NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY MUNGIN,

Petitioner,

vs.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

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

APPENDIX

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Appendix A

Order, *Mungin v. Sec'y, Fla. Dep't of Corr.,* No. 22-13616,
United States Court of Appeals for the Eleventh (March 18, 2024)

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-13616

ANTHONY MUNGIN,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 3:06-cv-00650-BJD-JBT

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

Before WILLIAM PRYOR, Chief Judge, and ROSENBAUM and BRASHER, Circuit Judges.

PER CURIAM:

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

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March 18, 2024

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 22-13616-P
Case Style: Anthony Mungin v. Secretary, Florida Department of Corrections, et al
District Court Docket No: 3:06-cv-00650-BJD-JBT

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

Appendix B

Opinion, United States Court of Appeals for the Eleventh Circuit, No. 22-13616, *Mungin v. Sec'y, Fla. Dep't of Corr.*, 89 F.4th 1308 (Jan. 8, 2024)

[PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 22-13616

ANTHONY MUNGIN,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 3:06-cv-00650-BJD-JBT

Before WILLIAM PRYOR, Chief Judge, and ROSENBAUM and BRASHER, Circuit Judges.

BRASHER, Circuit Judge:

In 1993, Anthony Mungin was convicted of murdering Betty Jean Woods and sentenced to death. For thirty years, Mungin has argued that his lawyer was ineffective in the guilt phase of his trial. We must resolve four such ineffective assistance of counsel claims in this appeal. Two were timely raised in Mungin's initial federal habeas petition, and two were not. We conclude that the first two ineffective assistance of counsel claims fail under *Strickland v. Washington*, 466 U.S. 668 (1984), and our habeas caselaw. We conclude that the last two claims cannot be litigated in federal court because they do not relate back to Mungin's initial habeas petition and are therefore barred by the statute of limitations. In doing so, we correct our precedent on the standard of review that applies to a district court's ruling on relation back under Federal Rule of Civil Procedure 15(c). Specifically, under *Krupski v. Costa Crociere S.p.A*, 560 U.S. 538 (2010), we review those decisions *de novo*. Because the district court did not err in denying Mungin's petition for a writ of habeas corpus, we affirm.

I.

A.

We will begin with the facts of the crime and the guilt phase of trial. The State of Florida charged Anthony Mungin with first-

degree murder. The State alleged that Mungin had shot and killed a store clerk, Betty Jean Woods, in the head while robbing the Jacksonville convenience store where she worked. The State's theory was that Mungin had committed a string of robberies and related shootings in the area, which culminated in the murder of Woods.

Mungin was represented by two experienced attorneys at trial. Charles Cofer was Mungin's lead defense counsel and handled the investigation, decision-making, and cross-examination of the primary witnesses. Another attorney, Lewis Buzzell, entered the case much later as second chair and presented the closing argument.

The State introduced two key pieces of evidence: forensic analysis of guns and bullet casings and an eyewitness who saw Mungin at the crime scene.

As for the forensic evidence, law enforcement officers found a gun at Mungin's residence and matched that gun to the bullets used to commit the murder and similar robberies. They also found a stolen car—a Dodge Monaco—about one hundred yards from the house. Officers found two expended shell casings inside that car that also matched to the gun that shot Woods. Unbeknownst to the jury, however, Deputy Malcolm Gillette, one of the law enforcement officers investigating the murder, stated on an inventory and vehicle storage receipt that there was "nothing visible" in the car. *Mungin v. State* (*Mungin VI*), 320 So. 3d 624, 625 (Fla. 2020).

As for the eyewitness testimony, Ronald Kirkland testified at trial that he arrived at the convenience store shortly after the

shooting and physically bumped into a man who was leaving the convenience store. Kirkland then found the victim on the floor. Kirkland identified the man he bumped into as Mungin in a photo lineup and in court at trial. A police officer, Detective Christie Conn, conducted the photo lineup. When she showed Kirkland six or seven photographs including Mungin's, Kirkland told Detective Conn that, based on the photograph he was shown, he could not swear Mungin was the individual leaving the store. But he nonetheless correctly identified Mungin's photograph and signed it. Detective Conn later testified about Kirkland's hesitancy in a deposition, but she was not called to impeach his testimony at trial.

There was another potential eyewitness at the scene—George Brown—who did not testify at trial. Detective Conn testified during her deposition that Brown told Detective Conn that he had arrived on the scene after Kirkland. Cofer, Mungin's lead attorney, tried to serve a subpoena on Brown to depose him; but Cofer could not find Brown at the address the government had given Cofer. Ultimately, Cofer could not find Brown to either confirm or rebut Detective Conn's recollection of his statement.

Nonetheless, Cofer extensively cross-examined Kirkland at trial. On cross-examination, Kirkland conceded that he only caught a glimpse of the man who was leaving the store and noticed nothing about the man's clothes. Cofer also prompted Kirkland to admit to inconsistencies between his previous statements to police and his testimony, such as his statements about the height, age, and appearance of the man he saw leaving the store. Specifically, Cofer

prompted Kirkland to state that he could not remember saying the man was five-foot-five before and that the man was somewhere in the area of 20 or 30 even though he had previously stated that the man was between 27 and 30. And Kirkland acknowledged that he had originally described the man at the scene as having a Jheri curl and a slight beard, despite Mungin's short-haired, clean-shaven appearance at the time. Kirkland also conceded that three people in the photo array had drawn his attention at first and that he had looked at the photos for fifteen or twenty minutes before identifying Mungin. When examined about his apparent statement to Detective Conn that he could not swear in court that the picture he selected was the man who bumped into him, Kirkland said he did not recall making such a statement.

Although Kirkland was on probation for misdemeanor charges of issuing worthless checks in the leadup to the trial, no one mentioned it during his cross-examination. The probation office issued violation-of-probation warrants against Kirkland two weeks before Mungin's trial, but it is not clear that Mungin's counsel or the prosecution were made aware of that fact. And, like the probation itself, no one mentioned these warrants at trial. These warrants were later recalled—that is, withdrawn—nearly three weeks after Mungin's trial.

Deputy Gillette testified at trial that he saw spent shell casings in the stolen Dodge Monaco near Mungin's house. Mungin's counsel did not know that Deputy Gillette had written that he saw nothing visible in the car on the inventory form. Years later,

Deputy Gillette recanted this testimony in an affidavit; he now says that he did not see shell casings in the car and that he had not reviewed his paperwork before testifying at trial. *See id.*

Florida law at the time of Mungin's trial allowed defense counsel to make a "sandwich" closing argument—addressing the jury first and last—in cases in which the defendant presented no evidence except his or her own testimony. *See* Fla. R. Crim. P. 3.250 (1993); *see also In re Amends. to the Fla. Rules of Crim. Proc.*, 606 So. 2d 227, 312 (Fla. 1992) (Appx. 1); *Boyd v. State*, 200 So. 3d 685, 705 (Fla. 2015). To benefit from this rule, Mungin's counsel decided to not call defense witnesses, including Detective Conn. Mungin's counsel ultimately waived the initial closing argument—forcing the prosecution to guess at Mungin's closing argument rather than directly rebut it—and presented unrebutted closing arguments with the last word in front of the jury.

After deliberating, the jury convicted Mungin of first-degree murder. On the jury's recommendation, a judge sentenced Mungin to death after finding the aggravating factors (1) that Mungin had committed a prior violent felony and (2) that the murder was committed during a robbery or attempted robbery and that the murder was committed for pecuniary gain. *See Mungin v. State* (*Mungin I*), 689 So. 2d 1026, 1028 & n.3 (Fla. 1995). Mungin's conviction and sentence were affirmed on direct appeal, *see id.* at 1028, and the U.S. Supreme Court denied his petition for a writ of certiorari on direct review on October 6, 1997, *see Mungin v. Florida*, 522 U.S. 833, 833 (1997).

B.

On September 17, 1998, Mungin filed his first state postconviction relief motion. On postconviction review, Mungin raised several claims of ineffective assistance of counsel in state court. The state circuit judge held an evidentiary hearing, during which Cofer—who had become a Florida circuit court judge by this time—testified about his experience and his decisions at Mungin's trial. Cofer had handled many homicide trials as an assistant public defender by the time of Mungin's trial, handling his first one around ten years before Mungin's trial.

Cofer explained that he knew about Kirkland's probation on misdemeanor charges of issuing worthless checks but that it was scheduled to end two weeks before Mungin's trial and that he knew Kirkland had successfully completed probation in the past. And he explained that he did not know that that violation-of-probation warrants had been issued against Kirkland two weeks before Mungin's trial. Cofer acknowledged that he could have impeached Kirkland about the probation if he were on probation at the time of trial and stated that he would have looked into that had he known about the violation warrants.

Cofer also explained that he did not call Detective Conn to impeach Kirkland about his identification of Mungin because he thought this testimony would be largely redundant and would also be a worse trial strategy. Cofer thought that most of Detective Conn's testimony would be redundant to what Kirkland would say on the stand and that the additional information—that Kirkland

said he could not swear in court that Mungin was the individual he saw leaving the store after the shooting—was not important enough to justify giving up the "sandwich" closing argument.

Mungin's counsel also explained why he did not call George Brown to testify. Cofer attempted to serve a deposition subpoena on Brown and could not find him at the address the government provided. Moreover, Cofer testified that he decided not to call Brown after he determined that Brown was not a critical witness. Cofer said that he made this determination based in part on Detective Conn's deposition testimony; he understood that Brown told Detective Conn that he had arrived on the scene after Kirkland and did not notice anyone leaving as he entered the store. In short, Cofer explained that he could not find Brown and that he thought Brown's testimony would not add any value that could not come from Kirkland's testimony.

At the end of years of state court litigation, the Florida Supreme Court denied Mungin's initial state postconviction relief motion with its mandate issuing on June 29, 2006. *See Mungin v. State* (*Mungin II*), 932 So. 2d 986, 1004 (Fla. 2006).

C.

Mungin filed a federal habeas petition on July 18, 2006. Claim I in his original habeas petition was that "Mr. Mungin Received Ineffective Assistance of Counsel at the Guilt Phase of his Capital Trial, in Violation of the Sixth Amendment to the United States Constitution." Dist. Ct. Doc. 1-2 at 28. Although styled in the original petition as a single claim, Claim I makes several different

Strickland claims about trial errors. Mungin has been litigating back and forth between state and federal court since then, culminating in us granting a certificate of appealability on four of his *Strickland* claims. We will trace the path of those four claims through Mungin's state and federal postconviction proceedings.

1.

In his original habeas petition, Mungin claimed that his counsel was ineffective for failing to adequately impeach Ronald Kirkland at trial with evidence related to his criminal record. During his state postconviction relief review process, the Florida Supreme Court rejected this claim. *See Mungin II*, 932 So. 2d at 998–99. In doing so, the Florida Supreme Court split this claim into two subparts: that Mungin's counsel should have (1) raised Kirkland's probation status on cross-examination and (2) informed the jury about the recalled warrants. The Florida Supreme Court reasoned that (1) assuming deficient performance, Mungin was not prejudiced by his counsel's failure to raise Kirkland's probationary status and (2) Mungin's counsel was not deficient for failing to inform the jury about Kirkland's recalled warrants because the warrants were not recalled until after the trial. *See id.* The federal district court denied Mungin relief on this claim on the merits.

2.

In his original habeas petition, Mungin claimed that his counsel was ineffective for failing to elicit favorable testimony at trial from Detective Christie Conn. The Florida Supreme Court

rejected this claim on the merits after concluding that Mungin had failed to establish a constitutional violation. *See id.* at 999. The district court denied Mungin relief on the merits.

3.

Mungin's original federal habeas petition did not mention George Brown. On August 16, 2007, Mungin filed a successive motion to vacate his conviction and sentence in state court based on recently discovered information in the form of an affidavit executed by George Brown on June 30, 2007. The district court stayed Mungin's federal habeas proceedings for Mungin to exhaust this claim, among others, in state court. A state postconviction court ruled against Mungin on these claims, concluding that—with respect to an ineffective assistance of counsel claim—the Brown-related affidavit was not sufficiently likely to change the result at trial. Although it did not discuss the *Strickland* claim, the Florida Supreme Court reversed and remanded for an evidentiary hearing on whether the government's failure to disclose information about Brown violated *Brady v. Maryland*, 373 U.S. 83 (1963), or *Giglio v. United States*, 405 U.S. 150 (1972). *See generally Mungin v. State* (*Mungin III*), 79 So. 3d 726 (Fla. 2011). The state court held the evidentiary hearing and again denied Mungin's petition. The Florida Supreme Court affirmed the decision and again did not explicitly discuss the Brown-related ineffective assistance of counsel claim. *See generally Mungin v. State* (*Mungin IV*), 141 So. 3d 138 (Fla. 2013). The mandate for this ruling issued on August 16, 2013.

On August 18, 2014—over a year later—Mungin asked the district court to end the stay, reopen the federal case, and supplement his habeas petition with the Brown-related ineffective assistance of counsel claim. The federal district court reopened the case on August 28, 2014, and Mungin moved to amend his federal habeas petition to add the Brown-related ineffective assistance of counsel claim. The State objected to the amendment on the ground that "any attempt to raise an IAC claim now in federal court, almost a decade after the state conviction became final and over seven years after Mungin's [first] amended federal habeas petition would egregiously violate the letter and purpose of the AEDPA's one-year statute of limitations." Dist. Ct. Doc. 31 at 81 (citation omitted). The district court nonetheless allowed the amendment but denied the claim on the merits and as procedurally defaulted.

4.

Mungin's original federal habeas petition did not mention Deputy Gillette except in the context of Deputy Gillette's penalty phase testimony. In 2015, ten months after Mungin moved to amend his habeas petition with the Brown-related claim, the district court again stayed the case so that Mungin could litigate additional claims in state court. Those additional claims are not at issue in this appeal. But, while Mungin was litigating those additional claims in state court, he filed more postconviction motions in state court, including one filed on September 25, 2017, claiming ineffective assistance of counsel related to a new affidavit from Deputy

Gillette. The new Deputy Gillette affidavit was executed on September 24, 2016—over one year earlier. *See Mungin VI*, 320 So. 3d at 625. Specifically, Mungin argued that his trial counsel provided ineffective assistance by failing to cross-examine Deputy Gillette about an inconsistency between his trial testimony that he saw shell casings in the stolen Dodge Monaco found in a parking lot near Mungin's house and the "inventory and vehicle storage receipt" in which he made a notation indicating that he saw "nothing visible" in the car. *Id.* In his 2016 affidavit, Deputy Gillette recanted his trial testimony about seeing the shell casings in the car. *See id.* The Florida Supreme Court denied Mungin's new Deputy Gillette-related claims as untimely. *See id.* at 626.

In 2022, the district court reopened the case for a final time, and Mungin moved to amend his second amended petition to add the Deputy Gillette-related claims. The district court denied Mungin leave to amend to add his Deputy Gillette-related ineffective assistance of counsel claim as futile in light of the statute of limitations.

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In August 2022, over sixteen years after Mungin filed his original habeas petition, the district court denied Mungin's petition and dismissed the action with prejudice. We granted a certificate of appealability on the claims discussed above.

II.

We must address four of Mungin's claims. He argues (1) that his counsel was ineffective for failing to adequately impeach Ronald Kirkland with evidence of his probationary status and (2) that his counsel should have called Detective Conn to testify about Kirkland's prior equivocating statement about the strength of his identification. He also argues (3) that his counsel should have presented George Brown's testimony and (4) that the district court should have allowed him to amend his petition to add an ineffective assistance of counsel claim about Deputy Gillette's recanted testimony. We will conclude that the first two claims fail on the merits and that the last two claims fail under the statute of limitations.

A.

We turn first to Mungin's related claims about his counsel's failure to impeach Kirkland's testimony with evidence of his probationary status and his equivocating statement to Detective Conn. "We review *de novo* the denial of a petition for a writ of habeas corpus." *Sears v. Warden GDCP*, 73 F.4th 1269, 1279 (11th Cir. 2023) (emphasis added) (quoting *Morrow v. Warden, Ga. Diagnostic Prison*, 886 F.3d 1138, 1146 (11th Cir. 2018)). Moreover, "[a]n ineffective assistance of counsel claim is a mixed question of law and fact[,] which we review *de novo*." *Williams v. Alabama*, 73 F.4th 900, 905 (11th Cir. 2023) (quoting *Sims v. Singletary*, 155 F.3d 1297, 1304 (11th Cir. 1998)).

Because these claims were adjudicated in state court, we may not grant a writ of habeas corpus under 28 U.S.C. § 2254 unless the state court's merits-based "adjudication of the claim . . . resulted in a decision that was" (1) "contrary to, or involved an unreasonable application of, clearly established Federal 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 State court proceeding." 28 U.S.C. § 2254(d). "An unreasonable application occurs when a state court identifies the correct governing legal principle from th[e] [Supreme] Court's decisions but unreasonably applies that principle to the facts of [the] petitioner's case." *Rompilla v. Beard*, 545 U.S. 374, 380 (2005) (internal quotation marks omitted) (quoting *Wiggins v. Smith*, 539 U.S. 510, 520 (2003)). "That is, 'the state court's decision must have been [not only] incorrect or erroneous [but] objectively unreasonable.'" *Id.* (alterations in original) (quoting *Wiggins*, 539 U.S. at 520–21). "To meet that 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) (quoting *Virginia v. LeBlanc*, 582 U.S. 91, 94 (2017)). "The prisoner must show that the state court's decision is so obviously wrong that its error lies 'beyond any possibility for fairminded disagreement.'" *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

"Ineffective assistance under *Strickland* is deficient performance by counsel resulting in prejudice, with performance being measured against an 'objective standard of reasonableness' 'under prevailing professional norms.'" *Rompilla*, 545 U.S. at 380 (citations

omitted) (first quoting *Strickland*, 466 U.S. at 688; and then quoting *Strickland*, 466 U.S. at 688; *Wiggins*, 539 U.S. at 521). Notably, the Supreme Court has "recognized the special importance of the AEDPA framework in cases involving *Strickland* claims." *Shinn*, 592 U.S. at 118. "[B]ecause the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Id.* (alteration in original) (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)). "Applying AEDPA to *Strickland*'s prejudice standard, we must decide whether the state court's conclusion that [counsel's] performance . . . didn't prejudice [petitioner]—that there was no 'substantial likelihood' of a different result—was 'so obviously wrong that its error lies beyond any possibility for fairminded disagreement.'" *Pye v. Warden, Ga. Diagnostic Prison*, 50 F.4th 1025, 1041–42 (11th Cir. 2022) (en banc) (quoting *Shinn*, 592 U.S. at 118–21). Establishing deficient performance under *Strickland* has this same high bar under AEDPA deference.

"On each claimed basis for relief, we review 'the last state-court adjudication on the merits.'" *Sears*, 73 F.4th at 1280 (quoting *Greene v. Fisher*, 565 U.S. 34, 40 (2011)). We apply these standards to Mungin's first two ineffective assistance of counsel claims.

1.

Mungin argues that his counsel was ineffective for failing to impeach Ronald Kirkland with facts surrounding his probation and probation violation warrants. Cofer's files suggest that he knew that Kirkland had been arrested on misdemeanor charges involving

worthless checks, and a judge had withheld an adjudication of guilt pending Kirkland serving 90 days' probation. The probation office issued violation-of-probation warrants against Kirkland two weeks before Mungin's trial. For reasons that are not clear on the record, these warrants were recalled shortly after the trial.

The Florida Supreme Court rejected this claim by splitting this claim into two actions by counsel with different holdings. *See Mungin II*, 932 So. 2d at 998–99. Neither holding is unreasonable.

First, the Florida Supreme Court held that, assuming deficient performance, Mungin was not prejudiced by his counsel's failure to cross-examine Kirkland on his probationary status or pending warrants for violating probation. *See id.* The Florida Supreme Court recognized that Mungin's counsel already attacked Kirkland's identification of Mungin on cross-examination and "argued extensively that . . . Kirkland's identification could not be believed beyond a reasonable doubt." *Id.* Therefore, the court reasoned that the additional impeachment evidence of Kirkland's probationary status would not have changed the outcome of the trial.

We cannot say the Florida Supreme Court unreasonably determined the facts or unreasonably applied U.S. Supreme Court caselaw. On this subpart of the claim, Mungin cannot establish that "the state court's conclusion that [counsel's] performance . . . didn't prejudice him—that there was no 'substantial likelihood' of a different result—was 'so obviously wrong that its error lies beyond any possibility for fairminded disagreement.'" *Pye*, 50 F.4th at 1041–42 (quoting *Shinn*, 592 U.S. at 118–21). Nothing about

Kirkland's probationary status is particularly compelling to undermine his identification of Mungin as the person he saw leaving the convenience store where the murder took place.[1] And, as the Florida Supreme Court noted, Cofer extensively challenged Kirkland's identification testimony in other ways. Because the Florida Supreme Court needed to hold only that Mungin fails one element of *Strickland* for him to lose on this part of this claim and because we agree that the Florida Supreme Court's determination was not unreasonable, we need not examine the other *Strickland* element of this subpart of this claim.

Second, the Florida Supreme Court held that Mungin's counsel was not deficient for failing to inform the jury about Kirkland's recalled warrants because the warrants were not recalled until after the trial. *See Mungin II*, 932 So. 2d at 999. That warrants were recalled after trial could theoretically suggest Kirkland had a deal with the government to recall the warrants in exchange for his testimony. But the state court found that Kirkland "did not have any deals with the State in exchange for his testimony at Mungin's trial," and Mungin does not argue otherwise. *Id.* Given the absence of any deal between Kirkland and the government to recall his warrants after his testimony, we cannot say the state court was unreasonable in concluding that his counsel was not deficient for failing

[1] Because the judge in Kirkland's case withheld an adjudication of guilt pending probation, it appears that Kirkland was never convicted of passing worthless checks. Mungin has not argued, and we do not address, whether Kirkland should have been impeached for passing worthless checks apart from his probationary status. *See* Fla. Stat. § 90.610.

to raise the recalled warrants at trial. Therefore, the Florida Supreme Court was not unreasonable in denying Mungin's Kirkland-related warrant argument on the ground that he failed to establish deficient performance.

Because the Florida Supreme Court was not unreasonable in resolving both the Kirkland probation and warrant issues, the district court properly denied Mungin's Kirkland-related ineffective assistance of counsel claim.

2.

Turning to Mungin's second, but related, ineffective assistance claim, Mungin argues that his counsel was ineffective for failing to call Detective Conn to the stand to impeach Kirkland's statement that he did not remember saying that he could not swear to his identification during the photo lineup. The Florida Supreme Court rejected this claim on the merits. After identifying the reasons that Mungin's counsel had exercised his strategic judgment not to call Detective Conn, the Court concluded that, even assuming deficient performance, Mungin failed to establish *Strickland*'s prejudice element. *See id.*

For our part, we will begin and end with the prejudice element of *Strickland*. Again, we cannot say the Florida Supreme Court unreasonably applied the law or unreasonably determined the facts in denying Mungin relief for his Detective Conn-related claim. This is so for two reasons.

First, Kirkland identified Mungin at two points in time. He initially identified Mungin's photograph and signed it during the police's murder investigation. Kirkland then identified Mungin again in person during Mungin's trial. Thus, even if Kirkland told Detective Conn that, based on the photograph he was shown, he could not swear Mungin was the individual leaving the store, we cannot say that impeaching Kirkland on this point would have undermined his additional in-court identification to the point that it would have affected the result of the trial.

Second, Mungin's counsel vigorously (and successfully) cross-examined Kirkland on the strength of his identification in other ways. For example, Cofer got Kirkland to admit that he only caught a glimpse of the man who bumped into him and did not notice anything about the man's clothes. Cofer also prompted Kirkland to state that he could not remember saying the man was five-foot-five before and that the man was somewhere in the area of 20 or 30 years old, even though he had previously stated that the man was between 27 and 30 years old. And, in response to Cofer's questioning, Kirkland acknowledged that he had originally described the man at the scene as having a Jheri curl and a slight beard, despite Mungin's short-haired, clean-shaven appearance at the time. Additionally, Cofer prompted Kirkland to admit that three people in the photo array had drawn his attention at first and that he had looked at the photos for fifteen or twenty minutes. Because Cofer performed such significant cross-examination of Kirkland's identification of Mungin, the state court was not unreasonable in

concluding that additional cross-examination through impeachment evidence would not have changed the outcome of Mungin's trial.

The state supreme court was not unreasonable in rejecting this claim. Because the state supreme court did not unreasonably apply the law or unreasonably determine the facts, the district court properly denied Mungin's Detective Conn-related ineffective assistance of counsel claim.

B.

We turn now to Mungin's final two claims: (1) that his counsel should have presented the testimony of George Brown and (2) that the district court should have allowed him to amend his petition to add a claim about Deputy Gillette's recanted testimony. Unlike the first two claims, which were raised in Mungin's initial habeas petition, he did not raise these two claims until his federal habeas litigation had been pending for many years.

We conclude that these claims fail under the statute of limitations. Even giving Mungin the benefit of the doubt about when the statute began to run, the claims were filed outside the one-year statute of limitations. And we cannot say these claims relate back to his original petition.

1.

For starters, Mungin does not dispute that both the Brown and Gillette claims are barred by the statute of limitations unless they relate back to Mungin's initial, timely filed habeas petition.

AEDPA's one-year statute of limitations clock starts running at the latest of several dates. *See* 28 U.S.C. § 2244(d)(1). There was no state impediment to bringing either of these claims, *see id.* § 2244(d)(1)(B), and there were no new constitutional rights at issue, *see id.* § 2244(d)(1)(C). Therefore, the only two dates relevant here are the finality of the state court conviction, *see id.* § 2244(d)(1)(A), and "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence," *id.* § 2244(d)(1)(D).

There's no question that these claims were first brought in federal court long after Mungin's conviction was final in state court. Mungin first brought the Brown claim in federal court in 2014 and first brought the Deputy Gillette-related claim in federal court in 2022, but his conviction was final in state court when the U.S. Supreme Court denied his petition for a writ of certiorari on direct review on October 6, 1997. *See Mungin v. Florida*, 522 U.S. 833, 833 (1997) (denying petition for a writ of certiorari); *see also Jimenez v. Quarterman*, 555 U.S. 113, 119 (2009) (quoting *Clay v. United States*, 537 U.S. 522, 527 (2003)). Mungin's statute of limitations began running for purposes of Section 2244(d)(1)(A) on this date. On September 17, 1998, Mungin filed his first state postconviction relief motion, which tolled the statute of limitations after it had run for 346 days. *See* 28 U.S.C. § 2244(d)(2). The clock began running again on June 29, 2006, when the Florida Supreme Court denied Mungin's initial state postconviction relief motion. *See Lawrence v. Florida*, 549 U.S. 327, 329, 333–34 (2007). No one disputes that Mungin's initial federal habeas petition was filed 19 days later

on the final day possible, July 18, 2006. Given that Mungin filed his Brown and Deputy Gillette claims in state court at least one day after July 18, 2006—and in fact did so much later—the statute of limitations ran on all claims not brought in the initial federal habeas petition as far as Section 2244(d)(1)(A) is concerned.

Mungin also cannot benefit from couching his claims as based on newly discovered evidence under Section 2244(d)(1)(D). Giving Mungin the benefit of the doubt, we will assume that Mungin could not have discovered Brown's allegations until he executed his affidavit on June 30, 2007—so his one-year clock started to run on that date. Mungin waited over a month to file his successive state motion for postconviction relief on August 16, 2007. That filing tolled his one-year clock. *See* 28 U.S.C. § 2244(d)(2). The Florida Supreme Court denied relief on this claim when its mandate issued on August 16, 2013—so the clock started running again. *See Lawrence*, 549 U.S. at 329, 333–34. But Mungin waited until August 18, 2014—over a year later—to ask the district court to end the stay, reopen the federal case, and supplement his habeas petition with the Brown-related ineffective assistance of counsel claim. The State objected to the 2014 Brown amendment on AEDPA statute of limitations grounds. When we exclude the time this claim was in state court, we see that Mungin waited approximately thirteen months and one week after his one-year AEDPA statute of limitations clock began running on this claim. Therefore, even giving Mungin the benefit of the doubt, the Brown claim was untimely.

The Deputy Gillette claim is even more clearly untimely. Deputy Gillette signed his affidavit on September 24, 2016, but Mungin did not file his third successive postconviction motion in state court on this issue until more than a year later on September 25, 2017. *See Mungin VI*, 320 So. 3d at 625. And, after the Florida Supreme Court ruled on this issue in 2020, he did not try to amend his federal habeas petition until 2022. So, even assuming Mungin could not have discovered this claim with the exercise of due diligence until Deputy Gillette signed his affidavit, Mungin still waited too long to bring this claim.

2.

Because both claims were added in federal court after the statute of limitations had run, the key question is whether either claim relates back to Mungin's original habeas petition. "Relation back is a legal fiction employed to salvage claims that would otherwise be unjustly barred by a limitations provision." *Caron v. NCL (Bah.), Ltd.*, 910 F.3d 1359, 1368 (11th Cir. 2018) (citing *McCurdy v. United States*, 264 U.S. 484, 487 (1924); *Moore v. Baker*, 989 F.2d 1129, 1131 (11th Cir. 1993)). In the habeas context, relation back is allowed when "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed. R. Civ. P. 15(c)(1)(B). A new claim does not relate back simply "because both the original petition and the amended pleading arose from the same trial and conviction." *Mayle v. Felix*, 545 U.S. 644, 650 (2005).

The district court allowed amendment to add the Brown claim under relation back principles but disallowed amendment to add the Deputy Gillette claim, and the parties disagree about the standard of review that we apply to this issue. Mungin argues that we review for abuse of discretion. The State argues that we must review this issue *de novo*. We agree with the State.

We have held that "[a]pplication of Rule 15(c) is reviewed for abuse of discretion." *Powers v. Graff*, 148 F.3d 1223, 1226 (11th Cir. 1998) (citing *Andrews v. Lakeshore Rehab. Hosp.*, 140 F.3d 1405, 1409 n.6 (11th Cir. 1998)). But we need not "follow a prior panel's decision where an intervening Supreme Court decision establishes that the prior panel decision is wrong." *United States v. Hogan*, 986 F.2d 1364, 1369 (11th Cir. 1993) (citing *United States v. Giltner*, 972 F.2d 1563, 1566 (11th Cir. 1992); *Lufkin v. McCallum*, 956 F.2d 1104, 1107 (11th Cir. 1992)). And, as relevant here, the Supreme Court held in *Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538 (2010), that Federal Rule of Civil Procedure 15(c)(1) "mandates relation back once the Rule's requirements are satisfied; it does not leave the decision whether to grant relation back to the district court's equitable discretion." *Id.* at 553 (citing Fed. R. Civ. P. 15(c)(1)). The Court has thus plainly held that relation back under Rule 15(c)(1) turns on a legal question that is not left to the district court's discretion.

In light of *Krupski*, we agree with most of our sister circuits and conclude that we must decide relation back questions *de novo*.[2] Whether a claim relates back to a previous pleading is a quintessentially legal question. And we are in no worse position than district courts to perform this kind of legal analysis because it involves assessing whether the facts that could support a new claim were present in a timely pleading. Because it is necessary to give effect to *Krupski*, we adopt a *de novo* standard of review of the Rule 15(c)(1) relation back inquiry.

3.

Having settled the standard of review, we ask whether Mungin's allegation that his counsel should have investigated more

---

[2] *See ASARCO LLC v. Goodwin*, 756 F.3d 191, 202 (2d Cir. 2014) (*de novo*); *United States v. Santarelli*, 929 F.3d 95, 100 (3d Cir. 2019) (same); *Robinson v. Clipse*, 602 F.3d 605, 607 (4th Cir. 2010) (same); *Durand v. Hanover Ins. Grp., Inc.*, 806 F.3d 367, 374 (6th Cir. 2015) (same); *ASARCO, LLC v. Union Pac. R.R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2014) (same); *United States v. Roe*, 913 F.3d 1285, 1298 (10th Cir. 2019) (same); *United States v. Hicks*, 283 F.3d 380, 389 (D.C. Cir. 2002) (treating relation back under Rule 15(c) as a legal question); *Anza Tech., Inc. v. Mushkin, Inc.*, 934 F.3d 1359, 1367 (Fed. Cir. 2019) (*de novo*). *But see Turner v. United States*, 699 F.3d 578, 585 (1st Cir. 2012) (abuse of discretion); *United States v. Alaniz*, 5 F.4th 632, 635 n.2 (5th Cir. 2021) (collecting cases) (declining to decide this issue but noting that the Fifth Circuit has tended to use abuse of discretion review); *Coleman v. United States*, 79 F.4th 822, 827–29 (7th Cir. 2023) (abuse of discretion); *Taylor v. United States*, 792 F.3d 865, 869 (8th Cir. 2015) (quoting *Dodd v. United States*, 614 F.3d 512, 515 (8th Cir. 2010)) (abuse of discretion).

thoroughly, and presented the testimony of, George Brown relates back to his original timely petition. Mungin did not mention Brown in his original habeas petition. In his original habeas petition, there are also no other facts that could reasonably serve as the basis for an ineffective assistance of counsel claim related to Brown at all, let alone related to Brown at the guilt phase of trial. Thus, the original habeas petition does not provide a factual basis for relation back.

Mungin argues that his Brown claim is related to his original claim that his counsel committed ineffective assistance at the guilt phase of trial. We disagree. Although Claim I in Mungin's original petition is "Mr. Mungin Received Ineffective Assistance of Counsel at the Guilt Phase of his Capital Trial, in Violation of the Sixth Amendment to the United States Constitution," Dist. Ct. Doc. 1-2 at 28, that general claim does not mean that all new ineffective assistance of counsel claims relate back. The Supreme Court has held that "[a]n amended habeas petition . . . does not relate back (and thereby escape AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." *Mayle*, 545 U.S. at 650. Accordingly, in the habeas context, a new ineffective assistance of counsel claim must relate to the specific facts underlying an already raised claim to "ar[i]se out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed. R. Civ. P. 15(c)(1)(B). That is, the new claim must arise out of the conduct, transaction, or occurrence in the original petition—which cannot be viewed so broadly as to allow a claim that merely involves another issue related to representation at trial. *Cf.*

Dean v. United States, 278 F.3d 1218, 1222 (11th Cir. 2002) (concluding that claims related back where the amendment sought "to add facts and specificity to the original claim[s]"). Applying these standards, the Brown claim is not sufficiently related to the allegations in Mungin's initial habeas petition to relate back under Rule 15(c).

The district court's decision to allow Mungin to raise this claim through an amendment "does not establish the timeliness of the amended claim[]." *Watkins v. Stephenson*, 57 F.4th 576, 582 (6th Cir. 2023) (citing *Hill v. Mitchell*, 842 F.3d 910, 922–23 (6th Cir. 2016)). Because the Brown-related ineffective assistance of counsel claim was untimely under AEDPA's statute of limitations, the district court was correct to dismiss this claim with prejudice.

4.

Finally, we ask whether Mungin's ineffective assistance claim about Deputy Gillette relates back to his original petition. This claim is based on Mungin's argument that there is an inconsistency between Deputy Gillette's trial testimony that he saw shell casings in the Dodge Monaco and the inventory storage receipt where he stated that he saw "nothing visible" in the car. *Mungin VI*, 320 So. 3d at 625.

The district court rejected Mungin's request to amend his petition to add this claim because, in part, it concluded that this claim was barred by the statute of limitations. Mungin argues that the district court should have allowed the amendment and, only afterward, addressed the timeliness or merits of the claim. We disagree. "Both the State and the victims of crime have an important

interest in the timely enforcement of a sentence." *Hill v. McDonough*, 547 U.S. 573, 584 (2006) (citing *Calderon v. Thompson*, 523 U.S. 538, 556 (1998)). District courts may decide timeliness issues without pausing a federal case to allow untimely claims to be exhausted in state court. They are also under no obligation to allow habeas petitioners to raise new futile claims that are time barred. *See Foman v. Davis*, 371 U.S. 178, 182 (1962); *Andrews*, 140 F.3d at 1409 n.7; *In re Engle Cases*, 767 F.3d 1082, 1122–23 (11th Cir. 2014); *Coventry First, LLC v. McCarty*, 605 F.3d 865, 870 (11th Cir. 2010) (quoting *Cockrell v. Sparks*, 510 F.3d 1307, 1310 (11th Cir. 2007)).

The district court correctly held that Mungin's new claim does not relate back to his original petition. Mungin's original petition mentioned Deputy Gillette only in the context of his penalty-phase testimony. It did not raise any claims pertaining to his trial testimony that he saw shell casings inside the Dodge Monaco. Mungin's ineffective assistance of counsel claim involving Deputy Gillette, however, is based on the failure of Mungin's attorney to cross-examine Deputy Gillette about the shell casings in the guilt phase of the trial. Thus, the new ineffective assistance of counsel claim is based on actions related to testimony of a different type and from a different time than the testimony mentioned within Mungin's original petition.

Because the testimony underlying Mungin's new ineffective assistance of counsel claim is of a different type and from a different time than the testimony underlying the timely claims, it does not relate back. *See Mayle*, 545 U.S. at 650. Consequently, the Deputy

Gillette-related ineffective assistance of counsel claim is untimely and barred by AEDPA's statute of limitations.

III.

We **AFFIRM** the district court's denial of Mungin's petition for a writ of habeas corpus.

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

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January 08, 2024

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 22-13616-P
Case Style: Anthony Mungin v. Secretary, Florida Department of Corrections, et al
District Court Docket No: 3:06-cv-00650-BJD-JBT

Electronic Filing
All counsel must file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Although not required, non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing are available on the Court's website.

Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

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CM/ECF Help Desk: 404-335-6125 Cases Set for Oral Argument: 404-335-6141

OPIN-1 Ntc of Issuance of Opinion

Appendix C

Order, *Mungin v. Sec'y, Fla. Dep't of Corr.,* No. 22-13616,
United States Court of Appeals for the Eleventh (March 14, 2023)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 22-13616-P

ANTHONY MUNGIN,

Petitioner - Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL,

Respondents - Appellees.

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

ORDER:

Appellant's motion for certificate of appealability is **GRANTED** limited to the following questions:

(1) Did Appellant's trial counsel provide ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984), by (a) failing to adequately impeach Ronald Kirkland; (b) failing to elicit testimony from Detective Christie Conn; and/or (c) failing to investigate and present George Brown's testimony?

(2) Did the district court err in denying as futile Appellant's motion for leave to amend to add an ineffective assistance of counsel claim under *Strickland v. Washington*, 466 U.S. 668 (1984), related to Deputy Gillette?

/s/ Andrew L. Brasher
UNITED STATES CIRCUIT JUDGE

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

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March 14, 2023

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Appeal Number: 22-13616-P
Case Style: Anthony Mungin v. Secretary, Florida Department of Corrections, et al
District Court Docket No: 3:06-cv-00650-BJD-JBT

All counsel must file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Although not required, non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing are available on the Court's website.

The enclosed order has been ENTERED.

Appellant's brief is due 40 days from the date of the enclosed order.

Clerk's Office Phone Numbers

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Cases Set for Oral Argument:	404-335-6141		

MOT-2 Notice of Court Action

Appendix D

Application for Certificate of Appealability, No. 22-13616,
United States Court of Appeals for the Eleventh (December 13, 2022)

No. 22-13616-P

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ANTHONY MUNGIN,

Appellant,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Appellee.

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

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APPLICATION FOR CERTIFICATE OF APPEALABILITY

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Anthony Mungin v. Secretary, Florida Dep't of Corrections
No. 22-13616-P

Appellant Anthony Mungin files this Certificate of Interested Persons and Corporate Disclosure Statement, listing the parties and entities interested in this appeal, as required by FRAP 26.1, 11th Cir. R. 26.1-1.

Davis, Brian J.	United States District Judge
Mungin, Anthony	Appellant/Petitioner
Rodriguez, Jason	Attorney for Appellee
Scher, Todd Gerald	Attorney for Appellant
Toomey, Joel Barry	United States Magistrate Judge
Veleanu, Leor	Attorney for Appellant

APPLICATION FOR CERTIFICATE OF APPEALABILITY

COMES NOW THE APPELLANT, ANTHONY MUNGIN, by and through his undersigned counsel, and herein moves the Court to grant a Certificate of Appealability (COA).

Appellant is a death-sentenced inmate whose case is on appeal from the denial of his Amended Petition for Writ of Habeas Corpus (DE:30). The United States District Court for the Middle District of Florida issued an Order denying the petition and a COA, and thereafter an Order denying his motion to alter or amend pursuant to Fed. R. Civ. P. 59 (e) (DE:91; 95). Timely notice of appeal was filed (DE:96).[1]

STANDARD FOR ISSUANCE OF A COA

A prisoner seeking a COA need only demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c)(2). A prisoner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. *See Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). A COA is also grantable on a procedural issue when jurists of reason would find it

[1] In order to ensure compliance with the Court's word-count limitations, Appellant refers the Court to his petition below to set forth the procedural history of the case, along with an outline of the trial and postconviction evidentiary hearing testimony (DE:30).

debatable "whether the petition states a valid claim of the denial of a constitutional right" and "whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

A court determining whether a COA should be granted is required to conduct an "overview" of the claims and a "general assessment of their merits," *Miller-El*, 537 U.S. at 336. However, the threshold requirement for a COA "does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it." *Id*. Thus, a petitioner need not show that "the appeal will succeed"; nor should a court decline a COA because the court "believes the applicant will not demonstrate an entitlement to relief." *Id*. at 337. Moreover, a petitioner is not required to demonstrate that "some jurists would grant the petition for habeas corpus" for a COA to issue. *Id*. at 338. While the severity of the penalty is not by itself sufficient to warrant the automatic issuance of a COA, it is a consideration. *Cf. Barefoot v. Estelle*, 463 U.S. 880, 893 (1983).

Appellant submits that a COA should issue as to the following claims:

I. APPELLANT'S GUILT PHASE VERDICT IS UNREALIABLE.

Due to the combined effects of ineffectiveness of trial counsel and the State's withholding of material exculpatory evidence, the outcome of Appellant's trial was unreliable, in violation of the Sixth Amendment.

A. Ineffectiveness during voir dire.

1. Facts Underlying Claim.

Trial counsel, Assistant Public Defender Charles Cofer, rendered prejudicially deficient performance when he accepted the jury without objection even though the State had clearly struck jurors on the basis of race. Cofer's deficient performance resulted in violation of Appellant's right to equal protection under *Batson v. Kentucky*, 476 U.S. 79 (1986), as was his right to have this issue considered on direct appeal, in violation of the Sixth Amendment and *Strickland v. Washington*, 466 U.S. 668 (1984). The district court agreed that the FSC did not address the deficiency prong of the *Strickland* standard but was "not convinced that there was an unreasonable application or an unreasonable determination of the facts" on the prejudice prong (DE:91 at 17-19).

The prosecutor eliminated seven prospective black jurors, three for cause and four by peremptory strikes (R531-38; 539-40; 544-46; 551-53; 554-55). Four blacks served on the jury (R559-60). As to three of the four black jurors eliminated by peremptory strike, the prosecutor articulated reasons that were not demonstrably pretextual. However, the peremptory strike to remove Helen Galloway was demonstrably pretextual, and Cofer asserted that the strike was exercised because Galloway was black and requested that the judge conduct an appropriate *Batson* inquiry under *State v. Neil*, 457 So. 2d 481 (Fla. 1984). The prosecutor stated that Galloway was struck because she had "mixed emotions" about the death penalty,

and that each juror, white or black, who reported mixed emotions about the death penalty, had been struck (T534). He noted that a white woman, Mrs. Podejko, was struck for this reason (T534).[2]

Defense counsel Cofer asserted that the State's purported reason was a ruse, and that having "mixed emotions" does not indicate whether the mix is weighted toward support or opposition to the death penalty (T534-35). "Mixed emotions" is ambiguous, Cofer stated, and the State made no effort to clarify what Galloway had meant (T537). Cofer pointed out that Galloway's responses were no different from those of juror Venettozzi, who said the death penalty would depend on the circumstances (T537). The prosecutor's sole rebuttal that the record spoke for itself as to his reasons, and that three people who said they had mixed emotions had been struck, without regard to whether they were black or white (T537-38). The judge stated that having mixed emotions about the death penalty had nothing to do with race and overruled the defense objection (T538). Galloway did not serve as a juror (T559-60).

Cofer did not renew his previous objections to the Galloway strike when the final jury was selected (T560), thereby waiving the issue under Florida law. *See*

[2] However, in addition to stating that she had mixed feelings about the death penalty, Podejko also was not sure she could *convict* if it might subject the defendant to a death sentence (R374; 403-04).

Ault v. State, 866 So. 2d 674, 683 (Fla. 2004) (in order to prevent waiver or juror challenge issue, opponent must call court's attention to its earlier objection before jury is sworn). The prejudice in failing to object caused the issue not to be preserved for appeal. *See Mungin v. State,* 689 So. 2d 1026, 1030 n.7 (Fla. 1995), *cert. denied*, 522 U.S. 833 (1997) [*Mungin I*].

2. The Florida Supreme Court's ruling is contrary to and/or an unreasonable application of *Strickland* and *Batson.*

Given the FSC's finding on direct appeal that this issue was not preserved for review, Appellant alleged that Cofer unreasonably failed to renew his objection to the final composition of the jury. Without affording an evidentiary hearing, the FSC affirmed, appearing to address only prejudice. *Mungin v. State, II*, 932 So. 2d 986, 996-97 (Fla. 2006) [*Mungin II*].

The FSC's decision is an unreasonable application of *Strickland* and its progeny. Cofer's deficient performance had an effect not on the trial itself but on Appellant's direct appeal. *See Davis v. Sec'y. for Dep't. Of Corrections*, 341 F. 3d 1310, 1315 (11th Cir. 2003) ("Thus, Davis faults his trial counsel not for failing to raise a *Batson* challenge–which counsel did–but for failing to preserve it. As his federal habeas counsel puts it, the issue is not trial counsel's failure `to bring the *Batson* issue to the attention of the trial court,' but "`failure in his separate and distinct role of preserving error for appeal.'"). "[W]hen a defendant raises the unusual claim that trial counsel, while efficacious in raising an issue, nonetheless

failed to preserve it for appeal, the appropriate prejudice inquiry asks whether there is a reasonable likelihood of a more favorable outcome on appeal had the claim been preserved." *Davis*, 341 F. 3d at 1316. This Court observed that the Supreme Court had also reached the same conclusion in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), where the Supreme Court explained that *Strickland*'s prejudice prong "is not always fastened to the forum in which counsel performs deficiently; even when it is *trial* counsel who represents a client ineffectively in the *trial* court, the relevant focus in assessing prejudice may be the client's appeal." *Davis*, 341 F. 3d at 1314-15.[3]

The FSC failed to properly apply *Strickland* and *Flores-Ortega.* As the FSC's one-sentence "no abuse of discretion" conclusion, more is required under *Flores-Ortega* for the FSC to appropriately determine that there is no reasonable probability of a more favorable outcome on appeal had trial counsel properly preserved the issue. The propriety of granting the State's peremptory challenge to Galloway was extensively briefed by the parties both on direct appeal and in Appellant's collateral litigation. The FSC conducted no analysis as to whether there was a reasonable probability of a more favorable outcome on appeal had the issue been preserved, and

[3] The district court declined to follow *Davis*, relying instead on a 2010 unpublished decision from the Court which distinguished *Davis* (DE:91 at 21). *Davis*'s application to the facts of that particular cases were fully briefed by the parties, as the text of that unpublished decision makes clear. *See Carratelli v. Stepp*, 382 F. Appx. 829 (11th Cir. 2010). All the more reason why a COA should be granted as to Appellant's claim.

its conclusion that the trial court did not err in overruling the defense objections to the striking of Galloway was contrary to and/or an unreasonable application of *Batson* and its progeny.

Galloway testified that she had lived in the area fourteen years, was single, had one child, was a shipment coordinator for Revlon, and had worked for Revlon for eight and a half years (T313, 378-79). Galloway was asked only three questions about the death penalty:

> MR. DE LA RIONDA: How do you feel about the death penalty?
>
> A VENIREMAN: I have mixed emotions.
>
> MR. DE LA RIONDA: Thank you, ma'am.

(T379).

> MR. DE LA RIONDA: . . . Mrs. Galloway, same questions. First part – first part of the trial, could you find the Defendant guilty if the State proves the case against the Defendant, could you find him guilty knowing that it could subject him to the death penalty?
>
> A VENIREMAN: Yes.
>
> MR. DE LA RIONDA: Second part, if the aggravating factors outweigh the mitigating factors, could you make a recommendation of death?
>
> A VENIREMAN: Yes.
>
> MR. DE LA RIONDA: Thank you.

(T407-08).

In objecting to the State's use of a peremptory against Galloway, counsel correctly asserted that Galloway's answers were indistinguishable from those of Mr. Venettozzi, a white male who served on the jury (R559-60). The record shows the first "questioning" of Venettozzi:

> [Prosecutor] Venettozzi. How do you feel about the death penalty, sir?
>
> A Venireman: I think it's mixed. It depends on how serious.
>
> [Defense counsel] Excuse me, Your Honor, I couldn't hear the response.
>
> A Venireman: I believe it depends on the circumstances. I don't think I could say yes or no without knowing.
>
> [Prosecutor] Okay. Thank you, sir.

(R374).[4] Follow-up questioning by defense counsel of Venettozzi revealed:

> [Defense counsel] You also indicated, I think, that the death penalty–you believe in the death penalty depending on the circumstance. Can you tell me what you meant by that?
>
> [A Venireman] If it's a violent–a violent–if they prove that the person is guilty, if you all prove to me that he was guilty and it was violent, malicious, I believe in the death penalty. I don't necessarily feel that death–I don't necessarily feel the death penalty goes with the guilty charge.

[4] Prior to this exchange, the prosecutor learned from Venettozzi that his son had been previously accused of a crime, but charges were later dropped due to insufficient evidence (R365-66).

> [Defense counsel] Okay. Do you feel as though there would be some circumstances then where you could weigh mitigation against any potential aggravation–
>
> [A Venireman] Yes, sir.
>
> [Defense counsel] –and vote for a life sentence?
>
> [A Venireman] Yes.
>
> [Defense counsel] Even if first degree murder has been proven to you?
>
> [A Venireman] Yes.

(R483-84). Hence, both jurors indicated mixed feelings about the death penalty, but when pressed by defense counsel, both indicated an ability to impose the death penalty and follow the law as instructed by the court. This is not a situation where Galloway expressed an unequivocal discomfort or disagreement with the death penalty.

In *Batson*, the Supreme Court held that "[p]urposeful racial discrimination in selection of the venire violates a defendant's right to equal protection." 476 U.S. at 86. Courts must engage in a three-step analysis in evaluating a *Batson* claim. First, a defendant must establish a prima facie case of discriminatory intent on the part of the prosecution by a showing that "`he is a member of a cognizable racial group' and that the `relevant circumstances raise an inference' that [the prosecution] has `exercised peremptory challenges to remove from the venire members of [his]

race.'" *Fludd v. Dykes*, 863 F.2d 822, 829 (11th Cir. 1989).[5] Next, "the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Batson*, 476 U.S. at 97. If the State clears this hurdle, the trial court has to determine whether the defendant has established purposeful discrimination. *See Purkett v. Elem*, 514 U.S. 765, 767-68 (1995). Appellant's claim centers on the third step: "the persuasiveness of the [proffered] justification." *Rice v. Collins*, 126 S. Ct. 969, 974 (2006).

The prosecutor's reasons for striking Galloway ("mixed emotions") was pretextual when compared to Venettozzi's identical responses. *See Miller-El v. Dretke*, 125 S. Ct. 2317, 2332 (2005) ("The whole of the voir dire testimony subject to consideration casts the prosecution's reasons for striking Warren in an implausible light. Comparing his strike with the treatment of panel members who expressed similar views supports a conclusion that race was significant in determining who was challenged and who was not"). That the trial court concluded that the State was justified in exercising its peremptory against Galloway does not vitiate a court's responsibility to review the prosecutor's proffered reason to see if it, as the *Miller-El* Court wrote, "holds up" to scrutiny.

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[5]The commonality of race requirement was later eliminated in *Powers v. Ohio*, 499 U.S. 400 (1991).

In rejecting this claim, it appears that the district court misunderstood or misconstrued Appellant's actual claim. The district court's Order states that "[a]ssuming arguendo counsel failed to properly preserve the issue, the FSC would have had to determine whether the error constituted fundamental error 'such that preservation would not be required'" (DE:91) (quotation omitted). From this proposition, the court addressed what it presumed to be the reasoning for the FSC's determination that "the trial court did not abuse its discretion in granting the peremptory challenge of Mrs. Galloway" (DE:91).[6] But the FSC never addressed any fundamental error on direct appeal; it found the error unpreserved. Appellant's argument is not that his *Batson* claim was fundamental error.

The district court's denial also concluded that Appellant failed to marshal evidence to show that "race played any role in this case, that any juror was biased, or that it is reasonably probable a black juror would have seen the evidence differently than the white jurors" who found Appellant guilty (DE:91 at 23) (quoting *Pryear v. Inch*, No. 3:19-cv-357-MCF-MJF, 2020 WL 6587280, at *7 (N.D. Fla. Aug. 9, 2020), *report and recommendation adopted by* 2020 WL 6582668 (N.D. Fla. Nov. 10, 2020)). Appellant is unaware of any requirement that he demonstrate that a "black juror" would view the evidence in his case "differently" than a "white" juror

[6]The Florida Supreme Court did not provide any reasoning for its rejection of Appellant's claim.

or frankly how one would even attempt to undertake such an assessment.[7] Indeed, *Batson* rejected the proposition from *Swain v. Alabama*, 320 U.S. 202 (1965), that a prosecutor could strike a black juror based on an assumption or belief that the black juror would favor a black defendant. The Supreme Court emphasized that a prosecutor may not rebut a claim of discrimination "by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race." 476 U. S. at 97. If a prosecutor cannot assume that a black juror would decide a case in a certain way, then it is contrary to *Batson* to require a defendant to show that a black juror would or would not decide the case in a certain way because he is black.

A COA is warranted because Appellant received prejudicially deficient performance from trial counsel who unreasonably failed to properly preserve a meritorious *Batson* challenge to the State's exercise of a peremptory challenge of juror Galloway, and because the FSC's decision is contrary to and/or an unreasonable application of *Strickland, Batson*, and their progeny.

C. Failure to Adequately Impeach Ronald Kirkland, and Failure to Elicit Favorable Testimony from Detective Conn.

[7]The quotation used by the district court does appear in the R&R in *Pryear v. Inch*. But neither case cited by the Magistrate Judge in the *Pryear* R&R after the "how a black juror would view evidence versus a white juror" language stands for that quite remarkable proposition.

Appellant was entitled to the effective assistance of counsel at his capital trial. *See Strickland v. Washington*, 466 U.S. 668 (1984). The State had a concomitant obligation to disclose any exculpatory and impeaching evidence. *See Brady v. Maryland*, 373 U.S. 83 (1963). The deficiencies in trial counsel's performance and/or the failure by the State to disclose impeachment evidence deprived Appellant of a reliable adversarial testing.

1. Deficient Impeachment of Ronald Kirkland.

Without a confession or physical evidence linking Appellant to the crime scene, Kirkland's identification of Appellant at the scene was unquestionably a critical piece of evidence for the prosecution. Moreover, Kirkland's testimony provided evidence supporting the State's theory of robbery; he was the only witness to testify that he saw Appellant leave the scene of the crime with a paper bag (R671).[8] Thus, any evidence undermining Kirkland's credibility was critical to the jury's assessment of the State's case.

Trial counsel Cofer failed to utilize critical impeachment evidence in his own file that would have given the jury a truer picture of Kirkland's motivations and thus his credibility. This evidence, in the form of a pending violation of probation warrant and an outstanding capias, was neither elicited on Kirkland's cross-

[8] Appellant was not charged with robbery or attempted robbery.

examination nor argued in closing arguments. In denying this claim, the FSC concluded that this allegation was meritless under the prejudice prong of *Strickland*. *Mungin II*, 932 So. 2d at 998-99. Appellant submits that the testimony and exhibits submitted at the state court evidentiary hearing established both prongs of *Strickland*, the FSC's decision is an unreasonable application of *Strickland*, and findings of fact are incorrect or unreasonable. *See* 28 U.S.C. §2254 (e)(1).

At the state court evidentiary hearing, Cofer explained that his strategy was to argue that Appellant was not guilty based on reasonable doubt (PCR270). Because there were no fingerprints linking Appellant to the convenience store where the homicide occurred nor were there any inculpatory statements made, his strategy centered on attacking Kirkland's perception as to the individual he purportedly saw exiting the store (PCR272-73). While Cofer did recall impeaching Kirkland's ability to identify Appellant (PCR273), he did not attempt to impeach Kirkland on the issue of bias because he did not know that such evidence existed. This failure is noteworthy given Cofer's practice to request criminal histories of all prosecution witnesses; in fact he received such a printout for Kirkland (PCR250-52). This criminal history was run after Kirkland's arrest for worthless check charges in September, 1992, and he would have reviewed any criminal histories prior to deposing Kirkland (PCR253; 255). Kirkland's deposition was conducted, however, in June 1992, prior to his arrest and subsequent probation sentence.

While there was some confusion about whether the State had provided the defense with an accurate account of Kirkland's criminal history, as it is obliged to do under *Brady,* the State's cross-examination of Cofer at the evidentiary. Hearing established that Cofer in fact had received from the State the information that Kirkland had a criminal history and was on probation at the time he testified for the State (PCR345) ("I will concede that in my file there was a docket that should have made me aware of that factor").[9] Cofer did not, however, recall ever having any documentation indicating that arrest warrants had been issued against Kirkland weeks after he was placed on probation (PCR354). These records, introduced at the hearing, established that Kirkland was never taken into custody but the capiases were inexplicably recalled around February, 1993 (PCR270; Defense Exhibits 5, 6, 7). Reasonably competent counsel would ensure that he adequately investigated the criminal history of the prosecution's principal witness. *Cf. Rompilla v. Beard*, 125 S. Ct. 2456 (2005).

While the record does support the fact that Cofer was aware that Kirkland had been on probation at the time he testified, contrary to the conclusion of the FSC, it also supports the fact that he was not aware that Kirkland had been subsequently

[9]In light of this testimony, the FSC's "finding" that Kirkland "did not tell anyone from the State Attorney's Office that he was on probation" is wrong and entitled to no deference.

arrested and had capiases issued against him which were subsequently and inexplicably recalled.[10] Under *Strickland*, counsel has an obligation to investigate and discover any available evidence tending to impeach the prosecution's key witness. At the evidentiary hearing, Cofer testified that had he known that Kirkland was on probation during the pendency of this case in addition to having had a capias recalled just prior to Mr. Mungin's trial, he would have wanted to elicit this information from Kirkland, as he explained (PCR274). He agreed that it would have been an effective argument because he would have been able to argue that Kirkland was more certain at trial than he was earlier about his identification of Appellant because he had pending legal difficulties and was attempting to curry favor with the State (PCR361-62).[11] Despite knowing that Kirkland had been on probation, he did not use this evidence to impeach him at trial.

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[10] Cofer testified that he could not hold out the possibility that the State had handed him the information concerning the January 1993 violation of probation and capias because the information was contained in his own file (PCR359-60). Cofer further testified that had he made the connection that Kirkland had a probation warrant he would have been "duty bound" to use the information to cross-examine Kirkland (PCR369).

[11] The time frames involved here would have lent strong support to the defense impeachment. Initially, in 1990, when Kirkland reviewed the photo spread, he told Detective Conn that he could not swear to any identification in court. After that photo spread and 1990 statement, Kirkland began having more legal troubles and, by the time of his June, 1992, deposition, he began to deny having told Conn that his identification was not good enough to swear to in court. After his deposition, Kirkland continued to have legal troubles which persisted until the time of Mr.

Appellant was prejudiced. A witness' bias and incentive for testifying is information that a jury is entitled to assess credibility. *Giglio v. United States*, 405 U.S. 763 (1972); *Moore v. State*, 623 So. 2d 608, 609 (Fla. 4th DCA 1993); *Brown v. Wainwright*, 785 F. 2d 1457, 1464 (11th Cir. 1986). This is particularly true where the witness is a critical one and the State's theory rests in large part, if not exclusively, on that witness's testimony and credibility. Under Florida law, this evidence would have been admissible and relevant. *See Auchmuty v. State*, 594 So. 2d 859, 860 (Fla. 4th DCA 1992); *Douglas v. State*, 627 So. 2d 1190, 1191-92 (Fla. 1st DCA 1993); *Phillips v. State*, 572 So. 2d 16, 17 (Fla. 4th DCA 1990); *Watts v. State*, 450 So. 2d 265, 267 (Fla. 2d DCA 1984). And contrary to the FSC's conclusion that Appellant failed to prove that there was "a deal" between Kirkland and the State, it matters not whether there was an actual *quid pro quo* between the witness and the State. *See Jean-Mary v. State*, 678 So. 2d 928, 929 (Fla. 3d DCA 1996).

The FSC's reliance on Kirkland's cross-examination on the issue of identity is insufficient under *Strickland* and refuted by the record. At trial, when Cofer pressed Kirkland to admit that he did not have a "nice drawn-out look at the fellow,"

Mungin's trial, thus giving him an incentive to curry favor with the State (as his identification of Mr. Mungin became more certain over time) and continue to deny having told Conn that he could not swear to his identification in court.

Kirkland did not admit to the weakness of his identification; rather, he said he remembered "looking back at him because it make me kind of mad. He about run me over coming out of the door" (T. 677-78). When Cofer pressed Kirkland as to the height of the individual he claimed to see exiting the store, asking him whether, at the time he believed him to be approximately five foot five, Kirkland did not admit to the weakness of his identification; rather, said "Yeah. I'm not sure. That was two years ago" (T. 678). When Cofer pressed Kirkland about whether he told the female police officer at the scene (Detective Conn) that the man was five foot five inches, Kirkland did not admit to the weakness of his identification; rather, he twice said "I'm not sure" to the same question (T. 679). When Cofer pressed Kirkland about whether he had previously estimated the person to be between 27 and 35 years of age, Kirkland did not agree with the weakness of his identification; rather, he said "I don't really recall. Like I say, that was two years ago" (R. 679). And finally, when Cofer pressed Kirkland about whether Detective Conn asked him he would be able to swear in court that the man he identified in the photo spread was the man he saw at the store, Kirkland did not admit to the weakness of his identification nor did he testify at first that he did not remember telling Detective Conn that he could not make an identification in the courtroom based on the photograph itself (DE:91 at 32); rather, he initially responded that he was "not sure whether she said if I could swear. I told her to the best of my ability that was the man I saw leaving the store"

(T. 685). This hardly constitutes a vigorous attack on Kirkland's identification as to render cumulative the potential of additional impeachment on a separate issue of bias; the additional source of impeachment "would not have been merely repetitious, reinforcing a fact that the jury already knew; instead, `the truth would have introduced a new source of potential bias.'" *United States v. Rivera Pedin*, 861 F. 2d 1522, 1530 (11th Cir. 1988) (quotation omitted).

2. Failure to elicit testimony from Detective Conn.

Cofer unreasonably failed to provide the jury with information from the deposition of Detective Conn that Kirkland said he would not be able to swear in court that the person he identified as Anthony Mungin in a photo spread was the actual person he saw on the day in question. Conn's deposition clearly contained information that would have been helpful for the defense at trial:

> Q [Prosecutor] Detective Conn was asked about what Mr. Kirkland told her?
>
> A [Mr. Cofer] Correct.
>
> Q Did she not state in deposition–and I can refer you to page 54 just to make sure we get the correct quote there. Take a second to look and make sure we're–I believe it's on page 54 and 57 also.
>
> (Witness reading transcript)
>
> A On 57, and this is in response to your questions during cross in the depo, and you asked him could he swear to it in court. Answer: right. And he said he couldn't, I guess, based on the photograph itself. And her answer was: He said he couldn't based–he couldn't based on the photograph.

> Q Okay. I gather that could have been brought out if you had called her on your case?
>
> A Yes.

(PCR348-49).

The state trial court concluded that Cofer made a tactical decision not to call Conn "based upon what he felt the facts of the case supported" (PCR206-07). The FSC likewise rejected this claim. *Mungin II*, 932 So. 2d at 999. The testimony and exhibits submitted at the state court evidentiary hearing established both prongs of *Strickland*, the FSC's decision is an unreasonable application of *Strickland*, and the findings of fact are incorrect or unreasonable. *See* 28 U.S.C. §2254 (e)(1).

The FSC overlooked Cofer's testimony at evidentiary hearing that Kirkland, on cross-examination at trial, had admitted to much of what he could have elicited from Detective Conn ***with the "exception about the certainty of his identification"*** (PCR275) (emphasis added) Cofer said he made a decision not to call Conn because "we just felt at the time that it was just not worth losing open and close to recall Detective Conn, who was an adverse witness, to establish that one fact" (*Id.*). However, as the FSC acknowledged, the trial record actually contradicts Cofer's proffered tactical decision: Cofer waived his opening closing argument (PCR362).

The FSC also found that Cofer discussed this issue with Appellant, who "agreed" with this strategic decision; this is ***entirely unsupported by the record.***

Cofer was first asked about this issue on direct examination by Appellant'scollateral counsel:

> Q You made a tactical decision not to call Detective Conn to rebut Mr. Kirkland's testimony at the time of trial, correct?
>
> A Yes. We[12] discussed this with Mr. Mungin, that as we got closer to trial it was our decision – Mr. De la Rionda is a very capable and very talented arguer, and it was our decision that unless we had something pretty important that we wanted to try to handle our case in a way so that we would reserve open and close. In other words, the sandwich in argument. On balance, Mr. Kirkland admitted during trial to most of the things that we could have utilized Detective Conn to impeach on, but with that one exception about the certainty of his identification. On balance we just felt at that time it was just not worth losing open and close to recall Detective Conn, who was an adverse witness, to establish that one fact.

(PCR275). The issue arose again during Cofer's cross-examination by the State at the evidentiary hearing, where it became even clearer that the "we" that Cofer referred to in his direct testimony was Cofer and Buzzell:

> Q Regarding Detective Conn, you made a decision, I guess, in consulting with Mr. Buzzell or by yourself or talking to Mr. Mungin, *I don't know,* that's why I'm asking, regarding not calling Ms. Conn?
>
> A Yes.
>
> Q You felt it was important to have the last word?
>
> A It's one of those considerations that we deal with trying to preserve open and close.

[12] The "we" referred to by Cofer is Cofer himself and co-counsel Buzzell, not Cofer and Appellant.

(PCR347) (emphasis added).

Based on the foregoing testimony, it was unreasonable for the FSC to "find" that Cofer (a) discussed the issue with Appellant and that (2) Appellant "agreed" not to call Conn. Nothing in the afore-cited testimony provides competent evidentiary support for any such findings; indeed, the prosecutor even acknowledged that he did not know if Cofer discussed the issue with Appellant. Appellant can hardly be faulted for not rebutting testimony that was never given.

Appellant has established deficient performance. "[A] criminal defense attorney may not fail to introduce evidence which directly exculpates his client of the crime charged for the sake of preserving the right to address the jury last in the closing argument." *Diaz v. State*, 747 So. 2d 1021, 1026 (Fla. 3d DCA 1999). *Accord Williams v. State*, 507 So. 2d 1122 (Fla. 5th DCA 1987). Cofer's putative strategic decision was neither consistent with the record nor was it reasonable here.

Appellant was unquestionably prejudiced. Despite the FSC's conclusion that Cofer "attacked Kirkland's identification" of Appellant during cross-examination, the record actually demonstrates that when Kirkland was questioned about the discrepancies with prior statements regarding the height of the person he saw, he gave vague answers and simply did not recall (R678). He refused to "remember" whether he had previously told Detective Conn that he could not swear to the identification of Appellant in court (R679). This hardly constitutes a vigorous attack

on Kirkland's credibility as to render cumulative the potential of additional impeachment by way of the testimony of a police officer. Kirkland's seemingly rock-solid identification was featured in the State's closing argument (R975-76). The prosecutor extolled Kirkland's credible identification because he was "alert" and "focused" and had "heightened perception of what was going on" much like people who remember where they were when President Kennedy was assassinated (R975). Given the importance of Kirkland's testimony, and the reliance on such by the State during closing argument, Appellant has more than established a reasonable probability of a different outcome had the jury known that when he first picked out Anthony Mungin in a photograph, Kirkland was unable to swear in court to his identification.

3. Failure to adequately investigate and present alibi evidence.

One of trial counsel's most important responsibilities is to conduct adequate pretrial investigation. *See House v. Balkcom*, 725 F. 2d 608, 618 (11th Cir.), *cert. denied*, 469 U.S. 870 (1984). Cofer failed to adequately investigate and present evidence that Appellant had an alibi for the day in question and that someone named "Ice" had committed the crime.

The state trial court denied this claim, relying on Cofer's testimony that he decided not to present the evidence because it was "inconsistent" with the facts of the case (PCR207). On appeal, the FSC rejected the claim, concluding that while

trial counsel was "confused" about the details of the alibi defense, no prejudice had been established. *Mungin II*, 932 So. 2d at 999-1000.

Appellant contends that the conclusion by that Court that prejudice has not been established is contrary to and an unreasonable application of *Strickland*, and that the findings of fact are incorrect or unreasonable. *See* 28 U.S.C. §2254 (e)(1).

It is settled that trial counsel failed to meaningfully investigate and that Cofer's decision to forego the presentation of a defense case was based on his own misunderstanding of the facts of the case. In a police report generated as a result of a November 21, 1991, interview with Appellant, Appellant stated he had taken a burgundy Ford Escort from a motel in Kingland, GA, at night, and had come to Jacksonville the next morning. After passing through Jacksonville, he went to Monticello where he was involved in a shooting, and then to Tallahassee where he was also involved in a shooting. Appellant then stated he returned to Jacksonville and ditched the car at 20th and Myrtle Avenue on the same day of the shooting. Later in the statement, Appellant said he traded the gun, money, and Escort for dope which he then took back with him to Georgia on a bus. In that first statement, Appellant said that the person he was dealing with in Jacksonville was someone named "Snow." Appellant next related that he spent several days doing drugs in Georgia, after which he was driven back to Jacksonville, where he found the Escort stripped. He then procured another car, a Dodge, and purchased the gun back from "Snow."

Then he went to see a girl on West 28th Street and then went to Pensacola to see Charlette Dawson. He said he was in Pensacola between 7 and 8 PM on the same day, and he returned to Georgia after spending two days in Pensacola.

In his second statement to police on March 31, 1992, Appellant clarified that the person he dealt with was named "Ice," not "Snow," and that he gave the gun, car, and money to "Ice" in exchange for cocaine and indicated that he would be back. Appellant discussed the shooting in Monticello and Tallahassee, and said his uncle thereafter took him back to Georgia. Most important, in this statement, he stated "he retrieved the gun which he had loaned/sold to a black male along with the car." He said it was daytime, almost evening, when he got the beige car, and he drive straight to Pensacola, stopping only for gas in Tallahassee. He arrived in Pensacola at night.

Cofer's misunderstanding of Appellant's alibi and his failure to investigate resulted in prejudice because the jury was deprived of testimony that was consistent with the defense theory that he did not commit the homicide and that Kirkland's identification was mistaken.

At the evidentiary hearing, Appellant presented extensive and unrebutted testimony which established the existence of "Ice" and that Appellant could not have committed the murder. Edward Kimbrough's testimony credibly verified the existence of "Ice" as someone who would regularly hang out at the same place in the Moncrief area of Jacksonville selling drugs (PCR380-81). "Ice" would always

be armed and always was driving different vehicles (PCR381-82), and was described as a tall man, from 190 to 250 pounds, with a "jeri-curl" hair style (PCR382).[13] Jesse Sanders gave an even more vivid physical description of "Ice" and confirmed that his regular hangout was in the Moncrief area (PCR392-94). "Ice" was a known hustler who also knew how to make money illegally by stealing cars and selling drugs (PCR395-98). Sanders would often see Appellant in cars that "Ice" was usually in possession of (PCR398).

Brian Washington testified that the last time he saw Appellant was around 10:30 AM on September 16, 1990, at a convenience store in Kingsland (PCR407-08).[14] He recounted the brief conversation they had during which Appellant said he needed a ride to Jacksonville, and Washington told him he could give him a ride but had to first take his wife to church (PCR408). After he took his wife to church, Washington picked up Appellant from the house of his cousin, Angie Jacobs (PCR409). They then drove to Jacksonville and Washington dropped Appellant off somewhere near Golfair Boulevard (PCR410). About a week or so later, Washington learned that Appellant had been arrested for a homicide (PCR410). After he learned

[13] At trial, Kirkland testified that the man he saw coming out of the Lil' Champ store in Jacksonville had longish hair done up in a "jeri curl" (T680-81).

[14] Washington knew it was September 16 because of several birthdays in the family in September and September 16 was a Sunday, which is the day he took his wife to church (PCR412).

this, Washington told his mother that it could have been true because of the time frame (PCR411). No one from Appellant's legal team ever contacted him about the case, and had he been asked he would have told them what he knew (PCR411).

Phillip Levy testified that in the mid-to-late 1980s, he and Appellant became friends and would hang out, drink, and listen to music (PCR430). The last time he saw Appellant was in 1990 on a Sunday between 11:30 AM and 1:00 PM (PCR431-32).[15] They met at Levy's aunt's house and then went to the area of 28th Street and Stuart to see if Donetta Dues, a former girlfriend of Appellant, was home (PCR433). After that, Levy and Appellant went to Levy's uncle's house, and then Appellant left to his aunt's house (PCR433-34). The last time Levy saw him was around 4:30 or 5:00 PM (PCR434). He was pretty sure this occurred on a Sunday in mid-September of 1990 (PCR435). Levy was sure it was a Sunday because when they went to see Ms. Dues, she was at church (PCR436). He did not know about Appellant's arrest for about a year after it happened because he had moved (PCR437-38). He did not see Appellant Mr. Mungin with a gun on that day (PCR441).

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[15] In rejecting Appellant's claim, the FSC wrote that Levy "remembered seeing Mungin in Jacksonville on a Sunday in September" but "could remember the exact date or time." *Mungin II*, 932 So. 2d at 1000. However, evidentiary hearing testimony established that Levy last saw Appellant between 11:30 AM and 1:00 PM "[i]n the middle of September on a weekend" (PCR431-32; 435). The FSC's "finding" is unreasonable and contrary to the record; Levy's testimony was more specific than merely that he saw Appellant "on a Sunday in September" at an undetermined time.

Finally, Appellant presented the testimony of Vernon Longworth, who also knew Appellant from the Jacksonville area (PCR477). Longworth's nephew is Philip Long (PCR478). In 1990, Longworth was residing at 28th and Stuart in Jacksonville (PCR478). The last time he saw Appellant was on a Sunday afternoon when he came to his house at 1:00 to 2:00 PM for a few hours to visit (PCR479).[16] He knew it was a Sunday because it was football season and the TV was on (PCR479). Appellant asked if he could shower because it was a hot day (PCR480). Longworth also testified that Appellant had gone to Donetta Dues's house across the street to visit the child he had with Ms. Dues (PCR480). After Appellant showered, he and Philip and a few other guys left to go to a juke joint (PCR480). In 1992 and 1993, Longworth resided in Jacksonville and would have been available to talk with anyone from Appellant's legal team had he been contacted (PCR481).

None of this testimony was evaluated or even mentioned in the state trial court's order denying relief, and, as explained above, the FSC mis-quoted and misunderstood it. This evidence was consistent with Appellant's account of his whereabouts in his police statements as well as the facts of the case. At the evidentiary hearing, Cofer acknowledged the consistency of what Appellant told him

[16] As did Levy, Longworth clearly testified to the time that Appellant arrived at his house, contravening the FSC's "finding" that Longworth also failed to remember the exact time he saw Appellant on the day in question. *Mungin II*, 932 So. 2d at 1000

and the detectives about his alibi (PCR295; 320; 496). The testimony supports Appellant's account to the police and supports his alibi, and all of these witnesses testified at the evidentiary hearing that they were available at the time of trial and would have testified if asked at trial. Had this testimony been presented at trial, there is more than a reasonable probability of a different outcome. It must be remembered that the FSC already found on direct appeal that there was insufficient evidence to support a verdict of premeditated murder. As the Supreme Court has explained, "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland*, 466 U.S. at 696.

With regard to the FSC's reliance on the ballistics evidence presented at trial, *Mungin II*, 932 So. 2d at 1000, Appellant submits that, like trial counsel Cofer, the FSC was "confused." In his first statement to police, Appellant stated he had taken a burgundy Ford Escort from a motel in Kingland, GA, at night, and had come to Jacksonville the next morning. After passing through Jacksonville, he went to Monticello where he was involved in a shooting, and then to Tallahassee where he was also involved in a shooting. Appellant then stated he returned to Jacksonville and ditched the car at 20th and Myrtle Avenue on the same day of the shooting. *Later in the statement, Appellant said he traded the gun, money, and Escort for dope which he then took back with him to Georgia on a bus.* In that first statement, Appellant

said that the person he was dealing with in Jacksonville was someone named "Snow." He next related that he spent several days doing drugs in Georgia, after which he was driven back to Jacksonville, where he found the Escort stripped. *He then procured another car, a Dodge, and purchased the gun back from "Snow."* Then he went to see a girl on West 28th Street and then went to Pensacola to see Charlette Dawson. He said he was in Pensacola between 7 and 8 PM on the same day, and he returned to Georgia after spending two days in Pensacola.

In his second statement to police on March 31, 1992, Appellant clarified that the person he dealt with was named "Ice," not "Snow," and that he gave the gun, car, and money to "Ice" in exchange for cocaine and indicated that he would be back. Appellant then discussed the shooting in Monticello and Tallahassee, and his uncle thereafter took him back to Georgia. Most important, in this statement, he stated "he retrieved the gun which he had loaned/sold to a black male along with the car." He said it was daytime, almost evening, when he got the beige car, and he drive straight to Pensacola, stopping only for gas in Tallahassee. He arrived in Pensacola in the nighttime.

Thus, Appellant had provided police with an explanation of how he had possession of the gun used to commit the Tallahassee and Monticello shootings, but did not have possession of the gun when the Jacksonville shooting took place. In light of his account, when considered in connection with the alibi evidence presented

at the state court hearing, there is more than a reasonable probability that a jury, given the opportunity to evaluate *all* the evidence, would have found a reasonable doubt.

Appellant also challenges the FSC's prejudice analysis which rejected this claim by concluding first that the sufficiency of the evidence at trial refuted any showing of prejudice. *Mungin II*, 932 So. 2d at 1000. Sufficiency of evidence is not the test for evaluating *Strickland*'s prejudice prong. *Thompson v. State*, 796 So. 2d 511, 517 n.9 (Fla. 2001) (*quoting Strickland*, 466 U.S. at 694). The FSC's reliance on the sufficiency of the evidence at trial to deny Appellant's claim of prejudice is contrary to *Strickland*. *See also Holmes v. South Carolina*, 126 S. Ct. 1727 (2006).[17]

The FSC also concluded that Appellant's alibi was not supported by "any credible evidence." *Mungin*, 932 So. 2d at 1000. First, this credibility finding is contrary to the record. Not one of the witnesses was mentioned by the trial court in its order denying relief and the trial court ***never made any credibility findings as to***

[17] In *Holmes*, the Supreme Court observed that "the true strength of the prosecution's proof cannot be assessed without considering challenges to the reliability of the prosecution's evidence. Just because the prosecution's evidence, *if credited*, would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case. And where the credibility of the prosecution's witnesses or the reliability of its evidence is not conceded, the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact . . . " *Holmes*, 126 S. Ct. at 1734 (emphasis in original).

these witnesses. The FSC does not make findings of fact concerning witness credibility and improperly substituted its own credibility determinations where the lower state trial court did not make any. *See State v. Spaziano*, 692 So. 2d 174, 178 (Fla. 1997).

When the State's case is weak (or, where, as here, there was insufficient evidence of premeditation), the "potential prejudicial impact of counsel's performance must be evaluated in light of that fact." *Johnson v. Baldwin*, 114 F. 3d 835, 838 (9th Cir. 1997). A "verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland*, 466 U.S. at 696. A COA should issue.

D. State's Withholding of Material Exculpatory Evidence, Presentation of False and/or Misleading Evidence, and Trial Counsel's Ineffectiveness.

Appellant alleged a violation of both *Brady v. Maryland* and *Giglio v. United States,* as well as a further violation of his Sixth Amendment right to the effective assistance of counsel in counsel's failure to investigate and present at trial the critical testimony of George Brown. Brown's testimony "completely contradicts" Kirkland on a "material detail: whether Kirkland could have seen Mungin leaving the convenience store right after the murder." *Mungin v. State,* 79 So.3d 726, 737 (Fla. 2011) [*Mungin III*]. Appellant has made out a claim of a *Giglio* violation and a *Brady* violation, and that the FSC's decision affirming the denial of relief on this claim is contrary to and/or an ureasonable application of *Brady* and *Giglio*. *Mungin*

v. State, 141 So.3d 138 (Fla. 2013) [*Mungin IV*]. The State court also made certain determinations that are not supported by the record. *See* 28 U.S.C. §2254 (d)(2). Finally, the FSC never addressed Appellant's ineffectiveness allegations related to trial counsel's performance vis-à-vis George Brown, and thus this aspect of Appellant's claim should be reviewed *de novo*.

In *Mungin IV*, the FSC rejected the *Brady* aspect of Appellant's claim because he "failed to show that the State willfully or inadvertently suppressed favorable evidence–a prong that Mungin must demonstrate in order to prevail on his *Brady* claim." *Mungin IV* at 143. The FSC determined that the record supported the lower court's finding that "Brown himself stated consistently that he did not tell the police the same facts that he testified to at the hearing because the 'other guy' took over." *Id*. This an unreasonable determination of fact in light of the record.

Brown recalled talking to the police when they arrived; he recalled speaking with a male officer and "might have" spoken with a female officer but he was not sure (3PCR 108-09). When he was speaking with the officers, he was outside of the store and "[b]y then there were a bunch of people there" (3PCR 110). After reviewing the portion of the police report where it states that Kirkland and Brown entered the store at the same time, Brown insisted that was not true; "I was in there by myself" (3PCR 114). When he spoke with the police, he gave them his name and address (3PCR 115). Upon questioning from the lower court, Brown testified that

what he told the police officers at the scene was consistent with what his affidavit stated (3PCR115). He reiterated on cross-examination that he told the police what he was saying now (3PCR 129). "[E]verything that went on from when I went in the store until I called 911 I can remember just like I was standing there now" (3PCR 133). That Brown spoke with both police officers at the scene – Wells and Conn – is not in dispute. And while the testimony of Conn was in some tension with that of Brown (a tension that will be addressed below), Wells never testified that Brown did not tell him that he, and not Kirkland, was the first to arrive at the store; rather, he testified merely that he could *not recall* if Brown had told him that (3PCR 185). There is a huge difference between denying that Brown told Wells the information and Wells simply not being able to recall. There is insufficient evidentiary support to substantiate the state court's finding that Brown testified that he did not provide this information to the police.

With regard to Conn's testimony, the FSC recounted that she testified that Brown "never told her that he was the only person who was inside the store by himself" and that "Brown never told her that somebody leaving the store had bumped into him." *Mungin IV* at 145. However, when the actual record is reviewed, there really is no tension between the testimony of Brown and Conn in many respects and the FSC's factual finding to the contrary is unreasonable. *Conn never testified that she in fact asked Brown any of these questions*; and during the interviews she had

with both Brown and Kirkland, the latter of which lasted maybe five minutes, the scene was an active crime scene and was described by Wells as "chaotic" (3PCR 256). The notes she relied on during her testimony were shorthand notes taken at the scene (3PCR 203). The information in the police report about Kirkland and Brown arriving at "about the same time" actually came from *Kirkland* (3PCR 206). There was nothing in her notes to establish that Brown was anything but cooperative with her questioning and he answered all of her questions (3PCR 210). Moreover, Conn was not present when Brown spoke with Wells (3PCR 184), so she would not have been in a position to know what Brown told Wells. None of these factors were considered when the state courts jumped to the unsupported (and wrong) factual conclusion that Brown did not tell Conn (or any law enforcement officer) that he, not Kirkland, was the first person to enter the store.

Other critical factors about Conn's credibility were not considered by the state courts. For example, Conn testified at the evidentiary hearing that Brown had told her that he went into the store and took a bottle of Gatorade to the counter and then waited it and after a short time which he took to the counter (3PCR 197-98). However, during the hearing and in his affidavit, Brown testified that he went to get "my Coke" as part of his daily routine and took it to the counter (3PCR 104). At trial, Kirkland also testified he stopped by the store to get a Diet Coke. *Mungin III* at 735-36 ("On his way to his girlfriend's house, [Kirkland] stopped by the Lil'

Champ convenience store to pick up a diet coke and breath savers"). This fact is significant because there was only one Diet Coke can at the scene and no bottle of Gatorade was found; according to the police reports, the only beverage item observed and seized was a Diet Coke can unopened by the front counter of the store. Latent prints from that Diet Coke can were compared to Appellant's with negative results. This is further undermines Conn's testimony that Brown told her that he had gotten a bottle of Gatorade. The only logical conclusion is that Brown was credible when he testified that he got the Diet Coke before going up to the counter, discovered the victim, *and then* Kirkland, who had stopped by to pick up a soda and breath mints before going to his girlfriend's house, arrived on the scene.

In evaluating Conn's testimony at the evidentiary hearing, the state courts also failed to consider additional important contradictions. For example, Conn testified that from her shorthand "notes" taken at the chaotic crime scene, she had written that two other individuals, Dawn Mitchell and Jonah Miller, arrived "at the scene apparently at the same time as the other two witnesses [Kirkland and Brown] so we have simultaneously them getting to the parking lot to the best of my understanding" (3PCR 116). However, according to the police reports and the testimony at the evidentiary hearing, Mitchell and Miller arrived at the scene around the same time that the other witnesses (Kirkland and Brown) *found the victim*, not at the same time that Kirkland and Brown *arrived at the convenience store* (3PCR 77; 174). In fact,

trial counsel Cofer confirmed that Mitchell and Miller arrived at the scene "after Mr. Kirkland and Mr. Brown were in the store" (3PCR 175). The reality is that Mitchell and Miller arrived at the store after Kirkland and Brown were already in the store, further undermining Conn's evidentiary hearing testimony and further undermining the state courts' bald reliance on her.

The most logical conclusion consistent with all the testimony and evidence presented at the state court evidentiary hearing is that Brown is and was not mistaken in what he observed, that the police reports in this case were false and/or misleading, and that Kirkland's testimony in large part was false and the State (through law enforcement agents) knew it. Brown testified that he was the first to arrive at the convenience store, observed an individual leaving in an unhurried fashion from the store, and was alone in the store when he came upon the victim. He further testified that as he called 911, another male (Kirkland) came into the store. Brown never wavered from his testimony that he arrived at the store first, was alone in the store, and came upon the victim while he was still alone in the store. Only then did the other person–Kirkland–enter the store. He also never told this information to the police.

The FSC only addressed *Brady*'s suppression prong. *Mungin IV* at 145. This Court is thus free to evaluate the materiality prong *de novo* because §2254(d) is inapplicable. *Wiggins v. Smith*, 559 U.S. 510, 534 (2003); *Rompilla v. Beard*, 545

U.S. 374, 390 (2005). That Kirkland was cross-examined at trial about some inconsistencies in his testimony does not lead to the conclusion that the withheld information about George Brown's truthful testimony would have only provided cumulative evidence of impeachment. "[E]vidence impeaching an eyewitness may not be material if the State's other evidence is strong enough to sustain confidence in the verdict," but this is "not the case" where the witness's testimony was the only evidence linking the defendant to the crime. *Smith v. Cain*, 132 S. Ct 627, 630 (2012). That there was an unbiased disinterested witness who completely contradicted Kirkland's version of events "would not have been merely repetitious, reinforcing a fact that the jury already knew; instead, `the truth would have introduced a new source of potential bias.'" *United States v. Rivera Pedin*, 861 F. 2d 1522, 1530 (11th Cir. 1988) (quotation omitted).

With regard to Appellant's *Giglio* violation, the state trial court concluded that no violation had been established because Appellant had not established that Kirkland's testimony was false or that "the prosecutor knew the testimony was false" (3PCR 88). In *Mungin IV*, the FSC affirmed this conclusion. *Mungin IV* at 146-47. However, the state courts' conclusions are not borne out by competent and substantial record support.

As demonstrated in the discussion of the *Brady* claim, Appellant established that Kirkland's testimony that he, not Brown, was the first to arrive at the

convenience store, was false and not merely "inconsistent" with Brown's testimony. Furthermore, the state courts' legal conclusion that the prosecutor himself has to know that the evidence or testimony is false is not in accord with the law. Under *Giglio*, like *Brady*, knowledge is imputed to the prosecutor even if it is only law enforcement that has the knowledge of the falsity. *See Williams v. Griswald*, 743 F. 2d 1533 (11th Cir. 1984) ("It is of no consequence that the facts pointed to may only support knowledge of the police because such knowledge will be imputed on the state prosecutors").

Finally, in his state court postconviction motion and on appeal to the FSC, Appellant alleged that he received ineffective assistance of counsel to the extent that the courts were to find that the jury did not know of the information to which Brown testified not because the State withheld it but because trial counsel failed to present it. Appellant's ineffectiveness claim, however, was not addressed and this Court is not bound by any AEDPA deference. Given the FSC finding that "Brown's testimony does call into question whether Kirkland could have seen Mungin leaving the store shortly after the shooting" but that "nobody in law enforcement was aware of Brown's postconviction version of the facts," *Mungin IV* at 146, Appellant received ineffective assistance of counsel due to trial counsel's failure to adequately investigate prior to trial.

II. CONFLICT OF INTEREST.

The State's key witness, Ronald Kirkland, had not only an extensive criminal history but also a history of being represented by the Duval County Public Defender's Office, the same office that represented Appellant at trial. Records submitted at the state court evidentiary hearing of Kirkland's cases established that Kirkland had been, at times prior to Appellant's trial, represented by the Duval County Public Defender's Office in numerous cases (PCR282-86). Significantly, printouts from the Clerk's Office established that in 1991, Kirkland was charged with three worthless check charges on which he was represented by the Duval Public Defender's Office (PCR254; 262-66). Kirkland was again arrested on September 26, 1992, and a notation on the file reveals that the Duval Public Defender's Office was appointed and that the cases were disposed of on October 13, 1992, by a guilty plea and withheld adjudication (PCR254). Trial counsel Cofer verified that his former office represented Kirkland by running the history on a database provided by the Clerk of Court (PCR259).

Cofer clearly was aware of some of Kirkland's criminal history because he deposed Kirkland and asked about his criminal history (PCR261). More importantly, Cofer conceded that he may have been aware from his own records checks done in advance of the evidentiary hearing that the Public Defender's office represented Kirkland for disorderly intoxication or possibly a DUI during a period of time prior to Mr. Mungin's arrest (PCR247). Cofer also had the ability to investigate whether

Kirkland had been or was being represented by the Public Defender's Office as they had a computer that would have been able to check (PCR287). In fact, Cofer himself developed the case tracking program that the Public Defender's Office used and the database went back to the mid-1980s (PCR287).

Cofer claimed no recollection of whether he knew that Kirkland was being represented by the Public Defender's Office during the pendency of Appellant's case (PCR246); he admitted, however, that he "may have been aware" from his "own record check" of the "possibility" that the Public Defender's Office had represented Kirkland (PCR247). He acknowledged that had he known he would have shared that information with Appellant and that it was up to Appellant to determine whether he believed a motion to withdraw due to a conflict should be filed (PCR255-57). Cofer did not, however, recall disclosing to Appellant that Kirkland was being represented by the same Public Defender's Office that was representing him on his capital murder case.

The Public Defender's Office prior and, more importantly, simultaneous representation of both Appellant and Kirkland was an actual conflict. *See Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Halloway v. Arkansas*, 435 U.S. 475 (1978). A public defender's office is the functional equivalent of a law firm and, as such, different attorneys in the same public defender's office cannot represent defendants with conflicting interests. *See Bouie v. State*, 559 So. 2d 1113 (Fla. 1990); *Turner v.*

State, 340 So. 2d 132 (Fla. 2d DCA 1976). In the alternative, Appellant submits that Cofer was ineffective under the standard of *Strickland v. Washington*, 466 U.S. 668 (1984).

The state trial court never resolved the factual issue of whether Cofer knew that his office had previously or was simultaneously representing Kirkland at the time of Appellant's trial (PCR205-06). The FSC rejected this claim on its merits. *Mungin II*, 932 So. 3d at 1000-02. The findings of the FSC are unreasonable, not supported by the evidence, its decision is contrary to and/or an unreasonable application of *Cuyler v. Sullivan*, 446 U.S. 335 (1980), and *Strickland v. Washington*, 466 U.S. 668 (1984).

As noted above, Cofer admitted he "may" have known of the "possibility" that the Public Defender's Office had represented Kirkland, and certainly had information in his files about Kirkland's criminal history that reflected such information. This testimony belies the FSC's unequivocal finding that "there is nothing in the record to support a conclusion that Cofer knew" that Kirkland had been represented by the Public Defender's office. In any event, Cofer had a duty to investigate whether he had a conflict and to disclose that information to Appellant. *Strickland*, 466 U.S. at 688 (counsel has "duty to avoid conflicts of interest").

Because of the simultaneous representation, Cofer would not have ethically been in a position to take an adverse position against Kirkland, namely to have

Kirkland taken into custody on the outstanding capias or to even investigate and cross-examine Kirkland on his bias as a result of the pending criminal sentence. This failure had an adverse effect on Appellant's case. Indeed, when questioned by the state court judge as to whether he or co-counsel ever actually went to look up in their files to determine if they ever represented Kirkland, Cofer acknowledged that he would "not do that" because he viewed that "as being an ethical breach toward Mr. Kirkland" (PCR336). If Cofer was not "struggling to serve two masters," the evil associated with such a conflict of interest, there would be no ethical concerns at all regarding his office's representation of Kirkland. Because Cofer acknowledged a concern about an ethical breach toward Kirkland, Appellant submits that his claim is established and that the FSC's decision is contrary to and an unreasonable application of *Cuyler* and *Strickland*.

Assuming that Cofer did not know that his office simultaneously represented Kirkland at the time of Appellant's trial, he was ineffective and Appellant was unable, due to Cofer's deficient performance, to even be in a position to decide for himself whether or not he wished Cofer to withdraw due to a conflict. Because Appellant cannot have been in a position to waive his right to conflict-free counsel absent his attorney providing him the information, prejudice is established under these circumstances.

III. *GRIFFIN V. UNITED STATES* DID NOT COMPEL AFFIRMANCE OF APPELLANT'S CONVICTION.

On direct appeal, the FSC held that the trial court erred in failing to grant Appellant's motion for a judgment of acquittal on the charge of premeditated first-degree murder but found, over the dissent of Justice Anstead, that reversal was not compelled under *Griffin v. United States*, 502 U.S. 46 (1991), because there was sufficient evidence to support a conviction for felony murder. *Mungin I* 689 So. 2d at 1029-30. Review of the FSC's decision establishes that the majority felt that the *Griffin* holding was required to be applied in Florida, since it was the only case cited by the majority opinion as compelling the conclusion that reversal was not warranted.

The FSC's decision is contrary to and/or an unreasonable application of clearly established Supreme Court law. As dissenting Justice Anstead noted, "there is a solid body of caselaw which states that where a jury is instructed that it can rely on any of two or more independent grounds to support a single count, and one of those grounds was improper, as the premeditation theory was here, a general verdict of guilt must be set aside because it may have rested exclusively on the improper ground." *Mungin I* at 1032. Because the FSC applied *Griffin* rather than the appropriate rule set out in *Yates v. United States*, 354 U.S. 298, 311-12 (1957), *Stromberg v. California*, 283 U.S. 359, 369-70 (1931), and *Zant v. Stephens*, 462 U.S. 862, 881 (1983), Appellant was entitled to relief. At a minimum, a COA should issue.

First, the FSC incorrectly identified the controlling rule. *Griffin* is and was applicable only to federal law and not binding on the states. *Griffin*, 502 U.S. at 47 ("This case presents the question whether, in a federal prosecution, a general guilty verdict on a multiple-object conspiracy charge must be set aside if the evidence is inadequate to support conviction as to one of the objects"). Other state courts have not felt bound by *Griffin*, relying instead on state law. *See State v. Jones*, 96 Haw. 171 (Ha. 2001); *Commonweath v. Plunkett*, 422 Mass. 634, 664 N.E. 2d 833 (Mass. 1996) ("The premise of the Supreme Court's position . . . is not so well founded as to attract our attention to it"). Because *Griffin* does not control Appellant's case, the FSC's decision is entitled to no deference.

The FSC relied on *Griffin*'s reasoning that when the only flaw in a ground submitted to the jury is that the evidence does not support it, it can be assumed that the jury will recognize that the unsupported ground was not proven and will base its guilty verdict on the ground that *is* supported by sufficient evidence. But even assuming *Griffin* applied to a state court prosecution, its reason for expecting jurors to decline to convict on a ground not supported by the evidence does not apply because the evidence of premeditation in Appellant's case was held to be insufficient due to a legal principle of which the jury was not informed. The jury was never told that the evidence could not prove premeditation unless it was inconsistent with any reasonable hypothesis of no premeditation; rather, it was simply given the standard

instruction on premeditation (T1034). The *Griffin* assumption that jurors will recognize that a ground lacking sufficient evidence was not proved, is not applicable in cases in which the jury instruction does not convey the case law that makes the evidence insufficient.

The appropriate rule to apply to the issue of whether the error found here is harmless is that set forth in *Yates, Stromberg,* and *Zant*. It is "settled law that `a general verdict must be set aside if the jury was instructed that it could rely on any or two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground." *Tafero v. Wainwright*, 796 F. 2d 1314, 1318-19 (11th Cir. 1986), *cert. denied*, 483 U.S. 1033 (1987) (citing *Zant v. Stephens*, 462 U.S. 862, 881 (1983), and *Hitchcock v. Wainwright*, 745 F. 2d 1332, 1340 (11th Cir. 1984)). Indeed in a post-*Griffin* case, this Court acknowledged that the *Stromberg/Yates/Zant* rule still applies. *See Parker v. Sec'y. for the Dep't. Of Corrections*, 331 F. 3d 764, 777 (11th Cir. 2003), *cert. denied*, 540 U.S. 1222 (2004). Under this line of cases, a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because "it is impossible to determine on which basis the jury reached its verdict, so deficiency in only one basis requires the entire verdict to be set aside." *Id*. at 777.

Because the FSC improperly applied the *Griffin* rule instead of the *Stromberg/Yates/Zant* rule, a COA should be granted.

IV. DENIAL OF LEAVE TO AMEND

When Appellant's case was in abeyance in the district court while the state courts continued to grapple with the effects of *Hurst* and its progeny, Appellant filed another Rule 3.851 motion on September 15, 2017, based on an affidavit executed by Deputy Gillette, in which he raised additional constitutional claims that had not been exhausted for federal review (DE:54 at 5). The state trial court granted an evidentiary hearing, which was conducted in January 2018 (DE:54 at 5). Relief was denied, and the FSC, imposing a procedural bar, affirmed. *Mungin v. State*, 320 So.3d 624 (Fla. 2020), *cert. denied*, 142 S.Ct. 908 (2022) [*Mungin V*].

Following the reopening of habeas proceedings (DE:77), Appellant sought leave to amend his pending amended petition to include the now-exhausted claims he raised in state court (DE:81). The district court declined to grant Appellant leave to amend, concluding, for a variety of reasons, that it would be futile to permit amendment of a claim on which the FSC had imposed a procedural bar (DE:90). Appellant seeks a COA as to the propriety of the district court's refusal to permit the requested amendment as to the claim relating to Deputy Gillette.

In *Mungin V*, the FSC noted that Appellant had alleged a number of constitutional violations with respect to information disclosed by Deputy Malcolm

Gillette. 320 So. 3d at 625 (Mungin alleged "that the State committed a *Brady* violation by failing to divulge that Gillette saw no shell casings and committed a *Giglio* violation by allowing Gillette to give false testimony at trial. Alternatively, Mungin alleged that defense counsel was ineffective by failing to speak to or cross-examine Gillette, and that the information in Gillette's affidavit was newly discovered evidence that was likely to produce an acquittal at retrial"). Those claims, which Appellant sought to include in an amended petition, have now been exhausted, the Florida Supreme Court determining that they were barred. *Id*. at 626.

Fed. R. Civ. P. 15(a) directs that leave to amend "shall be freely given when justice so requires." The rule "severely restricts" a district court's ability to deny leave to amend a habeas petition. *See Espey v. Wainwright*, 734 F.2d 748, 750 (11th Cir. 1984) (explaining that Rule 15(a) is based on a policy of "liberally permitting amendments"). Unless a district court has "substantial reason" to deny leave, its discretion "is not broad enough to permit denial." A compelling showing of prejudice to the party opponent is a key factor when a court considers granting or denying a motion for leave to amend: The only prerequisites are that the district court have jurisdiction over the case and an appeal must not be pending. If these two conditions are met, the court will proceed to examine the effect and the timing of the proposed amendments to determine whether they would prejudice the rights of any of the other parties to the suit. If no prejudice is found, then leave normally will be

granted. 6 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 1484 (3d ed. Apr. 2021; *see Bowers v. U.S. Parole Comm'n, Warden*, 760 F.3d 1177, 1185 (11th Cir. 2014) (rejecting district court's reasons for denying leave to amend as insubstantial).

For example, that a habeas petition sought to be amended is already "long and complicated" is an insubstantial basis for denying a request for leave to amend. *Id*. at 1185. Moreover, the "substantive merits of a claim or defense should not be considered on a motion to amend." Wright & Miller, *supra*, § 1487 & n.23 (citing *Fox v. City of West Palm Beach*, 383 F.2d 189, 195 (5th Cir. 1967). To the extent that a peek at the merits is appropriate, "leave to amend should only be denied on the ground of futility when the proposed amendment is clearly insufficient or frivolous on its face." *Taylor v. Fla. State Fair Auth*., 875 F. Supp. 812, 815 (M.D. Fla. 1995) (Kovachevich, J.) (emphasis added) (citation omitted).

Notwithstanding the fact that the district court did not have the state court record or the benefit of briefing aside from the motion, response, and reply filed by the parties,[18] it denied leave to amend, addressing procedural defenses such as

[18] In his pleading below, Appellant noted that numerous other courts in this district have granted leave to amend habeas petitions in capital cases after stays had been entered to allow the petitioner to exhaust claims in the state courts, even when the petitions in those cases had been previously amended, sometimes more than once (DE:81 & Attachments).

procedural bar and default raised by the Respondent as if Appellant has raised the issues in his habeas petition itself as opposed to in a motion for leave to amend. However, "[a] federal court is not required to honor a state's procedural [] ruling unless that ruling rests upon adequate state grounds that are independent of the federal questions." *Brown v. Sec'y, Dep't of Corrections*, 200 Fed. Appx. 885, 887 (11th Cir. 2006) (citing *Harris v. Reed*, 489 U.S. 255, 262 (1989)). Whether a federal constitutional claim, barred in state court, can ultimately be reviewed in federal court is itself a federal question. *See, e.g. Lee v. Kemna*, 534 U.S. 362, 375 (2002) ("`The adequacy of state procedural bars to the assertion of federal questions,' we have recognized, is not within the State's prerogative finally to decide; rather, adequacy 'is itself a federal question'") (quoting *Douglas v. Alabama*, 380 U.S. 415, 422 (1965)).

The FSC's imposition of a procedural bar does not equate to futility for purposes of amending a habeas petition. What the FSC's opinion does not reveal is that Appellant leveled significant challenges to the *factual and legal accuracy* of its imposition of the bar. For example, Appellant argued that "[t]he imposition of a time bar under the circumstances of this case is erroneous because the Court overlooked and/or misapprehended the factual underpinnings of Mr. Mungin's claim as well as the actual issue raised by Mr. Mungin about Deputy Gillette and the information he possessed that had not been previously disclosed" (Motion for

Rehearing, *Mungin v. State*, Case No. SC18-635 at 5). He further argued that the FSC's result "rests on a fundamental misapplication of the law and an ill-focused analysis" and that in imposing a time bar "it misstates or overlooks the actual testimony and other evidence in the record about Gillette's information and how he came to disclose it to Mr. Mungin's counsel when he did" (*Id*. at 6, 8). Appellant should have had the ability to amend his § 2254 petition with his Gillette-based claims in order to make the argument that, for example, the FSC's decision barring the Gillette claims 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)(2). Moreover, Appellant should have been given the opportunity to explain why the district court would not owe any deference at all to the FSC on the merits of his federal claims since the FSC did not even address them. *See Williams v. Alabama,* 791 F.3d 1267, 1273 (11th Cir. 2015) (citation omitted). These were not arguments to be made in the context of motion practice seeking leave to amend a habeas petition, much less decided in such an environment.

"District courts have limited discretion on denying leave to amend," and should allow amendment "unless there are substantial reasons to deny it[.]" *Bowers, supra.* "Certainly in a capital case, the district court should be particularly favorably disposed toward a petitioner's motion to amend." *Moore v. Balkom*, 716 F.2d 1511,

1526 (11th Cir. 1983). A COA should issue on the propriety of the district court's denial of leave to amend with the Gillette-based claim.

Conclusion

Based on the foregoing, Appellant moves the Court to grant a COA on the issues identified in this application.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-service through CM/ECF service, which will send notice to all represented counsel on this 13th day of December 2022.

By: s/*Todd G. Scher*
TODD G. SCHER

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

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By: *Todd G. Scher*
TODD G. SCHER

Appendix E

Order, United States District Court, Middle District of Florida
Mungin v. Sec'y, Fla. Dep't of Corr., Case No. 3:06-cv-00650-BJD-JBT
(September 23, 2022)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

ANTHONY MUNGIN,

Petitioner,

v. Case No. 3:06-cv-650-BJD-JBT

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, et al.,

Respondents.

ORDER

This Cause is before the Court on Petitioner's Motion to Alter or Amend Judgment (Motion) (Doc. 93). Pursuant to Rule 59(e), Federal Rules of Civil Procedure, Petitioner moves this Court to alter or amend the judgment as reflected in the Court's August 15, 2022 Order (Doc. 91) denying Petitioner's Second Amended Petition (Doc. 30). The Clerk entered Judgment (Doc. 92) on August 16, 2022. Respondents filed a Notice (Doc. 94) waiving a response. Respondents state: "[a]fter reviewing this Court's well-reasoned order and Petitioner's motion, the State believes a response is unnecessary and would

only serve to delay resolution of this case." Id. at 1. They ask the Court to deny Petitioner's Motion. Id.

Rule 59(e) affords the Court discretion to reconsider an order which it has entered. See Mincey v. Head, 206 F.3d 1106, 1137 (11th Cir. 2000), cert. denied, 532 U.S. 926 (2001); O'Neal v. Kennamer, 958 F.2d 1044, 1047 (11th Cir. 1992). The Supreme Court explained the Rule has a "corrective function" giving a district court the opportunity to rectify mistakes shortly after its decision. Banister v. Davis, 140 S. Ct. 1698, 1703 (2020). Therefore, under Rule 59(e), "a district court may 'alter or amend a judgment.'" Jenkin v. Anton, 922 F.3d 1257, 1263 (11th Cir. 2019). However, "[t]he only grounds for granting a Rule 59 motion are newly- discovered evidence or manifest errors of law or fact." Arthur v. King, 500 F.3d 1335, 1343 (11th Cir.) (per curiam) (quotations and citations omitted), cert. denied, 552 U.S. 1040 (2007). See Hamilton v. Sec'y, Fla. Dep't of Corr., 793 F.3d 1261, 1266 (11th Cir. 2015) (per curiam) (same), cert. denied, 578 U.S. 926 (2016).

This Court has interpreted those parameters to include "(1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or manifest injustice." Lamar Advertising of Mobile, Inc. v. City of Lakeland, Fla., 189 F.R.D. 480, 489 (M.D. Fla. 1999).

The purpose of Rule 59 is not to ask the Court to reexamine an unfavorable ruling in the absence of a manifest error of law or fact. Jacobs v. Tempur-Pedic Int'l., Inc., 626 F.3d 1327, 1344 (11th Cir. 2010). As such, Rule 59(e) cannot be used "to relitigate old matters, raise argument **or present evidence that could have been raised prior to the entry of judgment**." Michael Linet, Inc. v. Village of Wellington, Fla., 408 F.3d 757, 763 (11th Cir. 2005) (emphasis added); see also O'Neal, 958 F.2d at 1047.

Petitioner has not shown the existence of manifest error of law or fact. He has failed to present facts or law of a strongly convincing nature that would induce this Court to reverse its prior decision. Upon review, Petitioner is attempting to relitigate matters already considered and rejected by the Court. See Friedson v. Shoar, No. 20-14803, 2021 WL 5175656, at *5 (11th Cir. Nov. 8, 2021) (per curiam) (not reported in Fed. Rptr.) (disavowing use of a Rule 59(e) motion to relitigate old matters or raise new arguments that could have been raised prior to entry of judgment).

Petitioner has not demonstrated any basis under Rule 59 warranting the Court's granting of a motion to alter or amend its Order (Doc. 91) denying the Second Amended Petition (Doc. 30). Petitioner has not identified any change in the law or clear error by the Court. A review of the applicable law convinces

this Court that it has not committed a clear error in interpreting the law or the facts. As such, this is not a case in which the extraordinary remedy of granting a motion to alter or amend judgment should be employed.

The Court finds this is not a case in which the extraordinary remedy of 59(e) is warranted; therefore, Petitioner is not entitled to the relief he has requested, and the Motion is due to be denied.

Accordingly, it is now

ORDERED:

1. Petitioner's Motion to Alter or Amend Judgment (Doc. 93) is **DENIED.**

2. If Petitioner appeals the denial of the Motion (Doc. 93), **the Court denies a certificate of appealability**.[1] Because this Court has determined that a certificate of appealability is not warranted, the **Clerk** shall terminate from the pending motions report any motion to proceed on appeal as a pauper

[1] This Court should issue a certificate of appealability only if a petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make this substantial showing, Petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," Tennard v. Dretke, 542 U.S. 274, 282 (2004) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)), or that "the issues presented were 'adequate to deserve encouragement to proceed further,'" Miller-El v. Cockrell, 537 U.S. 322, 335-36 (2003) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)). Upon due consideration, this Court will deny a certificate of appealability.

that may be filed in this case. Such termination shall serve as a denial of the motion.

DONE AND ORDERED at Jacksonville, Florida, this 22nd day of September, 2022.

BRIAN J. DAVIS
United States District Judge

sa 9/22
c:
Counsel of Record

Appendix F

Decision, United States District Court, Middle District of Florida *Mungin v. Sec'y, Fla. Dep't of Corr.*, Case No. 3:06-cv-00650-BJD-JBT, 2022 WL 3357672 (Aug. 15, 2022)

Mungin v. Sec'y, Fla. Dep't of Corr.

United States District Court for the Middle District of Florida, Jacksonville Division

August 15, 2022, Decided; August 15, 2022, Filed

Case No. 3:06-cv-650-BJD-JBT

Reporter
2022 U.S. Dist. LEXIS 145618 *; 2022 WL 3357672

ANTHONY MUNGIN, Petitioner, vs. SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, et al., Respondents.

Prior History: *Mungin v. State, 689 So. 2d 1026, 1995 Fla. LEXIS 2203 (Fla., Sept. 7, 1995)*

Core Terms

state court, deference, postconviction, appellate counsel, murder, sentence, probation, robbery, ineffective assistance claim, evidentiary hearing, penalty phase, per curiam, habeas relief, shooting, felony murder, responded, shot, deficient performance, trial court, cases, jurors, court's decision, photographs, dog, circumstances, ineffective, determining facts, direct appeal, identification, proceedings

Counsel: **[*1]** For Anthony Mungin, Plaintiff: Todd Gerald Scher, LEAD ATTORNEY, Todd G. Scher, PL, Hollywood, FL.

For Secretary, Florida Department of Corrections, Defendant: Charmaine M. Millsaps, LEAD ATTORNEY, Office of the Attorney General, PL-01, The Capitol, Tallahassee, FL; Jason William Rodriguez, LEAD ATTORNEY, Florida Attorney General's Office, PL-01 The Capitol, Tallahassee, FL; Stephen Richard White, LEAD ATTORNEY, Stephen Richard White, Esq., Tallahassee, FL.

For Attorney General, Defendant: Jason William Rodriguez, LEAD ATTORNEY, Florida Attorney General's Office, PL-01 The Capitol, Tallahassee, FL; Stephen Richard White, LEAD ATTORNEY, Stephen Richard White, Esq., Tallahassee, FL; Tineshia Donalee Morris, LEAD ATTORNEY, Polk County Tax Collector, Bartow, FL.

Judges: BRIAN J. DAVIS, United States District Judge.

Opinion by: BRIAN J. DAVIS

Opinion

ORDER

I. INTRODUCTION

Through counsel, Petitioner Anthony Mungin, a death-sentenced inmate, filed a Petition for Writ of Habeas Corpus (Petition) (Doc. 1) under *28 U.S.C. § 2254*. He is proceeding on a Second Amended Petition for Writ of Habeas Corpus by a Death-Sentenced Person in State Custody Pursuant to *28 U.S.C. § 2254* (Second Amended Petition) (Doc. 30).[1] He challenges a state court (Duval County)

[1] Petitioner filed the original Petition (Doc. 1) on July 18, 2006. He sought leave to amend the Petition (contained within the Petition) and the Court granted leave to amend. Order (Doc. 3). He filed an Amended Petition (Doc. 6) on November 6, 2006. Petitioner attempted to supplement claim 1 of the Amended Petition and the Court struck the supplement and directed Petitioner to file a second amended petition as the operative petition. Order (Doc. 27). On October 6, 2014, Petitioner filed a Second Amended Petition (Doc. 30). Recently, the Court denied Petitioner's Motion to Amend (Doc.

conviction **[*2]** for murder in the first degree.

Respondents filed an Answer to Petition for Writ of Habeas Corpus (Doc. 16) in response to the Amended Petition.[2] After Petitioner filed his Second Amended Petition, Respondents filed an Amended Answer to Petition for Writ of Habeas Corpus (Response) (Doc. 31)[3] and a supplemental state court record, referred to as an Appendix on this Court's docket (Doc. 32), using numerals to designate the tabs of the supplemental record.[4] Petitioner filed a Reply to Amended Answer to Second Amended Petition for Writ of Habeas Corpus (Reply) (Doc. 35).[5] See Order (Doc. 9).

Petitioner raises seven grounds in the Second Amended Petition:

> Claim 1: "Mr. Mungin received ineffective assistance of counsel at the guilt phase of his capital trial, in violation of the *Sixth Amendment to the United States Constitution*[;]"
>
> Claim 2: "Mr. Mungin received ineffective assistance of counsel at the penalty phase in violation of the *Sixth Amendment*[;]"
>
> Claim 3: "The Duval County Public Defender's Office had an actual conflict of interest based on prior and simultaneous representation of key state witness Kirkland, in violation of Mr. Mungin's *Sixth Amendment* right to conflict-free counsel [;]
>
> Claim 4: "The Florida Supreme Court erred in its ruling on direct appeal that **[*3]** *Griffin v. United States, 502 U.S. 46, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991)*, compelled a finding that reversal of Mr. Mungin's conviction for first-degree murder[;]"
>
> Claim 5: "The Evidence was insufficient to prove the underlying felony as proof of felony murder[;]"
>
> Claim 6: "Mr. Mungin received ineffective assistance of counsel on direct appeal in violation of the *Sixth Amendment*[;]" and
>
> Claim 7: "The Florida Supreme Court's determination that the Introduction by the State of Evidence that Mr. Mungin shot a collateral crime victim in the spine was harmless error was error."

Second Amended Petition at 63, 119, 136, 140, 145, 148, 164 (capitalization and emphasis omitted).

II. MOTION TO STRIKE

Imbedded in the Response is a Motion to Strike (Motion). Response at 5-6. This Motion is due to be stricken. Pursuant to *Rule 12(f)(2) of the Federal Rules of Civil Procedure*, the court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter upon motion made by a party **before responding to the pleading**. Here, Respondent did not move to strike

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81). See Order (Doc. 90).

[2] Respondents filed an Appendix (Doc. 15), not scanned, and filed separately on October 25, 2007. The Court will hereinafter refer to the Exhibits contained in the Appendix as "Ex." Of note, the exhibits are not all bound and tabbed in alphabetical order. The page numbers referenced are the Bates stamp numbers at the bottom of each page of the exhibit. Otherwise, the page number on the document will be referenced. For the scanned documents (Second Amended Petition, Response, Reply, etc.), the Court references the page numbers assigned by the electronic filing system.

[3] Respondents provided the Court with a Habeas Corpus Checklist (Doc. 15) and a Habeas Corpus Checklist (cont'd from 10/25/07) (Doc. 32).

[4] Respondents filed an Appendix (Doc. 32), not scanned, and filed separately on December 22, 2014. The Court will hereinafter refer to the exhibits contained in the Appendix as "App." Of note, these exhibits are not all bound and tabbed in numerical order. The page numbers referenced are the Bates stamp numbers at the bottom of each page of the exhibit. Otherwise, the page number on the document will be referenced.

[5] Petitioner, on July 2, 2007, filed a List of Claims in Amended Petition for Writ of Habeas Corpus (List) (Doc. 8). However, he did not file an updated list after filing the Second Amended Petition; therefore, the claims and page numbers referenced in the List do not correspond with the claims and page numbers of the Second Amended Petition. Of note, in the Second Amended Petition, one additional claim is raised under Claim I: D. (State's Withholding of Material Exculpatory Evidence, Presentation of False and/or Misleading Evidence and Trial Counsel's Ineffectiveness) and it is not included in the List.

before responding to the pleading and failed to file a separate motion that complies with *Rule 12* and *Local Rule 3.01(a)* (requiring the filing of a motion in a single document no longer than 25 pages). Indeed, it is improper to seek affirmative relief by imbedding a request **[*4]** in a response. See *Rule 7(b)(1), Fed. R. Civ. P.* Thus, the Court will **strike** Respondent's Motion to Strike contained within the Response.

III. EVIDENTIARY HEARING

"In a habeas corpus proceeding, the burden is on the petitioner to establish the need for an evidentiary hearing." *Jones v. Sec'y, Fla. Dep't of Corr., 834 F.3d 1299, 1318 (11th Cir. 2016)* (citations omitted), cert. denied, *137 S. Ct. 2245, 198 L. Ed. 2d 683 (2017)*. To be entitled to an evidentiary hearing, the petitioner must allege "facts that, if true, would entitle him to relief." *Martin v. U.S., 949 F.3d 662, 670 (11th Cir.)* (quoting *Aron v. U.S., 291 F.3d 708, 715 (11th Cir. 2002)*) (citation omitted), cert. denied, *141 S. Ct. 357, 208 L. Ed. 2d 87 (2020)*. See *Chavez v. Sec'y, Fla. Dep't of Corr., 647 F.3d 1057, 1060 (11th Cir. 2011)* (opining a petitioner bears the burden of establishing the need for an evidentiary hearing with more than speculative and inconcrete claims of need), cert. denied, *565 U.S. 1120, 132 S. Ct. 1018, 181 L. Ed. 2d 752 (2012)*; *Dickson v. Wainwright, 683 F.2d 348, 351 (11th Cir. 1982)* (same).

If the allegations are contradicted by the record, patently frivolous, or based upon unsupported generalizations, the court is not required to conduct an evidentiary hearing. *Martin, 949 F.3d at 670* (quotation and citation omitted). In this case, the pertinent facts are fully developed in this record, or the record otherwise precludes habeas relief;[6] therefore, the Court can "adequately assess [Petitioner's] claim[s] without further factual development," *Turner v. Crosby, 339 F.3d 1247, 1275 (11th Cir. 2003)*, cert. denied, *541 U.S. 1034, 124 S. Ct. 2104, 158 L. Ed. 2d 718 (2004)*.

Petitioner has not met his burden as the record refutes the asserted factual allegations or otherwise precludes habeas **[*5]** relief. Therefore, the Court finds Petitioner is not entitled to an evidentiary hearing. *Schriro v. Landrigan, 550 U.S. 465, 474, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007)*.

IV. HABEAS REVIEW

Federal courts are authorized to grant habeas relief to a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." *Lee v. GDCP Warden, 987 F.3d 1007, 1017 (11th Cir.)* (quoting *28 U.S.C. § 2254*), cert. denied, *142 S. Ct. 599, 211 L. Ed. 2d 371 (2021)*. For issues previously decided by a state court on the merits, this Court must review the underlying state-court decision under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). In doing so, a federal district court must employ a very deferential framework. *Sealey v. Warden, Ga. Diagnostic Prison, 954 F.3d 1338, 1354 (11th Cir. 2020)* (citation omitted) (acknowledging the deferential framework of AEDPA for evaluating issues previously decided in state court), cert. denied, *141 S. Ct. 2469, 209 L. Ed. 2d 531 (2021)*; *Shoop v. Hill, 139 S. Ct. 504, 506, 202 L. Ed. 2d 461 (2019)* (per curiam) (recognizing AEDPA imposes "important limitations on the power of federal courts to overturn the judgments of state courts in criminal cases").

Thus, "[u]nder AEDPA, a court cannot grant relief unless the state court's decision on the merits was 'contrary to, or involved an unreasonable application of,' Supreme Court precedent, or 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *McKiver v. Sec'y, Fla. Dep't of Corr., 991 F.3d 1357, 1364 (11th Cir.)* (citing *28 U.S.C. § 2254(d)(1)-(2)*), cert. denied, *142 S. Ct. 441, 211 L.*

[6] Petitioner was represented by counsel in state-court post-conviction proceedings, and the state court conducted evidentiary hearings.

Ed. 2d 260 (2021). The Eleventh **[*6]** Circuit instructs:

> A state court's decision is "contrary to" clearly established federal law if the state court either reaches a conclusion opposite to the Supreme Court of the United States on a question of law or reaches a different outcome than the Supreme Court in a case with "materially indistinguishable facts." *Williams v. Taylor, 529 U.S. 362, 412-13, 120 S. Ct. 1495, 146 L.Ed.2d 389 (2000)*. "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle" from Supreme Court precedents "but unreasonably applies that principle to the facts of the prisoner's case." *Id. at 413, 120 S. Ct. 1495*.

Lee, 987 F.3d at 1017-18. Therefore, habeas relief is limited to those occasions where the state court's determinations are unreasonable, that is, if no fairminded jurist could agree with them. *McKiver, 991 F.3d at 1364*.

This high hurdle is not easily surmounted. If the state court applied clearly established federal law to reasonably determined facts when determining a claim on its merits, "a federal habeas court may not disturb the state court's decision unless its error lies 'beyond any possibility for fairminded disagreement.'" *Shinn v. Kayer, 141 S. Ct. 517, 520, 208 L. Ed. 2d 353 (2020)* (per curiam) (quoting *Harrington v. Richter, 562 U.S. 86, 103, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)*). Also, a state court's finding of fact, whether a state trial court or appellate court, is entitled **[*7]** to a presumption of correctness under *28 U.S.C. § 2254(e)(1)*. "The state court's factual determinations are presumed correct, absent clear and convincing evidence to the contrary." *Sealey, 954 F.3d at 1354* (quoting *28 U.S.C. § 2254(e)(1)*). See *Hayes v. Sec'y, Fla. Dep't of Corr., 10 F.4th 1203, 1220 (11th Cir. 2021)* (Newsome, Circuit Judge, concurring) (recognizing the universal requirement, applicable to all federal habeas proceedings of state prisoners, set forth in *28 U.S.C. § 2254(e)(1)*).

V. INEFFECTIVE ASSISTANCE OF COUNSEL

Claims of ineffective assistance of counsel are "governed by the familiar two-part *Strickland[v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]* standard." *Knight v. Fla. Dep't of Corr., 958 F.3d 1035, 1038 (11th Cir. 2020)*, cert. denied, *141 S. Ct. 2471, 209 L. Ed. 2d 531 (2021)*. To prevail on a claim of ineffective assistance of counsel, a petitioner must successfully show his counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the *Sixth Amendment*" as well as show "the deficient performance prejudiced the defendant, depriving him of a 'fair trial, a trial whose result is reliable.'" *Raheem v. GDCP Warden, 995 F.3d 895, 908 (11th Cir. 2021)* (quoting *Strickland, 466 U.S. at 687*), cert. denied, *142 S. Ct. 1234, 212 L. Ed. 2d 237 (2022)*. As both components under *Strickland* must be met, failure to meet either prong is fatal to the claim. *Raheem, 995 F.3d at 908* (citation omitted).

Not only is there the *Strickland* mandated layer of deference there is an additional layer of deference required by AEDPA to the state court's decision. Thus, given the double deference due, rarely is relief warranted upon federal habeas **[*8]** review on a claim of ineffective assistance of counsel once addressed on the merits in a state court proceeding. See *Tuomi v. Sec'y, Fla. Dep't of Corr., 980 F.3d 787, 795 (11th Cir. 2020)* (asking, under *§ 2254(d)*, is there any reasonable argument that counsel satisfied Strickland's deferential standard), cert. denied, *141 S. Ct. 1721, 209 L. Ed. 2d 484 (2021)*.

Petitioner also raises a claim of ineffective assistance of appellate counsel. A claim of ineffective assistance of appellate counsel is governed by this same *Strickland* standard. Id. (citing *Philmore v. McNeil, 575 F.3d 1251, 1264 (11th Cir. 2009)*). As in a claim of ineffective assistance of trial counsel, failure to establish either

prong of the *Strickland* standard is fatal to a claim of ineffective assistance of appellate counsel. Id.

In applying the two-pronged standard established in *Strickland*, the Court is mindful that appellate counsel may weed out weaker, although meritorious arguments, as there is no duty under the *Sixth Amendment* to raise every non-frivolous issue. *Overstreet v. Warden, 811 F.3d 1283, 1287 (11th Cir. 2016)*. Regarding the prejudice prong, "[a]ppellate] [c]ounsel's performance will be deemed prejudicial if we find that the neglected claim would have a reasonable probability of success on appeal." *Tuomi, 980 F.3d at 795* (quoting *Philmore, 575 F.3d at 1265*) (internal quotation omitted).

VI. THE OFFENSE

The Florida Supreme Court (FSC), in its opinion addressing Petitioner's direct appeal, detailed the facts of the case. *Mungin v. State, 689 So. 2d 1026, 1028 (Fla. 1995)* (per curiam) **[*9]** (*Mungin I*), cert. denied, *522 U.S. 833, 118 S. Ct. 102, 139 L. Ed. 2d 57 (1997)*. For context, the facts will be repeated here:

> Betty Jean Woods, a convenience store clerk in Jacksonville, was shot once in the head on September 16, 1990, and died four days later. There were no eyewitnesses to the shooting, but shortly after Woods was shot a customer entering the store passed a man leaving the store hurriedly with a paper bag. The customer, who found the injured clerk, later identified the man as Mungin. After the shooting, a store supervisor found a $59.05 discrepancy in cash at the store. Mungin was arrested on September 18, 1990, in Kingsland, Georgia. Police found a .25-caliber semiautomatic pistol, bullets, and Mungin's Georgia identification when they searched his house. An analysis showed that the bullet recovered from Woods had been fired from the pistol found at Mungin's house.

Jurors also heard *Williams* [7] rule evidence of two other crimes. They were instructed to consider this evidence only for the limited purpose of proving Mungin's identity.

First, William Rudd testified that Mungin came to the convenience store where he worked on the morning of September 14, 1990, and asked for cigarettes. When Rudd turned to get the cigarettes, Mungin shot **[*10]** him in the back. He also took money from a cash box and a cash register. Authorities determined that an expended shell recovered from the store came from the gun seized in Kingsland.

Second, Thomas Barlow testified that he saw Meihua Wang Tsai screaming in a Tallahassee shopping center on the afternoon of September 14, 1990. Tsai had been shot while working at a store in the shopping center. A bullet that went through Tsai's hand and hit her in the head had been fired from the gun recovered in Kingsland. The judge instructed the jury on both premeditated murder and felony murder (with robbery or attempted robbery as the underlying felony), and the jury returned a general verdict of first-degree murder.

In the penalty phase, several witnesses who knew Mungin while he was growing up testified that he was trustworthy, not violent, and earned passing grades in school. Mungin lived with his grandmother from the time he was five, but Mungin left when he was eighteen to live with an uncle in Jacksonville. An official from the prison where Mungin was serving a life sentence for the Tallahassee crime testified that Mungin did not have any disciplinary problems during the six months Mungin was **[*11]** under his supervision. Harry Krop, a forensic psychologist, testified that he found no evidence of any major mental illness or personality disorder, although Mungin had a history of drug and alcohol abuse. Krop said he thought Mungin could be rehabilitated because of his normal life

[7] *Williams v. State, 110 So. 2d 654, 662 (Fla.)*, cert. denied, ***361 U.S. 847, 80 S. Ct. 102, 4 L. Ed. 2d 86 (1959)***.

> before drugs, his average intelligence, and his clean record while in prison.
> The jury recommended death by a vote of seven to five. The trial judge followed the jury's recommendation and sentenced Mungin to death. In imposing the death penalty, the trial judge found two aggravating factors: (1) Mungin had previously been convicted of a felony involving the use or threat of violence to another person; and (2) Mungin committed the capital felony during a robbery or robbery attempt and committed the capital felony for pecuniary gain. The trial judge found no statutory mitigation and gave minimal weight to the nonstatutory mitigation that Mungin could be rehabilitated and was not antisocial.

Id. (footnotes omitted).

VII. GROUND ONE

Ground One: Ineffective Assistance of Counsel/Guilt Phase [8]

A. Voir Dire (*Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)*)

Petitioner claims Assistant Public Defender Charles G. Cofer performed deficiently when he accepted **[*12]** the jury without objection even though the state struck Helen Galloway, an African American female, on the basis of race.[9] Second Amended Petition at 64. Petitioner contends the state's use of a peremptory strike to remove Mrs. Galloway was demonstrably pretextual. Id. Petitioner argues that due to defense counsel's deficient performance, Petitioner's right to equal protection under *Batson* was violated and he was unable to have the claim considered on direct appeal due to counsel's deficient performance, in violation of the *Sixth Amendment* and the standard set forth in *Strickland*. Id. Petitioner contends counsel's failure to properly preserve his Neil [10] objection prejudiced Petitioner, causing the issue not to be preserved for appeal. Id. at 66.

Petitioner raised his claim of ineffective assistance of counsel in his Consolidated Amended Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend. Ex. FF at 22-30. The circuit court denied any hearing on the claim, finding the record refutes the allegations. *Id. at 411*. Thereafter, the court denied post-conviction relief. Ex. HH at 203-204, 209. Petitioner appealed, and the FSC found the following:

> At the Huff [11] hearing, the State argued that Mungin **[*13]** was not prejudiced by trial counsel's failure to object because the underlying claim was meritless. After reviewing the record of the voir dire, we conclude that the trial court did not abuse its discretion in granting the State's peremptory challenge of juror Galloway. Therefore, the prejudice prong of *Strickland* is conclusively refuted. See *Valle v. State, 705 So. 2d 1331, 1335 (Fla. 1997)*.

Mungin v. State, 932 So. 2d 986, 996-97 (2006) (per curiam) (*Mungin* II).

The record demonstrates the following occurred during jury selection. The prosecutor, Bernardo de la Rionda, asked Mrs. Galloway, a venireman,[12] how

[8] The List and its Index of Claims were not updated to correspond with the Second Amended Petition and as a result, are confusing at best. For ease of reference, the Court generally adopts the organization and summation of the claims utilized in the Response (Doc. 31), but, in an effort to somewhat simplify and clarify the claims, the Court will paraphrase some claims and related subclaims.

[9] Charles G. Cofer, currently the Public Defender for the Fourth Judicial Circuit, was formerly an Assistant Public Defender and a Duval County Judge.

[10] *State v. Neil, 457 So. 2d 481 (Fla. 1984)* (claiming the trial court erred in denying an objection and motion to strike, improperly allowing the state to exercise its peremptory challenges to exclude blacks from the jury).

[11] *Huff v. State, 622 So. 2d 982 (Fla. 1993)* (per curiam) (the trial court undertakes a *Huff* hearing to determine whether an evidentiary hearing is needed).

[12] The Court adopts the terminology used by the state court.

she felt about the death penalty, and she responded, "I have mixed emotions."[13] Ex. F at 379. Later in the proceeding, the prosecutor inquired: "Mrs. Galloway, same questions. First part -- first part of the trial, could you find the Defendant guilty if the State proves the case against the Defendant, could you find him guilty knowing that it could subject him to the death penalty?" Id. at 407. Mrs. Galloway responded yes. Id. The prosecutor then asked if the aggravating factors outweigh the mitigating factors, could Mrs. Galloway make a recommendation of death, and she responded yes. Id. at 407-408. Upon further inquiry by Mr. Cofer, Mrs. Galloway was asked about her "mixed emotions" response **[*14]** and whether she felt as though she could follow the law and the court's instructions on the law in terms of "weighing the statutory aggravations against mitigation." Id. at 491. She responded affirmatively. Id.

When the prosecutor asked venireman Mr. Venettozzi how did he feel about the death penalty, Mr. Venettozzi responded: "I think it's mixed. It depends on how serious." Id. at 374. Mr. Cofer said he could not hear the response, and Mr. Venettozzi responded: "I believe it depends on the circumstances. I don't think I could say yes or no without knowing."[14] Id. With regard to the prosecutor's two-pronged questions stated above, Mr. Venettozzi responded yes and yes. Id. at 403.

The prosecutor moved to strike Mrs. Golden, a black female, for cause, the court questioned the stated cause and found she answered satisfactorily, and then the prosecutor struck Mrs. Golden peremptorily. Id. at 529-30. The prosecutor sought to strike Mrs. Galloway. Id. at 531. At this point, Mr. Cofer objected, noting that Mrs. Golden and Mrs. Galloway are black females, and the prosecutor should not be allowed to exercise peremptory challenges against them. Id. at 531-33. Mr. Cofer asked for a *Neil* inquiry. **[*15]** Id. at 533. The court noted for the record that Mrs. Golden and Mrs. Galloway were "the first two blacks, they are both females, the Defendant in this case is black." Id.

The prosecutor said he struck Mrs. Galloway because she stated she had mixed emotions about the death penalty, noting that he also struck Mrs. Podejko and Mrs. Golden for the same reason. Id. at 534. Mr. Cofer complained this was just a ruse because Mrs. Galloway responded yes to Mr. de la Rionda's standard two-line questioning. Id. at 535. Mr. Cofer pointed out that mixed emotions did not mean that the individual was more inclined not to support the death penalty. Id. The court inquired whether that had to do with race, and Mr. Cofer said it does not. Id. The court then asked is not the state entitled to use its peremptory challenges "against those who have mixed feelings about capital punishment?" Id. at 536.

Mr. Cofer argued that Mrs. Galloway's responses were indistinguishable from those of Mr. Venettozzi, when he said he could impose the death penalty depending upon the circumstances. Id. at 537. Mr. de la Rionda countered that he had struck all three potential jurors who said they had mixed emotions. Id. at 537-38. The court, after **[*16]** hearing argument, decided:

> Well, the strikes by the State have been — there is a substantial amount of record to indicate that those folks were not sure, mixed as the case may be. But again, I don't think it has anything to do with race, particularly one of these is a white female, two of them are black females. The reasons are racially neutral so that I will find that the State has exercised the peremptories again

[13] Of note, venireman Mrs. Podejko said she had "mixed emotions on it" and venireman Mrs. Goodman said she had "mixed feelings on it." Ex. F at 374, 389. Venireman Mrs. Golden said she had "mixed emotions." Id. at 374-75. Venireman Mr. Newkirk said he had mixed feelings (later struck for cause because he said he could not vote for the death penalty). Id. at 390, 554-55. The state successfully peremptorily struck Podejko, Golden, and Galloway. Id. at 528-31. By the time of Mrs. Goodman's selection, the state no longer had any peremptory challenges left and the trial court denied the state's challenge for cause finding mixed feelings was not grounds for disqualification. Id. at 558-59.

[14] Mr. Venettozzi never used the phrase: "mixed emotions." He offered the explanation that he believed the imposition of the death penalty depends on the circumstances.

legitimately.

Id. at 538.

After the court listed the jurors, the court inquired, "[d]oes that agree with everybody?" Id. at 560. Mr. de la Rionda responded affirmatively. Id. The court said, "[w]hether you like them or not, you agree those are the ones?" Id. Again, Mr. de la Rionda said yes, and then the court asked Mr. Cofer if that was right, and he said yes. Id.

Petitioner complains that his trial counsel performed deficiently in accepting the jury without re-raising his objection concerning Mrs. Galloway. This is based on the fact that in Florida, for appellate review, counsel must raise an objection prior to the jury being sworn. See *Joiner v. State, 618 So. 2d 174, 176 (Fla. 1993)* (requiring trial counsel to renew an already rejected *Batson* challenge a second time at the conclusion of voir dire to preserve the *Batson* claim for appeal). In this instance, **[*17]** however, the FSC found Petitioner did not meet the prejudice standard under *Strickland*. Thus, even assuming Petitioner satisfied the deficient performance prong of *Strickland*, Petitioner did not satisfy the prejudice prong as the court was convinced, upon review of the transcript of the voir dire, that the trial court did not abuse its discretion in granting the state's peremptory challenge of juror Galloway. As such, in denying this claim, the court concluded Petitioner did not show this action so affected the fairness and reliability of the proceedings that confidence in the outcome is undermined.

To the extent Petitioner may be claiming counsel's failure to properly preserve the objection prejudiced Petitioner by denying him his right to an impartial jury, he is not entitled to habeas relief.[15] Failure to renew a *Neil* challenge does not necessarily mean a jury panel was actually biased.[16] Indeed, in this instance, the state courts were convinced given the trial court's sustaining the peremptory challenge of Mrs. Galloway, there was no resulting impartial jury because the peremptory challenge was not founded upon the basis of race nor was it demonstrably pretextual.

Here the state **[*18]** court properly applied the two-pronged *Strickland* standard of review for Petitioner's claim of ineffective assistance of counsel; therefore, Petitioner cannot satisfy the "contrary to" test of *28 U.S.C. § 2254(d)(1)*. As such, this Court must ask whether the court unreasonably applied that principle to the facts of Petitioner's case or premised its adjudication of the claim on an unreasonable determination of the facts. After reviewing the trial transcript, and in particular the record of the voir dire, the Court is not convinced there was an unreasonable application or an unreasonable determination of the facts.

In order to satisfy the prejudice prong of *Strickland*, the deficient performance must be shown to have so affected the fairness and reliability of the proceedings that confidence in the outcome is undermined. See *Mungin II at 996* (citation omitted and internal citation omitted). The FSC rejected the claim finding the prejudice prong conclusively refuted by the record. In this instance, the state court did not unreasonably apply *Strickland* to the facts before it. The state court applied clearly established federal law to reasonably determined facts.

The Court will not disturb the state court's decision as the determination was not unreasonable. **[*19]** Deference is due to the FSC's decision as the state court's adjudication of this claim

[15] The thrust of Petitioner's claim is that he received prejudicially deficient performance from Mr. Cofer, "who unreasonably failed to properly preserve a meritorious *Batson* challenge." Second Amended Petition at 75.

[16] Significantly, the jury included three African American females (Mrs. Watson, Mrs. Barnes, Mrs. Samuels) and one African American male (Mr. Combs). Ex. F at 559-60. See *United States v. Puentes, 50 F.3d 1567, 1578 (11th Cir. 1995)* (the seating of four African American jurors is not dispositive of a *Batson* claim, but it is considered a significant factor concerning paucity of the claim), cert. denied, ***516 U.S. 933, 116 S. Ct. 341, 133 L. Ed. 2d 239 (1995)***; *U.S. v. Ochoa-Vasquez, 428 F.3d 1015, 1039-47 (11th Cir. 2005)* (same), cert. denied, ***549 U.S. 952, 127 S. Ct. 380, 166 L. Ed. 2d 268 (2006)***.

is not contrary to or an unreasonable application of *Strickland* or based on an unreasonable determination of the facts.

Alternatively, as Petitioner has failed to satisfy the prejudice prong of *Strickland*, he is not entitled to habeas relief. Here, Petitioner is claiming his trial attorney failed to preserve his *Batson* claim for appellate review and this failure "had an effect not on the trial itself but on Mr. Mungin's appeal." Second Amended Petition at 69. For the proposition that the appropriate prejudice inquiry is whether there is a reasonable likelihood of a more favorable result on appeal, Petitioner relies on *Davis v. Sec'y for Dep't of Corr., 341 F.3d 1310, 1311 (11th Cir. 2003)* (per curiam) (finding trial counsel acts in an appellate role when failing to preserve a *Batson* claim, thus requiring a showing of some likelihood of a more favorable result on appeal had appellate counsel raised a *Batson* claim).

To the extent Petitioner's claim of prejudice "rests entirely on the failure to preserve this issue for appeal[,] the claim is without merit. *Agaro v. Sec'y, Fla. Dep't of Corr., No. 3:18-cv-341-J-34PDB, 2020 U.S. Dist. LEXIS 194713, 2020 WL 6161469, at *8 (M.D. Fla. Oct. 21, 2020)* (finding failure to establish requisite prejudice), cert. of appealability denied, No. 20-1444 7-C, 021 U.S. App. LEXIS 7010, 2021 WL 2190215 (11th Cir. March 10, 2021).[17] The relevant **[*20]** prejudice inquiry is focused on trial, not the appeal, as "there is no clearly established federal law by the Supreme Court specifically addressing whether the federal court should examine the prejudice on appeal rather than at trial in a case [where an issue was raised but not properly preserved.]" *Carratelli v. Stepp, 382 F. App'x 829, 832 (11th Cir. 2010)* (per curiam) (distinguishing *Davis*, finding the court's review was *de novo* and the standard of review decidedly different).

Assuming arguendo counsel failed to properly preserve the issue, the FSC would have had to determine whether the error constituted fundamental error "such that preservation would not be required." *Agaro, 2020 U.S. Dist. LEXIS 194713, 2020 WL 6161469, at *8*. The FSC found the trial court did not abuse its discretion in granting the peremptory challenge of Mrs. Galloway. The state court found the prosecutor's explanation made sense, in that the prosecutor consistently struck venire members who claimed "mixed emotions" about the death penalty, no matter their race. As such, Petitioner was not prejudiced by counsel's performance, even assuming counsel performed deficiently in failing to preserve the issue for appeal. Thus, he is not entitled to habeas relief.

Moreover, in this instance, the Court is not convinced the *Batson* claim **[*21]** itself is meritorious.[18] As such, there is not a reasonable probability that the Florida courts would grant relief on Petitioner's *Batson* claim, even if properly preserved and raised on direct appeal. The prosecutor was found to have met his burden of stating a racially neutral explanation for his actions. Comparing the peremptory strike of Mrs. Galloway with the treatment of panel members who expressed similar "mixed emotions," supports the conclusion that race was not significant to the prosecutor in determining who was challenged and who was not.[19]

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[17] The Court finds the reasoning of Agaro persuasive on this point. See *McNamara v. Gov't Emp. Ins. Co., 30 F.4th 1055, 1060-61 (11th Cir. 2022)* (reiterating that unpublished opinions may be cited as persuasive authority but are not binding precedent). See ***Rule 32.1, Fed. R. App. P.*** Throughout this opinion, in referencing unpublished opinions, the Court acknowledges that the opinions do not constitute binding precedent but serve as persuasive authority for the position at issue.

[18] On direct appeal Petitioner claimed the trial court erred in overruling a defense objection to the state's peremptory challenge of a black prospective juror; the FSC found the claim was not preserved for its review. *Mungin I at 1030 n.7*.

[19] One factor gives this Court pause; after Mrs. Galloway said she had mixed emotions the prosecutor asked no follow-up questions. Ex. F at 379. But this turns out to be a distinction without a difference. Mr. de la Rionda treated Mrs. Podejko, Mrs. Golden, Mrs. Goodman, Mr. Newkirk, Mr. Downer, and Mrs. Shelton similarly. Id. at 374-75, 389, 395. The record shows he treated the individuals who responded that they had "mixed emotions" similarly, without disparity based on race. Although there was a little more of an exchange with Mr. Venettozzi, this was due to Mr. Cofer interjecting that he could not hear Mr.

See *Miller-El v. Dretke, 545 U.S. 231, 252-64, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005)* (finding the prosecution's (Dallas County District Attorney's Office) reason for striking a juror taking into consideration the whole of the voir dire testimony, implausible, noting the use of the Texas jury shuffle, contrasting voir dire questions posed to black and nonblack panel members, disparate treatment of ambivalent black venire members from ambivalent white panel members, trickery through disparate questioning concerning punishment, and finally the engagement in the systematic exclusion of blacks from juries in Dallas County).

Finally, and importantly, "[t]here is no evidence that race played any role in this case, that any juror **[*22]** was biased, or that it is reasonably probable a black juror would have seen the evidence differently than the white jurors" who found Petitioner guilty. *Pryear v. Inch, No. 3:19cv357-MCR-MJF, 2020 U.S. Dist. LEXIS 210818, 2020 WL 6587280, at *7 (N.D. Fla. Aug. 9, 2020)* (footnote omitted), report and recommendation adopted by *2020 U.S. Dist. LEXIS 210031, 2020 WL 6582668 (N.D. Fla. Nov. 10, 2020)*. Indeed, upon review of the record, there is no evidence that a biased juror actually served on the jury. See *Carratelli v. State, 961 So. 2d 312, 324 (Fla. 2007)* (setting forth the Florida standard). There was strong and significant evidence linking Petitioner to the crime, including the ballistics evidence that identified the gun used in the Tallahassee and Monticello shootings and found in Petitioner's room the night he was arrested, as the very same gun as used to shoot the victim in the Duval County case. *Mungin II at 1000*. This evidence was supported by the convincing eyewitness testimony of Ronald Kirkland, who was not only able to pick Petitioner out of photographic lineup after his encounter with Petitioner but also to identify Petitioner in the courtroom as the man he saw leaving the store (where the victim was shot) carrying a bag. Under these circumstances, it is not reasonably probable that a black juror would have seen the significant evidence differently than white jurors.

B. Failure to Impeach [*23] Ronald Kirkland

Petitioner claims his counsel was ineffective for failure to impeach Ronald Kirkland with critical evidence: a pending violation of probation warrant and an outstanding capias. Second Amended Petition at 76-77. Petitioner argues this failure was significant to the defense as this witness "was the linchpin" of the state's case. Id. at 76.

The FSC rejected the claim of ineffective assistance of counsel finding Petitioner failed to establish prejudice. *Mungin II at 998-99*. In doing so, the court reasoned:

> Even if Cofer's performance was deficient because he failed to discover and use Kirkland's probationary status as impeachment evidence, Mungin has failed to establish prejudice. Cofer attacked Kirkland's identification of Mungin on cross-examination of Kirkland, and by his cross-examination of the victim of the Monticello shooting and the eyewitness to the Tallahassee shooting, whose descriptions of the perpetrator were different from Kirkland's. In closing argument, Cofer argued extensively that due to these inconsistencies, Kirkland's identification could not be believed beyond a reasonable doubt. Moreover, Kirkland testified that he did not tell anyone from the State Attorney's Office that **[*24]** he was on probation and that he did not have any deals with the State in exchange for his testimony at Mungin's trial. Mungin does not allege that any deals were made. As for trial counsel's failure to inform the jury of the recalled warrants for Kirkland's arrest, because the warrants were not recalled until after the trial it cannot be said that counsel's performance was deficient.

Venettozzi's initial response ("I think it's mixed. It depends on how serious."), providing Mr. Venettozzi with the opportunity to elaborate on his response; however, Mr. de la Rionda, consistent with his pattern of inquiry, did not make any additional inquiry as to Mr. Venettozzi's response at that juncture. Id. at 374.

Id.

Petitioner submits that this decision is an unreasonable application of *Strickland*, and the findings of fact are incorrect or unreasonable. Second Amended Petition at 78. Petitioner argues that not only was counsel deficient in his performance his performance prejudiced the case because the jurors were not informed "about Kirkland's potential for bias and motive for testifying and in becoming more 'certain' about his identification of Mr. Mungin." Id. at 85.

The circuit court conducted an evidentiary hearing. Petitioner's trial counsel, Mr. Cofer, testified as to his preparation for trial. He obtained Mr. Kirkland's rap sheet pertaining to Kirkland's criminal history up to October 13, 1992. Ex. GG at 338-39. Mr. Cofer deposed Mr. Kirkland and inquired about his DUI offense and an offense of disorderly intoxication. **[*25]** Id. at 339. Mr. Cofer noted that non-impeachable offenses that occurred sometime in the past would not have given him reason to withdraw. Id. at 341. He noted there was a docket in his file that should have made him aware that Mr. Kirkland was on probation at the time he testified. Id. at 346. Mr. Cofer stated that probation is a permissible area to inquire about a witness. Id. at 350. He said the document he received from the state did not include the warrant (a capias for a violation of probation), that was issued three weeks later. Id. at 354, 356, 359. Mr. Cofer testified he did not know why the warrant was ultimately recalled. Id. at 356-57.

At the hearing, Mr. Kirkland testified that the description he gave of Petitioner was a person having long hair and jeri-curls, age 28 to 32, a shorter individual, five-five to five-seven. Id. at 456-57. Mr. Kirkland stated he successfully completed the probation. Id. at 465. He attested he never discussed his probation with Mr. de la Rionda or anyone else from the State Attorney's Office. Id. Mr. Kirkland explained that neither the police nor the State Attorney's Office asked him if he was on probation around the time of the trial and the **[*26]** matter never came up at the time of trial. Id. at 465-66. He testified he had never been convicted of a felony and had one conviction for making a false statement. Id.

On cross examination, Mr. Kirkland stated he never talked with Mr. de la Rionda or anyone else from the State Attorney's Office about worthless checks, he never told them he was arrested on worthless checks, and he never told anyone about the worthless checks. Id. at 473-74. He attested that there were never any deals regarding any cases he had previously or pending at the time of trial for his trial testimony. Id. at 474.

The state called Mr. Cofer. Id. at 488. Upon inquiry, he said neither the State Attorney's Office nor the Public Defender's Office would be involved in the process to issue a warrant for a violation of probation. Id. at 495.

Mr. Kirkland was put on probation with the Salvation Army on October 13, 1992. Id. at 269. On January 11, 1993, warrants issued for violating probation. Id. Petitioner was found guilty of murder,[20] and a few weeks thereafter the capiases for Mr. Kirkland were recalled on February 17, 1993. Id. at 270.

Upon review, the findings of fact are not incorrect or unreasonable; indeed, they are well-supported **[*27]** and accurate. Furthermore, the Court is not convinced that there has been an unreasonable application of *Strickland*. As noted by Respondents, even if Mr. Cofer had attempted to impeach Mr. Kirkland about a misdemeanor violation-of-probation warrant, it would have been of negligible benefit to the defense as Mr. Kirkland did not know about the warrant, Mr. Kirkland did not tell the police or the State's Attorney's Office he was on probation, neither the State Attorney's Office nor the Public Defender's Office would be involved in the process to issue a warrant for a violation of probation, there was no evidence of a deal for

[20] The jury found Petitioner guilty on January 28, 1993.

Kirkland's testimony, and the warrant was ultimately withdrawn.

Based on this record, Petitioner cannot satisfy the contrary to test of *28 U.S.C. § 2254(d)(1)*. The Court finds the state court's adjudication of this claim is not contrary to or an unreasonable application of *Strickland* or based on an unreasonable determination of the facts. As such, this Court will give AEDPA deference to the state court's decision and will deny post-conviction relief.

Of import, Mr. Cofer's efforts to discredit the testimony of Mr. Kirkland did not constitute deficient performance by counsel. It evinced sound trial strategy. **[*28]** *Harvey v. Warden, Union Corr. Inst., 629 F.3d 1228, 1238 (11th Cir.)* (noting the performance inquiry usually boils down to whether it was deficient performance or sound trial strategy), cert. denied, *565 U.S. 1035, 132 S. Ct. 577, 181 L. Ed. 2d 422 (2011)*. Mr. Cofer used effective measures to attack Mr. Kirkland's identification of Petitioner. Mr. Kirkland's description of Petitioner did not match the description of Petitioner by others who had seen Petitioner during other recent offenses. Counsel argued these inconsistencies cast great doubt on Mr. Kirkland's identification of Petitioner. Regarding the prejudice prong, at the evidentiary hearing, Mr. Kirkland attested that he did not tell anyone from the State Attorney's Office he was on probation, and he was adamant there were no deals with the state for his testimony. Furthermore, Petitioner has not submitted any evidence there was a deal. As for any failure to bring forth testimony concerning recalled warrants, the evidence showed the warrants were not recalled until after Petitioner's trial.

Also, "[w]hen courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger." *Hardwick v. Benton, 318 F. App'x 844, 846 n.2 (11th Cir. 2009)* (per curiam) (quoting *Chandler v. U.S., 218 F.3d 1305, 1316 (11th Cir. 2000)*). Mr. Cofer received his undergraduate degree from Duke University in 1974 and graduated **[*29]** from the University of Virginia School of Law in 1977. Ex. GG at 236. He was in a civil private practice from 1977 to 1980 and in January of 1980 went to the Public Defender's Office. Id. He was an Assistant Public Defender from 1980 through July of 1998, when he received an appointment to the county court bench. Id. at 235. He began handling homicide cases around 1983 to 1984, and was in the homicide unit from 1987 to 1995 or 1996, and then he began supervising the county court operation. Id. There is a strong presumption that an experienced trial counsel's performance is not ineffective, and here Petitioner failed to overcome the presumption of effective performance accorded to his counsel.

"Strickland does not guarantee perfect representation, only a 'reasonably competent attorney.'" *Richter, 562 U.S. at 110* (quoting *Strickland, 466 U.S. at 687*) (internal quotation omitted). Mr. Cofer's representation did not so undermine the proper functioning of the adversarial process that Petitioner was deprived of a fair trial. Counsel's representation was effective, if not flawless. Id. (recognizing there is no expectation that competent counsel will be a flawless strategist or tactician). In this instance, Mr. Cofer's representation did not **[*30]** fall below an objective standard of reasonableness. In short, his representation was not so filled with serious errors that counsel was not functioning as counsel guaranteed by the *Sixth Amendment*. Petitioner is not entitled to habeas relief on this ground.

C. Failure to Elicit Testimony from Detective Conn

In this ground, Petitioner alleges that trial counsel failed to elicit testimony from Detective Christie Conn that Mr. Kirkland had told the detective at the time of the identification that he could not swear in court that the man in the photograph he had selected was the same man he saw exiting the store. Second Amended Petition at 85. At the evidentiary hearing, Mr. Cofer related that Detective Conn, in her deposition, testified that Mr. Kirkland told Detective Conn he could not make an identification in the

courtroom "based on the photograph itself." Ex. GG at 349. Mr. Cofer agreed that he could have brought that out if he had called Detective Conn in the defense's case. Id. However, Mr. Cofer explained why he and his co-counsel tactically decided, with the agreement of their client, not to do so:

> Yes. We discussed this with Mr. Mungin, that as we got closer to trial it was our decision — Mr. **[*31]** De la Rionda is a very capable and very talented arguer, and it was our decision that unless we had something pretty important that we wanted to try to handle our case in a way so that we would reserve open and close. In other words, the sandwich in argument. On balance, Mr. Kirkland admitted during trial to most of the things that we could have utilized Detective Conn to impeach on, but with that one exception about the certainty of his identification. On balance we just felt at that time that it was just not worth losing open and close to recall Detective Conn, who was an adverse witness, to establish that one fact.

Id. at 275.

Petitioner did not testify at the evidentiary hearing, and there was no testimony contrary to that offered by Mr. Cofer's concerning the tactical decision-making by the defense team. As noted by Mr. Cofer, through his cross-examination of Mr. Kirkland, Mr. Cofer attacked the discrepancies and weaknesses in Mr. Kirkland's testimony, including challenging Kirkland's description of the man leaving the store compared to Petitioner's appearance as described by others at around that time, the brevity of Mr. Kirkland's encounter with the man leaving the store, the fact that **[*32]** Mr. Kirkland saw the back side of the person's head, and the extended length of time it took Mr. Kirkland to pick out a picture from the photo lineup. See Ex. I at 677-85. And, of importance, upon inquiry, Mr. Kirkland said he did not remember telling Detective Conn that he could not swear in court. Id. at 685. The record shows that Mr. Kirkland admitted to the weaknesses in his identification, except he did not remember telling Detective Conn that he could not make an identification in the courtroom based on the photograph itself.

Both the circuit court and the FSC, applying the *Strickland* standard, addressed this ground and denied relief, finding defense counsel made a tactical decision not to call Detective Conn. Ex. HH at 206-207; *Mungin II at 999*. The circuit court found Mr. Cofer's testimony credible.[21] Ex. HH at 206. Of course, this Court has "no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them." *Consalvo v. Sec'y for Dep't of Corr., 664 F.3d 842, 845 (11th Cir. 2011)* (per curiam) (internal quotation marks omitted) (quoting *Marshall v. Lonberger, 459 U.S. 422, 434, 103 S. Ct. 843, 74 L. Ed. 2d 646 (1983)*), cert. denied, *568 U.S. 849, 133 S. Ct. 175, 184 L. Ed. 2d 87 (2012)*. Since the trial court observed Mr. Cofer's testimony and found it credible, this Court will not make any redetermination as this Court must defer to the state court's **[*33]** findings of fact, *28 U.S.C. § 2254(e)(1)*, including applying deference to the trial court's credibility determination. *Gore v. Sec'y for Dep't of Corr., 492 F.3d 1273, 1300 (11th Cir. 2007)*, cert. denied, *552 U.S. 1190, 128 S. Ct. 1226, 170 L. Ed. 2d 77 (2008)* (giving heightened deference to a credibility determination in a case on habeas review). See *Baldwin v. Johnson, 152 F.3d 1304, 1316 (11th Cir. 1998)* (accepting the state court's credibility determination that counsel was credible), cert. denied, *526 U.S. 1047, 119 S. Ct. 1350, 143 L. Ed. 2d 512 (1999)*.

Petitioner has not rebutted the presumption of

[21] Of import, the trial court opined, "[t]here may not be many lawyers with the experience of dealing with homicide cases as exhibited by current county court judge and former assistant public defender Charles G. Cofer's[sic], Defendant's trial attorney whose testimony presented at the evidentiary hearing was both more credible and more persuasive than Defendant's allegations." Ex. FF at 204. The court continued, "[t]aking the totality of evidence derived at the evidentiary hearing, this Court does not find any sufficient degree of ineffective assistance of counsel which would require reversal of Defendant's judgment and sentence." Id.

correctness by clear and convincing evidence. *28 U.S.C. § 2254(e)(1)*. Thus, his claim is unavailing. Even though trial counsel ultimately waived initial closing argument, the FSC said this factor "does not demonstrate that at the time the decision was made not to call Detective Conn, trial counsel did not intend to use both the initial and final closing." *Mungin II at 999*. The defense's trial strategy, when the decision was made, was to try to preserve open and close. Ex. GG at 347.

The FSC also reasoned, assuming arguendo deficient performance, Petitioner failed to establish prejudice, noting that the confidence in the outcome of the case is not undermined by any failure to call Detective Conn, an adverse witness, in the defense's case. *Mungin II at 999*. Recognizing the strength of Mr. Cofer's cross-examination of Mr. Kirkland and another victim, the state court concluded the second prong **[*34]** of *Strickland* had not been met.

The Court finds the state court's determination is consistent with federal precedent. As such, the state court's decision is entitled to AEDPA deference. The state court's ruling is based on a reasonable determination of the facts and a reasonable application of the law. In short, the state court's adjudication of the claim of ineffective assistance of counsel is not contrary to or an unreasonable application of *Strickland* and its progeny or based on an unreasonable determination of the facts. Therefore, the state court's decision is entitled to deference and this ground is due to be denied.

D. Failure to Adequately Investigate and Present Alibi

Petitioner claims his counsel failed to adequately investigate the circumstances of his alibi, contending Petitioner had an alibi for the date in question and that "Ice" committed the crime. Second Amended Complaint at 91-92. At the evidentiary hearing, Mr. Cofer testified there were three potential aspects of the alibi: witnesses in Georgia, "Ice" in Jacksonville, and Charlotte Dawson, the girlfriend in Pensacola. Ex. GG at 320-21. Mr. Cofer ascertained that it would be difficult to identify Ice, obtain his cooperation, and present **[*35]** his testimony. Id. at 321. Mr. Cofer was given a nickname for an individual in Jacksonville and was told Ice hung out in the Moncrief area. Id.

In his investigation of the circumstances to support an alibi, Mr. Cofer testified he did "leg work up in Georgia," travelled to Pensacola with his co-counsel, made stops in Monticello and Tallahassee, spoke with a victim of one of the other crimes (the other victim had gone back to China), and went to an address in Pensacola to try and find Ms. Dawson but her family no longer lived in the dwelling. Id. at 321-23. Eventually, Mr. Cofer was able to locate Ms. Dawson and defense counsel met with her. Id. at 323. Ms. Dawson said she had gone target practice shooting with Petitioner and described the gun, which matched the weapon seized from Petitioner. Id. at 324. Mr. Cofer said he discussed this investigation with Petitioner. Id. Mr. Cofer imparted to Petitioner that Ms. Dawson's testimony may be more harmful than helpful as she had never admitted to the detectives that she had been target practice shooting with Petitioner and used the small caliber semi-automatic. Id. at 325-26.

Apparently there was confusion about the exact nature of the potential **[*36]** alibi testimony, complicated by the fact that Petitioner had previously given statements to Jacksonville homicide detectives on two occasions. *Id. at 294-95*. In one statement, he referred to an individual as "Snow." Id. at 294. In another statement, Petitioner called the individual "Ice." Id. Petitioner's stories were certainly not identical, but the gist was that Snow/Ice allegedly possessed the gun at the time of the shooting in Jacksonville, not Petitioner.

Petitioner states that he agrees with the FSC's conclusion that Mr. Cofer rendered deficient performance. Second Amended Petition at 93. The Court is not convinced that the FSC rendered such a finding. Although not a model of clarity, apparently the FSC found neither deficient performance nor prejudice in any alleged failure to pursue an alibi defense. *Mungin II at 999-1000* ("The trial court

concluded that Cofer's strategic decision not to pursue this defense did not result in deficient performance or prejudice. **We agree**.") (emphasis added).[22] Notably, in its rationale, the FSC relied almost exclusively on the fact that Petitioner failed to establish the prejudice prong regarding the claim that counsel failed to follow up on the alibi defense ("In this case, it **[*37]** appears that counsel was confused about the details of Mungin's alibi defense. However Mungin has failed to establish prejudice."). *Id. at 1000*. See *Brewster v. Hetzel, 913 F.3d 1042, 1051-52 (11th Cir. 2019)* (reviewing court may begin with either component).

Under the prejudice prong of *Strickland*, the question to be asked is whether there is a reasonable probability that, but for counsel's unprofessional errors, would the result of the proceeding have been different. The FSC determined that any failure of counsel to follow up on the alibi defense would not have resulted in a different result. Indeed, there was significant circumstantial evidence linking Petitioner to the crime; there was strong witness testimony placing Petitioner at the store where the victim was shot; although Petitioner presented testimony that there was an individual named Ice, there was no testimony suggesting counsel would have been able to locate Ice during the investigation or any evidence connecting Ice to the gun; and, finally, Petitioner's alibi witnesses did not establish that Petitioner could not have committed the murder.[23] *Mungin II at 1000*. Thus, even assuming deficient performance, Petitioner failed to establish prejudice.

As the threshold standard of *Strickland* has not been met, Petitioner has failed **[*38]** to demonstrate a *Sixth Amendment* violation in that he has not shown the deficient performance prejudiced him, depriving him of a fair trial, a trial whose result is unreliable. *Raheem, 995 F.3d at 908*.

Upon review, the state court applied clearly established federal law to reasonably determined facts. Therefore, this Court will not disturb the state court's decision as the determination was not unreasonable and is entitled to AEDPA deference.

Petitioner has not satisfied the contrary to test of *28 U.S.C. § 2254(d)(1)* as the state court relied upon the two-pronged Strickland standard in undertaking its review. Furthermore, the state court's ruling is based on a reasonable determination of the facts and a reasonable application of the law. Petitioner has not demonstrated that the state court unreasonably applied *Strickland* or unreasonably determined the facts. As such, Petitioner is not entitled to habeas relief.

E. George Brown - Brady, [24] Gilgio, [25] and *Sixth*

[22] The record shows Mr. Cofer made some attempt to find Ice. Mr. Cofer utilized the Public Defender's database to search nicknames and aliases. Ex. GG at 296. That method proved unfruitful. Thereafter, he contacted investigator Mr. Blue, a former police officer, who had extensive knowledge of the black community to see if he knew anyone named Ice, but Mr. Blue did not have knowledge of an individual called Ice. Id. at 296-97. Mr. Cofer testified he was uncertain whether he sent someone to canvas the neighborhood, although if he had that would be reflected in his notes. Id. at 298.

[23] Petitioner submits that the FSC was not in a position to make credibility determinations on a cold record. Second Amended Petition at 104. The FSC, finding no prejudice, concluded, even accepting the testimony of the alibi witnesses, their testimony did not establish that Petitioner could not have committed the murder. *Mungin II at 1000* ("even assuming that the day they saw Mungin was September 16, 1990, their testimony does not provide persuasive evidence that Mungin would not have been unable to commit the murder between 1:30 and 2:00 that afternoon"). Indeed, one witness placed Petitioner in Jacksonville on September 16, 1990, the date of the shooting, and other witnesses remembered seeing Petitioner on a Sunday in September but could not provide exact dates or times. Even giving credibility to this evidence, it would not produce an acquittal on retrial in the face of the strong contradictory evidence that placed Petitioner at the scene of the homicide and in possession of murder weapon when he was found, and the damaging ballistics evidence, including the shell casing and bullet left at the scene matching the gun found in Petitioner's home.

[24] *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)* (to successfully sustain a *Brady* claim, a defendant must show favorable evidence — either exculpatory or impeaching, was willfully or inadvertently suppressed by the state, and the evidence was material, resulting in prejudice to defendant).

[25] *Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d*

Amendment

The record shows, pretrial, the state, in Response to Demand and Demand for Reciprocal Discovery, listed George Brown and provided his address. Ex. A at 7. Mr. Cofer attempted to locate Mr. Brown at the address provided. On July 14, 1992, Mr. Cofer filed a Motion for More Definite Address, which the trial court **[*39]** granted. Id. at 195-96.

At a proceeding on January 7, 1993, the court addressed the motion:

> THE COURT: Motion for more definite address for George Brown filed July 14th.
> MR. COFER: Judge, we don't have a more definite address.
> THE COURT: Okay. 8465 Forrest Street, that's all you've got?
> MR. DE LA RIONDA: Yes, sir. In fact, he — Mr. Cofer has already deposed the lead detective and has provided all the information he has regarding this Defendant [sic].
> THE COURT: I will grant the motion with the understanding if you find something, you have to tell him.
> MR. DE LA RIONDA: Yes, sir.
> THE COURT: I can't very well make him come out of the air, I don't suppose.

Ex. V at 290. Thereafter, the defense did not list Mr. Brown as a witness or seek a subpoena for him. Ex. E at 258-61.

The record contains a General Offense/Incident Continuation Report from reporting Officer Detective K. D. Gilbreath. App. 1 at 73. The report provides:

> Detective Conn also interviewed **George Brown**, the other white male who entered the store **the same time as Kirkland**. He stated he went into the store and took a bottle of Gatorade to the counter and then waited. After a short time he looked around and saw the victim on the floor **[*40]** coughing and spitting up blood. He called 9-1-1 and then checked the registers after Kirkland was administering first aid to the victim. **He stated he did not notice anyone leaving the store as he entered**.

Id. (emphasis added).

On April 21, 2008, Petitioner filed a successive Corrected Motion to Vacate Judgments of Conviction and Sentence Pursuant to *Fla. R. Crim. P. 3.851* with Request for Evidentiary Hearing.[26] App. 2. On August 12, 2009, the trial court conducted a *Huff* hearing on the motion. App. 4, Transcript attached to Appellant's Motion to Supplement the Record at 19-38. The state argued Petitioner did not meet the standards for newly discovered evidence, the merits of the claims, or the alternative claim of ineffective assistance of counsel. Id. at 52.

The trial court succinctly described Petitioner's claim:

> Defendant contends that the State withheld material and exculpatory evidence tending to impeach the testimony of State trial witness Ronald Kirkland, in violation of *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*, and *Giglio v. United States, 405 U.S. 150, 153-54, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972*). Defendant alleges that the State withheld statements of George Brown, a customer present at the store after Defendant killed Ms. Woods, which were inconsistent with Kirkland's statements regarding the discovery of Ms. Woods after **[*41]** she was shot, and which discredited Kirkland's identification of Defendant as the person "leaving the store hurriedly with a paper bag." According to Mr. Brown's affidavit, his involvement at the scene was not accurately represented in the police report.

Id., circuit court's order at 134. The court summarily

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104 (1972) (to establish a *Giglio* violation, a defendant must demonstrate the testimony was false, the prosecutor knew the testimony was false, and the statement was material).

[26] The Affidavits of George Brown and Charles G. Cofer are part of the record. App. 1 at 70-72, 74-75.

denied the motion, without an evidentiary hearing. Id. at 130-40. Along with denying the claims as conclusively refuted by the record, the court also concluded that the Petitioner was not entitled to a new trial because the evidence contained in the affidavit was not of such nature that it would probably produce an acquittal on retrial. Id. at 137 (citing *Jones v. State, 709 So. 2d 512, 521 (Fla. 1998)* (per curiam) (establishing a two-part test: (1) the evidence must not have been known by the trial court, the party, or counsel, and it must appear that the defendant or defense counsel could not have known of it by the use of due diligence, and (2) the evidence must be of such nature that it would probably produce an acquittal on retrial).

Petitioner appealed. App. 5; App. 6; App. 7; App. 8. The FSC affirmed in part, reversed in part, and remanded. App. 9; *Mungin v. State, 79 So. 3d 726 (Fla. 2011)* (per curiam) (Mungin III). The pertinent affidavits are reiterated in the decision. *Id. at 730-33*. In affirming **[*42]** in part on the newly discovered evidence claim, the FSC agreed with the trial court that the information provided by Brown was not of such a nature that it would probably produce an acquittal on retrial as there was significant evidence establishing Petitioner as the killer (he stole a red Escort car and was engaged in similar shootings prior to the shooting in Jacksonville, the stolen car was discovered in Jacksonville, and the shell casing and bullet left at the scene matched the gun found in Petitioner's home). *Id. at 738*. The court, however, reversed and remanded the *Brady* and *Giglio* claims for an evidentiary hearing "pertaining to Brown and the allegation that the police report was false." Id.

The circuit court denied the *Brady* and *Giglio* claims. App. 15. The court conducted an extensive evidentiary hearing, receiving testimony from the following witnesses: George Brown; Charles Cofer; Charles Wells; Christie Conn; Dale Gilbreath; and Bernardo de la Rionda.[27] App. 16. The state presented the testimony of Detective Christie Conn, the individual who interviewed Mr. Brown at the scene and took notes. App. 15 at 85; App. 16. She attested she had been with the Jacksonville Sheriff's Office since 1980, and was a homicide **[*43]** detective in 1990. App. 16 at 193. She responded to scene of the murder of Betty Jean Woods on September 16, 1990 as part of the homicide team. Id. Detective Conn was in plain clothes, wearing a gun and had her badge on her belt. Id. at 194. She said she interviewed several individuals, including Mr. Kirkland and Mr. Brown. Id. at 195-96. Detective Conn took notes during her interview of Mr. Brown, provided her notes to Detective Gilbreath, and she said those notes were accurately incorporated in the homicide report. Id.

Detective Conn attested that she was deposed by Mr. Cofer and Mr. Cofer asked her about the interview of Mr. Brown. Id. at 196. Detective Conn confirmed that she clearly documented what Mr. Brown said, and he told her he entered the store about the same time or at the same time as Mr. Kirkland. Id. at 197. In her deposition testimony, Detective Conn summarized Mr. Brown's statement, saying he said he pulled into the store behind Mr. Kirkland, Mr. Brown went to the drink box and got a Gatorade, and he arrived at the counter about the same time as Mr. Kirkland. Id. at 198. Mr. Brown said he waited, looked around, saw Ms. Woods on the floor spitting up blood, Mr. Brown **[*44]** called 911 from the counter, he observed Mr. Kirkland and a white female administering first aid to the victim, and Mr. Brown checked the register close to the victim. Id. at 198-99. Mr. Brown said there was no money in the register, and he started looking for phone numbers and keys to the store so he could lock up. Id. at 200.

Furthermore, Detective Conn testified in her deposition, Mr. Brown said he did not notice anyone leaving as he came in the store, and stated he went directly to the drink box. Id. Additionally, Mr. Brown did not mention seeing the car described by Mr. Kirkland. Id. Finally, Detective Conn testified, Mr. Brown never said that somebody bumped into

[27] Mr. Kirkland was deceased and found to be unavailable. App. 15 at 83.

him as he was going in the store. Id. Detective Conn did not ask who pulled into the parking lot first. Id. at 207-208. Detective Conn confirmed that Mr. Brown never told her he brushed against someone departing the store, so Detective Conn never recontacted Mr. Brown to show him a photospread. Id. at 211.

At the hearing, Mr. Brown testified nobody was in the parking lot when he pulled up. Id. at 104. He said as he went inside, somebody passed by him, kind of bumped him, but it was not hard enough to make Mr. Brown look. **[*45]** Id. Mr. Brown proceeded to get a coke and a cake and put it on the counter. Id. He said he stood there for a bit and waited but the lady was not up there. Id. He said he went to the bathroom, looked around the store, and looked in a little storeroom. Id. At this point, he saw the victim lying on the floor with a spilled cup of water and a pill stuck to her lip. Id. at 104-105.

Mr. Brown called 911 about the time a man came inside, and they rolled the lady over on her back. Id. at 105. The police arrived shortly. Id. Mr. Brown did not know whether the person who was departing the store was a male or female, white or black, and was unable to provide any sort of description of the person. Id. at 105-106. Mr. Brown said he did not touch the cash registers or drawers. Id. at 107.

Mr. Brown explained he never really had a chance to tell the police officers because "there was news people and everything and the other guy was there." Id. at 108. Mr. Brown recalled speaking to a male officer but did not recall speaking to a female officer. Id. at 109. Mr. Brown said Mr. Kirkland took over the conversation with the white male police officer. Id. at 110.

When asked if he told the police he had brushed **[*46]** into someone on his way into the store, Mr. Brown responded he was uncertain. Id. at 124-25. He explained: "I was so nervous finding somebody shot I may not have said it." Id. at 125. Mr. Brown admitted that he did not see the man (Mr. Kirkland) come through the door of the store. Id. at 144. Mr. Brown testified a man came up behind him and asked what was going on, but Mr. Brown said he never saw two women inside the store as he was worried about the victim. Id.

Mr. de la Rionda testified that he was unaware of Mr. Brown's version of the events that he was alone in the store until after he called 911, he was unaware that Mr. Brown claimed he encountered someone going out of the store, he was unaware that any law enforcement knew that Mr. Brown claimed he encountered someone going out of the store, and he was unaware that Mr. Brown claimed he did not touch the cash register. Id. at 249-50.

The trial court denied the *Brady* claim, noting that the information was not willfully or inadvertently suppressed by law enforcement or the state. App. 15 at 87. Neither was the trial court convinced that the evidence was material. Id. In denying the *Giglio* claim, the court remained unconvinced that Petitioner **[*47]** had shown Mr. Kirkland's testimony was false. Id. at 88. Instead, the court viewed the testimony as two witnesses perceiving the events differently. Id. Finally, the court, assuming arguendo that Kirkland's testimony was false, held there was no showing that the prosecutor knew it was false. Id. Indeed, Mr. de la Rionda attested he never knew of Mr. Brown's version of the events set forth in the affidavit and the court found Mr. de la Rionda's testimony credible. Id. Furthermore, the court found Mr. Brown and Detective Conn corroborated Mr. de la Rionda's testimony. Id.

The Brady and Giglio claims are fully analyzed in the FSC's opinion. *Mungin v. State, 141 So. 3d 138 (2013)* (per curiam) (*Mungin* IV). The court employed the appropriate analysis under Brady and affirmed the decision of the postconviction court, finding competent substantial evidence supporting the trial court's finding that Petitioner failed to show the state either willfully or inadvertently suppressed favorable evidence. *Id. at 143*. The court highlighted the fact that Mr. Brown admitted he did not tell the police the same facts because the other guy took over and Mr. Brown conceded he was unsure whether he told any officer that someone had nudged him as the

individual **[*48]** exited the store. Id. The court noted both Officer Wells and Detective Conn attested that Mr. Brown never said someone brushed up against him or that he was the first or only person inside the store. *Id. at 145*. In affirming the denial of post-conviction relief, the FSC found: "the record is devoid of any evidence that the State inadvertently or willfully suppressed favorable evidence[,]" concluding the second prong of Brady remained unsupported by sufficient evidence. Id.

Next, the FSC addressed whether the state knowingly presented false testimony in violation of Giglio. *Id. at 145*. The court recognized the requirements to establish a violation under Giglio. Id. Thereafter, the court discussed the evidence, particularly the fact that the prosecutor testified he had no knowledge that Brown was alone in the store with the victim until the 911 call was made or that Brown encountered someone leaving the store, nor was the prosecutor aware of any law enforcement officer who knew of such facts, nor did Brown contact the State Attorney's office. *Id. at 146*. Acknowledging that Brown's testimony calls into question whether Kirkland could have seen Mungin leaving the store, the court rejected the claim of a Giglio violation **[*49]** because Petitioner failed to establish that the prosecutor or law enforcement knew Brown's version of the events. Id. As such, the court found Petitioner failed to present testimony establishing the first two prongs of Giglio (the prosecutor presented or failed to correct false testimony and the prosecutor knew the testimony was false) and affirmed the denial of the Giglio claim. Id.

Petitioner raised Brady/Giglio claims and the postconviction court rejected the claims after an extensive evidentiary hearing. In this Court's review, the Court presumes the factual determinations of the state court are correct. Petitioner has failed to rebut the presumption of correctness with clear and convincing evidence. *28 U.S.C. § 2254(e)(1)*. This Court also extends deference to the state court's credibility determinations. After hearing testimony, the post-conviction court made a credibility determination, finding the testimony of the prosecutor and law enforcement credible. As noted previously, this Court will not redetermine credibility of witnesses. *Consalvo, 664 F.3d at 845*.

The FSC did not substitute its judgment for that of the post-conviction court, the court that heard the testimony of the witnesses and assessed the witnesses' demeanor **[*50]** and credibility. Instead, the FSC affirmed the decision of the postconviction court on the *Brady* claim because it concluded "the postconviction court's findings are supported by competent, substantial evidence." *Mungin IV at 145* (affirming, stating "the record is devoid of any evidence that the State inadvertently or willfully suppressed favorable evidence"). The FSC also affirmed the postconviction court's denial of the *Giglio* claim, noting the first two prongs were not met. Id. at 146-47. Again, the postconviction court found Petitioner "has not shown that [the] prosecutor presented or failed to correct false testimony" and also found, assuming arguendo Kirkland's testimony was false, Petitioner "has not shown that the prosecutor knew the testimony was false." App. 15 at 88.

This Court will give AEDPA deference to the FSC's decision as it is not contrary to or an unreasonable application of Supreme Court law or based on an unreasonable determination of the facts. Petitioner is not entitled to habeas relief on this contention of constitutional deprivation.

To the extent Petitioner is claiming the state failed to disclose favorable evidence pertaining to Mr. Brown, the claim is without merit. Defense counsel possessed **[*51]** Mr. Brown's name long before trial as his name was disclosed during discovery. The defense gained additional information concerning Mr. Brown when Mr. Cofer deposed Detective Conn. Any contention that the state suppressed Mr. Brown's name or identity is unsupportable. Since defense counsel had the information, any Brady claim founded upon failure to disclose must fail. Not only was Mr. Brown's existence disclosed through discovery, and thereby no Brady violation proved, there has been no showing that the prosecutor

knowingly presented any false trial testimony, and thereby no *Giglio* violation has been demonstrated.

In denying the *Giglio* claim, the FSC noted that Brown's testimony does call into question whether Kirkland could have seen Mungin leaving the store shortly after the shooting, but there was much more than just Mr. Kirkland's evidence presented against Petitioner. Indeed, there was other significant evidence that Petitioner committed the murder: "the murder weapon was found at Mungin's home days after the murder, that Mungin used this same gun to shoot two other store clerks just days before the murder, and that Mungin was linked to the stolen vehicles involved in the crime spree." *Mungin III at 739* (Polston, **[*52]** J., concurring in part and dissenting in part).

Upon review, Petitioner cannot satisfy the "contrary to" test of *28 U.S.C. § 2254(d)(1)* as the state court rejected these claims based on *Brady* and *Giglio*. Moreover, Petitioner has not shown the state court unreasonably applied *Brady* and *Giglio* or unreasonably determined the facts. Finally, the record and reasonableness standard support the state court's findings.

Therefore, applying the AEDPA deference standard, Petitioner is not entitled to habeas relief on the *Brady* and *Giglio* claims. The Court concludes the FSC's decision affirming the trial court's decision on the guilt phase is not contrary to, nor an unreasonable application of controlling United States Supreme Court precedent.[28] As Petitioner has failed to demonstrate that the adjudication of the state court was contrary to or an unreasonable application of any clearly established federal law as determined by the United States Supreme Court or an unreasonable determination of the facts, Petitioner is not entitled to habeas relief.

Petitioner raised a summary and unelaborated claim of ineffective assistance of counsel in his successive postconviction motion, claiming counsel unreasonably failed to develop and present **[*53]** Mr. Brown's information, depriving Petitioner of constitutionally adequate adversarial testing. App. 2 at 92, 94 n.10, 99. In a footnote, Petitioner claimed trial counsel was ineffective for failure to locate, speak to, and present evidence from Mr. Brown. Id. at 94 n.10.

The contention of ineffectiveness is belied by the record. The defense acquired the name of Mr. Brown when it was revealed during discovery. The record shows Mr. Brown could not be located at the address provided and Mr. Cofer moved for a more definite address; however, the prosecutor stated on the record that he did not have a more definite address but assured the court that defense counsel would be provided one if obtained. Apparently no more definite address was obtained. Notably, Mr. Cofer used alternative means to obtain information regarding Mr. Brown and deposed Detective Conn, the officer who interviewed Mr. Brown at the scene. As a result, Mr. Cofer obtained the same information the police had acquired regarding Mr. Brown and concerning his actions and interactions at the scene of the crime. As such, counsel did not perform deficiently.

Mr. Cofer performed well within the scope of permissible performance. His **[*54]** performance did not fall below an objective standard of reasonableness as he tried to locate Mr. Brown, and although that attempt proved unfruitful, he obtained significant information concerning Mr. Brown's version of the events by other means: deposing Detective Conn. Under the circumstances presented, defense counsel's performance cannot be deemed deficient for failure to locate and speak to Mr.

[28] Respondents contend Petitioner has not overcome the *Brecht* hurdle. Response at 72-73, citing *Brecht v. Abrahamson, 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993)* (requiring a demonstration that the violation had a substantial and injurious effect or influence in determining the jury's verdict). No *Brecht* analysis is needed for *Brady* claims as the showing of materiality necessarily establishes actual prejudice under Brecht. *Kyles v. Whitley, 514 U.S. 419, 435, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)*. Concerning a *Giglio* claim, courts may excuse *Giglio* violations under *Brecht* as harmless error. *Trepal v. Sec'y, Fla. Dep't of Corr., 684 F.3d 1088, 1113 (11th Cir. 2012)*, cert. denied, ***568 U.S. 1237, 133 S. Ct. 1598, 185 L. Ed. 2d 592 (2013)***. Assuming arguendo any violation, Petitioner has failed to satisfy the standard set forth in *Brecht*.

Brown. Upon review, defense counsel's performance did not so undermine the proper functioning of the adversarial process that Petitioner was deprived of his *Sixth Amendment* right to the effective assistance of counsel. Having failed to establish the performance prong of *Strickland*, Petitioner is not entitled to habeas relief on his claim of ineffective assistance of counsel.

Alternatively, to the extent the claim of ineffective assistance of counsel was addressed by the postconviction court and affirmed by the FSC, AEDPA deference is due. App. 4 at 138 (finding the unelaborated claim of ineffective-assistance claim refuted by the record); App. 5 (Initial Brief of Appellant); App. 7 (Amended Answer Brief of Appellee); App. 8 (Reply Brief of Appellant); App. 9 (reversing and remanding only the *Brady* and *Giglio* claims).

The Court **[*55]** finds the state court's determination is consistent with federal precedent and is entitled to AEDPA deference. The state court's adjudication of the claim is not contrary to or an unreasonable application of *Strickland* and its progeny or based on an unreasonable determination of the facts. Thus, the claim of ineffective assistance of counsel is due to be denied.

VIII. GROUND TWO

Ground Two: Ineffective Assistance of Counsel/Penalty Phase

A. Failure to Present Mitigation

Petitioner raised and exhausted a claim that his trial counsel was ineffective during the penalty phase for failure to present mitigation evidence that Petitioner attempted to commit suicide at the age of twelve. Ex. FF, consolidated amended motion at 36 (failure to present troubled childhood evidence in the penalty phase). He claimed the information was withheld from the jury, affecting the outcome of the case. Id. This claim was addressed at an evidentiary hearing. Ex. GG. Thereafter, the postconviction court denied relief finding Mr. Cofer was aware of Petitioner's suicide attempt at age twelve, and Mr. Cofer's practice was to present the information to the mental health expert, who in this case was Dr. Harry Krop, to allow the **[*56]** mental health professional to incorporate the factor in mental health mitigators. Ex. FF at 208.

Neither the postconviction court nor the FSC found this routine practice to constitute deficient performance on the part of counsel. Id.; *Mungin II at 1002*. Both state courts applied the two-pronged standard set forth in *Strickland*. Under these circumstances, Petitioner cannot satisfy the "contrary to" test of *28 U.S.C. § 2254(d)(1)* as the state court rejected this ground based on *Strickland*. Moreover, Petitioner has not shown the state court unreasonably applied *Strickland* or unreasonably determined the facts. See Second Amended Petition at 120-26. Finally, the record and reasonableness standard support the state court's findings.

The record demonstrates that Mr. Cofer testified at a postconviction evidentiary hearing on June 25, 2002. He attested he obtained a medical report or hospital records from Georgia concerning Petitioner's suicide attempt and hospitalization at the age of twelve. Ex. GG at 298-300. Mr. Cofer said he was aware of this hospitalization when he represented Petitioner. Id. at 300-301. When asked whether he presented the information to the jury during the penalty phase, Mr. Cofer responded: "[m]y typical method of handling that would have **[*57]** been to submit that information to any mental health professional that had been taken on to examine Mr. Mungin for penalty phase purposes." Id. at 301. Mr. Cofer explained that he found putting on a record by calling someone down from a hospital to explain various entries would not be as effective as having a mental health professional review the records, distill them, and then incorporate that information into their penalty phase testimony. Id. at 301-302. In this instance, counsel utilized Dr. Krop's expertise. Id. at 302-303. Mr. Cofer said he would

give Dr. Krop a very detailed folder with the original documents or source documents and obtain his opinion. Id. at 303.

The postconviction court found, "Defendant has not established that Judge Cofer's routine practice of presenting mental health mitigation evidence was error. Ex. FF at 208 (citing *Strickland*). The FSC reviewed this contention, noting this was not a case where counsel failed in his duty to prepare for the penalty portion of a capital case. *Mungin II at 1002*. Indeed, Mr. Cofer's testimony showed he investigated potential mental health mitigation and made "an informed strategic decision well within professional norms" to submit the mental health **[*58]** information to the expert, who ultimately concluded that Petitioner did not suffer from any major mental illness or personality disorder. Id.

The FSC went on to find, even assuming deficient performance, there was no prejudice as the suicide attempt took place twelve years before the murder, and there was no evidence of any suicidal tendencies as an adult or evidence contradicting Dr. Krop's expert opinion concerning Petitioner's mental state. *Id. at 1002-1003*. Finally, the court pointed to some notations in the hospital records regarding whether there was a suicide attempt or whether two Valium tablets were taken to aid sleep.[29] *Id. at 1003*.

Regarding the performance prong of *Strickland*, "[a]n attorney's actions are sound trial strategy, and thus effective, if a reasonable attorney could have taken the same actions." *Harvey, 629 F.3d at 1243*. A reasonable attorney could have concluded that providing the relevant information to the mental health expert to review, distill, and present in the most persuasive fashion at the penalty phase was the best course. Mr. Cofer testified he had developed an affinity for Dr. Krop and worked with him on many cases. Ex. GG at 303. Mr. Cofer undertook an investigation, found the medical records, and turned those **[*59]** records over to Dr. Krop so that he could incorporate them in mental health mitigators.[30] Id. at 334. As the bounds of constitutionally effective assistance of counsel are very wide, Mr. Cofer's actions were within the broad range of reasonably competent performance under prevailing professional standards. Failure to meet the deficiency prong of *Strickland* is fatal to Petitioner's claim of ineffective assistance of counsel. See *Reaves v. Sec'y, Fla. Dep't of Corr., 872 F.3d 1137, 1151 (11th Cir. 2017)*, cert. denied, *138 S. Ct. 2681, 201 L. Ed. 2d 1078 (2018)* (failure to satisfy one *Strickland* component is fatal to the claim).

The penalty phase record shows Mr. Cofer put on extensive evidence concerning Petitioner's childhood and upbringing, including testimony of Hagar Mungin, Petitioner's grandmother; cousins Angie Jacobs, an employee of the Board of Education, and Clifton Jerome Butler, Jr., an employee of Gilman Paper Company; Tracy Black, the mother of his child; Deputy Sheriff Malcom Anthony Gillett, a childhood friend; police officer Freddie L. Green, Jr., childhood friend; Ralph Pierce, assistant school superintendent and former coach; Gene Brewer, assistant superintendent for Harris County, Georgia and Petitioner's former teacher and coach; and Dr. Krop. Ex. P at 1137-75, 1183-1206. In hindsight, Mr. Cofer could have done **[*60]** things differently or done more, but that is not constitutionally compelled. Although every attorney may not have chosen the same approach or

[29] This last information seems more in character with patient history rather than a diagnosis from a medical professional and is not really persuasive. See Second Amended Petition at 124-25. Nevertheless, Petitioner did not otherwise establish prejudice.

[30] The record shows counsel thoroughly prepared for the penalty phase. Mr. Cofer undertook an investigation and turned the records over to the mental health expert, Dr. Krop. As such, the record developed by Petitioner "does not show that the state court's determination that his counsel's performance was not unreasonable 'was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Gavin v. Comm'r, Ala. Dep't of Corr., 40 F.4th 1247, 2022 WL 2752366, at *13 (11th Cir. 2022)* (quoting *Richter, 562 U.S. at 103*). Accordingly, the state court's application of clearly established federal law was not objectively unreasonable.

strategy, Mr. Cofer's performance did not so undermine the proper functioning of the adversarial process. Indeed, the close seven-to-five vote, despite the strength of the evidence of Petitioner's crime spree using the same gun, demonstrates Mr. Cofer's strategy and performance were sound.

Concerning the prejudice prong, as found by the FSC, any failure of counsel to directly present Petitioner's suicide attempt at the age of twelve to the jury did not "so affect[ ] the fairness and reliability of the proceedings that confidence in the outcome is undermined." *Mungin II at 1003* (citation omitted). The suicide attempt was remote, occurring twelve years prior to the murder, and Dr. Krop, the trusted mental health expert, found Petitioner did not suffer from any major mental illness or personality disorder, allowing defense counsel to persuasively argue that Petitioner was capable of being rehabilitated and should be spared from a recommendation of death. Ex. GG at 302. Again, the jury's close seven-to-five vote evinces the quality of the penalty phase presentation **[*61]** of the defense and demonstrates that the strategy chosen was effective, if not ultimately successful.

The Court finds the state court's determination is consistent with federal precedent. The state court's decision is entitled to AEDPA deference. The state court's ruling is based on a reasonable determination of the facts and a reasonable application of the law. In short, the state court's adjudication of the claim is not contrary to or an unreasonable application of *Strickland* and its progeny or based on an unreasonable determination of the facts. Therefore, the state court's decision is entitled to deference and this claim is due to be denied.

B. Failure to Object to Improper Argument

In closing argument during the penalty phase of the proceedings, the prosecutor, Mr. de la Rionda, argued that the jurors should not have sympathy for the grandmother and then not recommend death: "[j]ust because he has a nice grandmother who took care of him and tried to raise him up as a good person, — unfortunately he didn't turn out to be a good person, -- that doesn't mean that you feel sorry." Ex. Q at 1222. Continuing in this vein, Mr. de la Rionda argued:

> Just as a father or a mother may bring a dog home **[*62]** to their child, -- that dog may be a pit bull. As a puppy that dog is a wonderful dog. He plays with all the kids. He's great. Everybody loves him. Later on when that puppy dog gets big he becomes vicious and he starts biting people and he starts biting other dogs and kills other dogs, -- he starts biting other kids and he starts biting dogs, other dogs. He even kills dogs. That dog is the puppy who was a beautiful dog and nobody dreamed it would turn out to be the way it did.

Id. at 1222-23.

Mr. de la Rionda stated that simply because Petitioner was a good person as a youngster does not outweigh the aggravating factors in the case. Id. at 1223. Mr. de la Rionda argued that the aggravation outweighed the mitigation in this case. Finally, he urged the jury not to feel sorry "because of his grandmother or aunt[.]" Id.

Petitioner contends the prosecutor's "pit bull" argument analogizing Petitioner to a dog was clearly objectionable and counsel's failure to object allowed this inflammatory argument to denigrate the proceeding, resulting in substantial prejudice and unfairness. Second Amended Petition at 126-27. As such, Petitioner argues Mr. Cofer was duty-bound to object to the "pit bull" argument as the prosecutor **[*63]** was attempting to inflame the jury and make their penalty phase decision based on an emotional response. Id. at 127.

The record shows Mr. Cofer did not contemporaneously object to the "pit bull" argument, but in his closing argument, he countered the prosecutor's argument:

> Mr. de la Rionda made reference to what you do to a dog if a dog is once nice in its life and then turns out to be mean. I would hope that each of

> you in your deliberations are going to be guided by a standard which is fairly higher than that which you would judge a dog by.

Ex. R at 1229-30.

After acknowledging the jury selection process and the jurors' contention that they had the ability to follow the law, weighing mitigation against the aggravation, id. at 1230-32, Mr. Cofer, in terms of mitigation, noted that Petitioner was a well-mannered child raised by his grandparents and was a participating member in school activities who did not engage in any juvenile delinquency. Id. at 1238-39. Mr. Cofer said Petitioner, in his late teens, moved to a difficult urban environment and began using street drugs, leading up to the events "surrounding this shooting." Id. at 1239. Mr. Cofer argued that Petitioner had committed antisocial acts, **[*64]** but he was not antisocial through and through. Id. at 1240. In support of this contention, Mr. Cofer relied on Dr. Krop's expert opinion that Petitioner had good rehabilitation prospects and would not be a management problem. Id. at 1241.

Petitioner exhausted the claim of ineffective assistance of counsel by raising it in his consolidated amended postconviction motion as claim III. Ex. FF at 30-33. The postconviction court summarily denied the claim. Ex. HH at 203-204. On appeal of the denial of the claim, the FSC affirmed, finding the claim to be without merit in that the isolated comment was not objectionable and there was no ineffectiveness in failing to object. *Mungin II at 997*.

Petitioner avers there was an unreasonable application and determination of facts by the state court because the remarks were objectionable, improper, and subject to mistrial. Second Amended Petition at 127-28. He contends reasonably effective counsel would have objected to the comments, the objection would have been sustained, the improper comments would have been stricken, or mistrial would have been granted. Id. at 128.

The record shows the state court relied on the *Strickland* standard; therefore, Petitioner cannot satisfy the "contrary **[*65]** to" test of *28 U.S.C. 2254(d)(1)*. The Court must ask whether the state court unreasonably applied that principle to the facts or premised its adjudication of the claim on an unreasonable determination of the facts.

As noted previously, the state court referenced the applicable two-pronged *Strickland* standard as a preface to addressing Petitioner's claim of ineffective assistance of counsel, and the court employed the two-pronged test when addressing this particular claim. The decision is based on a reasonable determination of the facts and a reasonable application of the law. There is a reasonable basis for the state court to deny relief, and this decision will be given deference. In short, the state court's adjudication of the claim is not contrary to or an unreasonable application of *Strickland* and its progeny or based on an unreasonable determination of the facts. Therefore, the state court's decision is entitled to AEDPA deference and Petitioner is not entitled to relief on this ground.

Alternatively, assuming arguendo the remarks were objectionable, the question remains whether counsel performed deficiently by conduct that is outside the broad range of competent performance under prevailing professional norms and whether **[*66]** this alleged deficient performance so affected the fairness and reliability of the proceedings that confidence in the outcome is undermined. *Strickland*. The record shows Mr. Cofer did not object to the prosecutor's "pit bull" argument but, in his closing argument, Mr. Cofer specifically addressed, challenged, and countered the prosecutor's argument. Even assuming the FSC erred in concluding that this isolated argument was not objectionable, the Court is not otherwise convinced that counsel's failure to object amounted to deficient performance when defense counsel chose a different and reasonable course to attack the prosecutor's argument.[31]

[31] It is extremely doubtful that the comments comparing Petitioner to a cute puppy that grew into a vicious pit bull to argue past character was not a determinant of present character was impermissible. See

"Failure to object to improper prosecutorial argument rarely amounts to ineffective assistance of counsel[.]" *Lara v. State, 528 So. 2d 984, 985 (Fla. 3rd DCA 1988)* (per curiam). See *Miller v. State, 161 So. 3d 354, 382 (Fla. 2015)* (per curiam). The prosecutor's comments must be so inflammatory that they would have influenced the jury to reach a more severe verdict than it would have otherwise. *Walls v. State, 926 So. 2d 1156, 1167 (Fla. 2006)* (per curiam). Here, the comments at issue were brief and not so prejudicial as to vitiate the entire proceeding. *Miller, 161 So. 3d at 382*. It "is not enough that the prosecutors' remarks were undesirable or even universally condemned." *Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986)* (quoting *Darden v. Wainwright, 699 F.2d 1031, 1036 (11th Cir. 1983)*).

The record demonstrates counsel **[*67]** appealed to the jury's application of a higher standard than that which would be employed to judge a dog. Mr. Cofer argued Petitioner had led a well-mannered life until he moved to a difficult urban neighborhood, fraught with street drugs, leading Petitioner to undertake antisocial acts, although Petitioner was not antisocial through and through. Mr. Cofer relied on Dr. Krop's expert testimony to support this contention. As such, Mr. Cofer appealed to the jury's sensibilities that Petitioner was essentially a decent human being with good rehabilitation prospects, as evidenced by his years of decent conduct and conformed behavior throughout most of his life.

No doubt the use of offensive and demeaning terminology to describe a defendant is both undesirable and condemned, but the brief comments in the "pit bull" argument did not so infect the penalty phase proceeding with unfairness as to make the result a denial of due process. Thus, "defense counsel was able to, and did, directly rebut these contentions during his closing argument." *Medina v. Sec'y, Dep't of Corr., 733 F. App'x 490, 495 (11th Cir. 2018)* (per curiam). Mr. Cofer, by challenging the prosecutor's offensive argument through his own closing argument, turned the prosecutor's closing argument **[*68]** against him, "by placing many of the prosecutor['s] comments and actions in a light that was more likely to engender strong disapproval than result in inflamed passions against petitioner." *Darden, 477 U.S. at 182*.

Under these circumstances, defense counsel's representation did not fall outside the range of reasonably professional assistance in failing to object. Mr. Cofer addressed and rebutted the prosecutor's contentions during closing argument. Furthermore, there is no reasonable probability that the outcome of the proceeding would have changed if defense counsel had objected. See Reese; Darden. The record demonstrates that Petitioner's counsel's actions were within the broad range of reasonably competent counsel under prevailing professional norms. There is no reasonable probability that, if counsel had acted as Petitioner suggests, the result of the proceeding would have been different.

C. Failure to Properly Prepare Witness Glenn Young

Petitioner claims his counsel was ineffective for opening the door to damaging testimony that life does not always mean life and there is a possibility of early release if Petitioner is sentenced to life. In short, Petitioner contends due to counsel's deficient performance, **[*69]** Glenn Young's testimony minimized the significance of a life sentence, giving the jurors the impression that even with a 25-year mandatory term, Petitioner might serve less than 25 years. Second Amended Petition at 132.

The FSC rejected the claim of ineffective assistance of counsel, finding Petitioner cannot demonstrate prejudice under Strickland. *Mungin II at 998*. Thus, the rejection of the claim was not contrary to clearly established Federal law as the state court applied the

Reese v. Sec'y, Fla. Dep't of Corr., 675 F.3d 1277, 1293 (11th Cir.) (finding that because evidence of the petitioner's past character was presented to the jury, the prosecutor was entitled to make this type of argument), cert. denied, ***568 U.S. 905, 133 S. Ct. 322, 184 L. Ed. 2d 191 (2012)***.

appropriate two-pronged *Strickland* standard of review. Next, the Court must inquire as to whether there was an unreasonable determination of clearly established Federal law. Notably, "regardless of the specter of early release on Mungin's prior convictions, the jury knew that a life sentence in this case meant Mungin would serve at least twenty-five years in prison." *Mungin II at 998*. This is simply not an unreasonable determination of Federal law or the facts.

The record demonstrates the following. At the outset of voir dire, the trial court instructed the panel:

> If he is found guilty of first degree murder, the sentence must be death in the electric chair or life imprisonment without the possibility for parole for twenty-five years. Those are the only **[*70]** two penalties available for that offense.
> . . . .
> This advisory sentencing recommendation may be by the majority vote of the jury and thereafter I would sentence Anthony Mungin to death or life imprisonment without the possibility of parole for twenty-five years.

Ex. F at 301-302.

During the penalty phase, the circuit court reiterated, "[t]he punishment for this crime is either death or life imprisonment without the possibility of parole for 25 years." Ex. N at 1123. The court instructed the jury concerning reaching an advisory sentence and the jury's choices being a recommendation of a sentence of death or life imprisonment without possibility of parole for 25 years. Ex. S at 1249-51.

The Advisory Sentence too reflects that the advisory sentence selections provided to the jury were either life imprisonment without the possibility of parole for twenty-five years or death. Ex. T at 382, 1256.[32] The jury selected the advisory sentence of the death penalty by a vote of 7 to 5. Id. at 1256.

Thus, the record shows that the jury was repeatedly provided with clear and specific instructions that Petitioner would serve at least twenty-five years in prison if the jury gave an advisory sentence of life **[*71]** without the possibility of parole for 25 years and the court chose to adopt the jury's recommendation. Therefore, Petitioner has not established prejudice as Young's testimony that life does not always mean life did not so affect the fairness and reliability of the proceedings that confidence in the outcome is undermined.

Although not all of Young's testimony was favorable concerning what it meant to be sentenced to prison for life, there is no question that the circuit court's repeated instructions to the jury ensured that the jury well understood that in the present case Petitioner would serve at least 25 years in prison if the choice of an advisory sentence of life were selected.

The record also shows that Mr. Cofer called Mr. Young in the penalty phase proceedings and Young confirmed Petitioner was already serving a life sentence with a three-year minimum mandatory sentence. Ex. P at 1177. Immediately after Mr. Young offered that life does not really mean life, Mr. Cofer asked the clarifying question as to whether that really only applies to inmates "who were in the system prior to October 1 of 1993" and Mr. Young responded yes. Id. at 1178. Thus, defense counsel eliminated much **[*72]** of the detrimental effect of Mr. Young's observation.

Additionally, on cross-examination, Mr. Young explained: "[a]n inmate sentenced to a 25-year mandatory on a life sentence, those are the inmates you see doing more of the time." *Id. at 1180*. Mr. Cofer also asked additional questions on re-direct to make certain that the jury heard that eligibility for conditional release and controlled release only applied to sentences for a term of years, not a life sentence. *Id. at 1181*.

Thus, although not all of Young's testimony may be considered favorable to Petitioner, Mr. Cofer was able to reduce any possible negative impact of

[32] Exhibit T is split and found in two different parts of the record.

Young's testimony by asking questions which distinguished inmates in the system prior to October 1 of 1993 and those like Petitioner, distinguished life sentences in non-death penalty cases from life sentences in death penalty eligible cases, and distinguished eligibility for release in term of years sentences from life sentences.

As noted by the FSC, any specter of early release on Petitioner's prior convictions was distinguished from any sentence he may be eligible to receive and serve in the Duval County case. Therefore, any deficiency on the part of counsel for calling Young in the penalty **[*73]** phase did not deprive Petitioner of a fair proceeding.

In conclusion, Petitioner cannot satisfy the "contrary to" test of *28 U.S.C. § 2254(d)(1)*. Furthermore, he has not demonstrated that the state court unreasonably applied *Strickland* or unreasonably determined the facts. As such, the state court's decision is entitled to deference. Petitioner is not entitled to habeas relief on this claim of ineffective assistance of counsel in the penalty phase.

IX. GROUND THREE

Ground Three: Conflict of Interest

The claim as stated in the Second Amended Petition is: "[t]he Duval County Public Defender's Office had an actual conflict of interest based on prior and simultaneous representation of key state witness Kirkland, in violation of Mr. Mungin's *Sixth Amendment* Right to conflict-free counsel." Second Amended Petition at 136. Petitioner submits that the prior and simultaneous representation of both Petitioner and Mr. Kirkland was an actual conflict, relying on *Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)* and *Holloway v. Arkansas, 435 U.S. 475, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978)*. Second Amended Petition at 137. Alternatively, Petitioner claims Mr. Cofer was ineffective as counsel under *Strickland* as he had a duty to avoid conflicts of interest. Id. at 138-39.

Petitioner raised a similar claim in his consolidated amended post-conviction motion, claiming a conflict and **[*74]** a "very serious breach of ethics by Mr. Mungin's counsel" for failure of the Public Defender's Office to disclose the simultaneous representation of Petitioner and the sole eyewitness, Mr. Kirkland. Ex. FF at 6-9 ("The Duval County Public Defender[']s Office had an actual conflict of interest that should have been disclosed and the Public Defender[']s Office should have withdrawn from Anthony Mungin's Case."). The circuit court conducted an evidentiary hearing and addressed the issue. Ex. GG. Petitioner's post-conviction counsel, Ken Malnik, inquired as to whether Mr. Cofer filed a motion asking the state to produce "Brady material." Id. at 242. Mr. Cofer said he had requested the names of any witnesses who have charges pending in this or any other jurisdiction and whether the charges have been formally filed or not. Id. at 242-43. On December 21, 1992, the court granted the motion. Id. Mr. Cofer had no recollection that the state provided any criminal history as to Mr. Kirkland or as to any witness. Id. at 245. Mr. Cofer repeated that the State Attorney's Office had not provided him with a criminal history as to Mr. Kirkland. Id.

When asked if during his representation of Petitioner, **[*75]** had Mr. Cofer been aware that Mr. Kirkland had been represented by the Public Defender's Office for Duval County, Mr. Cofer responded that he did not have a recollection of having been aware that there had been a case which came up during the pendency of Petitioner's case where the Public Defender's Office represented Mr. Kirkland. Id. at 246. Mr. Cofer stated he may have been aware through his own record check that the Public Defender's Office had represented Mr. Kirkland in the past as Mr. Cofer had some recollection that Mr. Kirkland had arrests for disorderly intoxication and possibly a DUI during a time prior to Petitioner's arrest. Id. at 247. However, Mr. Cofer testified he could not state with certainty whether he knew whether the Public Defender's Office had represented Mr. Kirkland in the past. Id. Mr. Cofer did not recall having disclosed to

Petitioner "the possibility that Mr. Kirkland may have been represented by the Fourth Judicial Circuit." Id. at 248.

Mr. Cofer explained that the Public Defender's Office had no uniform policy as to when the Office would withdraw merely because the Office had touched upon a witness or victim's case. Id. at 248-49. The Office would look at the date **[*76]** or time period of representation of the individual, the type of offense, and the remoteness of the representation. Id. at 248. The Office would also look to whether it was an impeachable offense, the extent of the representation, and the severity of the offense. Id. at 249. Mr. Cofer offered, when a person is "involved more recently or with a more serious type of charge, certainly when the charges arise during the same period of time that the homicide case is going, that is a major situation that you have to address with the client." Id.

As far as the effectiveness of counsel's preparation, Mr. Cofer attested that he took Mr. Kirkland's deposition in June of 1992. Id. at 249. The state had not provided a criminal history of Mr. Kirkland. Id. at 250. It was Mr. Cofer's practice and habit to make his own request to get a copy of the criminal history record. Id. Mr. Cofer did not know whether he had done so prior to Mr. Kirkland's deposition. Id. at 251. Upon further inquiry and being shown a document, Mr. Cofer said he did request the criminal history of Mr. Kirkland. Id. at 252. The packet received contains a docket from September 26, 1992, arrests for three misdemeanor worthless check cases. Id. at 253. **[*77]** The record showed the Public Defender's Office was appointed and the cases disposed of on October 13, 1992 with pleas of guilty with the adjudication of guilt withheld by the court. Id. at 254. Mr. Cofer stated the cases were occurring simultaneously to counsel's representation of Petitioner. Id. Mr. Cofer did not recall reviewing the information. Id. at 254-55. He said had he known, he would have disclosed the information to Petitioner and discussed the alternatives with Petitioner. Id. at 255. Mr. Cofer explained that the Public Defender's Office would be reluctant to withdraw from a homicide case in which the conflict was based on misdemeanor cases. Id. at 255-56. Mr. Cofer noted the ethical concern and consideration by the attorneys and the desire to consult and advise the client. Id. at 256-57.

Of interest, Mr. Cofer testified that in preparation for the postconviction evidentiary hearing, he checked the docket and when Mr. Kirkland was sentenced on October 13, 1992, he was placed on 90-days probation. Id. at 259. In all three cases, a violation of probation warrant was issued on January 11, 1993. Id. at 260. Mr. Cofer went to trial on Petitioner's case about two weeks later, around **[*78]** January 25 or 26, 1993. Id.

Mr. Cofer attested when he deposed Kirkland, he admitted to a disorderly intoxication and DUI case; however, the deposition was taken before the September 26, 1992 arrest. Id. at 261. Mr. Cofer did not believe he had inquired as to Mr. Kirkland's representation. Id. at 261-62.

Mr. Cofer testified, based on the records it did not appear that Mr. Kirkland was taken into custody on the warrants, and the capiases were recalled in a February 17, 1993 post. Id. at 269-70. Mr. Cofer had no recollection of using the case-tracking program to find out if Mr. Kirkland had been represented by the Public Defender's Office. Id. at 288.

As to the viability of impeachment material from the worthless check offenses, Mr. Cofer attested that the worthless checks, particularly in light of the withhold of adjudication, would not be impeachable. Id. at 349. However, the fact that Mr. Kirkland was on probation was a matter open to inquiry, but Mr. Cofer had no recollection of Mr. Kirkland being on probation. Id. at 349-50.

Mr. Cofer testified that had he known that Mr. Kirkland was being represented by the Public Defender's Office at the time of Petitioner's representation, Mr. Cofer **[*79]** would have consulted with Petitioner and discussed whether or not he would waive the conflict, or the Public Defender would conflict out of Petitioner's

representation. Id. at 367A. Mr. Cofer believed the source of the conflict came potentially from the fact that the Public Defender's Office represented Mr. Kirkland at the time he entered his plea and was placed on probation, not that he was on probation or that a warrant had issued. Id. Mr. Cofer stated he would not have pulled any punches for someone charged with first degree murder simply because he had to cross-examine an individual who had been represented by the Public Defender's Office at a first appearance hearing and sentencing on a worthless check. Id. at 368. Mr. Cofer said apparently he had the information that Mr. Kirkland was on probation, and if Mr. Cofer had made the connection that Mr. Kirkland had a probation warrant, Mr. Cofer would have cross-examined Mr. Kirkland about it. Id. at 369.

Mr. Kirkland testified at the hearing. He did not recall whether the Public Defender was appointed to represent him on the worthless check charges. Id. at 464. He recalled successfully completing his probation. Id. at 465. He was never **[*80]** aware that there had been a warrant issued for violating the probation. Id. He never discussed being on probation with the prosecutor or anyone in the State Attorney's Office. Id. No one from that office ever asked if Mr. Kirkland was on probation. Id. at 466. It did not come up with anybody at the time of trial. Id. Mr. Kirkland stated he did not tell the State Attorney's Office or anyone about the worthless checks before he testified. Id. at 473-74. He confirmed there were no deals at the time he testified regarding any cases he had previously or pending. Id. at 474.

In denying the consolidated postconviction motion, the circuit court found Mr. Cofer "more credible," noting "[t]here may not be many lawyers with the experience of dealing with homicide cases as exhibited by current county court judge and former assistance public defender Charles G. Cofer[.] Ex. HH at 204. As such, the court did not "find any sufficient degree of ineffective assistance of counsel which would require the reversal of Defendant's judgment and sentence." Id. In sum, the circuit court rejected the conflict-claim after the evidentiary hearing, finding Petitioner failed to demonstrate an actual conflict of **[*81]** interest existed that adversely affected counsel's representation. *Id. at 205*.

Petitioner also raised a claim that counsel failed to properly impeach Mr. Kirkland concerning a violation of probation warrant and failed to attack his credibility by showing an interest in cooperating with the state concerning a violation of probation warrant. *Id. at 206*. The circuit court also rejected this claim, finding neither prong of *Strickland* had been met and the claim meritless. Id.

On appeal of the denial of the post-conviction motion, the FSC found that Mr. Cofer's testimony supported the trial court's finding that no actual conflict existed. *Mungin II at 1001-1002*. The evidentiary hearing testimony revealed that Mr. Cofer had deposed Mr. Kirkland and was aware of some of his prior criminal history, but Mr. Cofer did not recall whether he checked the Public Defender's database or whether he actually knew or made the connection that Mr. Kirkland had been represented by the Public Defender's Office. Further, Mr. Cofer attested had he known of any simultaneous representation, he would have disclosed that to Petitioner. Thus, the court found counsel's allegiance was not divided and there was no actual conflict.

Alternatively, the FSC found, even assuming **[*82]** an actual conflict did exist, Mr. Cofer's representation was not adversely affected in that Mr. Cofer conducted an extensive cross-examination of Mr. Kirkland concerning his identification of Petitioner.[33] Id. at 1002. Furthermore, any alleged conflict did not prevent the adequate cross-examination of Kirkland as Mr. Cofer did not know or make the connection that the Public Defender's Office represented Mr. Kirkland

[33] The attempt to discredit the testimony of Mr. Kirkland through cross-examination did not constitute deficient performance by counsel. See Ex. I at 675-85. This was sound trial strategy performed effectively.

and Mr. Cofer did not pull any punches during cross-examination. Id.

As to Petitioner's claim that Mr. Cofer was ineffective in that he failed in his duty to avoid conflicts of interest, the Court finds no merit to this claim. Mr. Cofer filed a motion asking the state to produce the names of any witnesses who have charges pending in this or any other jurisdiction and whether the charges have been formally filed or not. Although the motion was granted, the prosecutor never provided any such information to Mr. Cofer concerning Mr. Kirkland. Indeed, the state did not provide any criminal history of Mr. Kirkland. Although Mr. Cofer was aware that Mr. Kirkland had arrests for disorderly intoxication and possibly a DUI during a time prior to Petitioner's arrest, he did know whether **[*83]** the Public Defender's Office had represented Mr. Kirkland on those charges.

Mr. Cofer took the additional step of deposing Mr. Kirkland. Of note, the arrests for worthless checks and the subsequent probation occurred after the deposition. Mr. Cofer surmises that he eventually requested the criminal history of Mr.. Kirkland but he did not recall reviewing the information showing that the court appointed the Public Defender's Office to represent Kirkland and the cases were disposed of in October 1992. However, Mr. Cofer said had he known, he would have disclosed the information to Petitioner and discussed the alternative courses of action with him. Mr. Cofer simply had no recollection of using the case-tracking program to find out if Mr. Kirkland had been represented by the Public Defender's Office.

The State Attorney's Office did not provide Mr. Cofer with any information concerning the probation and the warrants. Prior to providing his trial testimony, Mr. Kirkland did not inform the State Attorney's Office or anyone else that he had been placed on probation. Mr. Kirkland was unaware that there were any warrants and completed his probation.

Under these circumstances, the Court is convinced **[*84]** that Petitioner has failed to demonstrate an actual conflict of interest existed that adversely affected counsel's representation. Petitioner's contention that counsel's failure to properly impeach Mr. Kirkland concerning a violation of probation warrant and his interest in cooperating with the state concerning this warrant should be considered deficient performance is unavailing because Mr. Kirkland was unaware the warrants had issued; therefore, the issuance of the warrants would have had no impact on his testimony or supported any contention that Mr. Kirkland's testimony was influenced by the issuance of the warrants or some sort of deal related thereto.

The record also supports the conclusion that Mr. Cofer's allegiance was not divided. He did not register the fact that Mr. Kirkland had been represented by the Public Defender's Office in the past or during Petitioner's proceedings. Certainly, the record shows the state did not provide him with that information. Although Mr. Cofer deposed Mr. Kirkland, the arrests for the misdemeanor worthless check charges occurred after the deposition. Mr. Cofer attested that after obtaining some documentation, had he made the connection and known **[*85]** that Mr. Kirkland was being represented by the Public Defender's Office at the time of Petitioner's case, Mr. Cofer would have consulted with Petitioner. He did not take that step because he did not make the connection.

Of great import, even assuming an actual conflict, Mr. Cofer's representation of Petitioner was not adversely affected. The record shows the Public Defender's representation of Mr. Kirkland on misdemeanor offenses did not cause Mr. Cofer any pause or restraint in his representation. Since he was unaware of the Public Defender's representation, it neither curtailed his cross-examination of Mr. Kirkland nor did it effect his relationship with his client and his ability to effectively conduct a cross-examination or otherwise adequately represent his client.

In *Reynolds v. Chapman, 253 F.3d 1337, 1342 (11th Cir. 2001)*, the Eleventh Circuit explained:

> Ineffective assistance of counsel claims in the conflict of interest context are governed by the standard articulated by the Supreme Court in *Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708, 64 L.Ed.2d 333 (1980)*. *Cuyler* establishes a two-part test that we use to evaluate whether an attorney is constitutionally ineffective due to a conflict of interest. To show ineffectiveness under *Cuyler*, a petitioner must demonstrate: (a) that his defense attorney had an actual **[*86]** conflict of interest, and (b) that this conflict adversely affected the attorney's performance. See *Cuyler, 446 U.S. at 348-49, 100 S. Ct. 1708*.

Of importance, "[i]n order to establish a violation of the *Sixth Amendment*, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan, 446 U.S. at 348* (footnote omitted). In these circumstances, once this test is met, a defendant need not demonstrate prejudice as prejudice is presumed. *Strickland, 466 U.S. at 692*. Indeed, "[a] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice[.]" *Cuyler, 446 U.S. at 349*. See *Zone v. U.S., No. 6:07-cv-1331-Orl-22KRS, 6:06-cr-198-Orl-22KRS, 2008 U.S. Dist. LEXIS 14804, 2008 WL 552555, at *2 (M.D. Fla. Feb. 27, 2008)* (not reported in F.Supp.2d) (same).

For example, a failure to cross-examine a prosecution witness or failure to challenge the presentation of arguably inadmissible evidence may be evidence of adverse effects of conflict. If a defendant were to submit evidence of impairment to a client's defense based on counsel's representation restrained or diminished by conflicting interests, demonstrating counsel's struggle to serve two masters, it would evince an actual conflict that resulted in impaired representation giving cause for reversal of the **[*87]** conviction. *Cuyler, 446 U.S. at 349*. In short, in order to present a successful conflict-claim, there needs to be an identified "actual lapse in representation[.]" Id. (relying on *Dukes v. Warden, 406 U.S. 250, 256, 92 S. Ct. 1551, 32 L. Ed. 2d 45 (1972)*).

Here, as noted by the FSC, Petitioner failed to show a conflict actually affected the adequacy of counsel's representation. *Mungin II at 1002*. Petitioner presented no evidence of inconsistent interests that hindered or impaired Mr. Cofer's performance. See *Freund v. Butterworth, 165 F.3d 839, 859 (11th Cir.)*, cert. denied, *528 U.S. 817, 120 S. Ct. 57, 145 L. Ed. 2d 50 (1999)*. Nor is there evidence that there was an alternative strategy that was dismissed or rejected because it conflicted with external loyalties. *Quince v. Crosby, 360 F.3d 1259, 1264 (11th Cir.)* (citing *Reynolds, 253 F.3d at 1343*), cert. denied, *543 U.S. 960, 125 S. Ct. 436, 160 L. Ed. 2d 325 (2004)*. See *Smith v. White, 815 F.2d 1401, 1404 (11th Cir.)* (recognizing this circuit adopted a test that enables courts to distinguish actual from potential or hypothetical conflicts and requiring a showing that inconsistent interests led counsel to make a choice between one path more favorable to one client but harmful to another), cert. denied, *484 U.S. 863, 108 S. Ct. 181, 98 L. Ed. 2d 133 (1987)*.

The heart of the issue is whether external loyalties caused counsel to fail to pursue a reasonable and plausible alternative strategy. *Reynolds, 253 F.3d at 1343* (citing *Freund, 165 F.3d at 860*). On this record, it is quite apparent there is no evidence of divided loyalty on Mr. Cofer's part. He knew that Mr. Kirkland's misdemeanor convictions could not be used to impeach **[*88]** him. Ex. GG at 249, 341. Mr. Cofer utilized other reasonable and effective strategies to best represent his client and challenge and attack Mr. Kirkland's testimony and his identification of Petitioner. Id. at 346-47.

Petitioner cannot identify any flaw in Mr. Cofer's performance that was related to the fact that his co-workers in the Public Defender's Office represented Mr. Kirkland. There were no actions taken by Mr. Cofer or not taken that were influenced by conflicted loyalties of his Office. Indeed, the record shows Mr. Cofer advocated diligently on behalf of his client and did not exhibit divided loyalties.

Apparently Mr. Cofer did not recognize that the Public Defender's Office actually represented Mr. Kirkland, and neither the state nor Mr. Kirkland informed him of such representation. Thus, Petitioner does not meet the requirements of *§ 2254(d)(1)* as he has "failed to establish a conflict of interest that violated the *Sixth Amendment*, because his counsel could not have been affected by a conflict of which he was unaware." *Hunter v. Sec'y, Dep't of Corr., 395 F.3d 1196, 1202 (11th Cir.)*, cert. denied, *546 U.S. 854, 126 S. Ct. 120, 163 L. Ed. 2d 128 (2005)*.

Petitioner cannot satisfy the "contrary to" test of *28 U.S.C. § 2254(d)(1)* as the state court analyzed Petitioner's claims under *Strickland* and *Cuyler*. The state court's ruling is based on a reasonable determination **[*89]** of the facts and a reasonable application of the law. Petitioner has failed to demonstrate that the state court unreasonably applied *Strickland* and *Cuyler* or unreasonably determined the facts. Thus, the state court's decision is entitled to AEDPA deference.

Petitioner is not entitled to relief on his claim of conflict and his *Sixth Amendment* claim of his right to conflict-free counsel. As such, ground three is due to be denied.

X. GROUND FOUR

Ground Four: FSC misinterpreted the holding in Griffin[34] in its opinion on direct appeal, resulting in an opinion that was contrary to well-established federal law or an unreasonable application of clearly established Supreme Court law.

In this ground, Petitioner asserts that the FSC improperly applied the holding in *Griffin* rather than the rule set forth in *Yates v. U.S., 354 U.S. 298, 311-12, 77 S. Ct. 1064, 1 L. Ed. 2d 1356 (1957)*, *Stromberg v. People of State of Cal., 283 U.S. 359, 369-70, 51 S. Ct. 532, 75 L. Ed. 1117 (1931)*, and *Zant v. Stephens, 462 U.S. 862, 881, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983)*.[35] Second Amended Petition at 140-41. He submits that *Griffin* is only applicable to federal law and not binding on the states. Id. at 142. Arguing *Griffin* does not control, he contends no deference is due to the FSC's decision in *Mungin I at 1029-30*. Second Amended Petition at 142-43.

Respondents counter that *Griffin*, at a minimum, stands for the proposition that if there is insufficient evidence to support one ground of conviction, the conviction is not undermined if there is **[*90]** an alternative independent basis to support the conviction. Response at 106. Acknowledging that while the FSC ultimately determined there was insufficient evidence to uphold a conviction for premeditated murder, it found the evidence sufficient to support a conviction for felony murder. Id. at 102-103.

On direct appeal, the FSC found "the evidence does not support premeditation[.]" *Mungin I at 1029*. As such, the court found it was error to instruct the jury on both premeditation and felony murder. Id. Relying on *Griffin*, the FSC concluded that the general verdict need not be set aside because it did not rest on an unconstitutional ground or a legally inadequate theory; instead, it was a situation "where the general verdict could have rested upon a theory of liability without adequate evidentiary support when there was an alternative theory of guilt for which the evidence was sufficient." *Id. at 1030*. The error was found to be harmless. Id.

The Court undertakes a review of the record to provide context to this ground. The record contains the Indictment for murder in the first degree. Ex. A at 1. It reads:

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[34] *Griffin v. U.S., 502 U.S. 46, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991)*.

[35] In *Zant, 462 U.S. at 884*, the United States Supreme Court decided that assuming *Stromberg* is applicable in the sentencing context, the death penalty was not required to be vacated as jury found the existence of other valid statutory aggravating circumstances, although another aggravating circumstance was found to be invalid as insufficient by itself.

> The Grand Jurors of the State of Florida and County of Duval, empaneled and sworn to inquire and true presentment make in and for **[*91]** the body of the County of Duval, upon their oaths, do present and charge that ANTHONY MUNGIN, on the 16th day of September, 1990, in the County of Duval and the State of Florida, unlawfully and from a premeditated design to effect the death of Betty Jean Woods, a human being, did then and there kill the said Betty Jean Woods by shooting her with a handgun giving her certain mortal wounds from which she did thereafter continually languish and languishing, did live until the 20th day of September, 1990, on which date she died of the mortal wounds aforesaid, contrary to the provisions of *section 782.04(1)(a), Florida Statutes*.

Ex. A at 1.

As allowed in Florida, the court charged both premeditated murder and felony murder. Ex. E at 309-23. The circuit court provided a general verdict form to the jury, and the jury found the defendant guilty of murder in the first degree. *Id. at 324*.

In Gudinas v. McNeil, this Court addressed a claim similar to that raised herein and denied relief:

> Here, Petitioner is not entitled to any relief on the basis of *Yates* or any of its progeny because, in Florida, it is legally permissible to proceed on a theory of felony murder even though the indictment charges premeditated murder. In contrast to *Yates* and *Stromberg*, Petitioner's **[*92]** case is properly governed by *Griffin v. U.S., 502 U.S. 46, 56, 112 S. Ct. 466, 116 L.Ed.2d 371 (1991)*. In *Griffin*, the United States Supreme Court refused to extend the *Yates* and *Stromberg* holdings to a claim that a general verdict form must be set aside because one of the bases of conviction is "unsupported by sufficient evidence." *Id. at 56*. Petitioner's case is more akin to *Griffin*, and further distinguishable from *Yates*, because Petitioner challenges the verdict form on an alleged insufficiency of the evidence to support one of the bases of conviction, namely premeditated murder. Nonetheless, it is not controverted, even by Petitioner, that the evidence of record supports Gudinas' conviction on felony murder. Consequently, Petitioner can show no constitutional violation based upon the general verdict form. See also *Knight v. Dugger, 863 F.2d 705, 725 (11th Cir.1988)* (noting that Florida law has long recognized that the prosecution may proceed on either felony murder or premeditated murder when the indictment charges only the offense of first degree murder or premeditated murder, and finding that even if the trial court erred in permitting the State to proceed on both theories the "[Court] is convinced that such error was not of a constitutional dimension. The benefit to the state from the error (if any was committed) did not contribute to **[*93]** Petitioner's conviction since there was ample evidence upon which to base a conviction under either theory.").

*Gudinas v. McNeil, No. 2:06-cv-357-FtM-36DNF, 2010 U.S. Dist. LEXIS 104850, 2010 WL 3835776, at *30 (M.D. Fla. Sept. 30, 2010)* (not reported in F.Supp.2d) (footnote omitted), aff'd sub nom. *Gudinas v. Sec'y, Dep't of Corr., 436 F. App'x 895 (11th Cir. 2011)*.

Indeed, it is legally permissible to proceed on a theory of felony murder, despite the indictment's charge of premeditated murder; therefore *Yates* and its progeny are distinguishable and postconviction relief unwarranted. *Hannon v. Sec'y, Dep't of Corr., 622 F.Supp.2d 1169, 1232 (M.D. Fla. 2007)*, aff'd, *562 F.3d 1146 (11th Cir. 2009)*. Also of note, in order to obtain *Stromberg* relief, there must be a showing of three factors: (1) the jury was instructed that a guilty verdict could be returned with respect to any one of several listed grounds, (2) it is impossible to determine from the record on which ground the jury based the conviction, and (3) **one of the listed grounds was constitutionally invalid**. *Stromberg, 283 U.S. at 368* (emphasis added). The third prong is required; therefore, for a *Stromberg* attack to be successful, there must be a charge to the jury that set

forth as a ground for conviction the violation of a statute previously held unconstitutional. *Knight v. Dugger, 863 F.2d 705, 730 (11th Cir. 1988)*. As both premeditated murder and felony murder exist under Florida law and neither was declared unconstitutional prior to Petitioner's trial, reliance on *Stromberg* is **[*94]** unwarranted.

Petitioner asks for relief similar to that sought by the petitioner in *Hebert v. Tucker, No. 3:11cv37/MCR/EMT, 2012 U.S. Dist. LEXIS 47467, 2012 WL 1130075, at *8 (N.D. Fla. Feb. 14, 2012)* (not reported in F.Supp.2d), report and recommendation adopted by *2012 U.S. Dist. LEXIS 47415, 2012 WL 1130001 (N.D. Fla. Apr. 4, 2012)* (not reported in F.Supp.2d), a case seeking an extension of the holding in *Yates* (one of the possible bases of conviction was illegal) and *Stromberg* (one of the possible bases of conviction was unconstitutional) to a situation where one of the possible bases of conviction was merely unsupported by sufficient evidence. The federal district court rejected the "semantical argument" that insufficiency of proof is "legal insufficiency" or "legal error" as used in *Yates*.[36] *Hebert, 2012 U.S. Dist. LEXIS 47467, 2012 WL 1130075, at *12*. Again, jurors are considered to be well equipped to analyze the evidence and reject a factually inadequate theory of the case. *2012 U.S. Dist. LEXIS 47467, [WL] at *9*.

Petitioner argues that *Parker v. Sec'y for Dep't of Corr., 331 F.3d 764, 777 (11th Cir. 2003)*, abrogation recognized by *Parker v. U.S., 993 F.3d 1257, 1265 (11th Cir. 2021)*, a post-*Griffin* Eleventh Circuit case lends support to his contention that the Stromberg/Yates/Zant rule "still applies" and is applicable in this instance. Yes, the *Stromberg*/Yates/Zant rule applies in relevant circumstances, but Petitioner's case is distinguishable as his circumstance calls into play the holding in *Griffin* (a conviction need not be set aside when the jury returns a general **[*95]** verdict and the evidence is insufficient to support a conviction on one, but not every ground).

For instance, in *Clark, 335 F.3d at 1308-1310*, an opinion rendered shortly after *Parker v. Sec'y for Dep't of Corr.*, the Eleventh Circuit recognized that *Griffin* departed from the rule announced in *Stromberg* and *Yates* and proceeded to examine the petitioner's state court conviction and argument in light of the Stromberg, Yates, and *Griffin* line of cases. The Eleventh Circuit provided an in-depth examination of the three cases, never found *Griffin* inapplicable to its analysis, and proceeded to analyze the petitioner's claim and challenge to Florida state-court conviction in light of these decisions.

Petitioner's contention that *Griffin* is only applicable to federal law and not binding on the states is simply without merit. Indeed, as recognized since *Griffin*, "a general verdict may be upheld where the jury is instructed on alternative theories of guilt, even if one but not all of the particular theories charged is factually inadequate, that is, there is insufficient evidence to support a conviction on one, but not every, ground charged." *Anderson v. Jones, No. 1:15cv186/MMP/EMT, 2017 U.S. Dist. LEXIS 216020, 2017 WL 7038416, at *8 (N.D. Fla. Jan. 9, 2017)* (not reported in F. Supp.) (emphasis in original) (citing *Griffin, 502 U.S. at 58-59*), report and recommendation adopted sub nom. *Anderson v. Sec'y, Fla. Dep't of Corr., No. 1:15-cv-00186-WTH-EMT, 2018 U.S. Dist. LEXIS 10487, 2018 WL 522770 (N.D. Fla. Jan. 23, 2018)* **[*96]** (not reported in F. Supp.). See *Gudinas, 2010 U.S. Dist. LEXIS 104850, 2010 WL 3835776, at *30* (considering an attack on an Orange County, Florida conviction for murder, and finding the case properly governed by *Griffin*, not *Yates* and *Stromberg*).

The Court finds the FSC's denial of this claim is entitled to deference. Because Petitioner has not

[36] Of note, the Eleventh Circuit has opined that it is unlikely that the decision in *Yates* is constitutionally compelled or reliant upon the *Due Process Clause*, thus, the holding in *Yates* has been considered to fall far short of the clarity required to render a state court's adjudication contrary to clearly established federal law. *Clark v. Crosby, 335 F.3d 1303, 1309-10 (11th Cir. 2003)*, cert. denied, ***540 U.S. 1155, 124 S. Ct. 1159, 157 L. Ed. 2d 1052 (2004)***.

shown that the state court's decision and rejection of the claim was either contrary to, or an unreasonable application of federal law, or an unreasonable determination of the facts based upon the evidence, this ground is due to be denied. The claim is without merit and Petitioner is not entitled to habeas corpus relief.

XI. GROUND FIVE

Ground Five: Insufficiency of the evidence.

Petitioner asserts there was no basis in the evidence to support the underlying felony of robbery or attempted robbery to support the conviction as to felony murder. He argues that the state's theory that there was a robbery followed by a shooting "is mere conjecture." Second Amended Petition at 148. He avers that the FSC's decision denying this claim is contrary to and/or an unreasonable application of federal law. Id. at 146. Finally, he asserts the evidence of robbery is insufficient under *Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)*. Second Amended Petition at 148.

On direct appeal, Petitioner raised a claim that the evidence was insufficient to prove first degree murder. Ex. W at 29-35. He raised a subclaim that the evidence was **[*97]** insufficient to prove robbery. Id. at 35-40. He claimed the denial of the motion for judgment of acquittal amounted to error. Id. at 35. Petitioner argued the evidence that the shooter was engaged in a robbery was circumstantial as there were no witnesses to the shooting; therefore, there was no direct evidence that the shooting of the victim occurred during a robbery and the motion for judgment of acquittal should have been granted. Id.

The ground presented in the appeal brief was couched in terms of trial court error. Petitioner did however, at the close of his brief, provide an additional issue, contending his conviction and sentence violate the Florida and United States Constitutions. Id. at 94. Of import, he claimed the evidence of robbery was insufficient as previously discussed, and relying on *Jackson*, he contended the evidence presented at trial fails to constitute proof of robbery beyond a reasonable doubt within the meaning of the *Due Process Clause of the United States Constitution*. Id.

The FSC agreed with Petitioner that the trial judge erred in denying the motion for judgment of acquittal as to premeditation but affirmed the trial court's decision to deny the motion for judgment of acquittal as to felony murder, finding the evidence **[*98]** supported the conviction for felony murder. *Mungin I at 1029*. In support of its affirmance, the FSP highlighted the following evidence:

> The evidence shows that Mungin entered the store carrying a gun, that $59.05 was missing from the store, that money from the cash box was gone, that someone tried to open a cash register without knowing how, and that Mungin left the store carrying a paper bag. We find that this evidence supports robbery or attempted robbery, and there is no *reasonable* hypothesis to the contrary.

Id.

The trial record demonstrates Mr. Lewis H. Buzzell, co-counsel for Petitioner, moved for judgment of acquittal asserting, "there is insufficient evidence through felony murder based on robbery." Ex. I at 904. He argued the only evidence that any property was taken was the audit and the testimony that $59.05 was missing from Lil' Champ. Id. Mr. Buzzell claimed this testimony was unpersuasive as the security officer for Lil' Champ could not state where the unusual amount of money was missing from or how he arrived at the figure of missing money. Id. Finally, Mr. Buzzell stated this testimony was circumstantial evidence and there was a reasonable hypothesis of innocence that the shooter did **[*99]** not do a robbery. Id. The court commented: "felony murder is any attempt to commit one of these." Id.

Mr. Buzzell pointed out that although one of the