No. _____

OCTOBER TERM 2024

In The

Supreme Court of the United States

HARRY FRANKLIN PHILLIPS,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition For A Writ Of Certiorari To
The United States Court of Appeals for the Eleventh Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

MARIE-LOUISE SAMUELS-PARMER*
FLA. BAR NO. 0005584
*COUNSEL OF RECORD

OFFICE OF THE CAPITAL COLLATERAL REGIONAL COUNSEL – SOUTH
110 S.E. SIXTH STREET, SUITE 701
FORT LAUDERDALE, FL 33301
TEL: (954) 713-1284
FAX: (954) 713-1299
EMAIL: MARIE@SAMUELSPARMERLAW.COM

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APPENDIX A

Phillips v. Sec'y, Fla. Dep't of Corr., No. 1:08-cv-23420-AJ, 2024 WL 512442 (11th Cir. Feb. 9, 2024)

[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 15-15714

HARRY FRANKLIN PHILLIPS,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:08-cv-23420-AJ

Before WILSON, JILL PRYOR, and NEWSOM, Circuit Judges.

PER CURIAM:

Florida death row inmate Harry Franklin Phillips appeals the district court's denial of his § 2254 petition for a writ of habeas corpus. After a thorough review of the record and with the benefit of oral argument, we affirm the district court's denial of the petition.

I. FACTS AND PROCEDURAL HISTORY

On the evening of August 31, 1982, Bjorn Thomas Svenson, a parole supervisor in Miami, was working late. He carried a stack of old telephone books outside to throw them away in a dumpster.

Svenson never returned. At 8:38 p.m., he was shot multiple times and died from the gunshot wounds. There were no eyewitnesses to the shooting. From bullets found on the scene, law enforcement officers determined the gun used was either a .357 Magnum or a .38 Special. But no murder weapon was ever recovered.

Phillips was charged with first-degree murder of Svenson. In this section, we start by discussing the evidence of Phillips's guilt introduced at his criminal trial. We then review the history of Phillips's direct appeal, his post-conviction proceedings in Florida state court, and his post-conviction proceedings in federal court.

A. Evidence of Guilt at Phillips's Criminal Trial

The State relied on several categories of evidence to prove that Phillips murdered Svenson, including evidence about (1) Phillips's interactions with Svenson and other parole officers before the murder, (2) statements Phillips made in interviews after the

murder, and (3) confessions Phillips made to other inmates while in custody. We review each category of evidence in turn.

1. Phillips's Interactions with Svenson and Other Parole Officers

At trial, the State introduced evidence showing that Phillips first encountered Svenson in 1980, while Phillips was on parole in Florida. Several parole officers, including Nanette Russell and Michael Russell,[1] testified at Phillips's criminal trial. The parole officers described a series of interactions that Svenson had with Phillips beginning in 1980 and continuing through the day of the murder.

In June 1980, Nanette, who reported to Svenson, was assigned to serve as Phillips's parole officer in Dade County. Under the terms of his parole, Phillips could not leave Dade County without permission. One night a few months into the parole term, Phillips showed up at a grocery store in Broward County where Nanette was shopping. When Nanette left the store, Phillips was waiting by her car. Phillips asked Nanette if they could sit in the car and talk. She refused. He then said, "I just want a goodnight kiss. I don't want any sex from you. I just want a goodnight kiss." Nanette ended the conversation, got in her car, and drove to the home that she shared with Michael, her boyfriend at the time (they later married). That night, Phillips drove by Nanette's home several times.

[1] For ease of reference, we refer to Nanette Russell as "Nanette" and Michael Russell as "Michael."

Nanette called Svenson and reported Phillips's conduct. She also called the police.

The next morning, Phillips called Nanette at home, even though she had not given him the number. He told her that a woman had offered him money to attack Michael.

After these incidents, Svenson assigned Phillips a new parole officer. Svenson also met with Phillips and told him to stay away from Nanette.

The parole commission petitioned to revoke Phillips's parole because he had traveled outside Dade County without permission. The witnesses at the parole hearing included Svenson, Nanette, and Michael. Phillips's parole was revoked, and he was incarcerated for an additional 20 months.

When Phillips was released from prison in August 1982, he was again placed on parole. He was assigned a parole officer who worked in a different building from Nanette. A few days after his release, Phillips went to Nanette's office and tried to see her. Nanette refused to see him and reported the incident to Svenson, who then met with Phillips.

Phillips showed up at Michael's office next. Michael refused to see him. Supervisors in Michael's office met with Phillips and warned him not to contact Nanette or Michael.

A few days later, someone fired four shots through the front window of the home Nanette and Michael shared. There were no eyewitnesses to the shooting. From bullets recovered on the scene,

law enforcement officers determined that the shooter used a .357 Magnum or a .38 Special.[2]

Police investigated whether Phillips was the shooter. On the night of the shooting, several officers went to Phillips's home, which he shared with his mother. The officers tested Phillips's hands for gunpowder residue. The next day, Svenson and other parole officers searched Phillips's home for the gun used in the shooting. When Phillips saw Svenson speaking to his mother, he became "very belligerent" and yelled at Svenson.

The next day at work, Phillips approached a coworker whose father was a police officer. Phillips told her that he had recently fired a gun with a friend and that the police had tested his hands for gunpowder residue. He asked whether the test would detect residue if he had washed his hands with Comet after firing the gun. (Phillips's test for gunpowder residue later came back as inconclusive.)

Around this time, Phillips ran into a friend, Tony Smith,[3] at a bar. Phillips complained that two parole officers (a man and a woman) had been hassling his mother. He told Tony that he was going to put a stop to it and had tried to shoot the female officer

[2] The evidence introduced at trial showed that these weapons were common and there were thousands of them in Florida at the time of the murder.

[3] We refer to Tony Smith as "Tony" to distinguish him from Greg Smith, the lead detective who investigated Svenson's murder. We refer to Greg Smith as "Smith."

but missed. That evening, Tony saw Phillips carrying a weapon that appeared to be a .357 Magnum or a .38 Special.

Phillips interacted with both Nanette and Svenson on August 31, the day Svenson was murdered. That morning, Nanette reported for a hearing on the courthouse's fourth floor. After entering the building, she walked to the elevator. She spotted Phillips standing by the elevator. To avoid him, she changed her route and used the escalator. When she arrived on the fourth floor, she again saw Phillips, and they made eye contact. She was frightened and reported the incident to court security and Svenson.

A court security officer stopped Phillips and asked whether he was following his former female parole officer. Phillips denied following anyone and said that he was in the building to meet with his attorney, James Woodard. Phillips also said that he would not recognize his former parole officer if he saw her.

Svenson and other parole officers then met with Phillips. Svenson told him to stay away from Nanette. Phillips was warned that if his behavior continued, he would be arrested for violating his parole. That evening, Svenson was murdered.

2. Phillips's Statements in Police Interviews

At trial, the jury heard testimony from Greg Smith, the lead investigator into Svenson's murder, and other officers involved in the investigation. These officers interviewed Phillips several times about Svenson's murder and told the jury about statements he made in the interviews.

The day after Svenson was murdered, detective Linda Beline interviewed Phillips. He denied murdering Svenson and told Beline that he had an alibi. He reported that he had left work at 5:00 p.m. and returned home at 5:20. Afterward, he ran a few errands, including picking his sister up from work and taking her children to church, before returning home. At 7:50 p.m., he went to a Winn-Dixie store to purchase a few items for dinner, left the Winn-Dixie between 8:10 and 8:15, and was home before 8:30. When Phillips arrived home, his mother asked for a ride to his sister's house. Shortly after he returned home, Phillips drove his mother to his sister's house, stopping to buy gas along the way. Phillips told Beline that he was home for the night by 9:00 p.m.

Beline uncovered evidence that conflicted with Phillips's timeline. She obtained a copy of Phillips's receipt from the Winn-Dixie store, which showed that he checked out at 9:13 p.m., approximately one hour later than he had reported. Phillips's sister confirmed that he arrived with their mother around 9:35 p.m., again about one hour later than the time Phillips had said.

Smith testified about other statements Phillips made during interviews. Phillips told Smith that after his release from prison he went to the office where Nanette worked because "he had received a phone call from an anonymous white male" who told him to report to the parole office and see Nanette. Phillips said that he saw Svenson at the parole office. According to Phillips, he spoke with Svenson for about an hour, they had a "general conversation about

the parole," and Svenson never instructed him to stay away from Nanette.

Phillips also admitted in an interview that he saw Svenson the day after the shooting at Nanette's home. Phillips denied arguing with Svenson that day.

Smith testified that he asked Phillips about seeing Nanette at the courthouse on August 31, the day of the murder. Phillips explained that he was at the courthouse that morning to meet with his attorney, Jim Woodward.[4] He denied seeing Nanette at the courthouse, maintaining that he had not seen her since the revocation hearing years earlier.

Smith also questioned Phillips about whether Svenson was present when Phillips met with parole officers later that morning. He told Smith that Svenson had not attended the meeting. But other officers who were at the meeting testified that Svenson was present.

At trial, Smith recounted other statements Phillips made during interviews. During one interview, Phillips asked whether Smith "had ruled out that there had been two people involved in this homicide." Smith responded that police were still investigating. Phillips then suggested that the number of shots fired at Svenson indicated that there had been more than one shooter. Smith then asked Phillips how he knew how many times Svenson had

[4] Woodward testified at trial that Phillips never was his client, and they had no appointment to meet on that day or any other day.

been shot. Phillips responded, "I heard he was shot many times." According to Smith, though, the police had never publicly released information about the number of times Svenson had been shot.

Phillips suggested to Smith that Svenson might have been murdered because he was a drug dealer. Phillips refused to tell Smith why he believed Svenson was a drug dealer. The police found no evidence, however, that Svenson was involved with drugs or any other illegal activities.

Phillips volunteered that he had heard other inmates in the jail say that they did not like Smith. According to Phillips, these inmates, whom he would not identify, knew Smith's home address and that he had a teenage son. Phillips warned that these inmates could cause "great bodily harm."

Smith also testified about Phillips's reaction upon hearing that he had been charged with Svenson's murder. Phillips said that the State had no case because it had no eyewitnesses and had never found the murder weapon. Phillips then said that he "didn't kill the motherfucker[,] but he was glad he was dead." Phillips continued, "They're lucky they got me when they did because I would have killed every last motherfucker in that office." "If somebody does me harm, I do them harm," he added.

Phillips then brought up Nanette, saying, "I fucked her, that skinny bitch, in the ass." He told Smith that he and Nanette had sexual intercourse the night he saw her at the grocery store. He ended the conversation by saying, "Smith, you ain't got no witnesses. There ain't nobody saw me kill that motherfucker."

3. Evidence of Phillips's Confession to Four Jailhouse Informants

The State also presented trial testimony about confessions Phillips made to four inmates: William Scott,[5] William Farley, Larry Hunter, and Malcolm Watson. Each inmate testified at trial that Phillips had confessed to murdering Svenson. We turn to the evidence about each confession.

a. Confession to Scott

Scott testified that Phillips confessed to him in jail shortly after Svenson was murdered. In August 1982, Scott, who was on probation, was arrested for attacking his wife's friend and violating the terms of his parole by traveling out of state. After his arrest, Scott was taken to the Dade County jail. In jail in early September, Scott saw Phillips, whom he had known for at least 10 years.[6]

Phillips asked what Scott was doing in jail. Scott explained that he had been arrested for aggravated battery and violating his parole. Phillips then said that he was in jail because "I just downed one of them motherfuckers." During that conversation, Scott warned Phillips that he needed to get rid of the murder weapon. Phillips responded, "Don't worry about the gun . . . 'cause some

[5] William Scott also used the name William Smith. We refer to him as Scott.

[6] After Svenson was murdered, Phillips was arrested for a parole violation. When Phillips encountered Scott, he had had not yet been charged with Svenson's murder.

woman got it." Phillips told Scott that he committed the murder because Svenson had "been riding him."

After Phillips confessed, Scott called Detective Hough with the Metro-Dade Police Department, whom Scott had known for decades. Scott told Hough about Phillips's confession. Hough then connected Scott with Smith.

Within a few days of reporting Phillips's confession, Scott was released from jail. Upon his release, Scott went to see Phillips's sister. At trial, Scott mentioned in passing that he had spoken with Phillips's sister about the murder. But he did not say why he had gone to see Phillips's sister or what they discussed.[7]

During his trial testimony, Scott was asked what he would receive from the State for testifying against Phillips. He denied that he had been promised anything for his testimony or that anyone had told him to talk to Phillips.

Scott also told the jury about what had happened to his criminal charges. He explained that the aggravated battery charge against him had been dropped because the victim had decided not

[7] Before trial, Phillips deposed Scott. At his deposition, Scott gave more details about visiting Phillips's sister. According to Scott, he went to see Phillips's sister on the day that he was released from Dade County Jail to bring her $20 to deposit in Phillips's commissary account.

As we describe below, at the post-conviction evidentiary hearing Scott testified that he went to see Phillips's sister at the direction of officers investigating the murder. *See infra* Section I-C-1-d. Scott did not mention this fact at his pretrial deposition or at trial.

to pursue the charge. After this charge was dropped, he had been released on his own recognizance. He acknowledged that he still had a pending charge for violating his parole but told the jury that the charge was "being taken care of."

On cross examination, Phillips questioned Scott about his motivation for testifying. He pointed out that Scott had previously worked as a confidential informant for the federal government and had been paid $1,000 a month for a four-year period.[8]

Phillips probed why Scott called Hough to report the confession. Scott explained that he had given Hough information in the past when a man had confessed to a killing. When the man confessed, Scott called Hough and asked him to "check it out." Scott testified that he reported Phillips's confession to Hough for the same reason. Phillips then asked, "Are you a member of any police agency that you wanted this checked out?" Scott responded, "No, no, no, I'm not a police agent." Phillips followed up by asking, "You run an investigative agency or something, your checking things out like this?" Scott answered, "No, man, no."

Smith testified at trial that he "made no promises" to Scott. And he denied playing any role in the State's decision to drop Scott's aggravated battery charge. Smith was not asked whether he played a role in securing Scott's release on his own recognizance for the parole revocation charge.

[8] At his pretrial deposition, Scott denied that he had worked as a confidential informant for the Metro-Dade police.

b. Confession to Farley

Farley testified at trial that Phillips had confessed to murdering Svenson. Farley met Phillips for the first time shortly after Svenson's murder when they were cellmates at the Reviewing Medical Center at Lake Butler. Soon after Farley and Phillips became cellmates, Smith and another officer interviewed Phillips. After the interview, they met with Farley and asked whether Phillips had spoken about the murder. Farley responded that he had not. During the interview, the officers did not tell Farley to ask Phillips any questions about the murder.

When Farley returned to his cell, Phillips mentioned that he had been questioned by two officers. Farley said that he too had been questioned. Phillips apologized for not warning Farley that the officers investigating Svenson's murder might try to speak to him.

According to Farley, Phillips then showed him a copy of a newspaper article about Svenson's funeral. Phillips told Farley that he had "murdered the cracker." He described how he committed the murder, saying that he "laid across the street" waiting for Svenson and "shot him a whole heap of times." He said that that he killed Svenson for having "sent him back to prison" for a parole violation. Phillips also said that Svenson was "toting an object" at the time he was shot.

After Phillips confessed, Farley told a prison official that he wanted to speak with Smith. Farley was moved to a new prison and met with Smith a few days later. Smith took a recorded

statement in which Farley described Phillips's confession. At trial, Farley testified that he and Smith did not discuss the confession before the recording began. But the recorded statement itself showed that they discussed Phillips's confession before the recording began.[9] When Farley described what Phillips had said about waiting for Svenson, Smith interrupted and asked, "In the pre-interview you said something about being behind a building? Did he say something about being behind a building across the street or anything like that?"

At trial, Farley was asked about his motivation for telling police about Phillips's confession. Farley said that he went to Smith because Phillips "had no respect for human life." Farley also said that he felt bad for Svenson's family.

Farley was questioned about what he expected to receive in exchange for his testimony. He testified that he was currently serving a prison sentence with a presumptive release date in November (about 11 months after the trial). Farley explained that he had an interview with the parole board scheduled for March, and based on the interview he could secure an earlier release date. He acknowledged that Smith and David Waksman, the lead prosecutor, had promised to write letters to the parole board on his behalf if he testified against Phillips.

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[9] As we describe in greater detail below, at Phillips's post-conviction evidentiary hearing, Smith admitted that he discussed the confession with Farley for approximately 90 minutes before the recording began. *See infra* Section I-C-1-a.

Farley testified that Waksman had helped him in another way as well. Before Phillips's trial, inmates learned that Farley was testifying against Phillips, labeled Farley a snitch, and attacked him. Waksman arranged for Farley to be moved for his safety.

On cross-examination, Phillips suggested that Farley made up the story about the confession. He introduced an affidavit from Farley stating that Farley made up the story about the confession "to get out of prison." But Farley testified that a group of inmates had forced him to sign the affidavit.

When Smith testified, he was asked about his meetings with Farley. He denied ever telling Farley what to say about Phillips's confession. He was not asked about whether he and Farley spoke about Phillips's confession before Smith began recording.[10]

Smith also described what had been promised to Farley. He explained that when Farley gave the recorded statement about Phillips's confession, he had not made any promises to Farley or agreed to give Farley anything in return. Smith said he later told Farley that he would send a letter to the parole board on Farley's behalf.

[10] Smith testified in a pretrial deposition that Farley's "full statement . . . would be within [his] report." The record does not indicate whether Smith was aware that Waksman had redacted the portion of his report stating that Smith talked with Farley before taking the recorded statement. *See infra* Section I-C-1-a (describing Waksman's redaction practices).

c. Confession to Hunter

The third inmate to testify that Phillips had confessed was Hunter. Hunter had previously been convicted of four crimes. In January 1983, he was again arrested and held at the Dade County jail, where he met Phillips in the jail's law library.

Hunter testified that Phillips confessed to murdering Svenson. Phillips told Hunter how he approached the parole building and shot Svenson in the parking lot. Phillips said that he murdered Svenson because Svenson had testified against him at the revocation hearing. Hunter said that Phillips asked him to serve as an alibi witness to say that he had seen Phillips at the Winn-Dixie around 8:30 p.m. on the night of the murder.

After this conversation with Phillips, Hunter said, he spoke with his cellmate. According to Hunter, without his knowledge, his cellmate reported to the police that Hunter had information about Svenson's murder. Smith then interviewed Hunter. Hunter reported Phillips's confession and turned over notes from Phillips telling Hunter what to say about seeing Phillips at the Winn-Dixie.

Hunter was asked what he expected to receive in exchange for his testimony. He explained that he had pending criminal charges and his case was set for trial in a few weeks. He testified that the police and prosecution had promised him that, if he was convicted, they would go to court and inform the judge that he had been a witness for the State at Phillips's trial. (When Smith testified, he confirmed making this promise.) But Hunter told the jury that

this assistance would not matter because he was innocent of the charges against him.

Hunter also testified that Waksman assisted him by having him transferred to another jail after Phillips threatened him. Before the trial, Phillips demanded that Hunter sign an affidavit saying he knew nothing about the case. When Hunter refused to sign, Phillips threatened his family. Afterward, Waksman had Hunter transferred to a different jail.

d. Confession to Watson

Watson was the fourth inmate who testified that Phillips confessed. Watson, who had three or four prior felony convictions, testified that he encountered Phillips in jail.

Watson told the jury that he had known Phillips for several years. In 1980, Phillips asked to borrow $50 from Watson and offered to give him a gun as collateral. During this conversation, Phillips told Watson that he was going to get even with a parole officer who was trying to send him back to prison. Watson did not lend Phillips any money or take the gun.

A few years later, Watson, who was then serving a sentence for armed robbery, encountered Phillips in the Dade County jail. When Watson saw Phillips, he exclaimed, "You did it. You finally did it?" Phillips responded, "Yeah, yeah, yeah." Watson then said, "You really killed a parole officer, right?" Phillips answered, "Yeah, yeah, but they got to prove it." Phillips told Watson that the police had no eyewitnesses and the gun was thrown away. On another

occasion, Watson heard Phillips tell another inmate that "he had fired a shot around at his parole officer's house."

Watson called police and reported Phillips's confession. He explained that he went to police because his brother was a law enforcement officer who had been shot and ended up paralyzed.

After Watson reported Phillips's confession, Phillips and other inmates threatened to kill Watson and his family if Watson testified. The prosecution then had Watson moved to another area of the jail for his safety. Watson admitted that on occasions he had told other inmates that he knew nothing about Phillips's case. But he said that he had lied to these inmates so that they would not harass him.

At trial, Watson was asked what he expected in exchange for his testimony. He explained that he had already been convicted and sentenced on the armed robbery charge. Although he admitted that he had participated in the robbery, he denied using a gun during the crime. According to Watson, Smith promised that he would arrange for Watson to receive a polygraph test for the underlying crime. If the polygraph test showed that Watson was not lying when he denied having a gun, Smith agreed to "speak up" for him in his criminal case. Smith confirmed making this agreement.

After hearing all this evidence at trial, the jury found Phillips guilty of murdering Svenson. During the penalty phase, by a vote of 7 to 5, the jury recommended a sentence of death.

B. Direct Appeal

Phillips appealed his conviction and sentence. On direct appeal, the Florida Supreme Court affirmed. *See Phillips v. State (Phillips I)*, 476 So. 2d 194 (Fla. 1985).

C. State Post-Conviction Proceedings

Phillips filed a Rule 3.850 post-conviction motion in state court. As relevant for our purposes,[11] he alleged that the State had failed to fulfill its disclosure obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and had run afoul of *Giglio v. United States*, 405 U.S. 150 (1972).

Phillips claimed that *Brady* and *Giglio* violations occurred in connection with the testimony of the four inmates. He alleged that the inmates falsely testified to his confessions, the State withheld evidence about what had been promised to the inmates for testifying against him, and the State allowed the inmates to testify falsely about these promises. He further alleged that the State either withheld material evidence about the inmates or allowed them to give false testimony on other topics, including Scott's relationship with the Metro-Dade police, how law enforcement learned of Phillips's confession to Hunter, the extent of Farley's and Watson's criminal histories, and Hunter's mental health history.

[11] In post-conviction proceedings, Phillips raised numerous challenges to his conviction and death sentence. We limit our discussion to Phillips's *Brady* and *Giglio* claims, the only claims before us in this appeal.

After an evidentiary hearing, the state court denied Phillips's post-conviction motion. In this section, we begin by describing the evidence introduced at the hearing. We then review the state court's order denying Phillips's claims. We conclude with the Florida Supreme Court's decision affirming that order.

1. The Evidentiary Hearing

At the evidentiary hearing, Phillips introduced evidence to support his *Brady* and *Giglio* claims. We discuss the evidence introduced at the hearing on the following topics: (1) whether Phillips confessed to Farley and Hunter, (2) the benefits promised to the inmates for testifying, (3) Scott's relationship with Metro-Dade police, (4) how the State learned of Phillips's confession to Hunter, (5) the extent of Farley's and Watson's criminal histories, and (6) Hunter's mental health history. We review each category of evidence in turn.

a. Evidence About Phillips's Confessions to Farley and Hunter

At the hearing, Phillips introduced testimony from Farley and Hunter in which they recanted their trial testimony about Phillips's confession. Farley and Hunter testified that Phillips never confessed and that Smith and Waksman told them what to say about Phillips's confession.

Farley. Farley testified at the hearing that Phillips never confessed to him. He also offered a new account of what happened before Smith took his recorded statement about Phillips's confession. Farley said he met with Smith for "15 or 20 minutes" before

giving his recorded statement. During this time, Smith instructed him what to say about Phillips's confession. At one point, Smith asked Farley how many times Phillips said he shot the victim. Farley initially responded, "once or twice," but Smith corrected him, saying "the victim was shot numerous times." And Farley said that both Smith and Waksman told him to say that Phillips had mentioned that Svenson was carrying something at the time of the shooting.

Smith and Waksman denied telling Farley what to say about Phillips's confession. Smith admitted that he and Farley discussed Phillips's confession before Farley gave the recorded statement. He testified that this conversation lasted for approximately 90 minutes and that Farley was "mistaken" when he testified at trial that no such conversation had occurred.

Although Smith noted in his police report that he met with Farley before taking the recorded statement, this portion of his report was not disclosed to Phillips before trial. Waksman removed the mention of the meeting from the copy of the report produced to Phillips because he did not believe that the statement had to be disclosed.

But Waksman did more than simply redact the statement from the police report. He reproduced the police report so that Phillips could not tell that any information had been removed. To do this, Waksman copied the report and cut out the part mentioning that Farley and Smith spoke before the recording began. He then pasted the report back together so that it appeared that no

information had been removed. He produced a copy of the reconstructed report to Phillips.

Waksman testified that his practice of cutting and pasting to remove information that was not discoverable was "rather common." Waksman defended his practice, saying that the rules "tell[] me what I'm supposed to disclose. I disclose what I think I have to, and I do not disclose the balance."

Hunter. At the evidentiary hearing, Phillips introduced an affidavit in which Hunter disavowed his trial testimony. According to the affidavit, Phillips "never made a confession" to and "never spoke" with Hunter about the murder. Hunter swore that the "only knowledge" he had about Svenson's murder came from Smith and Waksman.

In the affidavit, Hunter also told a new story about the notes he had turned over to Smith. Hunter said that he approached Phillips in jail and told Phillips that he had been at the Winn-Dixie on the night of the murder. Hunter offered to serve as an alibi witness and asked Phillips to write the notes to help him remember the details.

At the evidentiary hearing, Phillips called Hunter as a witness. But Hunter asserted his Fifth Amendment right against self-incrimination and refused to testify because he was worried about being prosecuted for perjury. When Waksman and Smith testified, they denied telling Hunter what to say about Phillips's confession.

b. Evidence About Promises Made to the Inmates and the Assistance They Ultimately Received

The second category of evidence introduced at the evidentiary hearing concerned what the State had promised the four inmates for cooperating and testifying against Phillips, as well as the benefits the inmates ultimately received. Phillips introduced evidence showing that, for testifying against him, each inmate received reward money and assistance from the State in a pending criminal case or a sentence he was serving.

First, Phillips introduced evidence showing that the four inmates received payments after the trial: Scott received $300, while Farley, Hunter, and Watson each received $175. Farley, Scott, and Hunter all stated that they knew about the reward money at the time they testified against Phillips.

Smith and Waksman acknowledged at the evidentiary hearing that each inmate was paid reward money after the criminal trial. Smith explained that the money came from the Police Benevolent Association as a reward for providing information the led to the conviction of Svenson's murderer. But he denied that any of the inmates were told about the money before trial. Waksman, too, testified that the inmates were not told about the reward money until the trial was over.

Second, Phillips introduced evidence about the assistance that each inmate received from the State for testifying against him. We review the evidence introduced as to each inmate.

Scott. Phillips introduced evidence showing that the State played a role in securing Scott's release from jail on his pending probation revocation charge. At trial, Scott testified that his battery charge was dropped after the victim decided not to press charges and then the parole board agreed that he could be released on his own recognizance pending a revocation hearing. At the evidentiary hearing Phillips introduced evidence showing that Smith had contacted the parole board and advised that Scott was assisting in Phillips's case.

***Farley*.** Phillips introduced evidence showing that Farley had been promised and, in fact, received additional assistance from Waksman and Smith that went beyond what was disclosed at trial. At the evidentiary hearing, Farley testified that Waksman had promised that if he testified against Phillips, Waksman would try to assist him in getting out of prison.

After Phillips's trial, Smith and Waksman helped to secure Farley an earlier release from prison. In January 1984, about a month after Phillips's criminal trial, Smith and Waksman jointly sent a letter to the parole board on Farley's behalf, stating that Farley had provided "outstanding assistance" at Phillips's trial and "recommend[ing] him for early parole."

The parole board did not act immediately on the letter, however. Farley, who remained in custody, became angry. He threatened Waksman that unless the parole board confirmed his release date, "I will do everything I can to sabotage the case and get Phillips

an acquittal." About a month later, Farley was granted parole and released from custody.

After his release from prison, Farley got into more trouble. He was arrested on new charges and faced up to five years in prison. Farley asked Waksman to contact the prosecutor, saying that he was "deathly afraid" to return to prison because he was worried about being attacked by other inmates. After Waksman wrote a letter on Farley's behalf, Farley ended up serving a year and a day in custody.

After Farley completed this sentence, he was arrested again, and again he contacted Waksman for help. When Waksman refused to assist him, Farley threatened to "sabotage" Phillips's case.

Smith and Waksman denied promising Farley that he would be released from custody if he testified against Phillips. Instead, they testified, before Phillips's trial they had promised Farley that if he testified truthfully, they would notify his attorney and the parole board about his assistance.

Hunter. Phillips introduced evidence showing that Hunter had been promised and, in fact, received additional assistance from Waksman and Smith that went beyond what was disclosed at trial. In his affidavit, Hunter explained that at the time of Phillips's trial, he had pending state charges for sexual battery, car theft, and possession of cocaine. Hunter said that Waksman promised he would receive a sentence of five years' probation if he testified against Phillips, but life if he did not. Waksman also instructed him to testify falsely that no such deal existed.

Approximately two weeks after Phillips's trial, Hunter and the State entered into a plea agreement. Under the plea agreement, which Waksman helped negotiate, Hunter pled guilty to grand theft and armed sexual battery and received a sentence of five years' probation. The State agreed to this deal because of Hunter's "invaluable help" in Phillips's murder trial.

Smith and Waksman denied promising Hunter that he would receive a sentence of probation if he testified against Phillips. Rather, they said they told Hunter the same thing they told the other inmates: if he testified against Phillips, they would "tell his judge he cooperated, period."

According to Waksman, he decided *after* Phillips's trial to assist Hunter with the plea deal. He maintained that he made this decision after seeing how Hunter "had been beat up in the county jail" and "had to spend months in [a] small safety cell[]" before Phillips's trial.

After his release from prison, Hunter continued to seek assistance from Waksman. While on probation, Hunter was arrested. He called Waksman seeking help because he was worried for his safety in jail. Waksman contacted a prison official, explained that Hunter had testified "against a seasoned inmate who had a lot of friends," and asked that Hunter be moved to another prison. After he was transferred to a new prison, Hunter reached out to Waksman again, but Waksman provided no further assistance.

Watson. Phillips introduced evidence showing that after Watson testified against Phillips, assistance from Smith and

Waksman resulted in Watson's life sentence being vacated and his being released from prison.

After Phillips's trial, Smith and Waksman arranged for Watson to take a polygraph test about whether he handled a gun during the robbery that resulted in his conviction for armed robbery. Watson passed the polygraph test and then filed a post-conviction motion challenging his armed robbery conviction. The State then agreed to vacate Watson's conviction for robbery with a firearm and allow him to plead guilty to robbery. Watson's sentence was reduced from life imprisonment to a term of 15 years' imprisonment, the unserved portion of which was suspended, and five years of probation. As a result, he was released from prison. Waksman represented the State in the proceedings in which the sentence was reduced.

c. Evidence About Scott's Relationship with the Metro-Dade Police

Phillips's evidence also covered Scott's role as an informant working for the Metro-Dade Police. The evidence showed that from 1972 Scott occasionally worked as a paid informant for Metro-Dade. He assisted the Metro-Dade police with Phillips's case. About a week after Phillips confessed to Scott, Scott was released from jail. That day, Scott met with Smith and another officer. The officers gave him $20 and asked him to find out whether Phillips's sister had information about the location of the murder weapon.

Although Smith's notes reflected that Scott went to see Phillips's sister at the police's direction, this information was not

disclosed to Phillips before trial. Once again, after deciding that the State was not required to turn over this information, Waksman performed a cut-and-paste job on Smith's report to remove the reference to Scott's visit with Phillips's sister.

According to Smith, during the pendency of Phillips's case, Scott was "not a documented informant" with Metro-Dade police. But Smith admitted that when Scott went to see Phillips's sister, he was acting as "an agent" of Metro-Dade Police. According to Smith, it was only after Phillips's trial that he opened an informant file for Scott and Scott was a assigned a number as a confidential informant. For his part, Waksman admitted that he knew during Phillips's trial that Scott had "periodically" provided information to Hough.

d. Evidence About How the State Learned of Phillips's Confession to Hunter

Also introduced at the evidentiary hearing was evidence about how law enforcement learned about Phillips's confession to Hunter. Recall that at trial, Hunter testified that his cellmate reached out to Smith. But at the evidentiary hearing, Hunter testified that he had contacted Waksman about Phillips's confession. Waksman then had Smith interview Hunter.

Smith's notes reflected that Hunter, not his cellmate, first contacted police. But Phillips did not know this information at the time of trial because Waksman had determined that the State was not required to disclose this information and had redacted it. And again, Phillips could not tell that Smith's notes had been redacted.

e. Evidence About Farley's and Watson's Criminal Records

Evidence at the hearing revealed that Farley and Watson did not fully disclose their criminal histories at Phillips's trial. At trial, Farley testified that he had one conviction and one parole violation. But Farley admitted at the hearing that he had two additional convictions. Farley's explanation for giving false testimony about his criminal record was, "I forgot a few things."

At trial, Watson testified that he was a convicted prisoner but said that he had never been on probation or parole. Phillips's hearing evidence showed that, to the contrary, Watson had actually been sentenced to probation twice.

f. Evidence About Hunter's Mental Health

Lastly, Phillips introduced into evidence records about Hunter's mental health from the period before Phillips's trial. The records included an inmate classification report, which had been found in the files of the prosecutor's office in another case, showing that in 1969 Hunter had been found not guilty by reason of insanity in two criminal cases. In addition, mental health records from 1970 through 1972 showed that Hunter had been diagnosed with paranoid schizophrenia. Records from this period also reflected that medical providers had determined that Hunter did not appreciate the wrongfulness of his conduct and was unable to adequately assist in his own defense in a criminal case.

2. The State Court's Order

After the evidentiary hearing, the state court denied Phillips's motion for post-conviction relief. In its order, the court discussed why it denied Phillips relief on his *Brady* claim but did not mention his *Giglio* claim.

In rejecting Phillips's *Brady* claim, the state court addressed whether the State violated *Brady* by failing to disclose two things: (1) that Phillips never confessed to Farley and Hunter and (2) that the four inmates received benefits beyond what was disclosed at trial.

First, as to whether the State violated *Brady* by failing to disclose that Phillips never confessed to Farley or Hunter, the court found Farley's hearing testimony to be "totally incredulous and unbelievable" and Hunter's affidavit to be "totally at odds with the facts." The court credited instead Waksman's and Smith's testimony. Based on these credibility determinations, the court concluded that Phillips failed to prove that the State withheld information showing that Phillips never confessed to Farley or Hunter.

Second, the court considered whether the State failed to disclose the full extent of what it had promised the inmates for testifying against Phillips. The court found that Phillips failed to substantiate his allegations that the inmates were told about reward money before they testified or that the State had made promises to the inmates beyond what was disclosed at trial. The court thus concluded that there was no *Brady* violation.

3. Florida Supreme Court's Decision

Phillips appealed the denial of his post-conviction motion to the Florida Supreme Court. In relevant part, the Florida Supreme Court affirmed. *See Phillips v. State (Phillips II)*, 608 So. 2d 778 (Fla. 1992). In its decision, the Florida Supreme Court discussed Phillips's *Brady* and *Giglio* claims.

The Florida Supreme Court quickly disposed of Phillips's *Brady* claim. *See id.* at 780–81. First, it rejected his arguments that the State violated *Brady* by failing to disclose that Phillips had never actually confessed to Farley and Hunter or that Smith and Waksman had told the inmates what to say about Phillips's confessions. *Id.* at 780. The Court explained that at the evidentiary hearing there was conflicting testimony, with Farley and Hunter, on the one hand, saying that the police gave them the information about Phillips's confessions, and Waksman and Smith, on the other hand, denying these allegations. *Id.* The Florida Supreme Court concluded that there was "competent, substantial evidence" to support the lower court's finding that Waksman and Smith were credible and that Farley and Hunter were not. *Id.* at 781.

Second, the Florida Supreme Court rejected Phillips's argument that the State violated *Brady* by withholding information about the benefits the inmates were promised. *Id.* at 780–81. Again, the Florida Supreme Court relied on the lower court's credibility determination. Given Waksman's testimony that at the time of the trial he had informed the inmates only that he would write letters on their behalf and did not know "to what extent he would end up

helping" the inmates, the Florida Supreme Court concluded there was no *Brady* violation. *Id.* at 780.

Next, the Florida Supreme Court addressed Phillips's *Giglio* claim based on the State's failure to correct the following trial testimony: (1) Scott's denial that he was an agent of the police, (2) Farley's statement that Smith started the tape recording immediately instead of speaking with him before he gave the recorded statement about Phillips's confession, and (3) statements from Farley and Watson about their criminal records. *Id.* at 781. The Court rejected each of these bases for the claim.

The Court began with the standard for establishing a *Giglio* violation: Phillips had "to demonstrate (1) the testimony was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material." *Id.* (citing *Routley v. State*, 590 So. 2d 397, 400 (Fla. 1991)).

For Scott's testimony denying that he acted as a police "agent," the Court concluded there was no *Giglio* violation because there was no false testimony. *Id.* Although "Scott was on the federal government payroll at the time of trial and was assigned an informant number for the federal authorities," the Court explained, "he did not, at that time, have an informant number for the Metro-Dade police, and therefore evidently did not believe that he was an agent for that department." *Id.* It further observed that, "[e]ven at the postconviction hearing, Scott seemed confused over whether he was an informant for Metro-Dade" when he provided information about Phillips. *Id.* Because "[a]mbiguous testimony

does not constitute false testimony for the purposes of *Giglio*," the Court concluded that no violation occurred. *Id.*

The Florida Supreme Court then considered whether a *Giglio* violation occurred when Farley testified that Smith immediately began to record his statement about Phillips's confession. The Court concluded that any misstatement was "immaterial," noting that it "could have been corrected by the defense, had it been important, since the defense was aware of the pre-interview." *Id.*

Next the Court addressed whether there was a *Giglio* violation when Farley and Watson testified falsely about their criminal records. *Id.* The Court accepted that these inmates gave "incorrect" statements about their criminal records at Phillips's trial. *Id.* But the Court concluded that Phillips failed to establish materiality because there was "no reasonable probability that the false testimony affected the judgment of the jury." *Id.* Because the jury had heard that Farley and Watson were convicted felons, the Court concluded, "the admission of an additional conviction or probationary sentence would have added virtually nothing to further undermine their credibility." *Id.*

The Florida Supreme Court did not explicitly address whether a constitutional violation occurred when (1) the State failed to disclose that Scott met with Phillips's family at the direction of law enforcement, (2) Hunter testified that his cellmate initially contacted Waksman; or (3) the State failed to turn over Hunter's mental health records. The Florida Supreme Court also did not address Waksman's routine practice of redacting police

records and cutting and pasting the records so that no redaction was apparent.

D. Federal Habeas Proceedings

After the Florida Supreme Court denied relief, Phillips filed a federal habeas petition raising *Brady* and *Giglio* claims. The district court denied relief.

On the *Brady* claim, the district court concluded that the Florida Supreme Court's decision was entitled to deference. Because there was conflicting evidence about whether the State had encouraged or coached witnesses to give false testimony and whether it had disclosed all the promises made to the inmates, the district court explained, this claim "rest[ed] on the credibility of the witnesses." The court concluded that Phillips "failed to overcome the presumption of correctness" owed to the state court's credibility determinations and other factual findings.

Addressing Phillips's *Giglio* claim, the district court began by considering whether a *Giglio* violation occurred when Scott testified at trial that he was not a police "agent." The district court gave deference to the Florida Supreme Court's determination that Scott did not give false testimony when he denied that he was a police agent because of the ambiguous way the question at trial had been formulated.

The district court also reviewed whether a *Giglio* violation occurred when Farley testified that he had not discussed Phillips's confession with Smith before giving his recorded statement. The court concluded that the Florida Supreme Court's decision that this

statement was not material was reasonable and thus entitled to deference. Similarly, the district court concluded that the Florida Supreme Court reasonably determined that Farley's and Watson's false statements about the extent of their criminal history were not material.

The district court also considered Waksman's redactions. The court explained that Waksman's conduct implicated *Giglio* because he "purposefully withheld" information from the defense, and "witnesses testified falsely concerning certain facts that had been withheld."

But the court explained that to establish his entitlement to relief, Phillips had to show not only that the false statements were material for purposes of *Giglio*, but also that any error was not harmless under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). To satisfy this standard, Phillips had to show that the "error had a substantial and injurious effect or influence on the jury's verdict." The court concluded that this standard was not satisfied given the other circumstantial evidence of Phillips's guilt, which included the evidence of Phillips's "serious problems" with Svenson and tying Phillips to a gun.

This is Phillips's appeal.

II. STANDARD OF REVIEW

We review *de novo* a district court's denial of a petition for a writ of habeas corpus. *Morrow v. Warden, Ga. Diagnostic Prison*, 886 F.3d 1138, 1146 (11th Cir. 2018).

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) governs our review of federal habeas petitions. *See* 28 U.S.C. § 2254(d). "AEDPA prescribes a highly deferential framework for evaluating issues previously decided in state court." *Sears v. Warden GDCP*, 73 F.4th 1269, 1279 (11th Cir. 2023). Under AEDPA, a federal court may not grant habeas relief on claims that were "adjudicated on the merits in [s]tate court" unless the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court of the United States" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d).

A state-court decision is "contrary to" clearly established law if the court "applie[d] a rule that contradicts the governing law" set forth by the Supreme Court or the state court confronted facts that were "materially indistinguishable" from Supreme Court precedent but arrived at a different result. *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000). To meet the unreasonable application of law standard, "a prisoner must show far more than that the state court's decision was merely wrong or even clear error." *Shinn v. Kayer*, 592 U.S. 111, 118 (2020) (internal quotation marks omitted). Rather, the decision must be "so obviously wrong that its error lies beyond any possibility for fairminded disagreement." *Id.* (internal quotation marks omitted). This standard is "difficult to meet and . . . demands that state-court decisions be given the benefit of the doubt." *Raulerson v. Warden*, 928 F.3d 987, 996 (11th Cir. 2019) (internal quotation marks omitted).

Federal courts must defer to a state court's determination of the facts unless the state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d)(2). Section 2254(d)(2) works much like § 2254(d)(1) in that it requires us to give state courts "substantial deference." *Brumfield v. Cain*, 576 U.S. 305, 314 (2015). "We may not characterize . . . state-court factual determinations as unreasonable merely because we would have reached a different conclusion in the first instance." *Id.* at 313–14 (alteration adopted) (internal quotation marks omitted). We presume a state court's factual determinations are correct absent clear and convincing evidence to the contrary. *See Pye v. Warden, Ga. Diagnostic Prison*, 50 F.4th 1025, 1035 (11th Cir. 2022) (en banc).

On each claimed basis for relief, we review "the last state-court adjudication on the merits." *Greene v. Fisher*, 565 U.S. 34, 40 (2011). "When a federal claim has been presented to a state court and the state court has denied relief," we presume "the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington v. Richter*, 562 U.S. 86, 99 (2011).

III. LEGAL ANALYSIS

Phillips argues on appeal that the Florida Supreme Court's decision is not entitled to deference and that he is entitled to habeas relief on his *Giglio* and *Brady* claims under a *de novo* standard. In this section, we begin by reviewing the standard that applies to *Giglio* and *Brady* claims before addressing the claims in turn.

A. Overview of *Giglio* and *Brady*

In *Brady*, the Supreme Court recognized that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." 373 U.S. at 87. The Court has since clarified that a defendant need not request favorable evidence from the State to be entitled to it. *See Kyles v. Whitley*, 514 U.S. 419, 433 (1995).

"There are two categories of *Brady* violations, each with its own standard for determining whether the undisclosed evidence is material and merits a new trial." *Smith v. Sec'y, Dep't. of Corr.*, 572 F.3d 1327, 1333 (11th Cir. 2009). The first category of violations (often referred to as *Giglio* violations) occurs when "the undisclosed evidence reveals that the prosecution knowingly made false statements or introduced or allowed trial testimony that it knew or should have known was false." *Id.* at 1334; *see Giglio*, 405 U.S. at 153. However, "there is no violation of due process resulting from prosecutorial non-disclosure of false testimony if defense counsel is aware of it and fails to object." *United States. v. Stein*, 846 F.3d 1135, 1147 (11th Cir. 2017) (alteration adopted) (internal quotation marks omitted). But when the government "affirmatively capitalizes" on the false testimony, "the defendant's due process rights are violated despite the government's timely disclosure of evidence showing the falsity." *Id.*

When a *Giglio* violation occurs, the defendant generally is entitled to a new trial "if there is any reasonable likelihood that the

false testimony *could* have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976) (emphasis added). This standard "requires a new trial unless the prosecution persuades the court that the false testimony was harmless beyond a reasonable doubt." *Smith*, 572 F.3d at 1333 (internal quotation marks omitted). "This standard favors granting relief." *Id.* We have described it as "defense friendly." *Ford v. Hall*, 546 F.3d 1326, 1333 (11th Cir. 2008).

But when a *Giglio* claim arises on collateral review, a petitioner also must satisfy the more onerous standard set forth in *Brecht*. *Rodriguez v. Sec'y, Fla. Dep't of Corr.*, 756 F.3d 1277, 1302 (11th Cir. 2014) (citing *Brecht*, 507 U.S. at 637). Under *Brecht*, a federal constitutional error is not a basis for relief on collateral review unless it resulted in "actual prejudice." 507 U.S. at 637 (internal quotation marks omitted). Under this standard, relief may be granted "only if the federal court has grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict." *Davis v. Ayala*, 576 U.S. 257, 267–68 (2015) (internal quotation marks omitted). There must be "more than a reasonable possibility that the error was harmful." *Id.* at 268 (internal quotation marks omitted).

This standard requires us to "consider the specific context and circumstances of the trial to determine whether the error contributed to the verdict." *Al-Amin v. Warden, Ga. Dep't of Corr.*, 932 F.3d 1291, 1301 (11th Cir. 2019); *see Mansfield v. Sec'y, Dep't of Corr.*, 679 F.3d 1301, 1313 (11th Cir. 2012) (explaining that this analysis "is necessarily fact-specific and must be performed on a case-

by-case basis"). The *Brecht* standard requires a reviewing court to "'ask directly' whether the error substantially influenced the jury's decision." *Granda v. United States*, 990 F.3d 1272, 1293 (11th Cir. 2021) (quoting *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995)). "[I]f the court cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, the court must conclude that the error was not harmless." *Id.* (internal quotation marks omitted). An error is "likely to be harmless" when "there is significant corroborating evidence or where other evidence of guilt is overwhelming." *Mansfield*, 679 F.3d at 1313 (citations omitted); *see Brecht*, 507 U.S. at 639 (concluding that error was harmless when "the State's evidence of guilt was, if not overwhelming, certainly weighty" and noting that "circumstantial evidence . . . pointed to petitioner's guilt").

The *Brecht* standard reflects the view that the State should "not be put to the arduous task of retrying a defendant based on mere speculation that the defendant was prejudiced by trial error." *Ayala*, 576 U.S. at 268 (alterations adopted) (internal quotation marks omitted); *see Fry v. Pliler*, 551 U.S. 112, 116 (2007) (explaining that the *Brecht* standard reflects "concerns about finality, comity, and federalism"). As a result, "*Brecht* can prevent a petitioner from obtaining habeas relief even if he can show that, were he raising a *Giglio* claim in the first instance on direct appeal before a state appellate court, he would be entitled to relief." *Rodriguez*, 756 F.3d at 1302.

"Because the *Brecht* harmlessness standard is more strict from a habeas petitioner's perspective than the *Giglio* materiality standard," we have recognized that "federal habeas courts confronted with colorable *Giglio* claims in § 2254 petitions . . . may choose to examine the *Brecht* harmlessness issue first." *Id.* at 1303 n.45 (internal quotation marks omitted). And, "[b]ecause we consider the *Brecht* question in the first instance on federal habeas review, there is no state court *Brecht* actual-prejudice finding to review or to which we should defer." *Trepal v. Sec'y, Fla. Dep't of Corr.*, 684 F.3d 1088, 1112 (11th Cir. 2012). "Of course, we still . . . defer to the state court's other fact findings derived from testimony, documents, and what happened at trial and the [evidentiary] hearing." *Id.*

The second category of *Brady* violations (often referred to as *Brady* violations) occurs when "the government suppresses evidence that is favorable to the defendant[], although the evidence does not involve false testimony or false statements by the prosecution." *Smith*, 572 F.3d at 1334. The defendant is entitled to a new trial if he establishes that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* (internal quotation marks omitted). "A reasonable probability of a different result exists when the government's evidentiary suppressions, viewed cumulatively, undermine confidence in the guilty verdict." *Id.* (internal quotation marks omitted). On federal habeas review of the denial of a claim that the State suppressed favorable evidence, we do not conduct a *Brecht* inquiry because the applicable materiality standard

"necessarily entails the conclusion that the suppression must have had substantial and injurious effect or influence in determining the jury's verdict." *Rodriguez*, 756 F.3d at 1303 (internal quotation marks omitted).

B. The *Giglio* Claim

Phillips argues that the State violated *Giglio* because it presented false testimony on the following topics:

(1) whether Farley discussed Phillips's confession with Smith before giving the recorded statement;

(2) the assistance promised to the inmates for testifying against Phillips;

(3) Scott's relationship with the Metro-Dade police department, including whether he was acting as an agent of the department;

(4) how Hunter first came into contact with the State about Phillips's confession; and

(5) the extent of Farley's and Watson's criminal histories.

In support of his *Giglio* claim, Phillips also points to Waksman's redactions, which he says concealed that the inmates gave false testimony.

In reviewing the Florida Supreme Court's denial of the *Giglio* claim, we begin with its determination that the State did not introduce false testimony about what had been promised to the inmates in exchange for their testimony or about Scott's relationship

with Metro-Dade Police. *See Phillips II*, 608 So. 2d at 781. As we explain in greater detail below, we conclude that this determination was not unreasonable. For the other alleged *Giglio* violations, the Florida Supreme Court concluded that any false testimony was not material. Rather than address whether this aspect of the Florida Supreme Court's decision is entitled to deference under AEDPA,[12] we conclude that Phillips is not entitled to relief because, under *Brecht*, any error was harmless given the State's other evidence about Phillips's guilt that was separate from and independent of any evidence the inmates supplied.

1. Reasonableness of the Determinations About Promises Made to the Inmates and Whether Scott Was an Agent

We now consider whether the Florida Supreme Court's decision—that no *Giglio* violation occurred when the inmates testified about the extent of assistance promised to them and when Scott denied acting as an agent of the State—was reasonable. As to the promises made to the inmates, the Florida Supreme Court reasonably concluded that no false testimony was given. As to Scott's testimony about his status as an agent, the Florida Supreme Court likewise reasonably concluded that Scott gave no false testimony.

[12] Phillips argues that the Florida Supreme Court's decision is not entitled to deference because it failed to apply the correct materiality standard or to conduct a cumulative analysis of materiality.

a. Testimony About Promises Made to the Inmates

We begin with the issue of whether a *Giglio* violation occurred when the inmates testified at trial about what they were promised for testifying against Phillips. The Florida Supreme Court reasonably rejected this claim based on the lower court's factual finding that Waksman and Smith did not decide until after trial to give additional assistance to the inmates.

As we described in detail above, at the evidentiary hearing, the parties introduced conflicting evidence on the factual question of what the State promised the inmates for testifying against Phillips. *See supra* Section I-C-1-b. To summarize, on the one hand, Smith and Waksman testified that as to any criminal charges or existing sentences, the inmates generally were told that in exchange for their testimony against Phillips, the State would tell the judges in their criminal cases (or the parole board) that they had assisted by testifying against Phillips. According to Smith and Waksman, it was only after the criminal trial that they decided to provide additional help to the inmates and told them about the reward money. On the other hand, some of the inmates testified at the evidentiary hearing that they were told about the reward money and promised additional assistance before trial.

Ultimately, the state court resolved this factual dispute by crediting Smith's and Waksman's testimony over the inmates' testimony. *See Phillips II*, 608 So. 2d at 780–81. Phillips challenges the state court's findings of fact. But AEDPA requires us to presume

that the state court's factual findings were correct unless rebutted by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1). And after carefully reviewing the record, we cannot say that Phillips came forward with the clear and convincing evidence necessary to reject the state court's credibility determinations. *See Pye*, 50 F.4th at 1045 n.13. Thus, taking as correct the state court's factual determination that Smith's and Waksman's testimony was truthful, we cannot say that it was unreasonable for the Florida Supreme Court to reject Phillips's claim that the State presented false testimony about the promises made to the inmates.[13]

b. Testimony About Scott's Status as an Agent

We now turn to Phillips's claim that a *Giglio* violation occurred when Scott denied that he was acting as an agent of the State. As a refresher, at trial, Phillips questioned Scott about why he reported Phillips's confession to law enforcement. Scott testified that he wanted the police to "check it out." Phillips's attorney then asked a line of questions comparing Scott to individuals who normally would investigate a confession. He began by asking, "Are

[13] In state court, Phillips also argued that a *Giglio* violation occurred because Hunter and Farley falsely testified that Phillips had confessed. The Florida Supreme Court rejected this claim, explaining that "competent, substantial evidence" supported the state court's finding that Farley and Hunter's hearing testimony was "completely unbelievable." *See Phillips* II, 608 So. 2d at 781. After carefully reviewing Phillips's appellate brief, we do not see an argument challenging this determination as unreasonable. But even assuming that he adequately raised this argument on appeal, we would conclude that the state court's decision was entitled to deference.

you a member of any police agency that you wanted this checked out?" Scott responded, "No, no, no, I'm not a police agent." Phillips's attorney then followed up by asking, "You run an investigative agency or something, your checking things out like this?" And Scott answered, "No, man, no."

Phillips argues that Scott gave false testimony when he denied being a "member of any police agency" and said he was "not a police agent." Because testimony at the evidentiary hearing indicated that Scott was working as an agent of police, Phillips reasons that Scott must have given false testimony at trial.

But, as the Florida Supreme Court explained, even at the evidentiary hearing, "Scott seemed confused over whether he was an informant for Metro-Dade." *Phillips II*, 608 So. 2d at 781. And from the record of the trial, it is not entirely clear what Scott meant when he answered that he was not an agent. He made the statement in response to a question asking whether he was a "member of any police agency." Phillips takes Scott's answer to be a denial that he had any relationship with the Metro-Dade police. But it is just as possible that Scott was denying being an employee of any police department or agency (as the question asked at trial suggested). Given this ambiguity, and because there is no evidence suggesting that Scott was an employee or member of a police department or agency, we hold that the state court reasonably concluded that Scott did not testify falsely and there was no *Giglio* violation. *See United States v. Petrillo*, 821 F.2d 85, 89 (2d Cir. 1987).

2. Harmlessness of Any Other *Giglio* Violation

Phillips also claimed that the State violated *Giglio* in other ways. But we need not decide whether it was unreasonable for the Florida Supreme Court to reject the remainder of his *Giglio* claim because any error was harmless under *Brecht*. Given the other evidence of Phillips's guilt, we are left with no grave doubt about whether the alleged *Giglio* violations had a substantial and injurious effect or influence on the jury's verdict.

In analyzing harmlessness, we assume that if the false testimony had been disclosed, Phillips would have been able to impeach the inmates to such an extent that the jury would not have relied on their testimony in reaching a verdict. But given the substantial evidence of Phillips's guilt that was unrelated to the four inmates, we conclude that any error was harmless.

To begin, the State introduced strong evidence of Phillips's motive. Testimony from multiple witnesses without questionable motivations indicated that Phillips was seeking vengeance on Svenson and Nanette. After Phillips harassed Nanette, showing up at her home and following her to a grocery store, Svenson and Nanette both played roles in sending him back to prison. Upon his release from prison, Phillips showed up at Nanette's office and tried to see her. A week later, shots were fired through the front window of her home. When Svenson searched Phillips's house after this shooting, he became belligerent. And on the morning of Svenson's murder, he and Phillips had another confrontation after Nanette spotted Phillips at the courthouse. Svenson met with Philips and

warned him that he might send him back to jail for intimidating Nanette. A few hours later, Svenson was murdered.

Moreover, Phillips made statements indicating that he sought revenge on Svenson and Nanette for sending him back to prison. Upon learning of the murder charge, Phillips said, "They're lucky they got me when they did because I would have killed every last motherfucker in that office" and also "[i]f somebody does me harm, I do them harm."

Motive aside, there was ample evidence that Phillips was the person who shot into Nanette's home and that he had access to a firearm around the time of the murder. Phillips admitted to Tony Smith that he had tried to shoot a female parole officer. Tony Smith saw Phillips carrying a .38 Special or a .357 Magnum, the same type of weapon that was used to shoot into Nanette's home and to murder Svenson. And on the evening of the shooting at Nanette's home, police tested Phillips's hands for gunpowder residue; after this test, Phillips told a coworker that he had recently fired a weapon and was concerned that officers would find gunpowder residue on his hands.

The State also introduced evidence showing that Phillips gave the police a false alibi. In an interview the day after the murder, Phillips reported that he had been shopping at the Winn-Dixie until 8:30 p.m. (the murder occurred at 8:38) and then drove home. He claimed that upon returning home from the grocery store, he drove his mother to his sister's house.

But the alibi quickly fell apart. Police obtained Phillips's Winn-Dixie receipt, which showed that he was at the store nearly one hour later, meaning that there was time for Phillips to drive to the parole office, wait for Svenson, shoot him, travel to the Winn-Dixie, and check out by 9:19 p.m. His sister admitted at trial that Phillips and his mother came to her house later than he told police. Phillips's false alibi further supports our conclusion on harmlessness. *See Hodges v. Att'y Gen., Fla.*, 506 F.3d 1337, 1343 (11th Cir. 2007) (considering, when assessing harmlessness of error under *Brecht*, that State had introduced evidence disputing the defendant's "alibi defense"); *United States ex rel. Hines v. LaValee*, 521 F.2d 1109, 1113 (2d Cir. 1975) (holding error was harmless because of, among other things, "the adverse inference to be drawn from [the defendant's] attempted use of a false alibi").

In addition to the false alibi, the State introduced evidence of other false statements Phillips made to police in interviews. When Phillips was asked about seeing Svenson the day after the shooting at Nanette's house, he denied arguing with Svenson. But the denial conflicted with testimony from other parole officers who were there. And Phillips said in interviews that Svenson was not at the meeting with parole officers on August 31. But several witnesses testified that Svenson was present.

Viewing the entire record, we cannot say that we have a grave doubt about whether the alleged *Giglio* errors had a substantial and injurious effect on the trial's outcome. Even though the State's evidence in this case was largely circumstantial and we

cannot say it was overwhelming, there was significant enough corroborating evidence of Phillips's guilt that any *Giglio* error was harmless. *See Brecht*, 507 U.S. at 639; *Mansfield*, 679 F.3d at 1313.

Phillips argues that our decision in *Guzman v. Secretary, Department of Corrections*, 663 F.3d 1336 (11th Cir. 2011), compels the opposite conclusion. We find the case distinguishable and therefore disagree.

James Guzman was convicted in Florida state court of murdering David Colvin. *Id.* at 1339–40. At the time of the murder, Guzman was living at a motel with Martha Cronin. *Id.* at 1340. Colvin also lived at the motel. *Id.* One morning, Colvin and Guzman left the motel together to drink beer and eat breakfast. *Id.* According to Guzman, when they returned, the two men went separate ways. *Id.* Later that day, Colvin was robbed and stabbed to death. *Id.* There were no eyewitnesses to the murder. *Id.* at 1354.

When police initially questioned Guzman and Cronin, both said they knew nothing about the murder. *Id.* at 1341. Months later, police again interviewed Cronin, who had an outstanding warrant for a probation violation. She reported that Guzman had confessed to robbing and murdering Colvin. *Id.* at 1341–42. A few weeks later, Cronin testified before the grand jury about Guzman's confession. *Id.* at 1342.

At Guzman's criminal trial, Cronin again testified that Guzman had confessed. *Id.* at 1340–41. The jury heard from both Cronin and the lead detective that Cronin had not received anything in exchange for her testimony. *Id.* at 1342. Guzman testified in his

own defense and denied robbing or murdering Colvin. *Id.* at 1352. He also introduced evidence of other "viable suspects," including two individuals who had previously used knives in physical altercations with Colvin at the motel. *Id.* at 1353 & n.21. Ultimately, Guzman was convicted and sentenced to death. *Id.* at 1339–40.

In post-conviction proceedings, Guzman raised a *Giglio* claim based on evidence showing that the lead detective gave Cronin a $500 reward before she testified to the grand jury. *Id.* at 1342–43. The Florida Supreme Court affirmed the denial of relief on the *Giglio* claim, concluding that "the evidence was immaterial." *Id.* at 1345 (internal quotation marks omitted). Guzman then filed a § 2254 petition in federal court. *Id.* The district court granted the petition and concluded that Guzman was entitled to a new trial. *Id.* We affirmed.

We held that the Florida Supreme Court's decision on materiality was unreasonable and thus not entitled to AEDPA deference. *Id.* at 1349. We also concluded that the *Giglio* error was not harmless under *Brecht* because the error had a "substantial and injurious effect on the outcome of [Guzman's] trial." *Id.* at 1355. We explained that the State's case had "significant weaknesses" and "boiled down essentially [to] a credibility contest between Guzman [who had testified] on the one side, and Cronin and [the detective] on the other." *Id.* at 1356. Cronin's credibility was "critical to the State's case." *Id.* at 1351. But due to the *Giglio* error, Guzman was unable to attack Cronin's credibility by showing that she changed her story to obtain the reward money. *Id.* at 1352. The *Giglio* error

also deprived Guzman of the opportunity to impeach the detective by showing that she gave false testimony about the payment, and such impeachment would have "impugned not only her veracity but the character of the entire investigation." *Id.* at 1353 (internal quotation marks omitted). In assessing the overall weakness of the State's case, we emphasized, too, that Guzman had identified "other viable suspects." *Id.* After viewing the "entire record," we were left with "grave doubt" about whether the *Giglio* error had swayed the outcome of the trial and thus affirmed the grant of relief. *Id.* at 1356 (internal quotation marks omitted).

Guzman is distinguishable from this case. Importantly, the State's case against Phillips was stronger than its case against Guzman. Here, the State's case included particularly robust evidence of motive (Svenson's role in sending Phillips back to prison and threatening to send him back to prison again) as well as evidence that Phillips had possessed a firearm, similar to the one used to shoot into Nanette's home and to murder Svenson, around the time of the murder; had shot into Nanette's home; and provided a false alibi. And at Phillips's trial, there was no evidence of other viable suspects. Given the totality of the evidence introduced at Phillips's trial, we simply cannot say that the alleged errors had a substantial and injurious effect or influence on the jury's guilty verdict. Even after considering *Guzman*, we remain convinced that the error here was harmless under *Brecht*.

Before moving on, we emphasize that our conclusion that any *Giglio* error was harmless should not be taken as condoning

Waksman's conduct in this case. To the contrary, we condemn the conduct. Waksman redacted discoverable material and then covered his tracks with his improper cut-and-paste practices, making the alterations undetectable. This behavior was dishonest and unethical. But our inquiry here is a different one. The Supreme Court has made clear that to be entitled to relief on collateral review, a state prisoner must do more than show a constitutional error; he also must show that the error had a substantial and injurious effect or influence on the jury's verdict. *See Fry*, 551 U.S. at 116. Because after carefully considering the entire record in the case we are not left with grave doubt about whether the outcome of the trial was swayed by *Giglio* error, we affirm the district court's order denying Phillips relief.

C. Phillips's *Brady* Claim

Finally, we turn to Phillips's *Brady* claim. Phillips argues that the State violated *Brady* when it suppressed evidence about (1) the "monetary and sentencing benefits" promised to the four inmates and (2) Hunter's mental health history. Because the Florida Supreme Court's decision denying relief on this claim was not unreasonable, we conclude that it is entitled to AEDPA deference.

We begin by considering whether the State violated *Brady* by failing to disclose the full range of monetary and sentencing benefits promised to the inmates. Of course, the State was required to disclose any promises made to the inmates about benefits they might receive for testifying because those promises could be used to impeach the witnesses and thus would qualify as "[e]vidence . . .

favorable to the accused for *Brady* purposes." *Stein*, 846 F.3d at 1146. But for the reasons we discussed in Section III-B-1 above, we conclude that the state court reasonably rejected Phillips's claim based on its factual determination that the State disclosed the promises made to the inmates before Phillips's criminal trial.

Phillips also contends that a *Brady* violation occurred when the State failed to turn over mental health records showing that in a previous case Hunter had been found not guilty by reason of insanity. We conclude that the decision rejecting this claim is entitled to deference because the Florida Supreme Court reasonably could have determined that the records were not material, meaning there was no reasonable probability of a different result if the State had disclosed the records.[14]

These records show that between 1970 and 1972 (approximately 10 years before the relevant time period), Hunter had mental health problems, including schizophrenia, and was found not guilty of a crime by reason of insanity. Given the strength of the State's case, which we discussed in Section III-B-2 above, it was

[14] In its decision, the Florida Supreme Court never expressly addressed the claim that the State violated *Brady* by failing to turn over Hunter's mental health records. Instead, it silently rejected the claim. *See Phillips II*, 608 So. 2d at 780. In determining whether this decision is entitled to AEDPA deference, we consider what arguments or theories "could have supported" the decision and ask whether those arguments or theories were reasonable. *Richter*, 562 U.S. at 102. The Florida Supreme Court could have rejected the *Brady* claim because the mental health records were not material, a conclusion we find to be reasonable.

reasonable for the Florida Supreme Court to conclude that there was not a reasonable probability of a different result if the records had been disclosed.

IV. CONCLUSION

For the above reasons, we affirm the district court's denial of Phillips's habeas petition.

AFFIRMED.

WILSON, Circuit Judge, concurring:

I concur in the thorough and well-reasoned majority opinion. But this case presents a close call as to whether any *Giglio*[1] error was harmless under the *Brecht*[2] standard. I write separately to highlight the implications of, as the majority aptly describes, Prosecutor Waksman's "dishonest and unethical" behavior.

At a post-conviction evidentiary hearing, Phillips elicited extensive information about Prosecutor Waksman's role in obtaining the informants' testimony and about Prosecutor Waksman's redaction of police reports—none of which Phillips knew at the time of his trial. In an affidavit, Larry Hunter stated that Prosecutor Waksman told him to testify at trial that he received no deal for his testimony, but in reality, Hunter was actually promised probation instead of life imprisonment. The evidence also showed that Prosecutor Waksman edited Detective Smith's police report to remove any reference to Prosecutor Waksman's contact with Hunter. This edited copy was the version handed over to the defense during discovery.

Phillips introduced a letter that William Farley had written on February 1, 1984 (the day Phillips was sentenced), stating that Prosecutor Waksman had not tried to get Farley out of prison as Farley expected and suggesting that Prosecutor Waksman had "used" him. According to Farley, Detective Smith visited him in

[1] *Giglio v. United States*, 405 U.S. 150 (1972).

[2] *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993).

jail after the first letter, upset that Farley would tell the truth, specifically that Detective Smith told Farley what he should say before the recorded interview. Farley was subsequently transferred to a harsher area of prison. Farley then sent a second letter on February 14, 1984, in which he accused Prosecutor Waksman of lying to him "about everything," including failing to send a letter to the parole commissioner on his behalf. A check was also introduced showing Farley cashed $175 from Prosecutor Waksman. Phillips also presented Detective Smith's unredacted report indicating that he and Farley spoke for 1.5 hours prior to the start of the recording. Prosecutor Waksman had edited Detective Smith's police report to remove reference to this unrecorded interview prior to handing the report over in discovery.

When confronted with this evidence, Prosecutor Waksman testified that he routinely redacted police reports in a manner that concealed the redaction to defense counsel. Prosecutor Waksman also admitted to providing the informants with benefits greater than what he had admitted to at trial; however, he justified these rewards because he decided to provide them *after* trial. Therefore, according to Prosecutor Waksman, the rewards did not incentivize the informants and could not be used as impeachment evidence.

Again, like the majority notes, under *Brecht*, any error was harmless. We use "harmless" to mean that the remainder of evidence on the record is sufficient to convict Phillips. *See Mansfield v. Sec'y, Dep't of Corr.*, 679 F.3d 1301, 1313 (11th Cir. 2012) ("[T]he erroneous admission of evidence is likely to be harmless under

the *Brecht* standard where there is significant corroborating evidence."). However, "harmless" should not be read to minimize Prosecutor Waksman's routine practice of redacting discovery documents. Prosecutorial misconduct like this is so egregious that it can easily cast a shadow on the entire criminal trial and our criminal justice system more broadly. But for the significant corroborating evidence in this case, Waksman's conduct amounts to a *Giglio* violation.

No. _____

OCTOBER TERM 2024

In The

Supreme Court of the United States

HARRY FRANKLIN PHILLIPS,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition For A Writ Of Certiorari To
The United States Court of Appeals for the Eleventh Circuit

APPENDIX B

United States Court of Appeals for the Eleventh Circuit, Order Denying Petition for Rehearing En Banc (Apr. 15, 2024)

In the

United States Court of Appeals

For the Eleventh Circuit

No. 15-15714

HARRY FRANKLIN PHILLIPS,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:08-cv-23420-AJ

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before WILSON, JILL PRYOR, and NEWSOM, Circuit Judges.

PER CURIAM:

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

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

April 15, 2024

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 15-15714-P
Case Style: Harry Phillips v. Secretary, FL DOC
District Court Docket No: 1:08-cv-23420-AJ

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

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

Clerk's Office Phone Numbers

General Information:	404-335-6100	Attorney Admissions:	404-335-6122
Case Administration:	404-335-6135	Capital Cases:	404-335-6200
CM/ECF Help Desk:	404-335-6125	Cases Set for Oral Argument:	404-335-6141

REHG-1 Ltr Order Petition Rehearing

No. _____

OCTOBER TERM 2024

In The

Supreme Court of the United States

HARRY FRANKLIN PHILLIPS,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition For A Writ Of Certiorari To
The United States Court of Appeals for the Eleventh Circuit

APPENDIX C

Petitioner-Appellant's Petition for Panel Rehearing or Rehearing En Banc
(March 11, 2024)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
APPEAL NO. 15-15714-P

HARRY FRANKLIN PHILLIPS,

Petitioner/Appellant **CAPITAL CASE**

v.

RICKY D. DIXON, Secretary Dept. of Corr.,

Respondent/Appellee

_____/

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION

PETITION FOR PANEL REHEARING OR REHEARING EN BANC

Marie-Louise Samuels Parmer
Florida Bar No. 0005584
Special Assistant CCRC-South
Capital Collateral Regional Counsel - South
110 S.E. 6th Street, Suite 701
Fort Lauderdale, FL 33301
marie@samuelsparmerlaw.com
(Ph.)813.732.3321
Counsel for Petitioner/Appellant

March 11, 2024

***Phillips v. Dixon*, Case No. 15-15714-P**

CERTIFICATE OF INTERESTED PERSONS
C-1 of 2

Brill, Penny (Assistant State Attorney)

Bondi, Pamela Jo (Former Attorney General)

Butterworth, Robert A. (Former Attorney General)

Dixon, Ricky D. (In his official capacity as the Secretary, Florida Department of Corrections)

Dupree, Neal A. (Counsel for Petitioner-Appellant)

Farina, Joseph P. (Circuit Court Judge, Postconviction)

Ferrer, Alex (Circuit Court Judge, Postconviction)

Guralnick, Ronald S. (Trial Counsel)

Hendon, Eric Wm. (Direct Appeal Counsel)

Hennis, William M. (Former Assistant CCRC-South)

Jaggard, Sandra Sue (Assistant Attorney General)

Jaszczolt, Marta (Former CCRC-South Staff Attorney)

Jordan, Adelberto (Current Eleventh Circuit Judge, presiding United States District Judge in the proceedings below)

Kershaw, Joe Lang (Trial Counsel)

Komeily, Fariba (Assistant Attorney General)

Lerner, Lisa-Marie (Assistant Attorney General)

Meyer, Michael Chance (Former CCRC-South Staff Attorney)

Middlebrooks, Donald M. (United States District Judge)

***Phillips v. Dixon*, Case No. 15-15714-P**

CERTIFICATE OF INTERESTED PERSONS- CONTINUED
C-2 of 2

Moody, Ashley (Attorney General, State of Florida)

Naylor, Julie D. (Direct Appeal Counsel)

Neimand, Michael J. (Assistant Attorney General)

Nolas, Billy H. (Former CCRC-South Staff Attorney)

Olive, Mark Evan (Former Assistant CCRC-South)

Parmer, Marie-Louise Samuels (Counsel for Petitioner-Appellant)

Phillips, Harry Franklin (Petitioner)

Reno, Janet (Former State Attorney)

Reyes, Israel (Circuit Court Judge, Postconviction)

Roca, Melissa J. (Assistant Attorney General)

Rundle, Katherine Fernandez (State Attorney)

Sayfie, Nushin G. (Circuit Court Judge, Postconviction)

Smith, Jim (Former Attorney General)

Spadling, Larry Helm (Former CCRC-South)

Synder, Arthur I. (Circuit Court Judge, Trial and Resentencing)

Svenson, Bjorn Thomas (Deceased Victim)

Waksman, David (Assistant State Attorney)

Zahralban, Christine (Assistant State Attorney)

STATEMENT OF COUNSEL

This petition raises an important question on which the circuits are split and which affects hundreds of inmates across the nation. This Circuit's binding precedent holds that *Brecht* applies to *Giglio/Napue* claims. *Trepal v. Sec'y, Fla. Dept. of Corr*., 684 F. 3d 1088, 1111-13 (11th Cir. 2012). The Third and Ninth Circuits hold that it does not; the First, Sixth, and Eighth Circuits agree with this Court. See, e.g., *Dickey v. Davis*, 69 F.4th 624, 645 n. 11 (9th Cir. 2023).

1. Whether a reviewing court should apply the *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed. 2d 353 (1993) harmless error analysis to *Giglio/Napue* claims involving uncontested, egregious prosecutorial misconduct brought in federal habeas proceedings.

Based on my reasoned and studied professional judgment, I believe this question is of exceptional importance.

s/Marie-Louise Samuels Parmer
Marie-Louise Samuels Parmer, Esq.
Counsel for Mr. Phillips

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TABLE OF CITATIONS

Constitutional Provisions Involved

U.S. Const. amend V, which reads in pertinent part, "No person shall be held to answer for a capital . . . crime . . . nor be deprived of life, liberty or property, without due process of law" ……*passim*

U.S. Const. amend XIV Sec. 1, which reads in pertinent part, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law". ……*passim*

Other

STATEMENT OF THE ISSUE FOR EN BANC CONSIDERATION

1. Whether a reviewing court should apply the *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed. 2d 353 (1993) harmless error analysis to *Giglio/Napue*[1] claims involving uncontested, egregious prosecutorial misconduct brought in federal habeas proceedings.

[1] *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

Mr. Phillips, who presents with an I.Q. in the Intellectually Disabled range,[2] has always denied committing the crime at issue. There are no eyewitnesses to the murder of Bjorn Svenson, there is no forensic or physical evidence linking Mr. Phillips to this crime, the State conceded at oral argument that the prosecutor committed misconduct in this case and the Panel determined that the prosecutor's behavior was dishonest and unethical. [3]

STATEMENT OF THE FACTS

A. The Trial

The State of Florida charged Phillips with the shooting murder of Bjorn Thomas Svenson, a parole supervisor in the Miami, Florida Parole and Probation

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[2] MM, V. 16, p. 60-62, 159-61; MM, V. 17, p. 244-45. The Supreme Court has noted that persons with intellectual disability are at risk of wrongful conviction based on the possibility of false confessions. *Atkins v. Virginia*, 536 U.S. 304, 320, 122 S. Ct. 2242, 2252, 153 L. Ed. 2d 335 (2002). Here, Phillips denied involvement in the offense, but statements he is alleged to have made to law enforcement were presented at trial and referenced by the Panel as supportive of a determination of guilt.

[3] Prosecutorial misconduct and incentivized testimony are both present in more than 60% of wrongful conviction cases, including 53% (prosecutorial misconduct) and 57% (incentivized testimony) of Florida wrongful conviction cases since 1989. https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx (last visited March 10, 2024); *see also* Carrie Leonetti, The Innocence Checklist, 58 Am. Crim. L. Rev. 97 (2021) ((known causes of wrongful convictions include prosecutorial misconduct, witness coaching, diminished mental capacity, recantations, police corruption, and snitch testimony).

office, and sought the death penalty. *Phillips v. State,* 476 So. 2d 194, 195 (1985) (*Phillips* I). In the evening of August 31, 1982, witnesses heard gunshots near the Parole and Probation building in Miami. *Id*. Police later found Mr. Svenson's body in the parole building parking lot and determined he "was the victim of multiple gunshot wounds." *Id*. There "were no eyewitnesses" to the shooting. *Id*. No murder weapon was found.

The State's theory at trial was that Mr. Svenson supervised "several probation officers in charge of [Phillips'] parole." *Id.* at 196. Over the course of two years prior to the murder, Phillips, who is Black, and Mr. Svenson "had repeated encounters" over Phillips' contact with a White female parole officer, who he had allegedly asked for a kiss. *Id*. "After one incident," Phillips' parole was revoked, and he was sent back to prison. *Id*. On August 24, 1982, about a week prior to the murders, an unknown person shot a gun through the window of the home of the female parole officer and her live-in male companion, who she would later marry and who was also a parole officer. Both had testified against Phillips in his revocation hearing. *Id*. No one was injured. *Id*. Phillips was subsequently charged with this shooting, although there were no witnesses and a swab of his hands the night of the shooting came back negative.[4]

[4] The Panel opinion states that the test came back inconclusive, but a careful review of the testimony shows that the analyst stated more than once that that the test

Phillips was incarcerated for parole violations almost immediately after Svenson's murder. *Id*. Phillips denied committing the murders, although statements he allegedly made to Detective Smith were used at trial to imply that he was guilty, as set out in the Panel opinion, including that the timing of his alibi was off. While in jail, and then later prison, Phillips allegedly confessed to other inmates that he murdered Svenson, all of whom would testify against him. *Id*. The omissions and falsehoods in the pre-trial depositions and trial testimony of these four inmates, William Farley, William Smith, aka William Scott, Larry Hunter, and Malcolm Watson, along with the egregious prosecutorial misconduct designed to conceal the falsehoods, formed the basis of the claim before this Court. All four of these witnesses testified that they expected little to nothing in return for their testimony and implicated Phillips in the crime in various ways as set out in the Panel opinion. (Appendix A, p. 10-18).

B. State Collateral Proceedings

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results were negative, prompting a dispute between defense counsel and the prosecutor, Mr. Waxman, who had failed to produce the analyst's report in violation of the Florida Rules of Discovery and claimed to not have received any results or a report. APP. HH, V. 5, p. 520, 528, 532-33. Another witness the panel credits - Tony Smith - testified at trial that Phillips told him that he tried to shoot the officer but missed. (Appendix A, p.5). Tony's trial testimony was in direct conflict with his pre-trial affidavit, however. APP. II, V. 25, p. 4373-78; Appendix D.

Phillips timely filed a motion for post-conviction relief in the state circuit court. The state post-conviction court granted Phillips an evidentiary hearing on his claims. At the hearing, Phillips presented evidence demonstrating that the snitch witnesses received benefits for their testimony, acted on behalf of law enforcement and gave false testimony about important details and their own prior records, mental health history, and benefits received as set out in the Panel opinion. (Appendix A, p. 19-30).

The post-conviction court denied the motion. The court identified Phillips' claim only as a "*Brady* violation." APP. II, V. 49, pp. 8694-97; (Appendix B). The court rejected the claims on credibility grounds and other reasons which Phillips has contended were unsupported by the state court record.

The Florida Supreme Court affirmed the post-conviction court's ruling on the *Brady* and *Giglio* claims but through different reasoning. (Appendix C) The Florida Supreme Court recognized that Phillips raised both a *Brady* claim and a *Giglio* claim, *Phillips v. State*, 608 So.2d 778, 780-81 (Fla. 1992) (Phillips II), and identified the third prong as whether the "statement was material," citing its own precedent of *Routly v. State*, 590 So. 2d 397, 400 (Fla. 1991)." *Phillips,* 608 So. 2d at 781. Twelve years later the Florida Supreme Court would acknowledge that its precedent, expressly identifying *Routly*, had been unclear on the different

materiality prongs of *Giglio* and *Brady*. *Guzman v. State*, 868 So. 2d 498, 505–06 (Fla. 2003).

As to the *Brady* claims, the Florida Supreme Court acknowledged that Phillips had presented evidence showing that the snitches had received reward money, that Waksman had done much more than was disclosed in reducing the snitches' criminal exposure and/or sentences, but credited Waksman's claim that he only did so after the trial and he himself did not realize to "what extent he would end up helping them." *Id.* at 781.

As to the *Giglio* claims, the Florida Supreme Court found that Scott's denials of involvement with the Metro-Dade police were "ambiguous" and thus did not "constitute false testimony for the purposes of *Giglio*." *Id*. As to Farley's lie "that the tape was started immediately when he gave his tape-recorded statement to the police," when, in fact, "a pre-interview was conducted which lasted approximately one and one- half hours," the court found Farley's "misstatement to be immaterial." *Id.* The court did not address the prosecutor's emphasis on the false statement in closing as indicative of Farley's credibility and knowledge. The court also agreed that Farley and Watson gave "incorrect" statements about their prior records but held that "there is no reasonable probability that the false testimony affected the judgment of the jury." *Id*. The court did not engage in a cumulative analysis under either the *Brady* or *Giglio* standard and did not

acknowledge Waxman's purposeful concealment of material portions of the police report, including concealing Farley's hour and a half conversation with law enforcement prior to Farley giving his statement.

C. The District Court Ruling

Phillips timely filed a petition for writ of habeas corpus in the District Court raising his *Brady* and *Giglio* claims. In addressing the *Brady* and *Giglio* claims, the district court correctly identified the distinction between *Brady* and *Giglio*. In its review of Phillips' claim, however, the district court stated that "the state courts' rejection of these claims was not contrary to, or an unreasonable application of, clearly established United States Supreme Court precedent." (Doc. 12, p. 62-63; 118). The court further determined that the Florida Supreme Court correctly identified the *Brady* and *Giglio* standards and "its analysis of the claim was consistent with these standards." (Doc. 12, p. 118).

D. Panel Opinion

The Panel issued its unpublished opinion on February 9, 2023. [5] The Panel denied Phillips' habeas petition, with the Panel's ruling hinging on this Court's binding precedent that "when a *Giglio* claim arises on collateral review, a petitioner must satisfy the more onerous standard set forth in *Brecht*. *Rodriguez v.*

[5] This Court granted an extension of time to file this Motion for Rehearing en Banc to March 11, 2024. Therefor, this Motion is timely.

Sec'y, Fla. Dep't of Corr. 756 F.3d 1277, 1302 (11th Cir. 2014) (citing *Brecht*, 507 U.S. at 637)." (Appendix A, p. 39). The Panel determined that, "we cannot say that we have a grave doubt about whether the *Giglio* errors had a substantial and injurious effect on the trial's outcome." (Appendix A, p. 49; *see also*, p. 52). Judge Wilson concurred, stating, "this case presents a close call as to whether any *Giglio* error was harmless under the *Brecht* standard." (Appendix A, p. 57). Judge Wilson further wrote that "prosecutorial misconduct like this is so egregious that it can easily cast a shadow on the entire criminal trial and our criminal justice system more broadly." (Appendix A, p. 59).

ARGUMENT AND CITATIONS OF AUTHORITY

Giglio/Napue violations should not be subject to a _Brecht_ analysis because the nature of the constitutional violation when a State presents false testimony and evidence to a court and jury does not fall within the concerns that framed the basis of the Court's opinion in _Brecht_.

This Court should grant rehearing en banc to review its prior precedent and determine whether egregious *Giglio/Napue* violations are subject to a *Brecht* analysis. [6] In *Brecht,* the Court expressly stated that its "holding does not foreclose the possibility that in an unusual case, *a deliberate and especially egregious error*

[6] This Court is bound by a prior panel opinion, even if it was wrongly decided, until the opinion's holding is overruled by the Supreme Court or the Court sitting en banc. *See United States v. Golden*, 854 F.3d 1256, 1257 (11th Cir. 2017).

of the trial type, or one that is *combined with a pattern of prosecutorial misconduct*, might so infect the integrity of the proceedings as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict." *Brecht*, 507 U.S. at 630 n. 9, 113 S.Ct. 1710 (emphasis added). This case squarely falls within the Court's anticipated exception. A review of the underpinnings of *Giglio* and *Napue* demonstrates why cases involving egregious and deliberate prosecutorial misconduct and the presentation of false testimony and evidence do not fit within *Brecht's* concerns and why the *Brecht* Court left for another day the opportunity to decide the proper materiality standard in cases of egregious prosecutorial misconduct.

A. A REVIEW OF THE UNDERPINNINGS OF PERJURY CLAIMS

A state violates the Fourteenth Amendment's due process guarantee when it knowingly presents or fails to correct false testimony in a criminal proceeding. *See Napue*, 360 U.S. at 269, 79 S.Ct. 1173; *Giglio*, 405 U.S. at 153, 92 S.Ct. 763. "[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), *holding modified by United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

"[T]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Giglio*, 405 U.S. at 153, 92 S.Ct. 763 (quoting *Napue*, 360 U.S. at 269, 79 S.Ct. 1173). A conviction must be set aside even if the false testimony goes only to a witness's credibility rather than the defendant's guilt. *Napue*, 360 U.S. at 270, 79 S.Ct. 1173. The standard of review applicable to perjured testimony claims is "strict." *Agurs*, 427 U.S. at 104, 96 S.Ct. 2392. This is so "not just because [those claims] involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process." *Id.*

The *Giglio*/*Napue* "materiality" standard is equivalent to the harmless-error standard articulated in *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (requiring the State to demonstrate the error was harmless beyond a reasonable doubt), *see Bagley*, 473 U.S. at 680 n.9, 105 S.Ct. 3375. In *Brecht*, the Court imposed an actual-prejudice standard on constitutional trial errors raised in *habeas* proceedings, as opposed to on direct review, holding that a petitioner is generally entitled to relief only if he can show "actual prejudice." *Brecht*, 507 U.S. at 631, 113 S.Ct. 1710. *Brecht* error is met when the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Id.* (quoting *Kotteakos v. United States,* 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)). "[I]f a judge has 'grave doubt' about whether an error

affected a jury in this way, the judge must treat the error as if it did so." *O'Neal v. McAninch*, 513 U.S. 432, 438, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995) (internal quotation marks omitted).

B. THE THIRD AND NINTH CIRCUIT'S REJECTION OF *BRECHT* HARMLESS ERROR STANDARD ON PERJURY CLAIMS

In *Haskell v. Superintendent Greene SCI*, 866 F. 3d 139 (3rd Cir. 2017), a case involving the knowing presentation of false testimony that the prosecutor "returned to and emphasized" in closing argument (as happened in Phillips' case), the Third Circuit decided whether a habeas petitioner must demonstrate a reasonable likelihood the false testimony could have affected the judgment of the jury under *Giglio* and *Napue*, or whether he must show "actual prejudice" under *Brecht*. *Id*. at 141. The court reviewed the underpinnings of *Giglio* and *Napue*, and reviewed the holdings of other circuits, in determining that *Brecht* did not apply.

The Third Circuit determined that "*Brecht* relied on three characteristics of habeas proceedings to ground the distinction between harmless error under *Chapman"* and the heightened standard on habeas under *Brecht*. *Haskell,* 866 F.3d at 148. The Brecht court first gave weight to the interest in the finality of convictions; second, to the concern that federal intrusion frustrates a State's "good faith attempts to honor constitutional rights," (citing *Eagle v. Isaac*, 456 U.S. 107, 128, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982)); and, third, "liberal allowance of the writ degrades the prominence of the trial itself, and at the same time encourages habeas petitioners to

relitigate their claims on collateral review." *Haskell,* 866 F.3d at 148 (internal citations omitted).

The Third Circuitrecognized that these concerns do not apply to all constitutional errors and "there are a number of exceptions to *Brecht*'s actual-prejudice requirement." *Id.* at 148-49. Relying in part on the Court's footnote in *Brecht*, *supra,* and the Court's reasoning in *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), the Third Circuit held that the *Brecht* actual prejudice standard does not apply to claims involving a state's knowing use of perjured testimony. *Id*. at 152.

The court reasoned that in cases involving perjured testimony, the *Brecht* Court's three underlying concerns were not implicated. The Third Circuit noted that the deliberate deception of a court and the presentation of false testimony is "inconsistent with the rudimentary demands of justice." *Id*. (*quoting Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340. 79 L.Ed. 791 (1935)). "Thus, it is difficult to see how concerns of finality would trump rudimentary demands of justice and fundamental fairness when those are precisely the values the writ of *habeas corpus* is intended to protect." *Id*. Second, a State's knowing presentation of perjury is not "a 'good-faith attempt [ ] to honor constitutional rights,' but instead [ ] a bad-faith effort to deprive the defendant of his right to due process and obtain a conviction through deceit." *Id*. (internal citations omitted). "Third, there is little chance that

excluding perjured testimony claims from *Brecht* analysis will 'degrade[ ] the prominence of the trial itself[,]' *Brecht*, 507 U.S. at 635, 113 S.Ct. 1710, because a defendant petitioner most likely will not know of the prosecution's use of perjured testimony until after the opportunity for direct review has passed. *Id*.

The Ninth Circuit has also held that *Brecht* does not apply to *Napue/Giglio* claims involving perjured testimony. *Hayes v. Brown*, 399 F.3d 972, 984 (9th Cir. 2005). The Ninth Circuit recognized *Kyles* suggests "that for the three types of due-process violations discussed in *Agurs* there is no need to perform a separate harmless-error analysis under *Brecht*." *Haskell*, 866 F. 3rd at 150 (citing *Hayes*, 399 F. 3d at 985, citing *Kyles*, 514 U.S. at 436, 115 S.Ct. 1555). For these violations, the materiality and harmless error standards merge and there is no need to look to the Brecht harmless-error standard. *Haskell,* at 150-51.

C. THE FIRST, EIGHTH, TENTH AND ELEVENTH CIRCUIT'S APPROACH

This Court, and the First, Eighth and Tenth Circuits have held that *Brecht* applies to *Napue/Giglio* claims. See *Trepal v. Sec'y, Fla. Dep't of Corr.,* 684 F.3d 1088, 1111-13 (11th Cir. 2012); *Gilday v. Callahan,* 59 F. 3d 257, 268 (1st Cir. 1995). *Rosencrantz v. Lafler,* 568 F.3d 577, 587-90 (6th Cir. 2009); and, *Douglas v. Workman,* 560 F. 3d 1156, 1173, n. 12 (10th Cir. 2009) (per curiam). The First Circuit reasoned that "the Supreme Court's recent decision in *Kyles* makes clear, *see* 514 U.S. at ——, 115 S.Ct. at 1567, the approach to harmless error in the

Brady/Giglio context has evolved as the *Chapman* formulation of "harmless beyond a reasonable doubt" has yielded in habeas cases to the softer *Brecht* test of whether the error " 'had substantial and injurious effect or influence in determining the jury's verdict,' " *Gilday v. Callahan*, 59 F.3d 257, 267 (1st Cir. 1995) (internal citations omitted). The Sixth Circuit relied on *Gilday* in determining perjured testimony was subject to a Brecht analyses, but in so doing, the court stated:

> True enough, harmless-error review under *Brecht* did not "foreclose the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict," [*Brecht*]507 U.S. at 638 n. 9, 113 S.Ct. 1710, but we do not view this case as the unusual, especially egregious instance of prosecutorial misconduct, or one that reveals any "pattern of prosecutorial misconduct."

Rosencrantz v. Lafler, 568 F.3d 577, 589 (6th Cir. 2009).

The Tenth Circuit reasoned that:

> [A]ssuming the *Giglio* 'reasonable likelihood' standard is in fact less demanding than the *Kyles* 'reasonable probability' standard, a petitioner who succeeds under that standard will still have to meet the harmless error standard of *Brecht v. Abrahamson,* 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), which the Supreme Court has held is met by the *Kyles* test. *See Kyles,* 514 U.S. at 435–36, 115 S.Ct. 1555. Thus for all practical purposes the two standards ultimately mandate the same inquiry. *Mitchell v. Gibson,* 262 F.3d 1036, 1062 n. 13 (10th Cir.2001).

Douglas v. Workman, 560 F.3d 1156, 1173 (10th Cir. 2009)

D. THIS COURT SHOULD GRANT REHEARING EN BANC AND ADOPT THE THIRD AND NINTH CIRCUIT'S APPROACH.

This Court, in determining that *Brecht* applies to *Giglio* violations, was not presented with the type of deliberate and egregious errors and prosecutorial misconduct that are present in Phillips' case. *Trepal* involved limited false testimony by an FBI chemist regarding the form of chemicals used by Trepal to murder his neighbor and attempt to murder six other members of her family. *Trepal*, 684 F.3d at 1091. In reasoning why *Brecht* applied on habeas review, this Court considered the same concerns addressed by the Third Circuit in *Haskell*: the justice system's interest in finality, the role of a State court in addressing constitutional error and the limitations on habeas relief to those "whom society has grievously wronged." *Id*. at 1111 (internal quotations and citations omitted). The court determined that "the erroneous admission of evidence is likely to be harmless under the *Brecht* standard where there is significant corroborating evidence, or where other evidence of guilt is overwhelming." *Id.* at 114 (internal citations and quotation marks omitted).

This was the standard applied by the Panel in this case. But applying the three concerns to Phillips' case, the merits weigh in Phillips' favor. The state failed to protect his constitutional rights, indeed, the prosecutor purposefully violated them, and in the process grievously wronged Phillips and cast a shadow over our system of justice. And, under *Kyles*, the type of due process violation in the instant case the

materiality and harmless error standards merge. This Court should adopt the standard favored by the Third and Ninth Circuits.

E. THE PANEL'S *BRECHT* ANALYSIS WAS ALSO FLAWED BECAUSE IT FAILED TO TAKE INTO ACCOUNT THE EFFECT ON THE JUROR'S CONSIDERATION OF THE PROSECUTOPR'S KNOWINFG USE OF FALSE TESTIMONY

Phillips further urges this Court en banc to find that this standard fails to take into account the effect on a juror of knowing that not only was a witness willing to knowingly lie, but that the State knowingly presented the jury and the court with false evidence. Phillips respectfully asserts that the Panel's analysis is flawed because it simply looks to the evidence as it would have existed without the snitches and fails to consider how the case would be viewed by the jury if it knew that the prosecution had been deliberately presenting it with false evidence. The prosecutor's misconduct in this case would rightfully make one or more jurors skeptical of other prosecution evidence not shown to be itself tainted. As in *Kyles*, the police investigation and prosecution is tainted because if the prosecution would conceal evidence and allow Farley to lie, what wouldn't they do? The Panel's analysis in Phillips' case fails to consider how a juror may have weighed the State's case and evidence, knowing that one or more key witnesses willingly lied.

Conclusion

Based on the above, this case presents an appropriate vehicle for this Court to reassess the application of the *Brecht* materiality standard to claims of egregious trial error and patterns of prosecutorial misconduct. [7]

Harry Franklin Phillips respectfully requests that this Court grant this motion for rehearing en banc and determine that *Giglio/Napue* violations of the type presented here are not subject to *Brecht* harmless error analysis, or, alternatively, that the Panel's assessment failed to consider how the case would be viewed by the jury if it knew that the prosecution had been deliberately presenting it with false evidence.

Respectfully submitted,

/s/ Marie-Louise Samuels Parmer
Marie-Louise Samuels Parmer
Florida Bar No. 0005584
Special Assistant CCRC-S
Capital Collateral Regional Counsel - South Office
110 S.E. 6th Street, Suite 701
Fort Lauderdale, FL 33301
813.732.3321
marie@samuelsparmerlaw.com

[7] Indeed, this prosecutor's office just last week was found to have engaged in egregious prosecutorial misconduct in a death penalty case stretching back 20 years – a time when the prosecutor in this case prosecuted homicide cases. https://www.cbsnews.com/miami/news/veteran-miami-prosecutor-quits-after-judges-rebuke-over-conjugal-visits-for-jailhouse-informants/
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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 35(b)(2)(A) because, excluding the parts of the documents exempted by 11th Cir. 35-1, this document contains 3,881 words and has been prepared in a proportionally spaced typeface using Times New Roman 14 Point Font.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was electronically filed with the Clerk of the Court on March 11, 2024, by using the CM/ECF Appellate Filing System which will send notice of electronic filing to Lisa Marie Lerner, Assistant Attorney General. I further certify that I mailed the foregoing document by first class mail to the following non-CM/ECF participant: Harry Franklin Phillips, FDOC # 008035, Union Correctional Institution, P.O. Box 1000, Raiford, FL, 32083. .

/s/ Marie-Louise Samuels Parmer
Marie-Louise Samuels Parmer
Florida Bar No. 0005584
Special Assistant CCRC-S
Capital Collateral Regional Counsel - South Office
110 S.E. 6th Street, Suite 701
Fort Lauderdale, FL 33301
813.732.3321
marie@samuelsparmerlaw.com

APPENDIX

INDEX TO APPENDICES

APPENDIX A

[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 15-15714

HARRY FRANKLIN PHILLIPS,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:08-cv-23420-AJ

Before WILSON, JILL PRYOR, and NEWSOM, Circuit Judges.

PER CURIAM:

Florida death row inmate Harry Franklin Phillips appeals the district court's denial of his § 2254 petition for a writ of habeas corpus. After a thorough review of the record and with the benefit of oral argument, we affirm the district court's denial of the petition.

I. FACTS AND PROCEDURAL HISTORY

On the evening of August 31, 1982, Bjorn Thomas Svenson, a parole supervisor in Miami, was working late. He carried a stack of old telephone books outside to throw them away in a dumpster.

Svenson never returned. At 8:38 p.m., he was shot multiple times and died from the gunshot wounds. There were no eyewitnesses to the shooting. From bullets found on the scene, law enforcement officers determined the gun used was either a .357 Magnum or a .38 Special. But no murder weapon was ever recovered.

Phillips was charged with first-degree murder of Svenson. In this section, we start by discussing the evidence of Phillips's guilt introduced at his criminal trial. We then review the history of Phillips's direct appeal, his post-conviction proceedings in Florida state court, and his post-conviction proceedings in federal court.

A. Evidence of Guilt at Phillips's Criminal Trial

The State relied on several categories of evidence to prove that Phillips murdered Svenson, including evidence about (1) Phillips's interactions with Svenson and other parole officers before the murder, (2) statements Phillips made in interviews after the

murder, and (3) confessions Phillips made to other inmates while in custody. We review each category of evidence in turn.

1. Phillips's Interactions with Svenson and Other Parole Officers

At trial, the State introduced evidence showing that Phillips first encountered Svenson in 1980, while Phillips was on parole in Florida. Several parole officers, including Nanette Russell and Michael Russell,[1] testified at Phillips's criminal trial. The parole officers described a series of interactions that Svenson had with Phillips beginning in 1980 and continuing through the day of the murder.

In June 1980, Nanette, who reported to Svenson, was assigned to serve as Phillips's parole officer in Dade County. Under the terms of his parole, Phillips could not leave Dade County without permission. One night a few months into the parole term, Phillips showed up at a grocery store in Broward County where Nanette was shopping. When Nanette left the store, Phillips was waiting by her car. Phillips asked Nanette if they could sit in the car and talk. She refused. He then said, "I just want a goodnight kiss. I don't want any sex from you. I just want a goodnight kiss." Nanette ended the conversation, got in her car, and drove to the home that she shared with Michael, her boyfriend at the time (they later married). That night, Phillips drove by Nanette's home several times.

[1] For ease of reference, we refer to Nanette Russell as "Nanette" and Michael Russell as "Michael."

Nanette called Svenson and reported Phillips's conduct. She also called the police.

The next morning, Phillips called Nanette at home, even though she had not given him the number. He told her that a woman had offered him money to attack Michael.

After these incidents, Svenson assigned Phillips a new parole officer. Svenson also met with Phillips and told him to stay away from Nanette.

The parole commission petitioned to revoke Phillips's parole because he had traveled outside Dade County without permission. The witnesses at the parole hearing included Svenson, Nanette, and Michael. Phillips's parole was revoked, and he was incarcerated for an additional 20 months.

When Phillips was released from prison in August 1982, he was again placed on parole. He was assigned a parole officer who worked in a different building from Nanette. A few days after his release, Phillips went to Nanette's office and tried to see her. Nanette refused to see him and reported the incident to Svenson, who then met with Phillips.

Phillips showed up at Michael's office next. Michael refused to see him. Supervisors in Michael's office met with Phillips and warned him not to contact Nanette or Michael.

A few days later, someone fired four shots through the front window of the home Nanette and Michael shared. There were no eyewitnesses to the shooting. From bullets recovered on the scene,

law enforcement officers determined that the shooter used a .357 Magnum or a .38 Special.[2]

Police investigated whether Phillips was the shooter. On the night of the shooting, several officers went to Phillips's home, which he shared with his mother. The officers tested Phillips's hands for gunpowder residue. The next day, Svenson and other parole officers searched Phillips's home for the gun used in the shooting. When Phillips saw Svenson speaking to his mother, he became "very belligerent" and yelled at Svenson.

The next day at work, Phillips approached a coworker whose father was a police officer. Phillips told her that he had recently fired a gun with a friend and that the police had tested his hands for gunpowder residue. He asked whether the test would detect residue if he had washed his hands with Comet after firing the gun. (Phillips's test for gunpowder residue later came back as inconclusive.)

Around this time, Phillips ran into a friend, Tony Smith,[3] at a bar. Phillips complained that two parole officers (a man and a woman) had been hassling his mother. He told Tony that he was going to put a stop to it and had tried to shoot the female officer

[2] The evidence introduced at trial showed that these weapons were common and there were thousands of them in Florida at the time of the murder.

[3] We refer to Tony Smith as "Tony" to distinguish him from Greg Smith, the lead detective who investigated Svenson's murder. We refer to Greg Smith as "Smith."

but missed. That evening, Tony saw Phillips carrying a weapon that appeared to be a .357 Magnum or a .38 Special.

Phillips interacted with both Nanette and Svenson on August 31, the day Svenson was murdered. That morning, Nanette reported for a hearing on the courthouse's fourth floor. After entering the building, she walked to the elevator. She spotted Phillips standing by the elevator. To avoid him, she changed her route and used the escalator. When she arrived on the fourth floor, she again saw Phillips, and they made eye contact. She was frightened and reported the incident to court security and Svenson.

A court security officer stopped Phillips and asked whether he was following his former female parole officer. Phillips denied following anyone and said that he was in the building to meet with his attorney, James Woodard. Phillips also said that he would not recognize his former parole officer if he saw her.

Svenson and other parole officers then met with Phillips. Svenson told him to stay away from Nanette. Phillips was warned that if his behavior continued, he would be arrested for violating his parole. That evening, Svenson was murdered.

2. Phillips's Statements in Police Interviews

At trial, the jury heard testimony from Greg Smith, the lead investigator into Svenson's murder, and other officers involved in the investigation. These officers interviewed Phillips several times about Svenson's murder and told the jury about statements he made in the interviews.

The day after Svenson was murdered, detective Linda Beline interviewed Phillips. He denied murdering Svenson and told Beline that he had an alibi. He reported that he had left work at 5:00 p.m. and returned home at 5:20. Afterward, he ran a few errands, including picking his sister up from work and taking her children to church, before returning home. At 7:50 p.m., he went to a Winn-Dixie store to purchase a few items for dinner, left the Winn-Dixie between 8:10 and 8:15, and was home before 8:30. When Phillips arrived home, his mother asked for a ride to his sister's house. Shortly after he returned home, Phillips drove his mother to his sister's house, stopping to buy gas along the way. Phillips told Beline that he was home for the night by 9:00 p.m.

Beline uncovered evidence that conflicted with Phillips's timeline. She obtained a copy of Phillips's receipt from the Winn-Dixie store, which showed that he checked out at 9:13 p.m., approximately one hour later than he had reported. Phillips's sister confirmed that he arrived with their mother around 9:35 p.m., again about one hour later than the time Phillips had said.

Smith testified about other statements Phillips made during interviews. Phillips told Smith that after his release from prison he went to the office where Nanette worked because "he had received a phone call from an anonymous white male" who told him to report to the parole office and see Nanette. Phillips said that he saw Svenson at the parole office. According to Phillips, he spoke with Svenson for about an hour, they had a "general conversation about

the parole," and Svenson never instructed him to stay away from Nanette.

Phillips also admitted in an interview that he saw Svenson the day after the shooting at Nanette's home. Phillips denied arguing with Svenson that day.

Smith testified that he asked Phillips about seeing Nanette at the courthouse on August 31, the day of the murder. Phillips explained that he was at the courthouse that morning to meet with his attorney, Jim Woodward.[4] He denied seeing Nanette at the courthouse, maintaining that he had not seen her since the revocation hearing years earlier.

Smith also questioned Phillips about whether Svenson was present when Phillips met with parole officers later that morning. He told Smith that Svenson had not attended the meeting. But other officers who were at the meeting testified that Svenson was present.

At trial, Smith recounted other statements Phillips made during interviews. During one interview, Phillips asked whether Smith "had ruled out that there had been two people involved in this homicide." Smith responded that police were still investigating. Phillips then suggested that the number of shots fired at Svenson indicated that there had been more than one shooter. Smith then asked Phillips how he knew how many times Svenson had

[4] Woodward testified at trial that Phillips never was his client, and they had no appointment to meet on that day or any other day.

been shot. Phillips responded, "I heard he was shot many times." According to Smith, though, the police had never publicly released information about the number of times Svenson had been shot.

Phillips suggested to Smith that Svenson might have been murdered because he was a drug dealer. Phillips refused to tell Smith why he believed Svenson was a drug dealer. The police found no evidence, however, that Svenson was involved with drugs or any other illegal activities.

Phillips volunteered that he had heard other inmates in the jail say that they did not like Smith. According to Phillips, these inmates, whom he would not identify, knew Smith's home address and that he had a teenage son. Phillips warned that these inmates could cause "great bodily harm."

Smith also testified about Phillips's reaction upon hearing that he had been charged with Svenson's murder. Phillips said that the State had no case because it had no eyewitnesses and had never found the murder weapon. Phillips then said that he "didn't kill the motherfucker[,] but he was glad he was dead." Phillips continued, "They're lucky they got me when they did because I would have killed every last motherfucker in that office." "If somebody does me harm, I do them harm," he added.

Phillips then brought up Nanette, saying, "I fucked her, that skinny bitch, in the ass." He told Smith that he and Nanette had sexual intercourse the night he saw her at the grocery store. He ended the conversation by saying, "Smith, you ain't got no witnesses. There ain't nobody saw me kill that motherfucker."

3. Evidence of Phillips's Confession to Four Jailhouse Informants

The State also presented trial testimony about confessions Phillips made to four inmates: William Scott,[5] William Farley, Larry Hunter, and Malcolm Watson. Each inmate testified at trial that Phillips had confessed to murdering Svenson. We turn to the evidence about each confession.

a. Confession to Scott

Scott testified that Phillips confessed to him in jail shortly after Svenson was murdered. In August 1982, Scott, who was on probation, was arrested for attacking his wife's friend and violating the terms of his parole by traveling out of state. After his arrest, Scott was taken to the Dade County jail. In jail in early September, Scott saw Phillips, whom he had known for at least 10 years.[6]

Phillips asked what Scott was doing in jail. Scott explained that he had been arrested for aggravated battery and violating his parole. Phillips then said that he was in jail because "I just downed one of them motherfuckers." During that conversation, Scott warned Phillips that he needed to get rid of the murder weapon. Phillips responded, "Don't worry about the gun . . . 'cause some

[5] William Scott also used the name William Smith. We refer to him as Scott.

[6] After Svenson was murdered, Phillips was arrested for a parole violation. When Phillips encountered Scott, he had had not yet been charged with Svenson's murder.

woman got it." Phillips told Scott that he committed the murder because Svenson had "been riding him."

After Phillips confessed, Scott called Detective Hough with the Metro-Dade Police Department, whom Scott had known for decades. Scott told Hough about Phillips's confession. Hough then connected Scott with Smith.

Within a few days of reporting Phillips's confession, Scott was released from jail. Upon his release, Scott went to see Phillips's sister. At trial, Scott mentioned in passing that he had spoken with Phillips's sister about the murder. But he did not say why he had gone to see Phillips's sister or what they discussed.[7]

During his trial testimony, Scott was asked what he would receive from the State for testifying against Phillips. He denied that he had been promised anything for his testimony or that anyone had told him to talk to Phillips.

Scott also told the jury about what had happened to his criminal charges. He explained that the aggravated battery charge against him had been dropped because the victim had decided not

[7] Before trial, Phillips deposed Scott. At his deposition, Scott gave more details about visiting Phillips's sister. According to Scott, he went to see Phillips's sister on the day that he was released from Dade County Jail to bring her $20 to deposit in Phillips's commissary account.

As we describe below, at the post-conviction evidentiary hearing Scott testified that he went to see Phillips's sister at the direction of officers investigating the murder. *See infra* Section I-C-1-d. Scott did not mention this fact at his pretrial deposition or at trial.

to pursue the charge. After this charge was dropped, he had been released on his own recognizance. He acknowledged that he still had a pending charge for violating his parole but told the jury that the charge was "being taken care of."

On cross examination, Phillips questioned Scott about his motivation for testifying. He pointed out that Scott had previously worked as a confidential informant for the federal government and had been paid $1,000 a month for a four-year period.[8]

Phillips probed why Scott called Hough to report the confession. Scott explained that he had given Hough information in the past when a man had confessed to a killing. When the man confessed, Scott called Hough and asked him to "check it out." Scott testified that he reported Phillips's confession to Hough for the same reason. Phillips then asked, "Are you a member of any police agency that you wanted this checked out?" Scott responded, "No, no, no, I'm not a police agent." Phillips followed up by asking, "You run an investigative agency or something, your checking things out like this?" Scott answered, "No, man, no."

Smith testified at trial that he "made no promises" to Scott. And he denied playing any role in the State's decision to drop Scott's aggravated battery charge. Smith was not asked whether he played a role in securing Scott's release on his own recognizance for the parole revocation charge.

[8] At his pretrial deposition, Scott denied that he had worked as a confidential informant for the Metro-Dade police.

b. Confession to Farley

Farley testified at trial that Phillips had confessed to murdering Svenson. Farley met Phillips for the first time shortly after Svenson's murder when they were cellmates at the Reviewing Medical Center at Lake Butler. Soon after Farley and Phillips became cellmates, Smith and another officer interviewed Phillips. After the interview, they met with Farley and asked whether Phillips had spoken about the murder. Farley responded that he had not. During the interview, the officers did not tell Farley to ask Phillips any questions about the murder.

When Farley returned to his cell, Phillips mentioned that he had been questioned by two officers. Farley said that he too had been questioned. Phillips apologized for not warning Farley that the officers investigating Svenson's murder might try to speak to him.

According to Farley, Phillips then showed him a copy of a newspaper article about Svenson's funeral. Phillips told Farley that he had "murdered the cracker." He described how he committed the murder, saying that he "laid across the street" waiting for Svenson and "shot him a whole heap of times." He said that that he killed Svenson for having "sent him back to prison" for a parole violation. Phillips also said that Svenson was "toting an object" at the time he was shot.

After Phillips confessed, Farley told a prison official that he wanted to speak with Smith. Farley was moved to a new prison and met with Smith a few days later. Smith took a recorded

statement in which Farley described Phillips's confession. At trial, Farley testified that he and Smith did not discuss the confession before the recording began. But the recorded statement itself showed that they discussed Phillips's confession before the recording began.[9] When Farley described what Phillips had said about waiting for Svenson, Smith interrupted and asked, "In the pre-interview you said something about being behind a building? Did he say something about being behind a building across the street or anything like that?"

At trial, Farley was asked about his motivation for telling police about Phillips's confession. Farley said that he went to Smith because Phillips "had no respect for human life." Farley also said that he felt bad for Svenson's family.

Farley was questioned about what he expected to receive in exchange for his testimony. He testified that he was currently serving a prison sentence with a presumptive release date in November (about 11 months after the trial). Farley explained that he had an interview with the parole board scheduled for March, and based on the interview he could secure an earlier release date. He acknowledged that Smith and David Waksman, the lead prosecutor, had promised to write letters to the parole board on his behalf if he testified against Phillips.

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[9] As we describe in greater detail below, at Phillips's post-conviction evidentiary hearing, Smith admitted that he discussed the confession with Farley for approximately 90 minutes before the recording began. *See infra* Section I-C-1-a.

Farley testified that Waksman had helped him in another way as well. Before Phillips's trial, inmates learned that Farley was testifying against Phillips, labeled Farley a snitch, and attacked him. Waksman arranged for Farley to be moved for his safety.

On cross-examination, Phillips suggested that Farley made up the story about the confession. He introduced an affidavit from Farley stating that Farley made up the story about the confession "to get out of prison." But Farley testified that a group of inmates had forced him to sign the affidavit.

When Smith testified, he was asked about his meetings with Farley. He denied ever telling Farley what to say about Phillips's confession. He was not asked about whether he and Farley spoke about Phillips's confession before Smith began recording.[10]

Smith also described what had been promised to Farley. He explained that when Farley gave the recorded statement about Phillips's confession, he had not made any promises to Farley or agreed to give Farley anything in return. Smith said he later told Farley that he would send a letter to the parole board on Farley's behalf.

[10] Smith testified in a pretrial deposition that Farley's "full statement . . . would be within [his] report." The record does not indicate whether Smith was aware that Waksman had redacted the portion of his report stating that Smith talked with Farley before taking the recorded statement. *See infra* Section I-C-1-a (describing Waksman's redaction practices).

c. Confession to Hunter

The third inmate to testify that Phillips had confessed was Hunter. Hunter had previously been convicted of four crimes. In January 1983, he was again arrested and held at the Dade County jail, where he met Phillips in the jail's law library.

Hunter testified that Phillips confessed to murdering Svenson. Phillips told Hunter how he approached the parole building and shot Svenson in the parking lot. Phillips said that he murdered Svenson because Svenson had testified against him at the revocation hearing. Hunter said that Phillips asked him to serve as an alibi witness to say that he had seen Phillips at the Winn-Dixie around 8:30 p.m. on the night of the murder.

After this conversation with Phillips, Hunter said, he spoke with his cellmate. According to Hunter, without his knowledge, his cellmate reported to the police that Hunter had information about Svenson's murder. Smith then interviewed Hunter. Hunter reported Phillips's confession and turned over notes from Phillips telling Hunter what to say about seeing Phillips at the Winn-Dixie.

Hunter was asked what he expected to receive in exchange for his testimony. He explained that he had pending criminal charges and his case was set for trial in a few weeks. He testified that the police and prosecution had promised him that, if he was convicted, they would go to court and inform the judge that he had been a witness for the State at Phillips's trial. (When Smith testified, he confirmed making this promise.) But Hunter told the jury that

this assistance would not matter because he was innocent of the charges against him.

Hunter also testified that Waksman assisted him by having him transferred to another jail after Phillips threatened him. Before the trial, Phillips demanded that Hunter sign an affidavit saying he knew nothing about the case. When Hunter refused to sign, Phillips threatened his family. Afterward, Waksman had Hunter transferred to a different jail.

d. Confession to Watson

Watson was the fourth inmate who testified that Phillips confessed. Watson, who had three or four prior felony convictions, testified that he encountered Phillips in jail.

Watson told the jury that he had known Phillips for several years. In 1980, Phillips asked to borrow $50 from Watson and offered to give him a gun as collateral. During this conversation, Phillips told Watson that he was going to get even with a parole officer who was trying to send him back to prison. Watson did not lend Phillips any money or take the gun.

A few years later, Watson, who was then serving a sentence for armed robbery, encountered Phillips in the Dade County jail. When Watson saw Phillips, he exclaimed, "You did it. You finally did it?" Phillips responded, "Yeah, yeah, yeah." Watson then said, "You really killed a parole officer, right?" Phillips answered, "Yeah, yeah, but they got to prove it." Phillips told Watson that the police had no eyewitnesses and the gun was thrown away. On another

occasion, Watson heard Phillips tell another inmate that "he had fired a shot around at his parole officer's house."

Watson called police and reported Phillips's confession. He explained that he went to police because his brother was a law enforcement officer who had been shot and ended up paralyzed.

After Watson reported Phillips's confession, Phillips and other inmates threatened to kill Watson and his family if Watson testified. The prosecution then had Watson moved to another area of the jail for his safety. Watson admitted that on occasions he had told other inmates that he knew nothing about Phillips's case. But he said that he had lied to these inmates so that they would not harass him.

At trial, Watson was asked what he expected in exchange for his testimony. He explained that he had already been convicted and sentenced on the armed robbery charge. Although he admitted that he had participated in the robbery, he denied using a gun during the crime. According to Watson, Smith promised that he would arrange for Watson to receive a polygraph test for the underlying crime. If the polygraph test showed that Watson was not lying when he denied having a gun, Smith agreed to "speak up" for him in his criminal case. Smith confirmed making this agreement.

After hearing all this evidence at trial, the jury found Phillips guilty of murdering Svenson. During the penalty phase, by a vote of 7 to 5, the jury recommended a sentence of death.

B. Direct Appeal

Phillips appealed his conviction and sentence. On direct appeal, the Florida Supreme Court affirmed. *See Phillips v. State (Phillips I)*, 476 So. 2d 194 (Fla. 1985).

C. State Post-Conviction Proceedings

Phillips filed a Rule 3.850 post-conviction motion in state court. As relevant for our purposes,[11] he alleged that the State had failed to fulfill its disclosure obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and had run afoul of *Giglio v. United States*, 405 U.S. 150 (1972).

Phillips claimed that *Brady* and *Giglio* violations occurred in connection with the testimony of the four inmates. He alleged that the inmates falsely testified to his confessions, the State withheld evidence about what had been promised to the inmates for testifying against him, and the State allowed the inmates to testify falsely about these promises. He further alleged that the State either withheld material evidence about the inmates or allowed them to give false testimony on other topics, including Scott's relationship with the Metro-Dade police, how law enforcement learned of Phillips's confession to Hunter, the extent of Farley's and Watson's criminal histories, and Hunter's mental health history.

[11] In post-conviction proceedings, Phillips raised numerous challenges to his conviction and death sentence. We limit our discussion to Phillips's *Brady* and *Giglio* claims, the only claims before us in this appeal.

After an evidentiary hearing, the state court denied Phillips's post-conviction motion. In this section, we begin by describing the evidence introduced at the hearing. We then review the state court's order denying Phillips's claims. We conclude with the Florida Supreme Court's decision affirming that order.

1. The Evidentiary Hearing

At the evidentiary hearing, Phillips introduced evidence to support his *Brady* and *Giglio* claims. We discuss the evidence introduced at the hearing on the following topics: (1) whether Phillips confessed to Farley and Hunter, (2) the benefits promised to the inmates for testifying, (3) Scott's relationship with Metro-Dade police, (4) how the State learned of Phillips's confession to Hunter, (5) the extent of Farley's and Watson's criminal histories, and (6) Hunter's mental health history. We review each category of evidence in turn.

a. Evidence About Phillips's Confessions to Farley and Hunter

At the hearing, Phillips introduced testimony from Farley and Hunter in which they recanted their trial testimony about Phillips's confession. Farley and Hunter testified that Phillips never confessed and that Smith and Waksman told them what to say about Phillips's confession.

Farley. Farley testified at the hearing that Phillips never confessed to him. He also offered a new account of what happened before Smith took his recorded statement about Phillips's confession. Farley said he met with Smith for "15 or 20 minutes" before

giving his recorded statement. During this time, Smith instructed him what to say about Phillips's confession. At one point, Smith asked Farley how many times Phillips said he shot the victim. Farley initially responded, "once or twice," but Smith corrected him, saying "the victim was shot numerous times." And Farley said that both Smith and Waksman told him to say that Phillips had mentioned that Svenson was carrying something at the time of the shooting.

Smith and Waksman denied telling Farley what to say about Phillips's confession. Smith admitted that he and Farley discussed Phillips's confession before Farley gave the recorded statement. He testified that this conversation lasted for approximately 90 minutes and that Farley was "mistaken" when he testified at trial that no such conversation had occurred.

Although Smith noted in his police report that he met with Farley before taking the recorded statement, this portion of his report was not disclosed to Phillips before trial. Waksman removed the mention of the meeting from the copy of the report produced to Phillips because he did not believe that the statement had to be disclosed.

But Waksman did more than simply redact the statement from the police report. He reproduced the police report so that Phillips could not tell that any information had been removed. To do this, Waksman copied the report and cut out the part mentioning that Farley and Smith spoke before the recording began. He then pasted the report back together so that it appeared that no

information had been removed. He produced a copy of the reconstructed report to Phillips.

Waksman testified that his practice of cutting and pasting to remove information that was not discoverable was "rather common." Waksman defended his practice, saying that the rules "tell[] me what I'm supposed to disclose. I disclose what I think I have to, and I do not disclose the balance."

Hunter. At the evidentiary hearing, Phillips introduced an affidavit in which Hunter disavowed his trial testimony. According to the affidavit, Phillips "never made a confession" to and "never spoke" with Hunter about the murder. Hunter swore that the "only knowledge" he had about Svenson's murder came from Smith and Waksman.

In the affidavit, Hunter also told a new story about the notes he had turned over to Smith. Hunter said that he approached Phillips in jail and told Phillips that he had been at the Winn-Dixie on the night of the murder. Hunter offered to serve as an alibi witness and asked Phillips to write the notes to help him remember the details.

At the evidentiary hearing, Phillips called Hunter as a witness. But Hunter asserted his Fifth Amendment right against self-incrimination and refused to testify because he was worried about being prosecuted for perjury. When Waksman and Smith testified, they denied telling Hunter what to say about Phillips's confession.

b. Evidence About Promises Made to the Inmates and the Assistance They Ultimately Received

The second category of evidence introduced at the evidentiary hearing concerned what the State had promised the four inmates for cooperating and testifying against Phillips, as well as the benefits the inmates ultimately received. Phillips introduced evidence showing that, for testifying against him, each inmate received reward money and assistance from the State in a pending criminal case or a sentence he was serving.

First, Phillips introduced evidence showing that the four inmates received payments after the trial: Scott received $300, while Farley, Hunter, and Watson each received $175. Farley, Scott, and Hunter all stated that they knew about the reward money at the time they testified against Phillips.

Smith and Waksman acknowledged at the evidentiary hearing that each inmate was paid reward money after the criminal trial. Smith explained that the money came from the Police Benevolent Association as a reward for providing information the led to the conviction of Svenson's murderer. But he denied that any of the inmates were told about the money before trial. Waksman, too, testified that the inmates were not told about the reward money until the trial was over.

Second, Phillips introduced evidence about the assistance that each inmate received from the State for testifying against him. We review the evidence introduced as to each inmate.

Scott. Phillips introduced evidence showing that the State played a role in securing Scott's release from jail on his pending probation revocation charge. At trial, Scott testified that his battery charge was dropped after the victim decided not to press charges and then the parole board agreed that he could be released on his own recognizance pending a revocation hearing. At the evidentiary hearing Phillips introduced evidence showing that Smith had contacted the parole board and advised that Scott was assisting in Phillips's case.

Farley. Phillips introduced evidence showing that Farley had been promised and, in fact, received additional assistance from Waksman and Smith that went beyond what was disclosed at trial. At the evidentiary hearing, Farley testified that Waksman had promised that if he testified against Phillips, Waksman would try to assist him in getting out of prison.

After Phillips's trial, Smith and Waksman helped to secure Farley an earlier release from prison. In January 1984, about a month after Phillips's criminal trial, Smith and Waksman jointly sent a letter to the parole board on Farley's behalf, stating that Farley had provided "outstanding assistance" at Phillips's trial and "recommend[ing] him for early parole."

The parole board did not act immediately on the letter, however. Farley, who remained in custody, became angry. He threatened Waksman that unless the parole board confirmed his release date, "I will do everything I can to sabotage the case and get Phillips

an acquittal." About a month later, Farley was granted parole and released from custody.

After his release from prison, Farley got into more trouble. He was arrested on new charges and faced up to five years in prison. Farley asked Waksman to contact the prosecutor, saying that he was "deathly afraid" to return to prison because he was worried about being attacked by other inmates. After Waksman wrote a letter on Farley's behalf, Farley ended up serving a year and a day in custody.

After Farley completed this sentence, he was arrested again, and again he contacted Waksman for help. When Waksman refused to assist him, Farley threatened to "sabotage" Phillips's case.

Smith and Waksman denied promising Farley that he would be released from custody if he testified against Phillips. Instead, they testified, before Phillips's trial they had promised Farley that if he testified truthfully, they would notify his attorney and the parole board about his assistance.

Hunter. Phillips introduced evidence showing that Hunter had been promised and, in fact, received additional assistance from Waksman and Smith that went beyond what was disclosed at trial. In his affidavit, Hunter explained that at the time of Phillips's trial, he had pending state charges for sexual battery, car theft, and possession of cocaine. Hunter said that Waksman promised he would receive a sentence of five years' probation if he testified against Phillips, but life if he did not. Waksman also instructed him to testify falsely that no such deal existed.

Approximately two weeks after Phillips's trial, Hunter and the State entered into a plea agreement. Under the plea agreement, which Waksman helped negotiate, Hunter pled guilty to grand theft and armed sexual battery and received a sentence of five years' probation. The State agreed to this deal because of Hunter's "invaluable help" in Phillips's murder trial.

Smith and Waksman denied promising Hunter that he would receive a sentence of probation if he testified against Phillips. Rather, they said they told Hunter the same thing they told the other inmates: if he testified against Phillips, they would "tell his judge he cooperated, period."

According to Waksman, he decided *after* Phillips's trial to assist Hunter with the plea deal. He maintained that he made this decision after seeing how Hunter "had been beat up in the county jail" and "had to spend months in [a] small safety cell[]" before Phillips's trial.

After his release from prison, Hunter continued to seek assistance from Waksman. While on probation, Hunter was arrested. He called Waksman seeking help because he was worried for his safety in jail. Waksman contacted a prison official, explained that Hunter had testified "against a seasoned inmate who had a lot of friends," and asked that Hunter be moved to another prison. After he was transferred to a new prison, Hunter reached out to Waksman again, but Waksman provided no further assistance.

Watson. Phillips introduced evidence showing that after Watson testified against Phillips, assistance from Smith and

Waksman resulted in Watson's life sentence being vacated and his being released from prison.

After Phillips's trial, Smith and Waksman arranged for Watson to take a polygraph test about whether he handled a gun during the robbery that resulted in his conviction for armed robbery. Watson passed the polygraph test and then filed a post-conviction motion challenging his armed robbery conviction. The State then agreed to vacate Watson's conviction for robbery with a firearm and allow him to plead guilty to robbery. Watson's sentence was reduced from life imprisonment to a term of 15 years' imprisonment, the unserved portion of which was suspended, and five years of probation. As a result, he was released from prison. Waksman represented the State in the proceedings in which the sentence was reduced.

c. Evidence About Scott's Relationship with the Metro-Dade Police

Phillips's evidence also covered Scott's role as an informant working for the Metro-Dade Police. The evidence showed that from 1972 Scott occasionally worked as a paid informant for Metro-Dade. He assisted the Metro-Dade police with Phillips's case. About a week after Phillips confessed to Scott, Scott was released from jail. That day, Scott met with Smith and another officer. The officers gave him $20 and asked him to find out whether Phillips's sister had information about the location of the murder weapon.

Although Smith's notes reflected that Scott went to see Phillips's sister at the police's direction, this information was not

disclosed to Phillips before trial. Once again, after deciding that the State was not required to turn over this information, Waksman performed a cut-and-paste job on Smith's report to remove the reference to Scott's visit with Phillips's sister.

According to Smith, during the pendency of Phillips's case, Scott was "not a documented informant" with Metro-Dade police. But Smith admitted that when Scott went to see Phillips's sister, he was acting as "an agent" of Metro-Dade Police. According to Smith, it was only after Phillips's trial that he opened an informant file for Scott and Scott was a assigned a number as a confidential informant. For his part, Waksman admitted that he knew during Phillips's trial that Scott had "periodically" provided information to Hough.

d. Evidence About How the State Learned of Phillips's Confession to Hunter

Also introduced at the evidentiary hearing was evidence about how law enforcement learned about Phillips's confession to Hunter. Recall that at trial, Hunter testified that his cellmate reached out to Smith. But at the evidentiary hearing, Hunter testified that he had contacted Waksman about Phillips's confession. Waksman then had Smith interview Hunter.

Smith's notes reflected that Hunter, not his cellmate, first contacted police. But Phillips did not know this information at the time of trial because Waksman had determined that the State was not required to disclose this information and had redacted it. And again, Phillips could not tell that Smith's notes had been redacted.

e. Evidence About Farley's and Watson's Criminal Records

Evidence at the hearing revealed that Farley and Watson did not fully disclose their criminal histories at Phillips's trial. At trial, Farley testified that he had one conviction and one parole violation. But Farley admitted at the hearing that he had two additional convictions. Farley's explanation for giving false testimony about his criminal record was, "I forgot a few things."

At trial, Watson testified that he was a convicted prisoner but said that he had never been on probation or parole. Phillips's hearing evidence showed that, to the contrary, Watson had actually been sentenced to probation twice.

f. Evidence About Hunter's Mental Health

Lastly, Phillips introduced into evidence records about Hunter's mental health from the period before Phillips's trial. The records included an inmate classification report, which had been found in the files of the prosecutor's office in another case, showing that in 1969 Hunter had been found not guilty by reason of insanity in two criminal cases. In addition, mental health records from 1970 through 1972 showed that Hunter had been diagnosed with paranoid schizophrenia. Records from this period also reflected that medical providers had determined that Hunter did not appreciate the wrongfulness of his conduct and was unable to adequately assist in his own defense in a criminal case.

2. The State Court's Order

After the evidentiary hearing, the state court denied Phillips's motion for post-conviction relief. In its order, the court discussed why it denied Phillips relief on his *Brady* claim but did not mention his *Giglio* claim.

In rejecting Phillips's *Brady* claim, the state court addressed whether the State violated *Brady* by failing to disclose two things: (1) that Phillips never confessed to Farley and Hunter and (2) that the four inmates received benefits beyond what was disclosed at trial.

First, as to whether the State violated *Brady* by failing to disclose that Phillips never confessed to Farley or Hunter, the court found Farley's hearing testimony to be "totally incredulous and unbelievable" and Hunter's affidavit to be "totally at odds with the facts." The court credited instead Waksman's and Smith's testimony. Based on these credibility determinations, the court concluded that Phillips failed to prove that the State withheld information showing that Phillips never confessed to Farley or Hunter.

Second, the court considered whether the State failed to disclose the full extent of what it had promised the inmates for testifying against Phillips. The court found that Phillips failed to substantiate his allegations that the inmates were told about reward money before they testified or that the State had made promises to the inmates beyond what was disclosed at trial. The court thus concluded that there was no *Brady* violation.

3. Florida Supreme Court's Decision

Phillips appealed the denial of his post-conviction motion to the Florida Supreme Court. In relevant part, the Florida Supreme Court affirmed. *See Phillips v. State (Phillips II)*, 608 So. 2d 778 (Fla. 1992). In its decision, the Florida Supreme Court discussed Phillips's *Brady* and *Giglio* claims.

The Florida Supreme Court quickly disposed of Phillips's *Brady* claim. *See id.* at 780–81. First, it rejected his arguments that the State violated *Brady* by failing to disclose that Phillips had never actually confessed to Farley and Hunter or that Smith and Waksman had told the inmates what to say about Phillips's confessions. *Id.* at 780. The Court explained that at the evidentiary hearing there was conflicting testimony, with Farley and Hunter, on the one hand, saying that the police gave them the information about Phillips's confessions, and Waksman and Smith, on the other hand, denying these allegations. *Id.* The Florida Supreme Court concluded that there was "competent, substantial evidence" to support the lower court's finding that Waksman and Smith were credible and that Farley and Hunter were not. *Id.* at 781.

Second, the Florida Supreme Court rejected Phillips's argument that the State violated *Brady* by withholding information about the benefits the inmates were promised. *Id.* at 780–81. Again, the Florida Supreme Court relied on the lower court's credibility determination. Given Waksman's testimony that at the time of the trial he had informed the inmates only that he would write letters on their behalf and did not know "to what extent he would end up

helping" the inmates, the Florida Supreme Court concluded there was no *Brady* violation. *Id.* at 780.

Next, the Florida Supreme Court addressed Phillips's *Giglio* claim based on the State's failure to correct the following trial testimony: (1) Scott's denial that he was an agent of the police, (2) Farley's statement that Smith started the tape recording immediately instead of speaking with him before he gave the recorded statement about Phillips's confession, and (3) statements from Farley and Watson about their criminal records. *Id.* at 781. The Court rejected each of these bases for the claim.

The Court began with the standard for establishing a *Giglio* violation: Phillips had "to demonstrate (1) the testimony was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material." *Id.* (citing *Routley v. State*, 590 So. 2d 397, 400 (Fla. 1991)).

For Scott's testimony denying that he acted as a police "agent," the Court concluded there was no *Giglio* violation because there was no false testimony. *Id.* Although "Scott was on the federal government payroll at the time of trial and was assigned an informant number for the federal authorities," the Court explained, "he did not, at that time, have an informant number for the Metro-Dade police, and therefore evidently did not believe that he was an agent for that department." *Id.* It further observed that, "[e]ven at the postconviction hearing, Scott seemed confused over whether he was an informant for Metro-Dade" when he provided information about Phillips. *Id.* Because "[a]mbiguous testimony

does not constitute false testimony for the purposes of *Giglio*," the Court concluded that no violation occurred. *Id.*

The Florida Supreme Court then considered whether a *Giglio* violation occurred when Farley testified that Smith immediately began to record his statement about Phillips's confession. The Court concluded that any misstatement was "immaterial," noting that it "could have been corrected by the defense, had it been important, since the defense was aware of the pre-interview." *Id.*

Next the Court addressed whether there was a *Giglio* violation when Farley and Watson testified falsely about their criminal records. *Id.* The Court accepted that these inmates gave "incorrect" statements about their criminal records at Phillips's trial. *Id.* But the Court concluded that Phillips failed to establish materiality because there was "no reasonable probability that the false testimony affected the judgment of the jury." *Id.* Because the jury had heard that Farley and Watson were convicted felons, the Court concluded, "the admission of an additional conviction or probationary sentence would have added virtually nothing to further undermine their credibility." *Id.*

The Florida Supreme Court did not explicitly address whether a constitutional violation occurred when (1) the State failed to disclose that Scott met with Phillips's family at the direction of law enforcement, (2) Hunter testified that his cellmate initially contacted Waksman; or (3) the State failed to turn over Hunter's mental health records. The Florida Supreme Court also did not address Waksman's routine practice of redacting police

records and cutting and pasting the records so that no redaction was apparent.

D. Federal Habeas Proceedings

After the Florida Supreme Court denied relief, Phillips filed a federal habeas petition raising *Brady* and *Giglio* claims. The district court denied relief.

On the *Brady* claim, the district court concluded that the Florida Supreme Court's decision was entitled to deference. Because there was conflicting evidence about whether the State had encouraged or coached witnesses to give false testimony and whether it had disclosed all the promises made to the inmates, the district court explained, this claim "rest[ed] on the credibility of the witnesses." The court concluded that Phillips "failed to overcome the presumption of correctness" owed to the state court's credibility determinations and other factual findings.

Addressing Phillips's *Giglio* claim, the district court began by considering whether a *Giglio* violation occurred when Scott testified at trial that he was not a police "agent." The district court gave deference to the Florida Supreme Court's determination that Scott did not give false testimony when he denied that he was a police agent because of the ambiguous way the question at trial had been formulated.

The district court also reviewed whether a *Giglio* violation occurred when Farley testified that he had not discussed Phillips's confession with Smith before giving his recorded statement. The court concluded that the Florida Supreme Court's decision that this

statement was not material was reasonable and thus entitled to deference. Similarly, the district court concluded that the Florida Supreme Court reasonably determined that Farley's and Watson's false statements about the extent of their criminal history were not material.

The district court also considered Waksman's redactions. The court explained that Waksman's conduct implicated *Giglio* because he "purposefully withheld" information from the defense, and "witnesses testified falsely concerning certain facts that had been withheld."

But the court explained that to establish his entitlement to relief, Phillips had to show not only that the false statements were material for purposes of *Giglio*, but also that any error was not harmless under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). To satisfy this standard, Phillips had to show that the "error had a substantial and injurious effect or influence on the jury's verdict." The court concluded that this standard was not satisfied given the other circumstantial evidence of Phillips's guilt, which included the evidence of Phillips's "serious problems" with Svenson and tying Phillips to a gun.

This is Phillips's appeal.

II. STANDARD OF REVIEW

We review *de novo* a district court's denial of a petition for a writ of habeas corpus. *Morrow v. Warden, Ga. Diagnostic Prison*, 886 F.3d 1138, 1146 (11th Cir. 2018).

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) governs our review of federal habeas petitions. *See* 28 U.S.C. § 2254(d). "AEDPA prescribes a highly deferential framework for evaluating issues previously decided in state court." *Sears v. Warden GDCP*, 73 F.4th 1269, 1279 (11th Cir. 2023). Under AEDPA, a federal court may not grant habeas relief on claims that were "adjudicated on the merits in [s]tate court" unless the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court of the United States" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d).

A state-court decision is "contrary to" clearly established law if the court "applie[d] a rule that contradicts the governing law" set forth by the Supreme Court or the state court confronted facts that were "materially indistinguishable" from Supreme Court precedent but arrived at a different result. *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000). To meet the unreasonable application of law standard, "a prisoner must show far more than that the state court's decision was merely wrong or even clear error." *Shinn v. Kayer*, 592 U.S. 111, 118 (2020) (internal quotation marks omitted). Rather, the decision must be "so obviously wrong that its error lies beyond any possibility for fairminded disagreement." *Id.* (internal quotation marks omitted). This standard is "difficult to meet and . . . demands that state-court decisions be given the benefit of the doubt." *Raulerson v. Warden*, 928 F.3d 987, 996 (11th Cir. 2019) (internal quotation marks omitted).

Federal courts must defer to a state court's determination of the facts unless the state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d)(2). Section 2254(d)(2) works much like § 2254(d)(1) in that it requires us to give state courts "substantial deference." *Brumfield v. Cain*, 576 U.S. 305, 314 (2015). "We may not characterize . . . state-court factual determinations as unreasonable merely because we would have reached a different conclusion in the first instance." *Id.* at 313–14 (alteration adopted) (internal quotation marks omitted). We presume a state court's factual determinations are correct absent clear and convincing evidence to the contrary. *See Pye v. Warden, Ga. Diagnostic Prison*, 50 F.4th 1025, 1035 (11th Cir. 2022) (en banc).

On each claimed basis for relief, we review "the last state-court adjudication on the merits." *Greene v. Fisher*, 565 U.S. 34, 40 (2011). "When a federal claim has been presented to a state court and the state court has denied relief," we presume "the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington v. Richter*, 562 U.S. 86, 99 (2011).

III. LEGAL ANALYSIS

Phillips argues on appeal that the Florida Supreme Court's decision is not entitled to deference and that he is entitled to habeas relief on his *Giglio* and *Brady* claims under a *de novo* standard. In this section, we begin by reviewing the standard that applies to *Giglio* and *Brady* claims before addressing the claims in turn.

A. Overview of *Giglio* and *Brady*

In *Brady*, the Supreme Court recognized that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." 373 U.S. at 87. The Court has since clarified that a defendant need not request favorable evidence from the State to be entitled to it. *See Kyles v. Whitley*, 514 U.S. 419, 433 (1995).

"There are two categories of *Brady* violations, each with its own standard for determining whether the undisclosed evidence is material and merits a new trial." *Smith v. Sec'y, Dep't. of Corr.*, 572 F.3d 1327, 1333 (11th Cir. 2009). The first category of violations (often referred to as *Giglio* violations) occurs when "the undisclosed evidence reveals that the prosecution knowingly made false statements or introduced or allowed trial testimony that it knew or should have known was false." *Id.* at 1334; *see Giglio*, 405 U.S. at 153. However, "there is no violation of due process resulting from prosecutorial non-disclosure of false testimony if defense counsel is aware of it and fails to object." *United States. v. Stein*, 846 F.3d 1135, 1147 (11th Cir. 2017) (alteration adopted) (internal quotation marks omitted). But when the government "affirmatively capitalizes" on the false testimony, "the defendant's due process rights are violated despite the government's timely disclosure of evidence showing the falsity." *Id.*

When a *Giglio* violation occurs, the defendant generally is entitled to a new trial "if there is any reasonable likelihood that the

false testimony *could* have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976) (emphasis added). This standard "requires a new trial unless the prosecution persuades the court that the false testimony was harmless beyond a reasonable doubt." *Smith*, 572 F.3d at 1333 (internal quotation marks omitted). "This standard favors granting relief." *Id.* We have described it as "defense friendly." *Ford v. Hall*, 546 F.3d 1326, 1333 (11th Cir. 2008).

But when a *Giglio* claim arises on collateral review, a petitioner also must satisfy the more onerous standard set forth in *Brecht*. *Rodriguez v. Sec'y, Fla. Dep't of Corr.*, 756 F.3d 1277, 1302 (11th Cir. 2014) (citing *Brecht*, 507 U.S. at 637). Under *Brecht*, a federal constitutional error is not a basis for relief on collateral review unless it resulted in "actual prejudice." 507 U.S. at 637 (internal quotation marks omitted). Under this standard, relief may be granted "only if the federal court has grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict." *Davis v. Ayala*, 576 U.S. 257, 267–68 (2015) (internal quotation marks omitted). There must be "more than a reasonable possibility that the error was harmful." *Id.* at 268 (internal quotation marks omitted).

This standard requires us to "consider the specific context and circumstances of the trial to determine whether the error contributed to the verdict." *Al-Amin v. Warden, Ga. Dep't of Corr.*, 932 F.3d 1291, 1301 (11th Cir. 2019); *see Mansfield v. Sec'y, Dep't of Corr.*, 679 F.3d 1301, 1313 (11th Cir. 2012) (explaining that this analysis "is necessarily fact-specific and must be performed on a case-

by-case basis"). The *Brecht* standard requires a reviewing court to "'ask directly' whether the error substantially influenced the jury's decision." *Granda v. United States*, 990 F.3d 1272, 1293 (11th Cir. 2021) (quoting *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995)). "[I]f the court cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, the court must conclude that the error was not harmless." *Id.* (internal quotation marks omitted). An error is "likely to be harmless" when "there is significant corroborating evidence or where other evidence of guilt is overwhelming." *Mansfield*, 679 F.3d at 1313 (citations omitted); *see Brecht*, 507 U.S. at 639 (concluding that error was harmless when "the State's evidence of guilt was, if not overwhelming, certainly weighty" and noting that "circumstantial evidence . . . pointed to petitioner's guilt").

The *Brecht* standard reflects the view that the State should "not be put to the arduous task of retrying a defendant based on mere speculation that the defendant was prejudiced by trial error." *Ayala*, 576 U.S. at 268 (alterations adopted) (internal quotation marks omitted); *see Fry v. Pliler*, 551 U.S. 112, 116 (2007) (explaining that the *Brecht* standard reflects "concerns about finality, comity, and federalism"). As a result, "*Brecht* can prevent a petitioner from obtaining habeas relief even if he can show that, were he raising a *Giglio* claim in the first instance on direct appeal before a state appellate court, he would be entitled to relief." *Rodriguez*, 756 F.3d at 1302.

"Because the *Brecht* harmlessness standard is more strict from a habeas petitioner's perspective than the *Giglio* materiality standard," we have recognized that "federal habeas courts confronted with colorable *Giglio* claims in § 2254 petitions . . . may choose to examine the *Brecht* harmlessness issue first." *Id.* at 1303 n.45 (internal quotation marks omitted). And, "[b]ecause we consider the *Brecht* question in the first instance on federal habeas review, there is no state court *Brecht* actual-prejudice finding to review or to which we should defer." *Trepal v. Sec'y, Fla. Dep't of Corr.*, 684 F.3d 1088, 1112 (11th Cir. 2012). "Of course, we still . . . defer to the state court's other fact findings derived from testimony, documents, and what happened at trial and the [evidentiary] hearing." *Id.*

The second category of *Brady* violations (often referred to as *Brady* violations) occurs when "the government suppresses evidence that is favorable to the defendant[], although the evidence does not involve false testimony or false statements by the prosecution." *Smith*, 572 F.3d at 1334. The defendant is entitled to a new trial if he establishes that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* (internal quotation marks omitted). "A reasonable probability of a different result exists when the government's evidentiary suppressions, viewed cumulatively, undermine confidence in the guilty verdict." *Id.* (internal quotation marks omitted). On federal habeas review of the denial of a claim that the State suppressed favorable evidence, we do not conduct a *Brecht* inquiry because the applicable materiality standard

"necessarily entails the conclusion that the suppression must have had substantial and injurious effect or influence in determining the jury's verdict." *Rodriguez*, 756 F.3d at 1303 (internal quotation marks omitted).

B. The *Giglio* Claim

Phillips argues that the State violated *Giglio* because it presented false testimony on the following topics:

(1) whether Farley discussed Phillips's confession with Smith before giving the recorded statement;

(2) the assistance promised to the inmates for testifying against Phillips;

(3) Scott's relationship with the Metro-Dade police department, including whether he was acting as an agent of the department;

(4) how Hunter first came into contact with the State about Phillips's confession; and

(5) the extent of Farley's and Watson's criminal histories.

In support of his *Giglio* claim, Phillips also points to Waksman's redactions, which he says concealed that the inmates gave false testimony.

In reviewing the Florida Supreme Court's denial of the *Giglio* claim, we begin with its determination that the State did not introduce false testimony about what had been promised to the inmates in exchange for their testimony or about Scott's relationship

with Metro-Dade Police. *See Phillips II*, 608 So. 2d at 781. As we explain in greater detail below, we conclude that this determination was not unreasonable. For the other alleged *Giglio* violations, the Florida Supreme Court concluded that any false testimony was not material. Rather than address whether this aspect of the Florida Supreme Court's decision is entitled to deference under AEDPA,[12] we conclude that Phillips is not entitled to relief because, under *Brecht*, any error was harmless given the State's other evidence about Phillips's guilt that was separate from and independent of any evidence the inmates supplied.

1. Reasonableness of the Determinations About Promises Made to the Inmates and Whether Scott Was an Agent

We now consider whether the Florida Supreme Court's decision—that no *Giglio* violation occurred when the inmates testified about the extent of assistance promised to them and when Scott denied acting as an agent of the State—was reasonable. As to the promises made to the inmates, the Florida Supreme Court reasonably concluded that no false testimony was given. As to Scott's testimony about his status as an agent, the Florida Supreme Court likewise reasonably concluded that Scott gave no false testimony.

[12] Phillips argues that the Florida Supreme Court's decision is not entitled to deference because it failed to apply the correct materiality standard or to conduct a cumulative analysis of materiality.

a. Testimony About Promises Made to the Inmates

We begin with the issue of whether a *Giglio* violation occurred when the inmates testified at trial about what they were promised for testifying against Phillips. The Florida Supreme Court reasonably rejected this claim based on the lower court's factual finding that Waksman and Smith did not decide until after trial to give additional assistance to the inmates.

As we described in detail above, at the evidentiary hearing, the parties introduced conflicting evidence on the factual question of what the State promised the inmates for testifying against Phillips. *See supra* Section I-C-1-b. To summarize, on the one hand, Smith and Waksman testified that as to any criminal charges or existing sentences, the inmates generally were told that in exchange for their testimony against Phillips, the State would tell the judges in their criminal cases (or the parole board) that they had assisted by testifying against Phillips. According to Smith and Waksman, it was only after the criminal trial that they decided to provide additional help to the inmates and told them about the reward money. On the other hand, some of the inmates testified at the evidentiary hearing that they were told about the reward money and promised additional assistance before trial.

Ultimately, the state court resolved this factual dispute by crediting Smith's and Waksman's testimony over the inmates' testimony. *See Phillips II*, 608 So. 2d at 780–81. Phillips challenges the state court's findings of fact. But AEDPA requires us to presume

that the state court's factual findings were correct unless rebutted by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1). And after carefully reviewing the record, we cannot say that Phillips came forward with the clear and convincing evidence necessary to reject the state court's credibility determinations. *See Pye*, 50 F.4th at 1045 n.13. Thus, taking as correct the state court's factual determination that Smith's and Waksman's testimony was truthful, we cannot say that it was unreasonable for the Florida Supreme Court to reject Phillips's claim that the State presented false testimony about the promises made to the inmates.[13]

b. Testimony About Scott's Status as an Agent

We now turn to Phillips's claim that a *Giglio* violation occurred when Scott denied that he was acting as an agent of the State. As a refresher, at trial, Phillips questioned Scott about why he reported Phillips's confession to law enforcement. Scott testified that he wanted the police to "check it out." Phillips's attorney then asked a line of questions comparing Scott to individuals who normally would investigate a confession. He began by asking, "Are

[13] In state court, Phillips also argued that a *Giglio* violation occurred because Hunter and Farley falsely testified that Phillips had confessed. The Florida Supreme Court rejected this claim, explaining that "competent, substantial evidence" supported the state court's finding that Farley and Hunter's hearing testimony was "completely unbelievable." *See Phillips* II, 608 So. 2d at 781. After carefully reviewing Phillips's appellate brief, we do not see an argument challenging this determination as unreasonable. But even assuming that he adequately raised this argument on appeal, we would conclude that the state court's decision was entitled to deference.

you a member of any police agency that you wanted this checked out?" Scott responded, "No, no, no, I'm not a police agent." Phillips's attorney then followed up by asking, "You run an investigative agency or something, your checking things out like this?" And Scott answered, "No, man, no."

Phillips argues that Scott gave false testimony when he denied being a "member of any police agency" and said he was "not a police agent." Because testimony at the evidentiary hearing indicated that Scott was working as an agent of police, Phillips reasons that Scott must have given false testimony at trial.

But, as the Florida Supreme Court explained, even at the evidentiary hearing, "Scott seemed confused over whether he was an informant for Metro-Dade." *Phillips II*, 608 So. 2d at 781. And from the record of the trial, it is not entirely clear what Scott meant when he answered that he was not an agent. He made the statement in response to a question asking whether he was a "member of any police agency." Phillips takes Scott's answer to be a denial that he had any relationship with the Metro-Dade police. But it is just as possible that Scott was denying being an employee of any police department or agency (as the question asked at trial suggested). Given this ambiguity, and because there is no evidence suggesting that Scott was an employee or member of a police department or agency, we hold that the state court reasonably concluded that Scott did not testify falsely and there was no *Giglio* violation. *See United States v. Petrillo*, 821 F.2d 85, 89 (2d Cir. 1987).

2. Harmlessness of Any Other *Giglio* Violation

Phillips also claimed that the State violated *Giglio* in other ways. But we need not decide whether it was unreasonable for the Florida Supreme Court to reject the remainder of his *Giglio* claim because any error was harmless under *Brecht*. Given the other evidence of Phillips's guilt, we are left with no grave doubt about whether the alleged *Giglio* violations had a substantial and injurious effect or influence on the jury's verdict.

In analyzing harmlessness, we assume that if the false testimony had been disclosed, Phillips would have been able to impeach the inmates to such an extent that the jury would not have relied on their testimony in reaching a verdict. But given the substantial evidence of Phillips's guilt that was unrelated to the four inmates, we conclude that any error was harmless.

To begin, the State introduced strong evidence of Phillips's motive. Testimony from multiple witnesses without questionable motivations indicated that Phillips was seeking vengeance on Svenson and Nanette. After Phillips harassed Nanette, showing up at her home and following her to a grocery store, Svenson and Nanette both played roles in sending him back to prison. Upon his release from prison, Phillips showed up at Nanette's office and tried to see her. A week later, shots were fired through the front window of her home. When Svenson searched Phillips's house after this shooting, he became belligerent. And on the morning of Svenson's murder, he and Phillips had another confrontation after Nanette spotted Phillips at the courthouse. Svenson met with Philips and

warned him that he might send him back to jail for intimidating Nanette. A few hours later, Svenson was murdered.

Moreover, Phillips made statements indicating that he sought revenge on Svenson and Nanette for sending him back to prison. Upon learning of the murder charge, Phillips said, "They're lucky they got me when they did because I would have killed every last motherfucker in that office" and also "[i]f somebody does me harm, I do them harm."

Motive aside, there was ample evidence that Phillips was the person who shot into Nanette's home and that he had access to a firearm around the time of the murder. Phillips admitted to Tony Smith that he had tried to shoot a female parole officer. Tony Smith saw Phillips carrying a .38 Special or a .357 Magnum, the same type of weapon that was used to shoot into Nanette's home and to murder Svenson. And on the evening of the shooting at Nanette's home, police tested Phillips's hands for gunpowder residue; after this test, Phillips told a coworker that he had recently fired a weapon and was concerned that officers would find gunpowder residue on his hands.

The State also introduced evidence showing that Phillips gave the police a false alibi. In an interview the day after the murder, Phillips reported that he had been shopping at the Winn-Dixie until 8:30 p.m. (the murder occurred at 8:38) and then drove home. He claimed that upon returning home from the grocery store, he drove his mother to his sister's house.

But the alibi quickly fell apart. Police obtained Phillips's Winn-Dixie receipt, which showed that he was at the store nearly one hour later, meaning that there was time for Phillips to drive to the parole office, wait for Svenson, shoot him, travel to the Winn-Dixie, and check out by 9:19 p.m. His sister admitted at trial that Phillips and his mother came to her house later than he told police. Phillips's false alibi further supports our conclusion on harmlessness. *See Hodges v. Att'y Gen., Fla.*, 506 F.3d 1337, 1343 (11th Cir. 2007) (considering, when assessing harmlessness of error under *Brecht*, that State had introduced evidence disputing the defendant's "alibi defense"); *United States ex rel. Hines v. LaValee*, 521 F.2d 1109, 1113 (2d Cir. 1975) (holding error was harmless because of, among other things, "the adverse inference to be drawn from [the defendant's] attempted use of a false alibi").

In addition to the false alibi, the State introduced evidence of other false statements Phillips made to police in interviews. When Phillips was asked about seeing Svenson the day after the shooting at Nanette's house, he denied arguing with Svenson. But the denial conflicted with testimony from other parole officers who were there. And Phillips said in interviews that Svenson was not at the meeting with parole officers on August 31. But several witnesses testified that Svenson was present.

Viewing the entire record, we cannot say that we have a grave doubt about whether the alleged *Giglio* errors had a substantial and injurious effect on the trial's outcome. Even though the State's evidence in this case was largely circumstantial and we

cannot say it was overwhelming, there was significant enough corroborating evidence of Phillips's guilt that any *Giglio* error was harmless. *See Brecht*, 507 U.S. at 639; *Mansfield*, 679 F.3d at 1313.

Phillips argues that our decision in *Guzman v. Secretary, Department of Corrections*, 663 F.3d 1336 (11th Cir. 2011), compels the opposite conclusion. We find the case distinguishable and therefore disagree.

James Guzman was convicted in Florida state court of murdering David Colvin. *Id.* at 1339–40. At the time of the murder, Guzman was living at a motel with Martha Cronin. *Id.* at 1340. Colvin also lived at the motel. *Id.* One morning, Colvin and Guzman left the motel together to drink beer and eat breakfast. *Id.* According to Guzman, when they returned, the two men went separate ways. *Id.* Later that day, Colvin was robbed and stabbed to death. *Id.* There were no eyewitnesses to the murder. *Id.* at 1354.

When police initially questioned Guzman and Cronin, both said they knew nothing about the murder. *Id.* at 1341. Months later, police again interviewed Cronin, who had an outstanding warrant for a probation violation. She reported that Guzman had confessed to robbing and murdering Colvin. *Id.* at 1341–42. A few weeks later, Cronin testified before the grand jury about Guzman's confession. *Id.* at 1342.

At Guzman's criminal trial, Cronin again testified that Guzman had confessed. *Id.* at 1340–41. The jury heard from both Cronin and the lead detective that Cronin had not received anything in exchange for her testimony. *Id.* at 1342. Guzman testified in his

own defense and denied robbing or murdering Colvin. *Id.* at 1352. He also introduced evidence of other "viable suspects," including two individuals who had previously used knives in physical altercations with Colvin at the motel. *Id.* at 1353 & n.21. Ultimately, Guzman was convicted and sentenced to death. *Id.* at 1339–40.

In post-conviction proceedings, Guzman raised a *Giglio* claim based on evidence showing that the lead detective gave Cronin a $500 reward before she testified to the grand jury. *Id.* at 1342–43. The Florida Supreme Court affirmed the denial of relief on the *Giglio* claim, concluding that "the evidence was immaterial." *Id.* at 1345 (internal quotation marks omitted). Guzman then filed a § 2254 petition in federal court. *Id.* The district court granted the petition and concluded that Guzman was entitled to a new trial. *Id.* We affirmed.

We held that the Florida Supreme Court's decision on materiality was unreasonable and thus not entitled to AEDPA deference. *Id.* at 1349. We also concluded that the *Giglio* error was not harmless under *Brecht* because the error had a "substantial and injurious effect on the outcome of [Guzman's] trial." *Id.* at 1355. We explained that the State's case had "significant weaknesses" and "boiled down essentially [to] a credibility contest between Guzman [who had testified] on the one side, and Cronin and [the detective] on the other." *Id.* at 1356. Cronin's credibility was "critical to the State's case." *Id.* at 1351. But due to the *Giglio* error, Guzman was unable to attack Cronin's credibility by showing that she changed her story to obtain the reward money. *Id.* at 1352. The *Giglio* error

also deprived Guzman of the opportunity to impeach the detective by showing that she gave false testimony about the payment, and such impeachment would have "impugned not only her veracity but the character of the entire investigation." *Id.* at 1353 (internal quotation marks omitted). In assessing the overall weakness of the State's case, we emphasized, too, that Guzman had identified "other viable suspects." *Id.* After viewing the "entire record," we were left with "grave doubt" about whether the *Giglio* error had swayed the outcome of the trial and thus affirmed the grant of relief. *Id.* at 1356 (internal quotation marks omitted).

Guzman is distinguishable from this case. Importantly, the State's case against Phillips was stronger than its case against Guzman. Here, the State's case included particularly robust evidence of motive (Svenson's role in sending Phillips back to prison and threatening to send him back to prison again) as well as evidence that Phillips had possessed a firearm, similar to the one used to shoot into Nanette's home and to murder Svenson, around the time of the murder; had shot into Nanette's home; and provided a false alibi. And at Phillips's trial, there was no evidence of other viable suspects. Given the totality of the evidence introduced at Phillips's trial, we simply cannot say that the alleged errors had a substantial and injurious effect or influence on the jury's guilty verdict. Even after considering *Guzman*, we remain convinced that the error here was harmless under *Brecht*.

Before moving on, we emphasize that our conclusion that any *Giglio* error was harmless should not be taken as condoning

Waksman's conduct in this case. To the contrary, we condemn the conduct. Waksman redacted discoverable material and then covered his tracks with his improper cut-and-paste practices, making the alterations undetectable. This behavior was dishonest and unethical. But our inquiry here is a different one. The Supreme Court has made clear that to be entitled to relief on collateral review, a state prisoner must do more than show a constitutional error; he also must show that the error had a substantial and injurious effect or influence on the jury's verdict. *See Fry*, 551 U.S. at 116. Because after carefully considering the entire record in the case we are not left with grave doubt about whether the outcome of the trial was swayed by *Giglio* error, we affirm the district court's order denying Phillips relief.

C. Phillips's *Brady* Claim

Finally, we turn to Phillips's *Brady* claim. Phillips argues that the State violated *Brady* when it suppressed evidence about (1) the "monetary and sentencing benefits" promised to the four inmates and (2) Hunter's mental health history. Because the Florida Supreme Court's decision denying relief on this claim was not unreasonable, we conclude that it is entitled to AEDPA deference.

We begin by considering whether the State violated *Brady* by failing to disclose the full range of monetary and sentencing benefits promised to the inmates. Of course, the State was required to disclose any promises made to the inmates about benefits they might receive for testifying because those promises could be used to impeach the witnesses and thus would qualify as "[e]vidence . . .

favorable to the accused for *Brady* purposes." *Stein*, 846 F.3d at 1146. But for the reasons we discussed in Section III-B-1 above, we conclude that the state court reasonably rejected Phillips's claim based on its factual determination that the State disclosed the promises made to the inmates before Phillips's criminal trial.

Phillips also contends that a *Brady* violation occurred when the State failed to turn over mental health records showing that in a previous case Hunter had been found not guilty by reason of insanity. We conclude that the decision rejecting this claim is entitled to deference because the Florida Supreme Court reasonably could have determined that the records were not material, meaning there was no reasonable probability of a different result if the State had disclosed the records.[14]

These records show that between 1970 and 1972 (approximately 10 years before the relevant time period), Hunter had mental health problems, including schizophrenia, and was found not guilty of a crime by reason of insanity. Given the strength of the State's case, which we discussed in Section III-B-2 above, it was

[14] In its decision, the Florida Supreme Court never expressly addressed the claim that the State violated *Brady* by failing to turn over Hunter's mental health records. Instead, it silently rejected the claim. *See Phillips II*, 608 So. 2d at 780. In determining whether this decision is entitled to AEDPA deference, we consider what arguments or theories "could have supported" the decision and ask whether those arguments or theories were reasonable. *Richter*, 562 U.S. at 102. The Florida Supreme Court could have rejected the *Brady* claim because the mental health records were not material, a conclusion we find to be reasonable.

reasonable for the Florida Supreme Court to conclude that there was not a reasonable probability of a different result if the records had been disclosed.

IV. CONCLUSION

For the above reasons, we affirm the district court's denial of Phillips's habeas petition.

AFFIRMED.

WILSON, Circuit Judge, concurring:

I concur in the thorough and well-reasoned majority opinion. But this case presents a close call as to whether any *Giglio*[1] error was harmless under the *Brecht*[2] standard. I write separately to highlight the implications of, as the majority aptly describes, Prosecutor Waksman's "dishonest and unethical" behavior.

At a post-conviction evidentiary hearing, Phillips elicited extensive information about Prosecutor Waksman's role in obtaining the informants' testimony and about Prosecutor Waksman's redaction of police reports—none of which Phillips knew at the time of his trial. In an affidavit, Larry Hunter stated that Prosecutor Waksman told him to testify at trial that he received no deal for his testimony, but in reality, Hunter was actually promised probation instead of life imprisonment. The evidence also showed that Prosecutor Waksman edited Detective Smith's police report to remove any reference to Prosecutor Waksman's contact with Hunter. This edited copy was the version handed over to the defense during discovery.

Phillips introduced a letter that William Farley had written on February 1, 1984 (the day Phillips was sentenced), stating that Prosecutor Waksman had not tried to get Farley out of prison as Farley expected and suggesting that Prosecutor Waksman had "used" him. According to Farley, Detective Smith visited him in

[1] *Giglio v. United States*, 405 U.S. 150 (1972).

[2] *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993).

jail after the first letter, upset that Farley would tell the truth, specifically that Detective Smith told Farley what he should say before the recorded interview. Farley was subsequently transferred to a harsher area of prison. Farley then sent a second letter on February 14, 1984, in which he accused Prosecutor Waksman of lying to him "about everything," including failing to send a letter to the parole commissioner on his behalf. A check was also introduced showing Farley cashed $175 from Prosecutor Waksman. Phillips also presented Detective Smith's unredacted report indicating that he and Farley spoke for 1.5 hours prior to the start of the recording. Prosecutor Waksman had edited Detective Smith's police report to remove reference to this unrecorded interview prior to handing the report over in discovery.

When confronted with this evidence, Prosecutor Waksman testified that he routinely redacted police reports in a manner that concealed the redaction to defense counsel. Prosecutor Waksman also admitted to providing the informants with benefits greater than what he had admitted to at trial; however, he justified these rewards because he decided to provide them *after* trial. Therefore, according to Prosecutor Waksman, the rewards did not incentivize the informants and could not be used as impeachment evidence.

Again, like the majority notes, under *Brecht*, any error was harmless. We use "harmless" to mean that the remainder of evidence on the record is sufficient to convict Phillips. *See Mansfield v. Sec'y, Dep't of Corr.*, 679 F.3d 1301, 1313 (11th Cir. 2012) ("[T]he erroneous admission of evidence is likely to be harmless under

the *Brecht* standard where there is significant corroborating evidence."). However, "harmless" should not be read to minimize Prosecutor Waksman's routine practice of redacting discovery documents. Prosecutorial misconduct like this is so egregious that it can easily cast a shadow on the entire criminal trial and our criminal justice system more broadly. But for the significant corroborating evidence in this case, Waksman's conduct amounts to a *Giglio* violation.

APPENDIX B

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

CRIMINAL DIVISION

CASE NO. 83-435

THE STATE OF FLORIDA,)

Plaintiff,)

vs.) FINAL ORDER DENYING MOTION TO VACATE JUDGMENT AND SENTENCE

HARRY PHILLIPS,)

Defendant.)

THIS CAUSE came before the Court on Phillips' Motion to Vacate Judgment and Sentence, pursuant to Rule 3.850, Florida Rules of Criminal Procedure, to vacate the judgment of guilt of first degree murder and sentence of death imposed on February 1, 1984. The Court has reviewed the pleadings, the trial transcript, and held evidentiary hearings on the issues raised in the motion to vacate. After careful consideration of the above, the Court concludes that the motion should be denied and that Phillips is entitled to no relief whatsoever.

PROCEDURAL HISTORY

Phillips was charged with the first degree murder of his parole supervisor, Bjorn Thomas Svenson. After trial by jury, Phillips was found guilty as charged. In accordance with the jury's recommendation of death, this Court imposed the death sentence. This decision was affirmed. Phillips v. State, 476 So.2d 194 (Fla. 1985).

After clemency was denied, Governor Martinez signed Phillips' first death warrant. A Petition for Writ of Habeas Corpus was then filed with the Florida Supreme Court wherein he challenged the constitutionality of his sentencing hearing based on Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 20 L.Ed.2d 231 (1985). The Court, without deciding the substantive merit of the claim, found

the claim to be procedurally barred and denied relief. Phillips v. Dugger, 515 So.2d 227 (Fla. 1987).

During the pendency of the death warrant, Phillips filed the instant Motion to Vacate and a Motion to Stay. This Court after reviewing the pleadings entered a stay of execution and thereafter held an evidentiary hearing and further evidentiary hearings as requested by Phillips' attorneys.

FACTUAL BACKGROUND

In affirming Phillips conviction and death sentence the Florida Supreme Court established the historical facts of the case:

> In the evening of August 31, 1982, witnesses heard several rounds of gunfire in the vicinity of the Parole and Probation building in Miami. An investigation revealed the body of Bjorn Thomas Svenson, a parole supervisor, in the parole building parking lot. Svenson was the victim of multiple gunshot wounds. There apparently were no eyewitnesses to the homicide.
>
> As parole supervisor, the victim had responsibility over several probation officers in charge of appellant's parole. The record indicates that for approximately two years prior to the murder, the victim and appellant had repeated encounters regarding appellant's unauthorized contact with a probation officer. On each occasion, the victim advised appellant to stay away from his employees and the parole building unless making an authorized visit. After one incident, based on testimony of the victim and two of his probation officers, appellant's parole was revoked and he was returned to prison for approximately twenty months.
>
> On August 24, 1982, several rounds of gunfire were shot through the front window of a home occupied by the two probation officers who had testified against appellant. Neither was injured in the incident, for which appellant was subsequently charged.
>
> Following the victim's murder, appellant was incarcerated for parole violations. Testimony of several inmates indicated that

> appellant told them he had killed a parole officer. Appellant was thereafter indicted for first-degree murder.
>
> 476 So.2d at 194-195.

CLAIMS THAT ARE PROCEDURALLY BARRED

Claims which either were or should have been raised on direct appeal are not cognizable in Rule 3.850 proceedings. Daugherty v. State, 505 So.2d 1323 (Fla. 1987). This rule applies even when a court is dealing with a death sentence. White v. State, 511 So.2d 984 (Fla. 1987). Based on the foregoing the following claims are summarily denied because they are ones which could have or should have been raised on direct appeal: That Phillips' statements were unlawfully obtained by the use of jailhouse informants; That the death sentence was imposed in violation of Caldwell v. Mississippi, supra.; That the jury instruction concerning the need for a majority vote for a life sentence deprived Phillips of a fair sentencing hearing; That the jury instruction concerning the burden of proving aggravating and mitigating circumstances shifted the burden of proof; That Phillips' absence during critical proceedings was involuntary; and, That his two prior convictions were unconstitutional and were improperly used as aggravating factors.

CLAIMS DECIDED ON THE MERITS

I

BRADY VIOLATION

Phillips claims the State violated the dictates of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by withholding favorable evidence concerning the nature of the jailhouse witnesses and the scope of the promises made to them for their testimony. In order for Phillips to succeed on this claim, he had to establish that favorable evidence was withheld and that said evidence was material to either guilt or punishment. Evidence is

material only if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the proceeding. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). This Court finds, as hereinafter delineated, that Phillips has failed to establish that any favorable evidence was withheld by the State and therefore this claim is denied.

Phillips' first contention is that the State withheld information on William Scott. Specifically he alleges that he was not informed that Scott was a police informant at the time Phillips confessed to Scott. This allegation is refuted by the pretrial deposition of Scott whereat Scott admitted that he was a paid confidential informant for the police. The fact that Scott was a police agent on other cases at the time Phillips confessed was not violative of Phillips' constitutional rights. Miller v. State, 415 So.2d 1262 (Fla. 1982), cert. denied, 459 U.S. 1155 (1983). Phillips also contends that information concerning promises for testimony Scott's was withheld. This contention has not been substantiated since there is no evidence that Scott received financial support during the pendency of Phillips trial or that the police were instrumental in having assault charges against Scott dismissed.

William Farley, another jailhouse informant who testified against Phillips at trial, also testified at the evidentiary hearing. This time he stated that he lied during the trial; that the confession that he stated that Phillips made to him did not occur; and, that he testified falsely to get out of prison early. Farley also testified that Detective Smith asked him to elicit information from Phillips, gave him information regarding the crime, promised

him an early release for information, and promised a reward if Farley testified at trial. He also testified that Detective Smith told him what to say in his taped statement.

Both the prosecutor and Detective Smith, at the hearing, denied these allegations. It was established that the prosecutor promised Farley that he would write a letter to the parole board on his behalf, and that this information was provided to defense counsel prior to trial.

Based on Farley's testimony, Phillips alleges that the State withheld evidence concerning William Farley's status as a police agent on this case at the time Phillips confessed to him and that evidence of promises and rewards for testimony was also withheld. This Court finds Farley's testimony to be totally incredulous and unbelievable and therefore rejects the same. Since this was the only testimony presented, Phillips has failed to substantiate his allegations concerning Farley and therefore this claim is denied.

Phillips further alleges that information was withheld with regard to the jailhouse informant Larry Hunter. These allegations deal with the State allegedly providing Hunter with information about the crime as well as concealment of the full scope of the promises made for testimony. Hunter was subpoenaed but refused to testify invoking his privilege against self incrimination. Pursuant to stipulation, this Court was permitted to consider Hunter's affidavit as evidence to support the claim. The affidavit claimed that the State provided Hunter with information about the crime and that he would receive both a monetary reward and a lenient sentence on his pending charges for testimony against Phillips. This Court finds that Hunter's affidavit is totally at odds with the facts adduced at the initial trial. This claim is rejected outright.

Phillips' final claimed Brady violation is that evidence concerning the promises made to Malcolm Watson was withheld. Specifically he complains not that the scope of the promise was not revealed, but that the State did not properly enforce the deal. The State, pretrial, revealed that in exchange for testimony, Watson's conviction would be reduced from armed robbery to simple robbery if he passed a polygraph on whether he was armed during the robbery. After Phillips' trial, Watson passed a polygraph and in accordance with the agreement his conviction was reduced to simple robbery. Since the promise was disclosed and subsequently enforced, this claim is meritless and is denied.

II

INCOMPETENCY TO STAND TRIAL

Phillips claims that he was incompetent to stand trial. In order to determine the ultimate merits of the claim, this Court heard the testimony of four doctors as well as Phillips' initial attorney and the attorney who subsequently tried the case. Jones v. State, 478 So.2d 346 (Fla. 1985).

Dr. Carbonel testified that Phillips was incompetent to stand trial. She testified that Phillips understood that he was being tried; that he had a lawyer; that the prosecution was against him; that the judge controls the proceedings and that the jury would decide his guilt or innocence. She further testified that Phillips did not understand legal motions, or that he could be given the death penalty. Phillips' understanding of the charges was that a parole officer had been killed, and that he was charged with the killing and that he could be sent to prison for life. Dr. Carbonel stated that in her opinion Phillips was incapable of expressing himself, and could not provide a coherent version of the events which prohibited him from assisting with his defense.

Dr. Toomer also testified that Phillips was incompetent to stand trial. His opinion was based on Phillips' low level of intellectual functioning. He stated that Phillips did not understand the seriousness of the charges nor did he appreciate the possible penalties, and that he did not understand the adversarial process. It was his opinion that Phillips understood the prosecutor's role, but not that of the judge and jury. Phillips, according to Dr. Toomer, could not provide a rational account of the events or assist in his defense.

Dr. Haber's opinion was that Phillips was competent to stand trial. Based on his examination, he found that Phillips was not suffering from any serious intellectual or emotional disturbances. Phillips is of borderline intellectual functioning. During his evaluation, Phillips was cooperative; although serious in mood. He was direct, responsive, alert, oriented to time, place, and person. He had an adequate grasp of vocabulary, context, and an adequate ability to recollect both recent and remote events. Dr. Haber testified that letters written by Phillips at the time of trial established that he appreciated the seriousness of the charges, and that he understood the adversarial nature of the proceedings. The letters also showed that he was able to relate to counsel and to communicate his position which reflected an interest, willingness and capacity to assist in his defense. The letters also established that he understood the role of witnesses and the consequences of adverse testimony. It was his opinion that Phillips knew that he was facing the death penalty and that his present denial was a defense mechanism.

Dr. Miller's opinion was that Phillips was competent to stand trial. This opinion was based on the facts that Phillips was able to name the judge, his lawyer, some of the witnesses, how long the trial lasted and the number of

jurors. These recollections established that he was alert and in touch with reality during his trial. The letters written at the time of trial indicated an awareness of the role of witnesses, the adversarial process and the consequences of adverse testimony. They were indicative of a person with less than average intelligence , but certainly not of a retarded person. Phillips also knew that a jury would decide his guilt or innocence and that the judge would decide his case. Dr. Miller found that Phillips was unbelievable when he stated that he did not know that he was facing the death penalty since he was alert during the trial and he understood what the judge said about a capital trial.

Joel Kershaw, Phillips initial counsel, was discharged by Phillips because he did not like the way Kershaw was handling the investigation. Kershaw testified that Phillips knew he was facing the death penalty; that he did not display the type of behavior that would have led him to seek a competency evaluation; and that he understood what was occurring.

Ronald Guralnick, Phillips trial attorney, testified that, based on his conduct, Phillips did not give any indication that he was incompetent. He stated that Phillips provided him with information to prepare a defense and that Phillips understood his instructions but chose not to follow them.

Dusky v. United States, 362 U.S. 402, 80 S. Ct. 788, 4 L.Ed. 2d 824 (1960), established the test for determining whether a defendant is competent to stand trial. The test is whether a defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him." Id. at 402. See also; Hill v. State, 473 So.2d 1253 (Fla. 1985).

In applying the foregoing legal standard to the evidence presented concerning Phillips competency, this Court finds that Phillips has failed to meet his burden of dispositively demonstrating that he was incompetent to stand trial. Muhammad v. State, 494 So.2d 969 (Fla. 1986). This finding is based, in part, on this Court's recollection of Phillips' behavior at trial and a review of the letters written by Phillips during trial. This information is congruent with both of Phillips' previous attorneys who testified that he was able to understand the proceedings and assist in preparing a defense. The foregoing necessitates an acceptance of Drs. Haber's and Miller's finding that Phillips was competent to stand trial and a rejection of Drs. Carbonel's and Toomer's finding of incompetence to stand trial.

III

INEFFECTIVE ASSISTANCE OF COUNSEL

Phillips claims that his trial attorney was ineffective at both the guilt or innocence phase and the penalty phase of his trial. In order to succeed on this claim, Phillips must establish that his attorney's performance was deficient and that said deficiencies prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Phillips alleges that counsel was ineffective at the guilt or innocence phase for his failure to move to suppress the statements of the jailhouse informants; for his failure to move for a change of venue based on pretrial publicity; for his failure to adequately prepare for trial; and for his failure to employ experts in the area of mental health and firearms. At the evidentiary hearing, evidence was not presented to establish deficient conduct in these areas. Based on this failure, this claim is denied.

As it relates to the penalty phase, Phillips contention is that his trial attorney failed to do any investigation for mitigating evidence and this failure rendered counsel ineffective. Based on trial counsel's testimony, this Court finds trial counsel was deficient for failing to conduct any investigation for mitigating evidence. However, this failure alone does not constitute ineffective assistance of counsel. Phillips must also prove that had an investigation occurred the result of sentencing hearing would have been different.

At the evidentiary hearing Phillips presented the testimony of family members. This testimony established that Phillips came from a poor family and that both of his parents worked. His father physically abused him. Phillips was very attached to his father and felt rejected when his father abandoned the family. Phillips was a below average student. When Phillips worked he helped support his family and was kind to his sister's children.

Dr. Carbonel testified Phillips has below average intelligence, on the borderline of being retarded. She did not find any organic brain damage. Based on Phillips' improverished background, his limited intellectual functioning, his history of passive/aggressive behavior and his inability to learn from experience, it was Dr. Carbonel's opinion that Phillips was suffering, at the time of the incident, from an extreme emotional disturbance.

Dr. Toomer agreed with Dr. Carbonel's conclusions. He concluded that Phillips was not psychotic but that he is incapable of abstract reasoning, suffers from intellectual deficiencies and emotional deprivation.

The State's experts explicitly refuted the foregoing opinions. Drs. Haber and Miller opined that Phillips was

not suffering from any serious intellectual or emotional disturbances.

This Court finds that the evidence that counsel failed to present would not have changed the outcome of the sentencing hearing. This conclusion is reached based on the four valid aggravating factors that exist and which are:

1) That the murder was committed while Phillips was under a sentence of imprisonment;
2) He was previously convicted of another felony involving the use of violence;
3) The murder was especially heinous, atrocious or cruel; and,
4) It was committed in a cold, calculated and premeditated manner.

Based on the facts surrounding the murder, this Court finds that there is no reasonable probability that the evidence of a troubled childhood and limited mental capacity would have altered the jury's decision and certainly not this Court's decision. Since Phillips has not established prejudice, he is not entitled to relief on this claim. Harris v. State, 528 So.2d 361 (Fla. 1988); Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986), cert. denied, 107 S.Ct. 1986 (1987).

It is therefore ORDERED and ADJUDGED that the Motion to Vacate Judgment and Sentence be, and the same is, hereby DENIED.

It is further ORDERED and ADJUDGED that the stay of execution previously entered herein is VACATED.

DONE and ORDERED this 13th day of February, 1989, at Miami, Dade County, Florida.

ARTHUR I. SNYDER
Circuit Judge

cc: David Waksman
Assistant State Attorney
1351 N.W. 12th Street
Miami, Florida 33125

Michael J. Neimand
Assistant Attorney General
401 N.W. 2nd Avenue, Suite N921
Miami, Florida 33128

Billy Nolas
Attorney for Defendant
Office of the Capital
Collateral Representative
225 West Jefferson Street
Tallahassee, Florida 32301

APPENDIX C

608 So.2d 778
Supreme Court of Florida.

Harry Franklin PHILLIPS, Appellant,
v.
STATE of Florida, Appellee.

No. 75598.
|
Sept. 24, 1992.
|
Rehearing Denied Dec. 24, 1992.

Synopsis

Following affirmance, 476 So.2d 194, of murder conviction and sentence of death, defendant petitioned to have his sentence vacated, set aside or corrected. The Circuit Court in and for Dade County, Arthur I. Snyder, J., denied the petition. Defendant appealed. The Supreme Court held: (1) state's disclosure of benefits offered to inmates in exchange for their testimony was adequate; (2) state did not fail to correct false testimony; (3) state did not use jailhouse informants to elicit testimony from defendant after he asserted his right to counsel; (4) defense counsel was not ineffective at the guilt phase; but (5) counsel was ineffective at the sentencing phase.

Affirmed in part and reversed in part; sentence vacated and remanded for resentencing.

Shaw, J., concurred in result.

McDonald, J., concurred in part and dissented in part and filed opinion.

Attorneys and Law Firms

***779** Larry Helm Spalding, Capital Collateral Representative (CCR), Jerrel E. Phillips, Asst. CCR, Office of Capital Collateral Representative, Tallahassee, and Billy H. Nolas and Julie D. Naylor, Sp. Asst. CCR, Ocala, for appellant.

Robert A. Butterworth, Atty. Gen. and Ralph Barreira, Asst. Atty. Gen., Miami, for appellee.

Opinion

PER CURIAM.

Harry Franklin Phillips, a prisoner under sentence of death, appeals from the circuit court's denial of his petition under Florida Rule of Criminal Procedure 3.850. We have jurisdiction under article V, section 3(b)(1) of the Florida Constitution.

Phillips was convicted of the 1982 murder of Bjorn Svenson, a parole supervisor. The jury recommended a death sentence by a vote of seven to five, and the judge followed this recommendation. This Court affirmed the conviction and sentence on appeal. *Phillips v. State,* 476 So.2d 194 (Fla.1985). After his first death warrant was signed, Phillips filed a petition for habeas corpus, alleging a violation of his rights under *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). The petition was denied by this Court as procedurally barred. *Phillips v. Dugger,* 515 So.2d 227 (Fla.1987). Phillips ***780** then filed this 3.850 motion. An evidentiary hearing was held, and the circuit court denied relief on all claims.

We first address the claims Phillips raises alleging error in the guilt phase of his trial. Much of the State's evidence at trial consisted of the testimony of inmates who had been in a cell with Phillips. These inmates testified that Phillips admitted his guilt to them, and each supplied details of the crime as Phillips portrayed it to them—details which presumably only the killer would know.

Phillips contends that the State failed to disclose the nature or extent of the benefits offered to these inmates in exchange for their testimony, violating his rights under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). However, before trial, Phillips was allowed to depose the prosecutor in this case, David Waksman. He also took the depositions of the inmates themselves and of the lead detective, Greg Smith. Through these depositions, Phillips learned that the inmates had been told that Waksman would write a letter informing the relevant authority—the parole board for those inmates who were serving prison sentences and the sentencing judge for those inmates who had not yet gone to trial—of their cooperation in the case. In addition, one inmate, Malcolm Watson, was promised that he would be given a polygraph test regarding his crime, and if he passed it his sentencing judge would be so informed. These promises were brought out on cross-examination of the inmates at trial.

Phillips now contends that the inmates were promised much more than was actually disclosed. In support of this claim, he introduced at the postconviction hearing documents showing

that Waksman and Smith were involved in various activities in aid of the inmates after trial. For example, Waksman became involved in plea negotiations which ultimately resulted in a lenient sentence of five years' probation for Larry Hunter.

In rebutting this allegation, the State presented Waksman as a witness, who explained that he did in fact do more than simply write letters for some of the inmates. Because they had been such a help to the case and had gone through such pains to testify, including spending more time in jail while their own trials were postponed and being subjected to beatings and threats from other prisoners, Waksman decided to aid these inmates in whatever ways he could. However, he did not inform the inmates that he was going to do anything other than write letters, and in fact he himself had no idea to what extent he would end up helping them. [1]

Phillips also introduced check stubs showing that the inmates were in fact given reward money after trial. However, Smith and Waksman explained that this money was provided by the Florida Police Benevolent Association, a private organization, that they themselves were unaware of the reward until shortly before trial, and that they never told the inmates about the money until after they testified. Accordingly, although the inmates were ultimately given reward money by an outside organization, they were not aware of the possibility of a reward until after trial, and it therefore could not have provided any incentive for them to testify.

Finally, Phillips presented the testimony of William Farley, who stated that he lied on the stand at trial, that Phillips had never in fact confessed to him, that all the information about the crime was provided to him by the police, and that he perjured himself on the stand after being promised freedom and reward money. A similar claim was made as to the testimony of Larry Hunter. While Hunter himself refused to testify on grounds of self-incrimination, the parties stipulated to the consideration of his affidavit. Waksman and Smith denied these allegations. The circuit ***781** court found this evidence to be completely unbelievable, and we find competent, substantial evidence to support this finding. Accordingly, we reject Phillips' *Brady* claim.

Phillips next claims that various witnesses lied on the stand at trial and the State failed to correct the false testimony, in violation of *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). In order to prevail on this claim, Phillips must demonstrate: (1) the testimony was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material. *Routly v. State,* 590 So.2d 397, 400 (Fla.1991).

Phillips first alleges that William Scott was a police informant at the time Phillips confessed to him, yet he stated on the witness stand that he was not a police agent. The fact that Scott had been a paid informant for the federal government and had aided one of the detectives in the Metro–Dade police department was well known to the defense through pretrial depositions of Scott and Detective Smith and was brought out on cross-examination at trial. Scott's statement that he was not a police agent is attributable to the ambiguity of the term "agent." Scott was on the federal government payroll at the time of trial and was assigned an informant number for the federal authorities; he did not, at that time, have an informant number for the Metro–Dade police, and therefore evidently did not believe that he was an agent for that department. Even at the postconviction hearing, Scott seemed confused over whether he was an informant for Metro–Dade. Ambiguous testimony does not constitute false testimony for the purposes of *Giglio. Routly,* 590 So.2d at 400.

Phillips also alleges that William Farley lied when he stated that the tape was started immediately when he gave his tape-recorded statement to the police; actually, a pre-interview was conducted which lasted approximately one and one-half hours. We find this misstatement to be immaterial. Further, the statement could have been corrected by the defense, had it been important, since the defense was aware of the pre-interview from Detective Smith's pretrial deposition.

Finally, Phillips contends that both Farley and Watson lied about their criminal records. While we agree that statements made by these witnesses regarding their records were incorrect, we find that there is no reasonable probability that the false testimony affected the judgment of the jury. The jury was made aware that these witnesses were convicted felons; the admission of an additional conviction or probationary sentence would have added virtually nothing to further undermine their credibility.

In a related claim, Phillips argues that the State used the jailhouse informants to elicit testimony from Phillips after he asserted his right to counsel, violating his rights under *United States v. Henry,* 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980). This claim is without merit, as Phillips has made no showing that the informants were state agents when they talked with him, [2] that they in any way attempted to elicit

information about the crimes, or that the State had anything to do with placing these persons in a cell with Phillips in order to obtain information.

Phillips next argues that his trial counsel was ineffective at the guilt phase. In order to prevail on this claim, Phillips must demonstrate that counsel's performance was deficient and that there is a reasonable probability that the result of the proceeding would have been different absent the deficient performance. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Phillips bases his claim on several alleged actions which counsel failed to take. First, Phillips contends that counsel should have obtained a competency evaluation before trial. In support of this allegation, ***782** Phillips presented the testimony of two forensic psychology experts, who stated that Phillips was not competent at the time of his trial. In rebutting this claim, the State presented the testimony of two experts who opined that Phillips was competent at trial, and the testimony of Phillips' counsel, who stated that there was absolutely no reason to doubt Phillips' competence at the time of trial. [3] The State also presented notes and letters written by Phillips at the time of trial which indicated overall intellectual functioning and an understanding of the case against him. The circuit court found that Phillips was competent at trial and that counsel was not ineffective for failing to have his competency evaluated. We find competent, substantial evidence to support the circuit court's finding on this issue.

Phillips next claims that counsel was ineffective for failing to investigate the jailhouse informants, for failing to file a motion to suppress, for failing to move for a change of venue, for failing to conduct an appropriate voir dire, for failing to obtain or consult with experts, for failing to object to Phillips' absence from certain proceedings, for failing to adequately cross-examine witnesses, and for failing to object to hearsay, lay opinions, and improper comments during the prosecutor's closing argument. We find these claims to be conclusory and summarily reject them. Many of these claims are exactly the type of hindsight second-guessing that *Strickland* condemns, and even those matters asserted as significant "omissions" would have been mere exercises in futility, with no legal basis. Accordingly, having found that Phillips has demonstrated neither deficient performance nor prejudice, we reject his claim that trial counsel was ineffective at the guilt phase.

We turn now to Phillips' claims regarding the sentencing phase of his trial. Phillips first argues that his trial counsel was ineffective at sentencing. Counsel testified at the postconviction hearing that he did virtually no preparation for the penalty phase. The only testimony presented in mitigation was that of Phillips' mother, who testified that Phillips was a good son who tried to help her when he was not in prison. The State has conceded that counsel's performance was deficient at the penalty phase, but contends that the deficient performance did not prejudice Phillips, as he would have been sentenced to death anyway. The circuit court agreed with the State.

At the postconviction proceeding, Phillips introduced a large amount of mitigating evidence through the testimony of relatives and friends of the family, who described Phillips' poor childhood, and through the testimony of expert witnesses, who described Phillips' mental and emotional deficiencies.

Phillips' mother, brother, and sister testified that Phillips grew up in poverty. His parents were migrant workers who often left the children unsupervised. Phillips' father physically abused him, and physically abused Phillips' mother in front of the children. Phillips was a withdrawn, quiet child with no friends. When he was thirteen or fourteen, Phillips was shot in the head and taken to the hospital.

The State argues that this childhood evidence is entitled to little weight, since Phillips was thirty-six years old at the time he committed this crime and had numerous chances to rehabilitate himself by then. Although it is true that this evidence is far less compelling as mitigation in light of Phillips' age, this does not change the fact that it was relevant, admissible evidence that should have been presented to the jury. It cannot be seriously argued that the admission of this evidence could have in any way affirmatively damaged Phillips' case.

More compelling evidence was presented by Phillips' experts. These experts testified that Phillips is emotionally, intellectually, ***783** and socially deficient, that he has lifelong deficits in his adaptive functioning, that he is withdrawn and socially isolated, that he has a schizoid personality, and that he is passive-aggressive. Phillips' IQ was found to be between seventy-three and seventy-five, in the borderline intelligence range. Both experts concluded that Phillips falls under the statutory mitigating circumstances of extreme emotional disturbance and an inability to conform his conduct to the requirements of the law. [4] They also opined that Phillips did not have the capacity to form the requisite

intent to fall under the aggravating factors of cold, calculated, and premeditated or heinous, atrocious, or cruel. [5]

Again, the State contends that this mitigation is not sufficiently compelling to demonstrate prejudice. However, this testimony provides strong mental mitigation and was essentially unrebutted. The testimony of the State experts related solely to the issue of competency. While these experts testified that they did not believe Phillips had significant mental or emotional disorders, they offered no opinion as to the applicability of the statutory mental mitigators, and even these experts agreed that Phillips' intellectual functioning is at least low average and possibly borderline retarded. Accordingly, even giving full credit to the testimony of the State's experts there was significant, unrebutted mental mitigation which should have been considered by the jury. [6]

The jury vote in this case was seven to five in favor of a death recommendation. The swaying of the vote of only one juror would have made a critical difference here. Accordingly, we find that there is a reasonable probability that but for counsel's deficient performance in failing to present mitigating evidence the vote of one juror would have been different, thereby changing the jury's vote to six to six and resulting in a recommendation of life reasonably supported by mitigating evidence. Having demonstrated both deficient performance and prejudice, Phillips is entitled to relief on his claim of ineffective assistance of counsel at the sentencing phase of his trial. Given our resolution of this issue, it is unnecessary for us to address the remainder of Phillips' claims of error in his sentencing. [7]

For the foregoing reasons, the circuit court's order is affirmed in part and reversed in part, the sentence of death is vacated, and the case is remanded for a new sentencing proceeding before a jury.

It is so ordered.

BARKETT, C.J., and OVERTON, GRIMES, KOGAN and HARDING, JJ., concur.

SHAW, J., concurs in result only.

McDONALD, J., concurs in part and dissents in part with an opinion.

McDONALD, Justice, concurring in part, dissenting in part.
I concur in the denial of relief to Phillips on the guilt phase of his trial, but would also deny relief on the sentence. I agree with the trial judge when he determined:

> Based on the facts surrounding the murder, this Court finds that there is no reasonable probability that the evidence of a troubled childhood and limited mental capacity would have altered the jury's decision and certainly not this Court's decision. Since Phillips has not established prejudice, he is not entitled to relief on this claim.

All Citations

608 So.2d 778, 17 Fla. L. Weekly S595

Footnotes

1 Phillips also cites several examples of good fortune which befell the inmates after they testified against him. For example, Malcolm Watson's life sentence was vacated, William Farley received early parole, and assault charges against William Scott were dropped. However, Phillips submitted no proof that these events were causally connected to the inmates' testimony at trial or that they took place in fulfillment of promises by the State.

2 Although William Scott was a state agent when he attempted to elicit information from Phillips' family, this action in no way implicated Phillips' rights. The circumstances of this incident were not hidden by the State, as Scott discussed the incident in his pretrial deposition.

3 Phillips places much emphasis on counsel's statements that Phillips was an “idiot.” Counsel explained that this statement did not reflect his feelings about Phillips' mental capacity, but rather about his tendency to take actions which sabotaged his own case, such as bragging about the crime to other inmates.

4 § 921.141(6)(b), (f), Fla.Stat. (1981).

5 § 921.141(5)(i), (h), Fla.Stat. (1981).

6 While the circuit judge ruled against Phillips on the competency claim, he never found as a factual matter that no mental mitigation was established.

7 Phillips argues: 1) comments by the court and prosecutor diminished the jury's sense of responsibility for the sentencing decision; 2) trial counsel was ineffective for failing to object to a jury instruction which shifted the burden of proof at sentencing to Phillips; and 3) trial counsel was ineffective for failing to object to inconsistent jury instructions regarding the vote necessary for a life recommendation.

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APPENDIX D

General Affidavit

State of Florida,
County of DADE

Before the undersigned, an officer duly commissioned by the laws of Florida, on this 14th day of NOVEMBER, 1983, personally appeared TONY F. SMITH,

who having been first duly sworn depose.... and say....:

MY NAME IS TONY F. SMITH, MY D.O.B IS 7-13-60 IN REGARDS TO MY STATEMENT CONCERNING HARRY PHILLIPS TO DET. GREGORY SMITH, WHILE IT IS FACTUAL THAT DET. SMITH DIDN'T OFFER ME ANY PROMISES OR CONSIDERATION FOR MY COOPERATION IN THE PHILLIP'S CASE, IT WAS A FORGONE CONCLUSION ON MY PART, FROM PAST EXPERIENCES AND INVOLVEMENT WITH DET. SMITH THAT I COULD EXPECT HIS ASSISTANCE IN THE FUTURE, OR THAT IN FACT HE WOULD "OWE ME ONE". IN A FAVORABLE SITUATION TO ME.

FURTHER IT HAS COME TO PAST IN MY PRESENT CASE THAT I HAVE RECEIVED SPECIAL CONSIDERATION, WHICH I FEEL IS BASED ON MY COOPERATION IN THE PHILLIPS MATTER, SINCE MY PROBATION OFFICER ELLIOTT LIASON RESPONDED IN MY FAVOR AND IS ATTEMPTING TO ASSIST ME IN MITIGATING MY CASE FURTHER.

FINALLY, THE STATEMENTS MADE TO ME BY HARRY PHILLIPS WERE ONLY INTERPRETATIONS ON MY PART, INTERPRETATIONS I KNEW THE POLICE WANTED TO HEAR.

X Tony Fowlkes Smith

Sworn to and subscribed before me this 14th day of November A. D. 1983

(SEAL)

NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXPIRES JUNE 17 1987
BONDED THRU GENERAL INSURANCE UND

1373

Case Number 303185-C
Investigation into the Homicide of BJORN T. SVENSON, W/M 33 years, which occurred at 1850 N. W. 183rd Street on August 31, 1982, at approximately 8:45 P.M. The following statement was taken at the Metro-Dade Police Department Building, 1320 N. W. 14th Street, Miami, Dade County, Florida, on Thursday, 23 December 1982, commencing at 11:35 A.M. and concluding at 11:44 A.M., in the presence of Detective G. Smith, Homicide Section. Recorded and transcribed by Steno-Reporter and Notary Public Peggy A. Hubbard.

(Thereupon TONY FROCHETTE SMITH was duly sworn according to law.)

Q (By Detective Smith) For the record, state your full name.
A Tony Frochette Smith.
Q How old are you?
A I'm twenty-two.
Q Your date of birth?
A 7-13-60.
Q Where do you live?
A Carol City, 16850 N. W. 42nd Avenue.
Q What is the phone number there?
A 624-9756.
Q Are you employed, Mr. Smith?
A No, I'm not.
Q Are you familiar with an individual by the name of Harry Phillips?
A Yes, I am.
Q How long have you known Harry Phillips?
A Oh, approximately six months.
Q Did you have any contact with Harry Phillips prior to this six months?
A Yes, I have.
Q Approximately how long ago?
A Oh, about four weeks ago.
Q Okay, before the four weeks, did you have any contact with Harry Phillips?
A Yes, I did.
Q How long ago was that?
A That was before the murder. That was about 8-10-82, about 8-10-82. That's in August.

Q Before that time, when did you last see him?
A Up in Carol City at Jean's Lounge on 207 N. W. about 34th Avenue.
Q Do you recall what time that was?
A About between ten and ten-thirty at night.
Q At that point and time, did you have a conversation with Harry Phillips?
A Yes, I did.
Q What was the topic of the conversation?
A About probation officers and parole officers.
Q During that conversation, did Harry Phillips speak of probation or parole officers?
A Yes, he did.
Q What was the nature of the conversation?
A He had conflicts with two parole officers, a female parole officer and a male parole officer.
Q What was the nature of the conflict?
A He claimed they had been coming to his home harassing his mother, and he said that he weren't going along with this here because he had--she had done went through enough while he was doing state time in prison and he figured that he was gonna put a stop to it because he figured she had done went through enough already.
Q Did he say how he was going to put a stop to it?
A No, he didn't. He didn't say how he was gonna put a stop to it.
Q How did you interpret him saying he was going to put a stop to it?
A What do you mean by that there?
Q What did it mean to you when he said he was going to put a stop to it?
A Well, usually when you see a man toting a gun, it usually means that someone's gonna have to pay for it.
Q Was he in possession of a gun that night?
A Yes, he was.
Q Do you recall what kind of gun it was?
A It had to either been a .38 revolver or either a .357 magnum.
Q Do you remember what color it was?
A It was chrome.
Q Where did you see this revolver?
A It was in his belt on his left side under a blue jacket.
Q Did he say anything else with regards to parole officers?
A Yes, he did. He said that he already tried to take care of one, but he messed around and didn't succeed in it.

Q Did he say anything further about the male or female parole officers?
A Yes, he did. He said that she was coming to his house day by day harassing his mother, asking for him, and that he was getting tired of it.
Q Did he say anything about her or her mode of transportation?
A Yes, he did. He said she was driving a green Toyota Corolla.
Q Prior to your conversation with Harry Phillips in the bar, when was the last time you saw him before that?
A It had to been a couple weeks before this happened, before the incident took place.
Q I mean in the bar you spoke with Harry Phillips--
A Yes, I did.
Q --and what I'm asking is when was the last time you saw him before that conversation?
A Oh, about six months, about six months later; six months. It had to been about six months later.
Q You saw him six months later after the conversation?
A No, before the conversation.
Q Where did you see him?
A It was out on the streets.
Q In the pre-interview you told me you hadn't seen him for a couple of years.
A Right.
Q And supposedly he was in prison?
A Right.
Q Is it six months or is it a couple years?
A A couple years; maybe three, maybe three years.
Q Are you confused about the time?
A Yes, I am, but I know that I did see him in August.
Q Do you remember approximately when in August?
A It had to been between the 10th and the 11th of August.
Q What makes you say the 10th or the 11th?
A It had to been about the 10th or 11th of August. It had to been. That's about the time when I started going up to Jean's.
Q In the pre-interview, you advised me it was about the middle of August?
A Right. About the 10th or the 11th. Right after the first couple weeks of August--first couple days of August that is.

Q Has everything that you have stated been true and correct to the best of your knowledge?
A Yes, it is.
Q Has anyone threatened or coerced you in any way to give this statement?
A No, no one has.
Q Have you given this statement freely and voluntarily?
A Yes, I have.
Q Mr. Smith, is it not a fact that I have not made you any promises of reward for giving this statement?
A No, you haven't.
DETECTIVE SMITH: Thank you very much. I have no further questions.

(Thereupon, the statement was concluded at 11:44 A.M.)

- - -

CERTIFICATE

STATE OF FLORIDA)
) SS.
COUNTY OF DADE)

I, PEGGY A. HUBBARD, Court Reporter and Notary Public, duly commissioned and qualified in and for the State of Florida at Large, do hereby certify that the foregoing transcript, pages one to and including four, is a true and correct transcription of my stenographic notes of the sworn statement given by TONY FROCHETTE SMITH at the Metro-Dade Police Department Building, 1320 N. W. 14th Street, Miami, Dade County, Florida, on the 23rd of December, 1982, commencing at 11:35 A.M.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 28th day of December, 1982.

Peggy A. Hubbard
Notary Public, State of Florida at Large

My Commission Expires:
Notary Public, State of Florida
My Commission Expires October 12, 1984
Bonded thru Maynard Bonding Agency

* * * * *

No. _____

OCTOBER TERM 2024

In The

Supreme Court of the United States

HARRY FRANKLIN PHILLIPS,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition For A Writ Of Certiorari To
The United States Court of Appeals for the Eleventh Circuit

APPENDIX D

United States District Court for the Southern District of Florida, Order Denying Habeas Corpus Petition (Sept. 30, 2015)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 08-23420-CIV-JORDAN

HARRY FRANKLIN PHILLIPS)
)
Petitioner)
)
vs.)
)
JULIE L. JONES[1])
)
Respondent)
)

ORDER DENYING HABEAS CORPUS PETITION & CLOSING CASE

In this habeas corpus proceeding, brought pursuant to 28 U.S.C. §2254, Harry Franklin Phillips seeks to overturn the death sentence imposed on him for his role in the murder of Bjorn Thomas Svenson over 30 years ago. Mr. Phillips contends that he was denied due process when the State used false and misleading testimony during the guilt phase of his trial and withheld material exculpatory evidence; that the State's use of jailhouse informants violated his rights under the Sixth and Fourteenth Amendments; that he was denied a competency hearing prior to trial; that his counsel was ineffective due to lack of preparation and ignorance; that the state court's determination that he is not mentally retarded was an unreasonable application of *Atkins v. Virginia*, 536 U.S. 304 (2002); that the state court applied the wrong standard of proof in determining mental retardation; that the summary denial of his Rule 3.850 claims deprived him of due process and a full and fair evidentiary hearing; that judicial bias motivated a denial of a public records request; that the jury instructions were misleading and diminished the jury's sense of responsibility for the advisory sentence; that the State urged the jury to apply aggravating

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

circumstances in a manner inconsistent with the law; that the re-sentencing court erred in denying a motion to disallow a large door-sized chart in front of the jury; that he is both innocent of first degree murder and the death penalty; and that appellate counsel was ineffective for failing to raise a claim that the State was allowed to present unrebutted hearsay testimony at his re-sentencing. Following oral argument, and a review of the extensive record in this case, Mr. Phillips' habeas corpus petition is **DENIED**.

I. THE UNDERLYING FACTS AND PROCEDURAL HISTORY

In 1983, a Florida jury convicted Mr. Phillips of the first-degree murder of Mr. Svenson. The Florida Supreme Court, in Mr. Phillips' direct appeal, summarized the basic facts as follows:

> In the evening of August 31, 1982, witnesses heard several rounds of gunfire in the vicinity of the Parole and Probation building in Miami. An investigation revealed the body of Bjorn Thomas Svenson, a parole supervisor, in the parole building parking lot. Svenson was the victim of multiple gunshot wounds. There apparently were no eyewitnesses to the homicide.
>
> As parole supervisor, the victim had responsibility over several probation officers in charge of appellant's parole. The record indicates that for approximately two years prior to the murder, the victim and appellant had repeated encounters regarding appellant's unauthorized contact with a probation officer. On each occasion, the victim advised appellant to stay away from his employees and the parole building unless making an authorized visit. After one incident, based on testimony of the victim and two of his probation officers, appellant's parole was revoked and he was returned to prison for approximately twenty months.
>
> On August 24, 1982, several rounds of gunfire were shot through the front window of a home occupied by the two probation officers who had testified against appellant. Neither was injured in the incident, for which appellant was subsequently charged.
>
> Following the victim's murder, appellant was incarcerated for parole violations. Testimony of several inmates indicated that appellant told them he had killed a parole officer. Appellant was thereafter indicted for first-degree murder.

Phillips v. State, 476 So.2d 194, 195-96 (Fla. 1985). After a separate sentencing hearing, the jury, by a 7-5 vote, recommended that Mr. Phillips be sentenced to death. The trial court sentenced Mr. Phillips to death in accordance with this recommendation. Mr. Phillips appealed, but the Florida Supreme Court affirmed the conviction and sentence. *See id.*

Mr. Phillips sought post-conviction relief in the Florida courts under Rule 3.850 of the Florida Rules of Criminal Procedure. The post-conviction court denied relief but the Florida Supreme Court affirmed in part and reversed in part. *See Phillips v. State*, 608 So.2d 778 (Fla. 1992). The Florida Supreme Court reversed Mr. Phillips' death sentence, finding that his counsel was ineffective at the sentencing phase of the trial. *See id.* at 783. Mr. Phillip's case was therefore remanded for a new sentencing proceeding before a jury. *See id.*

In 1994, Mr. Phillips' re-sentencing hearing was held in state court. The jury again recommended, by a vote of 7-5, that Mr. Phillips be sentenced to death. *See Phillips v. State*, 705 So.2d 1320, 1321 (Fla. 1997). In its written order, the re-sentencing court found that the following aggravators applied to Mr. Phillips: (1) at the time of the murder, Mr. Phillips was under a sentence of imprisonment (because he was on parole); (2) Mr. Phillips had prior convictions for violent felonies; (3) the murder was committed to disrupt or hinder the lawful exercise of a governmental function or the enforcement of laws; and (4) the murder was cold, calculated, and premeditated without any pretense of moral or legal justification (the CCP aggravator). The re-sentencing court also found that, although no statutory mitigators were applicable, the following nonstatutory mitigators applied: (1) Mr. Phillips' low intelligence (given little weight); (2) Mr. Phillips' poor family background (given little weight); and (3) Mr. Phillips' abusive childhood, including lack of proper guidance by his father (given little weight). The re-sentencing court held that the aggravating circumstances outweighed the mitigating circumstances and sentenced Mr. Phillips to death. Mr. Phillips appealed to the Florida Supreme Court, which affirmed his death sentence. *See id.* at 1323.

Mr. Phillips filed a petition for writ of certiorari with the United States Supreme Court. That petition was denied on October 5, 1998. *See Phillips v. Florida*, 525 U.S. 880 (1998).

Mr. Phillips subsequently filed a motion for post-conviction relief in state court pursuant to Rule 3.850. *See Phillips v. State*, 894 So.2d 28 (Fla. 2005). Mr. Phillips raised 24 claims. The post-conviction court held a *Huff*[2] hearing and thereafter summarily denied Mr. Phillips'

[2]*See Huff v. State*, 622 So.2d 982, 983 (Fla. 1993) (requiring a hearing in post-conviction cases "for the purpose of determining whether an evidentiary hearing is required and to hear legal argument relating to the motion").

motion. *See id.* at 34. Mr. Phillips appealed to the Florida Supreme Court, which affirmed and also simultaneously denied Mr. Phillips' petition for writ of habeas corpus. *See id.*

Mr. Phillips later filed a motion for a mental retardation determination pursuant to Rule 3.203 of the Florida Rules of Criminal Procedure. The state court determined that Mr. Phillips was not mentally retarded. Mr. Phillips appealed to the Florida Supreme Court, which affirmed. *See Phillips v. State*, 984 So.2d 503 (Fla. 2008). Mr. Phillips also filed a successive Rule 3.851(d) motion challenging the validity of his death sentence, alleging newly discovered evidence. The state court denied the motion and the Florida Supreme Court affirmed. *See Phillips v. State*, 996 So.2d 859 (Fla. 2008).

In December of 2008, Mr. Phillips filed this petition for writ of habeas corpus pursuant to 28 U.S.C. §2254. The State filed its answer and memorandum of law in April of 2009, and Mr. Phillips filed a reply memorandum in August of 2009. The parties presented oral argument in October of 2009.

II. MR. PHILLIPS' CLAIMS AND APPLICABLE STANDARDS

Mr. Phillips' habeas corpus petition is governed by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 110 Stat. 1214 (1996) (codified at various provisions in Title 28 of the U.S. Code), which significantly changed the standards of review that federal courts apply in habeas corpus proceedings.[3] Under AEDPA, if a claim was

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[3]Mr. Phillips argues that "because this is a capital case involving his fundamental constitutional right to life, as of March 21, 2005, he is no longer subject to any provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), nor are any of his claims subject to any assertion of procedural default, and none of his claims are subject to the AEDPA given Congress' passage of S.686 on March 21, 2005." D.E. 3 at 2. S. 686 is also known as A Bill to Provide for the Relief of the Parents of Theresa Marie Schiavo.

Section 1 of the Schiavo Act provides the following:

> The United States District Court for the Middle District of Florida shall have jurisdiction to hear, determine, and render judgment on a suit or claim by or on behalf of Theresa Marie Schiavo for the alleged violation of any right of Theresa Marie Schiavo under the Constitution or laws of the United States relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life.

Section 2 of the Schiavo Act provides, in pertinent part, that "[a]ny parent of Theresa Marie Schiavo shall have standing to bring a suit under this Act." Pub.L. 109-3 (S.686) (March 21, 2005).
This Act was passed to permit certain specific complainants, i.e., the parents of Theresa Marie Schiavo, to bring suit to assert a violation of the rights of Theresa Marie Schiavo in the Middle District of Florida.

adjudicated on the merits in state court, habeas corpus relief can only be granted if the state court's adjudication "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 "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). This is an "exacting standard." *Maharaj v. Secretary, Dept. of Corrections,* 432 F.3d 1292, 1308 (11th Cir. 2005). *See also Harrington v. Richter*, 131 S. Ct. 770, 783 (2011).

Pursuant to § 2254(d)(1), a state court decision is "contrary to" Supreme Court precedent if it "arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law" or "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at [an] [opposite] result." *Williams v. Taylor,* 529 U.S. 362, 405 (2000) (opinion of O'Connor, J., for a majority of the Court). In other words, the "contrary to" prong means that "the state court's decision must be substantially different from the relevant precedent of [the Supreme] Court." *Id.*

With respect to the "unreasonable application" prong of § 2254(d)(1), which applies when a state court identifies the correct legal principle but purportedly applies it incorrectly to the facts before it, a federal habeas court "should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Williams*, 529 U.S. at 409. *See also Wiggins v. Smith,* 539 U.S. 510, 520-21 (2003). Significantly, an "objectively unreasonable application of federal law is different from an incorrect application of federal law." *Woodford v. Visciotti,* 537 U.S. 19, 25 (2002). An "unreasonable application" can also occur if a state court "unreasonably extends, or unreasonably declines to extend, a legal principle from Supreme Court case law to a new context." *Putman v. Head,* 268 F.3d 1223, 1241 (11th Cir. 2001).

As noted above, § 2254(d)(2) provides an alternative avenue for relief. Habeas relief may be granted if the state court's determination of the facts was unreasonable. "A state court's

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See Pub.L. 109-3 (emphasis added). Mr. Phillips has provided no support for his argument that this extremely limited and narrow law (1) applies to him, (2) invalidates or supersedes the provisions of AEDPA or (3) eliminates state procedural bars or defaults. A plain reading of this Act shows that its sole purpose was to address alleged violations of Theresa Marie Schiavo's rights under the United States Constitution. Nowhere in its text does the Act remotely implicate the rights of a federal habeas corpus petitioner. Accordingly, Mr. Phillips' current federal habeas petition is governed by AEDPA and all of its attendant applications. *See Alley v. Bell*, 178 Fed. Appx. 538, 542-43 (6th Cir. 2006).

determination of the facts, however, is entitled to substantial deference" under § 2254(e)(1). *Maharaj,* 432 F.3d at 1309. This means that a federal habeas court must presume that findings of fact by a state court are correct, and, a habeas petitioner must rebut that presumption by clear and convincing evidence. *See Hunter v. Secretary, Dept. of Corrections,* 395 F.3d 1196, 1200 (11th Cir. 2005).

Finally, where a federal court would "deny relief under a *de novo* review standard, relief must also be denied under the much narrower AEDPA review standards." *Jefferson v. Fountain,* 382 F.3d 1286, 1295 n.5 (11th Cir. 2004).

III. TIMELINESS OF MR. PHILLIPS' PETITION

The State argues that the majority of Mr. Phillips' claims are barred by the applicable statute of limitations. I choose not to address this argument because Mr. Phillips' claims fail on the merits.

AEDPA imposes a one-year limitations period for the filing of an application for relief under § 2254. The relevant provision, 28 U.S.C. § 2244(d), provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

In most cases, including this one, the limitations period begins to run pursuant to § 2244(d)(1)(A). The Eleventh Circuit has ruled that a judgment becomes "final" within the meaning of § 2244(d)(1)(A) as follows: "(1) if the prisoner files a timely petition for certiorari, the judgment becomes 'final' on the date on which the Supreme Court issues a decision on the merits or denies certiorari, or (2) the judgment becomes 'final' on the date on which the defendant's time for filing such a petition expires." *Bond v. Moore*, 309 F.3d 770, 773 (11th Cir. 2002).

Mr. Phillips' sentence became final on October 5, 1998, when the United States Supreme Court denied his petition for writ of certiorari. *See Phillips v. Florida*, 525 U.S. 880 (1998). At that time, the one-year limitations period began to run. Because this federal petition for writ of habeas corpus challenging the instant convictions was not filed until December 10, 2008, well-beyond one year after the date on which the conviction and sentence became final, the petition would be time-barred pursuant to § 2244(d)(1)(A) unless the limitations period was extended by properly filed applications for state post-conviction or other collateral review proceedings. *See* 28 U.S.C. § 2244(d)(2).

On September 13, 1999, within the one-year period, Mr. Phillips filed his first motion for post-conviction relief. *See* D.E. 13, App. R at 1. This motion tolled the time to file a petition for writ of habeas corpus. At that time, Mr. Phillips had only 22 days remaining in the one-year period prescribed by § 2244(d).[4]

Ultimately, the state post-conviction court denied the motion and Mr. Phillips appealed to the Florida Supreme Court. The Florida Supreme Court affirmed and denied a motion for rehearing on January 27, 2005. *See Phillips*, 894 So.2d at 31. During the pendency of this post-conviction motion, Mr. Phillips also filed a petition for writ of habeas corpus in the Florida Supreme Court. *See* D.E. 13, App. W. This habeas petition was denied at the same time as the affirmance of the denial of his motion for post-conviction relief. *See id.* The mandate issued on February 14, 2005. *See* D.E. 13, App. Z at *vi*.

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[4] On January 5, 2000, Mr. Phillips also filed a petition for extraordinary relief, a writ of prohibition, and a writ of mandamus. *See* D.E. 13, App. O. That petition was denied on January 27, 2000. *See Phillips v. State*, 751 So.2d 1253 (Fla. 2000).

On September 23, 2004, while the appeal from the denial of his post-conviction motion and the habeas petition were still pending before the Florida Supreme Court, Mr. Phillips filed a successive post-conviction motion based on newly discovered evidence. *See* D.E. 13, App. Z at *v*. That motion was dismissed because Mr. Phillips already had an appeal pending with the Florida Supreme Court, and the trial court lacked jurisdiction to entertain the second motion. Mr. Phillips later re-filed. The re-filed motion was ultimately denied and Mr. Phillips appealed. On September 23, 2008, the Florida Supreme Court affirmed. *See Phillips v. State*, 996 So.2d 859 (Fla. 2008) (table decision). A motion for rehearing was denied on November 20, 2008.

On March 28, 2005, Mr. Phillips filed a Rule 3.203 motion arguing that he was (and is) mentally retarded and therefore ineligible for the death penalty. The motion was denied after an evidentiary hearing and Mr. Phillips appealed. On March 20, 2008, the Florida Supreme Court affirmed. *See Phillips v. State*, 984 So.2d 503 (Fla. 2008). The mandate issued on June 30, 2008.

Assuming that all these motions were considered "properly filed" for federal habeas tolling purposes, Mr. Phillips would have had until December 12, 2008, to file the instant federal petition because his final pending post-conviction motion for rehearing was denied on November 20, 2008, and at that time he had 22 days left to file his federal habeas petition. Mr. Phillips' petition was filed on December 10, 2008. Mr. Phillips had two days to spare.

The State argues, however, that some of Mr. Phillips' post-conviction motions were not properly filed and, as such, the instant petition is time barred. Indeed, the State devotes over 22 pages of its response to the complex procedural history of Mr. Phillips' state post-conviction proceedings. In sum, the State argues that Mr. Phillips' petition is time-barred because (1) his September 23, 2004, motion, which was dismissed for lack of jurisdiction, was not properly filed for tolling purposes; (2) even though Mr. Phillips was permitted to re-file that motion at a later time it should not be considered as "relating back" sufficiently to toll the time; (3) even if the motion was considered to be "relating back" it still should not toll the time because it was determined that the motion was not based on newly discovered evidence such that it qualified for an exception to Florida's one-year time limit; (4) his March 28, 2005, motion could not have tolled the time because his time had already expired on March 8, 2005; (5) an unsigned, unverified version of a proposed motion filed on November 30, 2004, also did not toll the time

because it too was not properly filed; (6) his post-conviction counsel's failure to file does not constitute grounds for application of § 2244(d)(1)(B); (7) his eighth claim for relief argues that it was based on newly discovered evidence but the state courts determined it was not and a federal court is bound by that determination; (8) certain of his claims do not present claims for federal habeas relief; and (9) Mr. Phillips is not entitled to equitable tolling. The State concedes that two of Mr. Phillips' claims—regarding mental retardation—were timely filed, but it argues that although Mr. Phillips does have some claims that are timely, this does not make his entire petition timely.

At the time of the filing of its response, the State invited me to overrule the Eleventh Circuit's decision in *Walker v. Crosby*, 341 F.3d 1240 (11th Cir. 2003). In the interim time period, however, the Eleventh Circuit has squarely resolved this issue. *See Zack v. Tucker*, 704 F.3d 917, 926 (11th Cir. 2013) (en banc) ("Accordingly, we hold that the statute of limitations in AEDPA applies on a claim-by-claim basis in a multiple trigger date case."). So, any timeliness analysis would have to be done on a claim by claim basis.

Nonetheless, given the complexities of the multiple issues regarding the statute of limitations, I find that judicial economy dictates reaching the merits of Mr. Phillips' claims rather than continuing to exert effort on the more complicated procedural issues. *See Barrett v. Acevedo*, 169 F.3d 1155, 1162 (8th Cir. 1999) (citing *Lambrix v. Singletary*, 520 U.S. 518, 524 (1997), and concluding that "[a]lthough the procedural bar issue should ordinarily be resolved first, judicial economy sometimes dictates reaching the merits if the merits are easily resolvable against a petitioner"). After careful review of the petition and regardless of whether some of Mr. Phillips' claims are time-barred, I choose to exercise my discretion and conclude that "the interests of justice would be better served by addressing the merits" than addressing the limitations issues. *See Day v. McDonough*, 547 U.S. 198, 210 (2006) (citing *Granberry v. Greer*, 481 U.S. 129, 136 (1987)).

IV. ANALYSIS

Mr. Phillips asserts 12 claims for federal habeas relief. Each is addressed below.

A. MR. PHILLIPS' *BRADY* AND *GIGLIO* CLAIMS

At trial, the State presented no physical evidence connecting Mr. Phillips to the murder, no eyewitnesses, and no murder weapon. The State's case was circumstantial in nature and the

evidence implicating Mr. Phillips came, in part, from jailhouse informants who testified that Mr. Phillips made certain admissions regarding his culpability for the crime. At trial, counsel for Mr. Phillips cross-examined each witness about his motivation for testifying and what, if any, benefits he received or was to receive from the State. Mr. Phillips now argues that the State provided those witnesses with undisclosed benefits and "stood idly by" while they perjured themselves. Mr. Phillips asserts that this violated both *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). Further, Mr. Phillips argues that the State affirmatively altered documents before disclosing them to defense counsel by redacting certain information out of police reports and then photocopying them such that the copy does not reflect the redaction. Mr. Phillips also asserts that the State concealed the prior crimes and mental health histories of the informants. *See* D.E. 1 at 7.

At trial, four witnesses testified that Mr. Phillips had made inculpatory statements about his involvement in the murder of Mr. Svenson. All four witnesses—William Smith, William Farley, Larry Hunter, and Malcolm Watson—had been incarcerated in the same correctional facility as Mr. Phillips. After trial, three of these four witnesses have, in some form, recanted their testimony. I have reviewed the testimony given at trial, at depositions, and at the post-conviction evidentiary hearings. Below I set forth in greater detail the pertinent testimony, divided into two categories: (1) the jailhouse informants, and (2) the State's other witnesses.

1. *The Jailhouse Informants*

• *William Smith a/k/a William Scott*

At trial, Mr. Smith testified that he had known Mr. Phillips since 1971. *See* D.E. 13, Vol. 5, Appx. HH at 578. In September of 1982, Mr. Smith saw Mr. Phillips at the Dade County Jail. At that time, Mr. Smith was in the Dade County Jail on an assault charge and a violation of parole. When Mr. Smith asked of Mr. Phillips why he was in jail, Mr. Phillips responded "I just downed one of them motherfuckers." *Id.* at 580. Mr. Phillips told Mr. Smith that he was not worried about the murder weapon because "some woman got it." *Id.* at 581. Mr. Smith further testified that no one told him to go into the cell and talk to Mr. Phillips about the case, but that he decided to call Detective Lloyd Hough to "check it out." *Id.* at 582. Detective Hough then put him in touch with Detective Greg Smith. Mr. Smith testified that he was not given anything by either the police or the prosecution in order to testify. Although the assault charge was dropped,

Mr. Smith testified that he "had [his] wife do it for [him]." *Id.* at 583. After the charge was dropped, Mr. Smith was released on his own recognizance. Although the violation of parole charge was still pending at the time, Mr. Smith testified that it was "being taken care of." *Id.* at 584.

On cross-examination, Mr. Smith continued to maintain that he received no benefit for giving the police information regarding Mr. Phillips' involvement in the crime. *Id.* at 591. Mr. Smith did not receive any monetary stipend paid to government informants.

At the initial post-conviction evidentiary hearing, Mr. Smith did not testify because his whereabouts were unknown.[5] However, after a ten month recess, Mr. Smith was located and the evidentiary hearing was re-opened. Mr. Smith testified that he had been a confidential informant for the Metro-Dade (now Miami-Dade) Police Department before 1984. *See* D.E. 13, Vol. 59, App II at 37. Mr. Smith testified that he had been a police informant for law enforcement (either state or federal) from 1982 to the then-present time. Mr. Smith received meals and lodging from a detective during Mr. Phillips' case and may have gotten "around fifty dollars" from a detective during the timeframe preceding Mr. Phillips' trial. Mr. Smith also received three hundred dollars after he testified at Mr. Phillips' trial. Mr. Smith knew about the reward money "a couple weeks before trial." *Id.* at 111. Mr. Smith also testified that he had taken a polygraph test about the veracity of his testimony at Mr. Phillips' trial and that he had passed. *Id.* at 127.

In its final order denying the motion to vacate judgment and sentence, the post-conviction court found that any contention Mr. Phillips made about the State withholding information as to Mr. Smith's status as a police informant was "refuted by the pretrial deposition of [Mr. Smith] whereat [Mr. Smith] admitted that he was a paid confidential informant for the police." DE 13, Vol. 49, App II. The court also found that "there is no evidence that [Mr. Smith] received financial support during the pendency of [Mr.] Phillips' trial or that the police were instrumental in having assault charges against [Mr. Smith] dismissed." *Id.*

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[5]Janice Scott, Mr. Smith's estranged wife, did testify at the evidentiary hearing regarding the dismissal of an aggravated battery case against Mr. Smith in advance of his testimony in Mr. Phillips' trial. She essentially testified that the charge was dismissed without her knowledge. The trial court found her testimony unbelievable and referred her name to the State Attorney's Office for a potential perjury prosecution. D.E. 13, Vol. 58, Appx. II at 1241.

• *William Farley*

At the time of trial, Mr. Farley had a presumptive release date of November 9, 1984. *See* D.E. 13, Vol. 7, Appx. HH at 805. Mr. Farley testified that neither the prosecution nor the police had anything to do with the Parole Board's decision to release him.

Mr. Farley first met Mr. Phillips at the Reviewing Medical Center at Lake Butler. *Id.* at 806. Mr. Farley testified that, while he was incarcerated at Lake Butler, two detectives from Miami came up and asked if he had spoken with Mr. Phillips about a murder. Mr. Farley responded in the negative. He then was sent back to his cell; Mr. Phillips was his cellmate. Thereafter, Mr. Phillips produced a copy of a newspaper article about a family departing a funeral and certain excerpts from the text had been highlighted. According to Mr. Farley, Mr. Phillips told him directly that "he actually murdered the man." *Id.* at 810. Mr. Farley clarified that Mr. Phillips had actually said he "murdered the cracker." Mr. Phillips told Mr. Farley that he "laid across the street" and "shot him a whole heap of times." Mr. Phillips said he wanted to kill the parole officer because he had "unjustly violated his parole and sent him back to prison." *Id.* at 812. After Mr. Phillips made these statements, Mr. Farley contacted the Dade County authorities and told them he would like to speak with them about the murder. Mr. Farley then gave a tape-recorded statement to Detective Smith. Mr. Farley testified that Detective Smith made no promises that he would do anything for him, and that his parole date had been set before he ever spoke to Mr. Phillips. Mr. Farley came to court to testify against Mr. Phillips because Mr. Phillips seemed like "he had no respect for human life" and because he felt bad for "the grieving little boy I seen in the news article." *Id.* at 817.

On cross-examination, Mr. Farley stated that he had known Mr. Phillips for a period of three days before Mr. Phillips confessed to the murder. *Id.* at 818. Mr. Farley also testified that he had previously signed an affidavit indicating that statements he made about Mr. Phillips' involvement in the murder were false. But he also testified that he was forced to sign the affidavit by a group of other inmates. *Id.* at 829. Although a prosecutor and Detective Smith promised to write letters on his behalf to the Parole Board, Mr. Farley stated that ultimately his decision to testify was because "[f]or once in my life I wanted to do something to try to serve society and help humanity." *Id.* at 851.

At the evidentiary hearing held on January 21, 1988, Mr. Farley's testimony changed. At that time, Mr. Farley testified that when he was in a cell with Mr. Phillips at Lake Butler, Mr. Phillips "made it explicit at that time that he didn't, you know, he wasn't guilty of the crime that he was accused of committing." D.E. 13, Vol. 56, Appx. II at 934. Mr. Farley did not know why he was placed in a cell with Mr. Phillips, but a few days after he was there, Detective Smith came to see him and inquired of whether Mr. Phillips had made any statements to him. *Id.* at 938. During that meeting, Detective Smith told Mr. Farley that he "looked like [he] was tired of being incarcerated or whatever." *Id.* at 945. Mr. Farley inferred that he could get out of jail if he provided some information about Mr. Phillips to the Metro-Dade police. Mr. Farley testified that Detective Smith told him that the victim had been shot "numerous times" and that there was a reward involved. *Id.* at 961. Mr. Farley testified that Detective Smith spoke with him for about 15-20 minutes before he turned on the recording device used to take Mr. Farley's statement. During those 15-20 minutes, according to Mr. Farley, Detective Smith promised to assist Mr. Farley in getting parole. Mr. Farley also alleged that Detective Smith "instructed me specifically to state certain things" on the tape-recorded statement. *Id.* at 971. There were also similar promises made by the prosecution.

At the evidentiary hearing, Mr. Farley read into the record excerpts of two letters that he had later penned to the prosecution. In both letters, he expressed concern about the prosecutor's ability to get him out of jail as promised. *Id.* at 998-99. He also verified that he received a one hundred seventy-five dollar check after he testified. Mr. Farley claimed that he was "promised money before the trial." *Id.* at 1006.[6] After he wrote the first letter to the prosecution, Detective Smith came to visit him in jail. According to Mr. Farley, Detective Smith was upset because Mr. Farley had threatened to tell the truth (that he had lied at Mr. Phillips' trial). Mr. Farley said that the same day he met with Detective Smith he was transferred to a section of the jail that was "harsher." *Id.* at 1012. In sum, Mr. Farley's testimony was essentially coached by the detective and the prosecution. The details about the murder that Mr. Farley gave during his trial testimony were not told to him by Mr. Phillips in jail but were disclosed to him by Detective Smith and the prosecution in advance of trial. Mr. Farley also acknowledged that he lied about his criminal

[6]Mr. Farley testified that although he had been promised one thousand dollars, he was only given one hundred seventy-five dollars. *Id.* at 1008.

record at trial when he told the jury that he only had one conviction and one parole violation. *Id.* at 1017.

On cross-examination, Mr. Farley admitted to having been re-arrested on more than one occasion after he was paroled following Mr. Phillips' trial. On those occasions, Mr. Farley had called the State Attorney's Office to ask if David Waksman, the Assistant State Attorney who prosecuted Mr. Phillips, would speak to the prosecutor on his new case to see if anything could be done regarding the pending charges. Mr. Farley denied that he came forward now because he was facing a life sentence and did not want to be known as a snitch in state prison. *Id.* at 1028-37.

In its order on Mr. Phillips' motion to vacate judgment and sentence, the post-conviction court found Mr. Farley's "testimony to be totally incredulous and unbelievable and therefore reject[ed] the same." D.E. 13, Vol. 49, Appx. II.

• *Larry Hunter*

At trial, Mr. Hunter testified that he had been arrested and housed in the Dade County Jail on January 19, 1983. During his incarceration, he met Mr. Phillips at the law library. *See* D.E. 13, Vol. 13, Appx. HH at 648. Mr. Hunter testified that Mr. Phillips approached him about crafting an alibi for the murder of Mr. Svenson. In doing so, Mr. Phillips told him that "he had come up from the east end of the parole building, from behind a clinic with some bushes, and he see [sic] one car in the back parking lot, and that he killed a man by the entrance of the gate to the parking lot, left the same way, and went home." *Id.* at 650. Thereafter, Mr. Hunter went back to his cell and told his cellmate what had occurred. His cellmate called Detective Smith, who came to the Dade County Jail to meet with Mr. Hunter. Mr. Hunter testified that he gave four alibi letters penned by Mr. Phillips to the detective. The only promise made to Mr. Hunter by the police and the prosecution was that they would come to court and inform the judge assigned to Mr. Hunter's case that he had been a witness for the State at Mr. Phillips' trial. *Id.* at 653. Later, Mr. Phillips approached Mr. Hunter and requested that he sign an affidavit which said that Mr. Hunter did not know anything about the case. Mr. Hunter testified that he felt threatened by Mr. Phillips to sign the document. As a result, the prosecution had him transferred from the Dade County Jail. One of the additional benefits conveyed to Mr. Hunter was that Detective Smith would let him smoke his cigarettes.

On cross-examination, Mr. Hunter explained that although both Detective Smith and the Assistant State Attorney advised him that they would speak in court on his behalf, he told them that he did not need their help because he was innocent of the charges that had been brought against him. Mr. Hunter testified that he did not think the State's assistance would be helpful to him because he did not need any help with his pending charges.

At the evidentiary hearing in 1988, Mr. Hunter asserted his Fifth Amendment right against self-incrimination and refused to testify. D.E. 13, Vol 57, Appx. II at 1056. The post-conviction court admitted his affidavit from November of 1997 into evidence. D.E. 13, Vol. 4, Appx. II at 652-56. In the affidavit, Mr. Hunter swore that Mr. Phillips had "never made a confession to me. He never spoke about the murder. The only knowledge that I have about the events I testified to was provided to me by Detective Smith and Mr. Waksman." *Id.* at 652. Mr. Hunter also swore that all the information he had about the details of the murder were given to him by Detective Smith. He also stated that Mr. Waksman told him to testify that no deal had been made even though, in truth, he was promised probation instead of the potential life sentence he was facing. Mr. Hunter also verified in his affidavit that he received two hundred dollars from Detective Smith after trial.

The post-conviction court found Mr. Hunter's affidavit "totally at odds with the facts." D.E. 13, Vol. 49, Appx. II.

• *Malcolm Watson*

At trial, Mr. Watson testified that, prior to his period of incarceration, he owned a dry cleaning store in Carol City, Florida. Mr. Watson related that, in 1980, Mr. Phillips came into his store, asked for $50.00 and wanted Mr. Watson to hold a gun as collateral. D.E. 13, Vol. 13, Appx. HH at 688. Mr. Watson also testified that Mr. Phillips stated that he was going to "get even" with a parole officer. *Id.* at 690. Mr. Watson saw Mr. Phillips again in 1982, this time at the Dade County Jail. At that time, Mr. Phillips admitted to killing his parole officer and said, "But they got to prove it." *Id.* at 692. Mr. Watson overheard Mr. Phillips talking in the law library about firing a shot at his parole officer's house. Mr. Watson testified that the police did not tell him to go into Mr. Phillips' cell and speak with him; rather Mr. Phillips "volunteered the information." *Id.* at 694. Mr. Watson concluded by testifying that Mr. Phillips had told him that there were no eyewitnesses and that the gun used in the murder was thrown away. Mr. Watson

did initiate contact with the police, but not for any rewards. Mr. Watson advised that he would receive no benefit from the police for his testimony because he had already pled guilty and had been sentenced. Rather, he testified that he came forward because his brother was "an officer, too" who was shot and was paralyzed from the waist down. Mr. Watson was moved from one area in the Dade County Jail to another for his safety. Further, for his safety, Mr. Watson made statements to other inmates that he knew nothing about Mr. Phillips' case but, at trial, he testified that he only said that because he was afraid for his own safety once the other inmates learned that he was a witness for the state. *Id.* at 698.

On cross-examination, Mr. Watson testified that he did request that a detective administer a polygraph test in relation to his underlying criminal case. If he passed, the detective would "speak up" for him since he was going to be a witness for the State. However, Mr. Watson insisted that the police would have administered a polygraph to him regardless because they believed in his innocence. On re-direct, Mr. Watson testified that Detective Smith once bought him dinner. *Id.* at 713.

Mr. Watson did not testify at the evidentiary hearing. Although Mr. Watson did not testify at the evidentiary hearing, the post-conviction court denied Mr. Phillips' claim as to Mr. Watson because "[a]fter [Mr.] Phillips' trial, [Mr.] Watson passed a polygraph and in accordance with the agreement his conviction was reduced to simple robbery." D.E. 13, Vol. 49, Appx. II. The court found that an agreement by the State and Mr. Watson was disclosed to Mr. Phillips by the State during pretrial proceedings, and "[s]ince the promise was disclosed and subsequently enforced, [the] claim is meritless and is denied."[7] *Id.*

The Other Witnesses

• *Detective Gregory Smith*

At the evidentiary hearing in 1988, the State called Detective Smith. Detective Smith was the lead investigator on the Svenson murder case. D.E. 13, Vol. 75, Appx. II at 1257.

[7]The post-conviction court characterized Mr. Phillips' claim in his Rule 3.850 motion as one where "he complains not that the scope of the promise was not revealed, but that the State did not properly enforce the deal." *Id.* I do not interpret Mr. Phillips' claim to be about enforcement of a deal; rather, Mr. Phillips complains that "[a] promise was made and consummated, yet, as with the other witnesses, the defense was repeatedly told that no such deal existed." D.E. 1 at 51. Mr. Phillips does not mention any failure of the State to enforce a deal with Mr. Watson.

During the course of his investigation, Detective Smith had the opportunity to come in contact with all of the informants who testified against Mr. Phillips.

Detective Smith first met Mr. Farley when he went to the correctional facility at Lake Butler. Detective Smith testified that he had nothing to do with Mr. Farley being Mr. Phillips' cellmate and he did not suggest that Mr. Farley seek to elicit information from Mr. Phillips. However, Detective Smith did ask Mr. Farley to listen to Mr. Phillips and, if Mr. Phillips made any incriminating statements, to contact him. *Id.* at 1258. Detective Smith denied ever advising Mr. Farley that he could be released from prison if he testified against Mr. Phillips. Detective Smith did not indicate that there was possible reward money available nor did he have anything to do with Mr. Farley being transferred to another correctional facility. After Mr. Farley was transferred to Poe Correctional Facility, Detective Smith went to see him again. At that time, Mr. Farley gave a tape-recorded oral statement. Detective Smith did not provide Mr. Farley with any information concerning the murder. The only promise that Detective Smith made to Mr. Farley was that he would "notify his attorney as to his involvement and testify before his judge if necessary." *Id.* at 1268. Detective Smith did state that he knew about the reward before trial but that he did not tell Mr. Farley about it until afterwards.

On cross-examination, Detective Smith testified that Mr. Farley was mistaken when he testified at trial that the two men had not had a conversation prior to the tape recorder being turned on at the Poe Correctional Facility. When Detective Smith was asked if he asked Mr. Waksman to correct that mistaken testimony at trial, he could not recall.

Detective Smith first met Mr. Hunter at the Dade County Jail after Mr. Waksman was notified that Mr. Hunter had some information to relay regarding the Svenson murder. *Id.* at 1271. Detective Smith did not have Mr. Hunter solicit information from Mr. Phillips, did not offer him any money as a reward for his testimony, and only promised to "notify [Mr. Hunter's] attorney as to his cooperation and to testify before the judge if necessary." *Id.* at 1273.

Detective Smith also testified that he spoke to parole officers and advised them that Mr. Smith was providing helpful information and the authorities would like him to continue to do so. *Id.* at 1291. Detective Smith had given Mr. Smith twenty dollars and asked him to go over to Mr. Phillips' family home in an effort to find out where the gun was that was used in the murder. Detective Smith acknowledged that, at that time, Mr. Smith was acting as an agent of the Metro-

Dade Police Department. *Id.* at 1295. Although this was in conflict with Mr. Smith's testimony at trial, Detective Smith stated that it may have been that Mr. Smith has a different definition of "agent" than he did.

• *Assistant State Attorney David Waksman*

At the evidentiary hearing in 1988, the defense called David Waksman, Assistant State Attorney, to testify. Mr. Waksman was the prosecutor assigned to Mr. Phillips' trial. Mr. Waksman met with the informants along with Detective Smith.[8]

As to Mr. Watson, Mr. Waksman testified that the State entered into a joint stipulation with Mr. Watson's counsel to have his conviction for robbery with a firearm vacated and a judgment for simple robbery entered by the court. The stipulation further requested that the court vacate the life sentence that had been imposed and instead impose a sentence of 15 years imprisonment, which would be suspended. Mr. Watson was also to be placed on probation for a period of five years. D.E. 13, Vol. 57, Appx. II at 1082. This stipulation was entered into despite a prior determination on October 26, 1981, by the State Attorney's Office that Mr. Watson was "without question a career criminal" and "his case should not be pled to anything less than 25 years in state prison." *Id.* at 1083.

As to Mr. Smith, Mr. Waksman testified that his knowledge regarding Mr. Smith's capacity as an informant for the Metro-Dade Police Department was that Mr. Smith "knew Detective Lloyd Hough over the years and periodically when he heard something—and Hough was assigned to homicide for many years—he would call Detective Hough and give him information." *Id.* at 1100. As to Mr. Farley, Mr. Waksman wrote a letter to the Florida Parole Commission in which he and Detective Smith recommended Mr. Farley for "early parole." *Id.* at 1130. As to Mr. Hunter, Mr. Waksman testified that he felt obligated to tell his judge at the time of sentencing that he rendered assistance in a major case for the State. *Id.* at 1131. This was the only promise made to Mr. Hunter before he testified at Mr. Philip's trial. Ultimately, Mr. Hunter's case was continued until after he testified at Mr. Phillips' trial and then he entered into a plea agreement which allowed him to be released from jail after Mr. Phillips' trial.

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[8] On December 8, 1993, defense counsel took the deposition of Mr. Waksman. D.E. 13, Vol. 10, Appx HH at 30-31.

Mr. Waksman conceded that more was done for the informants than had been initially promised but he explained that this was because "some of them had been beaten up in the county jail awaiting trial" or had spent months in "safety cells" for their own protection. *Id.* at 1158. Nonetheless, to the extent Mr. Waksman did more than he had originally promised, it was done without the knowledge of the informants. While Mr. Waksman became aware of some reward money from the Police Benevolent Association towards the end of the trial, he never told that to any of the witnesses until the case was over. Mr. Waksman denied that he told Mr. Farley before trial that the State had a witness who saw Mr. Svenson carrying something because the State did not have any such witnesses. Mr. Waksman also directly disputed that he had told Mr. Hunter that (1) there was going to be a reward, (2) the date of the murder, or (3) that he would get probation on Mr. Hunter's pending criminal case. Mr. Waksman said that his only promise to Mr. Hunter was that he would speak to the judge who would be accepting Mr. Hunter's guilty plea and advise him of Mr. Hunter's cooperation. After Mr. Farley had been released, he contacted Mr. Waksman additional times requesting further "help" from him in regards to subsequent arrests. When Mr. Waksman seemed less likely to assist, Mr. Farley threatened to "sabotage that Phillips case" by telling the papers that he lied at trial. *Id.* at 1207. Likewise, Mr. Hunter also contacted Mr. Waksman when he violated his probation and he was sent back to prison. When Mr. Waksman was unable to provide him with the resolution he sought, Mr. Hunter sent a letter to State Attorney Janet Reno saying that Mr. Waksman "was going back on his promise." *Id.* at 1208-09.

The more troubling testimony given by Mr. Waksman concerned the documents provided to defense counsel in discovery. Mr. Waksman admitted to employing a routine practice of "cut and paste," through which he would get a Xerox copy of the entire police report and then determine what was discoverable and what was not. Mr. Waksman would then cut out what was, in his opinion, not discoverable, scotch-tape the documents together, and photocopy the document again such that defense counsel was unaware that any information had been redacted and believed he was receiving a full copy of the documents without alterations. Mr. Waksman employed this practice rather than use a marker or white-out to remove or redact the undiscoverable material from a document.

For example, Mr. Waksman redacted the portion of Detective Smith's report pertaining to a telephone message from Mr. Hunter on May 17, 1983, which indicated that Mr. Hunter had contacted Mr. Waksman directly and offered that "he had information regarding the murder of the parole officer and Harry Phillips." *Id.* at 1094.[9] As a result, defense counsel was unaware that Mr. Hunter had contacted the State Attorney's Office to "offer" information regarding Mr. Phillips. When asked what rules allow an Assistant State Attorney to take a police report, cut a section out, and then tape it back together such that it appears the information was never there in the first place, Mr. Waksman responded that the rules "tell me what I am supposed to disclose. I disclose what I think I have to, and I do not disclose the balance." *Id.* at 1176.

In denying relief, the post-conviction court, albeit not expressly, appeared to generally find the testimony of both Detective Smith and Mr. Waksman credible. The post-conviction court noted that "[b]oth the prosecutor and Detective Smith, at the hearing, denied these allegations." D.E. 13, Vol. 49, Appx. II. Thereafter, the court did not credit the informants' testimony as supporting any *Brady* violations and found that Mr. Phillips failed to substantiate his claims. *Id.* The post-conviction court did not address the alteration of documents. Nor did it analyze Mr. Phillips' assertions pursuant to *Giglio*.

2. Brady and Giglio

In his claim for habeas relief, Mr. Phillips asserts three constitutional violations. Mr. Phillips claims that there were several *Brady* or *Giglio* violations: (1) the suppression of the substantial benefits given to the informants by the State; (2) the suppression of the manner in which contact was established with the informants and the manner that interviews were conducted; and (3) the prior criminal and mental health histories of the informants. Mr. Phillips fails to delineate which conduct violated *Brady* and which conduct violated *Giglio*, but asserts that the State violated both. Because the standards for establishing *Brady* and *Giglio* violations are different. I have reviewed the claim as presented and have determined which arguments apply to which legal theory.

The Florida Supreme Court found this claim to be without merit because any additional benefits conveyed to the informants were unknown to them at the time that they testified.

[9] In his petition, Mr. Phillips alleges two other instances wherein this practice was employed with a police report about Mr. Smith and Mr. Farley. At the evidentiary hearing, however, counsel for Mr. Phillips only inquired about the specific report involving Mr. Hunter.

Indeed, according to the Florida Supreme Court, even Mr. Waksman was unaware of what, if any, additional assistance he could offer them at the time. *See Phillips*, 608 So.2d at 780. As to the reward money given to the informants, the Florida Supreme Court found the informants "were not aware of the possibility of a reward until after trial, and it therefore could not have provided any incentive for them to testify." *Id.* at 781. Finally, as to the recantation of the trial testimony, it stated, "[t]he circuit court found this evidence to be completely unbelievable, and we find competent, substantial evidence to support this finding." *Id.* at 780-81. As the Florida Supreme Court addressed the merits, I can only grant habeas relief if I find that its decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d)(2). The question under AEDPA is not whether a federal court believes that the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold. *See Williams,* 529 U.S. at 411-12. AEDPA also requires federal habeas courts to presume the correctness of state courts' factual findings unless applicants rebut this presumption with "clear and convincing evidence." § 2254(e)(1). Mr. Phillips has not met this burden.

•*Brady v. Maryland*

Mr. Phillips' claim regarding the suppression of the substantial benefits given to the informants and their prior criminal and mental health histories is governed by *Brady v. Maryland*, 373 U.S. 83 (1963), in which the Supreme Court established three criteria a criminal defendant must prove in order to establish a violation of due process resulting from the prosecution's withholding of evidence. Specifically, "[t]he defendant alleging a *Brady* violation must demonstrate: (1) that the prosecution suppressed evidence, (2) that the evidence suppressed was favorable to the defendant or exculpatory, and (3) that the evidence suppressed was material." *United States v. Severdija*, 790 F.2d 1556, 1558 (11th Cir. 1986). Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Stewart*, 820 F.2d 370, 374 (11th Cir. 1987) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).[10]

[10] Mr. Phillips provides little, if anything, to support this allegation. Mr. Phillips does not argue why this information was favorable to him or was material for *Brady* purposes. Further, it is not enough that the State had knowledge of the information but rather Mr. Phillips must show that the State suppressed it. Mr. Phillips cannot prevail on a *Brady* claim if he had equal access to it. "[T]here is no suppression if the defendant knew of the information or had equal access to obtaining it." *Parker v.*

The State does not dispute that this is the standard governing Mr. Phillips' claim; rather, the State argues here, as it did to the Florida Supreme Court, that the prosecution could not have suppressed evidence because it either did not know at the time or did not disclose the benefits before trial.

A careful review of the record shows that, although the testimony at the evidentiary hearing was contradictory, the Florida Supreme Court's determination was not unreasonable based on the testimony provided. Mr. Waksman testified that he did not know the extent of his assistance regarding any possible sentence reduction or granting of parole at the time the informants testified. Moreover, he testified that he did not advise any of the informants about the reward money and expressly disavowed the allegations that he encouraged or coached the witnesses to give false testimony. Detective Smith testified likewise. The post-conviction court rejected the informants' testimony and credited the testimony of the detective and prosecutor. Without showing that the State suppressed evidence, Mr. Phillips cannot prevail. And because the testimony was conflicting, these claims rest on the credibility of the witnesses.

> Determining the credibility of witnesses is the province and function of the state courts, not a federal court engaging in habeas review. Federal habeas courts have "no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them." *Marshall v. Lonberger*, 459 U.S. 422, 103 S.Ct. 843, 851, 74 L.Ed.2d 646 (1983). We consider questions about the credibility and demeanor of a witness to be questions of fact. *See Freund v. Butterworth*, 165 F.3d 839, 862 (11th Cir. 1999) (en banc). And the AEDPA affords a presumption of correctness to a factual determination made by a state court; the habeas petitioner has the burden of overcoming the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e).

Consalvo v. Sec'y, Dep't of Corr., 664 F.3d 842, 845 (11th Cir. 2011). Mr. Phillips has failed to overcome the presumption of correctness owed to the factual findings of the Florida Supreme Court. These claims are therefore denied.

•*Giglio v. United States*

Mr. Phillips' remaining arguments concern alleged violations of *Giglio*. *Giglio* claims are a "species of *Brady* error" and exist "when the undisclosed evidence demonstrates that the prosecution's case included perjured testimony and that the prosecution knew, or should have

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Allen, 565 F.3d 1258, 1277 (11th Cir. 2009). Mr. Phillips has not shown that he did not have equal access to the information he says was suppressed by the State. This claim is therefore denied.

known, of the perjury." *Ventura v. Att'y Gen.,* 419 F.3d 1269, 1276-77 (11th Cir. 2005) (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1976)). Mr. Phillips' *Giglio* claims consist of some claims which were adjudicated on the merits by the Florida Supreme Court and some claims which were asserted by Mr. Phillips but no expressly addressed by the Florida Supreme Court in its opinion. They are as follows.

A prosecutor has a duty to disclose evidence of any promise made by the state to a prosecution witness in exchange for his testimony. *See Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). This is especially true when the testimony of the witness is essential to the state's case. *See Haber v. Wainwright*, 756 F.2d 1520, 1523 (11th Cir. 1985). To make out a valid *Giglio* claim, Mr. Phillips "must establish that (1) the prosecutor knowingly used perjured testimony or failed to correct what he subsequently learned was false testimony; and (2) such use was material—i.e., that there is any reasonable likelihood that the false testimony could have affected the judgment." *Davis v. Terry*, 465 F.3d 1249, 1253 (11th Cir. 2006) (per curiam) (quotation marks, alterations, and citation omitted).

Mr. Phillips' remaining claims are that the State failed to correct false and misleading testimony that it knew to be false. Specifically, Mr. Phillips asserts that the State sat silently by while its witnesses made misrepresentations to the jury and during depositions as to the nature of their relationships with the State and other critical matters. *See* D.E. 3 at 4. The Florida Supreme Court rejected this claim. As to William Smith (a/k/a William Scott), the court found that, to the extent Mr. Smith gave false testimony regarding his status as an "agent," it was attributable to the ambiguity of the term "agent" and ambiguous testimony does not constitute false testimony for purposes of *Giglio*. *See Phillips*, 608 So.2d at 781.

As this claim was reviewed on the merits by the Florida Supreme Court, AEDPA deference applies. Having reviewed the testimony, I conclude that the Florida Supreme Court's determination—that Mr. Smith's testimony was not false because the term "agent" was ambiguous—was not an unreasonable determination given the record. The question and answer were as follows:

> MR. GURALNICK: Are you member of any police agency that you wanted this [Mr. Phillips' statement about the murder] checked out?
>
> WITNESS: No, no, no, I'm not a police agent.

D.E. 13, Vol. 5, Appx. HH at 591. Given the way that the question was phrased, it was reasonable for the Florida Supreme Court to have found that Mr. Smith did not interpret the term "agent" in the same way as counsel and that, therefore, the term was ambiguous and the testimony was not false for *Giglio* purposes. Habeas relief as to this claim is denied.

As to the remaining claims adjudicated by the Florida Supreme Court, Mr. Farley testified at trial that the tape recording of his statement to police started as soon as he entered the interrogation room. In fact, Mr. Farley's recorded statement took place after a pre-interview with Detective Smith. Similarly, some of the informants falsely testified regarding the extent of their prior criminal history, although each informant testified that they were convicted felons. Although this testimony may have affected the informants' credibility and caused jurors to question the veracity of their statements, this is not the *Giglio* standard for materiality. *Giglio* materiality may carry a different, less difficult burden than *Brady,* but it nonetheless requires a reasonable likelihood that this false testimony could have affected the judgment of the jury.

> The *Giglio* materiality standard is "different and more defense-friendly" than the *Brady* materiality standard, as we have explained:
>
> > Where there has been a suppression of favorable evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the nondisclosed evidence is material: "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985). A different and more defense-friendly standard of materiality applies where the prosecutor knowingly used perjured testimony, or failed to correct what he subsequently learned was false testimony. Where either of those events has happened, the falsehood is deemed to be material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976) (emphasis added); *accord Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972); *Napue v. Illinois*, 360 U.S. 264, 271, 79 S.Ct. 1173, 1178, 3 L.Ed.2d 1217 (1959).
>
> *United States v. Alzate*, 47 F.3d 1103, 1109–10 (11th Cir. 1995). Thus, for *Brady* violations, the defendant must show a reasonable probability the result would have been different, but for *Giglio* violations, the defendant has the lighter burden of showing that there is any reasonable likelihood that the false testimony could

> have affected the jury's judgment. *Alzate*, 47 F.3d at 1109–10. The *Brady* materiality standard "is substantially more difficult for a defendant to meet than the 'could have affected' standard" under *Giglio*.FN22 *Id.* at 1110 n. 7.

Trepal v. Sec'y, Dep't. of Corr., 684 F.3d 1088, 1108 (11th Cir. 2012) (footnote omitted).

Therefore, it is not enough for the statement to simply be false. Mr. Phillips also must show that there is a reasonable likelihood that the false statement could have affected the jury's judgment. More importantly, he must show that the Florida Supreme Court's determination of this claim was contrary to or based on an unreasonable application of clearly established Supreme Court precedent. *See* 28 U.S.C. § 2254(d)(1). Here, the relevant Supreme Court precedent is *Giglio*, for "no Supreme Court case since *Giglio* itself has squarely addressed a *Giglio* claim." *Ventura v. Att'y. Gen. of Florida*, 419 F.3d 1269, 1279 (11th Cir. 2005).

I do not find, given the record, that the Florida Supreme Court's determination was unreasonable. The false testimony was that there was no pre-interview before Mr. Farley's tape-recorded statement and that the informants had more arrests than they acknowledged on the stand. It was not unreasonable for the Florida Supreme Court to find a reasonable probability that these false statements did not affect the judgment of the jury. The two events may have been relevant to the issue of credibility, but the jurors were aware that the witnesses were convicted felons and that the veracity of their statements could be deemed suspect. Similarly, the omission of the pre-interview was unlikely to have affected the jury's judgment, as Mr. Farley's credibility and motives were challenged on cross-examination. Habeas relief is therefore denied.

• *The Redaction Claim*

The Florida Supreme Court did not address any claimed *Giglio* violations due to the prosecution's redaction of police reports involving Larry Hunter, William Scott, or William Farley. *See id.* Likewise, the State offers little comment on the practice of redacting portions of police reports and cutting and pasting them other than to suggest that "it is entirely possible that the cell[mate] called Mr. Waksman and gave him Hunter's name and that Mr. Waksman then directed Det. Smith to speak to Hunter or that the discrepancy is based on a lapse of memory or oversight." D.E. 12 at 138. This argument overlooks the issue before me, which is that the State

suppressed information favorable to the defense which resulted in the presentation of false testimony. Indeed, it ignores the allegation of suppression of evidence altogether.

To recap, those claims are based on the fact that Assistant State Attorney David Waksman had an "usual practice" of removing undiscoverable portions of police reports, then cutting and pasting them back together, such that the defense had no idea that the document had been altered, and this allowed the State to use knowingly false testimony at trial. This claim was made in Mr. Phillips' Rule 3.850 motion and on appeal of the denial of the motion. D.E. 13, Vol. 2, Appx. F.[11][12]

Again, the Florida Supreme Court's opinion is silent as to this claim, but that does not change the level of deference that I give to the decision. "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington v. Richter*, 131 S.Ct. 770, 784-85 (2011) (citation omitted). *Harrington* is not limited solely to summary denials. Indeed, the Eleventh Circuit has determined that "[i]t makes no sense to say that a state court decision is entitled to AEDPA deference if the opinion fails to contain discussion at all of a claim but is entitled to no deference if it contains some but less than complete discussion." *Lee v. Comm'r, Ala. Dep't of Corr.*, 726 F.3d 1172, 1212 (11th Cir. 2013). Therefore, AEDPA deference applies to the denial of this claim despite an absence of analysis by the Florida Supreme Court.

In his petition for writ of habeas corpus, Mr. Phillips asserts that "the State admitted to altering police reports prior to disclosing them to [his] counsel." D.E. 1 at 7. This assertion is true. Unlike the majority of Mr. Phillips' claims, which required a credibility judgment between State and defense witnesses, Mr. Waksman admitted to reviewing police reports, determining what was discoverable, purposefully removing the undiscoverable portions, taping the document back together such that it appeared to be one unaltered document, photocopying it, and providing it to defense counsel without disclosing that editing had occurred. Mr. Waksman engaged in this procedure routinely and, somewhat incredibly, testified unapologetically to having done so.

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[11]In fact, Mr. Phillips' claim on appeal to the Florida Supreme Court provides far more detail of the three specific instances of misconduct alleged here. D.E. 13, Vol. 2, Appx. F at 27-93.

Mr. Phillips argues that the State "doctored" the police report of Detective Greg Smith dated October 2, 1982, concerning William Smith; the police report of Detective Greg Smith dated November 24, 1982, regarding William Farley; and the police report of Detective Greg Smith dated June 16, 1983, regarding Larry Hunter. D.E. 13, Vol. 2, Appx. F at 27-93. According to Mr. Phillips, the prosecution removed portions of these police reports that would have provided the defense with vital details affecting the witnesses' credibility and also demonstrated bias. The redactions included Detective Smith's narratives on the police's involvement in assisting Mr. Smith at his parole hearings, the pre-interview in advance of the tape-recorded statement given by Mr. Farley, and the actual circumstances under which Mr. Hunter came to contact Mr. Waksman and volunteer information, in direct contravention to Mr. Hunter's trial testimony.

The premise of *Giglio* is that the deliberate deception of the court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice. Mr. Waksman had information which he purposefully withheld from the defense, and witnesses testified falsely concerning certain facts that had been withheld. The State, through its prosecutor and lead detective, stood silent while this false testimony was given, with the full knowledge that the defense was unaware that such contradictions existed.

Consider the specifics of Mr. Hunter's testimony. At a pre-trial deposition, Mr. Waksman testified that he did not recall how Mr. Hunter "volunteered" his services but that he thought that the police found him. He also said that Mr. Hunter had called the police and told the police what was going on, and the police then told Mr. Waksman. D.E. 13, Vol. 57, Appx. II at 1096. Mr. Waksman also testified that the police saw everybody first and they brought him the names of witnesses. *Id.*

At trial, Mr. Hunter testified on direct examination that after Mr. Phillips confessed to him that he had killed Mr. Svenson, he went back to his cell and discussed it with his cellmate and his "cellmate contacted Homicide without my knowledge. And, after he did that, they came to see me and asked me did I have anything pertaining to the case. And I don't want to get no perjury charge or anything. So, the guy called him again and he came back and I gave him some papers." D.E. 13, Vol. 13, Appx. HH at 650-51. This testimony, it seems to me, was false, and was known to be false when it was given. This is because the relevant portion of Detective

Smith's report – a report which was redacted by Mr. Waksman using his "cut and paste" method before being given to the defense – stated that on May 17, 1983, Mr. Waksman advised the detective that "he received a phone call from an individual named Larry Hunter, who is an inmate at the Dade County Jail. Mr. Hunter related to Mr. Waksman that he had information regarding the murder of the parole office and Harry Phillips." D.E. 13, Vol. 57, Appx. II at 1094. Yet, neither Mr. Waksman nor Detective Smith moved to correct Mr. Hunter's contradictory testimony. In fact, during closing argument, Mr. Waksman attested to Mr. Hunter's veracity because he "g[ot] all of these letters, when he comes up says: Hey, man, I don't know nothing. Take me back to my cell. Put me back in solitary. Harry who? I don't know nobody." D.E. 13, Vol. 8, Appx. HH at 1183. As it stood at trial, Mr. Hunter was an unwilling witness who was unwittingly dragged into the case. This is in stark contrast to his taking affirmative steps to contact Mr. Waksman, the prosecutor. At best, Mr. Hunter's testimony was misleading and, at worst, it was a *Giglio* violation.

Nevertheless, because "the harmlessness standard [from *Brecht v. Abrahamson*, 507 U.S. 619 (1993)] is more strict from a habeas petitioner's perspective than the *Giglio* materiality standard, federal courts confronted with colorable *Giglio* claims in § 2254 petitions in many cases may choose to examine the *Brecht* harmlessness issue first." *Trepal*, 684 F.3d at 1114. In order to show that the denial of this claim by the Florida Supreme Court was an unreasonable application of clearly established federal law, Mr. Phillips must show that a *Giglio* error resulted in "actual prejudice" to him under the standard set forth in *Brecht*. "On collateral review, a federal constitutional error is harmless unless there is 'actual prejudice,' meaning that the error had a 'substantial and injurious effect or influence' on the jury's verdict." *Mansfield v. Sec'y, Dep't of Corrections*, 679 F.3d 1301, 1307 (11th Cir. 2012). Assuming Mr. Phillips has shown that parts of the informants' testimony was false about some things, and that the false testimony (1) can be imputed to the State, and (2) was material under *Giglio*, he has not shown that he suffered the actual prejudice required under *Brecht*.

In conducting the *Brecht* analysis, I must consider any *Giglio* error "in relation to all else that happened" at trial. *Kotteakos v. United States*, 328 U.S. 750, 764 (1946). Although there can be little doubt that the veracity of the witnesses' statements and their credibility was of the utmost importance due to the circumstantial nature of the case against him, Mr. Phillips has not

established that the constitutional error had a substantial and injurious effect on determining the jury's verdict. At trial, all the informants, in one form or another, had their credibility and veracity challenged. I cannot conclude that, had the jury known that (1) the Metro-Dade police were involved in assisting Mr. Smith during his parole hearings, (2) that the police met with Mr. Farley *before* the tape–recorded interview, and (3) that it was Mr. Hunter who came forward offering information to the prosecutor, there is a reasonable probability that these errors contributed to the conviction. *See Mason v. Allen*, 605 F.3d 1114, 1123 (11th Cir. 2010). Indeed, it is not clear that, had the defense known of this information and could have used it to challenge the informants' credibility, the jury would have completely disregarded the remainder of their testimony regarding Mr. Phillips' inculpatory statements.

Mr. Phillips' conviction was based on circumstantial evidence, but the informants' testimony was not the only circumstantial evidence before the jury. The State also presented multiple witnesses who were not convicted felons with questionable motivation, all of whom testified that, prior to the murder, Mr. Phillips had serious problems with Mr. Svenson. Mr. Svenson had previously sent Mr. Phillips back to state prison for a parole violation, and subsequently instructed Mr. Phillips on multiple occasions to stay away from Ms. Brochin or his parole would once again be violated. Further, the State presented testimony that Mr. Phillips had inquired as to how to remove gun powder residue and that Mr. Phillips had admitted to firing a gun in violation of his parole. In sum, I cannot find that the Florida Supreme Court's determination was unreasonable; it is not beyond any possibility for fairminded disagreement that the false testimony had more than a minimal effect upon the jury's verdict. Habeas relief is therefore denied.

B. MR. PHILLIPS' SIXTH AMENDMENT CLAIM REGARDING JAILHOUSE INFORMANTS

Mr. Phillips asserts that his Sixth Amendment right to counsel was violated when the State "dispatched informant after informant" to question him in his jail cell without counsel being present. According to Mr. Phillips, the four jailhouse informants who testified against him at trial "were government informants, agents of the State, who were working for the State at the time that they elicited the statements." In support of his argument, Mr. Phillips relies on *United States v. Henry*, 447 U.S. 264 (1980).

On direct appeal, the Florida Supreme Court rejected this argument as without merit. It found that Mr. Phillips had "made no showing that the informants were state agents when they talked with him, that they in any way attempted to elicit information about the crimes, or that the State had anything to do with placing these persons in a cell with Phillips in order to obtain information." *Phillips*, 608 So.2d at 781 (footnote omitted).

In establishing that an informant was an agent of the government, it is not enough for Mr. Phillips to show that he "either through prior arrangement or voluntarily, reported his incriminating statements to the police." *Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986). Rather, Mr. Phillips must demonstrate "that the police and their informant took some action, beyond merely listening, that was designed to elicit incriminating remarks." *Id.*

Under applicable AEDPA standards, Mr. Phillips is not entitled to habeas relief. The Florida Supreme Court's ruling that Mr. Phillips failed to show that the witnesses who testified against him at trial were agents placed in his cell by the State and were attempting to elicit information is neither contrary to, nor an unreasonable application of, clearly established federal law, nor was the ruling based on an unreasonable determination of the facts. *See Maharaj,* 432 F.3d at 1309. A review of the testimony elicited both at trial and during the post-conviction evidentiary hearings fails to convince me that Mr. Phillips has rebutted the presumption given to the Florida Supreme Court's findings by clear and convincing evidence. *See Hunter v. Sec'y, Dept. of Corr.,* 395 F.3d 1196, 1200 (11th Cir. 2005).

At the post-conviction hearing, Mr. Farley testified that after he was placed in a cell with Mr. Phillips at the medical center at Lake Butler Correctional Institution, Detective Greg Smith came to meet with him. The detective asked Mr. Farley if Mr. Phillips had made any statements and urged Mr. Farley to "keep your ears open" for any statements made by Mr. Phillips about the murder of Mr. Svenson. Before departing, the detective commented that Mr. Farley "looked tired of being incarcerated." Mr. Farley testified that he "grasped" or "implied" or "subconsciously" thought that Detective Smith could "perhaps" assist him in getting out of prison if he testified regarding statements made by Mr. Phillips. Mr. Farley also testified, however, that at a second meeting with Detective Smith at Poe Correctional, the detective told him that he could assist him with his parole hearing by writing a letter and having the State Attorney contact parole and probation officials in Tallahassee, if he testified at Mr. Phillips' trial.

Mr. Farley further testified that the detective advised that there was a $1000 reward for whoever testified at trial. Mr. Farley, finally, testified that despite his contrary testimony at trial, Mr. Phillips never told him that he committed any crime.

At the post-conviction hearing, Mr. Hunter invoked his right against self-incrimination and refused to testify. The trial court found that Mr. Hunter was unavailable and admitted his affidavit into evidence. The affidavit stated that Mr. Phillips "never made a confession" and "never spoke to me about the murder." Mr. Hunter attested that he testified falsely because the State offered him a very favorable plea deal.

Mr. Smith testified at the evidentiary hearing that he had been working as an informant for both state and federal law enforcement for a period of years. Mr. Smith further testified that he was put in the holding cell with Mr. Phillips without knowing about him. He maintained that the police had not asked him to question Mr. Phillips; rather, Mr. Phillips simply offered incriminating information during a conversation about their respective parole violations and current incarcerations. Additionally, as part of his cooperation with the Metro-Dade police, Mr. Smith wore a recording device and went to visit Mr. Phillips' mother and sister in an effort to get information regarding the location of the gun alleged to have been used in the murder of Mr. Svenson. Unlike Mr. Farley and Mr. Hunter, Mr. Smith did not recant his trial testimony.

Mr. Watson did not testify at the evidentiary hearing. As such, his trial testimony that he had not been offered anything in exchange for his testimony went unrebutted. Furthermore, Mr. Watson testified that the police did not contact him; rather he contacted the police to tell them about Mr. Phillips' incriminating statements. This testimony too went unrebutted.

There was some evidence presented at the post-conviction hearing which suggests that some witnesses were purposefully placed in the cell with Mr. Phillips in the hopes that an incriminating statement would be made. Mr. Phillips, however, has failed to show that these witnesses were instructed to deliberately engage him using investigatory techniques which would have amounted to interrogation. Indeed, while a possible inference may be that these witnesses were placed in the cell with Mr. Phillips for that very purpose, it is not the only inference available. Absent clear and convincing evidence to the contrary, I must give deference to the factual determinations of the state courts. On this record, the factual determinations of the

Florida Supreme Court were not unreasonable, and Mr. Phillips did not rebut them with clear and convincing evidence.

C. MR. PHILLIPS' COMPETENCY CLAIM

Mr. Phillips' third claim for habeas relief is that counsel was ineffective for failing to recognize "obvious signs and symptoms of mental deficiencies and emotional disturbance" and not requesting a competency evaluation. Mr. Phillips argues that such a deficiency resulted in prejudice and violated his due process rights.[12]

In the context of a capital case like this one,

> [i]neffective assistance under *Strickland* [*v. Washington,* 466 U.S. 668 (1984)], is deficient performance by counsel resulting in prejudice, with performance being measured against an 'objective standard of reasonableness,' 'under prevailing professional norms.' . . . In judging the defense's investigation, as in applying *Strickland* generally, hindsight is discounted by pegging adequacy to 'counsel's perspective at the time' investigative decisions are made, and by giving a 'heavy measure of deference to counsel's judgments.'

Rompilla v. Beard, 545 U.S. 374, 380-81 (2005) (citations omitted). Prejudice exists if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 390 (citations omitted). Mr. Phillips bears the burden of establishing both deficient performance and prejudice. *See, e.g., Dill v. Allen,* 488 F.3d 1344, 1354 (11th Cir. 2007). As explained below, Mr. Phillips has not done so.

Mr. Phillips asserts that because he possesses a "readily apparent intellectual deficiency," and low level of intellect, his counsel should not have proceeded to trial before receiving a proper competency evaluation and treatment. Mr. Phillips further contends that in addition to his

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[12] Mr. Phillips appears to have argued a variation of this claim before the state post-conviction court, asserting that the trial court erred in not conducting a competency evaluation prior to trial. Mr. Phillips did not argue that trial court error claim to the Florida Supreme Court; rather, he chose to argue that his counsel was ineffective for not asking the trial court to have a competency evaluation performed before trial. These are clearly two different claims. As Mr. Phillips did not make a claim of trial court error to the Florida Supreme Court, any such claim is unexhausted and procedurally barred from federal habeas review. To properly exhaust state remedies, Mr. Phillips must fairly present every issue raised in his federal petition to the *state's highest court*. *See Castille v. Peoples*, 489 U.S. 346, 351 (1989) (emphasis added). "When a petitioner fails to properly raise his federal claims in state court, he deprives the State of 'an opportunity to address those claims in the first instance' and frustrates the State's ability to honor his constitutional rights." *Cone v. Bell*, 556 U.S. 449, 465 (2009) (internal citations omitted).

low level of functioning, he was "hampered with head injuries with untold effects on cognitive and personality functioning."

A mental disease or defect does not render a defendant incompetent unless that defect interferes with his ability to understand the proceedings and assist counsel before and during trial. *See generally Dusky v. United States*, 362 U.S. 402, 402 (1960). At the evidentiary hearing, Mr. Phillips' former attorneys and mental health experts testified on Mr. Phillips' competency to stand trial. This hearing was held approximately four years after Mr. Phillips' conviction.

Dr. Jethro Toomer testified that he conducted a forensic competency evaluation of Mr. Phillips on January 15, 1988. During the course of the evaluation, Dr. Toomer administered the Revised Beta examination, Bender Gestalt designs, Wechsler Adult Intelligence Scale, Carlson Psychological Survey, and the Rorschach and Thematic Appreciation Test. Dr. Toomer also reviewed Mr. Phillips' records from the Department of Corrections and sworn statements from family members. Among other things, Dr. Toomer testified that Mr. Phillips exhibited a variety of serious intellectual deficits. Based on his review of the records and his independent administration of tests, Dr. Toomer opined that Mr. Phillips was not competent to stand trial in 1983. On cross-examination, however, Dr. Toomer acknowledged that low I.Q. in and of itself did not make Mr. Phillips incompetent to stand trial, and testified that his conclusion was based on the sum total of all the information he had.

Dr. Joyce Carbonell testified that she interviewed Mr. Phillips on November 7, 1987. As part of this interview, Dr. Carbonell administered the Wechsler Adult Intelligence Scale Revised, Wide Range Achievement Test - Level 2, the Peabody Individual Achievement Test, the Rorschach and Wechsler Memory Scale, and the Canter Background Interference procedure for the Bender Gestalt. Dr. Carbonell testified that Mr. Phillips had a full scale I.Q. of 75, relatively low reading comprehension, depression, social introversion, and intellectual impairment. Dr. Carbonell opined that, based on her evaluation, Mr. Phillips was not competent to stand trial in 1983. Dr. Carbonell testified that although Mr. Phillips understood the proceeding was a trial, and could have named the "players" (i.e: the judge, the attorneys), he did not have a "good grasp" of the judicial process beyond a superficial level. Dr. Carbonell further testified that Mr. Phillips told her that the jury would decide his guilt or innocence and that the judge "decides my

case."[13] Dr. Carbonell also testified that she though it unusual that Mr. Phillips told her that he didn't understand things that happened in court but did not ask his lawyer because he was satisfied to "let Mr. Guralnick do the talking." Dr. Carbonell concluded that because of his low intelligence and passive nature, Mr. Phillips was unable to assist his counsel in his own defense, thereby not meeting the legal criteria for competency.

Ronald Guralnick, trial counsel for Mr. Phillips, also testified at the evidentiary hearing. As to Mr. Phillips' competency, Mr. Guralnick testified that he did not "recall him [Mr. Phillips] acting in any way which would lead me to believe that he was incompetent." Mr. Guralnick stated that he was able to talk to Mr. Phillips and that he answered in a coherent manner. Mr. Guralnick testified that he thought Mr. Phillips was competent and if he had not thought so, he would have requested a competency hearing for him. Mr. Guralnick also testified that Mr. Phillips' former counsel, Joseph Kershaw, did not mention anything to him that would have indicated that Mr. Phillips did not possess the requisite competency to stand trial.[14]

Mr. Kershaw was Mr. Phillips' original trial attorney. Initially, he was retained by Mr. Phillips' family but then was subsequently appointed as a special public defender to Mr. Phillips by the court. Mr. Kershaw testified that Mr. Phillips did not exhibit any type of behavior which would have caused him to question his competency. Mr. Kershaw stated that Mr. Phillips was aware of the process, the charges against him, and the fact that he faced the death penalty. In fact, one of the reasons Mr. Phillips requested for him to be discharged was that he felt Mr. Kershaw was not moving the case forward because certain witness depositions had not been taken. On re-direct examination, however, Mr. Kershaw testified that he could not tell counsel the statutory competency criteria in Florida, the competency standard established by the United States Supreme Court, or the legal definition of competency taught to first year law students because he was not "a law man. I'm a fact man."

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[13] The post-conviction court advised Dr. Carbonell that the sentencing process in Florida during a capital case is essentially as Mr. Phillips described.

[14] Mr. Phillips makes much of the fact that Mr. Guralnick once categorized him as an "idiot." Yet Mr. Guralnick clarified, multiple times, that he meant Mr. Phillips behaved like an "idiot" when he expressly ignored his advice to not make any statements to other inmates about the murder or make inflammatory remarks in court.

Finally, two court-appointed mental health experts ultimately concluded that Mr. Phillips was competent to stand trial in 1983. Dr. Leonard Haber examined Mr. Phillips for two and a half hours, and reviewed prior reports and Dr. Carbonell's expert opinion. Dr. Haber also analyzed the "Brother White" letter, which he found to indicate that Mr. Phillips knew the role of witnesses and understood the effects of their adverse testimony. Ultimately, Dr. Haber concluded that he found "no indication of a lack of competence, lack of responsiveness, a lack of understanding or a disability pertaining to any of the listed competency criteria." Similarly, Dr. Lloyd Miller testified that his assessment of Mr. Phillips was that he "was indeed mentally competent to strand [sic] trial at the time of his trial." Dr. Miller admitted that assessing past mental states is "educated guesswork," but supported his conclusion with the fact that Mr. Phillips was not mentally ill, denied substance abuse disorders, and was not "identifiable as a mentally retarded person." Dr. Miller testified that he utilized the McGarry checklist in evaluating Mr. Phillips for competency. On cross-examination, Dr. Miller testified that Mr. Phillips did tell him that he did not know that the death penalty was a possible punishment in his case. Dr. Miller, however, did not find this answer to be credible. Ultimately, Dr. Miller concurred with Dr. Haber and found that Mr. Phillips was competent to stand trial in 1983.

On this record, the state post-conviction court concluded that Mr. Phillips was competent to stand trial. The order was silent regarding counsel's alleged ineffectiveness for failing to have his competency evaluated.[15] The court determined that, based on its own observations during trial and the testimony at the evidentiary hearing, "Mr. Phillips has failed to meet his burden of dispositively demonstrating that he was incompetent to stand trial." D.E. 13, Appx. II, Vol. 49.

On appeal, the Florida Supreme Court affirmed the trial court's denial of relief. Although the post-conviction court failed to address Mr. Phillips' ineffective assistance claim directly – again, because no such claim was raised in trial court – the Florida Supreme Court cited *Strickland* as setting the standard for ineffective assistance of counsel claims, and then found

[15] Although the Florida Supreme Court noted that the "[post-conviction] court found that Phillips was competent at trial and that counsel was not ineffective for failing to have his competency evaluated," the record reflects that the post-conviction court made no such finding. Nowhere in its order did the post-conviction court state that Mr. Phillips' counsel was not ineffective; nor did the court cite the *Strickland* standard or analyze the claim for deficiency or prejudice. D.E. 13, Appx. II, Vol. 49. That, of course, is not surprising, as Mr. Phillips did not raise an ineffectiveness claim regarding competency at the trial court.

"competent, substantial evidence to support the circuit court's finding on the issue." *Phillips*, 608 So.2d at 782. Given that the Florida Supreme Court addressed the ineffectiveness claim, I do as well.

I conclude, under the governing AEDPA standard of review, that the Florida Supreme Court reasonably concluded that there was support for the post-conviction court's "findings on this issue." *Phillips*, 608 So.2d at 782. Despite the failure of the post-conviction court to analyze the claim as made, it is evident that if Mr. Phillips was indeed competent – and that finding is not unreasonable – then counsel's performance was not deficient and Mr. Phillips was not prejudiced.

Although there was testimony given by Drs. Toomer and Carbonell that Mr. Phillips was not competent to have proceeded to trial in 1983, the predominant evidence, including documents penned by Mr. Phillips himself, showed that he did not exhibit the outward signs of incompetency. I do not conclude, nor do I need to, that Mr. Phillips was competent at the time of his 1983 trial. The question before me was whether counsel's performance was deficient for failing to request a competency hearing. On this record, I find that it was not.

"Because the trial of a person who is incompetent would violate that individual's due process rights, *Drope v. Missouri*, 420 U.S. 162, 171-72, 95 S.Ct. 896, 903-04, 43 L.Ed.2d 103 (1975), courts must conduct a hearing whenever there is a 'bona fide doubt' regarding that defendant's competence." *Agan v. Dugger*, 835 F.2d 1337, 1338 (11th Cir. 1987) (citing *Pate v. Robinson*, 383 U.S. 375, 385 (1966)). *See also Adams v. Wainwright*, 764 F.2d 1356, 1360 (11th Cir. 1985) (demanding "real, substantial, legitimate doubt as to [petitioner's] mental capacity"). The record before me, including the habeas petition, raises no serious doubts regarding Mr. Phillips competence in 1983. Mr. Phillips is not able to point to specific evidence which existed in 1983 that would have raised a red flag to counsel as to his competency. Mr. Phillips cites only to very general principles such as his low level of functioning, "a history of deprivation, beatings, serious head injury and subsequent personality change, and an inability to perform in school." While these attributes certainly can have an effect on a person's competency, they do not, in and of themselves, constitute incompetence. Absent some indication that Mr. Phillips was presently unable to understand the nature and consequences of the proceedings against him or properly assist in his defense, habeas relief is denied.

D. MR. PHILLIPS' INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM AS TO THE GUILT PHASE

At trial, Mr. Phillips was represented by Mr. Guralnick. Mr. Phillips contends that Mr. Guralnick was ineffective in investigating and preparing for the guilt phase, which resulted in numerous specific errors and omissions that substantially prejudiced him. In particular, Mr. Phillips alleges that Mr. Guralnick (1) conducted an unreasonably inadequate investigation and preparation, (2) failed to litigate and preserve issues or object to substantial errors at trial and sentencing, (3) failed to move for a change of venue and conduct an appropriate voir dire despite the extensive pretrial publicity, (4) failed to object to Mr. Phillips' absence during critical stages of the proceedings, (5) failed to investigate impeachment evidence, (6) failed to obtain the assistance of or consult with experts and (7) failed to research and familiarize himself with general criminal law.

Mr. Phillips asserted all seven of these claims in less than two and a half pages of his habeas corpus petition. D.E. 1 at 62-4. Thus, as one might imagine, given the brevity of his arguments, Mr. Phillips' claims are insufficiently pled. The underlying arguments made here were virtually identical to those made to the Florida Supreme Court, but with less detail.

The Florida Supreme Court found these claims "to be conclusory and summarily reject[ed] them," *Phillips*, 608 So.2d at 782, but also added that "[m]any of these claims are exactly the type of hindsight second-guessing that *Strickland* condemns, and even those matters asserted as significant 'omissions' would have been mere exercises in futility, with no legal basis." *Id.* It ultimately concluded, without further explanation, that Mr. Phillips failed to demonstrate either deficient performance or prejudice.

As noted earlier, § 2254(d) "applies even where there has been a summary denial." *Cullen v. Pinholster*, 131 S.Ct. 1388, 1402 (2011). In *Harrington,* for example, the Supreme Court found "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington*, 131 S.Ct. at 784–85 (emphasis added) (citations omitted). Under these circumstances, Mr. Phillips can satisfy the "unreasonable application" prong of § 2254(d)(1) only by showing that "there was no reasonable basis" for the Florida Supreme Court's decision. *Id.* at 784 ("[A] habeas court must determine what arguments or theories ... could have supported[ ] the state court's decision;

and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court."). After a thorough review of the state court record, I conclude that Mr. Phillips has failed to meet this high threshold.

> There is no dispute that the clearly established federal law here is *Strickland v. Washington*. In *Strickland*, this Court made clear that "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation ... [but] simply to ensure that criminal defendants receive a fair trial." 466 U.S., at 689, 104 S.Ct. 2052. Thus, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.*, at 686, 104 S.Ct. 2052 (emphasis added). The Court acknowledged that "[t]here are countless ways to provide effective assistance in any given case," and that "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Id.*, at 689, 104 S.Ct. 2052.

Cullen, 131 S.Ct at 1403. As this is a *Strickland* performance claim analyzed under the deferential lens of §2254(d), my review of the Florida Supreme Court's decision as to performance is "doubly deferential." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). Mr. Phillips has not shown that the Florida Supreme Court's determination that he failed to demonstrate deficient performance by guilt phase counsel necessarily involved an unreasonable application of federal law.

At the evidentiary hearing, D.E. 13, Appx. II, Vol. 70, Mr. Guralnick generally did not remember specific details of his pre-trial investigation and motions. However, he did testify that he did not move for a change of venue because he "didn't think it was applicable in this particular case." *Id.* at 532. With respect to the investigation, Mr. Guralnick testified that he "placed an investigator on the case" whom he "thought at that time [did] an excellent job getting statements, as I recall, from some or all of the cellmates that wound up testifying against Mr. Phillips." *Id.* at 543. Mr. Guralnick also asked the investigator to "check whatever records were necessary for [him] to be able to use to properly examine and to impeach" the testimony of the informants. *Id.* at 546.

Mr. Guralnick also deposed the prosecutor in advance of trial in the hopes of ascertaining any helpful impeachment evidence that could have been used against the informants. *Id.* Mr.

Guralnick testified that he studied the rules and applicable law before trial. *Id.* at 619.[16] Post-conviction counsel did not inquire into all the areas of deficiency alleged in Mr. Phillips' habeas petition when he had the opportunity to examine Mr. Guralnick, so some of the allegations in Mr. Phillips § 2254 petition are wholly unsupported by the record and lack inquiry sufficient to determine if trial counsel made a strategic decision. For that and for other reasons detailed below, the claim of ineffective assistance during the guilt phase is denied.

I have reviewed the trial transcript and the hearing transcripts in conjunction with the allegations made by Mr. Phillips. To begin, four of Mr. Phillips' seven claims were either refuted by the record or Mr. Guralnick testified that he made a strategic decision to not pursue the action that Mr. Phillips now argues was deficient.[17]

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable,' but those made after 'less than complete investigation' are reasonable only to the extent that reasonable professional judgment supports the limitations on investigation." *Strickland*, 466 U.S. at 690–691. Further, as *Harrington* emphasized, because the deficiency inquiry is governed by AEDPA, the question is not just if counsel's decisions were reasonable, but whether fairminded jurists could disagree about whether the state court's denial of the ineffective assistance claim was inconsistent with Supreme Court precedent or was based on an unreasonable determination of the facts. *See Harrington*, 131 S.Ct. at 785–86. If fairminded jurists could reasonably disagree, then habeas relief should be denied.

As to the remaining claims, Mr. Phillips' allegations appear in only the vaguest of terms. For example, he alleges that "[c]ritical evidentiary matters, of which Petitioner had unique knowledge that might have informed the actions of his attorney, were discussed without Petitioner's input." D.E. 1 at 59. This allegation leaves unanswered crucial questions, such as the nature of the critical evidentiary matters and what knowledge Mr. Phillips had that would

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[16] The investigator assigned to Mr. Phillips' case was subsequently prosecuted for suborning perjury. Mr. Waksman, the Assistant State Attorney who prosecuted Mr. Phillips, also prosecuted the investigator, who was convicted. D.E. 13, Vol. 70, Appx. II at 544.

[17] These are the allegations that Mr. Guralnick (1) conducted an unreasonably inadequate investigation and preparation, (3) failed to move for a change of venue and conduct an appropriate voir dire despite the extensive pretrial publicity, (5) failed to investigate impeachment evidence, and (7) failed to research and familiarize himself with general criminal law.

have aided counsel. Likewise, Mr. Phillips argues that his counsel was ineffective for failing to consult an expert in firearms because an expert could have testified that the "bullets in evidence could just as well have come from a nine shot revolver, and the State's elaborate and irrelevant display of the mechanics of gun-loading was therefore misleading." D.E. 1 at 60. Yet, Mr. Phillips failed to offer an expert who would have testified to those facts at trial and failed to argue that, had this testimony been presented, it would have affected the outcome of the trial. Finally, Mr. Phillips asserts that his counsel "failed to litigate and preserve issues or object to substantial errors at trial and sentencing." D.E. 1 at 58. Yet, Mr. Phillips does not indicate which issues should have been preserved or what errors should have been objected to. It is not for me to guess. Therefore, even if he could show deficient performance, Mr. Phillips has failed to satisfy *Strickland*'s prejudice prong. Indeed, Mr. Phillips has failed to articulate any specific prejudice which resulted from any of trial counsel's alleged deficiencies. This alone precludes habeas relief. *See Hall v. Head*, 310 F.3d 683, 699 (11th Cir. 2002) ("[A]lthough there is evidence in the record to support the district court's finding of deficient performance, we need not and do not 'reach the performance prong of the ineffective assistance test [because we are] convinced that the prejudice prong cannot be satisfied.'").

E. Mr. Phillips' Mental Retardation Claim

Following an evidentiary hearing pursuant to Florida Rule of Criminal Procedure 3.203, the state trial court rejected Mr. Phillips' mental retardation claim. On appeal, the Florida Supreme Court affirmed. The evidence presented at the hearing is set forth below.

1. The Evidence at the Hearing

At the hearing, the defense offered the testimony of Dr. Glen Ross Caddy, Ph.D., A.B.P.P., and Dr. Denis Williams Keyes, Ph.D.

Dr. Caddy testified that he was retained to conduct a comprehensive intellectual assessment of Mr. Phillips in 2005. In doing so, he administered the Wechsler Adult Intelligence Scale III ("WAIS III") to Mr. Phillips. Mr. Phillips achieved a full scale IQ score of 70 (his verbal dimension score was 69, overall score was 69, and performance IQ score was 76). *Id.* at 60. Dr. Caddy testified that this placed Mr. Phillips in the mild mental retardation category. On cross examination, however, Dr. Caddy admitted that he did not conduct any testing which looked at adaptive functioning (the second prong of the definition of mental retardation). Rather,

he relied on the testing done by a different doctor. Ultimately, Dr. Caddy concluded that Mr. Phillips qualified as mentally retarded. *See id.* at 106. Dr. Caddy also testified that he conducted no validity testing. On cross examination, Dr. Caddy conceded that Mr. Phillips' overall IQ score was on the borderline between mild mental retardation and borderline intelligence. Dr. Caddy agreed that the correct measure of mental retardation is the combination of IQ, along with adaptive functioning and onset before the age of 18. However, he only conducted the intellectual assessment measure test. On redirect, Dr. Caddy maintained that, due to the range of error measurement, 70 is a score which is in the borderline area and could be diagnosed as mild mental retardation. Dr. Caddy explained to the court that he did not conduct validity testing because the identical test was given to Mr. Phillips in the years prior and the scores were very similar.

Dr. Keyes testified that, in 2000, he administered the Draw-A-Person test, the Development Test of Visual-Motor Integration test, the Bender-Gestalt test, the Woodcock-Johnson Psychoeducational Battery test, and the WAIS III test. Dr. Keyes concluded that Mr. Phillips had achieved a verbal score of 75, a performance score of 76 and a full scale score of 74. *See* D.E. 13, App. MM, Vol. 17 at 244. Dr. Keyes testified that he also administered tests to Mr. Phillips to measure his adaptive functioning. He administered the Scale of Independent Behavior test and the Vineland. In doing so, he had to interview family members and others. Dr. Keyes found that Mr. Phillips had adaptive difficulties, which had improved slightly during the structured environment of prison. Dr. Keyes determined that the onset of his subaverage intellectual functioning and adaptive deficits was below the age of 18. *Id.* at 264. Dr. Keyes concluded that Mr. Phillips is mentally retarded. *Id.* On cross examination, Dr. Keyes conceded that, on the Woodcock-Johnson Psychoeducational Battery test, Mr. Phillips tested above the scoring range for a person with mental retardation. Regarding Mr. Phillips' employment history, Dr. Keyes testified that Mr. Phillips had worked at an unusually high level for someone who has mental retardation. He still ultimately concluded, however, that Mr. Phillips is mildly mentally retarded.

The State called one expert witness, Dr. Enrique Suarez, Ph.D. Dr. Suarez testified that he had reviewed the results from the testing done by Drs. Caddy and Keyes and found certain inconsistencies which prompted him to conduct nonverbal intelligence and validity testing. Dr. Suarez gave the TONI-III test to Mr. Phillips. Mr. Phillips obtained an IQ score of 86. D.E. 13,

App. MM, Vol. 18 at 454. This score placed him in the "low average" range of intelligence according to the TONI-III manual. Dr. Suarez also administered the Wechsler Memory Scale, Third Edition test to Mr. Phillips. Mr. Phillips scored a 62 on the auditory immediate memory index and a 53 on the visual immediate with an overall immediate recall score of 49. On his delayed scoring he achieved a 67 on the auditory delayed index and a 72 on the visual delayed memory index. Dr. Suarez opined that this change in results occurred because Mr. Phillips either putting forth insufficient effort or suppressing. Further, Mr. Phillips scored an 83 on the working memory score index. These results were considered an anomaly by Dr. Suarez because Mr. Phillips scored higher on the more difficult tests and performed at a low level on the simpler tests. These results caused Dr. Suarez to conclude that Mr. Phillips was malingering. *Id.* at 466. Dr. Suarez also administered the Wide Range Achievement Test, Third Edition. Mr. Phillips obtained a reading score of 88, which placed his reading at a ninth grade level. He scored a 90 on the spelling portion of the test, which placed his spelling at an eighth grade level. Mr. Phillips scored a 67 on the arithmetic portion, which is the equivalent of a third grade level.

Dr. Suarez also administered three validity tests, the Memory 15-Item Test ("Memory 15"), the Test of Memory Malingering ("TOMM"), and the Validity Indicator Profile ("VIP"). On the Memory 15, Mr. Phillips scored a 9. The test manual tells the administrator that a score below 12 could indicate that the test taker is "not giving their full effort." *Id.* at 479. Further, Mr. Phillips scored only a 6 on the recognition portion of the test, which would indicate that he was not giving forth full effort or was otherwise malingering. In contrast, Dr. Suarez found that Mr. Phillips "did well" on the TOMM test. Finally, on the VIP test, both the nonverbal and verbal subtests, Mr. Phillips' score was "classified as invalid," meaning that he did not put forth any effort into the examination. *Id.* at 492. Dr. Suarez concluded that Mr. Phillips was malingering.

Dr. Suarez also administered the Adaptive Behavior Assessment System to assess Mr. Phillips' adaptive functioning. He conducted telephone interviews with six of the correctional officers assigned to death row. Dr. Suarez found that Mr. Phillips had no current deficits in adaptive behavior which would go to the level of impairment necessary to classify Mr. Phillips as mentally retarded. Dr. Suarez concluded that Mr. Phillips is not mentally retarded and he functions in the low-average range. On cross examination, Dr. Suarez admitted that he did not

administer the two tests identified in Florida as the standardized tests for determining a person's IQ, the WAIS III and the Stanford-Binet. *See* Fla. R. Crim. P. 3.203. Dr. Suarez testified, however, that he did not need to give the WAIS III because it had been previously administered to Mr. Phillips on three different occasions. Although Dr. Suarez did admit certain problems with the testing (i.e. the structured environment of prison may skew certain results and the lack of records available in general), this did not change his determination that Mr. Phillips was not mentally retarded.

2. The Florida Supreme Court's Decision

After summarizing the evidence introduced at the hearing, on appeal the Florida Supreme Court explained that, under Fla. Stat. § 921.137(*l*) (enacted in 2001), Mr. Phillips had to show "(1) significantly subaverage general intellectual functioning, (2) existing concurrently with deficits in adaptive behavior, and (3) which has manifested during the period from conception to age 18." *Phillips*, 984 So.2d at 509. It then concluded that Mr. Phillips did not satisfy any of the prongs of the mental retardation standard.

First, although the defense experts opined – based on IQ scores of 75 (1987), 74 (2000), and 70 (2005) – that Mr. Phillips had significantly subaverage intellectual functioning, the state's expert had a contrary view, concluding that the low scores were the "result of malingering." *Id.* at 510. Because the defense experts had not tested for malingering, the trial court accepted the opinion of the state's expert, and the Florida Supreme Court gave deference to the trial court's evaluation of the experts. *Id.* As an alternative ground, the Florida Supreme Court concluded that Mr. Phillip's IQ scores did "not indicate that he is mentally retarded," and specifically noted that the majority of the IQ scores were above the 70 IQ threshold set forth in the Florida statute. *Id.* at 510-11. [18]

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[18] In 1987, Mr. Phillips' IQ was 75 (testing by Dr. Joyce Carbonell for competency). In 2000, Mr. Phillips' IQ was 74 (testing done by Dr. Keyes). In 2005, he scored an IQ of 70 on the WAIS-III (testing done by Dr. Caddy) and an IQ of 86 on the TONI-III (testing done by Dr. Suarez). *See Phillips*, 984 So.2d at 507-10. Even if I did not take into account the score on the TONI-III because it is not known as the gold standard for intelligence testing, Mr. Phillips has an averaged IQ of 73. Coincidentally, the Department of Corrections listed his IQ as 73 in a Psychological Screening Report dated February 28, 1984. That same report describes his intelligence as "below average." D.E. 13, App. MM, Vol. 10 at 1567. However, in January of 1963, an untitled report by the Department of Corrections indicated that Mr. Phillips had an IQ of 88, indicating "dull normal intelligence." Mr. Phillips was also administered a Beta Test for intelligence in February of 1963, when he was 17 years old and incarcerated, and his IQ was

Second, the Florida Supreme Court explained that the adaptive functioning testing conducted by Dr. Suarez, the defense expert, was not contemporaneous with his IQ testing. Dr. Suarez had relied on the "technique of retrospective diagnosis, focusing on [Mr.] Phillips's adaptive behavior before age 18." *Id.* at 511. Retrospective diagnosis, however, had already been held "insufficient to satisfy the second prong" of the mental retardation standard: "[B]oth the statute and the rule require significantly subaverage general intellectual functioning to exist *concurrently* with deficits in adaptive behavior." *Id.* (citing *Jones v. State,* 966 So.2d 319, 325-27 (Fla. 2007)). Dr. Suarez had tested Mr. Phillip's intellectual functioning in 2000, but did not assess Mr. Phillip's adaptive functioning as of that date. *Phillips*, 984 So.2d at 511.

In addition, the Florida Supreme Court found that the record contained competent substantial evidence that Mr. Phillips did not suffer from deficiencies in adaptive functioning. He supported himself by working as a short-order cook, a garbage collector, and a dishwasher, and the mental health experts "generally agreed that [he] possessed job skills that people with mental retardation lacked." *Id.* "The experts also agreed that the planning of the murder and cover-up in this case [were] inconsistent with a finding that [Mr.] Phillips suffers from mental retardation." *Id.* at 512. Specifically, Mr. Phillip's ability to orchestrate and carry out his crimes, his foresight, and his acts of self-preservation indicate that he has the ability to adapt to his surroundings." *Id.* "It is clear from the evidence," the Florida Supreme Court said, that Mr. Phillips "does not suffer from adaptive impairments. Aside from personal independence, [Mr.] Phillips has demonstrated that he is healthy, wellnourished, and wellgroomed, and exhibits good hygiene." *Id.*

Third, the Florida Supreme Court found that there was "ample evidence" to support the trial court's conclusion that Mr. Phillips failed to show the onset of low IQ and adaptive deficits before the age of 18. *Id.* Mr. Phillip's school history did not suggest onset before the age of 18, and his Cs and Ds in school were "easily attributed" to his truancy, his repeated suspensions from school, and his juvenile delinquency." *Id.* "Moreover, anecdotes about [Mr.] Phillip's childhood do not suggest a manifestation of low IQ and adaptive deficits before age 18." *Id.* at 513.

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83. D.E. 13, App. MM, Vol. 8 at 1324. When he was re-tested by the Department in June of 1964, his score was 85. (*Id.*). At that time, he was classified as having "dull normal intelligence."

3. Mr. Phillips' Arguments

In his habeas petition and accompanying memorandum of law, Mr. Phillips asserts that the Florida Supreme Court's determination that he is not mentally retarded, under Fla. Stat. § 921.137(*l*) and Rule 3.203 of the Florida Rules of Criminal Procedure, was an unreasonable application of, and in conflict with, clearly established federal law as recited by the United States Supreme Court in *Atkins v. Virginia*, 536 U.S. 304 (2002). It is difficult to parse out Mr. Phillips' exact arguments. But, as explained below, I do not see a basis for habeas relief.

Mr. Phillips first attacks the Florida Supreme Court's rejection of retrospective diagnosis a way to assess adaptive functioning. He argues that "the Florida Supreme Court has created a separate class of older death row inmates with mental retardation whose ability to prove that status has been eliminated by the Florida Supreme Court's interpretation of the rules." D.E. 1 at 65-66. *See also* D.E. 3 at 12-14. As Mr. Phillips puts it: "When a defendant is incarcerated and cannot be observed in typical community based environments, clinical experts must apply their experience and judgment to available information about the defendant's adaptive skills in typical environments **prior to confinement**." *Id.* at 67 (emphasis in original). Mr. Phillips also points out that the Florida Supreme Court overlooked publications which recognize that a retrospective diagnosis may sometimes be required. *See* American Association on Intellectual and Developmental Disabilities, User's Guide: Mental Retardation, Definition, Classification, and Systems of Support (10th ed. 2007).

Whatever the merits of Mr. Phillip's position on retrospective diagnosis, it does not entitle him to habeas relief. As noted earlier, the Florida Supreme Court did not rule against Mr. Phillips on adaptive functioning by simply rejecting retrospective diagnosis. It alternatively found that the record contained substantial evidence that Mr. Phillips did not suffer from deficiencies in adaptive functioning. *See Phillips*, 984 So.2d at 511-12. Mr. Phillips does not challenge this alternative ground, so he is "deemed to have abandoned any challenge of that ground, and it follows that the judgment [of the Florida Supreme Court] is due to be affirmed." *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 680 (11th Cir. 2014).

Mr. Phillips loses on this argument for another reason as well. Whether Mr. Phillips suffered from deficiencies in adaptive functioning is a finding of fact, *see Fults v. GDCP Warden*, 764 F.3d 1311, 1319 (11th Cir. 2014), and Mr. Phillips has not shown that the Florida

Supreme Court's determination that he did not suffer from deficiencies in adaptive functioning is an unreasonable one in "light of the evidence presented" in the state court proceedings. Nor has he rebutted, by clear and convincing evidence, the presumption of correctness that is afforded to the factual findings of the Florida Supreme Court. *See* 28 U.S.C. §§ 2254(d)(2) & (e)(1). With or without AEDPA deference, Mr. Phillips loses on this factual issue.

Mr. Phillips next asserts that the Florida Supreme Court's categorical requirement of an IQ score below 70, as expressed in cases like *Cherry v. State*, 959 So.2d 702, 714 (Fla. 2007), is an unreasonable application of *Atkins*. D.E. 1 at 69; D.E. 3 at 9-11. That argument, insofar as it goes, is legally sound, for the Supreme Court came to the same conclusion in *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014) (holding that a state may not execute a person whose IQ test score falls within the test's margin of error unless that person has been able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits). But that, again, does not entitle Mr. Phillips to relief, for the Florida Supreme Court did not use the 70 IQ cut-off to reject Mr. Phillips' argument as to significantly subaverage intellectual functioning. Instead, the Florida Supreme Court reviewed all of the evidence in the record, including Mr. Phillips' IQ scores 70 or above, and found (1) that the trial court had not erred in concluding that Mr. Phillips' low scores were the result of malingering, and (2) that in any event most of Mr. Phillips' IQ scores were above 70, thereby showing he was not mentally retarded. *See Phillips*, 984 So.2d at 510-11.

Mr. Phillips further contends that the Florida Supreme Court simply got its fact-finding on mental retardation wrong. *See* D.E. 1 at 70-71. On this record, however, that argument cannot succeed given AEDPA deference. The Florida Supreme Court's factual determinations are not unreasonable given the evidence presented to the trial court. *See Fults*, 764 F.3d at 1321 ("[W]e are not sitting as the initial triers of fact determining whether Mr. Fults is in fact mentally retarded. We are not even assessing factual findings made by a district court for clear error. We are reviewing the factual findings of the state . . . court through the prism of AEDPA, which calls for a presumption of correctness that can only be overcome by clear and convincing evidence.").

Finally, Mr. Phillips argues that the requirement of the onset before age 18 prong discriminates against older petitioners because of the lack of available information. At the evidentiary hearing, Mr. Phillips argued that, as an African-American attending schools in the

segregated South, he is unable to prove his claim because his school records are only marginally complete and there were no programs such as special education or IQ testing of African-American children at that time. Therefore, Mr. Phillips argues that he lacks the records that would have been reviewed to make the "onset before age 18" determination.

To be sure, Mr. Phillips could have been at a disadvantage because of his age and the fact that his schools did not keep detailed records or offer special education programs. Mr. Phillips, however, did have certain school records and had some family and friends available for interviews even if they only provided anecdotal evidence. Further, unlike other older habeas petitioners, Mr. Phillips has an extensive record from the Department of Corrections and the Florida Parole and Probation Commission because he was incarcerated during much of his youth.[19] None of these records showed significant deficits in adaptive functioning manifesting before age 18.

F. MR. PHILLIPS' SUMMARY DENIAL CLAIM

Mr. Phillips argues that the summary denial of some of his post-conviction claims denied him due process and the right to a full and fair evidentiary hearing. Specifically, Mr. Phillips asserts that the post-conviction court erred by summarily denying his ineffective assistance of counsel, *Ake*, judicial bias, and request for juror interview claims. Mr. Phillips states that he had both a neurologist and a mental retardation expert ready to testify, but the post-conviction court summarily denied his claims without an evidentiary hearing. The State responds that "the precise nature of the claim or claims Petitioner is attempting to present is unclear."

After reviewing the pleadings, I agree with the State. In his petition, Mr. Phillips categorizes this claim as a denial of due process due to the summary denial of some of his post-conviction claims, but his memorandum of law titles the claim as a denial of a full and fair

[19] Mr. Phillips' criminal history began at age 15 and he was in and out of penal institutions for most of his life. In a Classification Report completed in 1968, when Mr. Phillips was 23 years old, he was described as having a "rather low IQ." D.E. 13, App. MM, Vol. 8 at 1312. There are many of these types of reports in the record. These reports span a significant period of time and range in their assessment of Mr. Phillips from being a below average worker and a disciplinary problem to a good worker with a good attitude and with no discipline problems. Prior to the crime for which he is now incarcerated, Mr. Phillips was twice paroled. A Pre-Parole Investigation Report from January 10, 1963 indicated that Mr. Phillips' grades in high school were poor, improved "considerably" while attending a different school, but declined again when returning to his old high school. D.E. 13, App. MM, Vol. 8 at 1339.

evidentiary hearing, and his reply states that this claim is an ineffective assistance of penalty phase post-conviction counsel claim. Under AEDPA, Mr. Phillips must establish that the state court's determination was either a legal decision that involved an unreasonable application of clearly established federal law, a factual determination that was unreasonable in light of the evidence presented in the state court proceeding, or both. In order for me to analyze this claim properly, Mr. Phillips should clearly delineate his precise argument. Unfortunately, he has not done so.

Nonetheless, I have reviewed the arguments made to the Florida Supreme Court, the Florida Supreme Court's decision, and the pleadings before me. Here, Mr. Phillips complains only about the errors of the re-sentencing post-conviction court. However, I must review the decision of the Florida Supreme Court, the last court to rule on the claim.[20] To properly exhaust state remedies such that a federal habeas court may review his claim, Mr. Phillips must fairly present every issue raised in his federal petition to the *state's highest court*. *Castille*, 489 U.S. at 351 (emphasis added). "When a petitioner fails to properly raise his federal claims in state court, he deprives the State of 'an opportunity to address those claims in the first instance' and frustrates the State's ability to honor his constitutional rights." *Cone*, 556 U.S. at 465 (internal citations omitted).

On appeal from the denial of his post-conviction motion, Mr. Phillips argued to the Florida Supreme Court that the post-conviction court erred in summarily denying his claims without an evidentiary hearing. The Florida Supreme Court, in fact, summarized Mr. Phillips' claim as "the trial court improperly denied his post-conviction claims without an evidentiary hearing." *Phillips*, 894 So.2d at 34.

The Florida Supreme Court found that a "comprehensive mental mitigation investigation" was performed in his case and that the record showed that mitigation evidence was presented through other witnesses at trial such that Mr. Phillips did not have a valid ineffective assistance of counsel claim for failure to present adequate evidence. *Id.* at 38. The Florida Supreme Court also stated that "[g]iven that the record reflects that two mental health experts were appointed in

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[20] Mr. Phillips' lone citation to the Florida Supreme Court's opinion is located in his memorandum of law and is the concurring, in part, and dissenting, in part, opinion of Justice Pariente. *Phillips v. State*, 894 So.2d 28, 44-45 (Fla. 2004). This is not the opinion that I am to give deference to pursuant to AEDPA.

Phillips' defense, and each performed a comprehensive mental health evaluation of Phillips and testified thereto, we also affirm the trial court's summary denial of Phillips' *Ake* claim," *id.* at 39, and concluded that Mr. Phillips had not shown he was entitled to an evidentiary hearing.

To the extent that Mr. Phillips is arguing that the denial of the evidentiary hearing is an independent basis for granting federal habeas relief, his claim is not cognizable. "It is beyond debate that Petitioner is not entitled to relief on [this] ground[ ]. We have held the state court's failure to hold an evidentiary hearing on a petitioner's 3.850 motion is not a basis for federal habeas relief." *Anderson v. Sec'y, Dep't of Corr.*, 462 F.3d 1319 (11th Cir. 2006) (*citing Spradley v. Dugger*, 825 F.2d 1566, 1568 (11th Cir. 1987).[21]

In an abundance of caution, I have also read this so-called "summary denial" claim by Mr. Phillips to include a substantive ineffective assistance of counsel claim. I have reviewed Mr. Phillips' claim to the Florida Supreme Court and find that, based on the record before me and considering the stringent standards imposed by AEDPA, Mr. Phillips is not entitled to relief. Mr. Phillips asserts that at an evidentiary hearing he would present the testimony of two expert witnesses, which "would have established that at the time of the offense [he] suffered from both organic brain damage and mental retardation (not merely 'low IQ')." Based on these mental disturbances, Mr. Phillips argues he would be entitled to two statutory mitigating circumstances. I find that the Florida Supreme Court's determination that defense counsel's performance was not deficient "where the record shows similar mitigation evidence was presented through other witnesses" was not an unreasonable application of federal law. *See Phillips*, 894 So.2d at 37-38. The record shows that Mr. Phillips did present mental health mitigation evidence at his re-

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[21] If Mr. Phillips is arguing that he is entitled to an evidentiary hearing in federal court, an argument he has not expressly made here, his request is rejected.

> In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief. *See, e.g., Mayes v. Gibson*, 210 F.3d 1284, 1287 (10th Cir. 2000). Because the deferential standards prescribed by § 2254 control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is appropriate. *See id.*, at 1287–1288 ("Whether [an applicant's] allegations, if proven, would entitle him to habeas relief is a question governed by [AEDPA]").

Schriro v. Landrigan, 550 U.S. 465, 474 (2007).

sentencing. While it may not be the exact testimony that Mr. Phillips now seeks to assert, that does not make counsel's performance deficient, nor does it necessarily require an evidentiary hearing. In view of the evidence, it is not possible to say that the Florida Supreme Court's denial of Mr. Phillips' claim "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *See Harrington v. Richter*, 131 S.Ct. 770, 786-87 (2011).

G. MR. PHILLIPS' JUDICIAL BIAS (POST-CONVICTION COURT) CLAIM

Mr. Phillips asserts that the judge assigned to oversee his re-sentencing post-conviction proceedings was biased against him, which violated his due process rights because he was not before an impartial tribunal. Mr. Phillips provides very little factual basis for this claim aside from the adverse rulings on his public records requests. The one fact that Mr. Phillips cites in support of his claim of judicial bias is that, two months prior to the filing of his post-conviction motion, Judge Ferrer at Mr. Phillips' re-sentencing post-conviction stated on the record that "[i]f there is an evidentiary hearing, I don't expect you to have a hearing." Even if this statement were enough to support a claim for judicial bias, this claim is not cognizable for federal habeas review. "[H]abeas relief is available to address defects in a criminal defendant's conviction and sentence, an alleged defect in a collateral proceeding does not state a basis for habeas relief." *Quince v. Crosby*, 360 F.3d 1259, 1264 (11th Cir. 2004) (*citing Spradley v. Dugger*, 825 F.2d 1566, 1568 (11th Cir. 1987)). Judge Ferrer presided only over Mr. Phillips' re-sentencing post-conviction proceedings. He did not preside over Mr. Phillips' initial trial or his re-sentencing. Thus, even if Judge Ferrer had been biased against Mr. Phillips, this bias would be unrelated to the cause of Mr. Phillips' detention and is not a basis for habeas relief. *See id.*

I also read the transcript of the re-sentencing post-conviction hearings and find that the quote cited by Mr. Phillips does not accurately reflect the proceedings. The statement was made at a status conference on September 23, 1999. The re-sentencing post-conviction court was notified that certiorari was denied by the United States Supreme Court and Mr. Phillips' conviction and sentence was final on October 5, 1998. Counsel had reported that in the past year he had not received any documents from the repository. The re-sentencing post-conviction court inquired as to what steps counsel had taken to obtain these documents. Counsel reported that he had filed the single request in February and thereafter had failed to make further inquiries or file

any motions to compel. The court found that counsel was involved in the delay and there would be no further extensions of time. The re-sentencing post-conviction judge then said that the "final hearing" would be on January 6, 2000. The Assistant State Attorney then inquired whether the "final hearing" was the *Huff* hearing or an evidentiary hearing.

> MS. BRILL: When you say final - - this is what is a Hoff [sic] hearing. When you say final hearing, I'm assuming that is the hearing, what parameters will the evidentiary hearing be if there is - -
>
> THE COURT: If there is an evidentiary hearing. I don't expect you to have a hearing. On that day, I'm going to thin out the heard[sic] and this is not a hearing. This is not a hearing.

D.E. 13, Appx. KK, Vol.2 at 318. The statement could easily be read to mean that the January 6th hearing would not be an evidentiary hearing but simply a *Huff* hearing, which determines what claims, if any, require an evidentiary hearing. Mr. Phillips has not shown a legal or factual basis for a judicial bias claim. Moreover, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 555 (1994). "[E]xpressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women . . . sometimes display," do not establish bias or partiality. *Id.* at 555–56. Habeas relief is denied.

H. MR. PHILLIPS' JUDICIAL BIAS AND JURY ISSUES AT RESENTENCING CLAIM

To begin, Mr. Phillips' claim is insufficiently pled. While I liberally construe a habeas petitioner's petition and attempt to address and adjudicate every argument on the merits, Mr. Phillips' petition does not offer the first true glimpse into what claim for habeas relief he is asserting. In order to state a valid claim for federal habeas relief, Mr. Phillips must argue that he is a person in custody in violation of the Constitution or laws of the United States. A generous reading of this claim would indicate that Mr. Phillips *may* be asserting a judicial bias claim as to the re-sentencing court, a judicial bias claim as to the post-conviction court, an erroneous jury instruction claim, an ineffective assistance of counsel claim, a wrongful denial of a motion to interview jurors claim, an erroneous denial of an evidentiary hearing claim, and/or a newly discovered evidence claim. To further complicate matters, Mr. Phillips' memorandum of law for this claim contains legal argument regarding the CCP aggravator and premeditation instructions to the jury, where Mr. Phillips argues that his Eighth Amendment rights were violated. His

habeas petition, however, contains no such claim. Since no cogent argument was made here, I have no way of knowing what constitutional right Mr. Phillips was denied or what determination if any by the Florida Supreme Court was an unreasonable application of clearly established federal law or an unreasonable determination of the facts.[22] Given the gravity of the sentence imposed on Mr. Phillips, I do the utmost to consider all arguments on their merits. The state of this specific claim, however, does not allow me to make such a determination. The claim is insufficiently pled. "Federal courts are authorized to dismiss summarily any habeas petition that appears legally insufficient on its face," under 28 U.S.C. § 2254 Rule 4. *McFarland v. Scott*, 512 U.S. 849, 855 (1994); *see also Spillers v. Lockhart,* 802 F.2d 1007, 1010 (8th Cir. 1986) (holding that it is proper to dismiss a petitioner's claims that do not provide "any specifics to identify precisely how his counsel failed to fulfill those obligations"). Habeas relief as to this claim is denied.

I. MR. PHILLIPS' BURDEN SHIFTING CLAIM

Mr. Phillips' ninth claim for habeas relief consists of two sentences. The crux of the claim is that the "[c]ourt and the state both advised the jury that they had to find that sufficient mitigating circumstances existed to outweigh any aggravating circumstances they found to exist." D.E. 1 at 85. Likewise, Mr. Phillips' memorandum of law consisted of two sentences. Like the preceding claim, this claim is insufficiently pled.

Although Mr. Phillips did not point out to the Court precisely which statements were objectionable, I nonetheless reviewed the opinions of the Florida Supreme Court on direct appeal and Mr. Phillips' appeal of his Rule 3.851 motion. It appears that this claim was first made on appeal from the denial of the Rule 3.851 motion. The Florida Supreme Court determined, therefore, that this claim was procedurally barred. *Phillips*, 894 So.2d at 35.

This claim, furthermore, suffers from multiple infirmities. First, it does not allege a violation of federal law. While the implication may exist, the actual claim states that the State urged the jury to apply aggravating circumstances "in a manner inconsistent with the Florida

[22] While not entirely clear, it appears that some of these arguments could have been made on direct appeal, whereas others may have been made in Mr. Phillips' Rule 3.851 motion. *Compare Phillips v. State,* 705 So.2d 1320 (Fla. 1997) and *Phillips v. State*, 894 So.2d 28 (Fla. 2004). If these claims were asserted in his Rule 3.851 motion, the Florida Supreme Court found that they were procedurally barred because they should have been raised on direct appeal. *Id.* at 35, n.6.

Supreme Court's narrowed interpretation of those circumstances." D.E. 1 at 85. "Under 28 U.S.C. § 2241, a writ of habeas corpus disturbing a state-court judgment may issue only if it is found that a prisoner is in custody 'in violation of the Constitution or laws or treaties of the United States.' 28 U.S.C. § 2241(c)(3) (1976). A federal court may not issue the writ on the basis of a perceived error of state law." *Pulley v. Harris*, 465 U.S. 37, 41 (1984). As alleged, Mr. Phillips' claim is based on a state court's interpretation of state law, which bars us from granting a writ.

Further, the Florida Supreme Court found this claim procedurally barred and did not make a merits determination. A state procedural default precludes consideration of an issue on federal habeas review when the last state court rendering a judgment on the issue in question "clearly and expressly" states that its judgment rests on a procedural bar.[23] *See Coleman v. Thompson*, 501 U.S. 722, 734 (1991). *See also Harmon v. Barton*, 894 F.2d 1268, 1272 (11th Cir. 1990). To overcome a procedural bar, a petitioner must demonstrate objective cause for his failure to properly raise the claim in the state forum and actual prejudice resulting from the identified error.[24] *See United States v. Frady*, 456 U.S. 152, 167-68 (1982). Mr. Phillips has done neither. Habeas relief is denied as to this claim.

J. MR. PHILLIPS' CLAIM REGARDING NON-STATUTORY AGGRAVATING FACTORS

Mr. Phillips maintains that the re-sentencing court erred when it denied his motion to preclude the State from using a "large door-sized chart that laid out the alleged behavior of Petitioner during the period of November 1980 through August 31, 1982." D.E. 1 at 86. The facts surrounding this claim are as follows.

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[23] Except under limited circumstances, Florida law requires that "[i]ssues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack." *Smith v. State*, 445 So.2d 323, 325 (Fla. 1983). Further, a successive motion for post-conviction relief can be denied on the ground that it is an abuse of process if there is no reason for failing to raise the issues in the previous motion. *Moore v. State*, 820 So.2d 199, 205 (Fla. 2002).

[24] To establish cause for a procedural default, a petitioner "must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in state court." *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999). To show prejudice, a petitioner must demonstrate that there is at least a reasonable probability that the outcome of the proceeding would have been different. *See Crawford v. Head*, 311 F.3d 1288, 1327-28 (11th Cir. 2002).

On April 4, 1994, at a hearing on the motions in limine, Mr. Phillips argued that the State should not be allowed to put on a chart that catalogued the events leading up to the murder of Mr. Svenson because this was a re-sentencing and not a guilt determination. The State countered that because this information illustrated the cold, calculated and premeditated manner of the crime, along with the fact that it was an aggravated offense, it should come in at re-sentencing. The state court found that if the jury had a right to hear it during the guilt phase, then it had a right to hear it during re-sentencing.

Mr. Phillips raised a different variation of this claim on direct appeal. The Florida Supreme Court denied it finding it "procedurally barred or without merit." *Phillips*, 705 So.2d at 1321. Because the court grouped together several of Mr. Phillips' claims when making this determination, I cannot tell from the opinion whether the court found this claim to be procedurally barred or meritless. Regardless, because the claim presented on direct appeal is not the same as the claim Mr. Phillips presently raises, the Florida Supreme Court's determination is not relevant here. Mr. Phillips did, however, raise the present claim on appeal from the denial of his Rule 3.851 motion. *Phillips*, 894 So.2d at 35. The Florida Supreme Court denied the claim then as "procedurally barred because [it was] raised and rejected on direct appeal." *Id.*

This was error. The claim made on direct appeal was for prosecutorial misconduct, whereas the claim on appeal from the denial of the Rule 3.851 motion was for trial error as to the denial of Mr. Phillips' motion to preclude the State's use of the chart. While it certainly may be that this claim would have been procedurally barred because it could have and should have been made on direct appeal pursuant to state law, that was not the decision of the Florida Supreme Court. The court denied this claim without considering the merits because it found that this claim had been previously made and was rejected. This determination does not preclude me from reviewing this claim. *See Wellons v. Hall*, 130 S.Ct. 727, 730 (2010) (*citing Cone v. Bell,* 129 S.Ct. 1769, 1781 (2009)) ("When a state court declines to review the merits of a petitioner's claim on the ground that it has done so already, it creates no bar to federal habeas review.")

Procedural bar aside, this is not a recognizable claim for federal habeas relief. Mr. Phillips' claim appears to assert either that (1) the state court erred in an evidentiary ruling, an issue of state law, or (2) the state court allowed the introduction of non-statutory aggravating factors, also an issue of state law. Neither one of these errors can be remedied by a federal

habeas court. "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Wilson v. Corcoran*, 131 S.Ct 13, 16 (2010) (*quoting Estelle v. McQuire*, 502 U.S. 62, 67-68 (1991). If the state court at re-sentencing had allowed evidence that tended to show that Mr. Phillips was engaged in conduct that could be or was interpreted as "non-statutory aggravating factors," it would have been a state law error, which we cannot review on federal collateral appeal. *See id.*

Moreover, a review of the sentencing order does not show that the re-sentencing court considered the non-statutory aggravating factors about which Mr. Phillips complains when it sentenced Mr. Phillips to death. Rather, the re-sentencing judge found "the following four aggravators (1) the defendant was under a sentence of imprisonment at the time of the murder; (2) the defendant had prior convictions for violent felonies; (3) the murder was committed to disrupt or hinder the lawful exercise of a governmental function or the enforcement of laws; and (4) the murder was committed in a cold, calculated, and premeditated fashion." *Phillips*, 894 So. 2d at 33. Even if the re-sentencing court had allowed the impermissible argument on non-statutory aggravating factors, it was harmless error. Thus, habeas relief is denied.

K. MR. PHILLIPS' CLAIM THAT HE IS INNOCENT OF THE DEATH PENALTY

Mr. Phillips asserts that he "can show either innocence of first degree murder or innocence of the death penalty." D.E. 1 at 86. But he is not claiming actual innocence. Rather, Mr. Phillips asserts that had he been granted an evidentiary hearing, he could have presented evidence that he lacks the mental capacity to support the heightened level of premeditation required to sustain the CCP or the intent to disrupt or hinder the governmental function aggravating factors.

Mr. Phillips first raised this claim on appeal of the denial of his Rule 3.851 motion. The Florida Supreme Court denied it as "procedurally barred because [it] should have been raised on direct appeal," *Phillips*, 894 So.2d at 35, n.6, and as a result Mr. Phillips is unable to bring this claim here. When a petitioner has failed to present a claim to the state courts and "it is obvious that the unexhausted claims would be procedurally barred in state court due to a state-law procedural default, we can forego the needless 'judicial ping-pong' and just treat those claims now barred by state law as no basis for federal habeas relief." *Snowden v. Singletary*, 135 F.3d 732, 736 (11th Cir. 1998). Here, Mr. Phillips' failure to raise his innocence claim on direct

appeal in the Florida courts bars him from raising the issue in a state post-conviction petition. *See Smith v. State*, 445 So.2d 323, 325 (Fla.1983). Thus, his claim is procedurally barred.

To overcome a procedural bar, Mr. Phillips must "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). At best, Mr. Phillips has alleged that the re-sentencing judge should not have found two of the four aggravating factors. But Mr. Phillips has never provided any cause for failing to raise his innocence claim on direct appeal. On the record before me, Mr. Phillips has not shown the required cause to overcome the procedural bar. Habeas relief is therefore denied.

L. MR. PHILLIPS' INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CLAIM

Mr. Phillips argues that the admission of hearsay testimony during his re-sentencing violated the Sixth Amendment and that his appellate counsel was ineffective for failing to raise this claim on direct appeal. The backdrop of this claim is that in the time between Mr. Phillips' original trial in 1983 and his re-sentencing in 1994, several witnesses had recanted their testimony. In an evidentiary hearing held in 1988, some of those witnesses testified under oath that they had perjured themselves during the 1983 trial. Mr. Phillips argues that, during the re-sentencing, Detective Smith was allowed to testify as to statements made by the recanting witnesses, but Mr. Phillips was not allowed to present evidence that showed that those witnesses later recanted their statements. While it is not entirely clear from the petition, it appears that Mr. Phillips is arguing that because his right to confrontation was denied, appellate counsel was ineffective for failing to raise this issue on direct appeal.[25]

Mr. Phillips first raised this claim in his state petition for writ of habeas corpus. The Florida Supreme Court denied this claim because "[r]esentencing counsel did not raise a specific objection regarding Smith's hearsay testimony about what jailhouse informants Malcolm Watson, Tony Smith, and Larry Hunter told him. Because there was no motion filed or objection below, appellate counsel cannot be deemed ineffective for not raising this issue on direct

[25] The difficulty in discerning the actual claim begins with Mr. Phillips' failure to cite *Strickland* or to argue either deficiency or prejudice. The extent of Mr. Phillips' substantive argument appears to be that "appellate counsel's failure to raise on appeal this preserved and meritorious issue warrants habeas relief at this time." D.E. 3 at 28.

appeal." *Phillips*, 894 So.2d at 40. I have reviewed the record. In his state petition for writ of habeas corpus, Mr. Phillips titled this claim as "Failure to Raise on Appeal Detective Smith's Testimony." In the instant petition, Mr. Phillips titled his claim as "Detective Smith's Hearsay Testimony at Re-sentencing." After careful review, I find that the Florida Supreme Court did not reach the merits of Mr. Phillips' claim because the Florida Supreme Court misinterpreted his argument.

The Florida Supreme Court found that Mr. Phillips did not object to the admission of hearsay evidence. This is true. In fact, counsel for Mr. Phillips reached an agreement with the State on the admission of hearsay prior to the re-sentencing. Counsel, however, expressly stated on the record that "it seems like [the State's] position is pretty well taken. It's permissible. It's within your discretion how far it can go. *I'm just permitted to rebut it*." D.E. 13, Vol.4, Appx. JJ at 14. This is the precise issue Mr. Phillips asserts here. Mr. Phillips' claim is not that the hearsay testimony was erroneously admitted, but rather that he was disallowed from rebutting the testimony and that appellate counsel was ineffective for failing to raise that claim on direct appeal.

I have reviewed Mr. Phillips' claim as presented to the Florida Supreme Court in his state habeas petition and find that his claim was indeed confusing. He appears to argue two bases for relief. One of the bases raised was appellate counsel's failure to argue error based on the denial of re-sentencing counsel's objections and requests to cross-examine the detective with rebuttal testimony. Specifically, Mr. Phillips argued "[t]he testimony of Detective [sic] was clearly inadmissible, irrelevant, and unduly prejudicial to Mr. Phillips' case under the United States Constitution and Florida Constitutions, *where Mr. Phillips' counsel was helpless to rebut*." D.E. 13, Vol. 6, Appx. W at 40 (emphasis added). Mr. Phillips also asserted that "[t]he trial court simply failed to allow a *complete defense rebuttal* of the hearsay that came in through Detective Smith from the snitch witnesses." *Id.* at 39. The Florida Supreme Court's opinion failed to address these arguments. The court focused solely on the underlying admissibility of the detective's testimony without considering Mr. Phillips' argument that the error was not the admission of the testimony but the denial of the opportunity to rebut the testimony as admitted. Therefore, I review this claim *de novo*. *See Mason v. Allen*, 605 F.3d 1114, 1119 (11th Cir. 2010) ("When, however, a claim is properly presented to the state court, but the state court does

not adjudicate it on the merits, we review *de novo*. (citing *Cone v. Bell*, 556 U.S. 449, 472, 129 S. Ct. 1769, 1784, 173 L.Ed.2d 701 (2009))."

While federal habeas courts consider summary denials by state courts as adjudications on the merits, if, as is the case here, a state court opinion expressly ruled on what it considered a dispositive element of the claim and, therefore, did not rule on an additional element, there is no ruling to which to defer. *See, e.g.*, *Johnson v. Sec'y, Dep't of Corr.*, 643 F.3d 907, 930 & n.9 (11th Cir. 2011). ("The Court's instruction from *Harrington* does not apply here because the Florida Supreme Court did provide an explanation of its decision which makes clear that it ruled on the deficiency prong but did not rule on the prejudice prong, and it is also clear that the trial court's ruling on the prejudice prong did not address counsel's investigation and presentation of non-statutory mitigating circumstances evidence."). Like the two-pronged analysis of a *Strickland* claim, Confrontation Clause claims require that the evidence admitted was testimonial hearsay and that the defendant was not given the opportunity to rebut it. The Florida Supreme Court did not rule on Mr. Phillips' inability to rebut the testimony because it denied the claim based on his failure to object when the evidence was originally admitted. Thus, the court did not consider appellate counsel's deficiency for failing to assert that Mr. Phillips was denied his right to confrontation because he was not allowed to rebut the hearsay presented or the prejudice which resulted from counsel's deficiency. Therefore, I do not give AEDPA deference to the opinion.

The Strickland Standard

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court set forth the two-prong test that a convicted defendant must meet to demonstrate that his or her counsel rendered ineffective assistance. First, a defendant "must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. Second, a 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." *Id.* at 694. The Court defines a "reasonable probability" as one "sufficient to undermine confidence in the outcome." *Id.* Thus, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693.

Claims of ineffective assistance of appellate counsel are governed by the standard articulated in *Philmore v. McNeil*:

> In assessing an appellate attorney's performance, we are mindful that the Sixth Amendment does not require appellate advocates to raise every non-frivolous issue. Rather, an effective attorney will weed out weaker arguments, even though they may have merit. In order to establish prejudice, we must first review the merits of the omitted claim. Counsel's performance will be deemed prejudicial if we find that the neglected claim would have a reasonable probability of success on appeal.

575 F.3d 1251, 1264-65 (11th Cir. 2009) (internal quotation marks and citations omitted). Here, the omitted claim is that the re-sentencing court erred in denying counsel an opportunity to rebut the hearsay testimony of Detective Smith. The record shows that Mr. Phillips' counsel wanted to cross-examine Detective Smith about the reductions in sentence and other rewards given to these hearsay witnesses, but that the court denied his request. To make a record for appeal, the re-sentencing judge allowed counsel to have Detective Smith proffer for the record what he would have testified had he been asked these questions. At the conclusion of the proffer, the re-sentencing court found this testimony was not allowed. While it is not entirely clear, it appears that the re-sentencing court found that the hearsay witnesses' original statements to Detective Smith could come in to show Mr. Phillips' mental and intellectual ability because that would support the State's arguments regarding aggravating factors and would also rebut Mr. Phillips' arguments regarding mental retardation mitigation. Mr. Phillips, however, was not allowed to ask whether these hearsay witnesses had subsequently recanted or had been given benefits by the State following their testimony at the guilt phase in 1983 because the re-sentencing court perceived that information as bringing up impermissible lingering doubt, which the appellate court had already "ruled upon." D.E. 13, Vol. 6, Appx. JJ at 412.[26] For the reasons that follow, I find that the re-sentencing court erred.

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[26] In his initial Rule 3.851 post-conviction motion, Mr. Phillips asserted a *Brady/Giglio* claim arguing that "the State failed to disclose the nature or extent of the benefits offered to these inmates in exchange for their testimony." *Phillips*, 608 So. 2d 778, 779 (Fla. 1992). The post-conviction court and the Florida Supreme Court considered the testimony of the hearsay witnesses at an evidentiary hearing wherein they recanted. The post-conviction court found this testimony to be "completely unbelievable," and the Florida Supreme Court found "competent, substantial evidence to support this finding." *Id.* at 780–81.

Under Florida law, after a defendant is convicted of a capital felony, the trial court must conduct a separate proceeding before the jury to determine whether the defendant should be sentenced to death or to life imprisonment. Each side may present evidence relating to aggravating or mitigating factors for the jury to weigh in its advisory sentence to the judge. "Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, *provided the defendant is accorded a fair opportunity to rebut any hearsay statements.*" Fla. Stat. § 921.141(1) (1997) (emphasis added).[27]

Therefore, to prevail on his Sixth Amendment claim, Mr. Phillips must demonstrate he was prejudiced when his appellate counsel deficiently failed to argue that Mr. Phillips was deprived of the opportunity to rebut hearsay testimony at his sentencing hearing in violation of § 921.141(1). I can find prejudice only if, but for appellate counsel's omission, there was a reasonable probability that the Florida Supreme Court would have concluded the following (1) that Mr. Phillips was denied a fair opportunity to rebut hearsay evidence and (2) that this denial was grounds to remand the case for a new sentencing hearing. *See Strickland*, 466 U.S. at 695.

Rebuttal

The Florida Supreme Court has held that "[a]llowing the testimony of a jailhouse informant to be heard through the testimony of another witness" at the penalty phase without giving the defendant an opportunity to rebut out-of-court statements constitutes error. *Rodriguez v. State*, 753 So. 2d 29, 44 (Fla. 2000) (*citing Donaldson v. State*, 722 So. 2d 177, 186 (Fla. 1998); *Walton v. State*, 481 So. 2d 1197, 1200 (Fla. 1985); *Gardner v. State*, 480 So. 2d 91, 94 (Fla. 1985); *Engle v. State* 438 So. 2d 803, 813 (Fla. 1983)). "[T]he mere fact that a defendant has an opportunity to cross-examine the witness who is testifying to the hearsay does not alone constitute a fair opportunity to rebut the hearsay statement." *Id.* at 45. However, the Florida Supreme Court also held that such error can be harmless beyond a reasonable doubt where the case has several strong and indisputable aggravators. *Id.* This was the law in Florida at the time

[27] In this respect, Florida's death penalty statute is congruent with federal law. *See also Muhammad v. Sec'y, Fla. Dep't of Corr.*, 733 F.3d 1065, 1076 (11th Cir. 2013) ("[H]earsay is admissible at capital sentencing and . . . a defendant's rights under the Confrontation Clause are not violated if the defendant has an opportunity to rebut the hearsay.").

Mr. Phillips' appellate counsel could have raised the claim on direct appeal and of which he should have been aware.

At the *Spencer* hearing, the re-sentencing court found four aggravating factors when sentencing Mr. Phillips to death (1) the capital felony was committed by a person under sentence of imprisonment; (2) the defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person; (3) the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; and (4) the homicide was cold, calculated, and premeditated. The first two aggravators were clearly established. At the time of his conviction, Mr. Phillips was on parole for armed robbery and was previously convicted for assault with intent to commit first degree murder. D.E. 13, Vol. 8, Appx. JJ at 827-88. As to the third and fourth aggravators, however, the re-sentencing judge relied, in part, on the trial and hearsay testimony of the inmate informants, which Mr. Phillips argues he was unable to rebut at re-sentencing.

After careful review, I find that Mr. Phillips was denied a fair opportunity to rebut the State's hearsay evidence. The re-sentencing court barred Mr. Phillips from cross-examining Detective Smith about exchanges made between the prosecution and hearsay witnesses, including sentence reductions and monetary compensation. D.E. 13, Vol. 6, Appx. JJ at 269-70. Mr. Phillips was able to cross-examine Detective Smith without objection about the State's plea deal with Larry Hunter; a two-hundred dollar reward that Mr. Hunter was paid by the prosecution in exchange for testifying against Mr. Phillips, and about Mr. Hunter's affidavit that recanted his trial testimony. D.E. 13, Vol. 6, Appx. JJ at 685-86. But the jury was not permitted to hear about similar benefits given to witnesses Malcolm Watson (vacating his life sentence) and Tony Smith (reinstating him to probation). D.E. 13, Vol. 6, Appx. JJ at 450-55. The re-sentencing judge should have permitted Mr. Phillips to cross examine Detective Smith about these other hearsay witnesses in an effort to rebut the State's case. Failure to do so constituted error. *See Rodriguez*, 753 So. 2d at 44. My inquiry, however, does not end there. To prevail on his ineffective assistance of appellate counsel claim, Mr. Phillips also must show that such error was not harmless. *See Strickland*, 468 U.S. at 695. If the error was harmless, appellate counsel cannot be deficient for failing to raise the claim on direct appeal.

Remand for New Sentencing

As the jury voted 7-5 for the death sentence, it is not a foregone conclusion that such error was harmless. Nevertheless, Mr. Phillips' claim fails because, at best, the omitted rebuttal testimony could only have eliminated the third and fourth aggravating factors found by the trial court (disrupting a governmental function and homicide committed in a cold, calculated and premeditated manner). As to the CCP aggravator, the re-sentencing judge relied upon forensic evidence related to nature of the gunshot wounds, bullet casings found on the scene, and the testimony of witnesses near the crime scene—in addition to the disputed hearsay testimony—in concluding that the homicide was cold, calculated, and premeditated. D.E. 13, Vol. 8, Appx. JJ at 832. Analyzing the record most favorably towards Mr. Phillips, the jury would have had two aggravators which were established without the hearsay testimony of the informants (the capital felony was committed by a person under a sentence of imprisonment and the defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person) to weigh against only one non-statutory mitigator of a difficult upbringing, which the judge gave little weight. D.E. 13, Vol. 8, Appx. JJ at 842.

In addition to Detective Smith, the prosecution called (1) Lieutenant Gary Handcock, the police officer who investigated the armed robbery that Mr. Phillips was convicted of in 1973; (2) Nannette Brochin, the parole officer who was the subject of Mr. Phillips' affection and was at the heart of the dispute between Mr. Phillips and Mr. Svenson; (3) Mike Russell, the parole office married to Nannette Brochin who had contact with Mr. Phillips during his parole revocation proceedings; (4) Benjamin Rivers, a parole officer present at the meetings between Mr. Svenson and Mr. Phillips regarding parole revocation and special conditions of his probation; (5) Reggie Robinson, a corrections probation supervisor, who investigated the shooting at the Brochin/Russell home and who interviewed Mr. Phillips during the investigation; (6) Michael Mangoso, a probation supervisor who had dealings with Mr. Phillips about transferring parole officers and Mr. Svenson's denial of Mr. Phillips' request; (7) Dr. Barnhart, a forensic pathologist at the Dade County Medical Examiner's Office, who testified regarding the autopsy report and medical examiner's notes; (8) Dr. Miller, a psychiatrist who interviewed Mr. Phillips and conducted a diagnostic interview, and (9) Detective Greg Smith (Detective Smith's testimony was not limited to the hearsay statements of the informants). The record reflects that

the admission of hearsay statements, which went unrebutted, was harmless beyond a reasonable doubt because the State established several strong and indisputable aggravators separate and apart from the hearsay statements. Further, I am not convinced that even if the statements had been rebutted as requested by defense counsel, this would have made a difference in the determination that those four aggravating factors existed. Therefore, I find that the re-sentencing court's error was harmless beyond a reasonable doubt. Because Mr. Phillips has failed to show that this claim would have had merit on direct appeal, he has not met his burden to successfully assert an ineffective assistance of appellate counsel claim. *Philmore*, 575 F.3d at 1265. Habeas relief is denied.

L. MR. PHILLIPS' CLAIM REGARDING THE STANDARD OF PROOF

Mr. Phillips' final claim for habeas relief is that the standard of proof that Florida applies to determination of mental retardation is unconstitutional. Mr. Phillips argues that *Cooper v. Oklahoma*, 517 U.S. 348 (1996), "sets the Constitutional floor regarding the standard of proof." D.E. 3 at 28. Mr. Phillips raised this claim on appeal from the denial of his Rule 3.203 motion.

Mr. Phillips asserted that he is mentally retarded and, therefore, he cannot be executed. *See Atkins v. Virginia*, 536 U.S. 304 (2002). In denying his mental retardation claim, the circuit court applied the "clear and convincing evidence" standard of Fla. Stat. § 921.137(4), (2001). Mr. Phillips argues that the application of this standard to this claim is unconstitutional. The Florida Supreme Court did not decide this specific claim because it found that, based on the record, Mr. Phillips failed to meet even the more lenient "preponderance-of-the-evidence" standard. *Phillips*, 984 So. 2d at 509 n.11. I agree.

I have analyzed Mr. Phillips' mental retardation claim at great length in this order and find that even under an application of a less stringent and much more lenient preponderance standard, Mr. Phillips' claim would still fail. Therefore, I can resolve Mr. Phillips' claim without reaching the merits of his underlying claim regarding the standard of proof.

Even if Mr. Phillips had satisfied the preponderance of the evidence standard but had fallen short of the clear and convincing evidence standard, however, I note that his claim still fails because "*Atkins* simply did not consider or reach the burden of proof issue, and neither has any subsequent Supreme Court opinion. There is the possibility that the Supreme Court may *later* announce that a reasonable doubt standard for establishing the mental retardation exception

to execution is constitutionally impermissible." *Hill v. Humphrey*, 662 F.3d 1335, 1348 (11th Cir. 2011) (*en banc*). Under AEDPA, I can analyze only what the holdings of the Supreme Court established the law to be in 2008, when the Florida Supreme Court decided *Phillips*, 984 So. 2d at 509.

Further, even if Mr. Phillips' claim regarding the standard of proof shows a rule in Florida which is "incorrect or unwise," it is not enough to overcome the AEDPA deference. "[I]n the 219–year history of our nation's Bill of Rights, no United States Supreme Court decision has ever suggested, much less held, that a burden of proof standard on its own can so wholly burden an *Eighth Amendment right* as to eviscerate or deny that right." *Hill*, 662 F.3d at 1338. Therefore, even if I had concerns that Florida's clear and convincing standard of proof was problematic, absent clearly established law, I am constrained by AEDPA. "*Atkins's* decision to leave the task to the states not only renders the federal law *not* 'clearly established,' but also makes it 'wholly inappropriate for this court, by judicial fiat, to tell the States how to conduct an inquiry into a defendant's mental retardation.'" *Id.* at 1348 (quoting *In re Johnson*, 334 F.3d 403, 405 (5th Cir. 2003) (noting that *Atkins* explicitly left the procedures governing its implementation to the states)). Regardless, Mr. Phillips has failed to meet the less stringent preponderance of the evidence standard that he asserts should be his burden of proof under the Constitution. D.E. 3 at 28. Habeas relief is denied.

XV. CONCLUSION

For all the reasons set forth above, it is

ORDERED AND ADJUDGED that Mr. Phillips' petition for writ of habeas corpus is **DENIED**. The Clerk of the Court is instructed to **CLOSE** the case.

DONE and **ORDERED** in chambers at Miami, Florida, this 30th day of September, 2015.

Adalberto Jordan
United States Circuit Judge

Copies to counsel of record

No. _____

OCTOBER TERM 2024

In The

Supreme Court of the United States

HARRY FRANKLIN PHILLIPS,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition For A Writ Of Certiorari To
The United States Court of Appeals for the Eleventh Circuit

APPENDIX E

Phillips v. State, 608 So. 2d 778 (Fla. 1992)

Supreme Court of Florida

No. 75,598

HARRY FRANKLIN PHILLIPS,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[September 24, 1992]

PER CURIAM.

Harry Franklin Phillips, a prisoner under sentence of death, appeals from the circuit court's denial of his petition under Florida Rule of Criminal Procedure 3.850. We have jurisdiction under article V, section 3(b)(1) of the Florida Constitution.

Phillips was convicted of the 1982 murder of Bjorn Svenson, a parole supervisor. The jury recommended a death sentence by a vote of seven to five, and the judge followed this recommendation. This Court affirmed the conviction and sentence on appeal. Phillips v. State, 476 So. 2d 194 (Fla. 1985). After his first death warrant was signed, Phillips filed a petition for habeas corpus, alleging a violation of his rights under Caldwell v. Mississippi, 472 U.S. 320 (1985). The petition was denied by this Court as procedurally barred. Phillips v. Dugger, 515 So. 2d 227 (Fla. 1987). Phillips then filed this 3.850 motion. An evidentiary hearing was held, and the circuit court denied relief on all claims.

We first address the claims Phillips raises alleging error in the guilt phase of his trial. Much of the State's evidence at trial consisted of the testimony of inmates who had been in a cell with Phillips. These inmates testified that Phillips admitted his guilt to them, and each supplied details of the crime as Phillips portrayed it to them--details which presumably only the killer would know.

Phillips contends that the State failed to disclose the nature or extent of the benefits offered to these inmates in exchange for their testimony, violating his rights under Brady v. Maryland, 373 U.S. 83 (1963). However, before trial, Phillips was allowed to depose the prosecutor in this case, David Waksman. He also took the depositions of the inmates themselves and of the lead detective, Greg Smith. Through these depositions, Phillips

learned that the inmates had been told that Waksman would write a letter informing the relevant authority--the parole board for those inmates who were serving prison sentences and the sentencing judge for those inmates who had not yet gone to trial--of their cooperation in the case. In addition, one inmate, Malcolm Watson, was promised that he would be given a polygraph test regarding his crime, and if he passed it his sentencing judge would be so informed. These promises were brought out on cross-examination of the inmates at trial.

Phillips now contends that the inmates were promised much more than was actually disclosed. In support of this claim, he introduced at the postconviction hearing documents showing that Waksman and Smith were involved in various activities in aid of the inmates after trial. For example, Waksman became involved in plea negotiations which ultimately resulted in a lenient sentence of five years' probation for Larry Hunter.

In rebutting this allegation, the State presented Waksman as a witness, who explained that he did in fact do more than simply write letters for some of the inmates. Because they had been such a help to the case and had gone through such pains to testify, including spending more time in jail while their own trials were postponed and being subjected to beatings and threats from other prisoners, Waksman decided to aid these inmates in whatever ways he could. However, he did not inform the inmates that he was going to do anything other than write letters, and in

fact he himself had no idea to what extent he would end up helping them.[1]

Phillips also introduced check stubs showing that the inmates were in fact given reward money after trial. However, Smith and Waksman explained that this money was provided by the Florida Police Benevolent Association, a private organization, that they themselves were unaware of the reward until shortly before trial, and that they never told the inmates about the money until after they testified. Accordingly, although the inmates were ultimately given reward money by an outside organization, they were not aware of the possibility of a reward until after trial, and it therefore could not have provided any incentive for them to testify.

Finally, Phillips presented the testimony of William Farley, who stated that he lied on the stand at trial, that Phillips had never in fact confessed to him, that all the information about the crime was provided to him by the police, and that he perjured himself on the stand after being promised freedom and reward money. A similar claim was made as to the testimony of Larry Hunter. While Hunter himself refused to

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[1] Phillips also cites several examples of good fortune which befell the inmates after they testified against him. For example, Malcolm Watson's life sentence was vacated, William Farley received early parole, and assault charges against William Scott were dropped. However, Phillips submitted no proof that these events were causally connected to the inmates' testimony at trial or that they took place in fulfillment of promises by the State.

testify on grounds of self-incrimination, the parties stipulated to the consideration of his affidavit. Waksman and Smith denied these allegations. The circuit court found this evidence to be completely unbelievable, and we find competent, substantial evidence to support this finding. Accordingly, we reject Phillips' Brady claim.

Phillips next claims that various witnesses lied on the stand at trial and the State failed to correct the false testimony, in violation of Giglio v. United States, 405 U.S. 150 (1972). In order to prevail on this claim, Phillips must demonstrate: (1) the testimony was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material. Routly v. State, 590 So. 2d 397, 400 (Fla. 1991).

Phillips first alleges that William Scott was a police informant at the time Phillips confessed to him, yet he stated on the witness stand that he was not a police agent. The fact that Scott had been a paid informant for the federal government and had aided one of the detectives in the Metro-Dade police department was well known to the defense through pretrial depositions of Scott and Detective Smith and was brought out on cross-examination at trial. Scott's statement that he was not a police agent is attributable to the ambiguity of the term "agent." Scott was on the federal government payroll at the time of trial and was assigned an informant number for the federal authorities; he did not, at that time, have an informant number for the Metro-Dade police, and therefore evidently did not

believe that he was an agent for that department. Even at the postconviction hearing, Scott seemed confused over whether he was an informant for Metro-Dade. Ambiguous testimony does not constitute false testimony for the purposes of Giglio. Routly, 590 So. 2d at 400.

Phillips also alleges that William Farley lied when he stated that the tape was started immediately when he gave his tape-recorded statement to the police; actually, a pre-interview was conducted which lasted approximately one and one-half hours. We find this misstatement to be immaterial. Further, the statement could have been corrected by the defense, had it been important, since the defense was aware of the pre-interview from Detective Smith's pretrial deposition.

Finally, Phillips contends that both Farley and Watson lied about their criminal records. While we agree that statements made by these witnesses regarding their records were incorrect, we find that there is no reasonable probability that the false testimony affected the judgment of the jury. The jury was made aware that these witnesses were convicted felons; the admission of an additional conviction or probationary sentence would have added virtually nothing to further undermine their credibility.

In a related claim, Phillips argues that the State used the jailhouse informants to elicit testimony from Phillips after he asserted his right to counsel, violating his rights under United States v. Henry, 447 U.S. 264 (1980). This claim is

without merit, as Phillips has made no showing that the informants were state agents when they talked with him,[2] that they in any way attempted to elicit information about the crimes, or that the State had anything to do with placing these persons in a cell with Phillips in order to obtain information.

Phillips next argues that his trial counsel was ineffective at the guilt phase. In order to prevail on this claim, Phillips must demonstrate that counsel's performance was deficient and that there is a reasonable probability that the result of the proceeding would have been different absent the deficient performance. Strickland v. Washington, 466 U.S. 668 (1984).

Phillips bases his claim on several alleged actions which counsel failed to take. First, Phillips contends that counsel should have obtained a competency evaluation before trial. In support of this allegation, Phillips presented the testimony of two forensic psychology experts, who stated that Phillips was not competent at the time of his trial. In rebutting this claim, the State presented the testimony of two experts who opined that Phillips was competent at trial, and the testimony of Phillips' counsel, who stated that there was absolutely no reason to doubt

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[2] Although William Scott was a state agent when he attempted to elicit information from Phillips' family, this action in no way implicated Phillips' rights. The circumstances of this incident were not hidden by the State, as Scott discussed the incident in his pretrial deposition.

Phillips' competence at the time of trial.[3] The State also presented notes and letters written by Phillips at the time of trial which indicated overall intellectual functioning and an understanding of the case against him. The circuit court found that Phillips was competent at trial and that counsel was not ineffective for failing to have his competency evaluated. We find competent, substantial evidence to support the circuit court's finding on this issue.

Phillips next claims that counsel was ineffective for failing to investigate the jailhouse informants, for failing to file a motion to suppress, for failing to move for a change of venue, for failing to conduct an appropriate voir dire, for failing to obtain or consult with experts, for failing to object to Phillips' absence from certain proceedings, for failing to adequately cross-examine witnesses, and for failing to object to hearsay, lay opinions, and improper comments during the prosecutor's closing argument. We find these claims to be conclusory and summarily reject them. Many of these claims are exactly the type of hindsight second-guessing that Strickland condemns, and even those matters asserted as significant "omissions" would have been mere exercises in futility, with no

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[3] Phillips places much emphasis on counsel's statements that Phillips was an "idiot." Counsel explained that this statement did not reflect his feelings about Phillips' mental capacity, but rather about his tendency to take actions which sabatoged his own case, such as bragging about the crime to other inmates.

legal basis. Accordingly, having found that Phillips has demonstrated neither deficient performance nor prejudice, we reject his claim that trial counsel was ineffective at the guilt phase.

We turn now to Phillips' claims regarding the sentencing phase of his trial. Phillips first argues that his trial counsel was ineffective at sentencing. Counsel testified at the postconviction hearing that he did virtually no preparation for the penalty phase. The only testimony presented in mitigation was that of Phillips' mother, who testified that Phillips was a good son who tried to help her when he was not in prison. The State has conceded that counsel's performance was deficient at the penalty phase, but contends that the deficient performance did not prejudice Phillips, as he would have been sentenced to death anyway. The circuit court agreed with the State.

At the postconviction proceeding, Phillips introduced a large amount of mitigating evidence through the testimony of relatives and friends of the family, who described Phillips' poor childhood, and through the testimony of expert witnesses, who described Phillips' mental and emotional deficiencies.

Phillips' mother, brother, and sister testified that Phillips grew up in poverty. His parents were migrant workers who often left the children unsupervised. Phillips' father physically abused him, and physically abused Phillips' mother in front of the children. Phillips was a withdrawn, quiet child with no friends. When he was thirteen or fourteen, Phillips was shot in the head and taken to the hospital.

The State argues that this childhood evidence is entitled to little weight, since Phillips was thirty-six years old at the time he committed this crime and had numerous chances to rehabilitate himself by then. Although it is true that this evidence is far less compelling as mitigation in light of Phillips' age, this does not change the fact that it was relevant, admissible evidence that should have been presented to the jury. It cannot be seriously argued that the admission of this evidence could have in any way affirmatively damaged Phillips' case.

More compelling evidence was presented by Phillips' experts. These experts testified that Phillips is emotionally, intellectually, and socially deficient, that he has lifelong deficits in his adaptive functioning, that he is withdrawn and socially isolated, that he has a schizoid personality, and that he is passive-aggressive. Phillips' IQ was found to be between seventy-three and seventy-five, in the borderline intelligence range. Both experts concluded that Phillips falls under the statutory mitigating circumstances of extreme emotional disturbance and an inability to conform his conduct to the requirements of the law.[4] They also opined that Phillips did not have the capacity to form the requisite intent to fall under the

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[4] § 921.141(6)(b), (f), Fla. Stat. (1981).

aggravating factors of cold, calculated, and premeditated or heinous, atrocious, or cruel.[5]

Again, the State contends that this mitigation is not sufficiently compelling to demonstrate prejudice. The State bases this argument on the testimony of its own experts, who basically saw nothing seriously wrong with Phillips. However, as was the case with the childhood mitigation, the fact that it may be rebutted by State evidence or argument does not change the fact that it should have been considered by the jury. It is impossible to tell at this point which experts the jury would have believed.

The jury vote in this case was seven to five in favor of a death recommendation. The swaying of the vote of only one juror would have made a critical difference here. Accordingly, we find that there is a reasonable probability that but for counsel's deficient performance in failing to present mitigating evidence the vote of one juror might have been different, thereby changing the jury's vote to six to six and resulting in a recommendation of life reasonably supported by mitigating evidence. Having demonstrated both deficient performance and prejudice, Phillips is entitled to relief on his claim of ineffective assistance of counsel at the sentencing phase of his trial. Given our resolution of this issue, it is unnecessary for

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[5] § 921.141(5)(i), (h), Fla. Stat. (1981).

us to address the remainder of Phillips' claims of error in his sentencing.[6]

For the foregoing reasons, the circuit court's order is affirmed in part and reversed in part, the sentence of death is vacated, and the case is remanded for a new sentencing proceeding before a jury.

It is so ordered.

BARKETT, C.J., and OVERTON, GRIMES, KOGAN and HARDING, JJ., concur.
SHAW, J., concurs in result only.
McDONALD, J., concurs in part and dissents in part with an opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

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[6] Phillips argues: 1) comments by the court and prosecutor diminished the jury's sense of responsibility for the sentencing decision; 2) trial counsel was ineffective for failing to object to a jury instruction which shifted the burden of proof at sentencing to Phillips; and 3) trial counsel was ineffective for failing to object to inconsistent jury instructions regarding the vote necessary for a life recommendation.

McDONALD, J., concurring in part, dissenting in part.

I concur in the denial of relief to Phillips on the guilt phase of his trial, but would also deny relief on the sentence. I agree with the trial judge when he determined:

> Based on the facts surrounding the murder, this Court finds that there is no reasonable probability that the evidence of a troubled childhood and limited mental capacity would have altered the jury's decision and certainly not this Court's decision. Since Phillips has not established prejudice, he is not entitled to relief on this claim.

An Appeal from the Circuit Court in and for Dade County,

Arthur I. Snyder, Judge - Case No. 83-435

Larry Helm Spalding, Capital Collateral Representative; Jerrel E. Phillips, Assistant CCR, Office of the Capital Collateral Representative, Tallahassee, Florida; and Billy H. Nolas, Special Assistant CCR and Julie D. Naylor, Special Assistant CCR, Ocala, Florida,

for Appellant

Robert A. Butterworth, Attorney General and Ralph Barreira, Assistant Attorney General, Miami, Florida,

for Appellee

No. _____

OCTOBER TERM 2024

In The

Supreme Court of the United States

HARRY FRANKLIN PHILLIPS,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition For A Writ Of Certiorari To
The United States Court of Appeals for the Eleventh Circuit

APPENDIX F

Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, Final Order Denying Motion to Vacate Judgment and Sentence (Feb. 13, 1989)

cc: BN, TS, PH, JAY
EW, FB,

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

CRIMINAL DIVISION

CASE NO. 83-435

THE STATE OF FLORIDA,
Plaintiff,
vs.
HARRY PHILLIPS,
Defendant.

FINAL ORDER DENYING MOTION TO VACATE JUDGMENT AND SENTENCE

THIS CAUSE came before the Court on Phillips' Motion to Vacate Judgment and Sentence, pursuant to Rule 3.850, Florida Rules of Criminal Procedure, to vacate the judgment of guilt of first degree murder and sentence of death imposed on February 1, 1984. The Court has reviewed the pleadings, the trial transcript, and held evidentiary hearings on the issues raised in the motion to vacate. After careful consideration of the above, the Court concludes that the motion should be denied and that Phillips is entitled to no relief whatsoever.

PROCEDURAL HISTORY

Phillips was charged with the first degree murder of his parole supervisor, Bjorn Thomas Svenson. After trial by jury, Phillips was found guilty as charged. In accordance with the jury's recommendation of death, this Court imposed the death sentence. This decision was affirmed. Phillips v. State, 476 So.2d 194 (Fla. 1985).

After clemency was denied, Governor Martinez signed Phillips' first death warrant. A Petition for Writ of Habeas Corpus was then filed with the Florida Supreme Court wherein he challenged the constitutionality of his sentencing hearing based on Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 20 L.Ed.2d 231 (1985). The Court, without deciding the substantive merit of the claim, found

the claim to be procedurally barred and denied relief. Phillips v. Dugger, 515 So.2d 227 (Fla. 1987).

During the pendency of the death warrant, Phillips filed the instant Motion to Vacate and a Motion to Stay. This Court after reviewing the pleadings entered a stay of execution and thereafter held an evidentiary hearing and further evidentiary hearings as requested by Phillips' attorneys.

FACTUAL BACKGROUND

In affirming Phillips conviction and death sentence the Florida Supreme Court established the historical facts of the case:

> In the evening of August 31, 1982, witnesses heard several rounds of gunfire in the vicinity of the Parole and Probation building in Miami. An investigation revealed the body of Bjorn Thomas Svenson, a parole supervisor, in the parole building parking lot. Svenson was the victim of multiple gunshot wounds. There apparently were no eyewitnesses to the homicide.
>
> As parole supervisor, the victim had responsibility over several probation officers in charge of appellant's parole. The record indicates that for approximately two years prior to the murder, the victim and appellant had repeated encounters regarding appellant's unauthorized contact with a probation officer. On each occasion, the victim advised appellant to stay away from his employees and the parole building unless making an authorized visit. After one incident, based on testimony of the victim and two of his probation officers, appellant's parole was revoked and he was returned to prison for approximately twenty months.
>
> On August 24, 1982, several rounds of gunfire were shot through the front window of a home occupied by the two probation officers who had testified against appellant. Neither was injured in the incident, for which appellant was subsequently charged.
>
> Following the victim's murder, appellant was incarcerated for parole violations. Testimony of several inmates indicated that

> appellant told them he had killed a parole officer. Appellant was thereafter indicted for first-degree murder.
>
> 476 So.2d at 194-195.

CLAIMS THAT ARE PROCEDURALLY BARRED

Claims which either were or should have been raised on direct appeal are not cognizable in Rule 3.850 proceedings. Daugherty v. State, 505 So.2d 1323 (Fla. 1987). This rule applies even when a court is dealing with a death sentence. White v. State, 511 So.2d 984 (Fla. 1987). Based on the foregoing the following claims are summarily denied because they are ones which could have or should have been raised on direct appeal: That Phillips' statements were unlawfully obtained by the use of jailhouse informants; That the death sentence was imposed in violation of Caldwell v. Mississippi, supra.; That the jury instruction concerning the need for a majority vote for a life sentence deprived Phillips of a fair sentencing hearing; That the jury instruction concerning the burden of proving aggravating and mitigating circumstances shifted the burden of proof; That Phillips' absence during critical proceedings was involuntary; and, That his two prior convictions were unconstitutional and were improperly used as aggravating factors.

CLAIMS DECIDED ON THE MERITS

I

BRADY VIOLATION

Phillips claims the State violated the dictates of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by withholding favorable evidence concerning the nature of the jailhouse witnesses and the scope of the promises made to them for their testimony. In order for Phillips to succeed on this claim, he had to establish that favorable evidence was withheld and that said evidence was material to either guilt or punishment. Evidence is

material only if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the proceeding. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). This Court finds, as hereinafter delineated, that Phillips has failed to establish that any favorable evidence was withheld by the State and therefore this claim is denied.

Phillips' first contention is that the State withheld information on William Scott. Specifically he alleges that he was not informed that Scott was a police informant at the time Phillips confessed to Scott. This allegation is refuted by the pretrial deposition of Scott whereat Scott admitted that he was a paid confidential informant for the police. The fact that Scott was a police agent on other cases at the time Phillips confessed was not violative of Phillips' constitutional rights. Miller v. State, 415 So.2d 1262 (Fla. 1982), cert. denied, 459 U.S. 1155 (1983). Phillips also contends that information concerning promises for testimony Scott's was withheld. This contention has not been substantiated since there is no evidence that Scott received financial support during the pendency of Phillips trial or that the police were instrumental in having assault charges against Scott dismissed.

William Farley, another jailhouse informant who testified against Phillips at trial, also testified at the evidentiary hearing. This time he stated that he lied during the trial; that the confession that he stated that Phillips made to him did not occur; and, that he testified falsely to get out of prison early. Farley also testified that Detective Smith asked him to elicit information from Phillips, gave him information regarding the crime, promised

him an early release for information, and promised a reward if Farley testified at trial. He also testified that Detective Smith told him what to say in his taped statement.

Both the prosecutor and Detective Smith, at the hearing, denied these allegations. It was established that the prosecutor promised Farley that he would write a letter to the parole board on his behalf, and that this information was provided to defense counsel prior to trial.

Based on Farley's testimony, Phillips alleges that the State withheld evidence concerning William Farley's status as a police agent on this case at the time Phillips confessed to him and that evidence of promises and rewards for testimony was also withheld. This Court finds Farley's testimony to be totally incredulous and unbelievable and therefore rejects the same. Since this was the only testimony presented, Phillips has failed to substantiate his allegations concerning Farley and therefore this claim is denied.

Phillips further alleges that information was withheld with regard to the jailhouse informant Larry Hunter. These allegations deal with the State allegedly providing Hunter with information about the crime as well as concealment of the full scope of the promises made for testimony. Hunter was subpoenaed but refused to testify invoking his privilege against self incrimination. Pursuant to stipulation, this Court was permitted to consider Hunter's affidavit as evidence to support the claim. The affidavit claimed that the State provided Hunter with information about the crime and that he would receive both a monetary reward and a lenient sentence on his pending charges for testimony against Phillips. This Court finds that Hunter's affidavit is totally at odds with the facts adduced at the initial trial. This claim is rejected outright.

Phillips' final claimed Brady violation is that evidence concerning the promises made to Malcolm Watson was withheld. Specifically he complains not that the scope of the promise was not revealed, but that the State did not properly enforce the deal. The State, pretrial, revealed that in exchange for testimony, Watson's conviction would be reduced from armed robbery to simple robbery if he passed a polygraph on whether he was armed during the robbery. After Phillips' trial, Watson passed a polygraph and in accordance with the agreement his conviction was reduced to simple robbery. Since the promise was disclosed and subsequently enforced, this claim is meritless and is denied.

II

INCOMPETENCY TO STAND TRIAL

Phillips claims that he was incompetent to stand trial. In order to determine the ultimate merits of the claim, this Court heard the testimony of four doctors as well as Phillips' initial attorney and the attorney who subsequently tried the case. Jones v. State, 478 So.2d 346 (Fla. 1985).

Dr. Carbonel testified that Phillips was incompetent to stand trial. She testified that Phillips understood that he was being tried; that he had a lawyer; that the prosecution was against him; that the judge controls the proceedings and that the jury would decide his guilt or innocence. She further testified that Phillips did not understand legal motions, or that he could be given the death penalty. Phillips' understanding of the charges was that a parole officer had been killed, and that he was charged with the killing and that he could be sent to prison for life. Dr. Carbonel stated that in her opinion Phillips was incapable of expressing himself, and could not provide a coherent version of the events which prohibited him from assisting with his defense.

Dr. Toomer also testified that Phillips was incompetent to stand trial. His opinion was based on Phillips' low level of intellectual functioning. He stated that Phillips did not understand the seriousness of the charges nor did he appreciate the possible penalties, and that he did not understand the adversarial process. It was his opinion that Phillips understood the prosecutor's role, but not that of the judge and jury. Phillips, according to Dr. Toomer, could not provide a rational account of the events or assist in his defense.

Dr. Haber's opinion was that Phillips was competent to stand trial. Based on his examination, he found that Phillips was not suffering from any serious intellectual or emotional disturbances. Phillips is of borderline intellectual functioning. During his evaluation, Phillips was cooperative, although serious in mood. He was direct, responsive, alert, oriented to time, place, and person. He had an adequate grasp of vocabulary, context, and an adequate ability to recollect both recent and remote events. Dr. Haber testified that letters written by Phillips at the time of trial established that he appreciated the seriousness of the charges, and that he understood the adversarial nature of the proceedings. The letters also showed that he was able to relate to counsel and to communicate his position which reflected an interest, willingness and capacity to assist in his defense. The letters also established that he understood the role of witnesses and the consequences of adverse testimony. It was his opinion that Phillips knew that he was facing the death penalty and that his present denial was a defense mechanism.

Dr. Miller's opinion was that Phillips was competent to stand trial. This opinion was based on the facts that Phillips was able to name the judge, his lawyer, some of the witnesses, how long the trial lasted and the number of

jurors. These recollections established that he was alert and in touch with reality during his trial. The letters written at the time of trial indicated an awareness of the role of witnesses, the adversarial process and the consequences of adverse testimony. They were indicative of a person with less than average intelligence , but certainly not of a retarded person. Phillips also knew that a jury would decide his guilt or innocence and that the judge would decide his case. Dr. Miller found that Phillips was unbelievable when he stated that he did not know that he was facing the death penalty since he was alert during the trial and he understood what the judge said about a capital trial.

Joel Kershaw, Phillips initial counsel, was discharged by Phillips because he did not like the way Kershaw was handling the investigation. Kershaw testified that Phillips knew he was facing the death penalty; that he did not display the type of behavior that would have led him to seek a competency evaluation; and that he understood what was occurring.

Ronald Guralnick, Phillips trial attorney, testified that, based on his conduct, Phillips did not give any indication that he was incompetent. He stated that Phillips provided him with information to prepare a defense and that Phillips understood his instructions but chose not to follow them.

Dusky v. United States, 362 U.S. 402, 80 S. Ct. 788, 4 L.Ed. 2d 824 (1960), established the test for determining whether a defendant is competent to stand trial. The test is whether a defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him." Id. at 402. See also; Hill v. State, 473 So.2d 1253 (Fla. 1985).

In applying the foregoing legal standard to the evidence presented concerning Phillips competency, this Court finds that Phillips has failed to meet his burden of dispositively demonstrating that he was incompetent to stand trial. Muhammad v. State, 494 So.2d 969 (Fla. 1986). This finding is based, in part, on this Court's recollection of Phillips' behavior at trial and a review of the letters written by Phillips during trial. This information is congruent with both of Phillips' previous attorneys who testified that he was able to understand the proceedings and assist in preparing a defense. The foregoing necessitates an acceptance of Drs. Haber's and Miller's finding that Phillips was competent to stand trial and a rejection of Drs. Carbonel's and Toomer's finding of incompetence to stand trial.

III

INEFFECTIVE ASSISTANCE OF COUNSEL

Phillips claims that his trial attorney was ineffective at both the guilt or innocence phase and the penalty phase of his trial. In order to succeed on this claim, Phillips must establish that his attorney's performance was deficient and that said deficiencies prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Phillips alleges that counsel was ineffective at the guilt or innocence phase for his failure to move to suppress the statements of the jailhouse informants; for his failure to move for a change of venue based on pretrial publicity; for his failure to adequately prepare for trial; and for his failure to employ experts in the area of mental health and firearms. At the evidentiary hearing, evidence was not presented to establish deficient conduct in these areas. Based on this failure, this claim is denied.

As it relates to the penalty phase, Phillips contention is that his trial attorney failed to do any investigation for mitigating evidence and this failure rendered counsel ineffective. Based on trial counsel's testimony, this Court finds trial counsel was deficient for failing to conduct any investigation for mitigating evidence. However, this failure alone does not constitute ineffective assistance of counsel. Phillips must also prove that had an investigation occurred the result of sentencing hearing would have been different.

At the evidentiary hearing Phillips presented the testimony of family members. This testimony established that Phillips came from a poor family and that both of his parents worked. His father physically abused him. Phillips was very attached to his father and felt rejected when his father abandoned the family. Phillips was a below average student. When Phillips worked he helped support his family and was kind to his sister's children.

Dr. Carbonel testified Phillips has below average intelligence, on the borderline of being retarded. She did not find any organic brain damage. Based on Phillips' improverished background, his limited intellectual functioning, his history of passive/aggressive behavior and his inability to learn from experience, it was Dr. Carbonel's opinion that Phillips was suffering, at the time of the incident, from an extreme emotional disturbance.

Dr. Toomer agreed with Dr. Carbonel's conclusions. He concluded that Phillips was not psychotic but that he is incapable of abstract reasoning, suffers from intellectual deficiencies and emotional deprivation.

The State's experts explicitly refuted the foregoing opinions. Drs. Haber and Miller opined that Phillips was

not suffering from any serious intellectual or emotional disturbances.

This Court finds that the evidence that counsel failed to present would not have changed the outcome of the sentencing hearing. This conclusion is reached based on the four valid aggravating factors that exist and which are:

1) That the murder was committed while Phillips was under a sentence of imprisonment;
2) He was previously convicted of another felony involving the use of violence;
3) The murder was especially heinous, atrocious or cruel; and,
4) It was committed in a cold, calculated and premeditated manner.

Based on the facts surrounding the murder, this Court finds that there is no reasonable probability that the evidence of a troubled childhood and limited mental capacity would have altered the jury's decision and certainly not this Court's decision. Since Phillips has not established prejudice, he is not entitled to relief on this claim. Harris v. State, 528 So.2d 361 (Fla. 1988); Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986), cert. denied, 107 S.Ct. 1986 (1987).

It is therefore ORDERED and ADJUDGED that the Motion to Vacate Judgment and Sentence be, and the same is, hereby DENIED.

It is further ORDERED and ADJUDGED that the stay of execution previously entered herein is VACATED.

DONE and ORDERED this 13th day of February, 1989, at Miami, Dade County, Florida.

ARTHUR I. SNYDER

ARTHUR I. SNYDER
Circuit Judge

cc: David Waksman
Assistant State Attorney
1351 N.W. 12th Street
Miami, Florida 33125

Michael J. Neimand
Assistant Attorney General
401 N.W. 2nd Avenue, Suite N921
Miami, Florida 33128

Billy Nolas
Attorney for Defendant
Office of the Capital
Collateral Representative
225 West Jefferson Street
Tallahassee, Florida 32301