy air pistol.

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, where Jennings ultimately made lengthy statements to Florida law enforcement personnel. In a taped interview, Jennings blamed the murders on Graves, but admitted his (Jennings') involvement in planning and, after several aborted attempts, actually perpetrating the robbery with Graves. Jennings acknowledged wearing gloves during the robbery and using his Buck knife in taping the victims' hands, but claimed that, after doing so, he must have set the Buck knife down somewhere and did not remember seeing it again. Jennings further stated that he saw the dead bodies in the freezer and that his foot slipped in some blood, but that he did not remember falling, getting blood on his clothes or hands, or washing his hands in the kitchen sink. Jennings also stated that the Daisy air pistol belonged to Graves, and directed police to a canal where he and Graves had thrown other evidence of the crime.

> In an untaped interview the next day, during which he was confronted with inconsistencies in his story and the evidence against him, Jennings stated, "I think I could have been the killer. In my mind I think I could have killed them, but in my heart I don't think I could have."
>
> At trial, the taped interview was played for the jury, and one of the officers testified regarding Jennings' untaped statements made the next day. The items ultimately recovered from the canal were also entered into evidence.
>
> The medical examiner, who performed autopsies on the victims, testified that they died from "sharp force injuries" to the neck caused by "a sharp-bladed instrument with a very strong blade," like the Buck knife found at the crime scene. A forensic serologist testified that traces of blood were found on the Buck knife, the Buck knife case, the area around the sink, and one of the gloves recovered from the crime scene, but in an amount insufficient for further analysis. An impressions expert testified that Jennings' tennis shoes recovered from the canal matched the bloody shoe prints inside the restaurant as well as some of the shoe prints from the outside tracks leading away from the restaurant.
>
> . . .
>
> The State also presented testimony concerning previous statements made by Jennings regarding his

> dislike of victim Siddle. Specifically, Bob Evans, one of the managers at Cracker Barrel, testified that Jennings perceived Siddle to be holding him back at work and that, just after Jennings quit, he said about Siddle, "I hate her. I even hate the sound of her voice." Donna Howell, who also worked at Cracker Barrel, similarly testified that she was aware of Jennings' animosity and dislike of Siddle, and that Jennings had once said about Siddle, "I can't stand the bitch. I can't stand the sound of her voice."
>
> The jury found Jennings guilty as charged.

Jennings v. State, 718 So. 2d 144, 145–47 (Fla. 1998) (footnotes omitted).

B. The Penalty Phase

Following the jury's guilty verdict, Jennings's penalty phase proceeded the very next day. The trial court instructed the jury that its sentencing determination was an advisory recommendation and that "[t]he final decision as to what punishment shall be imposed rests solely with the judge."[3] The

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[3] At the time of Jennings's trial, the jury's sentencing determination was advisory and required only a majority vote, but the trial court was required to place "great weight" upon the recommendation of the jury. *See* Fla. Stat. § 921.141(2) (1996); *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975) (holding that jury recommendation "should be given great weight"), *abrogated by Hurst v. Florida*, 577 U.S. 92 (2016). A vote of six or more jurors was necessary for a recommendation of life imprisonment. *State v. Steele*, 921 So. 2d 538, 545 (Fla. 2005), *abrogated by Hurst*, 577 U.S. at 92; *see also Reynolds v. State*, 251 So. 3d 811, 827 (Fla. 2018) (explaining that under Florida's former capital

trial court further instructed that under Florida law, it was "required to give great weight and deference" to the jury's recommendation.

Jennings called six witnesses during the penalty phase—Michael Lobdell, Angela Lobdell, Brian McBride, Rebecca Lloyd, Mary Hamler, and his mother Tawny Jennings. These witnesses all testified very positively to Jennings's character, collectively stating that Jennings was a good friend to everyone, a good son, "happy-go-lucky," "easy going," "fun-loving," wonderful with children, and not a troublemaker.

On cross-examination, the State elicited testimony from Angela and Michael Lobdell that Jennings came to their home the day after the murder, and he was not acting any differently. Additionally, McBride testified that the day before the robbery, Jennings told McBride that he was working at a mall on a construction job and that he was getting paid the next day and

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sentencing scheme, a jury "had various options for recommendations, including life, 7–to–5 death, 8–to–4 death, 9–to–3 death, 10–to–2 death, 11–to–1 death, and unanimous death outcomes").

Florida has since amended its capital sentencing scheme and now requires that, in order for the jury to recommend a death sentence, the jury must unanimously find the existence of at least one aggravating factor and unanimously agree that the defendant should be sentenced to death. Fla. Stat. § 921.141(2) (2021). However, the jury's recommendation that the defendant be sentenced to death is still advisory, and the trial court may override the recommendation. *Id.* § 921.141(3).

would be heading to California.

Hamler—who was in a relationship with Jennings for a couple of years—testified on cross-examination that one time when they were watching a news broadcast about a robbery, Jennings stated that he "wouldn't be stupid enough to stick around" and that he "would go north." She also stated that Jennings was very angry with Cracker Barrel because it had told him to cut off his ponytail if he wanted "to advance himself," and his ponytail was part of his Indian heritage. She confirmed that Jennings cut his ponytail off and had a grudge against Cracker Barrel because he was not promoted. Jennings held victim Dorothy Siddle particularly responsible, and told Hamler "[o]ne day [Siddle] would get hers."[4]

Lastly, Tawny Jennings, Jennings's mother, testified to Jennings's background and the close relationship she shared with her son. Specifically, she testified that Jennings's father was a Sioux Indian, and she divorced him while she was pregnant with Jennings. Jennings never met his father. Jennings was her only

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[4] Siddle was an associate manager at the Cracker Barrel restaurant. During the guilt phase of the trial, another associate manager testified that Jennings, who was a grill cook, wanted to cross-train to become a server, but management told him that he had some areas he needed to improve first, including his "basic appearance, clothes, . . . [his] big long ponytail, . . . and also his attitude." It is unclear from the record whether Siddle was the associate manager tasked with relaying this information to Jennings, but as a scheduling manager, she would have been the person to schedule the desired cross-training.

living child.[5] She and Jennings moved a lot. They lived in Oregon for the first nine years of Jennings's life, then they moved to Colorado (for about a year and a half), moved back to Oregon (for six months), then moved to Wyoming (for a year), then moved back to Oregon (for a year), then Arizona, and finally Florida when Jennings was about 14 or 15 years' old. Tawny was a single mom all of Jennings's childhood, and she occasionally had "a male companion" that lived with them. According to Tawny, Jennings was a straight-A student in school, but he had to quit high school at 17 because Tawny became very ill, and he needed to care for her. Tawny explained that she and Jennings were "very close" like "best friends," and that she could not have asked for a better son.

In closing, the State argued that it had established three statutory aggravating factors:[6] (1) that the murders were

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[5] Tawny had twins that died of crib death before Jennings was born.

[6] At the time of Jennings's trial, Florida law defined aggravating circumstances as the following:

> (a) The capital felony was committed by a person under sentence of imprisonment or placed on community control.
>
> (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
>
> (c) The defendant knowingly created a great risk of death to many persons.
>
> (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an

committed while Jennings engaged in or was an accomplice in the commission of the crime of robbery;[7] (2) the murders were

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> attempt to commit, or flight after committing or attempting to commit, any robbery . . . .
>
> (e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
>
> (f) The capital felony was committed for pecuniary gain.
>
> (g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
>
> (h) The capital felony was especially heinous, atrocious, or cruel.
>
> (i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
>
> (j) The victim of the capital felony was a law enforcement officer engaged in the performance of his official duties.
>
> (k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.
>
> (l) The victim of the capital felony was a person less than 12 years of age.

Fla. Stat. § 921.141(5) (1996).

[7] In support of this aggravator, the State emphasized that the bloody shoe prints in the restaurant led from the freezer where the victims were to the office where the money was located.

committed for the purpose of avoiding or preventing a lawful arrest;[8] and (3) the murders were committed in a cold, calculated, and premeditated manner.[9]

In response, Jennings's counsel argued that the second and third aggravator did not apply. Jennings's counsel also argued that the State's contention that Jennings wanted to get revenge against Siddle because Jennings cut off his ponytail but then did not get the promotion was "a red herring" because Jennings and Graves did not know who the manager would be the morning of the robbery.

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[8] In support of the second aggravator, the State emphasized that Jennings and Graves wore gloves so as to not leave identifying fingerprints. The State pointed out that they had masks with them in the truck, and Jennings admitted in a statement to law enforcement that the initial plan had been to wear masks and snatch the money. The State argued that they chose not to wear the masks because they knew there was no reason to wear masks if they were going to eliminate the witnesses. The State also pointed to the testimony from the guilt phase that Jennings stated that if he ever committed a robbery, he would not leave any witnesses.

[9] In support of this third aggravator, the State argued that Jennings carried the knife and killed the victims in a very personal way, one by one. The State also emphasized that there was evidence of calculated premeditation, including that Jennings attempted to set up an alibi; he and Graves brought tape with them to bind the victims; they wore gloves; they hid the truck; they registered in a hotel both before and after the crime using their own names (which demonstrated that they were not concerned with being linked to the crime because they knew they were not leaving any witnesses); and the day after Jennings went to a friend's house and was not acting any different.

Finally, counsel argued that there were several mitigating factors in Jennings's life—"[h]is mother moved him about the country when he was young, quite a bit"; "[h]e never received a proper education"; "[h]e never knew his father" and "never had a continuous father image in his home"; he was an only child without any siblings to lean on; "[h]e had a succession of boyfriends of his mother's who lived in the home from time to time"; he loved his mother and quit school to help her when she got sick; Jennings worked and contributed positively to society; and he had friends and people liked him. Counsel also reminded the jury that Graves would receive a life sentence for the same offenses and begged the jury to "show mercy" on Jennings.

The jury deliberated approximately an hour and a half and returned a 10 to 2 recommendation in favor of the death penalty for each of the three murder counts.

At the separate sentencing hearing, the trial court addressed the aggravating and mitigating circumstances. First, the trial court found the existence of the three aggravating factors proffered by the State. Second, the trial court found one statutory mitigating factor—Jennings had no significant prior criminal history, which it gave some weight.[10] Third, the trial court found the following

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[10] Florida law provided for the following statutory mitigating circumstances:

> (a) The defendant has no significant history of prior criminal activity.

non-statutory mitigating circumstances: (1) Jennings had a "deprived childhood"—he never knew his father, his father abandoned his mother, his mother moved around frequently during his childhood years and had several boyfriends (given some weight); (2) Jennings's codefendant received life imprisonment for the same crimes based on the same evidence (given some weight); (3) Jennings cooperated with law enforcement and made a voluntary statement that led officers to various items of evidence

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> (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (c) The victim was a participant in the defendant's conduct or consented to the act.
>
> (d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.
>
> (e) The defendant acted under extreme duress or under the substantial domination of another person.
>
> (f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
>
> (g) The age of the defendant at the time of the crime.

Fla. Stat. § 921.141(6) (1996). Jennings argued for three statutory mitigating circumstances: (1) he had "no significant history of prior criminal activity"; (2) he was an accomplice in the offense and his participation was relatively minor; and (3) Jennings acted under "extreme duress or under the substantial domination of another person." *See* Fla. Stat. § 921.141(6)(a), (b), and (e) (1996). The trial court found that the second and third statutory mitigators Jennings argued for did not exist.

(given substantial weight); (4) Jennings had a regular, steady employment history (given little weight); (5) Jennings had a close, loving relationship with his mother (given little weight); (6) Jennings had "[p]ositive personality traits enabling the formation of strong, caring relationships with peers" (given some weight); (7) Jennings had a "[c]apacity to care for and be mutually loved by children" (given some weight); and (8) Jennings exhibited "exemplary courtroom behavior" during the proceedings (given little weight).

The trial court found that "the aggravating circumstances . . . substantially outweigh[ed] the mitigating circumstances present" and that death was the appropriate sentence. Accordingly, the trial court imposed a sentence of death for each of the three murder counts and 15 years' imprisonment for the robbery count.

On direct appeal, the Florida Supreme Court affirmed Jennings's convictions and sentences, and the United States Supreme Court denied certiorari. *Jennings*, 718 So. 2d at 144, *cert. denied*, 527 U.S. 1042 (1999).[11]

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[11] The Florida Supreme Court rejected Jennings's argument that the evidence was insufficient to support the avoid arrest aggravator and the cold, calculated, and premeditated aggravator. *Jennings*, 718 So. 2d at 150–53.

C. State Postconviction Proceedings

Thereafter, Jennings, through counsel, filed a state postconviction motion to vacate his judgment of conviction and sentence, under Florida Rule of Criminal Procedure 3.850 and 3.851, followed by several amended motions. In relevant part, he argued in two related claims that his counsel rendered constitutionally ineffective assistance when he failed to adequately investigate, prepare, and present mitigation at the penalty phase, including failing to adequately investigate his background and childhood, which he alleged contained a wealth of mitigation evidence, and failed to provide background information to the mental health experts that evaluated him prior to trial. The state postconviction court ordered an evidentiary hearing on his claims, at which Jennings presented several witnesses.

i. Evidentiary Hearing Testimony

As relevant to this appeal, Jennings's trial counsel, Thomas Osteen, who had extensive capital case experience at the time he represented Jennings,[12] testified that an investigator, a court-appointed psychiatrist, Dr. Robert Wald, and a court-appointed

[12] Osteen testified that he retired in 2000, but he had been an assistant public defender for 30 years, and he had represented approximately 30 capital defendants prior to representing Jennings in 1996. Osteen also testified that co-counsel Adam Sapenoff did not play any role in the penalty phase other than being present.

psychologist, Dr. Russell Masterson, assisted him with preparation for Jennings's trial and the penalty phase.[13]

Dr. Masterson conducted various tests on Jennings and the results were all within normal limits. Dr. Masterson opined that Jennings had superior intelligence, and his testing results revealed no evidence of "psychotic process," but "suggest[ed] the personality disorder, characterological disorder, sociopathic type of personality."

With regard to Jennings's background, Dr. Masterson noted the following in his report: (1) Jennings and his mother moved around Colorado, Wyoming, Oregon, and Arizona during his childhood; (2) his mother had multiple relationships; (3) Jennings never met his father; (4) Jennings reported being a straight-A student, with no behavior problems; (5) Jennings "always had lots of friends" and described his childhood as "pretty normal" and "a

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[13] Osteen utilized the Public Defender's Office's Investigator, Ed Neary, who was a retired police investigator and assisted Osteen in "just about all of [his] capital cases." Although Neary did not have any formal mental health training or expertise, Osteen believed that Neary had "a good feel" for those types of issues. Osteen also testified that he worked regularly with both Dr. Wald and Dr. Masterson in other cases, and that they "knew what [he] was looking for."

Osteen did not seek assistance from a mitigation expert, which he explained were "not prevalent" at the time of the trial. Instead, he relied on what he learned from Dr. Wald and Dr. Masterson. Osteen did not attempt to obtain school records, employment records, or medical records, and he did not attempt to interview any of Jennings's relatives other than Jennings's mother.

pretty good first 15 years"; (6) Jennings became sexually active at age 12 when he was seduced by an older woman he babysat for, but he indicated his "first sexual experiences" were at age 5 or 6 with a female cousin who was age 10; (7) Jennings denied any history of sexual abuse from adults; (8) at age 15, Jennings and his mother moved to Florida and his life "did a 180"—Jennings did not like the Florida school, he was bored, and he felt rejected by his peers, and he got into drugs, alcohol, and street racing; (9) as a teen, Jennings got into a fight with his mother's boyfriend and hospitalized him—the boyfriend had been drunk and attacked Jennings's mother; (10) Jennings dropped out of school his junior year of high school; (11) after dropping out, he "got into bar fights and was into acid, pot, and alcohol"; (12) he had regular employment in various occupations; (13) in 1989 or 1990, when a man threatened a woman Jennings was dating, Jennings kidnapped the man, had a firearm with him, and planned to kill the man, but he was arrested and pleaded no contest to attempted armed robbery (he was sentenced to a year in county jail and five years' probation); (14) while in jail, he was in "30 or 40 fights" but never got in trouble; (15) in 1992, "his life kind of fell apart" and he got heavy into drugs and alcohol and moved back in with his mother; (16) in 1994, he moved in with Mary Hamler—he loved her three kids a lot, but "really didn't care about her"; and (17) after he and Hamler broke up, Jennings moved in with codefendant Graves.

Dr. Wald's report indicated that Jennings self-reported similar information concerning his childhood, educational

history,[14] and background.[15] Jennings also reported that he saw a psychiatrist when he was eight years' old due to his "bad temper," including one instance where he choked his cousin for laughing at him. Dr. Wald agreed with Dr. Masterson's assessment that Jennings's testing was all relatively normal and opined that Jennings was very intelligent, with no mental disorders or brain dysfunction, and that Jennings had a "sociopathic personality."[16]

After reviewing their reports, Osteen elected not to call Dr. Wald or Dr. Masterson during the penalty phase.[17]

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[14] Dr. Wald reviewed Jennings's school records from Florida, noting that they were "essentially non-contributory" to his report and indicated that Jennings struggled with several courses.

[15] Dr. Wald also noted that Jennings suffered a concussion at age 2 or 3 after he was hit on the head by a wooden board, which resulted in his hospitalization, and that Jennings had a lengthy history of drug and alcohol abuse that began in his teens. Jennings had a "number of prior arrests," primarily for traffic violations, but including a shoplifting arrest in his teens and his arrest on attempted armed robbery. Jennings also self-reported that he "ha[d] stolen things for both money and . . . the 'adrenalin[e] rush.'" Jennings indicated that "he [sought] gratification, [did] not feel at all remorseful about crimes he ha[d] committed, and ha[d] experienced no guilt relative to legal infractions."

[16] Dr. Wald attempted to interview Jennings's mother, who was very resistant at first, and then she did not show up for the scheduled interview.

[17] Osteen explained that it was part of his trial strategy not to call Dr. Wald or Dr. Masterson as witnesses because, after speaking with them, he "came to the conclusion that [their testimony] would not be helpful to a great extent, and so [he] decided to rely on [Jennings's] mother and his friends to come

In addition to Osteen's testimony, at the state postconviction evidentiary hearing, Jennings presented testimony from three experts in support of his claims—Dr. Thomas Hyde, a behavioral neurologist, Dr. Hyman Eisenstein, a clinical psychologist and expert in neuropsychology, and Dr. Faye Sultan, a clinical psychologist. Dr. Hyde and Dr. Eisenstein both testified that Jennings suffered a number of closed head injuries[18] and had a history of febrile convulsions (seizures) between the ages of 8 months and 2 years. Dr. Hyde opined that the seizures were a typical indicator of abnormal brain function; and that a history of head trauma may predispose a person to "some long-lasting neurological effects from brain damage." Nevertheless, Dr. Hyde

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forward and make as many good statements as they could about the defendant." He also did not want to call the doctors as witnesses because there was information in their reports—such as Jennings's criminal history—that he did not want the jury to know about, particularly because he was arguing for, and received, the no significant criminal history statutory mitigator.

[18] Specifically, Jennings reported to Dr. Hyde and Dr. Eisenstein that he was hit in the head with a 2x4 piece of wood as a toddler; kicked in the head by a pony at age 4 or 5; punched in the face as a teen; ran into a brick wall at age 16; engaged in a head-butting competition as a teen; was involved in multiple fights and suffered blows to the head; and was involved in a motorcycle accident (Jennings denied any head injury from motorcycle accident, but Dr. Eisenstein opined that "it was impossible that he didn't have a closed head injury" from it).

opined that Jennings's neurological examination was normal "for the most part."[19]

Following testing, Dr. Eisenstein opined that Jennings was "gifted" with learning disabilities that went untreated.[20] Dr. Eisenstein also diagnosed Jennings with intermittent explosive disorder, which is characterized by explosive aggressive responses that are not proportionate to the provocation. Dr. Eisenstein opined that the following statutory mitigating circumstances applied to Jennings—(1) his capacity to appreciate the criminality of his conduct or to conform his conduct to the law was impaired, and (2) he was under the influence of an extreme mental or emotional disturbance when he committed the murders.

Dr. Faye Sultan testified that her investigation revealed that Jennings's maternal grandfather was "overtly sexual" with his daughters, and that Tawny (Jennings's mother) was molested by

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[19] Dr. Hyde noted three "subtle neurological findings"—(1) Jennings's pupils were asymmetrical (one was larger than the other); (2) he had a "postural tremor" in one hand; and (3) he had one unspecified "frontal release sign," but he admitted that these subtle findings can also be present "in normal individuals."

[20] Dr. Eisenstein explained that some of Jennings's scores were excellent, while others were "indicative of a brain dysregulation" and a learning disability. Dr. Eisenstein noted that although both Jennings and his mother indicated that Jennings was a straight-A student, his school records—although missing a number of years—revealed that was not true.

her brother, George "Sonny" Jennings.[21] Some of the people Sultan interviewed witnessed Jennings sit on Sonny's lap as a child, and Jennings reported that Sonny paid him a quarter to sit on his lap. Walter Croom, who married one of Jennings's cousins, was also a child molester, and he occasionally babysat Jennings. However, Dr. Sultan confirmed that Jennings denied any sexual abuse and there was no direct evidence indicating that any had occurred, although she speculated it could have given the environment that he grew up in. Dr. Sultan concluded that Jennings grew up in extreme poverty and neglect and in an environment that involved "the sexualization of children." She testified that children who grow up in that type of environment "don't develop normally neurologically" and are "quite impulsive, sometimes aggressive, over sexualized themselves, often substance abusers to the extreme."

Based on her interviews with Jennings's mother, Dr. Sultan opined that Tawny was "quite mentally ill"—although she could not offer any formal diagnosis—and Tawny had an "abnormal attachment" to Jennings when he was a child. Dr. Sultan noted that Tawny "behaved very oddly" toward Jennings, citing the fact that Tawny breastfed him until he was five, and an unspecified

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[21] Tawny told Jennings at a very young age that she was a victim of sexual abuse, and Dr. Sultan opined that such knowledge produces significant emotional distress in children and "it certainly contributed" to "Jennings'[s] state." And Jennings stated that at one time, he believed his uncle Sonny might be his biological father.

person Sultan interviewed purportedly witnessed Tawny engage in sex in the presence of Jennings.[22]

Dr. Sultan's interpretation of Jennings's testing results "was quite similar" to Dr. Masterson's interpretation. Dr. Sultan explained that Jennings was of above average intelligence, likely to be a serious substance abuser, had difficulty controlling his anger, was easily frustrated, extroverted, had a rigid personality, and was able to have relationships with other persons, but they were not likely to be long-lasting ones. Dr. Sultan also opined that Jennings had intermittent explosive disorder. She further opined that Jennings did not suffer from any mental illness, and that "he did not meet the standards for [Florida's] statutory mitigators." Nevertheless, she thought Jennings was "quite a damaged person" who "operate[d] in the world . . . in a highly dysfunctional way."

Finally, Jennings presented mitigation testimony from family and friends. Jennings's cousin, Patricia Scudder, testified that, between the ages of 6 and 12, Jennings and Tawny lived in a three-bedroom cabin-type home at the Buccaneer Apartments (also known as the Buccaneer Motel). Scudder stayed with Jennings and his mother for two-week periods on three different

[22] Dr. Eisenstein similarly opined that Tawny was not a good mother, lacked parenting skills, and was not an accurate historian of Jennings's background because she had been a victim of physical, sexual, and emotional abuse.

occasions.[23] She described the condition of their apartment during her first stay as "[v]ery, very messy" with clothes piled everywhere and there were "[d]irty [k]otexes" around the apartment. But on cross-examination, she clarified that the reason why she was staying with them was because Jennings's mother had just had surgery, was immobile, and needed help. The second time Patricia stayed with them, Jennings's mother was again having health issues and needed help. On this occasion, Jennings's mother had a new puppy, and there were puppy papers and dog poop on the floor, and dirty dishes everywhere. Patricia stated that Tawny prepared quick simple meals like toast, gravy, or hamburgers, and allowed Jennings to eat a lot of junk food.

According to Patricia, Jennings regularly slept in the same bed with his mother at 5 or 6 years' old. On one occasion, Patricia observed three men stay the night in Tawny's home while Jennings was home. The next morning after two of the men had left, Patricia walked into the apartment, and Tawny and her boyfriend were "cuddled up together" on the hide-a-bed in the living room, unclothed—although not engaged in any sexual act—and Jennings was lying on the floor watching tv. Nevertheless, despite her testimony concerning the squalor of Jennings's living conditions and poor parenting skills of Tawny, Patricia described Jennings's

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[23] Other than the three two-week periods that Patricia stayed with them, she saw Jennings and his mother "[n]ot very often at all." And she lost touch with them after they moved in 1990, and she did not know anything about the case until years after the trial.

and his mother's relationship as "very loving" and explained that she had never "seen a mother and a son as close" as they were.

Patricia's husband, Lloyd, testified that Sonny molested Patricia, and Croom molested his and Patricia's son, and that Sonny and Croom had the opportunity to be around Jennings. Lloyd also testified that he smoked marijuana with Tawny regularly, and that she also took a lot of pain pills because of health issues. Lloyd thought Tawny was a bad mother—describing her as selfish, unemployed, and a poor housekeeper and cook.[24] Lloyd often took Jennings fishing, taught him how to box, and did other things with him, like a father figure. But Lloyd lost touch with Jennings after Tawny moved from Oregon.

Next, Heather Johnson testified that she was "good friends" with Jennings for a couple of years when they were 17 or 18 years' old. She stated that Jennings often expressed unhappiness, conflict, and resentment with his mother. At the time of Jennings's trial, Johnson no longer lived in Florida, but she was contacted via letter by Jennings's defense team, asking if she could give any "good word" or character statement on behalf of Jennings and whether she knew of anyone else who would be willing to testify on his behalf. She wrote back stating that she was not sure that she could be of much help because she and Jennings had lost contact and had

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[24] When asked how Tawny supported herself, Lloyd stated that she was on welfare and speculated that she made money "[p]robably hooking."

not spoken in years.[25] She did not hear back from Jennings's counsel, but she would have been willing to testify.

Lastly, Kevin McBride testified that he was friends with Jennings when they were teenagers in Florida, and, at one point, Jennings lived with him for a few months when Jennings's mother "was in between places." He described Jennings's mother as a "very nice lady" who was "always friendly" but unstable financially. He recalled that Jennings and his mother were more like friends than mother and son. He stated that Jennings drank and used marijuana on a daily basis, and he and Jennings used acid and mushrooms on occasion.[26] McBride confirmed that he met with one of Jennings's investigators at the time of Jennings's trial, but that he was not asked to testify.

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[25] Specifically, Johnson advised in her response that "[a]ll [she could] offer [was] a brief summary of the Brandy Bain Jennings that [she] knew and loved, and even that may not be a sterling character reference." She went on to describe that Jennings was her best friend, confidant, and protector—a big brother type, who taught her things and made her feel safe. But he was also "often foolish" and would do impulsive things without considering the consequences. She stated that she believed he could have committed the robbery because it was a way to act out the anger and frustration that he had a difficult time expressing, but she did not believe him capable of murder. She also advised that she could not think of anyone else who would be willing to help Jennings.

[26] Bruce Martin, half-brother to Kevin McBride, similarly testified at the evidentiary hearing that Jennings drank heavily, used marijuana every day, and used acid about once a week.

ii. Trial Court Denies Jennings's Postconviction Motion

Following the evidentiary hearing, the trial court denied Jennings's postconviction motion on the merits. *Florida v. Jennings*, No. 1995-CF-02284, 2011 WL 11573988 (Fla. Cir. Ct. Jan. 31, 2011). The trial court concluded that counsel's mitigation investigation was not deficient because the record demonstrated that counsel interviewed Jennings's mother and various friends and called witnesses during the penalty phase that he thought could present positive information, which was "proper trial strategy." *Id.* at *4–6. Finally, the trial court concluded that Jennings could not show prejudice because, even if counsel had introduced all of the information in question, there was no reasonable probability of a different outcome. *Id.* at *6. Jennings appealed to the Florida Supreme Court.

iii. Florida Supreme Court's Decision

The Florida Supreme Court determined that counsel made a reasonable strategic decision to not present mitigation testimony from Dr. Wald and Dr. Masterson during the penalty phase "because it could open the door to other damaging testimony." *Jennings v. State*, 123 So. 3d 1101, 1114 (Fla. 2013) (*Jennings II*) (quotation omitted). The court concluded that counsel was not "deficient for choosing to pursue other mitigation evidence that he determined was more likely to help Jennings at trial." *Id.* Finally, the court held that Jennings failed to establish prejudice because the trial court found as a nonstatutory mitigation that Jennings had a deprived childhood, and the omitted information concerning

Jennings's troubled childhood and emotional development did "not rise to the level of unpresented mitigation previously held to be prejudicial." *Id.* at 1117–18.

D. Federal § 2254 Habeas Proceeding

Following the denial of state postconviction relief, Jennings filed a § 2254 federal habeas petition in the United States District Court for the Middle District of Florida, raising several claims. As relevant to this appeal, he combined his arguments that counsel was ineffective for failing to conduct an adequate investigation into mental health mitigation and his childhood background into a single claim. Specifically, he argued that counsel was ineffective at the penalty phase because (1) counsel's mitigation investigation was minimal and he failed to obtain medical or school records and failed to provide such records to the experts; and (2) counsel made no effort to truly investigate Jennings's background and childhood, which would have revealed a wealth of compelling mitigation.[27]

The district court denied the petition, concluding that the state court's determination that counsel was not deficient was not contrary to, or an unreasonable application of, *Strickland v.*

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[27] Jennings also took issue with the adequacy, sufficiency, and competency of Dr. Wald's and Dr. Masterson's reports and Osteen's reliance on those allegedly deficient reports, but as his counsel acknowledged during oral argument, that issue is beyond the scope of the COA in this case. *See Murray v. United States*, 145 F.3d 1249, 1251 (11th Cir. 1998) (holding that "in an appeal brought by an unsuccessful habeas petitioner, appellate review is limited to the issues specified in the COA").

Washington, 466 U.S. 668 (1984). *Jennings v. Sec'y, Dep't of Corr.*, No. 2:13-cv-751-FtM-38MRM, 2020 WL 7047706, *9–11 (M.D. Fla. Dec. 1, 2020). Because the district court found that the performance prong was not satisfied, it did not address the prejudice prong. *Id.* The district court denied Jennings a COA, and he sought a COA from this Court. *Id.* at *21. As noted previously, we granted Jennings a COA on one issue: "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."

II. Standard of Review

We review the district court's denial of a § 2254 habeas petition *de novo*. *Ward v. Hall*, 592 F.3d 1144, 1155 (11th Cir. 2010).

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") establishes a "highly deferential standard for evaluating state-court rulings, [and] demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)). Thus, under AEDPA, a federal court's review of a final state habeas decision is greatly circumscribed, and a federal habeas court cannot grant a state petitioner habeas relief on any

claim that was adjudicated on the merits in state court unless the state court's adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)–(2).

"[C]learly established Federal law" means "the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). "[T]o be 'contrary to' clearly established federal law, the state court must either (1) apply a rule that contradicts the governing law set forth by Supreme Court case law, or (2) reach a different result from the Supreme Court when faced with materially indistinguishable facts." *Ward*, 592 F.3d at 1155 (quotations omitted); *see also Bell v. Cone*, 535 U.S. 685, 694 (2002).

An "unreasonable application" of federal law occurs "if the state court correctly identifies the governing legal principle from [the Supreme Court's] decisions but unreasonably applies it to the facts of the particular case." *Bell*, 535 U.S. at 694. "[A]n unreasonable application of federal law is different from an incorrect application of federal law." *Williams*, 529 U.S. at 410 (emphasis omitted). "Indeed, 'a federal habeas court may not issue

the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.'" *Renico v. Lett*, 559 U.S. 766, 773 (2010) (quoting *Williams*, 529 U.S. at 411); *see also Shinn v. Kayer*, 141 S. Ct. 517, 523 (2020) ("To meet [the unreasonable application] standard, a prisoner must show far more than that the state court's decision was merely wrong or even clear error." (quotation omitted)). Rather, the state court's application of federal law "must be 'objectively unreasonable,'" *Renico*, 559 U.S. at 773, meaning that "the state court's decision is so obviously wrong that its error lies beyond any possibility for fairminded disagreement, *Shinn*, 141 S. Ct. at 523 (quotations omitted). "This distinction creates a substantially higher threshold for obtaining relief than *de novo* review." *Renico*, 559 U.S. at 773 (quotation omitted).

"[W]hen the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion . . . a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). However, we are not limited by the particular justifications the state court provided for its reasons, and we may consider additional rationales that support the state court's determination. *Pye v. Warden, Ga. Diag. Prison*, 50 F.4th 1025, 1036 (11th Cir. 2022) (en banc). A state court's decision is reasonable "so long as 'fairminded jurists could disagree' on the correctness of the state court's decision."

Harrington v. Richter, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

In addition, "a determination of a factual issue made by a State court shall be presumed to be correct," and the petitioner bears "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). With these principles in mind, we turn to the merits of Jennings's appeal.

III. Discussion

Jennings argues that Osteen was constitutionally ineffective by failing to adequately investigate and present mitigation evidence related to his childhood and background, and in failing to obtain and provide relevant background records to Dr. Wald and Dr. Masterson.

To succeed on a claim of ineffective assistance of counsel in violation of the Sixth Amendment, a petitioner must establish two elements. *Strickland*, 466 U.S. at 687. "First, the defendant must show that counsel's performance was deficient." *Id.* Review of counsel's actions is "highly deferential" and "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

"Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. Prejudice occurs when there is a reasonable probability that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "When a defendant challenges a death

sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."[28] *Id.* at 695. "The likelihood of a different result must be substantial, not just conceivable." *Harrington*, 562 U.S. at 112. In determining whether there is a reasonable probability of a different result, a court must "consider 'the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding'—and 'reweig[h] it against the evidence in aggravation.'" *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (quoting *Williams*, 529 U.S. at 397–98).

Because both prongs of the *Strickland* standard "must be satisfied to show a Sixth Amendment violation, a court need not address the performance prong if the petitioner cannot meet the prejudice prong, and vice-versa." *Ward*, 592 F.3d at 1163. Furthermore, the *Strickland* standard is a general standard, which means that "a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009); *see also Renico*,

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[28] Again, at the time of Jennings's trial, only a majority 7-5 vote was necessary to recommend death. *Reynolds*, 251 So. 3d at 827 (explaining that under Florida's old capital sentencing scheme, a jury "had various options for recommendations, including life, 7–to–5 death, 8–to–4 death, 9–to–3 death, 10–to–2 death, 11–to–1 death, and unanimous death outcomes").

559 U.S. at 776 ("Because AEDPA authorizes federal courts to grant relief only when state courts act unreasonably, it follows that '[t]he more general the rule' at issue—and thus the greater the potential for reasoned disagreement among fair-minded judges—'the more leeway [state] courts have in reaching outcomes in case-by-case determinations.'" (quoting *Yarborough*, 541 U.S. at 664)).

Here, we need not address Jennings's arguments related to the performance prong 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. The mitigation evidence offered in Jennings's postconviction proceedings primarily related to non-statutory mitigation. Specifically, in addition to Jennings's positive character traits and relationships that the jury and judge originally heard during the penalty phase, had the evidence submitted at the postconviction proceeding been presented at the penalty phase, the jury and the sentencing judge would also have learned of Jennings's chaotic childhood; his mother's poor parenting skills; his family's history of sexual abuse;[29] Jennings's drug and alcohol abuse; his history of head

[29] Jennings argues that the Florida Supreme Court unreasonably discounted the evidence of sexual abuse in his family and the effect that such an environment would have had on Jennings's emotional and mental development in contravention of the Supreme Court's decision in *Porter*. Contrary to Jennings's argument, the Florida Supreme Court did not discount the evidence of sexual abuse to "irrelevance" but instead determined that it was of minimal value because evidence of sexual abuse of Jennings's family

injuries and febrile seizures; that his neurological testing was normal despite repeated head injuries; that he did not have any mental illness; that he had intermittent explosive disorder and that two experts believed he had sociopathic personality traits; that Jennings had above-average intelligence; and that he had a history of criminal acts, some of which were violent.

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. As an initial matter, there 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." And we have held that it is not an

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members "might have been mitigating in establishing [his] troubled childhood and emotional development," but the trial court already found as a non-statutory mitigating factor that he had a deprived childhood. *Jennings II*, 123 So. 3d at 1118. It was not contrary to, or an unreasonable application of, clearly established federal law for the Florida Supreme Court to determine that the evidence of familial sexual abuse was of minimal value given that Jennings expressly denied any personal history of sexual abuse, and there was no other evidence indicating that Jennings himself suffered any sexual abuse from any family members.

unreasonable application of *Strickland* to conclude that there is no prejudice when much of the mitigation evidence would have constituted a double-edged sword. *See Gavin v. Comm'r, Ala. Dep't of Corr.*, 40 F.4th 1247, 1269 (11th Cir. 2022) (holding that mitigation evidence "could have been a double-edged sword," and, therefore, the state court reasonably applied *Strickland* when it concluded that petitioner could not establish prejudice); *Ponticelli v. Sec'y, Fla. Dep't of Corr.*, 690 F.3d 1271, 1296 (11th Cir. 2012) ("[B]oth the Supreme Court and this Court have consistently rejected [the] prejudice argument [ ] where mitigation evidence was a two-edged sword or would have opened the door to damaging evidence." (second and third alterations in original) (quotations omitted)).

Furthermore, there were significant aggravating factors present in this case—(1) the murders were committed while Jennings was engaged in or was an accomplice in the commission of a robbery; (2) the murders were committed for the purpose of avoiding or preventing a lawful arrest or to effectuate an escape from custody; and (3) the crimes were committed in a cold, calculated, premeditated manner. Notably, the cold, calculated, and premeditated factor is one of "the weightiest aggravating factors in Florida's capital sentencing scheme." *Carr v. State*, 156 So. 3d 1052, 1071 (Fla. 2015) (quotations omitted). And as the state postconviction court noted, the nature of, and circumstances surrounding, the three murders in this case were particularly heinous. "We've repeatedly held that even extensive mitigating

evidence wouldn't have been reasonably likely to change the outcome of sentencing in light of a particularly heinous crime and significant aggravating factors." *Pye*, 50 F.4th at 1049 (collecting cases); *see also Puiatti v. Sec'y, Fla. Dep't of Corr.*, 732 F.3d 1255, 1287–88 (11th Cir. 2013) (holding that petitioner could not show prejudice based on mitigation evidence of depraved, impoverished, and abusive childhood where one of the aggravating factors was the cold, calculated, and premeditated aggravator). Thus, in light of the facts of this case, we cannot say that the Florida Supreme Court's determination that Jennings did not suffer prejudice was so obviously wrong as to be beyond any possibility for fairminded disagreement, which is "the only question that matters" under § 2254(d). *Shinn*, 141 S. Ct. at 526; *see also Jones v. Sec'y, Fla. Dep't of Corr.*, 834 F.3d 1299, 1312–17 (11th Cir. 2016) (holding that state court's determination that the petitioner failed to demonstrate prejudice was reasonable where the mitigating evidence was of limited value and there were significant aggravating factors).

To the extent that Jennings argues that his case is analogous to *Porter* or *Sears v. Upton*, 561 U.S. 945 (2010), and that those cases compel a finding of prejudice in this case, his argument is unpersuasive. The mitigating evidence in *Porter* was significantly more compelling than that presented in Jennings's case. For instance, in *Porter*, the jury never heard that (1) he suffered from brain damage that could result in "impulsive, violent behavior"; (2) that he had "heroic military service in two of the most critical—and horrific—battles of the Korean War"; (3) he suffered from

mental health issues following the war; (4) he had an extensive history of childhood physical abuse by his father; and (5) that Porter was in special education classes and left school at the age of 12 or 13. 558 U.S. at 33–37, 41. More importantly, in *Porter*, the Supreme Court reasoned that, had the jury heard this extensive mitigation, there was a reasonable probability that the jury would have struck a different balance given that there appeared to be only one aggravating factor that tipped the scales in favor of a death sentence. *Id.* at 41–42. In contrast, although Jennings's mitigation evidence included details about a deprived and impoverished childhood and that he had a history of head trauma, there was no evidence of brain dysfunction, mental illness—indeed Jennings's experts opined that he was very intelligent with no mental disorders or brain dysfunction—or physical or sexual abuse, and Jennings's death sentence was supported by three significant aggravating factors. Given the significant differences between *Porter* and the case at hand, *Porter* cannot compel a finding of prejudice in this case.

Similarly, the mitigation evidence in *Sears* was far stronger than that in Jennings's case. The mitigation evidence in *Sears* included that (1) Sears "suffer[ed] from substantial cognitive impairment" and he was "among the most impaired individuals in the population in terms of ability to suppress competing impulses and conform behavior"; (2) he had a history of head trauma and "significant frontal lobe abnormalities"; (3) he grew up in a volatile, physically abusive home; and (4) he suffered sexual abuse from a

family member. 561 U.S. at 948–50. Furthermore—and this is a crucial difference—*Sears* was not subject to AEDPA's deferential review standard because the *Sears* appeal was not from a federal petition for a writ of habeas corpus; instead, Sears had appealed from the state court's decision directly to the United States Supreme Court. *Id.* at 946. Moreover, *Sears* did not involve a finding of prejudice. Rather, the Supreme Court determined that the state court failed to apply the proper prejudice inquiry, and it remanded the case for the state court to conduct "[a] proper analysis of prejudice" in the first instance. *Id.* at 956 ("It is for the state court—and not for either this Court or even [the dissenting Justice]—to undertake [the prejudice inquiry] in the first instance."). Thus, *Sears* cannot compel a finding of prejudice in Jennings's case.

Accordingly, we affirm the district court's denial of Jennings's habeas petition.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-11591-P

BRANDY BAIN JENNINGS,

Petitioner - Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent - Appellee.

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

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

BEFORE: JORDAN, BRANCH, and BRASHER, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

ORD-46

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

For rules and forms visit
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February 14, 2023

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 21-11591-P
Case Style: Brandy Jennings v. Secretary, Florida Department
District Court Docket No: 2:13-cv-00751-SPC-MRM

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Clerk's Office Phone Numbers

General Information	404-335-6100
New / Before Briefing Cases	404-335-6135
Cases in Briefing / After Opinion	404-335-6130
Cases Set for Oral Argument	404-335-6141
Capital Cases	404-335-6200
Attorney Admissions	404-335-6122
CM/ECF Help Desk	404-335-6125

REHG-1 Ltr Order Petition Rehearing

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

BRANDY BAIN JENNINGS,

Petitioner,

v. Case No.: 2:13-cv-751-FtM-38MRM

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

Respondents.
_____/

OPINION AND ORDER[1]

Before the Court is Petitioner Brandy Bain Jennings' Amended Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2254. (Doc. 61). Jennings, through counsel, challenges his 1996 convictions for three counts of murder and one count of robbery, for which he was sentenced to death by the Twentieth Judicial Circuit Court, in and for Collier County, sitting in Pinellas County, Florida.[2] He raises the following grounds for relief: (1) Jennings was denied effective assistance of counsel at the penalty phase in violation of the Sixth,

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[2] Jennings' trial was conducted in Pinellas County pursuant to an order granting a change of venue.

Eighth, and Fourteenth Amendments; (2) Jennings' convictions and sentences are materially unreliable because trial counsel was ineffective for failing to adequately impeach the prejudicial testimony of Angela Cheney; (3) the postconviction court erred in summarily denying several claims in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments; (4) the trial court should have suppressed Jennings' statements to law enforcement authorities and all evidence derived from it, as the statements were obtained in violation of his right to counsel; and (5) Jennings' death sentence violates the Sixth and Eighth Amendments and due process because a jury did not make the findings of fact necessary to render him eligible for a death sentence. (*Id.*).

Respondents filed an amended response (Doc. 66), and Jennings filed a reply (Doc. 67).

I. Timeliness and Evidentiary Hearing

Respondent concedes the Petition is timely filed. (Doc. 66 at 39-40). The Court agrees.

Jennings asks for an evidentiary hearing on each of his claims. (Doc. 61 at 27). In support, he claims, "The state court evidentiary development was limited in fundamental ways and inadequate." (*Id.* at 38). Respondent argues Jennings does not carry his burden of establishing his entitlement to an evidentiary hearing. (Doc. 66 at 46-47).

A federal court "must limit its review under § 2254(d) to the state court's record." *Brannon v. Sec'y, Fla. Dep't of Corr.*, No. 19-13757, 2020 WL 2188675, at *5 (11th Cir. May 6, 2020) (finding district court erred in granting evidentiary hearing and considering evidence not before the state court). "An evidentiary hearing is unnecessary unless it would "enable [a postconviction petitioner] to prove the petition's factual allegations, which, if true, would entitle [him] to federal habeas relief." *Samuels v. Sec'y, Dep't of Corr.*, No. 19-13445, 2020 WL 2097260, at *1 (11th Cir. May 1, 2020) (quoting *Crowe v. Hall*, 490 F.3d 840, 847 (11th Cir. 2007)). "[T]he burden is on the petitioner to establish the need for an evidentiary hearing." *Jones v. Sec'y, Fla. Dep't of Corr.*, 834 F.3d 1299, 1318 (11th Cir. 2016) (citations omitted), cert. denied, __ U.S. __, 137 S. Ct. 2245 (2017). Conclusory allegations will not suffice. Instead, a petitioner must proffer specific facts and evidence, which, if true, would prove an entitlement to relief. *Id.* at 1319.

Jennings has set forth no specific facts or evidence which warrant an evidentiary hearing. As discussed *infra*, Jennings does not establish that the state court erred in summarily denying certain claims. The Court finds an evidentiary hearing is not warranted because the material facts are developed in the record. *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) (if the record refutes the factual allegations in the petition or otherwise precludes habeas relief, a district court need not hold an evidentiary hearing); *see also Jones*, 834

F.3d at 1318-19. Jennings has not demonstrated he is entitled to an evidentiary hearing, 28 U.S.C. § 2254(e)(2), and therefore his request for an evidentiary hearing is denied.

II. Factual and Procedural Background

A. Trial and Sentence

On December 20, 1995, a grand jury returned indictments charging Jennings and Charles Jason Graves with three counts of premeditated murder and one count of robbery. (Direct Appeal Record (DA) at 20-21). Tom Osteen and Adam Sapenoff from the Office of the Public Defender represented Jennings. Graves was represented by private counsel. Jennings filed a pretrial motion to suppress statements made to law enforcement (DA at 152) and motion for change of venue (DA at 108). The circuit court denied the motion to suppress (DA at 170) but granted a change of venue (DA at 140).

Jennings' trial started on October 28, 1996 in Pinellas County, Florida. On October 31, 1996, the jury found Jennings guilty of murdering Dorothy Siddle, Vicki Smith, and Jason Wiggins during the robbery of a Cracker Barrel restaurant in Naples, Florida. (Trial Transcript (TT) at 835). The penalty phase proceeding was held the next day. The jury, by a vote of 10-2, recommended the death penalty for each murder count. (Penalty Phase Transcript at 163). The trial court, following the jury's recommendation, sentenced Jennings to death (DA at 790). The Florida Supreme Court

accurately summarized the underlying facts presented at trial in Jennings' direct appeal:

> Dorothy Siddle, Vicki Smith, and Jason Wiggins, all of whom worked at the Cracker Barrel Restaurant in Naples, were killed during an early morning robbery of the restaurant on November 15, 1995. Upon arriving on the scene, police found the bodies of all three victims lying in pools of blood on the freezer floor with their throats slashed. Victim Siddle's hands were bound behind her back with electrical tape; Smith and Wiggins both had electrical tape around their respective left wrists, but the tape appeared to have come loose from their right wrists.
>
> Police also found bloody shoe prints leading from the freezer, through the kitchen, and into the office, blood spots in and around the kitchen sink, and an opened office safe surrounded by plastic containers and cash. Outside, leading away from the back of the restaurant, police found scattered bills and coins, shoe tracks, a Buck knife, a Buck knife case, a pair of blood-stained gloves, and a Daisy air pistol.
>
> 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, where Jennings ultimately made lengthy statements to Florida law enforcement personnel. In a taped interview, Jennings blamed the murders on Graves, but admitted his (Jennings') involvement in planning and, after several aborted attempts, actually perpetrating the robbery with Graves. Jennings acknowledged wearing gloves during the robbery and using his Buck knife in taping the victims' hands, but claimed that, after doing so, he must have set the Buck knife down somewhere and did not remember seeing it again. Jennings further stated that he saw the dead bodies in the freezer and that his foot slipped in some blood, but that he did not remember falling, getting blood on his clothes or hands, or washing his hands in the kitchen sink. Jennings also stated that the Daisy air pistol belonged to Graves, and directed police to a canal where he and Graves had thrown other evidence of the crime.

In an untaped interview the next day, during which he was confronted with inconsistencies in his story and the evidence against him, Jennings stated, "I think I could have been the killer. In my mind I think I could have killed them, but in my heart I don't think I could have."

At trial, the taped interview was played for the jury, and one of the officers testified regarding Jennings' untaped statements made the next day. The items ultimately recovered from the canal were also entered into evidence.

The medical examiner, who performed autopsies on the victims, testified that they died from "sharp force injuries" to the neck caused by "a sharp-bladed instrument with a very strong blade," like the Buck knife found at the crime scene. A forensic serologist testified that traces of blood were found on the Buck knife, the Buck knife case, the area around the sink, and one of the gloves recovered from the crime scene, but in an amount insufficient for further analysis. An impressions expert testified that Jennings' tennis shoes recovered from the canal matched the bloody shoe prints inside the restaurant as well as some of the shoe prints from the outside tracks leading away from the restaurant.

The State also presented testimony concerning previous statements made by Jennings regarding robbery and witness elimination in general. Specifically, Angela [Cheney], who had been a friend of Jennings', testified that about two years before the crimes Jennings said that if he ever needed any money he could always rob someplace or somebody. [Cheney] further testified that when she responded, "That's stupid. You could get caught," Jennings replied, while making a motion across his throat, "Not if you don't leave any witnesses." On cross-examination, [Cheney] further testified that Jennings had "made statements similar to that several times."

The State also presented testimony concerning previous statements made by Jennings regarding his dislike of victim Siddle. Specifically, Bob Evans, one of the managers at Cracker Barrel, testified that Jennings perceived Siddle to be holding him back at work and that, just after Jennings quit, he said about Siddle, "I hate her. I even hate the sound of her voice." Donna

Howell, who also worked at Cracker Barrel, similarly testified that she was aware of Jennings' animosity and dislike of Siddle, and that Jennings had once said about Siddle, "I can't stand the bitch. I can't stand the sound of her voice."

The jury found Jennings guilty as charged. In the penalty phase, the defense presented mitigation evidence, including general character testimony from witness Mary Hamler, who testified on direct examination that she had lived with Jennings for two and one-half years. She also testified that Jennings had gotten along well with her children during that time, and that he cried when they (Jennings and Hamler) broke up.

On cross-examination, the State elicited testimony from Hamler that there was another side to Jennings' character and that Jennings once said that if he ever committed a robbery, he would not be stupid enough to stick around, but would go north. Hamler further testified on cross-examination that Jennings was angry at Cracker Barrel in general, and Siddle in particular, for "jerking him around" and holding him back at work, and that in this regard Jennings once said of Siddle that "one day she would get hers."

The defense presented further character evidence from several of Jennings' friends 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' mother testified that her son never met his father and that she raised Jennings herself. She claimed that Jennings had been a straight-A student, but quit school to take care of her when she became sick.

The jury recommended death by a vote of ten to two as to each of the murders. In its sentencing order, the trial court found three aggravators: (1) that the murders were committed during a robbery; (2) that they were committed to avoid arrest; and (3) that they were cold, calculated, and premeditated (CCP).

The trial court found only one statutory mitigator: that Jennings had no significant history of prior criminal activity (some weight). The trial court explicitly found that two urged statutory mitigators did *not* exist: that Jennings was an accomplice in a capital felony

> committed by another and that his participation was relatively minor; and that Jennings acted under extreme duress or under the substantial domination of another person. The trial court also found eight nonstatutory mitigators: (1) that Jennings had a deprived childhood (some weight); (2) that accomplice Graves was not sentenced to death (some weight); (3) that Jennings cooperated with police (substantial weight); (4) that he had a good employment history (little weight); (5) that he had a loving relationship with his mother (little weight); (6) that he had positive personality traits enabling the formation of strong, caring relationships (some weight); (7) that he had the capacity to care for and be mutually loved by children (some weight); and (8) that he exhibited exemplary courtroom behavior (little weight).
>
> After evaluating the aggravators and mitigators, the trial court sentenced Jennings to death for each murder. The trial court also sentenced Jennings to fifteen years' imprisonment for the robbery.

Jennings v. State, 718 So.2d 144, 145-47 (Fla. 1998) (footnotes omitted). The Florida Supreme Court affirmed the conviction and sentence on direct appeal. *Jennings v. State*, 718 So. 2d 144 (Fla. 1998). Jennings unsuccessfully petitioned the United States Supreme Court for a writ of certiorari. *Jennings v. Florida*, 527 U.S. 1042 (1999).

B. State Post-Conviction Proceedings

Jennings raised twenty-five postconviction claims in state court. (Post-Conviction Appeal Record (PCA) at 2289-2400). The postconviction court granted an evidentiary hearing on five ineffective-assistance claims and summarily dismissed the rest. (PCA 2549-2570). Over several days, the postconviction court heard testimony from eleven witnesses: trial attorney Thomas Osteen, mental health experts Dr. Thomas Hyde, Dr. Hyman

Eisenstein, and Dr. Faye Sultan, and friends and family members, including Angela Cheney, Patricia Scubbard, Lloyd Scubbard, Heather Johnson, Kevin McBride, Bruce Martin, and co-defendant Graves. (PCA at 2645-3154).

Osteen, who had represented about 30 capital defendants at the time of Jennings' trial, was assisted by co-counsel Sapenoff and investigator Ed Neary. At the postconviction hearing, Osteen testified mainly about his investigative and strategic decisions. When Osteen began representing Jennings, he enlisted the help of two mental health experts: psychiatrist Robert Wald and psychologist Russell Masterson. Osteen asked Dr. Wald to evaluate Jennings' competency and delve into his personality and background for anything that could be a mitigating factor during sentencing. Dr. Masterson supplemented Dr. Wald's work with psychological testing. Osteen chose Drs. Wald and Masterson because he had a good relationship with them, and they understood the type of evaluation he wanted. It was Osteen's practice to speak with the doctors after receiving their reports to get more detail. Osteen ultimately determined that Jennings did not have a strong mental-health defense and chose not to present testimony from Dr. Wald or Dr. Masterson because it would open the door to harmful evidence mentioned in their report, like Jennings' criminal history.

Osteen said he probably did not consult the ABA guidelines when representing Jennings, and he did not hire a mitigation specialist. He instead

relied on Neary to investigate Jennings' background. Osteen did not know if Neary traveled outside Florida for this case. Osteen himself talked to Jennings, his mother, and several of his friends. Osteen recalled that Jennings came from a lower socioeconomic background, but that he had a close, loving relationship with his mother, Tawny Jennings. At the penalty phase of the trial, Osteen had Jennings' mother and friends testify about his positive character traits and hopefully elicit sympathy from the jury.

All three post-conviction medical experts testified about Jennings' history of head injuries, febrile seizures, and drug and alcohol abuse. The results of behavioral neurologist Thomas Hyde's examination of Jennings were mostly normal. But because of some subtle neurological findings and Jennings' history, Hyde recommended neuropsychological testing. Jennings' counsel thus hired neuropsychologist Hyman Eisenstein, who tested Jennings first in 2000 and again in 2010. In 2000, Dr. Eisenstein found that Jennings had above-average intelligence, but discrepancies between certain scores, like Jennings' verbal IQ and performance IQ, suggested brain dysregulation. Dr. Eisenstein described the results as "sort of a red flag saying there is something going on here that is not typical." (PCA at 2999). But he reached no clinical diagnosis in 2000.

The results of Dr. Eisenstein's 2010 testing fit with the 2000 results, but this time he diagnosed Jennings with a reading disorder and intermittent

explosive disorder. Dr. Eisenstein testified that Dr. Masterson's conclusions were consistent with his, but he criticized the sufficiency of Dr. Masterson's testing and reporting. Applying his findings to the facts of this case, Dr. Eisenstein opined that Jennings' untreated reading disorder "led to tremendous amounts of aggression and hostility disproportionate to any precipitating event or factor." (PCA at 2718). He then concluded that the murders were not premeditated because some unknown provocation during the robbery triggered Jennings' intermittent explosive disorder, creating in Jennings an irresistible impulse to kill the victims.

Psychologist Ellen Sultan investigated Jennings' background and testified about factors that could have been considered mitigating. Dr. Sultan found that sexual abuse was pervasive in Jennings' extended family. She described Tawny Jennings as mentally ill and inadequate as a parent. Tawny introduced Jennings to marijuana, fed him beer as a baby, and told him about her history of sexual abuse at an inappropriate age. Dr. Sultan, like Dr. Eisenstein, diagnosed Jennings with intermittent explosive disorder, but she did not tie the murder to the diagnosis. While she found none of Florida's statutory mitigators applicable, Dr. Sultan considered Jennings a "quite damaged person" who operates "in the world in a highly dysfunctional way." (PCA at 3096). And she opined that Jennings' background—particularly the excessive and prolonged substance abuse beginning in pre-adolescence and a

sexually exploitative, neglectful, and impoverished childhood environment—are predictive of impulse control, attention, and concentration problems, occupational and social difficulties, propensity towards criminal behavior, and the inability to regulate emotions.

Jennings' cousin, Patricia Scudder, and her husband, Lloyd Scudder, testified about Jennings' life before he moved to Florida. Patricia described Jennings' childhood homes as very messy, with dirty dishes, papers, and dog feces everywhere. Tawny's bed was so covered in clothes she slept in a hide-a-bed with Jennings. Patricia described Tawny's relationship with Jennings as close and loving, but also overprotective and sometimes inappropriate. For example, Tawny breastfed Jennings until he was four or five years old. Lloyd Scudder described Tawny as a bad mother. He understood her only sources of income to be welfare and "hooking."

Tawny had a series of boyfriends, including Frank, who seemed jealous of Jennings and tried to push him away from his mother. Once, Patricia walked into the apartment and saw Tawny in bed with a man—both naked—with Jennings lying on the floor watching television. Both Scudders identified child molesters in Jennings' extended family, but neither claimed that Jennings himself was abused.

Angela Cheney appeared and mostly answered questions about her trial testimony—that Jennings said he could get away with robbery by leaving no

witnesses, while gesturing across his throat. Cheney's testimony was largely unchallenged at trial, but at the hearing she revealed details Osteen could have used to attack her credibility. Cheney became friends with Jason Graves in high school, and she met Jennings through Graves. Cheney dated Jennings for about a month and did not maintain a friendship with him after they broke up. She later married Graves' brother, Robert Cheney. Robert was present when Cheney first met with police to give her statement, but they were divorced or separated during Jennings' trial. Cheney acknowledged being partly motivated by concern for Graves' well-being. But she also reaffirmed the truthfulness of her trial testimony.

Jason Graves testified at the postconviction hearing, but he said nothing notable, and neither party relied on his testimony in their briefs to this Court. Three of Jennings' friends from his teenage years—Heather Johnson, Kevin McBride, and Bruce Martin—testified that he was not an aggressive person but could get angry when provoked. They also described Jennings' heavy drinking and regular drug use.

After hearing and considering this testimony, the postconviction court denied Jennings' motion for postconviction relief. (PCA at 3247-3260). Jennings appealed to the Florida Supreme Court and simultaneously petitioned for a writ of habeas corpus. Denying both, the Florida Supreme Court held: (1) Jennings' "trial counsel was not ineffective for failing to obtain

or present childhood and background mitigation" because Osteen's mitigation strategy could be considered sound; (2) trial counsel was deficient in the cross-examination of Angela Cheney, but the failure did not undermine the court's confidence in the outcome because other compelling evidence supported it; (3) the postconviction court did not err by summarily dismissing three of Jennings' claims because each was procedurally barred, refuted by the record, or both; and (4) Jennings' appellate counsel was not deficient for failing to raise certain issues on appeal because none of those issues had merit. *Jennings v. State*, 123 So. 3d 1101 (Fla. 2013).

Jennings now petitions this Court for a writ of habeas corpus.

III. Applicable Habeas Law

A. AEDPA

The Antiterrorism Effective Death Penalty Act (AEDPA) governs a state prisoner's petition for habeas corpus relief. 28 U.S.C. § 2254. Relief may only be granted on a claim adjudicated on the merits in state court if the adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). This standard is both mandatory and difficult to meet. *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014). A state court's violation of state law is not enough to show that a petitioner is in custody in violation of the "Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); *Wilson v. Corcoran*, 562 U.S. 1, 16 (2010).

"Clearly established federal law" consists of the governing legal principles set forth in the decisions of the United States Supreme Court when the state court issued its decision. *White*, 134 S. Ct. at 1702; *Casey v. Musladin*, 549 U.S. 70, 74 (2006) (citing *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). Habeas relief is appropriate only if the state court decision was "contrary to, or an unreasonable application of," that federal law. 28 U.S.C. § 2254(d)(1). A decision is "contrary to" clearly established federal law if the state court either: (1) applied a rule that contradicts the governing law set forth by Supreme Court case law; or (2) reached a different result from the Supreme Court when faced with materially indistinguishable facts. *Ward v. Hall*, 592 F.3d 1144, 1155 (11th Cir. 2010); *Mitchell v. Esparza*, 540 U.S. 12, 16 (2003).

A state court decision involves an "unreasonable application" of Supreme Court precedent it the state court correctly identifies the governing legal principle, but applies it to the facts of the petitioner's case in an objectively unreasonable manner, *Brown v. Payton*, 544 U.S. 133, 134 (2005); *Bottoson v. Moore*, 234 F.3d 526, 531 (11th Cir. 2000), or "if the state court either

unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Bottoson*, 234 F.3d at 531 (quoting *Williams*, 529 U.S. at 406). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fair-minded jurists could disagree on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). "[T]his standard is difficult to meet because it was meant to be." *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2558 (2018).

Finally, when reviewing a claim under 28 U.S.C. § 2254(d), a federal court must remember that any "determination of a factual issue made by a State court shall be presumed to be correct[,]" and the petitioner bears "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *Burt v. Titlow*, 134 S. Ct. 10, 15 (2013) ("[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.").

B. Retroactivity

Federal courts generally "cannot disturb a state conviction based on a constitutional rule announced after a conviction became final." *Knight v. Fla. Dep't of Corr.*, 936 F.3d 1322, 1331 (11th Cir. 2019), *cert. denied* --- U.S. --- (2020) (citing *Teague v. Lane*, 489 U.S. 288 (1989)). "Only two narrow

exceptions pierce this general principle of nonretroactivity: new rules that are 'substantive rather than procedural,' and 'watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.'" *Id.* (quoting *Schriro v. Summerlin*, 542 U.S. 348, 352-53 (2004)). When a question of retroactivity arises, a federal court must conduct a threshold *Teague* analysis. *Id.* (citing *Horn v. Banks (Banks I)*, 536 U.S. 266 (2002)).

C. Exhaustion and Procedural Default

AEDPA precludes federal courts, absent exceptional circumstances, from granting habeas relief unless a petitioner has exhausted all means of relief available under state law. Failure to exhaust occurs "when a petitioner has not fairly presented every issue raised in his federal petition to the state's highest court, either on direct appeal or on collateral review." *Pope v. Sec'y for Dep't. of Corr.*, 680 F.3d 1271, 1284 (11th Cir. 2012) (cleaned up). The petitioner must apprise the state court of the federal constitutional issue, not just the underlying facts of the claim or a similar state law claim. *Snowden v. Singletary*, 135 F.3d 732, 735 (11th Cir. 1998). Respondents concede that Jennings exhausted all grounds but one, which the Court will address below.

D. Ineffective Assistance of Counsel

In *Strickland v. Washington*, the Supreme Court established a two-part test for determining whether a convicted person may have relief for ineffective

assistance of counsel. 466 U.S. 668, 687-88 (1984). A petitioner must establish: (1) counsel's performance was deficient and fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced the defense. *Id.* This is a "doubly deferential" standard of review that gives both the state court and the petitioner's attorney the benefit of the doubt. *Burt*, 134 S. Ct. at 13 (citing *Cullen v. Pinholster*, 131 S. Ct. 1388, 1403 (2011)).

When considering the first prong, "courts must 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Sealey v. Warden*, 954 F.3d 1338, 1354 (11th Cir. 2020) (quoting *Strickland*, 466 U.S. at 689). When considering counsel's duty to investigate, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91. The Eleventh Circuit has held that while counsel in a capital case must conduct an adequate background investigation, it need not be exhaustive. *Sealey*, 954 F.3d at 1355.

The second prong requires the defendant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (quoting *Strickland*, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "An ineffective-assistance claim can be decided on either the deficiency or prejudice prong." *Id.* And "[w]hile the *Strickland*

standard is itself hard to meet, 'establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult.'" *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 105 (2011)).

Analysis

A. Ground One: Jennings was denied effective assistance of counsel at the penalty phase in violation of the Sixth, Eighth, and Fourteenth Amendments

Jennings argues that lead trial counsel Thomas Osteen failed to adequately investigate Jennings' past for mitigating evidence, and as a result, Osteen did not provide his mental health experts—Dr. Wald and Dr. Masterson—with necessary documents (like school and medical records). That failing, coupled with incomplete testing and reporting by Wald and Masterson, led to inaccurate and inadequate evaluations and reports. (Doc. 61 at 45-84). Respondent concedes this claim is exhausted for habeas purposes. (Doc. 66 at 47).

The Florida Supreme Court evaluated Jennings' argument in two components: failure to present mental health mitigation and failure to conduct an adequate background investigation. As to the mental-health component, the court found that Osteen made a reasonable strategic decision not to present mental mitigation testimony because he believed (1) this was not a strong mental-health case and (2) it could have opened the door to other damaging evidence, like Jennings' drug use and criminal history. The Florida Supreme

Court was unmoved by Jennings' attacks on the work of Dr. Wald and Dr. Masterson, which was mostly fueled by the testimony of Dr. Eisenstein. It agreed with the lower court's characterization of Dr. Eisenstein's criticism as "mere semantics." *Jennings*, 123 So. 3d at 1115.

The state court also found, despite Jennings' contentions, that Dr. Wald and Dr. Masterson "were aware of and considered [Jennings's] history of head injuries, drug and alcohol use, and childhood psychiatric treatment for anger issues." *Id.* And the court held that Osteen could not have been deficient for relying on qualified experts, even if Jennings presented more favorable expert opinions post-conviction. Finally, the court found that even if Osteen and his experts should have sought more information, Jennings did not show prejudice because he identified no particular information that would have made a difference.

As to the insufficient-investigation component of this claim, the Florida Supreme Court found no deficiency in trial counsel's performance. The court noted that Dr. Masterson's findings were similar to Dr. Sultan's, despite Dr. Sultan's more thorough background investigation. It found that "this is not a case where trial counsel failed to investigate, obtain, or provide any background information to the experts and therefore could not have made a reasoned strategic decision about its presentation." *Id.* The court excused Osteen's failure to discover the history of sexual abuse in Jennings' family

because his practice was to inquire into sexual abuse and it never came up as an issue. In fact, Jennings denied any history of sexual abuse. Even if Osteen should have discovered the abuse in Jennings' family, the state court found no prejudice:

> While information concerning the sexual abuse of his family members might have been mitigating in establishing Jennings' troubled childhood and emotional development, the trial court found as nonstatutory mitigation that Jennings had a deprived childhood, and the presentation of this testimony might have run contrary to counsel's strategic decision of finding friends who could speak positively about Jennings.

Id. at 1118.

Jennings objects to several aspects of the state court's analysis. First, he bristles at the characterization of Dr. Eisenstein's criticism of Dr. Masterson's report as "mere semantics." But arguing about what is and is not "mere semantics" is simply more semantics. What matters is whether Osteen was constitutionally deficient for relying on Dr. Masterson's report. Dr. Eisenstein found Dr. Masterson's report "grossly insufficient" from a "neuropsychiatric aspect" and more of a "neuropsychological screener" than a full examination report. (PCA at 2751). But he also called the report "a good starter" for someone "trying to figure out if there is significant mitigation or not." (PCA at 2753-54). And despite the differences in their testing and reporting practices, Dr. Eisenstein testified that Dr. Masterson's conclusions were consistent with his. (PCA at 2698). After carefully reviewing Dr.

Masterson's report, given Dr. Eisenstein's criticisms, the Court finds Osteen's reliance on the report to be within an objective standard of reasonableness.

Dr. Eisenstein did reach several diagnoses that Dr. Masterson did not—most notably intermittent explosive disorder (IED). The IED diagnosis did not stem from neuropsychological testing. Rather, in accordance with the DSM-IV, Dr. Eisenstein based it on discrete episodes of aggressive impulses grossly out of proportion to any precipitating psychosocial stressors, as reported by Jennings and his mother. Dr. Masterson did not fail to uncover Jennings' history of violent incidents—he mentions several in his report—and he reported a clinical indication of "difficulty with impulse control." (PCA at 3767). So, although Osteen did not have formal diagnosis of IED, he did have the information he needed to make an aggressive-impulse argument at sentencing. But that might have done more harm than good by opening the door to Jennings' prior violent acts. It certainly would have conflicted with Osteen's strategy of emphasizing Jennings' positive character traits.

Next, Jennings argues that Osteen failed to obtain enough school and medical records, which would have shown a history of febrile seizures and repeated head injuries. Osteen knew of Jennings' history of head injuries because Dr. Masterson mentioned it in his report. Osteen apparently did not know of the febrile seizures, but Jennings fails to show how that knowledge might have impacted the trial. According to Dr. Hyde, the importance of the

febrile seizures and repeated head injuries was that they showed a need for neuropsychological testing. But since Osteen had Jennings tested, knowledge of the seizures would not have led to the discovery of any additional mitigating information.

Jennings' argument that Osteen failed to adequately investigate his life before moving to Florida is likewise unavailing. He points to new details presented at the postconviction hearing of his squalid childhood living conditions and his troubled relationship with his mother. But Osteen had ample information on Jennings' early life from Jennings' extensive self-reporting, and he used that information successfully at sentencing—the trial court considered Jennings' deprived childhood a mitigating factor. Osteen's strategy of focusing on the positive aspects of Jennings' relationship with his mother also bore fruit, as the trial court considered it another mitigating factor.

Osteen did not learn of the sexual abuse pervasive in Jennings' family and Jennings' exposure to known child molesters. Although Jennings himself was not a victim of those men, Dr. Sultan explained how learning about sexual violence at a young age could have been mitigating:

> Q You mentioned that [Tawny Jennings] was a victim of sexual abuse. To your knowledge, was Mr. Jennings aware that his mother had been sexually abused?
>
> A. Yes. It was one of the first things he told me about actually.

> Q. Can you briefly explain what kind of impact that might have on an individual, the knowledge that his mother had been sexually abused by family members?
>
> A. There is a body of literature that has to do with witnessing sexual violence and being told about sexual violence at an inappropriate age. I don't know what an appropriate age would be—adulthood would be an appropriate age, but he was a pre-adolescent when he knew about this. What we know is that even the telling of such stories produce significant emotional distress in children because they're simply not prepared—in a brain development sense, not prepared for the kind of information. So I don't know how to separate out the contribution of that damage to Mr. Jennings' state, but I know that it certainly contributed.

(PCA at 3099).

That Osteen's investigation did not uncover this information does not necessarily show he was ineffective. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland*, 466 U.S. at 691. "An attorney does not render ineffective assistance by failing to discover and develop evidence of childhood abuse that his client does not mention to him. *Williams v. Head*, 185 F.3d 1223, 1237 (11th Cir. 1999). Osteen did not learn of the sexual abuse in Jennings' family because neither Jennings nor his mother told him about it. He interviewed both in preparation for sentencing, and it was his practice to investigate past sexual abuse. Osteen was not deficient for relying on Jennings to self-report this type of potentially mitigating information.

Osteen's investigation of Jennings' background might not have been exhaustive, but it was reasonable and adequate. Osteen's investigation decisions were guided largely by the information he received from Jennings. As the Supreme Court explained, "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by defendant. In particular, what investigation decisions are reasonable depends critically on such information." *Strickland*, 466 U.S. at 691. Every mental health expert consulted in this case—before and after trial—agreed that Jennings has an above-average intelligence, and none found any mental health issues that would make him an unreliable historian. Osteen properly relied on Jennings to self-report his history.

Based upon a thorough review of the record, the Court finds the state court's denial of relief on this ground was not contrary to or an unreasonable application of *Strickland*.

B. Ground Two: Jennings' convictions and sentences are materially unreliable because trial counsel was ineffective for failing to adequately impeach the prejudicial testimony of Angela Cheney

Jennings claims Osteen was constitutionally ineffective for failing to adequately cross-examine Angela Cheney. (Doc. 61 at 84-93). The state concedes this ground is exhausted for habeas purposes. (Doc. 66 at 66).

During the guilt phase of Jennings' trial, Angela Cheney gave the following testimony:

> Q. Now, let me direct your attention back before the November 15th, 1995 Cracker Barrel murders and robbery. Do you recall having a discussion with the Defendant, Brandy Jennings, about a robbery?
> A. Yes, sir.
> Q. It where did this discussion occur?
> A. At his apartment.
> Q. All right. And would you tell the jury about this discussion. What did he say and what did you say?
> A. There was a couple people around and we were just talking about money and stuff like that and he said if he ever needed any money, he could always rob someplace or somebody. And we were talking and I said, "Well that's stupid. You can get caught." And he said, "Not if you don't leave any witnesses."

(TT at 699-700). Cheney also testified that Jennings gestured across his throat as he spoke. Osteen's cross-examination was minimal. He asked when the conversation occurred—November 1993—and who else was there—Chris Graves and someone named Bruce. The sentencing court cited Cheney's testimony to support the avoiding arrest and cold, calculated, and premeditated (CCP) aggravating factors. Jennings faults Osteen for not attacking Cheney's credibility with (1) her relationships with Jennings and Graves, (2) her communications with Graves after his arrest, and (3) her history of drug use.[3]

[3] Jennings also argues that Osteen should have impeached Cheney's testimony with evidence that Jennings lived at North Gate Club apartments with Bruce

Upon review, the Florida Supreme Court found that Osteen "was deficient with respect to his preparation for and cross-examination of Cheney" because "by failing to question Cheney about her potential motivations and biases in this case, regardless of whether any such biases influenced her testimony, counsel deprived the jury of the ability to make a fully informed decision about Cheney's credibility." *Jennings*, 123 So. 3d at 1119. Despite the state's use of Cheney's evidence to support a guilty verdict and two aggravating factors, the Florida Supreme Court determined that Jennings failed to prove prejudice. The court reasoned Osteen's deficiency did not undermine the state court's confidence in the guilty verdict because "the State presented considerable other evidence of Jennings' guilt… Specifically, Jennings made inculpatory statements to law enforcement, owned the murder weapon, and left bloody shoe prints leading away from the murder scene." *Id.* at 1120.

The court likewise found no prejudice in the sentencing phase because the aggravators were supported by other evidence. For the CCP aggravator, that evidence included "Jennings' established dislike for one of the victims, the speed with which the robbery and murders were accomplished, and Jennings'

Martin in November 1993. This evidence contradicts Cheney's testimony at the 2010 postconviction hearing, when she recalled the conversation occurring at an apartment they shared—perhaps in a complex called Waverly. But the evidence would not have impeached her trial testimony, so it is not relevant here.

ownership of the murder weapon[,]" as well as the "execution-style nature of the killings." *Id.* And for the avoid arrest aggravator, the court noted that Jennings wore gloves but no mask, even though the witnesses knew and could identify him, and that the victims were restrained in the freezer, so Jennings could have eliminated any immediate threat by securing the freezer door. Finally, the court found that an adequate cross-examination would not have entirely destroyed Cheney's credibility. *Id.* at 1121.

Jennings argues the state court unreasonably applied *Strickland* by (1) glossing over the significance of Cheney's testimony and (2) applying the wrong standard—that an adequate cross-examination must have entirely destroyed Cheney's credibility. Both of Jennings' arguments mischaracterize the state court's reasoning. It did not downplay the significance of Cheney's testimony or apply an overly rigorous standard. Rather, the court considered the other evidence to determine the likelihood of a different outcome had Cheney not testified at all.

The *Strickland* Court explained the legal standard courts should use when assessing prejudice from counsel's errors:

> When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence…, the 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.

Strickland, 466 U.S. at 696. The state court's application of *Strickland* was proper. In fact, by evaluating the evidence as if Cheney had not testified, it applied a standard more favorable to Jennings than required, because adequate cross-examination would have impeached—not excluded—Cheney's testimony. Jennings has no right to relief on this ground.

C. Ground Three: The state court erred in summarily denying three meritorious claims in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments

This ground has multiple parts. First, Jennings argues the state court erred by denying an evidentiary hearing on three postconviction claims: (1) the prosecutor made improper statements and arguments at trial, (2) Osteen was ineffective for failing to challenge forensic evidence, and (3) Osteen was ineffective for failing to challenge the admissibility and reliability of Jennings' statements to the police. Because the postconviction court denied two of these claims before the postconviction evidentiary hearing, Jennings complains it violated Florida Rule of Criminal Procedure 3.851. (Doc. 61 at 94-99). The state concedes this ground is substantially exhausted. (Doc. 66 at 75).

No habeas relief lies for the post-conviction court's refusal to grant an evidentiary hearing on three of the claims. It is "beyond debate" that Jennings is not entitled relief on this ground. *Anderson v. Sec'y, Dep't. of Corr.*, 462 F.3d 1319, 1330 (11th Cir. 2006). The Eleventh Circuit has "held the state court's

failure to hold an evidentiary hearing on a petitioner's 3.850 motion is not a basis for federal habeas relief." *Id.*

The Court now turns to each of the substantive merits of the three claims the Florida Supreme Court determined were properly summarily denied:

1. Prosecutorial misconduct

This sub-claim has two parts: prosecutorial misconduct and ineffective assistance of counsel. Jennings identifies three allegedly improper statements made by the prosecutor in the sentencing phase:

> The prosecutor mischaracterized the nature of mitigation, as an "attempt to escape accountability," argued impermissible aggravating circumstances including that Jennings had "spent his ill gotten gains at Flints, a topless dance club," and stated that the co-defendant Graves had already received a life sentence.

(Doc. 61 at 96-97). And he claims the prosecutor violated his rights to due process and a fair trial by arguing inconsistent theories in Jennings' and Graves' trials. The Florida Supreme Court held these claims were procedurally barred because Jennings could and should have raised them on direct appeal.[4] *Jennings* 123 So. 3d at 1122.

Federal courts "cannot consider a claim where 'the last state court rendering a judgment in the case clearly and expressly stated that its judgment

[4] The Florida Supreme Court did address, and reject, Jennings' claim of inconsistent theories on direct appeal when deciding a related issue—whether Jennings' and Graves' sentences were impermissibly disparate.

rests on a state procedural bar.'" *Spencer v. Sec'y, Dep't. of Corr.*, 609 F.3d 1170, 1178 (11th Cir. 2010) (quoting *Parker v. Sec'y, Dep't. of Corr.*, 331 F.3d 764, 771 (11th Cir. 2003)). "Accordingly, 'a federal habeas claim may not be reviewed on the merits where a state court determined that the petitioner failed to comply with an independent and adequate state procedural rule that is regularly followed.'" *Id.* (quoting *Philmore v. McNeil*, 575 F.3d 1251, 1260 (11th Cir. 2009)). The Supreme Court affirmed these principles in *Johnson v. Lee*, 136 S. Ct. 1802 (2016).

Jennings does not attack the adequacy of the procedural rule that barred his postconviction claims. It would have been fruitless. *See Spencer*, 609 F.3d at 1179. ("There is no doubt that, under Florida law, a claim is procedurally barred from being raised on collateral review if it could have been but was not raised on direct appeal."). Two exceptions would allow this Court to consider Jennings' claims of prosecutorial misconduct:

> This procedural bar may be overcome—and we may consider the merits of these claims—only if [the petitioner] demonstrates both cause for the failure to raise the claims on direct appeal and actual prejudice, or demonstrates that a failure to consider the claims will result in a fundamental miscarriage of justice. To establish "cause" for procedural default, a petitioner must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in state court. To establish "prejudice," a petitioner must show that there is at least a reasonable probability that the result of the proceeding would have been different. Finally, a "fundamental miscarriage of justice" occurs in an extraordinary case, where a constitutional violation has resulted in the conviction of someone who is actually innocent.

Spencer, 609 F.3d at 1179-80 (cleaned up). Jennings does not identify cause or prejudice to excuse his failure to raise prosecutorial misconduct on direct appeal. Indeed, the prosecutor's statements at both his and Graves' trial were known when he filed his direct appeal. Nor does Jennings claim he is innocent. Thus, this Court may not consider his claims of prosecutorial misconduct.

Jennings also claims that Osteen was ineffective for failing to object to the prosecutor's three allegedly improper statements during sentencing: that mitigation was "an attempt to escape accountability," that Jennings "spent his ill gotten gains at Flints, a topless dance club," and that Graves had received a life sentence. (Doc. 61 at 96-97). The state court properly rejected this ineffective-assistance claim because Jennings failed to show prejudice. In fact, the trial court considered Graves' life sentence as a mitigating factor.

This claim is insufficient. Jennings does not identify any clearly established federal law contrary to the Florida Supreme Court's reasoning or any unreasonable factual finding. And—like in state court—he does not show any prejudice stemming from Osteen's failure to object to the prosecutor's statements.

2. Failure to challenge forensic evidence

Jennings next contends counsel was ineffective because he failed to challenge the reliability of the forensic evidence. (Doc. 61 at 102-104). At issue

is the state's expert witness testimony of cause and manner of death and shoeprint examination, and crime-scene testimony from two police officers. Dr. Manfred Borges opined that the victims' wounds matched Jennings' Buck knife, which he saw at the scene. Borges came to his opinion by comparing the wounds to "a dental knife with almost all the same characteristics." (TT at 393). David Grimes testified that Jennings' Reebok shoes matched various shoeprints at the crime scene. And Officers Robert Browning and John Horth testified about their observations of the crime scene. Jennings claims Osteen was ineffective because he did not call his own forensic experts to rebut the state's evidence.

The Florida Supreme Court rejected this claim as legally insufficient because Jennings did "not allege what specific information other experts would have been able to offer or how this presentation would have impacted the case." *Jennings*, 123 So.3d at 1123. Jennings identifies no federal law contrary to the state court's adjudication. When "a petitioner raises an ineffective assistance claim based on counsel's failure to call a witness, the petitioner carries a heavy burden 'because often allegations of what a witness would have testified to are largely speculative.'" *Finch v. Sec'y, Dep't. of Corr.*, 643 F. App'x 848, 852 (11th Cir. 2016) (quoting *Sullivan v. DeLoach*, 459 F.3d 1097, 1108-09 (11th Cir. 2006)).

In *Finch*, the petitioner asserted that a particular expert would have testified that the state's DNA evidence was unreliable because of flawed methodology, but he did not support the assertion with any evidence. *Id.* The Eleventh Circuit found that the Florida Supreme Court's denial of the claim "was not contrary to, or an unreasonable application of, clearly established federal law." *Id.* Similarly, the petitioner in *Wilson v. Sec'y, Dep't. of Corr.* argued that trial counsel should have called an expert to rebut the state's medical examiner but did not establish what conclusion his expert would have reached. 769 F. App'x 825, 827 (11th Cir. 2019). The Eleventh Circuit denied the claim because "ineffective assistance of counsel cannot be proven via conclusory assertion." *Id.* Jennings has done even less than *Finch*. He does not state, even hypothetically, what forensic evidence Osteen could have presented. Jennings has not carried his burden on this point.

3. Failure to challenge admissibility and reliability of Jennings' confession

Jennings next faults Osteen for not investigating the circumstances surrounding Jennings' confession, which led to Osteen's alleged ineffectiveness in his motion to suppress the confession and his subsequent cross-examination of the State's key witnesses. (Doc. 61 at 104-107). Ralph Cunningham, chief investigator for the Twentieth Judicial Circuit of Florida State Attorney's Office, interviewed Jennings twice. Jennings expressly waived his *Miranda*

rights both times. The first interview was taped, and the jury listened to the tape at trial. Cunningham conducted a second, untaped interview the next day to "clear up some inconsistencies" and "go over some other facts." (TT at 704). Cunningham testified that during the second interview, Jennings said, "I think I could have been the killer. In my mind I think I could have killed them, but in my heart I don't think I could have." (TT at 738).

Jennings argues that Osteen failed to adequately investigate two aspects of the statement: (1) Jennings' mental health and how it affected his ability to knowingly, intelligently, and voluntarily waive his *Miranda* rights; and (2) discrepancies within and between "Cunningham's report and testimony [and] the reports of Officers Crenshaw and Rose." (Doc. 61 at 107).

As pointed out by the Florida Supreme Court, contrary to Jennings' assertions, the state court did not summarily deny the mental-health aspect of this claim. *Jennings*, 123 So. 3d at 1123. Rather, the postconviction court afforded Jennings an evidentiary hearing on this claim, but the only evidence Jennings elicited was that "Osteen did not recall if defendant used drugs at the time he gave his confessions and he was sure he investigated that issue." (PCA at 3259). The Florida Supreme Court also denied Jennings relief on the second part of this claim—the alleged discrepancies—because Jennings did "not allege what these inconsistencies are or what information trial counsel should have been aware of or used as impeachment evidence." *Jennings*, 123 So. 3d at 1123.

Jennings challenges no aspect of the Florida Supreme Court's adjudication of this claim, and the Court finds no fault in it. Jennings' conclusory assertion that he was unable to knowingly and voluntarily waive his *Miranda* rights is not enough. He presented no evidence to support it, despite ample opportunity—he had three mental health experts testify at the postconviction hearing, and the postconviction court gave the green light for evidence on the issue. Jennings' failure to identify the discrepancies Osteen could have used to challenge Cunningham's testimony is likewise fatal to this claim. *See Boyd v. Comm'r, Ala. Dep't. of Corr.*, 697 F.3d 1320, (11th Cir. 2012) (denying an ineffective-assistance claim because the petitioner disclosed no specific piece of evidence trial counsel should have uncovered).

Having reviewed each of the subparts of Ground Three, the Court finds Jennings has not demonstrated that the state court's rejection was contrary to clearly established federal law or based on an unreasonable determination of the facts. Ground Three is denied in its entirety. 28 U.S.C. § 2254(d).

D. Ground 4: Jennings' statements to police, and all evidence derived from them, should have been suppressed because they were obtained in violation of his right to counsel

Jennings argues the trial court erred by refusing to suppress his statements to detectives. (Doc. 61 at 107-111). Respondents acknowledge this ground is exhausted for federal habeas purposes. (Doc. 66 at 87).

Jennings and Graves were arrested in Las Vegas on December 8, 1995. Collier County Sheriff's Office detectives Rose and Crenshaw traveled to Las Vegas later that day and met with Jennings at the Clark County Jail on December 9, just after midnight. Detective Crenshaw read Jennings his *Miranda* warning, including his right to an attorney, whether or not he could afford one. During the interview, Jennings said he wanted a lawyer. The officers stopped the interview, and Detective Rose offered to get Jennings a phone book.

Investigator Cunningham went to the Clark County Jail on December 10, 1995, to talk to Graves. As Cunningham was leaving the interview room, he saw Jennings near the booking desk. Jennings asked Cunningham if he had heard from Tawny Jennings. Cunningham said he had not, but that Detective Crenshaw was trying to reach her. Jennings then said that after talking to his mother, he decided he wanted to talk about the robbery. "He said that he did not want to take the blame for the killings of three people that his partner had done, that he wanted to tell his side of the story." (DA at 976).

Cunningham, Rose, and Jennings went into the interview room, and Cunningham read Jennings his *Miranda* rights. Jennings said he understood his rights and wished to speak. He then went through the facts of the crime with Cunningham and Rose. Cunningham asked if they could take a recorded statement, Jennings consented, and Cunningham advised Jennings of his

Miranda rights again. In the two-and-a-half hour taped interview, Jennings described his history, the events leading up to the crime, and the crime itself. During the interview, Jennings told the officers where they could find some physical evidence he and Graves hid after fleeing the Cracker Barrel. Police later recovered that evidence. Cunningham returned to the jail on December 11 to go over some inconsistencies and other facts with Jennings. During this conversation, Jennings said, "I think I could have been the killer. In my mind I think I could have killed them, but in my heart I don't think I could have." (TT at 738).

Osteen moved to suppress Jennings' statements, and the trial court held a suppression hearing. (DA at 154). The trial court denied the motion, finding that Jennings voluntarily initiated his contact with Cunningham and Rose and knowingly, intelligently, and voluntarily waived his right to counsel and his right to remain silent. At trial, the state played the recorded interview, and Cunningham testified about Jennings' confession over Osteen's objections. The state also introduced the physical evidence Jennings helped police recover.

On direct appeal, Jennings argued that Detective Rose's offer to get him a phone book was an inadequate response to Jennings' invocation of his right to counsel, and any subsequent waiver of his *Miranda* rights was tainted. The Florida Supreme Court found that "even if Jennings invoked his right to counsel, he voluntarily initiated further contact with the police" and that he

gave the statements "after voluntarily, knowingly, and intelligently waiving his *Miranda* rights." *Jennings v. State*, 718 So. 2d 144, 150 (Fla. 1998). Thus, the statements were admissible under *Edwards v. Arizona*, 451 U.S. 477 (1981). The state court also found that Jennings' decision to reinitiate a conversation with Cunningham and Rose "was motivated *not* by any misapprehension of this right or 'taint' of the telephone book scenario, but by an interceding conversation between Jennings and his mother, wherein she advised Jennings to talk to the police." *Jennings*, 718 So. 2d at 149.

In his petition to this Court, Jennings' reasserts his contention that any waiver of his *Miranda* rights was not knowing, intelligent, and voluntary because of Detective Rose's allegedly inadequate response when Jennings invoked his right to counsel. Jennings' argument is based mainly on state law—the Florida Constitution provides greater protections than the federal Constitution. But Florida state law cannot be the basis of federal habeas relief. 28 U.S.C. § 2254(a); *Wilson v. Corcoran*, 562 U.S. 1, 16 (2010). And the federal cases cited by Jennings' strongly support the state court's adjudication.

In *Edwards*, the Supreme Court held that an accused, "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, *unless the accused himself initiates further communication, exchanges, or conversations with the police*." *Edwards*, 451 U.S. at 485 (emphasis added).

Jennings does not challenge the state court's factual finding that he voluntarily initiated contact with Cunningham and Rose after invoking his right to counsel.

In *Oregon v. Bradshaw*, 462 U.S. 1039 (1983), the Supreme Court reaffirmed the *Edwards* rule and clarified that even when an accused reinitiates dialogue with police, the prosecution still must prove the accused knowingly and voluntarily waived the right to counsel and the right to remain silent. The Florida Supreme Court found that the prosecution met its burden, based on these facts:

> Upon Jennings' reinitiation of conversation with police, he was again advised of his *Miranda* rights, including his right to have a lawyer appointed to represent him before questioning if he could not afford one. Thereafter, at the beginning of the taped interview when Detective Rose and Investigator Cunningham prepared to again advise Jennings of his *Miranda* rights, Jennings stated that he could save them the trouble because he understood his rights fully. Despite this, Detective Rose again advised Jennings of his *Miranda* rights, once again including his right to have a lawyer appointed to represent him before questioning if he could not afford one. The record also indicates that, before making his subsequent untaped statement the next day, Jennings was again advised of his *Miranda* rights and executed a written waiver.

Jennings, 718 So. 2d at 150. Jennings challenges none of these factual findings, and they are supported by the record. The state court correctly applied *Edwards*. Jennings fails to meet his burden for habeas relief on Ground Four, and the Court denies it. 28 U.S.C. § 2254(d).

E. Ground 5: Jennings' death sentence violates the Sixth and Eighth Amendments and his right to due process because a jury did not make all necessary findings of fact

Jennings attacks the constitutionality of his sentence and the procedure used to deny his successive Rule 3.851 motion in light of the Supreme Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016) and its progeny. (Doc. 61 at 112-139). Before addressing the claims, the Court provides some background.

After the jury found Jennings guilty on all counts, the trial court conducted the sentencing phase of trial. Upon conclusion, the jury recommended a death sentence by a vote of 10 to 2. The trial court found three statutory aggravating factors—commission during a robbery, avoiding arrest, and CCP—outweighed the mitigating circumstances and, following the jury's recommendation, sentenced Jennings to death. Jennings' convictions and sentence became final in 1999, when the Supreme Court denied Jennings' petition for a writ of certiorari.

In 2002, the Supreme Court cast doubt on the constitutionality of Florida's capital sentencing scheme when it held Arizona's procedure, which was similar in some respects to Florida's, violated the Sixth Amendment. *Ring v. Arizona*, 536 U.S. 584 (2002). The Arizona scheme required the trial judge, following a jury adjudication of a defendant's guilt for first-degree murder, to determine the presence or absence of aggravating and mitigating factors. The Arizona judge could sentence the defendant to death only if there was at least

one aggravating factor and "no mitigating circumstances sufficiently substantial to call for leniency." *Id.* at 593. The Court reasoned that "Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'" so "the Sixth Amendment requires that they be found by a jury." *Id.* at 609 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000)).

In 2016, the Supreme Court held Florida's capital sentencing scheme also violated the Sixth Amendment. *Hurst*, 136 S. Ct. 616. Despite the differences in Florida's and Arizona's schemes—namely, Florida's requirement for a jury recommendation—the Court found *Ring* applicable. Since Florida's death-penalty statute required the judge—not the jury—to decide whether any aggravating factors existed, it violated the Sixth Amendment. *Hurst*, 136 S. Ct. at 624. The Court overruled previous decisions *Spaziano v. Florida*, 468 U.S. 447 (1984) and *Hildwin v. Florida*, 490 U.S. 638 (1989) "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." *Id.* at 624.

On remand of *Hurst v. Florida,* the Florida Supreme Court went a step further. Along with the existence of aggravating circumstances, it held that a "jury must also unanimously find that the aggravating factors are *sufficient* for the imposition of death and unanimously find that the aggravating factors

outweigh the mitigation before a sentence of death may be considered by the judge." *Hurst v. State*, 202 So. 3d 40, 54 (Fla. 2016). The court based its heightened protection in part on Florida law and in part on its understanding that "*Hurst v. Florida* mandates that all the findings necessary for imposition of a death sentence are 'elements' that must be found by a jury[.]" *Id.* at 57.

In 2016, the Florida Supreme Court addressed the retroactivity of *Hurst* in two separate cases: *Asay v. State*, 210 So. 3d 1 and *Mosley v. State*, 209 So. 3d 1248. Applying *Witt v. State*, 387 So. 2d 922 (Fla. 1980), which provides more expansive retroactivity standards than the federal *Teague* test, the court decided to make the Supreme Court's issuance of *Ring* the cutoff date. Thus, Florida courts retroactively apply *Hurst* only to cases in which a death sentence became final after June 24, 2002. *Asay*, 210 So. 3d at 22; *Mosley*, 209 So. 3d at 1283.

Despite Jennings' 1999 finality of sentence and conviction, he filed a successive Rule 3.851 motion, seeking relief under *Hurst*. After the post-conviction court denied Jennings' motion, he appealed to the Florida Supreme Court. The Florida Supreme Court stayed Jennings' appeal pending its decision in *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017). In *Hitchcock*, the Florida Supreme Court rejected constitutional arguments that *Hurst* should be applied to sentences that became final before *Ring*. The court then ordered Jennings to show cause why its reasoning in *Hitchcock* should not be

dispositive in his case. Jennings' response failed to sway the court, and it affirmed denial of his motion. *Jennings v. State*, 237 So. 3d 909 (Fla. 2018).

The Court turns to the claims raised in in Ground Five.

1. Jennings' right to retroactive application of *Hurst v. Florida*

Jennings argues the Florida Supreme Court's decision to deny him relief under *Hurst* is contrary to federal law for three reasons: (1) *Hurst* announced substantive constitutional rules that must be given retroactive effect; (2) Florida's limited retroactivity rule violates the Eighth Amendment because it ensures arbitrary and unreliable infliction of the death penalty; and (3) Florida's limited retroactivity rule violates the Equal Protection Clause of the Fourteenth Amendment.

i. *Retroactive effect of* Hurst

When facing questions of retroactivity in habeas cases, federal courts must apply the standards articulated in *Teague*. The first step is to determine when the petitioner's conviction became final. *Knight*, 936 F.3d at 1334. Jennings' conviction became final when the Supreme Court denied his motion for a writ of certiorari on June 24, 1999. Next, if the rule at issue had not been announced by the final-conviction date, the Court must "'assay the legal landscape' as it existed at the time and determine whether existing precedent compelled the rule—that is, whether the case announced a new rule or applied an old one." *Id.* Jennings does not argue that *Hurst v. Florida* applied an

existing rule. Even if he did, the Eleventh Circuit has rejected that argument because "*Hurst* was not dictated by prior precedent—and in fact explicitly overruled existing precedent upholding Florida's death penalty sentencing scheme[.]" *Id.* at 1336.

Jennings focuses on the final step of the *Teague* analysis—whether *Hurst* falls within one of the two exceptions to nonretroactivity. Those exceptions are "(1) holdings that create substantive (not procedural) rules that place 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,' and (2) holdings that constitute 'watershed rules of criminal procedure.'" *Id.*

Jennings hangs his hat on the first exception, arguing that *Hurst* announced two substantive rules:

> First, the court held that the Sixth Amendment requires that a jury decide whether the aggravating factors have been proven beyond a reasonable doubt, whether they are sufficient to impose the death penalty, and whether they are outweighed by the mitigating factors…Second, the court held that the Eighth Amendment requires the jury's fact-finding during the penalty phase to be unanimous.

(Doc. 61 at 126-27). Jennings' argument fails. First, he relies on Florida Supreme Court's *Hurst v. State* decision, not the United States Supreme Court's *Hurst v. Florida* decision. Federal habeas relief must be based on federal law, as established by the United States Supreme Court. *Hurst v. Florida* announced a narrower rule than *Hurst v. State*—the Sixth Amendment

requires a jury, not a judge, to determine the existence of any aggravating factors. The Florida Supreme Court's broader interpretation of *Hurst v. Florida* was wrong, a mistake it recently recognized in *State v. Poole*, 297 So. 3d 487 (Fla. 2020): "This Court clearly erred in *Hurst v. State* by requiring that the jury make any finding beyond the section 921.141(3)(a) eligibility finding of one or more statutory aggravating circumstances." *Poole*, 297 So. 3d at 503.

The issue for this Court is whether either of the *Teague* exceptions applies to the narrower rule announced in *Hurst v. Florida*. The Eleventh Circuit decided they do not in *Knight*:

> The *Hurst* rule does not fit within either exception. To begin, substantive rules include decisions that change the range of conduct or the class of person that the law punishes. Procedural rules, on the other hand, regulate only the *manner of determining* the defendant's culpability. In considering which category the *Hurst* rule falls into, we have a head start because the Supreme Court has already held that *Ring* represented a prototypical procedural rule. And that makes sense: *Ring* changed the permissible *procedure* for sentencing in a capital case when it required that a jury rather than a judge find the essential facts necessary to impose the death penalty. Because *Hurst*'s holding—that an advisory jury's mere recommendation is not enough to satisfy this procedural requirement—is an extension of the rule from *Ring*, we have no trouble concluding that *Hurst* also announced a procedural rule, and not a substantive rule.

Knight v. Fla. Dep't of Corr., 936 F.3d 1322, 1336-37 (11th Cir. 2019). Jennings, like Knight, does not contend that *Hurst v. Florida* fits within the second exception. "Indeed, the watershed exception remains somewhat

theoretical at this point; in the years following *Teague*, the Supreme Court has never found a rule that fits." *Id.* at 1337. "In short, *Hurst* [*v. Florida*] meets neither exception, and therefore is not retroactive." *Id.*

ii. *Retroactivity and the Eighth Amendment*

Before addressing Jennings' two constitutional objections to Florida's retroactivity decision *vis-à-vis Hurst v. Florida*, the Court notes that they are probably not cognizable here. States may fashion and apply their own retroactivity standards in state postconviction proceedings, and state retroactivity decisions have no significance in federal habeas cases. *Id.* Before applying any rule retroactively, this Court *must* perform a threshold *Teague* analysis. *Id.* Thus, this Court cannot grant Jennings any relief under *Hurst v. Florida* without ignoring the binding precedent set out in *Knight*.

Jennings raises three Eighth Amendment arguments. His first is an attack on a fundamental aspect of retroactivity. Jennings contends that by setting a cutoff date for the retroactivity of *Hurst v. Florida* and *Hurst v. State*—permitting *Hurst* relief only to inmates whose death sentences were final before June 24, 2002—the Florida Supreme Court ensured arbitrary infliction of the death penalty. Jennings provides no Supreme Court precedent suggesting that state retroactivity decisions cannot hinge on the date a conviction becomes final. Indeed, the *Teague* test does just that: "Unless they fall within an exception to the general rule, new constitutional rules of criminal

procedure will not be applicable to those cases which have become final before the new rules are announced." *Teague*, 489 U.S. at 310.

Jennings next argument has nothing to do with the retroactivity of *Hurst v. Florida*. Rather, it springs from a rule adopted by the Florida Supreme Court in *Hurst v. State*: "the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed." *Hurst*, 202 So. 3d at 59. The Florida Supreme Court recognized it was adopting a rule that required "more protection…than that mandated by the federal Constitution[,]" and it explicitly derived the rule from "the Florida Constitution and Florida's long history of requiring jury unanimity in finding all the elements of the offense to be proven[.]" *Id.* at 54-57. Based on state law supplemented by snippets of Supreme Court *dicta*, Jennings argues his death sentence violates the Eighth Amendment because it flowed from a non-unanimous death recommendation. The argument fails because Jennings identifies no misapplication of federal law. What is more, the jury did unanimously find one aggravating factor when it convicted Jennings of robbery. *See* Fla. Stat. § 921.141(6)(d).

Jennings' third Eighth Amendment argument has even less to do with *Hurst v. Florida*. He raises a *Caldwell*[5] challenge based on the trial court's

[5] *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985).

instruction to the jury "that its penalty phase verdict was merely advisory and only needed to be returned by a majority vote." (Doc. 61 at 134). The Supreme Court explained the reach of *Caldwell* in *Romano v. Oklahoma*:

> [W]e have since read *Caldwell* as relevant only to certain types of comment—those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision. Thus, to establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law.

512 U.S. 1, 9 (1994) (cleaned up). Jennings identifies no part of the trial court's instructions to the jury that mischaracterized the jury's role in sentencing, and after thorough review, the Court finds none. Jennings' *Caldwell* challenge lacks merit. *See Davis v. Singletary*, 119 F.3d 1471, 1482 (11th Cir. 1997) ("[I]t is clear that references to and descriptions of the jury's sentencing verdict as an advisory one, as a recommendation to the judge, and of the judge as the final sentencing authority are not error under *Caldwell*…because they accurately characterize the jury's and judge's sentencing roles under Florida law.").

iii. *Retroactivity and the Fourteenth Amendment*

Finally, Jennings argues that Florida's retroactivity rule violates the Equal Protection Clause: "Florida's decision to apply the *Hurst* decisions only to the 'post-*Ring*' group of death row inmates results in the unequal treatment of prisoners who were all sentenced to death under the same unconstitutional

scheme." (Doc. 61 at 136). This argument is merely a restatement of his Eighth Amendment argument, and it fails for the same reasons. The Supreme Court not only approves of but mandates a retroactivity rule that hinges on when sentences became final. *Teague*, *supra.*

To establish an equal-protection violation, Jennings "must prove purposeful, intentional discrimination—and to do that, he must prove that the governmental decisionmaker acted as it did 'because of, and not merely in spite of, its effects on an identifiable group.'" *Morrissey v. United States*, 871 F.3d 1260, 1171 (11th Cir. 2017) (quoting *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)). Jennings fails to allege—much less prove—an unlawful intent. The Florida Supreme Court explained the reason for the rule in *Mosley v. State*, 209 So. 3d 1248, 1281 (Fla. 2016); it believed "that Florida's capital sentencing statute was unconstitutional from the time that the United States Supreme Court decided *Ring*."

Thus, Jennings has not demonstrated his sentence violates the Equal Protection Clause of the Fourteenth Amendment.

2. Florida Supreme Court's procedure on appeal of Jennings successive Rule 3.851 motion

Jennings contends that by ordering him to brief the applicability of *Hitchcock* to his case, and by affirming the denial of his successive Rule 3.851 motion without full briefing, the Florida Supreme Court violated his Eighth

Amendment and Fourteenth Amendment rights to due process. Jennings' argument fails for two reasons. First, the Florida Supreme Court's procedure did not harm Jennings because he is not entitled to retroactive application of *Hurst v. Florida*. Second, an alleged defect in a state collateral proceeding cannot be the basis for federal habeas relief because it does not undermine the legality of the conviction itself. *Holsey v. Thompson*, 462 F. App'x 915, 917 (11th Cir. 2012).

Having reviewed each of the subparts of Ground Five, the Court finds Jennings has not demonstrated that the state court's rejection was contrary to clearly established federal law or based upon an unreasonable determination of the facts. Ground Five is denied in its entirety. 28 U.S.C. § 2254(d).

DENIAL OF CERTIFICATE OF APPEALABILITY

A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253(c)(1). Rather, a district court must first issue a certificate of appealability (COA). "A [COA] may issue…only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, a petitioner must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (*quoting Slack v. McDaniel*, 529 U.S. 473, 484 (2000)), or that "the issues presented were adequate to deserve

encouragement to proceed further," *Miller–El v. Cockrell*, 537 U.S. 322, 335–36 (2003) (citations omitted). Jennings has not made the requisite showing here and may not have a certificate of appealability on any ground of his Petition.

Accordingly, it is now

ORDERED:

(1) Petitioner Brandy Bain Jennings' Amended Petition for Writ of Habeas Corpus by a Person in State Custody (Doc. 61) is **DENIED**.

(2) Petitioner is **DENIED a certificate of appealability**.

(3) The Clerk of the Court is **ORDERED** to terminate any pending motions, enter judgment, and close this case.

DONE and **ORDERED** in Fort Myers, Florida on December 1, 2020.

SHERI POLSTER CHAPPELL
UNITED STATES DISTRICT JUDGE

Copies: All Parties of Record

APPENDIX D

123 So.3d 1101
Supreme Court of Florida.

Brandy Bain JENNINGS, Appellant,
v.
STATE of Florida, Appellee.
Brandy Bain Jennings, Petitioner,
v.
Michael D. Crews, etc., Respondent.

Nos. SC11–1016, SC11–1031.
|
June 27, 2013.
|
Rehearing Denied Oct. 3, 2013.

Synopsis

Background: After defendant's convictions for robbery and first-degree murder were affirmed by the Supreme Court, 718 So.2d 144, defendant moved for post-conviction relief. Following an evidentiary hearing, the Circuit Court, Collier County, Frederick Robert Hardt, J., denied motion. Defendant appealed.

Holdings: The Supreme Court held that:

[1] defense counsel's failure to present mental health mitigation evidence during penalty phase was not ineffective assistance;

[2] defense counsel's failure to discover and present mitigating evidence of childhood sexual abuse during penalty phase was not deficient performance;

[3] defense counsel's failure to adequately investigate and impeach State's witness at trial constituted deficient performance, but did not prejudice defendant;

[4] State's expert witness testimony was properly admitted at trial;

[5] admission of photographs at trial was not erroneous; and

[6] trial judge's characterization during pretrial jury selection of case as "infamous" was not fundamental error.

Affirmed.

Polston, C.J., and Lewis, J., concurred in result.

Attorneys and Law Firms

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Opinion

PER CURIAM.

Brandy Bain Jennings, who was twenty-six years old at the time of the crime, was convicted and sentenced to death for the November 1995 first-degree murders of

Dorothy Siddle, Vicki Smith, and Jason Wiggins, all of which occurred during a robbery of the Cracker Barrel Restaurant in Naples. On direct appeal, we affirmed his convictions and sentences. *See Jennings v. State,* 718 So.2d 144 (Fla.1998). Jennings now appeals the denial of his ***1108** motion for postconviction relief, filed pursuant to Florida Rule of Criminal Procedure 3.850, [1] and simultaneously petitions this Court for a writ of habeas corpus. We have jurisdiction. *See* art. V, § 3(b)(1), (9), Fla. Const. For the reasons expressed herein, we affirm the postconviction court's denial of relief and deny Jennings' petition for a writ of habeas corpus.

FACTS AND PROCEDURAL HISTORY

This Court summarized the pertinent facts underlying this crime on direct appeal as follows:

> Dorothy Siddle, Vicki Smith, and Jason Wiggins, all of whom worked at the Cracker Barrel Restaurant in Naples, were killed during an early morning robbery of the restaurant on November 15, 1995. Upon arriving on the scene, police found the bodies of all three victims lying in pools of blood on the freezer floor with their throats slashed. Victim Siddle's hands were bound behind her back with electrical tape; Smith and Wiggins both had electrical tape around their respective left wrists, but the tape appeared to have come loose from their right wrists.

Police also found bloody shoe prints leading from the freezer, through the kitchen, and into the office, blood spots in and around the kitchen sink, and an opened office safe surrounded by plastic containers and cash. Outside, leading away from the back of the restaurant, police found scattered bills and coins, shoe tracks, a Buck knife, a Buck knife case, a pair of blood-stained gloves, and a Daisy air pistol.

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, where Jennings ultimately made lengthy statements to Florida law enforcement personnel. In a taped interview, Jennings blamed the murders on Graves, but admitted his (Jennings') involvement in planning and, after several aborted attempts, actually perpetrating the robbery with Graves. Jennings acknowledged wearing gloves during the robbery and using his Buck knife in taping the victims' hands, but claimed that, after doing so, he must have set the Buck knife down somewhere and did not remember seeing it again. Jennings further stated that he saw the dead bodies in the freezer and that his foot slipped in some blood, but that he did not remember falling, getting blood on his clothes or hands, or washing his hands in the kitchen sink. Jennings also stated that the Daisy air pistol belonged to Graves, and directed police to a canal where he and Graves had thrown other evidence of the crime.

In an untaped interview the next day, during which he was confronted with inconsistencies in his story and the evidence against him, Jennings stated, "I think I could have been the killer. In my mind I think I could have killed them, but in my heart I don't think I could have."

At trial, the taped interview was played for the jury, and one of the officers testified regarding Jennings' untaped statements made the next day. ***1109** The items ultimately recovered from the canal were also entered into evidence.

The medical examiner, who performed autopsies on the victims, testified that they died from "sharp force injuries" to the neck caused by "a sharp-bladed instrument with a very strong blade," like the Buck knife found at the crime scene. A forensic serologist testified that traces of blood were found on the Buck knife, the Buck knife case, the area around the sink, and one of the gloves recovered from the crime scene, but in an amount insufficient for further analysis. An impressions expert testified that Jennings' tennis shoes recovered from the canal matched the bloody shoe prints inside the restaurant as well as some of the shoe prints from the outside tracks leading away from the restaurant.

The State also presented testimony concerning previous statements made by Jennings regarding robbery and witness elimination in general. Specifically, Angela Chainey, who had been a friend of Jennings', testified that about two years before the crimes Jennings said that if he ever needed any money he could always rob someplace or somebody. Chainey further testified that when she responded, "That's stupid. You could get caught," Jennings replied, while making a motion across his throat, "Not if you don't leave any witnesses." On cross-examination, Chainey further testified that Jennings had "made statements similar to that several times."

The State also presented testimony concerning previous statements made by Jennings regarding his dislike of victim Siddle. Specifically, Bob Evans, one of the managers at Cracker Barrel, testified that Jennings perceived Siddle to be holding him back at work and that, just after Jennings quit, he said about Siddle, "I hate her. I even hate the sound of her voice." Donna Howell, who also worked at Cracker Barrel, similarly testified that she was aware of Jennings' animosity and dislike of Siddle, and that Jennings had once said about Siddle, "I can't stand the bitch. I can't stand the sound of her voice."

The jury found Jennings guilty as charged. In the penalty phase, the defense presented mitigation evidence, including general character testimony from witness Mary Hamler, who testified on direct examination that she had lived with Jennings for two and one-half years. She also testified that Jennings had gotten along well with her children during that time, and that he cried when they (Jennings and Hamler) broke up.

On cross-examination, the State elicited testimony from Hamler that there was another side to Jennings' character and that Jennings once said that if he ever committed a robbery, he would not be stupid enough to stick around, but would go north. Hamler further testified on cross-examination that Jennings was angry at Cracker Barrel in general, and Siddle in particular, for "jerking him around" and holding him back at work, and that in this regard Jennings once said of Siddle that "one day she would get hers."

The defense presented further character evidence from several of Jennings' friends 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' mother testified that her son never met his father and that she raised Jennings herself. She claimed that Jennings had been a straight-A student, but quit school to take care of her when she became sick.

***1110** The jury recommended death by a vote of ten to two as to each of the murders. In its sentencing order, the trial court found three aggravators: (1) that the murders were committed during a robbery; (2) that they were committed to avoid arrest; and (3) that they were cold, calculated, and premeditated (CCP).

The trial court found only one statutory mitigator: that Jennings had no significant history of prior criminal activity (some weight). The trial court explicitly found that two urged statutory mitigators did not exist: that Jennings was an accomplice in a capital felony committed by another and that his participation was relatively minor; and that Jennings acted under extreme duress or under the substantial domination of another person. The trial court also found eight nonstatutory mitigators: (1) that Jennings had a deprived childhood (some weight); (2) that accomplice Graves was not sentenced to death (some weight); (3) that Jennings cooperated with police (substantial weight); (4) that he had a good employment history (little weight); (5) that he had a loving relationship with his mother (little weight); (6) that he had positive personality traits enabling the formation of strong, caring relationships (some weight); (7) that he had the capacity to care for and be mutually loved by children (some weight); and (8) that he exhibited exemplary courtroom behavior (little weight).

After evaluating the aggravators and mitigators, the trial court sentenced Jennings to death for each murder. The trial court also sentenced Jennings to fifteen years' imprisonment for the robbery.

Jennings, 718 So.2d at 145 47 (footnotes omitted). This Court affirmed Jennings' convictions and sentences. *Id.* at 155.[2] Jennings filed a petition for writ of certiorari with the United States Supreme Court, which was denied. *See Jennings v. Florida,* 527 U.S. 1042, 119 S.Ct. 2407, 144 L.Ed.2d 805 (1999).

In March 2000, Jennings filed an initial motion for postconviction relief. He filed an amended motion in June 2000 and a second amended motion in August 2009, in which he raised twenty-five claims.[3] Following ***1111** a *Huff*[4] hearing, the postconviction court granted an evidentiary hearing on five of Jennings' claims: (1) trial counsel's alleged failure to adequately impeach State witness Angela Cheney (a portion of claim 1 in Jennings' second amended postconviction motion); (2) trial counsel was ineffective concerning the lack of a mental health evaluation (claim 3); (3) trial counsel failed to investigate mitigation evidence (claim 4); (4) trial counsel was ineffective for failing to challenge aspects related to the admission of Jennings' statements to law enforcement (claim 6); and (5) trial counsel was ineffective for failing to raise issues about the sentencing order and the trial court's consideration of nonstatutory mitigation (claim 20). Following a three-day evidentiary hearing, the postconviction court denied Jennings' second amended motion for postconviction relief.

***1112** This appeal follows, and Jennings simultaneously petitions this Court for a writ of habeas corpus.

ANALYSIS

I. Rule 3.850 Claims

In Jennings' appeal to this Court, he raises three claims. He first alleges that trial counsel rendered ineffective assistance of counsel for failing to discover and present sufficient mitigation evidence at the penalty phase of his trial. Second, Jennings alleges that trial counsel was also ineffective for failing to adequately impeach State witness Angela Cheney.[5] Lastly, he argues that the postconviction court erred in summarily denying several of his other postconviction claims. We address each issue in turn, beginning with Jennings' ineffective assistance of penalty-phase counsel claim.

Ineffective Assistance of Penalty Phase Counsel

In his first claim, Jennings raises an ineffectiveness challenge focusing on trial counsel's allegedly inadequate performance during the penalty phase, as well as counsel's alleged lack of preparation. Specifically, Jennings alleges that the pretrial mental health evaluations performed in this case were inadequate, that trial counsel did not conduct a full investigation of Jennings' troubled childhood, and that trial counsel did not obtain or provide his experts with sufficient records to enable them to offer a fully informed opinion regarding mental health mitigation.

Following the United States Supreme Court's decision in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), this Court has held that for ineffective assistance of counsel claims to be successful, a defendant must satisfy the following two requirements:

> First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined. A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied.

Schoenwetter v. State, 46 So.3d 535, 546 (Fla.2010) (quoting *Maxwell v. Wainwright,* 490 So.2d 927, 932 (Fla.1986)).

[1] [2] [3] [4] [5] To establish the deficiency prong under *Strickland,* the defendant must prove that counsel's performance was unreasonable under "prevailing professional norms." *Morris v. State,* 931 So.2d 821, 828 (Fla.2006) (quoting *Strickland,* 466 U.S. at 688, 104 S.Ct. 2052). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052. The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* (quoting *Michel v. Louisiana,* 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* "[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered ***1113** and rejected and counsel's decision was reasonable under the norms of professional conduct." *Occhicone v. State,* 768 So.2d 1037, 1048 (Fla.2000).

[6] [7] [8] [9] "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland,* 466 U.S. at 691, 104 S.Ct. 2052. "This Court has recognized that 'the obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated.' " *Sexton v. State,* 997 So.2d 1073, 1079 (Fla.2008) (quoting *State v. Lewis,* 838 So.2d 1102, 1113 (Fla.2002)). "Clearly, '[a]n attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence.' " *Id.* (quoting *Ragsdale v. State,* 798 So.2d 713, 716 (Fla.2001)). The focus of review should be "whether the investigation supporting counsel's decision not to introduce mitigating evidence ... *was itself reasonable.*" *Wiggins v. Smith,* 539 U.S. 510, 523, 123 S.Ct. 2527, 156 L.Ed.2d

471 (2003) (citing *Strickland,* 466 U.S. at 691, 104 S.Ct. 2052). "Trial counsel will not be held to be deficient when [counsel] makes a reasonable strategic decision to not present mental mitigation testimony during the penalty phase because it could open the door to other damaging testimony." *Gaskin v. State,* 822 So.2d 1243, 1248 (Fla.2002).

[10] "Penalty phase prejudice under the *Strickland* standard is measured by whether the error of trial counsel undermines this Court's confidence in the sentence of death when viewed in the context of the penalty phase evidence and the mitigators and aggravators found by the trial court." *Hurst v. State,* 18 So.3d 975, 1013 (Fla.2009). That standard does not "require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.' " *Porter v. McCollum,* 558 U.S. 30, 130 S.Ct. 447, 455 56, 175 L.Ed.2d 398 (2009) (quoting *Strickland,* 466 U.S. at 693 94, 104 S.Ct. 2052) (alteration in original).

[11] **[12]** Both prongs of the *Strickland* test present mixed questions of law and fact. *Sochor v. State,* 883 So.2d 766, 771 (Fla.2004). "In reviewing a trial court's ruling after an evidentiary hearing on an ineffective assistance of counsel claim, this Court defers to the factual findings of the trial court to the extent that they are supported by competent, substantial evidence, but reviews de novo the application of the law to those facts." *Mungin v. State,* 932 So.2d 986, 998 (Fla.2006).

[13] Jennings presented eleven witnesses at the evidentiary hearing, including his lead trial counsel; three experts hired by postconviction counsel; and several friends and family members.[6] Jennings was represented at trial by Thomas Osteen, who testified at the evidentiary hearing that at the time of Jennings' trial, he was the deputy public defender running the Collier County office. In addition, Jennings was represented by a second attorney, also with the public defender's office, and counsel's trial preparation was assisted by the chief investigator in the public defender's office, who was a former law enforcement officer and whom Osteen described as having a "good feel" for mitigation information. While Osteen's co-counsel had no experience in capital cases, Osteen had represented "[m]aybe 30" prior capital defendants in death penalty cases, the majority of which went to the penalty phase. At the evidentiary hearing, Osteen ***1114** testified that he began his preparations for the penalty phase at about the same time as his trial preparation, speaking to Jennings' mother and people that knew Jennings.

Jennings' argument that trial counsel was ineffective at the penalty phase has essentially two components. First, Jennings alleges that trial counsel failed to provide necessary documentation or guidance to his mental health experts and that because those experts conducted insufficient evaluations of Jennings, counsel's decision to forego mental health mitigation in this case was not fully

informed or reasonably determined. Second, Jennings alleges that counsel's mitigation investigation was minimal, consisting only of interviews with Jennings' mother and individuals who knew Jennings in adulthood, and that substantial mitigation evidence about Jennings' troubled childhood and history of substance abuse therefore went undiscovered. We address each of these arguments in turn.

Mental Health Mitigation

Jennings' first contention is that the decision to forego mental mitigation in this case was unreasonable and based on insufficient and incomplete information. On this point, the postconviction court found as follows:

> Mr. Osteen testified that he moved for the appointment of two mental health experts, Dr. Wald and Dr. Masterson, with whom he had previously worked in several cases, who knew what he was looking for, and who knew what he wanted in their reports. He further testified that he always spoke with the doctors after their reports were submitted and received more details than were included in the reports. He stated that the experts were retained to determine the defendant's competency and the existence of any mitigators. Once he reviewed the reports, Mr. Osteen concluded that the doctors would not be helpful. He testified that this was not a strong mental health case, so he "chose to go a different route." Mr. Osteen further testified that if he had the doctors testify, the contents of their reports would have been "fair game," and by not calling them to testify, the jury was not informed of specific details which may have harmed defendant. Counsel cannot be ineffective for making a reasonable strategic decision to forego presentation of mitigating evidence that would likely have been more harmful than helpful and could have damaged defendant's chances with the jury.

(Citations omitted.) After a full review of the record, we conclude that the trial court's factual findings are supported by competent, substantial evidence.

We further conclude that trial counsel made "a reasonable strategic decision to not present mental mitigation testimony during the penalty phase because it could open the door to other damaging testimony." *Gaskin v. State,* 822 So.2d at 1248. Trial counsel made this decision based on his experience, the reports of competent experts, and his strategy of emphasizing Jennings' many positive character traits over his negative traits. Specifically, trial counsel testified at the evidentiary hearing that he was concerned that the mental mitigation was not particularly strong and had the potential to do more harm than good by revealing Jennings' extensive drug use and prior criminal acts. Counsel cannot be found deficient for choosing to pursue other mitigation evidence that he determined was more likely to help Jennings at trial. *See Winkles v. State,* 21 So.3d 19, 26 (Fla.2009) ("This Court previously has found no deficiency where trial counsel made a strategic decision not to present expert witness testimony after investigating ***1115**

and concluding that the testimony would be more harmful than helpful."); *Willacy v. State,* 967 So.2d 131, 143 44 (Fla.2007) (finding that counsel could not be considered deficient when mental mitigation evidence "would have opened the door to aggravating facts," such as the defendant's prior bad acts and negative personality traits).

[14] Jennings nevertheless argues that the information on which trial counsel made the determination to forego mental mitigation was incomplete, in that counsel failed to provide his experts with complete school and medical records. He also contends that the mental health experts were themselves inadequate. Jennings relies primarily on the postconviction testimony presented at the evidentiary hearing of Dr. Hyman Eisenstein, a clinical psychologist hired by postconviction counsel, who detailed what he perceived as the many inadequacies in Dr. Masterson's pretrial report. Dr. Eisenstein performed numerous neuropsychological tests of Jennings in 2000 and again in 2010 and concluded that Jennings' performance was indicative of "some brain disregulation." Following his 2010 evaluation, Dr. Eisenstein diagnosed Jennings with a learning disorder and with intermittent explosive disorder.

With respect to Dr. Eisenstein's testimony, the postconviction court found as follows:

> Dr. Eisenstein criticized Dr. Masterson's report, stating his opinion that Dr. Masterson did not put it all together in his report, did not list all the tests performed, and did not list all the raw data. Dr. Eisenstein disagreed with some of Dr. Masterson's conclusions and how Dr. Masterson listed Defendant's test results. However, Dr. Eisenstein conceded that this was a difference of opinion, that Dr. Masterson's report eluded [sic] to many of the same issues he had testified to, and that Dr. Masterson used the correct tests available at the time. He admitted that there was no authority that dictated how to write a report and that is [sic] was possible a report might be tailored to meet an attorney's needs. While Dr. Eisenstein complained that there was a whole battery of tests available that Dr. Masterson could have performed on defendant, he admitted there were no required tests.
>
> In light of Mr. Osteen's testimony that he chose to retain experts who were familiar with what he wanted to see and always spoke with his experts to obtain more detail than was listed in the reports, the Court finds Dr. Eisenstein's criticism of Dr. Masterson's report to be mere semantics.... That the defendant has now offered expert opinions different from those of the experts appointed before trial does not mean relief is warranted. Trial counsel made a reasonable tactical decision not to pursue further mental health investigation after receiving an initial diagnosis that there was no mental health mitigation, and that initial diagnosis is not rendered incompetent merely because defendant has now secured the testimony of an expert who gives a more favorable diagnosis. Defense counsel is entitled to rely on the evaluations conducted by qualified mental health experts, even if, in retrospect, those evaluations may not

have been as complete as others may desire.

(Citations and paragraph numbers omitted.) The postconviction court further found that Dr. Wald's and Dr. Masterson's reports "show they were aware of and considered defendant's history of head injuries, drug and alcohol use, and childhood psychiatric treatment for anger issues," which were all issues raised by postconviction ***1116** counsel through testimony at the evidentiary hearing.

[15] The postconviction court's factual findings are supported by competent, substantial evidence in the record, and the court did not err as to its legal conclusions. Jennings predominantly attributes the deficiencies in the presentation of mental health mitigation to the experts and not to counsel, and the postconviction court found that Dr. Eisenstein's criticisms of Dr. Masterson's report amounted to "mere semantics." Thus, Jennings has failed to establish that trial counsel was deficient for not presenting mental mitigation at trial. *See Sexton,* 997 So.2d at 1084 85. As this Court has previously stated, the fact that a defendant "produced more favorable expert testimony at his evidentiary hearing is not reason enough to deem trial counsel ineffective." *Peede v. State,* 955 So.2d 480, 494 (Fla.2007). Trial counsel cannot be deficient for relying on the evaluations of qualified mental health experts, "even if, in retrospect, those evaluations may not have been as complete as others may desire." *Darling v. State,* 966 So.2d 366, 377 (Fla.2007).

[16] Moreover, although Jennings argues that trial counsel did not provide his experts with complete school or medical records, Dr. Wald's report indicates that he reviewed Lee County school records, as well as medical records from the Collier County Jail. Further, even assuming trial counsel should have sought further records, Jennings has not demonstrated prejudice. Although Dr. Eisenstein testified at the evidentiary hearing that he had reviewed additional records, Jennings has not shown what specific information in these records was different from the information to which counsel was already privy, or what effect those additional records would have had.

Accordingly, we affirm the denial of relief on this claim.

Childhood and Background Mitigation

[17] Jennings also alleges that trial counsel conducted an insufficient background investigation of available mitigation information in this case. In support of his argument, Jennings presented testimony from Dr. Faye Sultan, a clinical psychologist hired by postconviction counsel, and from several individuals who knew Jennings and his mother during Jennings' childhood. Dr. Sultan testified in particular that through her investigation, she learned of pervasive sexual abuse in Jennings' family. Dr. Sultan's evaluation of Jennings, however, revealed similar findings to those of Dr. Masterson's pretrial report, and her review of Dr. Masterson's and Dr. Wald's reports indicated that they did address Jennings'

history of substance abuse but not, in her opinion, "the severity of [Jennings'] substance abuse" or the sexual violence. Dr. Sultan opined that, although Jennings does not suffer from any major mental illness, he "is quite a damaged person" and he "operates in the world ... in a highly dysfunctional way."

Jennings also presented testimony at the evidentiary hearing from his cousin, Patricia Scudder, and her husband Lloyd, both of whom testified that Jennings was exposed to child molesters in his youth and that Jennings' mother exhibited poor parenting skills. However, Patricia also testified that the relationship between Jennings and his mother was "very loving" and that Jennings' mother was "very, very overly protective" of Jennings.

Jennings argues that this postconviction testimony on the whole establishes that trial counsel was ineffective for failing to discover and present as mitigating evidence the history of sexual abuse and incest in Jennings' family and the dysfunctional home situation in which Jennings ***1117** was raised. Jennings contrasts these witnesses' testimony with that of trial counsel, who testified that "[i]f there was one thing Mr. Jennings had, he had a mother. A good one." Jennings thus suggests that counsel was deficient for failing to uncover mitigating information about Jennings' childhood and for relying on Jennings' mother to establish the mitigation he chose to present.

On this claim, the postconviction court found as follows:

> As it relates to information regarding sexual abuse or emotional neglect, Mr. Osteen could not be ineffective for failing to present evidence of which he was not aware, since he testified this information was not reported to him. In fact, in Dr. Masterson's report, defendant specifically denied any history of sexual abuse. Furthermore, sexual abuse of defendant's mother or other family members would not be significantly mitigating. In Dr. Wald's report, defendant also denied being intoxicated or under the influence of drugs at the time the crimes were committed. Mr. Osteen testified that he chose to rely on the positive statements by defendant's mother and friends, and the good, loving relationship between defendant and his mother in order to attempt to elicit sympathy from the jury. Again, this was proper trial strategy to focus on positive information, rather than negative information such as poverty or extreme drug and alcohol use.

(Citation omitted.) As the postconviction court's findings demonstrate, this is not a case where trial counsel failed to investigate, obtain, or provide any background information to the experts and therefore could not have made a reasoned strategic decision about its presentation. *Cf. State v. Riechmann,* 777 So.2d 342, 350 (Fla.2000) (holding that counsel's performance was deficient where he "was unable to provide any explanation as to why he did not conduct an investigation or contact witnesses available to him"). Trial counsel stated that it was his practice that either he or his investigator would ask about a history of sexual abuse and that it "never came up as an issue" in this case. Counsel further testified that he spoke to Jennings' mother several times and that he tried to arrange for her to meet with Dr. Wald but that she did not want to participate. None of the witnesses counsel questioned, including Jennings and his mother, revealed any history of sexual abuse in the family, and Jennings specifically denied that he himself had been abused. In previous cases, we have found that trial counsel was not deficient for failing to present evidence of sexual abuse when the defendant, who was the abuse victim, denied or did not inform counsel or mental health experts about it. *See, e.g., Anderson v. State,* 18 So.3d 501, 510 (Fla.2009); *Morton v. State,* 995 So.2d 233, 240 (Fla.2008); *Davis v. State,* 928 So.2d 1089, 1110 (Fla.2005).

The facts of this case present an even stronger reason not to find deficient performance by trial counsel because, in this case, the defendant was not the victim of the abuse and counsel testified that it was his practice to affirmatively ask potential witnesses about any history of sexual abuse. Counsel cannot be deemed deficient for failing to discover and present evidence of sexual abuse in Jennings' family when none of the witnesses questioned provided any information to suggest that there was a history of familial abuse. *See Carroll v. State,* 815 So.2d 601, 614 (Fla.2002) (stating that the reasonableness of counsel's decisions may be influenced by the defendant's own statements).

[18] Even assuming trial counsel should have learned about the abuse of Jennings' family members through other ***1118** means, Jennings has not demonstrated prejudice. While information concerning the sexual abuse of his family members might have been mitigating in establishing Jennings' troubled childhood and emotional development, the trial court found as nonstatutory mitigation that Jennings had a deprived childhood, and the presentation of this testimony might have run contrary to counsel's reasonable strategic decision of finding friends who could speak positively about Jennings. In addition, this information does not rise to the level of unpresented mitigation previously held to be prejudicial. *Cf. Winkles,* 21 So.3d at 27 (finding that unpresented testimony that the defendant himself had suffered sexual abuse was not prejudicial).

Jennings' further contention that trial counsel should have done more to investigate out-of-state friends and records is likewise unavailing. Counsel was already

aware of Jennings' childhood background through Jennings' own detailed self-reports, and in any event, this presentation would have been contrary to counsel's strategic decision, based on his investigation, to present positive penalty-phase witnesses who could speak to Jennings' good character traits.

In sum, we conclude that the postconviction court did not err in finding that trial counsel was not ineffective for failing to obtain or present childhood and background mitigation. Jennings has not "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052 (quoting *Michel,* 350 U.S. at 101, 76 S.Ct. 158). Accordingly, we deny relief on this claim.

Failure to Impeach

[19] Jennings next asserts that trial counsel was ineffective for failing to adequately investigate and impeach State witness Angela Cheney at trial. The postconviction court denied this claim, finding that Jennings' postconviction counsel did not question trial counsel about any alleged failure to adequately cross-examine Cheney and that Jennings therefore "failed to present any evidence that would show Mr. Osteen was in any way deficient on this issue." After considering the pertinent testimony from both the evidentiary hearing and Jennings' trial, we conclude that trial counsel was in fact deficient with respect to this claim. However, a close examination of the record in this case reveals that Jennings has not established that trial counsel's failure in this regard "so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined." *Pittman v. State,* 90 So.3d 794, 812 (Fla.2011) (quoting *Maxwell,* 490 So.2d at 932). Accordingly, we deny relief on this claim.

Angela Cheney testified at Jennings' trial regarding a statement Jennings made in November 1993. According to Cheney, Jennings said that if he ever needed money, "he could always rob someplace or somebody." When Cheney told Jennings that he could get caught, Jennings replied, while making a gesture across his throat, "Not if you don't leave any witnesses." On cross-examination, Cheney indicated that Jennings had made similar statements "several times." Jennings' trial counsel questioned Cheney on cross-examination only about the context in which the original statement occurred and when Cheney alerted police to Jennings' remark.

At the evidentiary hearing, Cheney testified that she was friends with Jennings' codefendant, Jason Graves, in high school and that she met Jennings through Graves. Cheney dated Jennings for about a month, after which she did not maintain any friendship or acquaintance with Jennings. Cheney later married Graves' ***1119** brother, but was either in the process of divorce or already divorced from him when she testified at Jennings' trial. Cheney also testified that she had thirty or forty conversations with Graves after he and Jennings were arrested for the Cracker

Barrel murders, that she was concerned for Graves' physical and emotional well-being while he was in jail, that she attended the first meeting with Graves' lawyers, and that her husband at the time (Graves' brother) was present with her when she gave her statement to police regarding Jennings' prior comments.

Although the postconviction court denied this claim, the court did note that Jennings had established that trial counsel should have been aware, based on information provided during pretrial discovery, of the nature of Cheney's relationships with both Jennings and Graves, and of what Cheney would testify to at trial. Given the information trial counsel knew from discovery material, a complete review of the trial transcript reveals that counsel was deficient with respect to his preparation for and cross-examination of Cheney. The cross-examination consisted merely of a few basic questions and actually led Cheney to disclose that Jennings had made several statements similar to the one to which she originally testified on direct examination. Counsel's failure to inquire of Cheney regarding the nature of her relationships with Jennings and Graves, and of her desire to help Graves, was unreasonable under prevailing professional standards.

Cheney's testimony at the evidentiary hearing that her trial testimony was truthful and uninfluenced by her relationship with Graves does not alter our assessment of counsel's cross-examination. Determining the credibility of a witness is up to the jury, and by failing to question Cheney about her potential motivations and biases in this case, regardless of whether any such biases influenced her testimony, counsel deprived the jury of the ability to make a fully informed decision about Cheney's credibility. This is not a case where the jury had other "ample information from which to assess [the witness's] credibility and weigh [her] testimony accordingly." *Robinson v. State,* 707 So.2d 688, 694 (Fla.1998). Furthermore, there is no suggestion that trial counsel had any strategic reason to limit his cross-examination of Cheney. *See, e.g., Hannon v. State,* 941 So.2d 1109, 1122 (Fla.2006) (finding no deficient performance when defense counsel made "reasonable strategic decisions ... in an attempt to avoid confusing the jury by attacking a witness that was not relevant to the defense case"). Thus, given the available impeachment evidence and the incriminating nature of Cheney's testimony, trial counsel's failure to adequately prepare for and cross-examine Cheney was deficient performance.

[20] Because we have concluded that counsel was deficient with respect to this claim, it is necessary to determine whether Jennings was prejudiced as a result. Jennings argues that prejudice is evident because Cheney's testimony helped to establish guilt and two aggravators in the penalty phase. Indeed, the trial court's sentencing order and this Court's direct appeal opinion refer to Cheney's testimony in finding and upholding the avoid arrest aggravator and CCP. *See Jennings,* 718 So.2d at 150 52. This Court also referred to Cheney's testimony in concluding that the evidence was sufficient to support Jennings' murder convictions.

See id. at 154. However, we conclude that Jennings has not demonstrated that counsel's deficient performance on this issue undermines the Court's confidence in the outcome of either the guilt phase or penalty phase of Jennings' trial.

***1120** While this Court did note Jennings' "past statements about committing a robbery and not leaving any witnesses" in finding that the evidence was sufficient to support Jennings' murder convictions, *see id.,* these statements did not represent the only evidence against Jennings, and the State presented considerable other evidence of Jennings' guilt such that trial counsel's failure to impeach Cheney does not undermine confidence in the jury's guilty verdict in this case. Specifically, Jennings made inculpatory statements to law enforcement, owned the murder weapon, and left bloody shoe prints leading away from the murder scene. *See id.*

With respect to CCP, this Court stated the following on direct appeal:

> The scenario of events supports the elements of a calculated plan and heightened premeditation. We begin with witness Chainey's [sic] testimony that, approximately two years before these crimes, Jennings made general statements and gestures to the effect that if he ever needed any money, he would simply rob someplace or someone and eliminate any witnesses by slitting their throats. Moreover, Jennings admitted to several aborted robbery attempts of the Cracker Barrel in close proximity to the actual crimes that he ultimately committed there. Evidence of a plan to commit a crime other than murder (such as, in this case, robbery) is in and of itself insufficient to support CCP. However, the execution-style murders, combined with the advance procurement of the murder weapon, the previously expressed dislike for victim Siddle, and the previously expressed intent not to leave any victims if robbery were committed are all additional factors that support the elements of a calculated plan and heightened premeditation. The evidence here does not suggest a "robbery gone bad."

Id. at 152 (citation omitted). Although it is true that the trial court and this Court noted Cheney's testimony in finding CCP in this case, other evidence supported the CCP aggravator. The trial court also cited Jennings' established dislike for one of the victims, the speed with which the robbery and murders were accomplished, and Jennings' ownership of the murder weapon as evidence of "a plan that was carried out with ruthless efficiency." *Id.* Further, in affirming the death sentences, this Court noted the execution-style nature of the killings, *id.,* which the Court has previously said are inherently "cold." *Wright v. State,* 19 So.3d 277, 299 (Fla.2009). Indeed, as outlined by the Court on direct appeal, the very nature of the way these murders were committed binding the victims, placing them in the freezer, and then slashing their throats alone strongly supports a finding of CCP.

We recognize that the trial court and this Court also cited Cheney's testimony

in finding and upholding the avoid arrest aggravator. However, regarding this aggravating circumstance, this Court found it "significant that the victims all knew and could identify their killer." *Jennings,* 718 So.2d at 151. The Court also stressed that "the facts of the present case show that the victims had been bound," and that "all three victims were confined to the freezer, and any immediate threat to Jennings could have been eliminated by simply closing and securing the freezer door." *Id.* In other words, we emphasized multiple facts, including that Jennings used gloves and did not use a mask, that supported the avoid arrest aggravator, outside of the prior statements allegedly made by Jennings to Cheney.

While we recognize that Cheney's testimony was used by the State both for guilt ***1121** and for the CCP and avoid arrest aggravators, the impeachment value of what was not presented must be considered in analyzing whether the defendant has demonstrated prejudice. *Cf. Hunter v. State,* 29 So.3d 256, 271 (Fla.2008) (stating that the impeachment value of the undisclosed evidence must be considered in determining whether prejudice ensued in the context of a newly discovered evidence claim). Although the information concerning Cheney's relationships with Graves and Jennings would have been impeaching, it is unlikely that it would have entirely destroyed Cheney's credibility as Jennings assumes. In *Parker v. State,* 89 So.3d 844, 868 69 (Fla.2011), we considered a similar argument regarding the value and effect of additional witness impeachment information and concluded that, although the information would have provided the jury with additional impeachment material regarding the witness's motive to testify, it would not have destroyed the witness's credibility. Similarly, the judge and jury in Jennings' case were aware that Cheney was at one time friends with Graves and Jennings. We conclude that the jury would not have fully discounted Cheney's testimony, as Jennings contends, even assuming an adequate cross-examination, simply because additional motives for testifying were brought forth.

In light of the fact that there was other compelling evidence that clearly supports Jennings' guilt and the CCP and avoid arrest aggravators, Jennings has not established prejudice so as to undermine our confidence in the outcome of either the guilt phase or penalty phase of this case. Accordingly, we deny relief on this claim.

Summary Denial of Claims

Jennings next argues that the postconviction court erred in summarily denying various claims, primarily regarding ineffective assistance of counsel. Specifically, Jennings contends that three claims warranted an evidentiary hearing: (1) the prosecutor made improper comments at trial and Jennings' trial counsel was ineffective for failing to object; (2) Jennings' trial counsel was ineffective for failing to challenge forensic evidence presented at trial; and (3) Jennings' trial counsel was ineffective for failing to challenge the admissibility of Jennings' post-

arrest statements. Because each of these claims is either procedurally barred, refuted by the record, or both, we affirm the postconviction court's summary denial of all three claims.

[21] **[22]** **[23]** **[24]** A postconviction court's decision of whether to grant an evidentiary hearing on a rule 3.850 motion is ultimately based on written materials before the court. Therefore, the court's ruling is tantamount to a pure question of law, subject to de novo review. *See Van Poyck v. State,* 961 So.2d 220, 224 (Fla.2007). When reviewing the summary denial of a claim raised in a rule 3.850 motion, the court must accept the movant's factual allegations as true to the extent that they are not refuted by the record. *Occhicone,* 768 So.2d at 1041. Generally, a defendant is entitled to an evidentiary hearing on a rule 3.850 motion unless: (1) the motion, files, and records in the case conclusively demonstrate that the movant is entitled to no relief; or (2) the motion or particular claim is legally insufficient. *Freeman v. State,* 761 So.2d 1055, 1061 (Fla.2000). The defendant bears the burden of establishing a prima facie case based on a legally valid claim; mere conclusory allegations are insufficient. *Id.*

With this background established, we now address each of Jennings' three summarily denied claims in turn.

Improper Prosecutorial Arguments

[25] **[26]** In his first claim, Jennings asserts that the postconviction court erred in ***1122** summarily denying his claim that the prosecutor made improper comments during his trial and that his trial counsel was ineffective for failing to object. To the extent Jennings argues that the comments themselves were improper, this issue is procedurally barred because it should have been raised on direct appeal. *See Spencer v. State,* 842 So.2d 52, 60 (Fla.2003) ("[C]laims of prosecutorial misconduct could and should have been raised on direct appeal and thus are procedurally barred from consideration in a postconviction motion."). In addition, Jennings' argument that the prosecutor took inconsistent positions between his trial and the trial of codefendant Graves was previously litigated and rejected, and is therefore likewise procedurally barred. *See Jennings,* 718 So.2d at 154.

[27] With respect to Jennings' ineffective assistance of counsel claims, Jennings initially asserts that trial counsel was ineffective for failing to object to improper comments at the guilt phase of his trial. However, Jennings does not point to any specific comments in particular. We therefore deny this part of Jennings' claim. *See Patton v. State,* 878 So.2d 368, 380 (Fla.2004) (holding that conclusory allegations are insufficient for appellate purposes).

[28] Next, Jennings asserts that trial counsel was ineffective for failing to object to improper prosecutorial comments at the penalty phase of his trial, and he cites to three instances in which he alleges that trial counsel should have objected.

Jennings first challenges the prosecutor's comment that the presentation of mitigation evidence was "another desperate effort to escape accountability." Jennings has not established, however, how this comment prejudiced his trial. This claim was therefore properly summarily denied by the postconviction court.

[29] Jennings also alleges that the prosecution argued impermissible aggravating circumstances in stating that Jennings spent the robbery money at a "topless dance club." The assertion that Jennings visited a "topless dance club" after the robberies was supported by trial testimony from a club employee, and in any event, there is nothing in the record to suggest that the trial court relied on any impermissible aggravating factors in sentencing Jennings to death.

[30] Finally, Jennings takes issue with the prosecutor's comment that Jennings' codefendant was convicted of the same crime and sentenced to life imprisonment. Again, however, Jennings has not established how this comment prejudiced his penalty-phase proceeding. Additionally, the trial court found the codefendant's life sentence to be a mitigating factor, and it is therefore illogical for Jennings to now argue that trial counsel was ineffective for failing to object to the prosecutor's reference to mitigation evidence submitted by defense counsel and found by the trial court.

Accordingly, we deny relief on this claim.

Forensic Evidence

In his second claim, Jennings asserts that the postconviction court erred in summarily denying his claim that trial counsel was ineffective for failing to challenge the forensic evidence presented at trial. Because this claim is legally insufficient, we deny relief.

[31] Jennings argues that his trial counsel failed to investigate the crime scene and the forensic evidence presented by the State and that counsel was deficient for failing to call any expert to testify on Jennings' behalf. However, while Jennings generally argues that trial counsel ***1123** should have presented his own forensic witnesses to rebut the State's evidence, he does not allege what specific information other experts would have been able to offer or how this presentation would have impacted the case. Without more specific factual allegations about how further investigation or challenge of the State's evidence would have benefited Jennings, trial counsel cannot be deemed deficient. *See Bryant v. State,* 901 So.2d 810, 821 (Fla.2005) ("[W]hen a defendant alleges ineffective assistance of counsel for failure to call specific witnesses, a defendant is 'required to allege what testimony defense counsel could have elicited from witnesses and how defense counsel's failure to call, interview, or present the witnesses who would have testified prejudiced the case.' " (quoting *Nelson v. State,* 875 So.2d 579, 583 (Fla.2004))). Accordingly, summary denial was proper. *See Freeman,* 761 So.2d at 1061 (stating that "[m]ere conclusory

allegations are not sufficient" to meet the defendant's burden).

Admissibility of Statements

In his third and final claim, Jennings asserts that the postconviction court erred in summarily denying his claim that trial counsel was ineffective for failing to raise issues related to Jennings' post-arrest statements. Although Jennings challenges the postconviction court's summary denial of this claim, we note at the outset that Jennings was granted an evidentiary hearing with respect to his claim that trial counsel was ineffective for failing to establish that Jennings was not competent to waive his constitutional *Miranda* rights and for failing to object to the admission of Jennings' statements. The record reflects, however, that aside from briefly inquiring whether trial counsel was aware of any substance abuse by Jennings around the time he gave his confession to police, Jennings did not present any witnesses or make any argument at the evidentiary hearing regarding this claim.

[32] Accordingly, it appears that the only issue Jennings is now raising with respect to the admission of his post-arrest statements is the postconviction court's summary denial of his contention that trial counsel was ineffective for failing to fully investigate and effectively cross-examine a key State witness about the circumstances surrounding Jennings' statements. Jennings argues that if trial counsel had properly investigated discrepancies between several versions of events relayed by witnesses in the case, counsel would have been able to effectively challenge the admissibility and reliability of Jennings' statements. However, Jennings does not specifically allege what these inconsistencies are or what information trial counsel should have been aware of or used as impeachment evidence. Because he has not established what testimony would have been offered or what information would have been discovered through a more thorough investigation and questioning of the State witness, Jennings' claim is legally insufficient, and the postconviction court's summary denial was proper.

II. Habeas Corpus Petition

[33] **[34]** **[35]** **[36]** In his habeas corpus petition, Jennings argues that certain omissions by his appellate counsel on direct appeal constituted ineffective assistance of appellate counsel. "Claims of ineffective assistance of appellate counsel are appropriately presented in a petition for a writ of habeas corpus." *Chavez v. State,* 12 So.3d 199, 213 (Fla.2009) (citing *Freeman,* 761 So.2d at 1069). To grant habeas relief on the basis of ineffectiveness of appellate counsel, this Court must resolve the following two issues:

> ***1124** [W]hether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside

> the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.

Bradley v. State, 33 So.3d 664, 684 (Fla.2010) (quoting *Pope v. Wainwright,* 496 So.2d 798, 800 (Fla.1986)). Under this standard, "[t]he defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based." *Anderson,* 18 So.3d at 520 (quoting *Freeman,* 761 So.2d at 1069). Importantly, "[i]f a legal issue 'would in all probability have been found to be without merit' had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective." *Walls v. State,* 926 So.2d 1156, 1175 76 (Fla.2006) (quoting *Rutherford v. Moore,* 774 So.2d 637, 643 (Fla.2000)). We address each of Jennings' habeas claims in turn.

Admissibility of State Witness Testimony

In his first habeas claim of ineffective assistance of appellate counsel, Jennings argues that his appellate counsel was deficient for failing to challenge on direct appeal portions of the testimony of three State witnesses. Specifically, Jennings contends that appellate counsel should have raised the claim that Officer Robert Browning, examiner David Grimes, and Corporal Joe Barber used non-standard terminology to render expert testimony opinions. We discuss each witness individually.

[37] Officer Browning, the supervisor of the Collier County Sheriff's Office crime scene section, testified at trial that blood transfers found in the kitchen of the Cracker Barrel Restaurant "looked like shoe tracks" going in a certain direction. Defense counsel objected to this testimony, stating that the witness was "testifying as an expert, giving his opinion as to reconstruction of the crime scene" and "not testifying just to what he saw." The trial court overruled this objection, stating that the alignment of the blood tracks was "a physical observation." Jennings now claims that it was error for appellate counsel not to raise this issue on direct appeal.

This argument is without merit. Jennings does not cite any case law or other authority to support his claim that appellate counsel should have raised this issue. Instead, he merely points out that defense counsel objected to the testimony at trial and assumes prejudice as a result of appellate counsel's failure to raise the issue on direct appeal. The testimony Officer Browning offered was based on his physical observations of the blood tracks and did not require any specialized knowledge or skill. It was therefore not improper, and appellate counsel was not ineffective for failing to raise this meritless issue on appeal. *See Walls,* 926 So.2d at 1175 76.

[38] Jennings next challenges portions of the testimony of David Grimes, a document and impressions examiner who testified as an expert in the field of footwear and shoe print examination. Defense counsel did not object to Grimes' qualification as an expert witness. Grimes' testimony concerned comparisons between crime scene impressions and particular shoes, stating that several impressions "match[ed]" or "correspond[ed]." Jennings argues that Grimes' use of these types of descriptive terms and phrases ***1125** were subjective and lacked a scientific basis. We disagree.

Grimes was qualified as an expert in the field of shoe print examination and therefore was permitted to testify in the form of an opinion as to his specialized knowledge. § 90.702, Fla. Stat. (1995). Jennings does not cite, and we have not located, any authority for the proposition that an expert witness's use of terms such as "match" or "correspond" lacks a reasonable basis in science and is improper for a qualified expert to employ. To the extent Jennings alleges that Grimes' testimony contained legal conclusions, statements that a particular shoe made a particular impression merely represent the kind of opinion an expert specialized in the field of shoe print examination is entitled to, and would be expected to, offer. There was no error in the trial judge's rulings with respect to trial counsel's objections to Grimes' testimony, and appellate counsel therefore cannot be deemed ineffective for failing to raise this meritless issue. *See Walls,* 926 So.2d at 1175 76.

[39] Lastly, Jennings challenges Corporal Joe Barber's testimony that the air pistol that law enforcement found in this case was "almost identical" to a "real firearm," and Corporal Barber's use of an actual firearm as a demonstrative aid to show the jury the similarity between the two items. Defense counsel objected to Corporal Barber's demonstration as cumulative, but the trial court overruled the objection and Corporal Barber proceeded to hold the two items up for the jury to observe. In response to a question about which was the "real gun," Corporal Barber stated that the air pistol "seem[ed] as [if] it's almost a perfect replica." Jennings now asserts that appellate counsel was ineffective for failing to challenge Corporal Barber's testimony on direct appeal. However, Jennings presents no support for his contention that there was error in the trial court's ruling on this issue or that it would have been a meritorious argument on appeal. Thus, appellate counsel cannot be deemed deficient for failing to raise this meritless issue. *See Walls,* 926 So.2d at 1175 76.

Alleged State Misconduct

In his second habeas claim of ineffective assistance of appellate counsel, Jennings argues that appellate counsel was deficient for failing to challenge the trial court's denial of his motion for mistrial based on an incident at trial in which an employee of the State Attorney's Office provided a cough drop to a member of the jury. This claim is without merit.

[40] **[41]** **[42]** "A motion for mistrial should be granted only when the error is deemed so prejudicial that it vitiates the entire trial, depriving the defendant of a fair proceeding. The standard of review applied to motions for mistrial is abuse of discretion." *Floyd v. State,* 913 So.2d 564, 576 (Fla.2005) (citation omitted). "A motion for mistrial is properly denied where the matter on which the motion is based is rendered harmless by a curative instruction." *Perez v. State,* 919 So.2d 347, 364 (Fla.2005).

[43] In this case, Jennings' motion for mistrial was based on the allegedly improper conduct of an individual seated at the prosecution's counsel table who furnished a cough drop to a juror suffering from a coughing spell. Defense counsel brought the matter to the court's attention, and the trial judge immediately dismissed the jury and inquired into the incident. The trial court admonished the parties involved and emphasized the importance of avoiding the appearance of impropriety, but denied Jennings' motion for mistrial. The trial court did, however, ***1126** provide a curative instruction, informing the jury that the conduct in question was "very inappropriate" and that the jury should "not be influenced in any way by this gesture on the part of the individual who passed whatever it was to you."

Despite the curative instruction, Jennings argues that appellate counsel should have raised the denial of his motion for mistrial on appeal. Jennings does not allege, however, how the improper conduct may have affected the jury or why the curative instruction was insufficient. Because Jennings has not demonstrated that the trial court erred in denying his motion for mistrial, appellate counsel cannot be deficient for failing to raise the meritless issue on direct appeal. *See Walls,* 926 So.2d at 1175 76.

Admissibility of Photographs

In his third habeas claim of ineffective assistance of appellate counsel, Jennings argues that appellate counsel was deficient for failing to challenge the admission of several allegedly prejudicial photographs at trial. Because the underlying claim lacks merit, we deny habeas relief.

[44] **[45]** "This Court has long followed the rule that photographs are admissible if they are relevant and not so shocking in nature as to defeat the value of their relevance." *Hertz v. State,* 803 So.2d 629, 641 (Fla.2001) (quoting *Czubak v. State,* 570 So.2d 925, 928 (Fla.1990)). "The test for admissibility of photographic evidence is relevancy rather than necessity." *Pope v. State,* 679 So.2d 710, 713 (Fla.1996). "Crime scene photographs are considered relevant when they establish the manner in which the murder was committed, show the position and location of the victim when he or she is found by police, or assist crime scene technicians in explaining the condition of the crime scene when police arrived." *Douglas v. State,* 878 So.2d 1246, 1255 (Fla.2004). This Court has "consistently upheld the admission of allegedly gruesome photographs where they were independently

relevant or corroborative of other evidence." *Hertz,* 803 So.2d at 641 (quoting *Czubak,* 570 So.2d at 928). In addition, the Court has stated in particular that "autopsy photographs are relevant to show the manner of death, location of wounds, and identity of the victim, and to assist the medical examiner." *Jones v. Moore,* 794 So.2d 579, 587 (Fla.2001).

[46] [47] [48] However, "[t]o be relevant, a photo of a deceased victim must be probative of an issue that is in dispute." *Seibert v. State,* 64 So.3d 67, 88 (Fla.2010) (quoting *Almeida v. State,* 748 So.2d 922, 929 (Fla.1999)) (alteration in original). Furthermore, even relevant photographs must be carefully scrutinized by the trial court to determine whether the "gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jur[ors] and [distract] them from a fair and unimpassioned consideration of the evidence." *Czubak,* 570 So.2d at 928 (quoting *Leach v. State,* 132 So.2d 329, 331 32 (Fla.1961)) (second alteration in original). In other words, the relevancy standard "by no means constitutes a carte blanche for the admission of gruesome photos." *Almeida,* 748 So.2d at 929.

[49] Jennings first challenges the admission of photographs, over defense objection, of Jennings and codefendant Graves with exotic dancers sitting on their laps, arguing that the pictures' probative value in relation to the crime was substantially outweighed by the danger of unfair prejudice. The trial court found that the pictures were relevant to demonstrate that Jennings was not acting afraid of Graves and to show the affluent lifestyle Jennings and Graves were living after the robbery.

We conclude that Jennings has not demonstrated any error in the trial court's ***1127** ruling. Because the photos at issue were relevant, probative of several issues in the case, and "not so shocking in nature as to defeat the value of their relevance," *Hertz,* 803 So.2d at 641 (quoting *Czubak,* 570 So.2d at 928), the trial court did not err in admitting these photographs.

[50] Next, Jennings challenges the admission of crime scene photographs depicting the deceased victims and the bloody surroundings. Jennings claims that appellate counsel should have raised an issue regarding the trial court's denial of defense objections to these crime scene photographs as cumulative and unduly prejudicial. While depicting a murder scene, the photographs at issue do not appear to be overly gruesome or shocking, and they were used by law enforcement officers in describing how the officers found the victims and other evidence, such as bloody shoe tracks, upon arrival at the restaurant. A reconstruction of the crime scene and the fact that the victims' hands were tied behind their backs were relevant issues in the case, and the pertinent photographs were probative of those issues. The trial court therefore did not err in admitting these photographs.

[51] Lastly, Jennings challenges the admission of three autopsy photographs admitted during the medical examiner's testimony. This Court has previously upheld

the admission of autopsy photographs when they were relevant to assist the medical examiner's testimony and to demonstrate premeditation. *See, e.g., Philmore v. State,* 820 So.2d 919, 932 (Fla.2002). While "trial courts must be cautious in not permitting unduly prejudicial or particularly inflammatory photographs before the jury," photographs "are admissible 'to show the manner of death, location of wounds, and the identity of the victim.' " *Brooks v. State,* 787 So.2d 765, 781 (Fla.2001) (quoting *Larkins v. State,* 655 So.2d 95, 98 (Fla.1995)). The three autopsy photographs to which Jennings objects show the neck wounds suffered by each victim in this case and were therefore relevant to the medical examiner's testimony and properly admitted.

Accordingly, we deny habeas relief on this claim.

Trial Judge's Comment

[52] **[53]** In his fourth habeas claim of ineffective assistance of appellate counsel, Jennings argues that appellate counsel was deficient for failing to raise on appeal the trial judge's characterization of the case during pretrial jury selection as "the infamous Cracker Barrel case." Jennings' trial counsel did not contemporaneously object to this comment, so the issue was not preserved for appellate review. Accordingly, Jennings must demonstrate that the underlying claim constituted fundamental error. *See Power v. State,* 886 So.2d 952, 963 (Fla.2004). "Fundamental error is the type of error which reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Id.* Because Jennings cannot meet this high burden on the alleged facts, we deny habeas relief on this claim.

[54] A review of the context surrounding the remark reveals that, at the time it was uttered, the judge was trying to aid a potential juror in remembering whether the venireperson had heard anything about the case or formed any fixed opinion. In fact, the record clearly displays that the judge was in actuality attempting to determine the potential juror's familiarity with the facts of the case for the very purpose of ascertaining the presence of potential bias. Jennings does not raise any specific challenge to jury selection or composition, or allege impermissible pretrial publicity, but instead relies on a general allegation ***1128** that the judge's reference to the case as "infamous" tainted the entire proceeding from the start. This argument is unavailing and falls short of the required showing needed to demonstrate fundamental error. We therefore deny habeas relief on this claim.

Rule Regarding Juror Interviews

In his final habeas claim of ineffective assistance of appellate counsel, Jennings contends that appellate counsel was deficient for failing to assert that Rule Regulating the Florida Bar 4 3.5(d)(4), which imposes restrictions on post-trial juror interviews by lawyers, violates his constitutional rights.

Although Jennings refers to two events that he alleges may have biased jurors, Jennings asserts only that appellate counsel was deficient because he failed to bring a constitutional challenge to the rule.

[55] The underlying issue was not preserved for review. Moreover, this Court has on numerous occasions rejected similar constitutional challenges to rule 4 3.5(d)(4). *See, e.g., Floyd v. State,* 18 So.3d 432, 459 (Fla.2009) (rejecting claim that rule 4 3.5(d)(4) violated due process rights as well as the First, Sixth, Eighth, and Fourteenth Amendments); *Israel v. State,* 985 So.2d 510, 522 (Fla.2008) (rejecting claim that rule 4 3.5(d)(4) violates constitutional rights of due process and equal protection); *Power,* 886 So.2d at 957 (rejecting contention that rule 4 3.5(d)(4) violated appellant's right of access to courts under article I, section 21, of the Florida Constitution). In addition, "where the defendant merely complains about the 'inability to conduct "fishing expedition" interviews,' the claim is without merit." *Evans v. State,* 995 So.2d 933, 952 (Fla.2008) (quoting *Johnson v. State,* 804 So.2d 1218, 1225 (Fla.2001)).

Accordingly, appellate counsel cannot be deemed deficient for failing to raise a nonmeritorious issue on direct appeal. *See Farina v. State,* 937 So.2d 612, 626 (Fla.2006) (holding as meritless defendant's claim that appellate counsel was ineffective for failing to challenge rule 4 3.5(d)(4) as unconstitutional).

CONCLUSION

Based on the foregoing, we affirm the postconviction court's denial of relief, and we also deny Jennings' habeas petition.

It is so ordered.

PARIENTE, QUINCE, CANADY, LABARGA, and PERRY, JJ., concur.

POLSTON, C.J., and LEWIS, J., concur in result.

All Citations

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Footnotes

1 Because Jennings initially filed his motion for postconviction relief before October 1, 2001, his claims are governed by Florida Rule of Criminal Procedure 3.850, rather than rule 3.851. *See Rodriguez v. State,* 39 So.3d 275, 282 n. 4 (Fla.2010).

2 Jennings raised four claims on direct appeal, all of which the Court rejected: (1) the trial court erred in denying his motion to suppress statements he made to Florida law enforcement while in custody in Las Vegas; (2) the trial court erred in finding the avoid arrest aggravator; (3) the trial court erred in finding CCP; and (4) Jennings' death sentences were impermissibly disparate from codefendant Graves' sentences of life imprisonment. *Id.* at 147–53. The Court did not address Jennings' challenge to his robbery sentence because it was not preserved below. *See id.* at 145 n. 1.

3 Jennings' twenty-five claims were as follows: (1) Jennings' convictions are materially unreliable due to the cumulative effects of the following: (a) trial counsel's failure to investigate the circumstances surrounding Jennings' confession, depose or prepare for cross-examination of several State witnesses, investigate the crime scene and consult forensic

experts, and object to prosecutorial misconduct; (b) improper rulings of the trial court; and (c) the withholding of exculpatory evidence; (2) trial counsel was ineffective for failing to object to prosecutorial misconduct, including the State making inconsistent arguments at Jennings' and codefendant Graves' trials; (3) trial counsel was ineffective for failing to obtain an adequate mental health evaluation of Jennings and for failing to provide the necessary background information to the mental health experts in order to present critical information to the jury regarding Jennings' mental state at the guilt, penalty, and sentencing phases of Jennings' trial; (4) trial counsel was ineffective for failing to investigate, prepare, and present mitigation evidence and for failing to adequately challenge the aggravating circumstances presented to the jury; (5) trial counsel was ineffective for failing to conduct adequate voir dire and for failing to request a curative instruction after the trial judge introduced the case to potential jurors as the "infamous Cracker Barrel case"; (6) trial counsel was ineffective for failing to establish that Jennings was not competent to waive his *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), rights and for failing to object to the admission of Jennings' statements on the ground that they were obtained by the use of threats, promises, and misleading information; (7) Jennings is entitled to a new trial as a result of newly discovered evidence regarding weaknesses in the field of forensic sciences; (8) there were insufficient aggravating factors to render Jennings eligible for the death penalty, the jury was given unconstitutionally vague instructions on the aggravators, and newly discovered mitigation evidence renders Jennings' death sentences disproportionate; (9) the penalty phase instructions were improper and trial counsel was ineffective for failing to object to the instructions; (10) the State failed to prove the avoid arrest aggravator, which is unconstitutionally vague, and trial counsel was ineffective for failing to raise this issue; (11) the jury instruction on expert witness testimony was deficient and trial counsel was ineffective for failing to object; (12) the "during the commission of a felony" aggravator is unconstitutionally vague and overbroad, and trial and appellate counsel failed to properly litigate this issue; (13) the trial court relied on nonstatutory aggravating factors in sentencing Jennings to death, and trial counsel was ineffective for failing to object; (14) the trial court improperly instructed the jury regarding its role in the penalty phase in violation of *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), and trial counsel was ineffective for failing to litigate this issue; (15) rule 4–3.5(d)(4) of the Rules Regulating the Florida Bar is unconstitutional because it prohibits defense counsel from interviewing jurors to determine if constitutional error was present in Jennings' case; (16) the jury was not adequately instructed regarding the aggravating factors, and section 921.141, Florida Statutes (2009), is unconstitutionally vague and overbroad; (17) Florida's capital sentencing statute is unconstitutional, and trial and appellate counsel failed to properly litigate this issue; (18) Jennings was denied a fair trial due to pretrial publicity, and trial counsel was ineffective for failing to research local media coverage of the case in Pinellas County, where it was tried, and for failing to request that the trial be conducted outside the influence of the Collier County press; (19) the trial court improperly considered inadmissible victim impact evidence, and trial and appellate counsel failed to properly litigate this issue; (20) the sentencing order did not reflect independent weighing or reasoned judgment, and trial counsel was ineffective for failing to litigate this issue; (21) the aggravating circumstance of commission during the course of an enumerated felony is unconstitutional, and trial and appellate counsel were ineffective for failing to litigate this issue; (22) cumulative errors entitle Jennings to relief; (23) Jennings was denied a proper direct appeal due to omissions in the record, and trial counsel was ineffective for failing to ensure that a proper record was provided to the court; (24) Jennings is insane and cannot be executed; and (25) lethal injection constitutes cruel and unusual punishment, the Department of Corrections unconstitutionally delegated its authority to create and implement lethal injection procedures to the Attorney General's Office, and denial of appointed counsel to raise a federal civil rights action violates the Equal Protection Clause.

4 *Huff v. State,* 622 So.2d 982 (Fla.1993).

5 Cheney's name was misspelled in the trial transcript as Angela Chainey.

6 The State did not present any witnesses at the evidentiary hearing.