

In The  
Supreme Court of the United States

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BRANDY BAIN JENNINGS,

*Petitioner,*

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

*Respondent.*

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

RESPONDENT'S BRIEF IN OPPOSITION

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**Capital Case**  
**QUESTION PRESENTED**

Whether under the deferential review of the AEDPA the Eleventh Circuit correctly held there was no reasonable probability of a different sentence than death when the omitted mitigation evidence contained information that was a “two edged sword” that would both undermine much of the mitigation the sentencing court found to exist and open the door to damaging evidence, including evidence that Jennings had sociopathic character traits and a long criminal history that included violence?

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The opinion of the Eleventh Circuit Court of Appeals is reported as *Jennings v. Sec'y, Fla. Dept. of Corr.*, 55 F.4th 1277 (11th Cir. 2022).

## **PRELIMINARY STATEMENT**

In this appeal, Respondent-Appellee, Secretary, Florida Department of Corrections, will be referred to as “Appellee” or “the State.” Petitioner-Appellant, Brandy Bain Jennings, will be referred to as “Petitioner” or “Jennings.”

References to the district court record follow the procedure authorized by this Court when the volume numbers are not available, i.e., “Doc. (Doc. #:page #).” Respondent filed a copy of the state court proceedings in paper format in the district court and filed a Master Index of Exhibits. (Doc. 23). Citations to the state court record will utilize the system contained in Doc. 23, for example (A11:T845-963) is the transcript of proceedings held on November 1, 1996.

## **STATEMENT OF JURISDICTION**

The Eleventh Circuit Court of Appeals affirmed the district court’s denial of habeas relief. The instant petition was timely filed with this Court on June 16, 2023. Petitioner invokes the jurisdiction of this Court based upon 28 U.S.C. § 1254(1). Respondent agrees that this statutory provision sets out the scope of this Court’s certiorari jurisdiction but submits that this case is inappropriate for the exercise of this Court’s discretionary jurisdiction.

## **CONSTITUTIONAL PROVISIONS INVOLVED**

The Sixth Amendment to the United States Constitution provides in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and

public trial, by an impartial jury of the state and district wherein the crime shall have been committed ... [and] to be confronted with the witnesses against him, to have compulsory process of obtaining witnesses in his favor, and to have the assistance of counsel." Amend VI, U.S. Const., § 1.

The Fourteenth Amendment to the United States Constitution states in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." Amend. XIV, U.S. Const., § 1.

#### **STATEMENT OF THE CASE**

On November 15, 1995, police found the bodies of Dorothy Siddle, Vicki Smith, and Jason Wiggins lying in pools of blood on the freezer floor of the Naples, Florida Cracker Barrel restaurant. Their throats were slashed, and Dorothy Siddle still had both her hands bound together behind her back with electrical tape, although Smith and Wiggins managed to loosen the tape from their right wrists. There were bloody shoe prints leading from the freezer, through the kitchen, and into an office with an open empty safe surrounded by cash. Leading away from the restaurant, police found shoe tracks, scattered money, a buck knife and a case, an air pistol, and a pair of blood-stained gloves.

Jennings, (age twenty-eight) and Jason Graves (age eighteen), both of whom worked at this Cracker Barrel and knew the victims, were apprehended in Las Vegas, Nevada approximately three weeks later. Jennings, in taped interviews, admitted to planning the robbery, his involvement in several aborted attempts, and his involvement in the robbery resulting in Siddle, Smith, and Wiggins's deaths, but

blamed Graves for the murders despite also admitting he wore gloves that night, used the knife to tie the victims' hands, saw the dead bodies in the freezer, and slipped and fell in the blood. The following day, in another interview, 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." He directed the police to a canal where he and Graves had thrown other evidence. There the police found evidence from the robbery, including the clothes Jennings said they wore during the robbery and more cash, coins, checks, traveler checks and money orders made out to "Cracker Barrel," a money bag marked "Cracker Barrel," and Cracker Barrel deposit slips. *Jennings v. State*, 718 So. 2d 144, 145-47 (Fla. 1998). (A20).

#### **A. Trial Proceedings**

On December 20, 1995, Jennings was indicted for the first-degree murders of Siddle, Smith, and Wiggins, and the robbery of Siddle which resulted in the murders. His trial commenced on October 28, 1996, in Pinellas County pursuant to an order granting a change of venue. (A7-A10; A1:133-37, 140-41).

His lead counsel was a highly experienced assistant public defender, Tom Osteen. (C15:2874). At the time of Jennings's trial, Osteen was the deputy public defender running the Collier County office and had represented approximately thirty capital defendants, most of whose cases were tried as death cases through penalty phase. (C15:2876-77, 2923). No client of his has secured relief from a death sentence due to ineffective assistance. (C15:2935). Adam Sapenoff assisted as co-counsel. Sapenoff had no capital experience but was assigned various tasks and

responsibilities by Osteen. Jennings's defense acknowledged his participation in the robbery but asserted that co-defendant Graves actually killed the victims. (A8:229-232; A10:751-65). In addition to Jennings's confession and the items recovered from the robbery, the evidence admitted included prior statements from Jennings expressing his extreme dislike for Siddle and that if he ever committed a robbery, he would eliminate the witnesses. The jury returned a verdict on October 31, 1996, finding Jennings guilty on all counts. (A5:784-90).

At the penalty phase, the defense presented the testimony of Jennings's mother, who testified to the difficult upbringing Jennings suffered, how he quit school to help her when she was ill, and how she loved him. The defense also presented five good friends of Jennings's who testified to positive character traits he possessed. (A5:699-727). After penalty phase proceedings, the jury recommended death sentences by a vote of 10-2 for each murder. (A4:622-24). At Jennings's *Spencer*<sup>1</sup> hearing, his mother addressed the court and asserted her belief in his innocence of the murders (A6:957-62). She stated that Jennings had saved lives, had made straight As, and had paid the bills and taken care of her when she got breast cancer; she observed that she had not been able to afford to give him things he needed. (A6:957-62).

The court followed the jury's recommendations and sentenced Jennings to death on the murder convictions. (A5:790). The court found three aggravating circumstances: (1) that the murders were committed during a robbery, (2) that they

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<sup>1</sup> *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

were committed to avoid arrest, and (3) that they were cold, calculated, and premeditated (CCP). (A5:784-86). The court found one statutory mitigator: that Jennings had no significant history of prior criminal activity (some weight) and rejected two statutory mitigators: (1) Jennings was an accomplice in a capital felony committed by another and (2) Jennings's participation was relatively minor and that he acted under extreme duress or under the substantial domination of another person. In addition, the court found eight non-statutory 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) (A5:786-90).

Jennings's convictions and sentences were affirmed by the Florida Supreme Court on September 10, 1998. *Jennings v. State*, 718 So. 2d 144, 145-147 (Fla. 1998). Jennings sought certiorari review before this Court, asserting constitutional violations based on the State allegedly taking inconsistent positions between Jennings's trial and the trial of his codefendant. (B1). Review was denied on June 24, 1999. *Jennings v. Florida*, 527 U.S. 1042. (1999) (B3).

## **B. State Postconviction Proceedings**

Jennings filed his state postconviction motion on March 20, 2000. (C1:38-73). The motion was amended twice, and the final motion was filed on or about July 29, 2009 (C12:2289-2409). An evidentiary hearing was held before the Honorable Frederick Hardt on five claims of ineffective assistance of trial counsel (C13:2549-71). Testimony was presented on April 28-29, 2010 (C15:2834-C14:2831-y)<sup>2</sup> and concluded on August 11, 2010 (C16:3058-3155). Jennings presented eleven witnesses: Jennings's lead trial attorney, Thomas Osteen; mental health professionals Dr. Thomas Hyde, Dr. Hyman Eisenstein, and Dr. Faye Sultan; lay witnesses and friends of Jennings's, Angela Ostrander (f/k/a Angela Cheney), Heather Johnson, Kevin McBride, and Bruce Martin; the cousin of Jennings's mother, Patricia Scudder and her husband, Lloyd Scudder; and co-defendant, Charles Jason Graves.

Jennings's family members testified that although they had limited contact with him and his mother prior to them moving to Florida, they believed Jennings's mother was overprotective and exhibited inappropriate parenting, even though Mrs. Scudder described the relationship between Jennings and his mother as "very loving." (C14: 2785-86, 2801-06, 2809, 2813-14). They also testified that there was a history of incest in the family involving adults molesting children, although Jennings was not one of the children either stated was molested. Jennings's friends testified that

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<sup>2</sup> Due to an error in the sequencing of Volumes 14 and 15, the transcript of the hearing commences on April 28, 2010, in Volume 15 at page 2832, continues on April 29, 2010 in Volume 14 at page 2645, and is completed on August 11, 2010 in Volume 16 at pages 3058-3155.

there were sometimes difficulties between Jennings and his mother, which included conflict with his mother, frustration with her, and resentment towards her. (C14:2831-M-S; C16:3121-23, 3136). They also described Jennings as good natured, although he sometimes got angry, and even violent, and abused both drugs and alcohol. (C14:2831-O-R; C16:3128-34, 3141-48, 3169-71).

Dr. Thomas Hyde, a behavioral neurologist, evaluated Jennings for postconviction purposes in 2000 and then again shortly before the 2010 evidentiary hearing. Dr. Hyde did not offer any specific diagnosis but testified that for the most part the neurological examination was normal. He noted two factors from Jennings's background that he felt stood out. The first was a history of febrile convulsions in childhood and several closed head injuries. However, Dr. Hyde did not identify any brain damage or cognitive deficits with Jennings. Furthermore, when asked, he could not offer any opinion as to what effect Jennings's "neurological situation" had to do with the commission of the robbery or murders. (C15:2841-54).

Dr. Hyman Eisenstein is a clinical psychologist specializing in neuropsychology. He conducted two neuropsychological evaluations of Jennings. The initial one was in June of 2000; a second examination was conducted before the hearing in 2010. (C15:2936-3051-C14:2645-49). He administered a battery of tests, most of which Jennings performed normally. (C15:2947-3027). Dr. Eisenstein reached two diagnoses after the second evaluation. The first is that Jennings is gifted/learning disabled, the disability being a reading disorder. The second is that Jennings suffers from Intermittent Explosive Disorder. ("IED") (C14:2685-93, 2729-30). Dr. Eisenstein

opined that both statutory mental mitigators applied in this case. (C14:2716-18). The “extreme disturbance” mitigator was based on Jennings’s learning disability, which caused frustration, dysregulation of brain function, and poor impulse control. (C14:2718). When this is combined with the IED, Dr. Eisenstein believed Jennings was unable to appreciate the criminality of his conduct or conform his conduct to the requirements of law. (C14:2718-19).

Dr. Faye Sultan, a clinical psychologist, spoke with Jennings’s mother, friends, relatives, and investigators. (C16:3062, 3070-78). Dr. Sultan testified that children that grow up in the type of environment in which Jennings was raised do not develop normally from an emotional or neuropsychological standpoint. They are typically impulsive and aggressive, often oversexualized, and extreme substance abusers, which is how she characterized Jennings’s substance abuse. They suffer a lot of difficulty with memory and concentration, a distorted sense of safety, and often commit violent crimes. (C16:3081-85). Dr. Sultan’s personality testing did not reveal any extreme emotional distress, major mental illness, or statutory mental mitigation (C16:3089, 3096). However, Jennings was a serious substance abuser, easily frustrated, and had difficulty controlling his anger. (C16:3089).

She agreed that the diagnosis of Intermittent Explosive Disorder is the one that “comes closest to fitting” Jennings. (C16:3092-94). However, she could not suggest that the IED related to the murders or that Jennings was experiencing an IED episode at the time of the murders. (C16:3111). She also acknowledged that

Jennings's jail records did not reflect any behavior suggesting IED, as Jennings had few infractions, which mostly involved property issues. (C16:3095).

Although Jennings stated that he was not sexually abused, Dr. Sultan confirmed that she was not directly informed that Jennings was sexually abused by his family, and there was no testimony that Jennings witnessed either his mother having sex or any of the sexual abuse that may have occurred in his mother's family, Dr. Sultan opined that his mother informing him at too young of an age that *she* was sexually abused created significant emotional stress contributing to his mental state because he was not prepared for that type of information. (C16:3099-3100). Moreover, she considered him sexually abused because he was paid a quarter when a child to sit on the lap of an abuser. (C16:3101-02).

Dr. Sultan concluded from her discussions with Jennings's mom that she is "quite mentally ill," and had an abnormal attachment to Jennings when he was young. (C16:3086). She behaved oddly, nursing Jennings until he was five or six, having sex in his presence, and possessed only minimal parenting skills. This left Jennings without adequate supervision, encouragement, and support. (C16:3086-87). Sultan was informed that Ms. Jennings was often intoxicated. (C14:2791; C16:3083).

Reports by the experts retained by trial counsel, Dr. Wald and Dr. Masterson, were admitted into evidence at the hearing. The reports reflect that one or both of the experts had reviewed Jennings's Lee County School District records; his Collier County Jail records; a December 21, 1995, investigator's activity report on another case of his; and obtained through interviews with Jennings, an extensive personal

history, including medical history, family history, and other issues going back to early childhood. (C15:2883-87; C20:3760-81).

The reports outline Jennings's criminal history, which included mostly traffic violations, a shoplifting arrest, and a plea to attempted armed robbery, but also contain information concerning other criminal activities and plans of his. Specifically, Dr. Wald's report notes that Jennings began seriously considering robbing the Cracker Barrel after an appearance before another judge on an unrelated matter and needed "quick cash to leave the state, admitted to being involved in transporting and selling drugs in 1989 and 1990, stealing things for both money and "the adrenalin rush," and stealing money from businesses two dozen times, or more. (C15:2919-20; C20:3772-81). Dr. Masterson's report indicates that Jennings hospitalized his mother's boyfriend when Jennings "slammed [him] to the ground in the driveway" in anger. It also contains multiple references to Jennings dealing drugs. Finally, it contains an admission by Jennings that the attempted armed robbery charge resulted from him kidnapping someone whom Jennings stated threatened his girlfriend over drug money she owed, and that Jennings intended to kill the man with the firearm in Jennings's possession at the time. (C20:3760-71).

Moreover, the reports contain multiple references regarding evidence that Jennings may suffer from a sociopathic personality disorder. Although there was no formal diagnosis in either report that Jennings is a sociopath, Dr. Masterson states that Jennings's MMPI testing results "are usually seen in people . . . inclined toward the sociopathic side of character disorder" and "[t]his MMPI would suggest the

personality disorder, characterological disorder, sociopathic type of personality.” Wald’s report states that “[Jennings] indicates that any past crimes in which he has participated seemed not to affect him at all. He admits that he seeks gratification, does not feel at all remorseful about crimes he has committed, and has experienced no guilt relative to legal infractions,” reiterates Masterson’s interpretation of the MMPI and agrees that “the profile tends to describe a person . . . inclined toward the sociopathic side of character disorder,” states that Jennings “manifests most characteristics of the sociopathic personality type” before concluding, “I believe we are dealing with a sociopathic personality.” (C20:3760-81).

Lead trial counsel, Tom Osteen, testified that he did not believe that Saperoff participated in presenting any part of the penalty phase. (C15:2899-2901). Osteen knew from the start of the case that the State would be seeking the death penalty and began to prepare for the penalty phase right away. (C15:2912-14). He had mental health experts appointed early in the case. He had a good relationship with Dr. Wald, a psychiatrist, who he worked with quite often and who understood the type of evaluation Osteen wanted. He requested Wald’s involvement to determine Jennings’s competency and sanity. (C15:2878-79). Because Wald was a psychiatrist, Osteen requested that Dr. Masterson, a psychologist, be appointed to conduct the relevant testing. Osteen previously worked with Dr. Masterson through the years, also. He also knew what Osteen was looking for and would help him in that regard. (C15:2878-79, 2888).

Osteen asked Wald to evaluate Jennings's personality, background, and anything at all that would be a mitigating factor in a penalty phase. However, Osteen would not have relied only on a review of Dr Wald's report. He always spoke to Wald afterwards and went into more detail. (C15:2883). Osteen tried to have Jennings's mother, the only family member available to speak to about the case, meet with Dr. Wald. Osteen instructed Investigator Neary to make attempts or have him contact her to do so. However, based on his review of Dr. Wald's report, the attempts to get her to meet with him were not successful. (C15:2878, 2916).

Osteen had presented mental health mitigation in other cases, but based on his experience, he felt that the testimony of Dr. Wald and Dr. Masterson did not present a sufficiently persuasive case to the jury and realized that if one was called as a witness, the contents of the confidential report would have to be disclosed and could be used. As a result, he "chose to go a different route." (C15:2920-21). After considering that Jennings did not have a significant prior criminal record, Osteen decided to present good statements and positive character traits through Jennings's mother and his friends (C15:2898). Osteen decided that he would rely on Jennings's lack of any real deep trouble with the law in the past and the testimony of his mother and friends to argue mitigation, realizing that there was likely to be a guilty verdict. (C15:2921).

Jennings seemed to have a close, loving relationship with his mother. (C15:2892). Osteen felt that Jennings's mother was a good witness who loved her son and "would elicit some sympathy in the jury." She thought Jennings was a good boy

and did not have anything unusual to report. (C15:2917). In his conversations with Jennings and his mother, Osteen never heard about any sexual abuse in the family or learned of any incest, although that is the type of information that he and Investigator Neary typically sought. (C15:2895-96). Osteen recalled that some of Jennings's "so-called friends" had negative information and would not be helpful for mitigation. (C15:2929-31).

Following the evidentiary hearing, written closing arguments were filed by the parties (C16:3160-3246). Jennings's motion to vacate the judgement and sentence was denied on January 31, 2011 (C17:3247-60). The court concluded that Jennings had not demonstrated either deficient performance or prejudice as to any of the claims of ineffective assistance. (C17:3251, 3255, 3258-59).

On appeal, the Florida Supreme Court affirmed the denial of postconviction relief. *Jennings v. State*, 123 So. 3d 1101. (Fla. 2013) (C30). Jennings also filed a petition for writ of habeas corpus in the Florida Supreme Court, which was denied in the same opinion. The mandate issued on October 21, 2013 (C33).

### **C. Federal Court History**

Jennings filed his initial federal habeas petition with the Middle District of Florida on October 17, 2013. (Doc. 1). On February 22, 2016, he filed a motion to stay. (Doc. 29). The court granted the motion to stay pending the outcome of litigation in the Florida Supreme Court until June 1, 2017. (Doc. 32). Upon review of the court, the stay was extended until June 1, 2018. (Doc. 46). The stay was lifted on June 18, 2018, pursuant to an order issued by the court on that same day. (Doc. 55). Jennings

then filed an amended petition on November 30, 2018. (Doc. 61). The District Court denied relief as to all claims on December 1, 2020. (Doc. 69).

Appellant filed his notice of appeal on May 7, 2021 (Doc. 73). The Court of Appeals for the Eleventh Circuit granted Jennings's certificate of appealability as to one issue on July 7, 2021 (Doc. 75):

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.

On August 16, 2021, Jennings filed his initial brief. Respondents filed their answer brief on September 15, 2021, and on October 7, 2021, Jennings filed his reply brief. On December 13, 2022, the United States Court of Appeals for the Eleventh Circuit issued its opinion denying Jennings's appeal.

A petition for writ of certiorari was filed by Jennings on June 16, 2023, to which this response issues.

#### **REASONS FOR DENYING THE WRIT**

The court of appeals correctly rejected Jennings's claim that his trial counsel was ineffective for not discovering and presenting additional mitigation evidence at the penalty phase proceedings. It recognized that the evidence admitted in the postconviction evidentiary hearing both undermined the evidence presented to the sentencing court that it found mitigating and would open the door to damaging evidence that may have hurt Jennings more than it helped him.

In essence, Jennings merely argues that the court of appeals misapplied *Strickland v. Washington*, 466 U.S. 668 (1984) because it did not consider the minimal

weight the trial court attributed to the mitigating evidence that would be undermined by presenting the omitted evidence. However, the court of appeals properly weighed the *totality of the circumstances* and concluded it could not 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." *Jennings v. Sec'y, Florida Dept. of Corr.*, 55 F.4th 1277, 1295 (11th Cir. 2022).

The court of appeals correctly recognized that "the nature of, and circumstances surrounding the three murders in this case were particularly heinous" with "significant aggravating factors" that outweighed the combined mitigation from both the sentencing phase and the postconviction proceedings, particularly considering that the additional mitigation presented at postconviction undermined much of the mitigation established at the trial's penalty phase and opened the door to damaging evidence demonstrating that Jennings had a long history of criminal activity, including violent crimes, and possessed sociopathic character traits.

When the veneer of a legal controversy is peeled away, it is clear that what Petitioner really seeks is a fact intensive review of his claim in the hope that this Court will resolve it differently from the state and lower federal courts. There is no dispute as to the application of the law; simply a disputed outcome, in a case which conflicts with no precedent from this Court or any other courts of appeal. As such, certiorari review should be denied. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) (noting that the Court does "not grant a certiorari to review evidence and discuss specific facts."). This Court is "consistent in not granting certiorari except in

cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties.” *Rice v. Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955) (quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)).

**A. The Circuit Court of Appeals Correctly Found that the Florida Supreme Court Did Not Unreasonably Determine that Jennings Failed to Demonstrate there was a Reasonable Probability that the Omitted Mitigation Evidence Would Result in a Different Sentence.**

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Court provided both state and other federal courts a standard for determining whether an attorney failed to provide effective representation to a client:

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

*Strickland*, 466 U.S. 668, 687. The Court explained further that because the defendant is required to demonstrate both that the attorney's performance was deficient and that the deficient performance prejudiced the defense, if the defendant makes an insufficient showing as to one of these two components, there is no reason for the reviewing court to address the other. *Strickland*, 466 U.S. 668, 697.

As circumstances would have it, the district court in this case only addressed the deficiency prong of *Strickland* and the circuit court only addressed the prejudice

prong of *Strickland*. Yet, each court determined from its review of the particular prong it examined, that Jennings failed to demonstrate that the Florida Supreme Court’s decision was unreasonable when viewing that decision through the lens of AEDPA (a writ of habeas corpus shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the decision was contrary to, or involved an unreasonable application of, clearly established Federal law). 28 U.S.C. § 2254(d).

As the circuit court of appeals noted, this Court has also instructed courts that “[i]n determining whether there is a reasonable probability of a different result, a court must consider the totality of the available mitigation evidence – that adduced at trial, and the evidence adduced in the habeas proceeding – and reweigh it against the evidence in aggravation.” *Jennings v. Sec’y, Florida Dept. of Corr.*, 55 F.4th 1277, 1293 (11th Cir. 2022) *citing Porter v. McCollum*, 558 U.S. 30, 41 (2009) (internal quotations and citations omitted). But the court also pointed out that because “the *Strickland* standard is a general standard, ‘a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard’” quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009) and citing to *Renico v. Lett*, 559 U.S. 766, 773, 776 (2010) (“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.”

With these parameters in mind, the court of appeals concluded that Jennings did not establish that the Florida Supreme Court unreasonably determined that he failed to demonstrate prejudice, and thus, it was unnecessary for the court to address the performance prong. *Jennings*, 55 F.4th at 1293. The court noted that the Eleventh Circuit has held over the past decade that “it is not an unreasonable application of *Strickland* to conclude that there is no prejudice when much of the mitigation evidence would have constituted a double-edged sword.” *Jennings*, 55 F.4th at 1294, citing *Gavin v. Commr., Ala. Dept. of Corr.*, 40 F.4th 1247, 1269 (11th Cir. 2022) (the state court reasonably applied *Strickland* when it concluded that petitioner could not establish prejudice because the mitigation evidence would have constituted a double-edged sword) and *Ponticelli v. Sec'y, Fla. Dept. of Corr.*, 690 F.3d 1271, 1296 (11th Cir. 2012) (both the Supreme Court and the Eleventh Circuit have consistently rejected the prejudice argument if the mitigation evidence either was a two-edged sword or would have opened the door to damaging evidence). The court explained that “much of the omitted mitigation evidence” would undermine some of the mitigating factors found by the trial court at sentencing and specifically pointed out the following mitigating factors it believed the additional evidence created a “significant probability” of undermining: (1) Jennings had no significant prior criminal history (the only statutory mitigating factor as noted by the circuit court), (2) Jennings had a close, loving relationship with his mother, and (3) Jennings had “positive personality traits enabling the formation of strong, caring, relationships with peers.” *Jennings*, 55 F.4th at 1294.

Jennings argues that this Court has reversed cases even though the postconviction evidence can be characterized as a double-edged sword, citing *Porter*, and contends that there is no way to distinguish cases in which mitigating evidence “may be devalued and discounted as a double-edged sword from cases in which it may not.” (Petition at 22). He argues that this is especially a problem in cases, like the present one, in which the courts “diminish compelling mitigation in favor of mitigation which the trial court determined was of minimal value.” He faults the opinion in *Porter* for not providing “a clear standard that courts can apply going forward” and claims “courts are foundering in their attempts to reconcile this Court’s *Strickland* prejudice rulings” even though he cites no case to support this claim. (Petition at 23-24).

But the Court rejected this approach in *Strickland*. “Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that *the principles we have stated do not establish mechanical rules*. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.” *Strickland*, 466 U.S. at 696. (emphasis added).

In *Strickland*, the defendant’s trial counsel sought to establish several bases for mitigation in the sentencing phase of his trial, including that the defendant was fundamentally a good person who had briefly gone badly wrong under extremely stressful circumstances; he had no history of criminal activity; and committed the crimes due to an extreme mental or emotional disturbance. However, postconviction

counsel argued that trial counsel erred because he did not order a presentence investigation, even though this would have undermined the mitigation he sought based on no prior substantial criminal history. Postconviction counsel also argued that trial counsel erred because he did not provide a psychological evaluation even though the reports introduced by postconviction counsel denied that the defendant suffered from extreme mental or emotional disturbance. The Court observed at the time that “admission of the evidence respondent now offers might even have been harmful to his case: his “rap sheet” would probably have been admitted into evidence, and the psychological reports would have directly contradicted respondent's claim that the mitigating circumstance of extreme emotional disturbance applied to his case.

Ultimately, a court's decision comes down to whether, considering the totality of the evidence introduced as both aggravation and mitigation, with the mitigation evidence being viewed to the extent it helps in some ways and hurts in others, is there a reasonable probability that Jennings would have received a different sentence? The court of appeals correctly concluded that given the nature, circumstances, and aggravating factors present in the case and the totality of the mitigation, some of which undermined the minimal mitigation the trial court found and much of which is more harmful than helpful, it could not find that the decision of the Florida Supreme Court was unreasonable.

**B. Even if the Circuit Court Determination is Wrong, the District Court Correctly Found that the Florida Supreme Court Did Not Unreasonably Determine that Jennings Failed to Demonstrate that His Trial Counsel Provided Deficient Representation.**

Although Jennings challenges the circuit court's holding that he was not prejudiced, even if the Court rules in his favor on the question he presents, the Court's ruling is unlikely to determine the outcome of his case. *Strickland* is a two-pronged test. *Strickland*, 466 U.S. at 687. Jennings only prevails in his habeas proceedings if he also demonstrates that the Florida Supreme Court unreasonably held that he failed to demonstrate his trial counsel's investigation and presentation of mitigation about Jennings's childhood and background was deficient. The Certificate of Appealability was limited to the effectiveness of counsel's investigation and presentation of mitigation about Jennings's childhood and background. (Doc. 75).

The district court held that Jennings failed to do so. The district court's ruling was correct, as explained below. Therefore, Jennings cannot ultimately prevail in this case, and the Court's review of the question presented will merely result in prolonged delay in concluding his habeas proceedings. *Shinn v. Ramirez*, 142 S. Ct. 1718, 1739 (2022). The district court found Jennings's argument that trial counsel failed to adequately investigate his life before moving to Florida as "unavailing." (Doc. 69:23). It found the investigation of Jennings's background "might not have been exhaustive, but it was reasonable and adequate." (Doc. 69:24). The district court determined that trial counsel's investigation decisions were guided largely by the information he received from Jennings. The court also found that trial counsel properly relied on Jennings to self-report his history. "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. As the district court noted, "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." (Doc. 69:25).

The district court noted that "trial counsel, did not learn of the sexual abuse in Jennings's family because neither Jennings nor his mother told him about it." "[Trial counsel] interviewed both in preparation for sentencing, and it was his practice to investigate past sexual abuse. [He] was not deficient for relying on Jennings to self-report this type of potentially mitigating information." *citing Strickland*, 466 U.S. at 691 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions."). (Doc. 69:24). In fact, Jennings denied any history of sexual abuse when he spoke with the mental health experts his trial counsel obtained to assist in the case (other than that of a neighbor for whom he babysat seducing him), described his childhood blissfully, and expressly specified that it was his move to Florida that marked the time that his life went badly.

In addition, as the court noted, although Jennings points to new details presented at the postconviction hearing about his childhood living conditions and troubled relationship with his mother, his trial counsel had ample information on Jennings's early life from his "extensive" self-reporting. The district court specifically pointed out that trial counsel was even able to use this information successfully at

sentencing – obtaining a finding of the sentencing court that it considered Jennings's deprived childhood to be a mitigating factor.

The district court also found trial counsel's reliance on the reports of the mental health experts he retained to be within an objective standard of reasonableness. (Doc. 69:22). The court agreed those mental health experts were unable to provide any testimony that would be sufficiently helpful in the penalty phase of the case. In addition, the court recognized that their reports contained information that would be detrimental to the case and would have to be disclosed if they were used as witnesses. As a result, the district correctly concluded that use of the experts might have done more harm than good by opening the door to Jennings's prior criminal acts. (Doc. 69:22). The court correctly found that Jennings's trial counsel made a reasonable strategic decision not to present any mental health testimony and, instead, chose to present a penalty phase defense based on Jennings's lack of a serious criminal record, his positive characteristics, and strong relationship with his mother. Presentation of the omitted evidence certainly would have conflicted with trial counsel's strategy of emphasizing Jennings's strong relationship with his mother, positive character traits, and lack of a criminal record. Moreover, this strategy of focusing on the positive aspects of Jennings's relationship with his mother also bore fruit, as the trial court considered it another mitigating factor.

The district court correctly found that based on the investigation Jennings's trial counsel already conducted, he had no reason to suspect that further investigation of Jennings's childhood background would provide any valuable

evidence. Moreover, the court also correctly determined that it was not deficient representation for trial counsel to not present a case based upon the mental health evidence available to him because it could prove more harmful than helpful. Because the district court correctly found that the state court's denial of relief on this ground was not contrary to or an unreasonable application of *Strickland* the Court should not grant certiorari to review a question that will not resolve this case, but instead, lead to further unnecessary delay in the habeas proceedings.

**C. This Case is a Poor Vehicle for Determining Whether Trial Counsel was Ineffective for Omitting “Substantial Postconviction Mitigation” that Undermines the Mitigation the Trial Court Deemed to be of Limited Weight.**

Jennings also argues that the courts reviewing his case have wrongly diminished the value of the “compelling mitigation” evidence that was omitted by trial counsel “in favor of mitigation which the trial court determined was of minimal weight” because the omitted evidence presented a “two-edge sword.” Although Jennings’s postconviction counsel introduced more evidence than introduced at trial that Jennings suffered from a deprived childhood, it is a stretch to describe the sum total of the additional evidence as “substantial postconviction evidence” in the sense that it was any more *compelling* than that presented at trial.

As noted, much of the evidence was cumulative testimony about the difficult childhood Jennings suffered. It provided more detail, but hardly a new story. Furthermore, the additional details of rape and incest have little mitigation effect because they relate not to Jennings himself, but to his mother and other family members related to him. In addition, although new information was provided at

postconviction regarding his mental health, Dr. Eisenstein's and Dr. Sultan's opinions conflicted on statutory mitigation. And while they both agreed that Jennings suffered from IED, they disagreed on what effect, if any, it had upon Jennings's actions in this case. Finally, the mental health mitigation would have opened the door to evidence likely to hurt Jennings as much or more than it would have helped him. It would show Jennings to have been a long-time drug dealer and thief who stole from persons and businesses alike, and who had previously contemplated killing a person as a result of his business deals. And, although Jennings correctly argues that his abuse of drugs and alcohol is an additional mitigator that could have been argued, there is no guarantee that this evidence would not be considered with hostility by a jury. Jennings's trial counsel made a strategic decision to go in a different direction because he did not believe this was a promising route, and for a good reason. The mitigation evidence that he rejected using was simply not sufficiently compelling.

This claim simply presents no question worthy of certiorari review. There is no conflict in the law, simply a disputed outcome in a case that was correctly decided below. Petitioner has not cited any controlling precedent which suggests, much less establishes that the state court decision in this case was incorrectly decided. Habeas relief was properly denied, and certiorari review would resolve no disputed question of law.

## CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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