APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

APPENDIX A

[Filed Sept. 12, 2024]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 23-13453

VIOLET LOVE RAY,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

Appeal from United States District Court
for the Middle District of Florida
D.C. Docket No. 5:20-cv-00263-JLB-PRL

ORDER:

Violet Ray appeals the denial of her 28 U.S.C. § 2254 habeas corpus petition and seeks a certificate of appealability ("COA"). Her motion for a COA is

DENIED because she has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

/s/ Andrew L. Brasher
UNITED STATES CIRCUIT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

VIOLET LOVE RAY,

Petitioner,

v. CASE NO.: 5:20-cv-263-JLB-PRL

STATE, DEPARTMENT OF CORRECTIONS and FLORIDA ATTORNEY GENERAL,

Respondents.

_____/

ORDER

This case is before the Court on a petition for habeas corpus filed under 28 U.S.C. § 2254 by Violet Love Ray, a state prisoner of the Florida Department of Corrections. (Doc. 1.) Respondents, the Secretary of the Florida Department of Corrections and the Florida Attorney General, filed their response in opposition of the petition. (Doc. 13.) Petitioner filed a reply. (Doc. 20.)

After careful review of the parties' briefs and the entire state-court record before the Court, the Court finds that Petitioner is not entitled to federal habeas

corpus relief. Further, because the Court was able to resolve all claims on the record, an evidentiary hearing is not warranted. *See Schriro v. Landrigan*, 550 U.S. 465, 474 (2007).

I. Background

On May 18, 2012, Petitioner was convicted of first-degree murder, aggravated child abuse, and child neglect in Marion County, Florida. (Doc. 14-10 at 11.) These charges stemmed from the death of Petitioner's two-year-old adopted daughter, F.R., on December 7, 2008. (Docs. 14-1 at 70; 14-3 at 70; 14-4 at 84.) Petitioner was sentenced to life imprisonment on August 28, 2012. (Doc. 14-10 at 12–15.) Petitioner's judgement and sentence was affirmed by the Fifth District Court of Appeal on January 21, 2014. (*Id*. at 126–27.) On February 14, 2014, the mandate issued. (*Id*. at 129.)

Petitioner filed her initial Rule 3.850 motion for postconviction relief on February 18, 2015. (*Id*. at 131–65; Doc. 14-11 at 1–15.) On September 22, 2017, Petitioner filed a Motion for Leave to Amend Motion to Vacate Judgment of Conviction and Sentence. (Doc. 14-11 at 46–97.) An evidentiary hearing on Petitioner's amended Rule 3.850 motion was held on December 5, 6, and 7, 2017. (Doc. 14-15 at 2.) The postconviction court entered its order denying all relief on March 21, 2018. (Doc. 14-15 at 2–38.) The postconviction court's order was affirmed on August 9, 2019. (Doc. 14-19 at 137–44.)

On September 4, 2019, Petitioner filed her Notice to Invoke Discretionary Jurisdiction of the Florida Supreme Court. (Doc. 14-19 at 148–49.) Petitioner filed her jurisdictional brief on October 17, 2019. (Doc. 14-19 at 151–64.) On April 14, 2020, the Florida Supreme Court declined to accept jurisdiction of Petitioner's case. (Doc. 14-19 at 179.)

Petitioner filed this 28 U.S.C. § 2254, through counsel, on June 12, 2020. (Doc. 1.)

II. Legal Standards

A. The Antiterrorism Effective Death Penalty Act (AEDPA)

Under the AEDPA, federal habeas relief may not be granted with respect to a claim adjudicated on the merits in state court unless the 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). In this context, clearly established federal law consists of the governing legal principles, and not the *dicta*, set forth in the decisions of the United States Supreme Court at the time the state court issued its decision. *White v. Woodall*, 572 U.S. 415, 420 (2014); *Carey v. Musladin*, 549 U.S. 70, 74 (2006) (citing *Williams v. Taylor*, 529 U.S. 362, 412 (2000)).

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 the Supreme Court's precedents if 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), 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 v. Moore*, 234 F.3d 526, 531 (11th Cir. 2000) (quoting *Williams*, 529 U.S. at 406).

The standard to obtain relief under 28 U.S.C. § 2254(d) is both mandatory and difficult to meet. To demonstrate entitlement to federal habeas relief, the

petitioner must show that the state court's ruling was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *White*, 572 U.S. at 420 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). Moreover, when reviewing a claim under section 2254(d), a federal court must presume that any "determination of a factual issue made by a State court" is correct, and the petitioner bears "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e).

A state court's summary rejection of a claim, even without explanation, qualifies as an adjudication on the merits—warranting deference. *Ferguson v. Culliver*, 527 F.3d 1144, 1146 (11th Cir. 2008). Generally, in the case of a silent affirmance, a federal habeas court will "look through" the unreasoned opinion and presume that the affirmance rests upon the specific reasons given by the last court to provide a reasoned opinion. *See Ylst v. Nunnemaker*, 501 U.S. 797, 806 (1991); *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). However, the presumption that the appellate court relied on the same reasoning as the lower court can be rebutted "by evidence of, for instance, an alternative ground that was argued [by the state] or that is clear in the record" showing an alternative likely basis for the silent affirmance. *Wilson*, 138 S. Ct. at 1196.

B. Ineffective Assistance of Counsel

In *Strickland v. Washington*, the Supreme Court established a two-part test for determining whether a convicted person is entitled to relief on the ground that her counsel rendered ineffective assistance. 466 U.S. 668, 687–88 (1984). A petitioner must establish that counsel's performance was deficient and fell below an objective standard of reasonableness *and* that 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 v. Titlow*, 571 U.S. 12, 15 (2013).

The focus of inquiry under *Strickland*'s performance prong is "reasonableness under prevailing professional norms." *Id.* at 688. In reviewing counsel's performance, a court must presume that "counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689 (citation omitted). A court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct," applying a highly deferential level of judicial scrutiny. *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000) (quoting *Strickland*, 466 U.S. at 690). Proving *Strickland* prejudice "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." 466 U.S. at 687.

C. Exhaustion and Procedural Default

The AEDPA precludes federal courts, absent exceptional circumstances, from granting habeas relief unless a petitioner has exhausted all means of available relief under state law. 28 U.S.C. § 2254(b)(1). Exhaustion of state remedies requires that the state prisoner "fairly presen[t] federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights[.]" *Duncan v. Henry*, 513 U.S. 364, 365 (1995). 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 (11th Cir. 1998). Under the similar doctrine of procedural default, "a federal court will not review the merits of claims, including constitutional claims, that a state court declined to hear because the prisoner failed to abide by a state procedural rule." *Martinez v. Ryan*, 566 U.S. 1, 9 (2012).

A petitioner can avoid the application of the exhaustion or procedural default rules by establishing objective cause for failing to properly raise the claim in state court and actual prejudice from the alleged constitutional violation. *Spencer v. Sec'y, Dep't of Corr.*, 609 F.3d 1170, 1179–80 (11th Cir. 2010). To show cause, a petitioner "must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in state court." *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999). To show prejudice, a petitioner must demonstrate a reasonable probability the outcome of the proceeding

would have differed. *Crawford v. Head*, 311 F.3d 1288, 1327–28 (11th Cir. 2002).

A second exception, known as the "fundamental miscarriage of justice," only occurs in an extraordinary case, where a "constitutional violation has probably resulted in the conviction of one who is actually innocent[.]" *Murray v. Carrier*, 477 U.S. 478, 479–80 (1986).

III. Discussion

To better understand Petitioner's claims, a summary of the facts—as recounted by the state appellate court—is as follows:

> On the night in question, [Petitioner] was home alone with her six children. Around 9:00 p.m., she called her father. Sensing something was amiss, he and [Petitioner's] mother went to the Ray household. He found [Petitioner] holding her two-year-old daughter in the kitchen. [Petitioner's] five-year-old son secretly called 9-1-1 and left the line open, prompting an officer to respond to the Ray household. The family declined the offer to call an ambulance. Tragically, several hours later, [Petitioner's] daughter stopped breathing and was rushed by ambulance to the hospital. By that time, she was brain dead and had noticeable bruises on her back, buttocks, and thighs.
>
> The State's theory was that [Petitioner's] daughter died from intentionally inflicted

> head injuries. [Petitioner] was represented by three attorneys with over 40 years of experience. [Petitioner's] defense was that her daughter fell in the kitchen after her bath, while [Petitioner] was giving her other children a bath.

(Doc. 14-19 at 138.)

At trial, the defense called two expert witnesses to support Petitioner's defense that F.R. died as a result of an accidental injury. Defense counsel first called Dr. Edward Willey who testified as an expert in pathology and forensic medicine. (Doc. 14-6 at 11–12.) Dr. Willey testified that while he could not disprove the medical examiner's conclusions regarding F.R.'s death, he believed she omitted the likelihood that her death could have been a result of an accidental injury. (*Id*. at 20.)

Defense counsel then called Dr. John Lloyd who was tendered as an expert in ergonomics and biomechanics. (*Id*. at 68.) Dr. Lloyd testified that he was requested to "investigate the biomechanics of head trauma, and whether or not the claimed cause of injury would be a plausible cause of such a serious brain injury." (*Id*. at 71–72.)

> In her rule 3.850 motion, [Petitioner] argue[d] that she received ineffective assistance of counsel because the defense did not engage in a highly scientific, medicolegal, battle of the experts. [Petitioner] contends, in hindsight, that there were several experts that

> potentially could have offered opinions contrary to the State's medical examiner, Dr. Lavezzi.

(Doc. 14-19 at 138.)

An evidentiary hearing was held on Petitioner's amended Rule 3.850 motion for postconviction relief on December 5, 6, and 7, 2017. (Doc. 14-15 at 2.) Petitioner was represented by counsel and present but, she did not testify. (*Id*.) Postconviction counsel called four expert witnesses to testify: Dr. Edward Willey, Dr. Michael Freeman, Dr. Janice Ophoven, and Dr. Ronald Auer. (*Id*.) Dr. Edward Willey testified at Petitioner's trial. (Doc. 14-6 at 11–12.) Dr. Freeman testified at the evidentiary hearing as an expert in forensic medicine and epidemiology. (Doc. 14-14 at 36.) Dr. Ophoven testified as a pediatric forensic pathologist with special training in injuries and diseases in children. (*Id*. at 61.) Dr. Auer testified as a neuropathologist and neuroscientist. (*Id*. at 248.) At the evidentiary hearing, postconviction counsel also called Patricia Jenkins and Nicole Hardin, two of the attorneys who represented Petitioner at trial. (Doc. 14-15 at 2.)

In her petition, Petitioner raises nine grounds of ineffective assistance of counsel as bases for relief; Ground A raises six subgrounds.[1] Each of the grounds were raised in Petitioner's Rule 3.850 Motion for

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[1] In Ground A-1, Petitioner argues the standard of review applicable to her claims. (*See* Doc. 1 at 52–55.) The Court does not address Ground A-1 as a separate ground.

Postconviction Relief. The Fifth District Court of Appeal affirmed the postconviction court's decision with a written opinion discussing only ground A-2. (Doc. 14-19 at 137–144.) With regard to the appellate court's silent affirmance on the remaining claims, the Court will look through the unreasoned opinion and presume that the affirmance rests upon the specific reasons given by the postconviction court. *Wilson*, 138 S. Ct. at 1194. The Court will address each ground in turn.[2]

A. Ground A

1. Ground A-2

In Ground A-2, Petitioner asserts that trial counsel was ineffective for failing to rebut Dr. Lavezzi's testimony that F.R. suffered 13 separate impacts to the head. (Doc. 1 at 55–60.) Petitioner contends trial counsel failed to "effectively" cross-examine Dr. Lavezzi regarding the 13 separate impacts and failed to "effectively prepare or present Dr. Willey to rebut Dr. Lavezzi's testimony." (*Id*. at 55, 57.)

Petitioner raised this claim in her Rule 3.850 Motion for Postconviction Relief. (Doc. 14-10 at 149–57.) The postconviction court conducted an evidentiary hearing on Petitioner's Rule 3.850 Motion and denied this claim finding that "[t]he cross examination of Dr. Lavezzi by Ms. Jenkins was

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[2] Petitioner lists her grounds as Grounds A through I, and the Court will do the same.

certainly within the parameters of the wide range of reasonable professional assistance." (Doc. 14-15 at 9.) The postconviction court noted:

> At trial Dr. Lavezzi testified that during her autopsy of the victim she identified subscalpular hemorrhages on the back of the victim's head. Dr. Lavezzi testified that each subscalpular hemorrhage represented a separate point of impact. The defendant argues trial counsel failed to properly cross-examine Dr. Lavezzi as to this testimony by failing to show that the hemorrhages did not represent separate impacts caused by blunt force trauma, that the hemorrhages were too small to be considered significant impacts, and that there was no basis to conclude that any impacts occurred at the same time.
>
> However, during cross-examination, Ms. Jenkins questioned Dr. Lavezzi about each of these issues. First, Ms. Jenkins questioned Dr. Lavezzi about the victim's injuries, including the subgaleal hemorrhages, subdural hematomas, subarachnoid hemorrhage, and cerebral edema, and whether the injuries could have be[e]n the result of oxygen deprivation rather than traumatic impacts. Next, Ms. Jenkins questioned Dr. Lavezzi about the aging of the bruises and what the best means would be for determining when and where the bruises to the victim's body occurred. Finally, Ms. Jenkins questioned Dr. Lavezzi regarding the

> severity of the bruises and that some of the bruises were not deep, only 1/16th of an inch deep.

(*Id.* (citations to the record omitted).) The Fifth District Court of Appeal affirmed the postconviction court's denial of all Petitioner's claims; the majority wrote specifically to discuss this claim as addressed in the dissent.[3] (Doc. 14-19 at 137–144.)

In finding that Petitioner had failed to establish that trial counsel's performance was deficient under *Strickland*, the Fifth District Court of Appeal noted that Dr. Willey was, in fact, asked questions during his trial testimony to rebut Dr. Lavezzi's opinions. (*Id.* at 139–40.) The appellate court highlighted the following testimony provided by Dr. Willey at trial:

> Q. And were you aware of Dr. Lavezzi's opinion—and by that, I mean her conclusions of—subsequent to the autopsy?
>
> A. Yes.
>
> Q. And after review of all of the materials that you've indicated do you agree with her conclusions?

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[3] One panel member dissented as to this ground, concluding, "In my view, the failure to challenge Dr. Lavezzi's testimony constituted ineffective assistance of counsel. I would reverse and remand for a new trial." *Ray v. State*, 325 So. 3d 911, 916 (Fla. 5th DCA 2019) (Cohen, J., dissenting).

A. Well, I can't disprove her conclusion, but I think that she omits the likelihood that this could actually be an accidental injury.

…

Q. And Dr. Lavezzi concluded in her report that there were 13 points of impact on [the victim's] head. Is that consistent with a single fall?

A. Doesn't sound like it, no.

Q. Okay.

A. The major injury on the head, to my way of thinking, is a big hemorrhage under the galea, which is part of the scalp on the top and back of the head, very close to the top of the head.

Q. So if there were points of hemorrhage that you could count up, would that be consistent with a finding of impact, or abuse, or simply in conjunction with what you've told us already?

A. Well, it could be either. It could be [a medical condition], or it could be impact. And it doesn't have to be impact all at one time. And you can't age bruises effectively, you can't look at one and say how old it is.

(*Id.*)

A review of the record supports the state courts' rejection of this claim. The record shows that on cross-examination trial counsel questioned Dr. Lavezzi regarding her opinion that F.R. suffered from 13 separate impacts, her opinion regarding the age of the bruises, and her opinion regarding the severity of the bruises. (Doc. 14-4 at 112–14, 116; Doc. 14-5 at 10.) The record also demonstrates that trial counsel, through Dr. Willey's testimony, was able to present evidence that rebutted Dr. Lavezzi's conclusions regarding the victim's injuries. (Doc. 14-6 at 20–24, 33–34.)

Though Petitioner now contends that trial counsel neither "effectively" rebutted Dr. Lavezzi's testimony nor did he "effectively" prepare Dr. Willey, such hindsight determinations are not dispositive of whether trial counsel's performance was deficient. *See Chandler v. United States*, 218 F.3d 1305, 1316 (11th Cir. 2000). "In reviewing counsel's performance, a court must avoid using 'the distorting effects of hindsight' and must evaluate the reasonableness of counsel's performance 'from counsel's perspective at the time.'" *Id.* (citing *Strikland*, 466 U.S. at 689.)

Thus, the state courts' determination that trial counsel did not perform deficiently was neither contrary to nor an *unreasonable* application of *Strickland*, and it was not based on an unreasonable determination of the facts. "Under the doubly deferential judicial review that applies to a *Strickland* claim evaluated under the [28 U.S.C.]

§ 2254(d)(1) standard[,]" Indeed, "[t]he question is not whether a federal court believes the state court's determination under the *Strickland* standard was incorrect but whether that determination was unreasonable—a substantially higher threshold." Petitioner has failed to satisfy this substantially higher threshold and thus this ineffective assistance of trial counsel claim must fail. *Knowles v. Mirzayance*, 556 U.S. 111, 123–24 (2009). Ground A-2 is denied.

2. Grounds A-3 and A-4

In Grounds A-3 and A-4, Petitioner asserts that trial counsel was ineffective for failing to rebut Dr. Lavezzi's testimony that F.R. suffered traumatic axonal injury and ruptured bridging veins. (Doc. 1 at 60–65.) Specifically, Petitioner contends defense counsel should have obtained the beta amyloid precursor protein ("BAPP") stains and provided them to Dr. Willey to analyze in order to rebut Dr. Lavezzi's finding of traumatic axonal injury. (*Id*. at 60–61.) Petitioner also asserts trial counsel should have investigated the forensic evidence concerning Dr. Lavezzi's conclusion that F.R. suffered sheared bridging veins that caused the subdural hematomas observed on her brain during autopsy. (*Id*. at 63–65.)

The postconviction court conducted an evidentiary hearing on Petitioner's Rule 3.850 Motion and denied these claims, finding trial counsel did present evidence at trial that disagreed with Dr. Lavezzi's conclusions regarding F.R.'s injuries. (Doc.

14-15 at 10.) In so finding, the postconviction court noted the following:

> On direct examination at trial, Dr. Willey explained to the jury axonal injuries and the difference between hypoxic ischemic injuries and traumatic axonal injuries. Dr. Willey testified that it is very difficult, if not impossible, to tell the difference between hypoxic ischemic injuries and traumatic axonal injuries. He testified that the BAPP stains do not have much significance in making the determination between hypoxic ischemic injuries and traumatic axonal injuries "because you can't distinguish those from – hypoxic encephalopathy from trauma." Dr. Willey also discussed rotational or volitional injury. Dr. Willey concluded that the victim's head injury could have been caused by an accidental fall while the hemorrhages could have been caused by an infection that caused disseminated intravascular coagulopathy.
>
> …
>
> [B]oth Dr. Ophoven, one of the defendant's post conviction experts, and Dr. Lavezzi testified at the evidentiary hearing that BAPP stains are not used much anymore.
>
> The record is clear that the defendant's trial counsel presented evidence, through the testimony of Dr. Willey, that disagreed with

> Dr. Lavezzi's conclusions as to the victim's injuries. Trial counsel was not ineffective in this regard.

(*Id*. (citations to the record omitted).) The Fifth District Court of Appeal affirmed the postconviction court's denial of all Petitioner's claims. (Doc. 14-19 at 137–144.)

A review of the record supports the postconviction court's rejection of this claim. The record shows Dr. Willey testified regarding axonal injuries, their causes, and the significance of BAPP stains. (Doc. 14-6 at 30–32.) The record also demonstrates that trial counsel, through Dr. Willey's testimony, *did present evidence* that rebutted Dr. Lavezzi's conclusions regarding the victim's injuries. (Doc. 14-6 at 33–34.) Again, Petitioner cannot show ineffective assistance of counsel.

Accordingly, the state courts' decision to deny Petitioner's claim was neither contrary to nor an unreasonable application of *Strickland*, and it was not based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d). Grounds A-3 and A-4 are denied.

3. Ground A-5

In Ground A-5, Petitioner asserts that trial counsel was ineffective for failing "to rebut Dr. Lavezzi's opinion that F.R.'s fatal head injury could only have resulted from an assault with extreme force." (Doc. 1 at 66–69.) Petitioner contends that trial counsel "could have–and should have–presented to

the jury irrebuttable epidemiological evidence that children of F.R.'s age can sustain fatal head injuries from falling down in ways that children fall down every day." (*Id*. at 67.)

The postconviction court conducted an evidentiary hearing on Petitioner's Amended Rule 3.850 Motion and denied this claim finding as follows:

> At the evidentiary hearing, the defense presented testimony from Dr. Michael Freeman, a forensic epidemiologist. Dr. Freeman testified that he accessed information from U.S. hospital databases to evaluate the accuracy of Dr. Lavezzi's testimony. Dr. Freeman searched the databases for injuries described as subdural hematoma in a child, aged one through five, without a skull fracture. Dr. Freeman testified that "[c]hildren present with subdural hematoma in hospitals without fracture at almost the exact same rate as a result of a short fall as they do from intentional trauma." However, children are four times more likely to die in the hospital due to intentional trauma than due to short falls. Dr. Freeman did not include the presence of other bruising on the body as a search parameter because, according to him, Dr. Lavezzi did not state that bruises were impossible in a short fall.
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> Dr. Freeman acknowledged on cross-examination that the databases he used were

> not designed for forensic use in criminal cases. He relied on the information as it was put into the database. There is no way to cross reference the information to determine if the information was imputed correctly. Nor is there a way to determine if the history given during the initial assessment was accurate.
>
> However, Dr. Lavezzi did not testify that children cannot die from a short fall. She testified that, based on her review of the evidence and the constellation of injuries suffered by the victim in this case, the victim did not die as a result of a short fall.
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> …
>
> The court observes that Dr. Freeman's testimony would not have contradicted Dr. Lavezzi's conclusion that, given the constellation of injuries suffered by the victim, the victim did not die as a result of a short fall, and Dr. Freeman cannot confirm the accuracy of the information he relied upon for his testimony. Moreover, at trial, Dr. Willey addressed Dr. Lavezzi's conclusion that the victim did not die as a result of a short fall. Dr. Willey testified that he disagree[d] with Dr. Lavezzi, and he believed the victim's death could have been caused by an accidental injury.

(Doc. 14-15 at 11–14 (citations to the record omitted).) The Fifth District Court of Appeal affirmed the

postconviction court's denial of all Petitioner's claims. (Doc. 14-19 at 137–44.)

A review of the record supports the postconviction court's rejection of this claim. The record demonstrates that trial counsel, through Dr. Willey's testimony, was able to present evidence that rebutted Dr. Lavezzi's testimony regarding F.R.'s death not being the result of a short fall. (Doc. 14-6 at 20–22.) Dr. Willey testified that while he could not disprove Dr. Lavezzi's conclusion, he opined that she, in fact, omitted the possibility that F.R.'s death could be the result of an accidental injury. (*Id.* at 20.) Dr. Willey specifically testified:

> Well, because I think that the injury could result in severe damage and death from a short fall, whereas [Dr. Lavezzi] dismisses that out of hand. She says it has to be from a four story window. Well, in all candor, falling out of a four story window onto a hard surface would totally shatter the skull, and damage the brain. That may be sufficient to cause injury or death, but that doesn't mean that that's what's required in every case. And it's common knowledge that people do get hurt from short falls. It's probably the most common reason for people to become disabled and be admitted to nursing homes is a result of short falls.

(*Id.* at 20–21.)

Upon a thorough review of the record and the applicable law, the state courts' adjudication of this claim was not contrary to clearly established federal law, did not involve an unreasonable application of clearly established federal law, and was not based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Ground A-5 is denied.

4. Ground A-6

In Ground A-6, Petitioner asserts that trial counsel was ineffective for failing to introduce evidence that F.R. suffered from medical conditions that could have caused or contributed to her death. (Doc. 1 at 69–75.) Specifically, Petitioner contends trial counsel failed to address the "confounding variables or complications" related to F.R. having clotted blood in the dural sinuses, sickled red blood cells, pneumonia, and clotting abnormalities, all which could have explained F.R.'s death. (*Id*. at 69.)

Petitioner raised this claim in her Rule 3.850 Motion for Postconviction Relief. (Doc. 14-10 at 149–157.) The postconviction court conducted an evidentiary hearing on Petitioner's amended Rule 3.850 Motion and denied this claim finding it to be without merit and noting the following:

> 1. Clotted Blood in the Dural Sinuses.
> The defendant argues her trial counsel should have presented evidence that clotted blood in the dural sinuses could have caused or contributed to the victim's death. At the

evidentiary hearing, the defense presented testimony from Dr. Janice Ophoven, a forensic pathologist, regarding the presence of clotted blood in the dural sinuses. According to Dr. Ophoven, clotted blood in the dural sinuses is evidence of cortical venous thrombosis. Dr. Ophoven testified that this is a major finding because it could "explain why a–what may appear to be a lesser impact could result in a fatal outcome." Dr. Ophoven testified that cortical venous thrombosis can often be a mimic for what is characterized as abusive head trauma.

Dr. Lavezzi testified at the evidentiary hearing that in her autopsy report she noted clotted blood in the dural sinuses. However, this was not a finding of a dural sinus thrombosis. She explained that a dural sinus thrombosis looks very different from the clotted blood in the dural sinuses that she found in the autopsy. She testified that had she found a thrombosis during autopsy, she would have taken sections and examined them under the microscope.

Ms. Jenkins testified at the evidentiary hearing that she did not remember specific discussions about these issues; however, if Dr. Willey would have told her the issues were important, she would have explored the issues further.

2. Sickled Red Blood Cells.

The defendant argues trial counsel should have presented evidence that the victim's sickled red blood cells could have caused or contributed to her death. At the evidentiary hearing, the defense presented testimony from Dr. Willey, which the defendant claims should have been presented at trial. Dr. Will[e]y testified that, during his investigations in the instant case, he discovered the victim had sickled red blood cells. On May 7, 2012, Dr. Willey wrote a letter to Ms. Jenkins wherein he advised Ms. Jenkins of the sickled red blood cells. He testified that he believed the sickled red blood cells could have been a contributing factor to the victim's death because "[i]t would decrease the capillary circulation, which is necessary for proper oxygenization [sic] of the nervous system" and the autopsy showed signs of hypoxic ischemic and encephalopathy. Dr. Willey testified that be does not remember having any discussions with Ms. Jenkins regarding the sickled red blood cells but, "in retrospect," he believes the issue should have been addressed at trial as a potential contributing factor to the victim's death.

At the evidentiary hearing Ms. Jenkins explained that, while investigating the case she would make a list of all issues she wanted to discuss with Dr. Willey to determine whether any of those issues were important.

Dr. Willey would also identify issues through his own investigation that he believed to be important. Ms. Jenkins testified that, had Dr. Willey not advised her about sickled red blood cells, she would have specifically asked him about the issue. Then, if Dr. Willey advised her it was not an important issue, she would not have questioned Dr. Lavezzi about the sickled red blood cells. Ms. Jenkins relied upon Dr. Willey to advise her as to which medical issues were important so she could question Dr. Lavezzi about those issues.

Dr. Willey's belief that now, in hindsight, that he should have addressed the victim's sickled red blood cells at trial is another inappropriate hindsight analysis.

3. Pneumonia.

The defendant argues trial counsel should have presented evidence that pneumonia could have caused or contributed to the victim's death. Trial counsel did. Dr. Willey testified that the victim suffered from pneumonia, and that the victim had an abnormal clotting mechanism called disseminated intravascular coagulopathy, or DIC. Dr. Willey testified that DIC is caused by an infection, and the medical records establish that the victim had an infection or pneumonia. The medical records from Munroe Regional Medical Center indicated the victim had a high white blood count and infiltrates in the upper lobe of the left lung.

> The medical records from Shands Hospital indicated that the victim's white blood count was dropping from what it was while at Munroe Regional Medical Center and were of an unusual type. Dr. Willey testified that these records are consistent with the victim having pneumonia, and that the autopsy indicated the victim had pneumonia. This claim is without merit.
>
> 4. Clotting Abnormalities.
> The defendant argues her trial counsel should have presented evidence that clotting abnormalities could have caused or contributed to the victim's death. Trial counsel did. As discussed above, Dr. Willey testified that the victim had a clotting abnormality called DIC, likely caused by pneumonia. Dr. Willey testified that people with this medical condition can spontaneously bruise with little or no trauma. He explained that DIC is an inflammatory process that excites clotting in the bloodstream and breaks down fibrinogen, the substance in the blood necessary for clotting. This claim is without merit.

(Doc. 14-15 at 14–17 (citations to the record omitted).) The Fifth District Court of Appeal affirmed the postconviction court's denial of all of Petitioner's claims. (Doc. 14-19 at 137–44.)

A review of the record also supports the state courts' rejection of this claim. The postconviction

court, reasonably so, rejected Petitioner's claim as to the child's preexisting medical conditions based on the trial evidence and the evidence presented at Rule 3.850 evidentiary hearing. As the postconviction court highlighted, contrary to Petitioner's assertions, trial counsel did present evidence that F.R. did, in fact, suffer from medical conditions that could have caused or contributed to her death. (Doc. 14-6 at 22–23.) And Petitioner's trial counsel squarely testified that she would have explored these medical conditions if Dr. Willey had believed they could have caused the child's death. Based on the postconviction court's findings and reasoning discussed above, this Court cannot conclude that no competent counsel would have taken the same action.

Although Petitioner's postconviction counsel would have tried Petitioner's case differently, that does not make trial counsel ineffective under *Strickland*. *See Strickland*, 466 U.S. at 689. Thus, the postconviction court's determination that trial counsel did not perform deficiently was neither contrary to nor an unreasonable application of *Strickland*, and it was not based on an unreasonable determination of the facts. "Under the doubly deferential judicial review that applies to a *Strickland* claim evaluated under the[28 U.S.C.] § 2254(d)(1) standard[,]" Petitioner's ineffective assistance of trial counsel claim must fail. *Knowles*, 556 U.S. at 123–24. Ground A-6 is denied.

5. Ground A-7

In Ground A-7, Petitioner asserts that trial counsel was ineffective for failing to introduce evidence of "reasonable, innocuous explanations" for F.R.'s constellation of injuries. (Doc. 1 at 75–79.) Petitioner contends that trial counsel failed to "effectively cross-examine Dr. Lavezzi" regarding F.R.'s injuries and failed to present "readily available evidence of alternative explanations" for the injuries. (*Id*. at 75–76.)

The postconviction court conducted an evidentiary hearing on Petitioner's amended Rule 3.850 Motion, and denied this claim finding trial counsel did, in fact, present evidence of alternative explanations for F.R.'s injuries, noting the following:

> The defendant claims trial counsel should have offered alternative explanations for the victim's injuries, including the victim's head banging, roughhousing by the children in the defendant's home, the victim's fall on the porch, the victim's brother striking the victim in the back while swinging, and intentional conduct by the defendant's husband, Joe Ray. Trial counsel did present this evidence, except as to Mr. Ray, and except as to the head-banging, both of which were strategic decisions that were reasonable under the circumstances.
>
> …

> [T]rial counsel discussed the possibility of presenting evidence of a third-party perpetrator, specifically, Mr. Ray. However, the defendant insisted that the attorneys not present any evidence that Mr. Ray could have inflicted the injuries on the victim. In addition, such evidence was contrary to their trial strategy, which was to present evidence that the victim's death was accidental, which is a reasonable trial strategy.
>
> …
>
> Both Ms. Jenkins and Ms. Hardin testified that the defense team was aware the victim had a history of head-banging. It was investigated and considered as an alternative explanation for the bruising on the victim's head. Although neither Ms. Jenkins nor Ms. Hardin now remember the reason the head-banging was not addressed at trial, both believe the defense team made a strategic decision not to address the head-banging after consultation amongst the defense team and the defense expert witnesses. Ms. Hardin testified that she believed the defense team may have thought the testimony regarding the victim's head-banging may have conflicted with Dr. Lloyds's testimony.

(Doc. 14-15 at 17–19 (citations to the record omitted).)

The postconviction court also determined that trial counsel did cross-examine Dr. Lavezzi about the

possibility that F.R.'s injuries could have been caused by something other than intentional abuse and highlighted the following questions asked by trial counsel at trial:

> Ms. Jenkins first questioned Dr. Lavezzi about whether the victim falling in the bathtub on toys could have caused the bruises on the victim's body. Ms. Jenkins next asked Dr. Lavezzi about the possibility that the victim's injuries could have been caused by roughhousing between the children, including hitting each other with swords. Dr. Lavezzi admitted that the bruising could have been caused by the children if they were adult-sized children. Ms. Jenkins questioned Dr. Lavezzi about the possibility that spanking caused the bruising on the victim's buttocks.

(*Id*. at 18 (citations to the record omitted).) The Fifth District Court of Appeal affirmed the postconviction court's denial of all Petitioner's claims. (Doc. 14-19 at 137–44.)

A review of the record supports the state courts' rejection of this claim. "[S]trategic choices . . . are virtually unchallengeable," *Strickland*, 466 U.S. at 690, and as the postconviction court pointed out, both Janette Hamblen and Joe Ray testified at trial regarding innocuous circumstances that could have caused the injuries F.R. had at the time of her death. (Doc. 14-1 at 92–93; Doc. 14-2 at 66–67, 75–76.) Specifically, Janette Hamblen testified that there was "a lot of roughhousing" between the children in the

house and that the children liked to play pirates using swords and sticks. (Doc. 14-1 at 92–93.) Additionally, Joe Ray testified that on the night of her death, F.R. had a scrape on her forehead from a previous fall on the porch and bruising on her back from walking in front of her brother while he was swinging on a swing. (Doc. 14-2 at 66–67.) Mr. Ray also testified that on the day prior to her death, F.R. had fallen on toys while taking a bath. (Doc. 14-2 at 75–76.)

Considering the testimony elicited at trial regarding alternative explanations for F.R.'s injuries and trial counsel's testimony regarding the strategic decision not to present certain alternative explanations, Petitioner is not entitled to relief based on this claim. The state postconviction and appellate courts' adjudication of this claim was not contrary to clearly established federal law, did not involve an unreasonable application of clearly established federal law, and was not based on an unreasonable determination of the facts based on the evidence presented in the state court proceedings. Ground A-7 is denied.

B. Ground B

In Ground B, Petitioner asserts that trial counsel was ineffective for failing to present evidence of an alternative timeline of events leading up to F.R.'s death than was presented by the state. (Doc. 1 at 79–85.) Petitioner argues Dr. Lavezzi's testimony was the only causation evidence presented at trial, and that but for trial counsel's errors, there is a reasonable

probability that the verdict would have been different. (*Id*. at 85.)

The postconviction court conducted an evidentiary hearing on Petitioner's Rule 3.850 Motion and denied this claim, finding that "the record is clear that the jury was presented with evidence of two separate falls – one on December 4, 2008, and the other on December 5, 2008." (Doc. 14-15 at 20–21.) The postconviction court also found "the theory that a prior fall contributed to the death of the victim [was] not medically supported[,]" noting the following:

> At the evidentiary hearing, Dr. Willey testified about the injuries sustained by the victim. Dr. Willey testified that the head injuries that caused the death of the victim occurred the night of the incident. Dr. Lavezzi also testified that, during the autopsy of the victim, she saw no evidence of old blood or of a prior serious head trauma. Dr. Lavezzi explained that, with children, any blood on the brain, which could be caused by an injury to the brain, would be symptomatic. "So you're going to have a kid that has, you know, loss of consciousness or decrease in consciousness with any blood on the brain."

(*Id*. at 21 (citations to the record omitted).) The Fifth District Court of Appeal affirmed the postconviction court's denial of all of Petitioner's claims. (Doc. 14-19 at 137–44.)

A review of the record supports the state courts' rejection of this claim. While not couched as an "alternative time line" of events, evidence of other injuries sustained by F.R. in the days preceding her death was, in fact, presented at trial. Specifically, trial counsel elicited testimony from Joe Ray regarding F.R. falling inside the bath on some toys the day prior to her death. (Doc. 14-2 at 75–76.) Petitioner's statement to law enforcement was also introduced at trial explaining a prior fall and the bruising seen on F.R.'s back. (Doc. 14-4 at 17–18.)

Additionally, Petitioner cannot obtain relief under section 2254(d) based on what other witnesses might have testified at trial:

> The widespread use of the tactic of attacking trial counsel by showing what "might have been" proves that nothing is clearer than hindsight—except perhaps the rule that we will not judge trial counsel's performance through hindsight … We reiterate: "The mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel."

Waters v. Thomas, 46 F.3d 1506, 1514 (11th Cir. 1995) (en banc) (quoting *Foster v. Dugger*, 823 F.2d 402, 406 (11th Cir. 1987). "The fact that a criminal defense attorney could have conducted a more thorough investigation that might have borne fruit does not establish that that attorney's performance

was outside the wide range of reasonably effective assistance." *Spaziano v. Singletary*, 36 F.3d 1028, 1040 (11th Cir. 1994).

Upon thorough review of the record and the applicable law, the state courts' decision to deny Petitioner's claim was neither contrary to nor an unreasonable application of *Strickland*, and it was not based on an unreasonable determination of the facts given the evidence presented to the state court. *See* 28 U.S.C. § 2254(d). Ground B is denied.

C. Ground C

In Ground C, Petitioner asserts that trial counsel was ineffective for the use of Dr. Lloyd as an expert witness for the defense. (Doc. 1 at 85–89.) Specifically, Petitioner contends trial counsel "critically" undermined the theory of defense by having Dr. Lloyd testify "about an experiment that lacked any foundation in the factual record[.]" (*Id.* at 85.)

Petitioner raised this claim in her Rule 3.850 Motion for Postconviction Relief. (Doc. 14-10 at 162–65.) The postconviction court conducted an evidentiary hearing on Petitioner's Rule 3.850 Motion and denied this claim, finding that "the fact that the State was able to expose some of the weakness in [Dr. Lloyd's] experiment does not mean that trial counsel was ineffective for calling Dr. Lloyd to support their theory of defense." (Doc. 14-15 at 22–24.) The postconviction court noted:

> Dr. Lloyd was asked to investigate the biomechanics of the victim's head trauma to

determine whether the claimed cause of injury could have caused the brain injury suffered by the victim. He reviewed Dr. Lavezzi's autopsy report, the police reports, the victim's medical records, interviews of the people associated with the case, and photographs and a sketch of where the fall was alleged to have occurred. After reviewing all of the materials provided, Dr. Lloyd designed an experiment to show the jury how the victim could have suffered the injuries during the fall.

During the experiment Dr. Lloyd used a CRABI 12. He explained that while the CRABI was originally developed to examine air bag interaction, the mannequins have since been used in other impact tests, such as falls. Dr. Lloyd used the exact chair from the defendant's kitchen, placed the mannequin on its knees for one test and on its feet for the other test, and then dropped the mannequin onto a tile over concrete floor, the same floor as in the defendant's kitchen. During the experiment, Dr. Lloyd found the location of the fall of the mannequin to be consistent with the injuries sustained by the victim. He testified that the injury sustained by the victim is consistent with an accidental fall and is not consistent with intentional impact.

Dr. Lloyd's hypothetical experiment was to support the defense theory that the injuries

> sustained by the victim were caused by an accidental fall and not intentional abuse.

(*Id.* at 23–24 (citations to the record omitted).) The Fifth District Court of Appeal affirmed the postconviction court's denial of all Petitioner's claims. (Doc. 14-19 at 137–44.)

A review of the record supports the state courts' rejection of this claim. As noted by the postconviction court, Dr. Lloyd created an experiment, after review of the materials provided to him, to support the defense theory that F.R.'s injuries were caused by an accidental fall and not intentional abuse. Because F.R. allegedly suffered an unwitnessed fall, it is reasonable that trial counsel would elicit testimony from Dr. Lloyd regarding scenarios during which F.R. could have sustained her fatal injuries by accident.

The Constitution requires reasonably effective counsel, not perfect error-free counsel. "Strickland does not guarantee perfect representation, only a 'reasonably competent attorney.'" *Harrington*, 562 U.S. at 110 (quoting *Strickland*, 466 U.S. at 687). Notably, "there is no expectation that competent counsel will be a flawless strategist or tactician." *Id.* Indeed, an attorney "may not be faulted for a reasonable miscalculation or lack of foresight[.]" *Id.*

Therefore, as the postconviction court pointed out, simply because the state was able to point to weaknesses in Dr. Lloyd's testimony during trial, that does not mean that trial counsel was ineffective for calling him as a witness or eliciting testimony about

his experiment. Additionally, "[w]hich witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that [courts] will seldom, if ever, second guess." *Waters*, 46 F.3d at 1512.

Thus, the state courts' determination that trial counsel did not perform deficiently was neither contrary to nor an unreasonable application of *Strickland*, and it was not based on an unreasonable determination of the facts. "Under the doubly deferential judicial review that applies to a *Strickland* claim evaluated under the [28 U.S.C.] § 2254(d)(1) standard[,]" Petitioner's ineffective assistance of trial counsel claim must fail. *Knowles*, 556 U.S. at 123–24. Ground C is denied.

D. Ground D

In Ground D, Petitioner asserts that trial counsel was ineffective for failing to engage the "right" experts to address the particular issues of her case. (Doc. 1 at 89–92.) Specifically, Petitioner contends when comparing the experts presented by her trial counsel and the experts presented by post-conviction counsel at the evidentiary hearing, trial counsel "failed to pick experts with the relevant and appropriate expertise to address the forensic and medical issues most critical to [Petitioner's] defense." (*Id*. at 89–90.)

Petitioner raised this claim in her Rule 3.850 Motion for Postconviction Relief. (Doc. 14-10 at 165.) The postconviction court conducted an evidentiary

hearing on this claim and denied it. Specifically, the postconviction court found that trial counsel "cannot be considered ineffective merely because the defendant has secured the testimony of a more favorable expert in the post conviction proceedings." (Doc. 14-15 at 27.)

The postconviction court highlighted that the defense called two expert witnesses, Dr. Willey and Dr. Lloyd, both of whom the trial court found to be qualified to testify as experts. (*Id.* at 25.) The postconviction court noted the following regarding their testimony:

> Dr. Willey testified that, after reviewing the records provided, he disagreed with Dr. Lavezzi's opinion and believed the victim's injuries and resulting death were accidental. Dr. Willey testified that a bruise is different than a hemorrhage and that a hemorrhage does not signify trauma. He explained that spontaneous bleeding can occur, like he believes occurred here, which can then cause spontaneous hemorrhages or spontaneous bruises. He testified that the victim suffered from an abnormal clotting mechanism, DIC, that was caused by the victim having pneumonia. Dr. Willey explained axonal injuries, the difference between hypoxic ischemic axonal injuries and traumatic axonal injuries, and why he believes the victim suffered from hypoxic ischemic axonal injuries.

…

> Dr. Lloyd testified that the results of the experiment he conducted demonstrated that the injury sustained by the victim is consistent with an accidental fall and is not consistent with intentional impact.

(*Id.* at 25–26 (citations to the record omitted).)

In evaluating Petitioner's claim that trial counsel should have consulted a forensic pathologist with specialized expertise in cases involving pediatric head trauma, the postconviction court compared the testimony of Dr. Ophoven, who testified at Petitioner's evidentiary hearing, and the testimony provided at trial by Dr. Willey, noting the following:

> At the evidentiary hearing, the defendant presented Dr. Ophoven as a forensic pathologist with such an expertise. The defendant argues that Dr. Ophoven, unlike Dr. Willey, would have been able to explain to the jury (1) additional causes of subgaleal hemorrhages; (2) why characterizing a hemorrhage as an "impact" is medically unsupportable; (3) how Dr. Lavezzi's conclusion that the subdural bleeding was caused by torn bridging veins was unfounded; and (4) how additional conditions that the victim suffered (including dural venous sinus thrombosis, sickled red blood cells, pneumonia, and clotting abnormalities) could have contributed to her death.

…

> Dr. Willey testified to many of the things Dr. Ophoven testified to at the evidentiary hearing. Moreover, Dr. Ophoven testified that she was familiar with Dr. Willey and had reviewed his testimony from the defendant's trial. Dr. Ophoven agreed that Dr. Willey testified consistently with her findings on many of the issues in the case; mainly, that the hypoxic ischemic injury is a reasonable explanation for the victim's cause of death; that the victim suffered from pneumonia at the time of her injuries; that the victim had problems with blood coagulation; that bruises could appear from spontaneous bleeding; that the administration of heparin could have effects on the victim[']s body; that the victim had more blood present during the autopsy than the initial CT scans at Munroe Regional Medical Center; that a person could experience a period of lucidity after a head injury; and that Dr. Lavezzi's testimony regarding the victim's injuries being caused by a fourth-story fall is flawed.

(*Id.* at 26–27 (citations to the record omitted).) The postconviction court concluded that the fact that Petitioner had located Dr. Ophoven, who would have testified "to information in addition to that testified to by Dr. Willey to rebut the State's evidence against the defendant does not establish that Dr. Willey's testimony was insufficient, or that trial counsel was

ineffective for failing to consult additional experts." (*Id*. at 27.)

Regarding Petitioner's claim that trial counsel should have consulted a neuropathologist and forensic epidemiologist, the postconviction court noted the following:

> The defendant also argues that her trial counsel should have consulted a neuropathologist. At the evidentiary hearing, the defendant presented Dr. Auer as a neuropathologist. The defendant argues that Dr. Auer could have evaluated the BAPP stains relied upon by Dr. Lavezzi and explain[ed] why the stains show[ed] hypoxic ischemic axonal injury rather than traumatic axonal injury. […] Dr. Willey testified at the defendant's trial regarding axonal injuries and the difference between hypoxic ischemic injuries and traumatic axonal injuries. Dr. Willey testified the injuries suffered by the victim could have been caused by hypoxic ischemic axonal injury. He testified that it is very difficult, if not impossible, to tell the difference between hypoxic ischemic injuries and traumatic axonal injuries, and BAPP stains do not have much significance "because you can't distinguish those from–hypoxic ischemic encephalopathy from trauma." […] [T]rial counsel was not ineffective for not calling Dr. Auer, who would have offered substantially the same testimony as did Dr. Willey.

The defendant also argues her trial counsel should have consulted a forensic epidemiologist. At the evidentiary hearing, the defendant presented testimony from Dr. Michael Freeman, a forensic epidemiologist. Dr. Freeman had accessed information from U.S. hospital databases searching for injuries described as a subdural hematoma in a child, aged one through 5, without a skull fracture that was caused during a short fall and during intentional trauma. Dr. Freeman testified that the results indicate that children present with subdural hematoma without fracture from a short fall at about the same rate as from intentional trauma. However, children are four times more likely to die due to intentional trauma than due to short falls. Dr. Freeman did not include the presence of other bruising on the body as a search parameter because, according to Dr. Freeman, Dr. Lavezzi did not state that bruises were impossible in a short fall. The defendant argues that Dr. Freeman could have testified to this information at trial to show that the injuries suffered by the victim could have resulted from an accidental short fall in contradiction to Dr. Lavezzi's testimony that the injuries could have only resulted from intentional abuse, a car crash, or a fall from a fourth-story window.

…

> Dr. Freeman utilized databases that were not designed for forensic use in criminal cases, and he had to rely on the information as it was put into the database. There is no way to cross reference the information to determine if the information was imputed correctly, nor is there a way to determine if the history given during the initial assessment was accurate.

(*Id*. at 27–28 (citations to the record omitted).)

The postconviction court ultimately found that just because Petitioner was able to obtain "additional experts to testify to information in addition to that which was presented at trial does not demonstrate that the information presented at trial was insufficient, or that trial counsel was ineffective for not calling additional experts." (*Id*. at 28–29.) The Fifth District Court of Appeal affirmed the postconviction court's denial of all Petitioner's claims. (Doc. 14-19 at 137–144.)

A review of the record supports the state courts' rejection of this claim. In analyzing a claim of ineffective assistance of counsel,

> [t]he test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial…We are not interested in grading lawyers' performances; we are interested in

> whether the adversarial process at trial, in fact, worked adequately.

White v. Singletary, 972 F.2d 1218, 1220–21 (11th Cir. 1992); *accord* Chandler, 218 F.3d at 1313 ("To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable … [T]he issue is not what is possible or 'what is prudent or appropriate, but only what is constitutionally compelled.'") (quoting *Burger v. Kemp*, 483 U.S. 776, 794 (1987)). To show deficient performance, a petitioner must show "that no competent counsel would have made such a choice." *Provenzano v. Singletary*, 148 F.3d 1327, 1332 (11th Cir. 1998).

After careful review, this Court cannot conclude that no competent counsel would have taken the same action, namely calling a neuropathologist. This is because Dr. Willey testified at trial as to substantially the same area that Dr. Auer would have offered. Again, the Court cannot find that no reasonable trial counsel would have offered Dr. Willey's expert testimony as to the substantially same areas that a neuropathology expert would have testified. Therefore, Petitioner cannot show ineffective assistance of counsel for trial counsels' choice of experts.

Accordingly, the state courts' decision to deny Petitioner's claim was neither contrary to nor an unreasonable application of *Strickland*, and it was not based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d). Ground D is denied.

E. Ground E

In Ground E, Petitioner asserts that trial counsel was ineffective for failing to offer reverse *Williams*[4] Rule evidence. (Doc. 1 at 92–93.) Specifically, Petitioner contends that trial counsel unreasonably omitted evidence that would have implicated Joe Ray in F.R.'s death. (*Id*.)

Petitioner raised this claim in her Rule 3.850 Motion for Postconviction Relief. (Doc. 14-10 at 160–162.) The postconviction court conducted an evidentiary hearing on this claim and denied it. (Doc. 14-15 at 21–22.) In so finding, the postconviction court noted the following:

> At the evidentiary hearing, Ms. Jenkins testified that, after consulting with the attorneys and the experts on the defense team, the defense presented a theory that the injuries that led to the death of the victim were caused by an accidental fall rather than intentional abuse. She testified that evidence

[4] The Florida Supreme Court has determined that "evidence of any facts relevant to a material fact in issue except where the sole relevancy is character or propensity of the accused is admissible unless precluded by some specific exception or rule of exclusion." *Williams v. State*, 110 So. 2d 654, 663 (Fla. 1959). Under this rule, relevant similar fact evidence is admissible, even if it points to the commission of another crime. *Id*. Additionally, a defendant may offer similar fact evidence to show that someone else committed the crime for which the defendant is being tried as "reverse *Williams* rule evidence." *State v. Savino*, 567 So. 2d 892, 893 (Fla. 1990).

> of a third-party perpetrator would have been inconsistent with the defense theory, which could have undermined their defense theory and strategy. In addition, Ms. Jenkins testified that there was no evidence of any third-party perpetrator causing the death of the victim and "we weren't going to make that up."
>
> Moreover, Ms. Jenkins testified the attorneys specifically discussed the possibility of presenting evidence that Mr. Ray caused the death of the victim. However, the defendant "insisted that we not do it." The defense was "forbidden very strenuously to put on any evidence of Joe Ray inflicting any injury on that child." The defendant did not testify at the evidentiary hearing, and this testimony was otherwise uncontroverted at the evidentiary hearing. The defendant should not be heard to complain now for action she insisted upon at trial. Counsel is not ineffective where deficiencies in the investigation are attributable to an uncooperative defendant, or where counsels [sic] reasonable efforts were significantly hampered by the failure of the defendant and the defendant's family to participate in the process or provide information.

(*Id*. (citations to the record omitted).) The Fifth District Court of Appeal affirmed the postconviction court's denial of all Petitioner's claims. (Doc. 14-19 at 137–144.)

A tactical decision amounts to ineffective assistance of counsel "only if it was so patently unreasonable that no competent attorney would have chosen it." *Adams v. Wainwright*, 709 F.2d 1443, 1445 (11th Cir. 1983); *accord Strickland*, 466 U.S. at 690. Tactical decisions made by counsel do not render assistance ineffective merely because in retrospect it is apparent that counsel chose the wrong course. *Adams v. Balkcom*, 688 F.2d 734, 739 (11th Cir. 1982); *see also Alexander v. Dugger*, 841 F.2d 371, 375 (11th Cir. 1988). Thus, a court deciding an ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. *Strickland*, 466 U.S. at 690.

A review of the record supports the state courts' rejection of this claim. At the evidentiary hearing, trial counsel testified that, after discussion, it was determined that presenting evidence that another person committed intentional abuse against F.R. was not only inconsistent with the theory of defense—that F.R.'s death was a result of an *accidental injury*—but also inconsistent with the evidence that they had. (Doc. 14-14 at 231–32.) Trial counsel also testified that presenting any such evidence tending to implicate Joe Ray in the death of F.R. was prohibited by Petitioner and would ultimately undermine Petitioner's overall theory of the case. (*Id*. at 232.) Therefore, this Court cannot conclude that no competent counsel would made the tactical decision trial counsel made not to offer reverse *Williams* rule evidence under these circumstances.

Considering trial counsel's testimony at the evidentiary hearing, the postconviction court's adjudication of this claim was not contrary to clearly established federal law, did not involve an unreasonable application of clearly established federal law, and was not based on an unreasonable determination of the facts. Ground E is denied.

F. Ground F

In Ground F, Petitioner asserts that trial counsel was ineffective for failing to offer character evidence at trial to rebut the state's evidence regarding Petitioner's mental state. (Doc. 1 at 94–96.) Specifically, Petitioner contends trial counsel's decision not to call character witnesses to testify as to her "peaceful and non-violent character" was unreasonable. (*Id.* at 94–95.)

Petitioner raised this claim in her Rule 3.850 Motion for Postconviction Relief. (Doc. 14-11 at 5–8.) The postconviction court conducted an evidentiary hearing on this claim and denied it, finding "[t]he testimony of the five [character] witnesses presented by the defense at the evidentiary hearing would have been cumulative" if presented at trial, and "[t]he decision to not call the character witnesses was clearly a strategic decision by trial counsel." (Doc. 14-15 at 30–32).

In finding the character evidence presented at the evidentiary hearing would have been cumulative if presented at trial, the postconviction court noted the following evidence that was, in fact, presented at trial:

[T]rial counsel did present evidence at trial that the defendant was a loving mother and was good with children. The defendant's mother testified at trial on this matter as follows:

Q. Is it fair to say that Violet called you for a lot of advice and opinions when she was raising these children?

A. Violet knew children. She loved children. She was good with children. Sure, she would call when she was concerned about stuff, but she didn't say, mom, I need this, mom, I need that, I don't know what to do with that. That wasn't the way it was.

Q. And you said you have nine children?

A. Yes mam.

Q. You raised nine children?

A. Yes mam.

Q. Did Violet help out with her siblings when she was growing up?

A. Yes mam. Violet is the oldest of nine children and every–in the evening when I was cooking supper, I always gave her her [sic] choice, I said, Violet, do you want to help me in the kitchen or would you want to watch the little kids and she always chose to watch the kids.

> Q. Did any of those children have special needs?
>
> **A.** Yes, my daughter, Dawn. She died eight years ago. She had Down Syndrome.
>
> Q. And Violet spend [sic] a lot of time taking care of her?
>
> A. She as–yes. Yes.

(*Id*. at 30–31 (citations to the record omitted).)

In finding trial counsel's decision not to present additional character evidence at trial to be a strategic decision, the postconviction court noted the following:

> Ms. Hardin testified at the evidentiary hearing that she, Ms. Jenkins, and Mr. Woodard discussed whether to call the character witnesses. After discussing the matter, the attorneys agreed not to call the character witnesses because they "thought that would allow the State to, perhaps, back-door in testimony that we did not want in the trial," specifically as it related to Christian Ray. Christian Ray was the oldest of the children the defendant and her husband adopted.

(*Id*. at 32 (citations to the record omitted).) The Fifth District Court of Appeal affirmed the postconviction court's denial of Petitioner's claims. (Doc. 14-19 at 137–144.)

A review of the record supports the state courts' rejection of this claim. At the evidentiary hearing, trial counsel testified that the defense team collectively discussed whether or not to present reputation evidence at trial. (Doc. 14-14 at 376–77.) After that discussion, a decision was made not to put on such evidence based on the "pitfalls to that strategy." (*Id*. at 377.) It was trial counsel's strategy to avoid opening the door to testimony that would be detrimental to Petitioner's case by presenting this evidence. (*Id*.)

"The decision as to which witnesses to call is an aspect of trial tactics that is normally entrusted to counsel." *Blanco v. Singletary*, 943 F.2d 1477, 1495 (11th Cir. 1991). "Even if counsel's decision [to not call a certain witness] appears to have been unwise in retrospect, the decision will be held to have been ineffective assistance only if it was so patently unreasonable that no competent attorney would have chosen it." *Dingle v. Sec'y for Dep't of Corr.*, 480 F.3d 1092, 1099 (11th Cir. 2007). This Court cannot conclude that no competent counsel would have made the strategic decision not to present additional character witness evidence at trial based on the considerations made by trial counsel in this case.

Accordingly, the postconviction court's determination that trial counsel did not perform deficiently was neither contrary to nor an unreasonable application of *Strickland*, and it was not based on an unreasonable determination of the facts. "Under the doubly deferential judicial review that applies to a *Strickland* claim evaluated under the

[28 U.S.C.] § 2254(d)(1) standard[,]" Petitioner's ineffective assistance of trial counsel claim must fail. *Knowles*, 556 U.S. at 123–24. Ground F is denied.

G. Ground G

At the time of Petitioner's trial, on the wall outside the State Attorney's Office—located in the courthouse where Petitioner's trial took place—was an array of photographs of persons identified by the State Attorney's Office as victims of violent crimes. (Doc. 14-15 at 32–33.) A photograph of F.R. was included in the display. (*Id*.)

In Ground G, Petitioner asserts that trial counsel was ineffective for failing to properly guard against prejudice resulting from F.R.'s photograph on the victims of violent crimes display. (Doc. 1 at 97–98.) Petitioner contends that trial counsel's "remedial efforts were deficient and the risks of prejudice were clear." (*Id*. at 98.)

Petitioner raised this claim in her Rule 3.850 Motion for Postconviction Relief. (Doc. 14-11 at 8–10.) The postconviction court conducted an evidentiary hearing on Petitioner's Rule 3.850 Motion and denied this claim, noting the following:

> Although not through formal objection or motion for mistrial, trial counsel addressed the issue with the trial judge, and made clear their concerns about prejudice to the defendant. The court took precautions to prevent any prejudice from occurring. The defendant [did] not allege[], nor did the

> defendant offer up any evidence that any juror actually saw the victim's photograph on the victim's memorial board, or that the board itself was even seen by any juror. There is nothing in the record to establish that the victim's memorial board, or the victim's photograph was seen by any juror.

(Doc. 14-15 at 32–34.) The Fifth District Court of Appeal affirmed the postconviction court's denial of all Petitioner's claims. (Doc. 14-19 at 137–144.)

A review of the record supports the state courts' rejection of this claim. The record demonstrates that trial counsel addressed this issue with the trial court on two separate occasions. (Docs. 14-2 at 55–57; 14-6 at 1.) On both occasions the trial court resolved to instruct the jury not to enter the area where the display was located after trial counsel brought to the court's attention the potential prejudice to Petitioner. (Id.) As noted by the postconviction court, there is nothing in the record to show that F.R.'s photograph displayed on the board was seen by any juror, or that the board itself was seen by any juror. (*Id.*) Importantly, a jury is presumed to follow instructions. *Richardson v. Marsh*, 481 U.S. 200, 211 (1987).

Speculation of potential prejudice is not a basis for federal habeas relief. *See Wood v. Bartholomew*, 516 U.S. 1, 8 (1995) (a federal court may not grant habeas relief "on the basis of little more than speculation with slight support."); *Tejada v. Dugger*, 941 F.2d 1551, 1159 (11th Cir. 1991) (vague, conclusory, or unsupported allegations cannot

support an ineffective assistance of counsel claim). There is no indication that, but for trial counsel's actions, the result of the proceeding would have been different. Thus, Petitioner cannot demonstrate ineffective assistance of counsel.

Accordingly, the state courts' decision to deny Petitioner's claim was neither contrary to nor an unreasonable application of *Strickland*, and it was not based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d). Ground G is denied.

H. Ground H

In Ground H, Petitioner asserts that trial counsel was ineffective for failing to object to the autopsy photos of F.R. presented at trial by the state. (Doc. 1 at 98–101.) Petitioner argues the probative value of this evidence was substantially outweighed by the potential for prejudice, and therefore trial counsel's silence was unreasonable. (*Id*. at 99–100.)

Petitioner raised this claim in her Rule 3.850 Motion for Postconviction Relief. (Doc. 14-11 at 10–13.) The postconviction court conducted an evidentiary hearing on Petitioner's Rule 3.850 Motion and denied it, finding trial counsel's "[f]ailure to raise merit-less claims [did] not constitute ineffective assistance of counsel." (Doc. 14-15 at 34–36.) The postconviction court reasoned that "[t]he test for admissibility of photographic evidence is relevance, not necessity"; and further noted that "[r]elevant evidence is admissible unless its probative value is substantially outweighed by the danger of unfair

prejudice to the defendant, it creates confusion of the issues, it is misleading to the jurors, or it is needless presentation of cumulative evidence." (*Id*. at 35.) The postconviction court found Petitioner had failed to establish that any of the prohibitions were present as to warrant exclusion of the photographs, or to warrant objection to the photographs being entered into evidence at trial. (*Id*. at 35–36.) In so finding, the postconviction court noted:

> During Dr. Lavezzi's direct examination, the State introduced 19 of the 120 photographs from the autopsy of the victim. Dr. Lavezzi testified at the evidentiary hearing that each of the photographs introduced at trial was necessary for her to explain the extent of the injuries to the victim.
>
> …
>
> The defendant's argument that the photographs do not depict how the victim appeared after she collapsed on the floor is misplaced. The photographs were not offered to show how the victim appeared when she collapsed on the floor. They were offered to assist the medical examiner in her testimony and her explanations of the extent of the victim's injuries.

(*Id*. (citations to the record omitted).) The Fifth District Court of Appeal affirmed the postconviction court's denial of all Petitioner's claims. (Doc. 14-19 at 137–144.)

A review of the record supports the state courts' rejection of this claim. Although the question before the Court is one of ineffective assistance of counsel, the issue that underlies this claim—the admissibility of evidence—is a question of state law. *See Sims v. Singletary*, 155 F.3d 1297, 1312 (11th Cir. 1998.) The trial court's decision on this issue binds this Court. *See Estelle v. McGuire*, 502 U.S. 62, 67 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."). The trial court determined that the photographs were admissible, and found that trial counsel could, therefore, not be deemed ineffective for failing to raise a meritless issue.

Thus, it is clear that Petitioner is not entitled to relief on the basis of this claim because the state courts' adjudication of this claim was not contrary to clearly established federal law, did not involve an unreasonable application of clearly established federal law, and was not based on an unreasonable determination of the facts. Ground H is denied.

I. Ground I

In Ground I, Petitioner asserts cumulative error. (Doc. 1 at 101–02.) Petitioner incorporates all previous grounds raised into this claim stating that "[h]ad trial counsel not engaged in all of these errors, there is a reasonable probability that the outcome of

[Petitioner's] trial would have been different." (*Id*. at 101.)

"The cumulative error doctrine provides that an aggregation of non-reversible errors (i.e., plain errors failing to necessitate reversal and harmless errors) can yield a denial of the constitutional right to a fair trial, which calls for reversal." *United States v. Baker*, 432 F.3d 1189, 1223 (11th Cir. 2005) (internal quotation marks omitted). The Eleventh Circuit addresses "claims of cumulative error by first considering the validity of each claim individually, and then examining any errors that [it] find[s] in the aggregate and in light of the trial as a whole to determine whether the appellant was afforded a fundamentally fair trial." *Morris v. Sec'y, Dep't of Corr.*, 677 F.3d 1117, 1132 (11th Cir. 2012). Because the Court has determined that none of Petitioner's individual claims of error or prejudice have merit, Petitioner's cumulative error claim cannot stand. *See United States v. Taylor*, 417 F.3d 1176, 1182 (11th Cir. 2005) ("[There being] no error in any of the district court's rulings, the argument that cumulative trial error requires that this Court reverse [the defendant's] convictions is without merit."). Ground I is denied.

IV. Conclusion

Based on the foregoing, Petitioner is not entitled to relief on the habeas claims presented here.

Accordingly, it is ordered that:

1. The 28 U.S.C. § 2254 petition filed by Violet Love Ray is **DENIED**.

2. The Clerk is **DIRECTED** to enter judgment in favor of Respondents and against Petitioner, deny any pending motions as moot, and close this case.

Certificate of Appealability[5]

A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of her petition. 28 U.S.C. § 2253(c)(1). Rather, a district court or circuit justice or judge 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 this substantial showing, a petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), or that "the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

Upon consideration of the record, the Court declines to issue a COA. Because Petitioner is not

[5] Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts, the "district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."

entitled to a COA, she is not entitled to appeal in forma pauperis.

DONE AND ORDERED in Fort Myers, Florida on September 20, 2023.

/s/ John L. Badalamenti
JOHN L. BADALAMENTI
UNITED STATES
DISTRICT JUDGE

APPENDIX C

SUPREME COURT OF FLORIDA

No. SC2019-1558

VIOLET RAY,
Appellant(s),

vs.

STATE OF FLORIDA,
Appellee(s).

April 14, 2020

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d)(2).

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

APPENDIX D

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FIFTH DISTRICT

VIOLET LOVE RAY,

Appellant,

v. Case No. 5D18-1277

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed August 9, 2019

3.850 Appeal from the Circuit Court for Marion County,
Willard Pope, Judge.

Sonya Rudenstine, of Law Office of Sonya Rudenstine, Gainesville, Stephen G. Foresta, Paul F. Rugani, Leena Charlton and Katherine Kinsey, of Orrick, Herrington & Sutcliffe, LLP, New York, NY, and Michael Ufferman, of Michael Ufferman Law Firm, P.A., Tallahassee, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Kellie A. Nielan, Assistant Attorney General, Daytona Beach, for Appellee.

ROBERSON, E.C., Associate Judge.

Violet Love Ray was convicted of first-degree murder, aggravated child abuse, and child neglect related to the death of her two-year-old daughter. Her conviction was affirmed on direct appeal. *Ray v. State*, 149 So. 3d 36 (Fla. 5th DCA 2014). We now affirm the denial of her Florida Rule of Criminal Procedure 3.850 motion for postconviction relief entered after an evidentiary hearing.

On the night in question, Ray was home alone with her six children. Around 9:00 p.m., she called her father. Sensing something was amiss, he and Ray's mother went to the Ray household. He found Ray holding her two-year-old daughter in the kitchen. Ray's five-year-old son secretly called 9-1-1 and left the line open, prompting an officer to respond to the Ray household. The family declined the offer to call an ambulance. Tragically, several hours later, Ray's daughter stopped breathing and was rushed by ambulance to the hospital. By that time, she was brain dead and had noticeable bruises on her back, buttocks, and thighs.

The State's theory was that Ray's daughter died from intentionally inflicted head injuries. Ray was represented by three attorneys with over 40 years of experience. Ray's defense was that her daughter fell in the kitchen after her bath, while Ray was giving her other children a bath.

In her rule 3.850 motion, Ray argues that she received ineffective assistance of counsel because the defense did not engage in a highly scientific, medicolegal, battle of the experts. Ray contends, in

hindsight, that there were several experts that potentially could have offered opinions contrary to the State's medical examiner, Dr. Lavezzi.[1] We deny the majority of Appellant's arguments without discussion but write, however, to address the concerns raised in the dissent.

During Dr. Lavezzi's trial testimony, the jury was presented with evidence that there were thirteen subgaleal hemorrhages present on the two-year-old's head and that each hemorrhage came from a separate impact. The defense challenged Dr. Lavezzi on the aging process of those bruises, eliciting that the bruises could have been from three or four days prior. Ray's expert, Dr. Willey, testified that bruises do not always involve trauma and could develop from other medical conditions. Dr. Willey conceded that Dr. Lavezzi's opinion regarding 13 separate impacts was not consistent with a single fall. Instead, Dr. Willey suggested that the bruises were consistent with other medical conditions or an impact, that the bruises could have happened at different times, and that it was difficult to determine the age of the bruises.

At the postconviction hearing, Dr. Willey disagreed with Dr. Lavezzi's trial testimony because he did not "believe that there are thirteen discrete things that indicate thirteen distinct contact injuries." When asked how he would have responded

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[1] These experts include Dr. Janice Ophoven, a pediatric forensic pathologist; Dr. Michael Freeman, an expert in forensic medicine and epidemiology; and Dr. Roland Auer, a neuropathologist and neuroscientist.

to Dr. Lavezzi's testimony about the victim's head trauma, Dr. Willey stated:

> Well, the premise of the question is faulty because the hemorrhages that are described are not necessarily all due to trauma, in fact, it's reasonable to assume most of them are not, they're very small or trivial. The number is overwhelming, there are 20 with various subsets, three to four each. I'm sure that's a substantial number, which is misleading because they're not that many injuries, in fact, most of them are probably not due to injury, they're hemorrhages, which are described. And there are other explanations for hemorrhages than traumatic injury.

But, in fact, Dr. Willey was asked to respond to Dr. Lavezzi's opinions during the trial itself. Specifically, he was asked:

> Q. And were you aware of Dr. Lavezzi's opinion—and by that, I mean her conclusions of—subsequent to the autopsy?
>
> A. Yes.
>
> Q. And after review of all of the materials that you've indicated do you agree with her conclusions?
>
> A. Well, I can't disprove her conclusion, but I think that she omits the likelihood that this could actually be an accidental injury.

. . . .

Q. And Dr. Lavezzi concluded in her report that there were 13 points of impact on [the victim's] head. Is that consistent with a single fall?

A. Doesn't sound like it, no.

Q. Okay.

A. The major injury on the head, to my way of thinking, is a big hemorrhage under the galea, which is part of the scalp on the top and back of the head, very close to the top of the head.

Q. So if there were points of hemorrhage that you could count up, would that be consistent with a finding of impact, or abuse, or simply in conjunction with what you've told us already?

A. Well, it could be either. It could be [a medical condition], or it could be impact. And it doesn't have to be impact all at one time. And you can't age bruises effectively, you can't look at one and say how old it is.

A defendant alleging ineffective assistance of counsel must show that counsel's performance was both deficient and prejudicial. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). A deficient performance is one that falls below the standard guaranteed by the Sixth Amendment. *Id*. Prejudice,

on the other hand, means that the defendant was deprived of a fair trial. *Id*. at 689. Prejudice requires a reasonable probability that "but for counsels unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694.

There is a strong presumption that trial counsel's performance was not deficient. *See Strickland*, 466 U.S. at 690; *see also Johnston v. State*, 63 So. 3d 730, 737 (Fla. 2011). Indeed, trial counsel's performance is given great deference and the defendant must "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). Strategic decisions do not constitute ineffective assistance of counsel, *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000), and counsel is entitled to great latitude in making strategic decisions. *Dufour v. State*, 905 So. 2d 42, 56 (Fla. 2005).

If a defendant fails to establish one prong of the *Strickland* standard, there is no need for the court to examine whether she made a showing as to the other prong. *See Strickland*, 466 U.S. at 697 ("[T]here is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one."); *see also Downs v. State*, 740 So. 2d 506, 518 n.19 (Fla. 1999) (finding no need to address prejudice prong where defendant failed to establish deficient

performance prong); *Kennedy v. State*, 547 So. 2d 912, 914 (Fla. 1989) (noting that where defendant fails to establish prejudice prong court need not determine whether counsel's performance was deficient). In this case, Ray failed to establish that trial counsel's performance was deficient. As such, there is no need for this court to analyze *Strickland*'s prejudice prong.

We hold that trial counsel's performance was not deficient for two reasons. First, the decision to go with a straightforward causation defense, as opposed to a scientific "battle of the experts," was a reasonable trial strategy. In making that decision, Ray's counsel consulted with Dr. Willey and discussed the State's theory of thirteen separate impacts. Specifically, trial counsel recalled that:

> Dr. Willey testified that they were trivial, and that they had no connection at all to the fatality. And when I met with him and we discussed this case, his opinion was that those very small indicators really—again, the term he used was trivial, because I remember I was surprised—and that they could have been spontaneous. They didn't need to be a result of trauma, inflicted trauma.

This is a reasonable strategy and one that coincided with the defense's theory at trial.

Second, a defense strategy challenging Dr. Lavezzi's opinion of thirteen separate impacts potentially could have opened the door to some of the most damning testimony imaginable. Although not

well developed in the record, during the investigation of this case, another one of Ray's children "describe[d] a period of time where Violet Ray was slamming [the victim's] head into the back of a sink." Counsel cannot be faulted or second-guessed for avoiding the possibility of this testimony being put before the jury.

AFFIRMED.

GROSSHANS, J., concurs.
COHEN, J., dissents with opinion.

COHEN, J., dissenting.

I would reverse the order denying Ray's Florida Rule of Criminal Procedure 3.850 motion for postconviction relief entered after an evidentiary hearing.

Many of Ray's arguments in her first claim revolved around counsel's cross-examination of the medical examiner, Dr. Lavezzi.[2] At trial, Dr. Lavezzi testified that she identified thirteen subgaleal hemorrhages on the victim's head and opined that each hemorrhage demonstrated a separate point of impact. On cross-examination, Dr. Lavezzi reiterated her opinion that the hemorrhages were bruises under the victim's scalp, which occurred from multiple impacts. Counsel questioned Dr. Lavezzi regarding the aging process of the bruises but made little effort to challenge the alleged thirteen separate impacts, which in my view, was critical to the State's case.

Dr. Willey, the defense's expert in pathology and forensic medicine, testified that a bruise does not necessarily imply trauma. However, when counsel asked Dr. Willey whether Dr. Lavezzi's conclusion regarding the thirteen points of impact on the victim's

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[2] Ray's other claims were that trial counsel was ineffective for failing to: present an alternative timeline; offer reverse *Williams* rule evidence; use one of its expert witnesses effectively; engage the right experts to address the forensic and medical issues; offer evidence of her peaceful and non-violent character; guard against prejudice resulting from a photograph displayed in the courthouse; and object to the introduction of autopsy photographs. I find no error in the court's denial of these claims.

head was consistent with a single fall, Dr. Willey responded, "Doesn't sound like it, no." In eliciting that answer, counsel effectively eviscerated Ray's own theory of defense.[3]

Further, Dr. Willey's response contradicted the testimony of the defense's other expert witness, Dr. Lloyd, an expert in ergonomics and biomechanics. Dr. Lloyd presented the results of an experiment, which demonstrated that the victim's fatal injury could have occurred from a single fall.

The evidence submitted at the hearing on Ray's motion for postconviction relief raised serious doubts about Dr. Lavezzi's conclusion that the victim suffered thirteen separate impacts to her head. Additionally, at the hearing, Dr. Willey testified that had counsel asked him during trial, he would have disagreed with Dr. Lavezzi's testimony that the victim suffered thirteen contact injuries.

In my view, the failure to challenge Dr. Lavezzi's testimony constituted ineffective assistance of counsel. I would reverse and remand for a new trial.

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[3] He then stated that the hemorrhages could have been caused by impact or by the victim's disseminated intravascular coagulation, a condition which affects clotting. However, counsel did not explore this statement further.

APPENDIX E

IN THE CIRCUIT COURT OF APPEAL OF THE
FIFTH JUDICIAL DISTRICT
IN AND FOR MARION COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff, CASE NO.: 42-2009-1379-CF-A-W

v.

VIOLET LOVE RAY,

Defendant.

_____/

ORDER DENYING AMENDED MOTION FOR POST CONVICTION RELIEF

THIS CAUSE is before the court on defendant's "Amended Motion to Vacate Judgment of Conviction and Sentence" filed September 22, 2017, pursuant to *Fla. R. Crim. P.* 3.850. The initial motion was filed February 18, 2015, and contained eight claims for relief. The amended motion withdraws claims six and seven, and adds claims nine and ten, for a total of eight claims. An evidentiary hearing was held on the amended motion on December 5, 6, and 7, 2017. The defendant was represented by local attorney Sonya Rudenstine, and by New York attorneys Stephen Foresta, Paul F. Rugani, Matthew S. Ingles, and Louisa S. Irving, each of whom appeared *pro hac vice*. The State was represented by Assistant State

Attorneys Amy Berndt and Nicholas Camuccio. The defendant was present but did not testify. The defendant called four expert witnesses: Dr. Edward Willey (who also testified at the defendant's trial), Dr. Michael Freeman, Dr. Janice Ophoven, and Dr. Ronald Auer. The defense called eight other witnesses: Christina Montgomery, Carmen Belcher, Pat Caren, Carrie Kinsey, Ellen Costello, Carol Allen (the records custodian for the District 5 Medical Examiner's Office), and Patricia Jenkins and Nicole Hardin, who were two of the attorneys who represented the defendant at trial. The State called Dr. Wendy Lavezzi, the medical examiner who testified for the State at trial. Post hearing written final arguments and supporting briefs filed by both the State and the defendant. The court has reviewed the court file and the evidence presented at the evidentiary hearing, including the testimony of the witnesses, and has reviewed the post hearing briefs filed by both parties. Upon the evidence presented, being otherwise fully informed in the premises, and for the reasons set forth below, the court finds the motion should be denied.

BACKGROUND

On April 6, 2009, the defendant was charged in a three count indictment with first degree felony murder, a capital felony (count one); aggravated child abuse, a first degree felony (count two); and child neglect, a third degree felony (count three). A copy of the indictment is attached. The defendant was represented by Assistant Public Defenders Patricia C. Jenkins, Nicole Hardin, and Joshua Woodard. The

case was tried before Circuit Judge Robert Hodges.[1] On May 18, 2012, the defendant was found guilty as charged on all three counts at a jury trial. On August 28, 2012, the defendant was sentenced to life in prison without the possibility of parole on count one, to twenty years in prison on count two, and to five years in prison on count three. The sentences were ordered to run concurrently. The defendant appealed. The Fifth District Court of Appeal entered its *per curiam* affirmed decision on January 21, 2014, and the Mandate was entered on February 14, 2014. *(See Ray v. State,* 149 So.3d 36 (Fla. 5th DCA 2014); Fifth DCA case number 5D12-3745). The initial motion for post conviction relief followed and was filed February 18, 2015. The State filed a response on June 8, 2015. A copy of the State's response is attached.

JURISDICTION

The defendant's initial post conviction motion was filed within two years of the Mandate from the district court of appeal and is timely filed. This court has jurisdiction for the post conviction proceedings. *Huff v. State,* 569 So.2d 1247 (Fla. 1990); *Fla. R. Crim. P.* 3.850.

STANDARD OF REVIEW

In order to prove an ineffective assistance of counsel claim, the defendant must establish two

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[1] During the pendency of the post conviction proceedings Judge Hodges disqualified himself upon motion by the defendant. The undersigned was assigned the case thereafter.

elements. First, the defendant must show that counsel's performance was deficient. This requires a 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 resulted from a breakdown in the adversary process that rendered the result unreliable. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Rutherford v. State,* 727 So.2d 216, 219-220 (Fla. 1998). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Strickland,* 466 U.S. at 693. To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id* at 694.

"Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. 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, to evaluate the conduct from counsel's perspective at the time." *Strickland,* at 689, *Francis v. State,* 529 So.2d 670, 672, n.4 (Fla. 1988), *Lusk v. State,* 498 So.2d 902 (Fla. 1986), *Spencer v. State,* 842 So.2d 52, 61 (Fla. 2003). There is a strong presumption that counsel's conduct falls into a wide range of reasonable professional assistance. *Asay v. State,* 769 So.2d 974 (Fla. 2000). The fact that a more thorough or detailed presentation could have been made does not establish ineffective assistance of counsel. It is always possible to imagine a more thorough job being done than actually was. *Maxwell v. Wainwright,* 490 So.2d 927 (Fla. 1986). In *Maxwell,* the Florida Supreme Court summarized the standard as follows:

> A claim of ineffective assistance of counsel, to be considered meritorious, must include two general components. 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. *Downs v. State,* 453 So.2d 1102 (Fla. 1984). A court considering a claim of ineffective assistance of counsel need not make a specific ruling on the performance

> component of the test when it is clear that a prejudice component is not satisfied.

Id. at 932.

As *Maxwell* makes clear, both prongs of the *Strickland* standard must be established or the claim fails. In *White v. Singletary,* 972 F.2d 1218, 1220-1221, (11th Cir. 1992), the court explained:

> the test has nothing to do with what the best lawyer would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial … . We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.

The defendant bears the burden of satisfying both the performance and prejudice prongs, and ultimately must show a reasonable probability that, but for counsel's errors, the defendant would not have been found guilty at trial. *Strickland, supra, at* 687. The defendant must establish a prima facie case of ineffective assistance of counsel based upon a legally valid claim. Mere conclusory allegations are insufficient to meet this burden. *Kennedy v. State,* 54 7 So.2d 912, 913 (Fla. 1989).

GROUNDS FOR RELIEF

The amended motion contains ten claims for relief alleging ineffective assistance of counsel; however, it specifically withdraws claims six and seven, leaving eight pending claims for resolution and disposition. Each claim is addressed herein below in the order presented in the amended motion. The claims are directed at "trial counsel." Although the motion does not identify trial counsel, the court file does, and the defendant called both Patricia Jenkins and Nicole Hardin to testify at the evidentiary hearing. Patricia Jenkins was the lead attorney. A copy of the entire evidentiary hearing transcript is attached.

"CLAIM 1: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ADEQUATELY REBUT THE STATE'S MEDICALLY UNSUPPORTABLE TESTIMONY"

Much of this claim is an improper attack on the sufficiency of the evidence for a conviction. Claims of insufficient evidence to sustain a conviction are an issue that could have and should have been raised on direct appeal, and is improperly raised in a motion for post conviction relief. *Smith v. State,* 445 So.2d 323, 325 (Fla. 1983); *Montana v. State,* 597 So.2d 334 (Fla. 1st DCA 1992). In fact, the Statement of Judicial Acts to be Reviewed (copy attached) filed with the Notice of Appeal in the instant case reflects the very first item for review on appeal is the sufficiency of the evidence in this case. This claim was rejected by the appellate court as indicated above.

Aside from the improperly raised arguments that the defendant was convicted on insufficient evidence, the crux of this claim is that counsel was ineffective because she failed to "adequately rebut the State's medically unsupportable testimony," counsel did an inadequate job of cross-examining the medical examiner who testified for the State (Dr. Wendy Lavezzi), counsel under utilized the expert witness she retained for the defense (Dr. Edward Willey), and counsel should have retained a forensic pathologist evaluate the victim's injuries. More specifically, counsel failed to obtain all forensic evidence necessary to prepare for cross-examination of Dr. Lavezzi, and for direct-examination of Dr. Willey; failed to properly rebut Dr. Lavezzi's testimony; failed to present empirical evidence as to a potential cause of the victim's head injury; failed to present evidence of other medical conditions that could have contributed to the victim's death, and failed to address "the constellation of non-fatal injuries" that the State used to establish the defendant's guilt. Also embedded in this claim is the allegation that trial counsel was ineffective because of a failure to rehabilitate the defense teams only other expert witness, Dr. John Lloyd, when he testified about the biomechanics of head trauma in a manner that was favorable to he State; however, Dr. Lloyd is specifically addressed in detail in claim four and is not addressed here. Each sub-claim, as set forth in the defendant's post hearing brief, is addressed separately below.

A. Failure to obtain evidence for cross-examination of Dr. Lavezzi and direct examination of Dr. Willey.

The defendant alleges trial counsel was ineffective for failure to obtain all histological slides reviewed by Dr. Lavezzi to make her determination of the cause and manner of death of the victim. The defendant alleges trial counsel obtained the slides containing the H & E stains, but failed to obtain the slides containing the iron stains and the BAPP (beta amyloid precursor protein) stains.

At the evidentiary hearing, Ms. Jenkins testified about her attempts to obtain the histological slides from the medical examiner's office. Ms. Jenkins testified: "we tried for months to get those slides." *See Evidentiary Hearing Transcript, page* 353. Ms. Jenkins explained that her legal assistant was responsible for getting the slides from the medical examiner's office and providing them to the defense experts. Her legal assistant was told the slides were lost or they did not exist. *Id.* at 353-54. Nonetheless, they continued to try to get the slides until Dr. Willey informed Ms. Jenkins that the slides "[were not] important, that it was really something that he rarely asked for." *Id.* at 354. Dr. Willey confirmed that he did not believe reviewing the BAPP stains to be important at the time of the defendant's trial. His testimony at the evidentiary hearing was:

Q. Now, as it relates to the BAPP stains themselves, no one prevented you from reviewing those stains, correct?

A. I didn't have them. I couldn't possibly have reviewed them. Nobody erected a barrier.

Q. Actually, isn't it true that you stated that you stated that you don't consider it important?

A. Well, at the time I didn't. That's right.

Q. That was reviewing the BAPP stains, you did not consider that important?

A. Yeah, I considered it almost irrelevant because both accidental trauma and inflicted trauma can produce exactly the same thing.

Q. Which is the crux of your testimony and the crux of the theory of defense in this case?

A. I don't know about the crux or not, but certainly that was stated.

Id. at 83-84. This claim is without merit.

B. Failure to properly rebut Dr. Lavezzi's testimony.

The defendant alleges trial counsel failed to rebut (1) Dr. Lavezzi's testimony that the victim's death was caused by 13 separate impacts; and (2) Dr. Lavezzi' s testimony that the impacts to the victim's head created rotational forces that tore the bridging

veins and sheared the axons of her brain. These claims are addressed separately.

1. Dr. Lavezzi's testimony regarding 13 separate impacts.

At trial Dr. Lavezzi testified that during her autopsy of the victim she identified subscalpular hemorrhages on the back of the victim's head. *See attached Trial Transcript, page* 766. Dr. Lavezzi testified that each subscalpular hemorrhage represented a separate point of impact. *Id.* The defendant argues trial counsel failed to properly cross-examine Dr. Lavezzi as to this testimony by failing to show that the hemorrhages did not represent separate impacts caused by blunt force trauma, that the hemorrhages were too small to be considered significant impacts, and that there was no basis to conclude that any impacts occurred at the same time.

However, during cross-examination, Ms. Jenkins questioned Dr. Lavezzi about each of these issues. First, Ms. Jenkins questioned Dr. Lavezzi about the victim's injuries, including the subgaleal hemorrhages, subdural hematomas, subarachnoid hemorrhage, and cerebral edema, and whether the injuries could have ben the result of oxygen deprivation rather than traumatic impacts. *Id.* at 811-13. Next, Ms. Jenkins questioned Dr. Lavezzi about the aging of the bruises and what the best means would be for determining when and where the bruises to the victim's body occurred. *Id.* at 815 & 830-32. Finally, Ms. Jenkins questioned Dr. Lavezzi

regarding the severity of the bruises and that some of the bruises were not deep, only 1/16th of an inch deep. *Id.* at 829-30.

The cross examination of Dr. Lavezzi by Ms. Jenkins was certainly within the parameters of the wide range of reasonable professional assistance. This claim is the kind of hindsight analysis that is inappropriate. *See Brown v. State,* 846 So.2d 1114 (Fla. 2003).

2. Dr. Lavezzi's testimony regarding tom bridging veins and sheared axons.

The defendant argues trial counsel should have shown that there was no basis for Dr. Lavezzi to conclude that impacts to the victim's head created rotational forces that tore the victim's bridging veins and sheared the axons in the brain. The defendant further claims trial counsel should have provided the BAPP stains to Dr. Willey, or a person more qualified, to analyze the BAPP stains to rebut Dr. Lavezzi's testimony regarding axonal injury.

On direct examination at trial, Dr. Willey explained to the jury axonal injuries and the difference between hypoxic ischemic injuries and traumatic axonal injuries. *See attached Trial Transcript, pages* 969-71. Dr. Willey testified that it is very difficult, if not impossible, to tell the difference between hypoxic ischemic injuries and traumatic axonal injuries. *Id.* at 970. He testified that the BAPP stains do not have much significance in making the determination between hypoxic ischemic injuries and

traumatic axonal injuries "because you can't distinguish those from—hypoxic encephalopathy from trauma." *Id.* at 971. Dr. Willey also discussed rotational or volitional injury. *Id.* at 972-74. Dr. Willey concluded that the victim's head injury could have been caused by an accidental fall while the hemorrhages could have been caused by an infection that caused disseminated intravascular coagulopathy. *Id.* at 974-75.

The argument regarding the BAPP stains is addressed above. In addition, both Dr. Ophoven, one of the defendant's post conviction experts, and Dr. Lavezzi testified at the evidentiary hearing that BAPP stains are not used much anymore. *Evidentiary Hearing Transcript, pages* 282 & 471.

The record is clear that the defendant's trial counsel presented evidence, through the testimony of Dr. Willey, that disagreed with Dr. Lavezzi's conclusions as to the victim's injuries. Trial counsel was not ineffective in this regard.

C. Failure to present empirical evidence as to a potential cause of the victim's head injury.

The defendant argues trial counsel should have presented epidemiological evidence that children can sustain fatal head injuries from short falls to rebut Dr. Lavezzi's trial testimony that the injuries sustained by the victim required significant force equivalent to a fall from a four-story building or a car accident.

At the evidentiary hearing, the defense presented testimony from Dr. Michael Freeman, a forensic epidemiologist. Dr. Freeman testified that he accessed information from U.S. hospital databases to evaluate the accuracy of Dr. Lavezzi's testimony. *See Evidentiary Hearing Transcript, pages* 168-70. Dr. Freeman searched the databases for injuries described as subdural hematoma in a child, aged one through five, without a skull fracture. *Id.* at 174. Dr. Freeman testified that "[c]hildren present with subdural hematoma in hospitals without fracture at almost the exact same rate as a result of a short fall as they do from intentional trauma." *Id.* at 175. However, children are four times more likely to die in the hospital due to intentional trauma than due to short falls. *Id.* at 176. Dr. Freeman did not include the presence of other bruising on the body as a search parameter because, according to him, Dr. Lavezzi did not state that bruises were impossible in a short fall. *Id.* at 177-78.

Dr. Freeman acknowledged on cross-examination that the databases he used were not designed for forensic use in criminal cases. He relied on the information as it was put into the database. There is no way to cross reference the information to determine if the information was imputed correctly. Nor is there a way to determine if the history given during the initial assessment was accurate. *See Evidentiary Hearing Transcript, page* 185.

However, Dr. Lavezzi did not testify that children cannot die from a short fall. She testified that, based on her review of the evidence and the constellation of

injuries suffered by the victim in this case, the victim did not die as a result of a short fall. Her testimony on direct-examination was:

> A. Well, children of this age, first of all, don't have enough body weight to generate enough mass to create these injuries. And, specifically, just talking about the head injury, which we really can't do because we have a constellation of a whole bunch of injuries, so we can't ignore those. But, you know, just talking about the head injury, children don't generally have enough mass to propel themselves hard enough, and certainly not in 13 different places, with a single fall to create that kind of injury inside of the head.
>
> Q. Okay. The 13 points of impact that you talked about on the head?
>
> A. Right, right.
>
> Q. What—how did the numerous bruises and injuries to the rest of her body contribute to you being able to say and rule out an accidental cause of death?
>
> A. Well, again, all of those injuries couldn't have happened in one fall, and I would have to know what exactly she fell on to create those linear bruises that looked like a cylindrical object. And I just wasn't getting a history consistent with these, this constellation of injuries.

Trial Transcript, pages 783-84. Dr. Lavezzi reiterated her position that the constellation of injuries suffered by the victim could not have occurred during a short fall.

> Q. It is your opinion that the only way the injuries that you observed on [the victim] could be accidental would be if [the victim] had fallen from a four-story building or been involved in a serious car accident. Is that right?
>
> A. I don't want to limit it to that, but it's something to that effect. So some serious mechanism. Certainly nothing that would occur during playing or falling in the house.
>
> Q. What data is there to show that a fall from a four story building would cause the type of injuries that you saw?
>
> A. There are, there are several papers written on lengths of fall in children. There are several that speak specifically with short falls and, by those papers, we know that children that suffer a short fall, meaning sort of less than that, two or three feet or even higher, ten feet generally, they may get a skull fracture. They may actually get a subdural hematoma, in some cases. But they certainly don't get the constellation of all of those injuries. It would be a single blow

> to the head and a single impact in the head injury. So those are not impossible, but they are very rare. Even children that fall out of a higher, higher stories, the studies that have shown they don't all get fatal injuries.

Id. at 803-04.

The court observes that Dr. Freeman's testimony would not have contradicted Dr. Lavezzi's conclusion that, given the constellation of injuries suffered by the victim, the victim did not die as a result of a short fall, and Dr. Freeman cannot confirm the accuracy of the information he relied upon for his testimony. Moreover, at trial, Dr. Willey addressed Dr. Lavezzi's conclusion that the victim did not die as a result of a short fall. Dr. Willey testified that he disagree with Dr. Lavezzi, and he believed the victim's death could have been caused by n accidental injury. Dr. Willey testified as follows:

> Q. And after review of all of the materials that you've indicated do you agree with her conclusion?
>
> A. Well, I can't disprove her conclusion, but I think that she omits the likelihood that this could actually be an accidental injury.
>
> Q. Okay. Well, why?
>
> A. Well, because I think that the injury could result in severe damage and death from a

short fall, whereas she dismisses that out of hand. She says it has to be from a four story window. Well, in all candor, falling out of a four story window onto a hard surface would totally shatter the skull, and damage the brain. That may be sufficient to cause injury or death, but that doesn't mean that that's what's required in every case. And it's common knowledge that people do get hurt from short falls. It's probably the most common reason for people to become disable and be admitted to nursing homes is a result of short falls.

Q. You just described a fall from a four story window. Was there anything in the material that you reviewed that would indicate to you that the injury suffered by [the victim] would be consistent with falling out of a four story window?

A. Oh, absolutely not. I think the damages would be so great that it would be readily apparent.

Q. And that's your opinion to a reasonable degree of medical certainty Doctor?

A. Yes, it is. I think that probably a general statement should be made, and that is the landing surface is very important. For example, if one jumps off a three meter board into a pool, there is no problem. If

> one jumps off a three meter pool—board, and misses the pool and lands on the deck, it's likely to be fatal.

See Trial Transcript, pages 959-61. This claim is without merit.

D. Failure to present evidence of other medical conditions that could have contributed to the victim's death.

The defendant argues trial counsel was ineffective for failure to present available evidence of other medical conditions that cold have caused or contributed to the victim's death. The defendant claims her trial counsel should have presented evidence as to the significance of the victim having (1) clotted blood in the dural sinuses, (2) sickled red blood cells, (3) pneumonia, and (4) clotting abnormalities.

1. Clotted Blood in the Dural Sinuses.

The defendant argues her trial counsel should have presented evidence that clotted blood in the dural sinuses could have caused or contributed to the victim's death. At the evidentiary hearing, the defense presented testimony from Dr. Janice Ophoven, a forensic pathologist, regarding the presence of clotted blood in the dural sinuses. According to Dr. Ophoven, clotted blood in the dural sinuses is evidence of cortical venous thrombosis. *See Evidentiary Hearing Transcript, page* 243. Dr. Ophoven testified that this is a major finding because it could "explain why a—what may appear to be a lesser impact could result in a fatal outcome." *Id.* at

249. Dr. Ophoven testified that cortical venous thrombosis can often be a mimic for what is characterized as abusive head trauma. Id. at 255.

Dr. Lavezzi testified at the evidentiary hearing that in her autopsy report she noted clotted blood in the dural sinuses. However, this was not a finding of a dural sinus thrombosis. She explained that a dural sinus thrombosis looks very different from the clotted blood in the dural sinuses that she found in the autopsy. She testified that had she found a thrombosis during autopsy, she would have taken sections and examined them under the microscope. *Evidentiary Hearing Transcript, pages* 439-41.

Ms. Jenkins testified at the evidentiary hearing that she did not remember specific discussions about these issues; however, if Dr. Willey would have told her the issues were important, she would have explored the issues further. *Id.* at 362, 63.

2. Sickled Red Blood Cells.

The defendant argues trial counsel should have presented evidence that the victim's sickled red blood cells could have caused or contributed to her death. At the evidentiary hearing, the defense presented testimony from Dr. Willey, which the defendant claims should have been presented at trial. Dr. Willy testified that, during his investigations in the instant case, he discovered the victim had sickled red blood cells. On May 7, 2012, Dr. Willey wrote a letter to Ms. Jenkins wherein he advised Ms. Jenkins of the sickled red blood cells. *See Evidentiary Hearing Transcript,*

pages 47-49. He testified that he believed the sickled red blood cells could have been a contributing factor to the victim's death because "[i]t would decrease the capillary circulation, which is necessary for proper oxygenization of the nervous system," and the autopsy showed signs of hypoxic ischemic and encephalopathy. *Id.* at 50-51. Dr. Willey testified that he does not remember having any discussions with Ms. Jenkins regarding the sickled red blood cells but, "in retrospect," he believes the issue should have been addressed at trial as a potential contributing factor to the victim's death. *Id.* at 51.

At the evidentiary hearing Ms. Jenkins explained that, while investigating the case, she would make a list of all issues she wanted to discuss with Dr. Willey to determine whether any of those issues were important. *Id.* at 342. Dr. Willey would also identify issues through his own investigation that he believed to be important. *Id.* at 324-25. Ms. Jenkins testified that, had Dr. Willey not advised her about sickled red blood cells, she would have specifically asked him about the issue. *Id.* at 359-60. Then, if Dr. Willey advised her it was not an important issue, she would not have questioned Dr. Lavezzi about the sickled red blood cells. *Id.* at 360. Ms. Jenkins relied upon Dr. Willey to advise her as to which medical issues were important so she could question Dr. Lavezzi about those issues. *Id.* at 362-63.

Dr. Willey's belief that now, in hindsight, that he should have addressed the victim's sickled red blood cells at trial is another inappropriate hindsight analysis.

3. Pneumonia.

The defendant argues trial counsel should have presented evidence that pneumonia could have caused or contributed to the victim's death. Trial counsel did. Dr. Willey testified that the victim suffered from pneumonia, and that the victim had an abnormal clotting mechanism called disseminated intravascular coagulopathy, or DIC. *See Trial Transcript, page* 961. Dr. Willey testified that DIC is caused by an infection, and the medical records establish that the victim had an infection or pneumonia. *Id.* at 961-62 & 981. The medical records from Munroe Regional Medical Center indicated the victim had a high white blood count and infiltrates in the upper lobe of the left lung. The medical records from Shands Hospital indicated that the victim's white blood count was dropping from what it was while at Munroe Regional Medical Center and were of an unusual type. Dr. Willey testified that these records are consistent with the victim having pneumonia, and that the autopsy indicated the victim had pneumonia. *Id.* at 961-62. This claim is without merit.

4. Clotting Abnormalities.

The defendant argues her trial counsel should have presented evidence that clotting abnormalities could have caused or contributed to the victim's death. Trial counsel did. As discussed above, Dr. Willey testified that the victim had a clotting abnormality called DIC, likely caused by pneumonia. Dr. Willey testified that people with this medical condition can

spontaneously bruise with little or no trauma. He explained that DIC is an inflammatory process that excites clotting in the bloodstream and breaks down fibrinogen, the substance in the blood necessary for clotting. *Id.* at 961-63. This claim is without merit.

E. Failure to address "constellation of non-fatal injuries" that the State used to establish the defendant's guilt.

The defendant argues trial counsel failed to present evidence of alternative explanations for the victim's injuries and failed to effectively cross-examine Dr. Lavezzi regarding alternative explanations for the injuries. The defendant claims trial counsel should have offered alternative explanations for the victim's injuries, including the victim's head-banging, roughhousing by the children in the defendant's home, the victim's fall on the porch, the victim's brother striking the victim in the back while swinging, and intentional conduct by the defendant's husband, Joe Ray. Trial counsel did present this evidence, except as to Mr. Ray, and except as to the head-banging, both of which were strategic decisions that were reasonable under the circumstances.

At trial, the defendant's mother, Janette Hamblen, testified about roughhousing between the children in the home. She testified that the children had lots of toys and played together outside frequently. The kids played pirates with swords or sticks, and there was "a lot of roughhousing" in the house. *See Trial Transcript, pages* 497-98.

Trial counsel also questioned Joe Ray about the victim's fall in the bathtub and a swinging incident between the victim and her brother. Mr. Ray testified that on the night of December 5, 2008, the victim had one scrape on her forehead from when she fell on the porch and bruises on her back from a few days before when she walked in front of her brother on the swing and was kicked in the lower right back and side. *Id.* at 566-67. Mr. Ray also testified that on December 4, 2008, the victim had fallen on toys while taking a bath. Id. at 575-76.

During cross-examination of Dr. Lavezzi, Ms. Jenkins questioned Dr. Lavezzi about the possibility that the injuries on the victim's body could have been caused by something other than intentional abuse. Ms. Jenkins first questioned Dr. Lavezzi about whether the victim falling in the bathtub on toys could have caused the bruises on the victim's body. *Id.* at 798-99. Ms. Jenkins next asked Dr. Lavezzi about the possibility that the victim's injuries could have been caused by roughhousing between the children, including hitting each other with swords. Dr. Lavezzi admitted that the bruising could have been caused by the children if they were adult-sized children. *Id.* at 817. Ms. Jenkins questioned Dr. Lavezzi about the possibility that spanking caused the bruising on the victim's buttocks. *Id.* at 819.

The defendant claims that trial counsel should have presented evidence of intentional conduct by Mr. Ray, which could have caused or contributed to the victim's death. As discussed below in the resolution of claim 3, trial counsel discussed the possibility of

presenting evidence of a third-party perpetrator, specifically, Mr. Ray. However, the defendant insisted that the attorneys not present any evidence that Mr. Ray could have inflicted the injuries on the victim. In addition, such evidence was contrary to their trial strategy, which was to present evidence that the victim's death was accidental, which is a reasonable trial strategy. *See Evidentiary Hearing Transcript, pages* 362-62 & 368.

At the evidentiary hearing the defense presented the testimony of Christina Montgomery, Carmen Belcher, and Ellen Costello concerning the victim's history of head-banging. Ms. Montgomery testified about an incident in the children's nursery at church where the victim was banging her head on the door. There was no injury to the victim. *Id.* at 92-94 & 98. Ms. Belcher testified that the victim would run into the wall "and stuff like that" if she would get upset and want attention. There were no injuries to the victim as a result. *Id.* at 109. Ms. Costello, the victim's aunt, testified about an incident on Thanksgiving Day in 2008 where she saw the victim bang the back of her head against the wall. Again, the victim was not hurt or injured. *Id.* at 306,312.

Both Ms. Jenkins and Ms. Hardin testified that the defense team was aware the victim had a history of head-banging. It was investigated and considered as an alternative explanation for the bruising on the victim's head. *Id.* at 352-53 & 488, 490. Although neither Ms. Jenkins nor Ms. Hardin now remember the reason the head-banging was not addressed at trial, both believe the defense team made a strategic

decision not to address the head-banging after consultation amongst the defense team and the defense expert witnesses. *Id.* at 352-53 & 505-06. Ms. Hardin testified that she believed the defense team may have thought the testimony regarding the victim's head-banging may have conflicted with Dr. Lloyds's testimony. *Id.* at 510.

"Strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Occhicone v. State,* 768 So.2d 1037, 1048 (Fla. 2000), *Rutherford v. State,* 727 So.2d 216, 223 (Fla. 1998), *State v. Bolender,* 503 So.2d 1247, 1250 (Fla. 1987), *Pardo v. State,* 941 So.2d 1057, 1070-1071 (Fla. 2006) and *Franqui v. State,* 965 So.2d 22 (Fla. 2007).

As for the allegation that trial counsel was ineffective because of a failure to rehabilitate Dr. John Lloyd when he testified about the biomechanics of head trauma, Dr. Lloyd is addressed in claim four below.

"CLAIM 2: TRIAL COUNSEL WAS INEFFECTNE FOR FAILING TO INVESTIGATE AND PRESENT EVIDENCE OF AN ALTERNATIVE TIME LINE"

In this claim the defendant argues that trial counsel was ineffective because counsel conceded to the accuracy of the State's timeline of events by failing to rebut the State's timeline with an alternative timeline. Specifically, the defendant argues trial counsel should have presented evidence

of the victims fall in the bathtub on December 4, 2008, and a second fall on December 5, 2008. The defendant argues that by failing to present an alternative timeline they excluded other contributing factors to the victim's head injury that could not have ben blamed on the defendant.

However, evidence was presented at trial that the victim fell in the bathtub prior to the fall on December 5, 2008. The defendant's husband, Joe Ray, testified that on December 4, 2008, while she had been in the bathtub, the victim slipped and fell on some toys. *See Trial Transcript, pages* 575-76. Later during the trial the defendant's statement to Detective Stroup was introduced. In the statement the defendant informed Detective Stroup that the victim had fallen on toys while in the shower on December 4, 2008. *Id.* at 717. Though not phrased by trial counsel as a "timeline," the record is clear that the jury was presented with evidence of two separate falls—one on December 4, 2008, and the other on December 5, 2008.

Moreover, the theory that a prior fall contributed to the death of the victim is not medically supported. At the evidentiary hearing, Dr. Willey testified about the injuries sustained by the victim. Dr. Willey testified that the head injuries that caused the death of the victim occurred the night of the incident. *See Evidentiary Hearing Transcript, page* 79. Dr. Lavezzi also testified that, during the autopsy of the victim, she saw no evidence of old blood or of a prior serious head trauma. Dr. Lavezzi explained that, with children, any blood on the brain, which could be caused by an injury to the brain, would be

symptomatic. "So you're going to have a kid that has, you know, loss of consciousness or decrease in consciousness with any blood on the brain." *Id.* at 480-81.

Trial counsel's performance was not deficient, the defendant was not prejudiced, and this claim is without merit.

"CLAIM 3: INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO PRESENT REVERSE *WILLIAMS* RULE EVIDENCE OF A THIRD-PARTY PERPETRATOR"

In this claim the defendant argues trial counsel was ineffective for failing to establish the theory of a perpetrator other than the defendant being responsible for the victim's death; specifically, Joe Ray, the defendant's husband.

At the evidentiary hearing, Ms. Jenkins testified that, after consulting with the attorneys and the experts on the defense team, the defense presented a theory that the injuries that led to the death of the victim were caused by an accidental fall rather than intentional abuse. She testified that evidence of a third-party perpetrator would have been inconsistent with the defense theory, which could have undermined their defense theory and strategy. In addition, Ms. Jenkins testified that there was no evidence of any third-party perpetrator causing the death of the victim and "we weren't going to make that up." *See Evidentiary Hearing Transcript, page* 361.

Moreover, Ms. Jenkins testified that the attorneys specifically discussed the possibility of presenting evidence that Mr. Ray caused the death of the victim. However, the defendant "insisted that we not do it." *Id.* at 361-62. The defense was "forbidden very strenuously to put on any evidence of Joe Ray inflicting any injury on that child." *Id.* at 368. The defendant did not testify at the evidentiary hearing, and this testimony was otherwise uncontroverted at the evidentiary hearing. The defendant should not be heard to complain now for action she insisted upon at trial. Counsel is not ineffective where deficiencies in the investigation are attributable to an uncooperative defendant, or where counsels reasonable efforts were significantly hampered by the failure of the defendant and the defendant's family to participate in the process or provide information. A defendant's lack of cooperation or decision not to call witnesses does not constitute ineffective assistance of counsel. *See Rodriguez v. State,* 919 So.2d 1252 (Fla. 2005) and *Thomas v. State,* 838 So.2d 535 (Fla. 2005). That being said, this claim is otherwise without merit.

"CLAIM 4: INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO ADEQUATELY INVESTIGATE DR. LLOYD'S EXPERTISE AND METHODS"

The defendant argues in this claim that trial counsel was ineffective for failing to adequately investigate the qualifications of her own expert witness, Dr. Lloyd, and that she was ineffective for offering Dr. Lloyd's testimony at all.

The defense called Dr. Lloyd at trial to testify as an expert in the field of ergonomics and biomechanics. Dr. Lloyd received his Bachelor of Science in Ergonomics from Loughborough University in 1992, and his Ph.D. in Ergonomics from Loughborough University in 2002. He is board certified in the field of Professional Ergonomics, a member of the Institute of Ergonomics and Human Factors, and has a certification as a brain injury specialist. At the time of the trial, Dr. Lloyd was the Director of the Traumatic Brain Injury Research Program at the Veteran's Affairs Hospital in Tampa, was an Assistant Professor in the College of Engineering in the Department of Chemical and Biomedical Engineering at the University of South Florida, and a professor in the College of Medicine in the Department of Pathology and Cell Biology at the University of South Florida. Dr. Lloyd had consulted on 40 criminal cases and had published 23 papers in peer-reviewed journals. The trial court found Dr. Lloyd qualified as an expert in the areas of ergonomics and biomechanics. *See Trial Transcript, pages* 997-1010.

Dr. Lloyd testified that he became involved in the defendant's case after giving a presentation on the biomechanics of head trauma at a Public Defender's Association meeting. He was approached at the meeting by Ms. Jenkins and thereafter became involved in the case. Dr. Lloyd was asked to investigate the biomechanics of the victim's head trauma to determine whether the claimed cause of injury could have caused the brain injury suffered by the victim. He reviewed Dr. Lavezzi's autopsy report,

the police reports, the victim's medical records, interviews of the people associated with the case, and photographs and a sketch of where the fall was alleged to have occurred. After reviewing all of the materials provided, Dr. Lloyd designed an experiment to show the jury how the victim could have suffered the injuries during the fall. *Id.* at 1010-12.

During the experiment Dr. Lloyd used a CRABI 12. He explained that while the CRABI was originally developed to examine air bag interaction, the mannequins have since been used in other impact tests, such as falls. Dr. Lloyd used the exact chair from the defendant's kitchen, placed the mannequin on its knees for one test and on its feet for the other test, and then dropped the mannequin onto a tile over concrete floor, the same floor as in the defendant's kitchen. *Id.* at 1013-21. During the experiment, Dr. Lloyd found the location of the fall of the mannequin to be consistent with the injuries sustained by the victim. He testified that the injury sustained by the victim is consistent with an accidental fall and is not consistent with intentional impact. *Id.* at 1021-27.

Dr. Lloyd's hypothetical experiment was to support the defense theory that the injuries sustained by the victim were caused by an accidental fall and not intentional abuse. The defendant argues now that the experiment had many weaknesses and, because of those weaknesses, trial counsel should have called a different expert to testify at trial. However, the fact that the State was able to expose some of the weaknesses in the experiment does not mean that

trial counsel was ineffective for calling Dr. Lloyd to support their theory of defense.

"A defendant is 'not entitled to perfect or error-free counsel, only to reasonably effective counsel.'" *Yarbrough v. State,* 871 So.2d 1026 (Fla. 1st DCA 2004) (quoting *Waterhouse v. State,* 522 So.2d 341, 343 (Fla. 1988)). The test when assessing the actions of trial counsel is not how, in hindsight, present counsel would have proceeded. *Bradley v. State,* 33 So.3d 664, 671 (Fla. 2010). When examining counsel's performance, an objective standard of reasonableness applies, and great deference is given to counsel's performance. There is a strong presumption that trial counsel's performance was not ineffective. *Id.* The defendant has failed to overcome that presumption. The defendant is not entitled to relief on this claim.

CLAIM 5: INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO ENGAGE PROPER EXPERTS"

The crux of this claim is that trial counsel was ineffective for not retaining the proper experts at trial. The defendant argues that trial counsel should have retained a forensic pathologist with specialized expertise in pediatric head trauma, a neuropathologist, and a forensic epidemiologist.

At trial the defense called two expert witnesses, Dr. Willey and Dr. Lloyd. Dr. Willey is a forensic pathologist. *See Trial Transcript, page* 948. Dr. Willey attended the University of Michigan for undergraduate school and medical school. After

medical school, Dr. Willey trained in pathology at the University of Michigan and at Duke University. He is board certified in anatomical pathology. Following his schooling and training, Dr. Willey worked as a part-time medial examiner in Jacksonville for four years. After that he began consulting as a forensic pathologist part time for 45 years, and full time for the past 25 years. *See Id.* at 949. Dr. Willey has testified as an expert in the field of pathology in every metropolitan area, and many of the rural areas, in the State of Florida, in federal district court, and in many other states. *Id.* at 950. Dr. Willey has conducted well over 2,000 autopsies in his career, including on children. *Id.* at 952.

The trial court found both Dr. Willey and Dr. Lloyd to be qualified to testify as an expert. *Id.* at 951 & 1010. Dr. Willey testified that, after reviewing the records provided, he disagreed with Dr. Lavezzi's opinion and believed the victim's injuries and resulting death were accidental. *Id.* at 958-81. Dr. Willey testified that a bruise is different than a hemorrhage and that a hemorrhage does not signify trauma. He explained that spontaneous bleeding can occur, like he believes occurred here, which can then cause spontaneous hemorrhages or spontaneous bruises. *Id.* at 967-68. He testified that the victim suffered from an abnormal clotting mechanism, DIC, that was caused by the victim having pneumonia. *Id.* at 961-63. Dr. Willey explained axonal injuries, the difference between hypoxic ischemic axonal injuries and traumatic axonal injuries, and why he believes the victim suffered from hypoxic ischemic axonal injuries. *Id.* at 969-75.

Dr. Lloyd's background and qualifications are set forth above in connection with claim four. Dr. Lloyd testified that the results of the experiment he conducted demonstrated that the injury sustained by the victim is consistent with an accidental fall and is not consistent with intentional impact. *Id.* at 1021-27.

The defendant argues her trial counsel should have consulted a forensic pathologist with specialized expertise cases involving pediatric head trauma. At the evidentiary hearing, the defendant presented Dr. Ophoven as a forensic pathologist with such an expertise. The defendant argues that Dr. Ophoven, unlike Dr. Willey, would have been able to explain to the jury (1) additional causes of subgaleal hemorrhages; (2) why characterizing a hemorrhage as an "impact" is medically unsupportable; (3) how Dr. Lavezzi's conclusion that the subdural bleeding was caused by torn bridging veins was unfounded; and (4) how additional conditions that the victim suffered (including dural venous sinus thrombosis, sickled red blood cells, pneumonia, and clotting abnormalities) could have contributed to her death.

As discussed above, Dr. Willey testified to many of the things Dr. Ophoven testified to at the evidentiary hearing. *See Trial Transcript, pages* 959-81. Moreover, Dr. Ophoven testified that she was familiar with Dr. Willey and had reviewed his testimony from the defendant's trial. *See Evidentiary Hearing Transcript, pages* 292-93. Dr. Ophoven agreed that Dr. Willey testified consistently with her findings on many of the issues in the case; mainly, that hypoxic ischemic injury is a reasonable

explanation for the victim's cause of death; that the victim suffered from pneumonia at the time of her injuries; that the victim had problems with blood coagulation; that bruises could appear from spontaneous bleeding; that the administration of heparin could have effects on the victims body; that the victim had more blood present during he autopsy than the initial CT scans at Munroe Regional Medical Center; that a person could experience a period of lucidity after a head injury; and that Dr. Lavezzi's testimony regarding the victim's injuries being caused by a fourth-story fall is flawed. *Id.* at 293-96.

The fact that the defendant has found an expert, Dr. Ophoven, who will testify to information in addition to that testified to by Dr. Willey to rebut the State's evidence against the defendant does not establish that Dr. Willey's testimony was insufficient, or that trial counsel was ineffective for failing to consult additional experts. Trial counsel cannot be considered ineffective merely because the defendant has secured the testimony of a more favorable expert in post conviction proceedings. *See Gaskin v. State,* 822 So.2d 1243 (Fla. 2002); *Asay v. State,* 769 So2d 974 (Fla. 2000); *Davis v. Singletary,* 119 F.3d 1471 (11th Cir. 1997). The mere fact that a defendant is able to secure an expert with a differing opinion than experts presented at trial does not demonstrate that the initial experts' evaluations were insufficient. *Nixon v. State,* 932 So.2d 1009 (Fla. 2006).

The defendant also argues that her trial counsel should have consulted a neuropathologist. At the evidentiary hearing, the defendant presented Dr.

Auer as a neuropathologist. The defendant argues that Dr. Auer could have evaluated the BAPP stains relied upon by Dr. Lavezzi and explain why the stains show hypoxic ischemic axonal injury rather than traumatic axonal injury. As discussed above, Dr. Willey testified at the defendant's trial regarding axonal injuries and the difference between hypoxic ischemic injuries and traumatic axonal injuries. Dr. Willey testified the injuries suffered by the victim could have been caused by hypoxic ischemic axonal injury. He testified that it is very difficult, if not impossible, to tell the difference between hypoxic ischemic injuries and traumatic axonal injuries, and BAPP stains do not have much significance "because you can't distinguish those from—hypoxic ischemic encephalopathy from trauma." *See Trial Transcript, pages* 969-71. For the reasons and on the authorities cited above regarding the testimony of Dr. Ophoven, trial counsel was not ineffective for not calling Dr. Auer, who would have offered substantially the same testimony as did Dr. Willey.

The defendant also argues her trial counsel should have consulted a forensic epidemiologist. At the evidentiary hearing, the defendant presented testimony from Dr. Michael Freeman, a forensic epidemiologist. Dr. Freeman had accessed information from U.S. hospital databases searching for injuries described as a subdural hematoma in a child, aged one through 5, without a skull fracture that was caused during a short fall and during intentional trauma. *See Evidentiary Hearing Transcript, pages* 168-74. Dr. Freeman testified that the results indicate that children present with

subdural hematoma without fracture from a short fall at about the same rate as from intentional trauma. *Id.* at 175. However, children are four times more likely to die due to intentional trauma than due to short falls. *Id.* at 176. Dr. Freeman did not include the presence of other bruising on the body as a search parameter because, according to Dr. Freeman, Dr. Lavezzi did not state that bruises were impossible in a short fall. *Id.* at 177-78. The defendant argues that Dr. Freeman could have testified to this information at trial to show that the injuries suffered by the victim could have resulted from an accidental short fall in contradiction to Dr. Lavezzi's testimony that the injuries could have only resulted from intentional abuse, a car crash, or a fall from a fourth-story window.

As mentioned above, Dr. Freeman utilized databases that were not designed for forensic use in criminal cases, and he had to rely on the information as it was put into the database. There is no way to cross reference the information to determine if the information was imputed correctly, nor is there a way to determine if the history given during the initial assessment was accurate. *See Evidentiary Hearing Transcript, page* 185.

As discussed above, the fact that the defendant has been able to secure additional experts to testify to information in addition to that which was presented at trial does not demonstrate that the information presented at trial was insufficient, or that trial counsel was ineffective for not calling additional experts. The presentation of changed opinions and

additional mitigating evidence in the post conviction proceeding does not establish ineffective assistance of counsel. *Hodges v. State,* 885 So.2d 338 (Fla. 2003); *Gaskin v. State,* 822 so.2d 1243, 1250 (Fla. 2002); *Asay v. State*, 769 So.2d 974, 896 (Fla. 2000); *Davis v. Singletary,* 119 F.3d 1471, 1475 (11th Cir. 1997) ruling that the "mere fact a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial."; *Rose v. State,* 617 So.2d 291, 295 (Fla. 1993) "[t]he fact that Rose has now obtained a mental health expert whose diagnosis differs from that of the defense's trial expert does not establish that the original evaluation was insufficient."; *Provenzano v. Dugger,* 561 So.2d 541, 546 (Fla. 1990) holding prejudice was not demonstrated where mental health testimony would have been largely repetitive; also, fact that defendant had secured an expert who could offer more favorable testimony based upon additional background information not provided to the original mental health expert was an insufficient basis for relief. Presenting, at an evidentiary hearing, testimony of experts that is inconsistent with the opinion of an expert retained by trial counsel does not rise to the level of prejudice necessary to warrant relief under the prejudice prong of the *Strickland* standard. *Dufour v. State,* 905 So.2d 42 (Fla. 2005). The defendant is not entitled to relief on this claim.

"CLAIM 6: INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO CONDUCT A PSYCHOLOGICAL EVALUATION AND MOVE FOR A COMPETENCY HEARING DURING TRIAL

AND ADVISING VIOLET TO STOP TAKING HER PRESCRIBED ANTIDEPRESSANT MEDICATION PRIOR TO TRIAL"

THIS CLAIM WAS WITHDRAWN BY THE DEFENDANT

"CLAIM 7: INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO PROPERLY COUNSEL VIOLET AS TO WHETHER TO TESTIFY AT TRIAL, OR, IN THE ALTERNATIVE, FOR FAILURE TO CALL VIOLET AS A WITNESS"

THIS CLAIM WAS WITHDRAWN BY THE DEFENDANT

"CLAIM 8: INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO REBUT THE INTENT ELEMENT OF THE AGGRAVATED CHILD ABUSE CHARGE WITH EVIDENCE OF VIOLET'S CHARACTER FOR NON-VIOLENCE"

In this claim the defendant argues trial counsel was ineffective for inadequately addressing the State's lack of proof of the element of intent as to the aggravated child abuse, and for failing to offer evidence of the defendant's peaceful and non-violent character to rebut the inferences by the State of the defendant's intent.

At the evidentiary hearing the defendant presented the testimony of fives witnesses to establish the defendant's reputation in the community for peacefulness. Those witnesses were: Christina Montgomery, Carmen Belcher, Pat Caren,

Carrie Kinsey, and Misty Hamblen. Each of these witnesses testified that they were familiar with the defendant and believed her to be a kind person and a loving mother, and all were available and willing to testify at trial. *See Evidentiary Hearing Transcript, pages* 92, 96, 104-05, 108, 123, 128-31, 132-33, 139-41, & 142.

However, trial counsel did present evidence at trial that the defendant was a loving mother and was good with children. The defendant's mother testified at trial on this matter as follows:

Q. Is it fair to say that Violet called you for a lot of advice and opinions when she was raising these children?

A. Violet knew children. She loved children. She was good with children. Sure, she would call when she was concerned about stuff, but she didn't say, mom, I need this, mom, I need that, I don't know what to do with that. That wasn't the way it was.

Q. And you said you have nine children?

A. Yes mam.

Q. You raised nine children?

A. Yes mam.

Q. Did Violet help out with her siblings when she was growing up?

A. Yes mam. Violet is the oldest of nine children and every—in the evening when I was cooking supper, I always gave her her choice, I said, Violet, do you want to help me in the kitchen or would you want to watch the little kids and she always chose to watch the kids.

Q. Did any of those children have special needs?

A. Yes, my daughter, Dawn. She died eight years ago. She had Down Syndrome.

Q. And Violet spend a lot of time taking care of her?

A. She as—yes. Yes.

See Trial Transcript, pages 505-06.

Evidence that the defendant was not a violent person and did not like to spank her children was also presented at trial. The State introduced the defendant's audiotaped statement to Detective Stroup, wherein the defendant stated she did not like to spank her children, and that when she did spank the victim on an occasion for pulling her sister's hair, she regretted it. She stated that she should not have done it because she doesn't like to do that to her kids. *See Trial Transcript, pages* 717-19.

The testimony of the five witnesses presented by the defense at the evidentiary hearing would have been cumulative. It is not ineffective assistance when counsel fails to present evidence that is merely cumulative to evidence already presented. *See*

Henyard v. State, 883 So.2d 753 (Fla. 2004); *Gudinas v. State,* 816 So.2d 1095, 1105-06 (Fla. 2002). Moreover, Ms. Hardin testified at the evidentiary hearing that she, Ms. Jenkins, and Mr. Woodard discussed whether to call the character witnesses. After discussing the matter, the attorneys agreed not to call the character witnesses because they "thought that would allow the State to, perhaps, back-door in testimony that we did not want in the trial," specifically as it related to Christian Ray. *See Evidentiary Hearing Transcript, pages* 506-07. Christian Ray was the oldest of the children the defendant and her husband adopted.

The decision to not call the character witnesses was clearly a strategic decision by trial counsel. "Strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Occhicone v. State,* 768 So.2d 1037, 1048 (Fla. 2000), *Rutherford v. State,* 727 So.2d 216, 223 (Fla. 1998), *State v. Bolender,* 503 So.2d 1247, 1250 (Fla. 1987), *Pardo v. State,* 941 So.2d 1057, 1070-1071 (Fla 2006) and *Franqui v. State,* 965 So.2d 22 (Fla. 2007). The court finds the decision of trial counsel in this case to not call the cumulative witnesses was reasonable, especially in light of the fact that they considered it as a team, and ruled in out because of potential harmful consequences. Based upon the testimony that was presented, and the other evidence presented in the case, it is mere speculation that the testimony of these character witnesses, if allowed, would have had any effect on the trial at all.

CLAIM 9: INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO PURSUE AN OBJECTION AND/OR MOTION FOR MISTRIAL BASED ON UNDULY PREJUDICIAL 'VICTIMS OF VIOLENT CRIMES' BOARD"

On the wall outside the State Attorney's Office, on the fifth floor of the Marion County Judicial Center, is displayed an array of photographs of persons identified by the State Attorney's Office as victims of violent crimes. During the time of the trial in this case, a photograph of the victim was included in the display. The courtroom where the trial was being conducted was nearby. The defendant argues that it was possible for jurors to walk by the display and see the photograph of the victim, and recognize her from the photographs of the victim introduced by the State at trial. The defendant argues that trial counsel was ineffective for failing to adequately pursue objections to the photographic display, and did not move to have the jurors questioned about whether any of them had seen and been affected by the photograph of the victim in the display, and potentially move for a mistrial.

The record shows that after the lunch recess on May 15, 2012, the first day evidence was presented at trial, the issue was addressed by trial counsel. Ms. Jenkins informed the trial judge that there was a victim's memorial board around the area the jurors had access to, and argued that the board was prejudicial to the defendant. Ms. Jenkins asked that the jurors be instructed not to go near the area where the board was located. After some discussion it was determined that the board contained the photographs

of many people, the victim's photograph was placed on the board weeks prior to trial, and the board was located near the eastern elevators. The jurors were using the centrally located elevators. The court pointed out that the victim's memorial board was a big board and the jurors had not seen the victim's photograph yet, so if any juror had already seen the board, it would be meaningless to them. The court informed both the defense and the State that the jurors would be asked to use the central elevators in the future, and not the eastern elevators, so there would be no possibility of seeing the victim's photograph on the memorial board. *See Trial Transcript, pages* 555-57.

The victim's memorial board was again addressed on May 17, 2012, when the court allowed the jurors to walk around the courthouse during a lunch break. *Id.* at 940. The court instructed the jurors to use the central elevators if they walked around the courthouse. The court explained to the jurors that they were not to use the eastern elevators because those elevators were by the Office of the State Attorney, and the court did not want there to be any conflict. *Id.* at 941.

Although not through formal objection or motion for mistrial, trial counsel addressed the issue with the trial judge, and made clear their concerns about prejudice to the defendant. The court took precautions to prevent any prejudice from occurring. The defendant has not alleged, nor did the defendant offer up any evidence that any juror actually saw the victim's photograph on the victim's memorial board,

or that the board itself was even seen by any juror. There is nothing in the record to establish that the victim's memorial board, or the victim's photograph was seen by any juror. In *Reynolds v. state,* 99 So.3d 459, 492 (Fla. 2012), the court held that counsel was not deficient in failing to request an interview with the jurors where the defendant failed to allege that jurors actually saw a victim's memorial board outside the courtroom. This claim is without merit.

"CLAIM 10: INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO OBJECT TO THE UNDULY PREJUDICIAL PHOTOGRAPHS SHOWN TO THE JURY AT TRIAL"

Post conviction counsel has determined that the photographs admitted in evidence at trial by the State were inadmissible as unduly prejudicial, cumulative, and graphic, and that trial counsel was ineffective for allowing the photographs to come into evidence without objection.

Autopsy photographs are admissible in evidence when they are offered "to explain a medical examiner's testimony, the manner of death, the location of the wounds, or to demonstrate the heinous, atrocious, or cruel (HAC) factor." *McWalters v. State,* 36 So.3d 613 (Fla. 2010). Further, it has been held that "[a]utopsy photographs are relevant to show the manner of death, location of wounds, to identify the victim, and to assist the medical examiner. *Jones v. Moore,* 794 So.2d 579, 587 (Fla. 2001).

Prior to Dr. Lavezzi testifying at trial there was a discussion between Ms. Jenkins, Ms. Berndt, and the court regarding the autopsy photographs the State sought to introduce in evidence. *See Trial Transcript, pages* 736-38, 741-43. Ms. Jenkins reviewed all of the photographs Ms. Berndt intended to introduce in evidence, and Ms. Berndt explained to the court and to Ms. Jenkins the reason for each photograph. Ms. Jenkins advised the court that the photographs showed distinct injuries and were not repetitious; therefore, she would not be objecting to any of the photographs. *Id.* at 741-42. During Dr. Lavezzi's direct examination, the State introduced 19 of the 120 photographs from the autopsy of the victim. Dr. Lavezzi testified at the evidentiary hearing that each of the photographs introduced at trial was necessary for her to explain the extent of the injuries to the victim. *Evidentiary Hearing Transcript, pages* 436-37.

The test for admissibility of photographic evidence is relevance, not necessity. See, for example, *Mansfield v. State,* 758 So.2d 636 (Fla. 2000), where the Court held that photographs depicting the mutilation of the victim's genitalia and the autopsy of the victim's brain were relevant as to the manner of death; and *Henderson v. State,* 463 So2d 196, 200 (Fla. 1985), where the Court held that photographs of partially decomposed bodies were relevant to show the location of the bodies, the amount of time lapse between the murders and when the bodies were found, and the manner in which the victims were clothed, bound, and gagged.

Relevant evidence is admissible unless its probative value is substantially outweighed by the danger of unfair prejudice to the defendant, it creates confusion of the issues, it is misleading to the jurors, or it is needless presentation of cumulative evidence. *See Fla. Stat. s.* 90.403. The defendant has failed to establish that any of these prohibitions is present in this case such as to warrant exclusion of the photographs offered and received in evidence at trial, or to warrant an objection to the photographs for any of these reasons. The defendant's argument that the photographs do not depict how the victim appeared after she collapsed on the floor is misplaced. The photographs were not offered to show how the victim appeared when she collapsed on the floor. They were offered to assist the medical examiner in her testimony and her explanations of the extent of the victim's injuries. *Evidentiary Hearing Transcript,* pages 436-37.

Failure to raise merit-less claims does not constitute ineffective assistance of counsel. *Franqui v. State,* 965 So.2d 22 (Fla. 2007). Counsel cannot be ineffective for failing to file a motion which would have been properly denied. *Branch v. State,* 952 So.2d 970 (Fla. 2006), *Whitted v. State,* 992 So.2d 352 (Fla. 4th DCA 2008), *Peterson v. State,* 154 So.3d 275 (Fla. 2014).

This claim is without merit.

CONCLUSION

The defendant has failed to satisfy both the performance and prejudice prongs of the *Strickland* standard, and has failed to show a reasonable probability that, but for counsel's alleged errors, the defendant would not have been found guilty at trial. *Strickland, supra, at* 687. Mere conclusory allegations are insufficient to meet this burden. *Kennedy v. State,* 547 So.2d 912, 913 (Fla. 1989).

The defendant has not shown that counsel's performance was deficient, or that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. The defendant has not shown that her counsel's 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 resulted from a breakdown in the adversary process that rendered the result unreliable. *Strickland v. Washington, supra.*

Missing from the defendant's presentation is any evidence that no reasonably competent attorney would have made the same decisions as trial counsel in this case. Post conviction counsel for the defendant established that trial counsel did not handle the case in the same manner as would post conviction counsel have handled it. "Counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions." *Occhicone v.*

State, 768 So.2d 1037, 1048, (Fla. 2000). The defendant is not entitled to a perfect trial; rather, she is entitled to a fair trial. The fact that she did not utilize the experts chosen by post conviction counsel does not make the trial unfair when the experts that were utilized at trial accomplished substantially the same objective as the post conviction experts suggested.

"An attorney can almost always be second-guessed for not doing more. However, this is not the standard by which counsel's performance is to be evaluated under *Strickland.* Deficient performance involves 'particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards.'" *Kilgore v. State,* 55 So.3d 487, 500 (Fla. 2010), citing *Maxwell,* 490 So.2d at 932. The defendant has not demonstrated that trial counsel's performance was outside that broad range, or that no reasonable attorney would not have performed as did trial counsel in this case. It is, therefore,

ORDERED AND ADJUDGED that the defendant's Motion for Post Conviction Relief is DENIED as to each individual ground and claim for relief and in its entirety. The defendant is informed that she has thirty days from the date of the rendition of this order to appeal to the Fifth District Court of Appeal. Copies of all documents, records, and transcripts referred to herein are attached hereto as indicated herein, and made a part hereof by reference.

DONE AND ORDERED this 21st day of March, 2018.

/s/ Willard Pope
Willard Pope, Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by eservice to Amy Berndt and Nicholas Camuccio, Assistant State Attorneys, at eservicemarion@sao5.org. and to Sonya Rudenstine, attorney for defendant, at srudenstine@yahoo.com. this 21 day of March, 2018.

/s/ Mary Kisicki
Mary Kisicki, Judicial Assistant
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APPENDIX F

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FIFTH DISTRICT

VIOLET LOVE RAY,

Appellant,

v. Case No. 5D12-3745

STATE OF FLORIDA,

Appellee.

_____/

Decision filed January 21, 2014

Appeal from the Circuit Court for Marion County,
Robert William Hodges, Judge.

James S. Purdy, Public Defender, and Leonard R. Ross, Assistant Public Defender, Daytona Beach, for Appellant.

Sonya Rudenstine, of Law Office of Sonya Rudenstine, Gainesville, Joseph J. Frank, E. Joshua Rosenkranz, Brian A. Schmidt, Ilene C. Albala, Matthew S. Ingles, Matthew L. Craner, and Paul F. Rugani, New York, NY, Daniel Habib, Washington, DC, and Mary Kelly Persyn, of Orrick, Herrington & Sutcliffe, LLP, San Francisco, CA, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Kellie A. Nielan, Assistant Attorney General, Daytona Beach, for Appellee.

PER CURIAM.

AFFIRMED.

TORPY, C.J., GRIFFIN and BERGER, JJ., concur.

APPENDIX G

[Filed Nov. 21, 2024]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 23-13453

VIOLET LOVE RAY,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

Appeal from United States District Court
for the Middle District of Florida
D.C. Docket No. 5:20-cv-00263-JLB-PRL

Before GRANT and BRASHER, Circuit Judges.

BY THE COURT:

Violet Ray has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's September 12, 2024, order denying a certificate of appealability to appeal the denial of her 28 U.S.C. § 2254 petition. Upon review, Ray's motion for reconsideration is DENIED because she has offered no new evidence or arguments of merit to warrant relief.