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 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

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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., No. 20-11271, 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.

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 (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 things differently or done more, but that is not constitutionally compelled. Although every attorney may not have chosen the same approach or 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 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 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 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, 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 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 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]

"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

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 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 (2012).

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 (1986) (quoting Darden v. Wainwright, 699 F.2d 1031, 1036 (11th Cir. 1983)).

The record demonstrates counsel 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 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, 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 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 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 without the possibility of parole for 25 years and the court chose to adopt the jury's recommendation.

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

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 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 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 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 (1980) and Halloway v. Ark., 435 U.S. 475 (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 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, 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 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. 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 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 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 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 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 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 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.

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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.

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 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 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 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 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 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 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 (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 (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 (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 (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 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 (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 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 (1957), Stromberg v. People of State of Cal., 283 U.S. 359, 369-70 (1931), and Zant v. Stephens, 462 U.S. 862, 881 (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

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34 Griffin v. U.S., 502 U.S. 46 (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.

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 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:

> The Grand Jurors of the State of Florida and County of Duval, empaneled and sworn to inquire and true presentment make in and for 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 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 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 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 unwarranted.

Petitioner asks for relief similar to that sought by the petitioner in Hebert v. Tucker, No. 3:11cv37/MCR/EMT, 2012 WL 1130075, at *8 (N.D. Fla. Feb. 14, 2012) (not reported in F.Supp.2d), report and recommendation

adopted by 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 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. Id. 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

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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. 155 (2004).

the jury returns a general 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 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 WL 522770 (N.D. Fla. Jan.

23, 2018) (not reported in F. Supp.). See Gudinas, 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 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 (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 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 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 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 registers was open, that was consistent with the testimony that it was company policy to leave the register open. Id. at 905. He also noted that no money was missing from the registers. Id.

Mr. de la Rionda responded that there was $59.05 missing. Id. at 906. Also, he argued, "you only need attempted armed robbery." Id. He referred to the testimony that money could be kept on the clips or in the carton underneath the cash register. Id. Finally, he noted the testimony that the one cash register that did have money also had the E key punched in, signifying some tampering with the register. Id.

In addition, Mr. de la Rionda argued there was evidence connecting Petitioner to the scene, including the gun that was used to commit the killing found where Petitioner was located, a bullet found at the murder scene, the shell casing from the murder scene, the bullet from the victim matching the gun found with Petitioner, and the relevant location of the two stolen vehicles found in Florida and Georgia. Id. at 906-907. After hearing argument, the court denied the motion for judgment of acquittal. Id. at 907. Thereafter, Mr. Buzzell renewed the motion for judgment of acquittal, relying on the same grounds and argument. Id. at 960. The court denied the renewed motion. Id. at 961.

Petitioner has not established that the FSC's decision was contrary to or an unreasonable application of federal law, nor that there was an unreasonable determination of the fact. The Court will give deference under AEDPA to the FSC's decision.

Petitioner is not entitled to habeas relief on his claim of a Fourteenth Amendment violation. A state prisoner is entitled to habeas relief if the federal court finds: "upon the record evidence adduced at the trial no rational trier of fact could have found proof beyond a reasonable doubt." McDaniel v. Brown, 558 U.S. 120, 121 (2010) (per curiam) (quoting Jackson, 443 U.S. at 324). Not only must the federal court consider all of the evidence admitted at trial the court must also review the evidence in the light most favorable to the prosecution. Jackson, 443 U.S. at 319. This criterion impinges upon the jury's role, "only to the extent necessary to guarantee the fundamental protection of due process of law." Id. (footnote omitted).

Upon review, the evidence adduced at Petitioner's trial was sufficient to convict Petitioner of felony murder. After viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found Petitioner committed the offense of robbery or attempted robbery. See McDonald v. Sec'y, Dep't of Corr., No. 8:18-cv-973-T-33CPT, 2018 WL

10517118, at *7 (M.D. Fla. Oct. 31, 2018) (not reported in F. Supp.) (attempted robbery is sufficient to support felony murder).

The record shows the court charged the jury as follows. After providing the charge for premeditated murder, the court charged felony murder: Ex. E at 312-13. The court gave three elements for felony murder: (1) Betty Jean Woods is dead; (2)(a) the death occurred as consequence of and while Petitioner was engaged in the commission of robbery; or (b) the death occurred as a consequence of and while Petitioner was attempting to commit robbery; (3) Petitioner was the person who actually killed Betty Jean Woods. Id. The court defined robbery, providing four elements: (1) Petitioner took money from the person or custody of Betty Jean Woods; (2) the taking was by force, violence or assault, or by putting Betty Jean Woods in fear; (3) the property taken was of some value; and (4) Petitioner took money from the person or custody of Betty Jean Woods and at the time of the taking intended to permanently deprive Betty Jean Woods of the property or any benefit from it. Id. at 313. The court also defined attempt to commit robbery, providing the following: (1) Petitioner did some act toward committing the crime of robbery that went beyond just thinking or talking about it, and (2) he would have committed the crime except that he failed. Id. at 314-15.

Petitioner asserts that reliance on the cash count was misguided because the source was a matter of discrepancy and could have been based on a mistaken conclusion and reliance on the testimony concerning the "E" indicator on a cash register was similarly unfounded. Second Amended Petition at 146-48. In reviewing the evidence in the light most favorable to the prosecution, a rational trier of facts could have found Petitioner committed robbery or attempted robbery. Mr. Kirkland testified he observed Petitioner departing the store carrying a brown bag and then Mr. Kirkland discovered the injured clerk inside the store. The state presented testimony that money was missing from the store and there was evidence that someone attempted to open a cash register. There was extensive ballistics evidence tying Petitioner to the shooting, including the police finding a .25-caliber semiautomatic pistol and bullets during a search of Petitioner's house in Georgia and the evidence that a bullet recovered from Woods had been fired from the pistol found at Petitioner's house. Mungin I at 1028.

After reviewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found Petitioner committed the robbery or attempted robbery and ultimately committed felony murder. Although there may be conflicting inferences, there is a presumption that the jury resolved the conflicts in favor of the prosecution. Johnson v. Ala., 256

F.3d 1156, 1172 (2001) ("federal courts must defer to the judgment of the jury in assigning credibility to the witnesses and in weighing the evidence"), cert. denied, 535 U.S. 926 (2002). Viewing the record of the evidence and reasonable inferences in the light most favorable to the prosecution and referring to the essential elements of the crimes as defined by Florida state law, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Wilcox v. Ford, 813 F.2d 1140, 1143 (11th Cir.) (given that evidence may give some support to the defendant's theory of innocence, that is not sufficient to warrant habeas relief), cert. denied, 484 U.S. 925 (1987). Also, as a matter of federal constitutional law, Florida's circumstantial evidence rule has no place in the sufficiency of the evidence analysis as a matter of federal constitutional law. Id. at 1145 n.7. On the contrary, there is no requirement under federal law that the prosecution has an affirmative duty to rule out every hypothesis except that of guilt beyond a reasonable doubt. Jackson, 443 U.S. at 326. Petitioner is not entitled to relief under Jackson as no due process violation exists.

Thus, this Court will defer to this resolution as well as give AEDPA deference to the FSC's decision to the extent the claim was raised and addressed in the federal constitutional sense. The state court's rejection of the constitutional claim is entitled to deference under AEDPA. McDaniel v.

Brown, 558 U.S. at 132 (a reviewing court must not depart "from the deferential review that Jackson and § 2254(d)(1) demand"). See Preston v. Sec'y, Fla. Dep't of Corr., 785 F.3d 449, 463 (11th Cir. 2015) (recognizing that a petitioner raising a Jackson claim faces a high bar in federal habeas due to the two layers of judicial deference) (citing Coleman v. Johnson, 566 U.S. 650, 651 (2012) (per curiam)). As such, Petitioner is not entitled to habeas relief on this ground.

XII. GROUND SIX

Ground Six: Ineffective assistance of appellate counsel.

In ground six, Petitioner claims he received ineffective assistance of appellate counsel in violation of the Sixth Amendment. Second Amended Petition at 148. He claims his appellate counsel was ineffective for failure to raise an issue concerning the state's introduction of hearsay testimony during the penalty phase, specifically, the testimony of Tallahassee police officer Cecil Towle concerning the facts of a prior crime that had been used during the guilt phase as Williams rule evidence. Id. at 151-52. Petitioner contends his right to confrontation under Crawford v. Washington, 541 U.S. 36 (2004) was violated. Second Amended Petition at 159-61. He also complains that over defense objection, the trial court permitted the state to introduce two photographs of the victim of the Tallahassee case and appellate counsel failed

to argue that the admission of the photographs was improper and constituted error as the prejudicial nature of the photographs outweighed the probative value. Id. at 152-53, 163-64.

The record demonstrates that during the penalty phase, the state called Cecil Towle, a homicide investigator for the Tallahassee Police Department. Ex. O at 1125. When the prosecutor inquired as to Meihua Want Tsai's statements in her interview, Mr. Buzzell objected on the basis of hearsay and otherwise inadmissible. Id. at 1126-27. Mr. de la Rionda countered, "I believe hearsay is admissible in this proceeding." Id. at 1127. The court overruled the objection. Id.

Concerning the photographs, Mr. de la Rionda inquired if photographs were taken of injuries to Ms. Tsai's hand. Id. at 1129. Mr. Towle said the photograph depicted Ms. Tsai's right hand, with a contact wound to the middle finger with charring and blackening of the wound area. Id. at 1130. The other photograph was a photograph of the victim in the emergency room, with blood on her pillow and in front of her blouse. Id. Mr. Buzzell objected to their introduction into evidence, stating the prejudicial value outweighs the probative value, especially since the defense is stipulating Petitioner had been convicted of a violent felony as a result of the incident. Id. at 1131. Mr. Buzzell raised the specter of the right to due process under the Fifth and

Fourteenth Amendments with regard to it being victim impact evidence of a collateral offense. Id. Mr. de la Rionda responded that he was not introducing the photographs to demonstrate victim impact but to show the identity of the victim with the hand injury and to show it was a close-range shot. Id. The court overruled the objection and received the evidence. Id.

Petitioner faces several obstacles. The use of hearsay testimony of a police officer discussing a prior crime during the penalty phase does not constitute error.[37] Mungin II at 1003. Under these circumstances appellate counsel was not ineffective for failure to raise the issue on appeal. To the extent Petitioner was attempting to raise a confrontation claim under Crawford, Crawford's principles are inapplicable to Petitioner because Crawford is not retroactive. Whorton v. Bockting, 549 U.S. 406, 421 (2007) (finding the new rule in Crawford is not a watershed rule of criminal procedure). See Mungin II at 1003 (citing Chandler v. Crosby, 916 So. 2d 728 (Fla. 2005)). Trial counsel made a hearsay objection, but the United States Supreme Court has "been careful 'not to equate the Confrontation Clause's prohibitions with the general rule prohibiting the admission of hearsay

37 Under Florida law, hearsay testimony is admissible in the penalty phase, allowing that the defendant is afforded a fair opportunity to rebut any hearsay statements. Hodges v. Sec'y, Dep't of Corr., No. 8:03-cv-01591-SCB-TGW, 2007 WL 604982, at * 6 (M.D. Fla. Feb. 22, 2007) (not reported in F.Supp.2d) (citing Fla. Stat. § 921.141(1)).

statements[,]'" although both the rules and the clause are generally designed to protect similar values. White v. Ill., 502 U.S. 346, 352 (1992) (quoting Idaho v. Wright, 497 U.S. 805, 814 (1990)). Finally, there is no Confrontation Clause violation as "hearsay evidence is admissible at a capital sentencing." Chandler v. Moore, 240 F.3d 907, 918 (11th Cir.), cert. denied, 534 U.S. 1057 (2001).

In Mungin II at 1004, the FSC noted, during the penalty phase, the same standard was applicable for both the introduction of testimony concerning prior violent felony convictions as well as photographs. As such, the court reasoned that the photographs of the victim of a prior violent felony are admissible if relevant and the prejudicial effect of the photographs does not outweigh the prejudice. Id. The court found the photographs relevant as they showed the victim and "the circumstances of the Tallahassee shooting." Id. Also, even assuming they were not relevant, the FSC found their admission harmless beyond a reasonable doubt. Id. As such, the FSC denied the claim of ineffective assistance of appellate counsel. Id.

The state court's determination is consistent with federal precedent. The criteria for proving ineffective assistance of appellate counsel parallels that of ineffective assistance of trial counsel, with the second prong focusing on whether the deficiency in the performance compromised the appellate

process to the degree as to undermine confidence in the correctness of the result. Mungin II at 1003 (citation omitted).

Petitioner's burden is a heavy one. He must show that his appellate counsel was objectively unreasonable in failing to raise these matters on appeal. If he satisfies that requirement, he must then show a reasonable probability that, but for counsel's unprofessional errors, he would have a reasonable probability of success on appeal. It is a difficult task to show appellate counsel was incompetent. Smith v. Robbins, 528 U.S. 259, 288 (2000). "Appellate counsel's performance will be deemed prejudicial only if we find that 'the neglected claim would have a reasonable probability of success on appeal.'" Farina v. Sec'y, Fla. Dept. of Corrections, 536 F. App'x 966, 979 (11th Cir. 2013) (per curiam) (quoting Heath v. Jones, 941 F.2d 1126, 1132 (11th Cir. 1991)), cert. denied, 574 U.S 1003 (2014).

An effective appellate attorney will weed out weaker arguments, even if they may have merit. Philmore v. McNeil, 575 F.3d 1251, 1264 (11th Cir. 2009) (per curiam), cert. denied, 559 U.S. 1010 (2010). Upon review, Petitioner's appellate counsel raised nine issues on direct appeal in a brief consisting of just under one hundred pages. Ex. W. Addressing Issue 2 of the brief (the evidence was insufficient to prove first-degree murder), the FSC agreed with Petitioner that the trial judge erred in denying Petitioner's motion

for judgment of acquittal as to premeditation. Mungin I at 1029. The FSC also found it was error to instruct the jury on premeditation as the evidence did not support premeditation. Id. Although Petitioner prevailed on this significant issue, ultimately, the FSC affirmed both the conviction of first-degree murder and the sentence, finding sufficient evidence of felony murder. Id. at 1029-30, 1032.

Had Petitioner's appellate counsel raised the claims Petitioner now contends should have been raised on direct appeal, no appellate relief would have been forthcoming as evinced by the FSC's decision denying post-conviction relief on the claim of ineffective assistance of appellate counsel. Thus, Petitioner has failed to show a reasonable probability the outcome of the direct appeal would have been different had appellate counsel argued as Petitioner's suggests appellate counsel should have on direct appeal.

Petitioner has not shown that the FSC decided his claim of ineffective assistance of appellate counsel in a manner contrary to Strickland, or that the FSC's application of Strickland was objectively unreasonable. Appellate counsel need not raise every nonfrivolous issue. As previously noted, appellate counsel proceeded with strong arguments and prevailed on a significant issue, although the court affirmed the conviction on the alternative

theory of felony murder and affirmed the sentence of death. See Mungin II at 992.

The FSC's decision is entitled to AEDPA deference. The denial of relief on the ineffective assistance of appellate counsel claim was neither contrary to, nor an unreasonable application of Strickland. The FSC applied the criteria set forth in Strickland. Mungin II at 1003. Upon review, its adjudication of the claim of ineffective assistance of appellate 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 FSC's decision is entitled to deference and the ground is due to be denied.

Petitioner has failed to demonstrate that his state court proceeding was fundamentally unfair and his appellate counsel ineffective. Thus, he has failed to demonstrate constitutional violations. As such, he is not entitled to habeas relief.

XIII. GROUND SEVEN

Ground Seven: FSC erred in finding admission of collateral crime evidence harmless error.

In ground seven, Petitioner contends that the FSC's analysis of harmless error is contrary to and or an unreasonable application of the decision in Chapman v. Cal., 386 U.S. 18 (1967). The rule set forth in Chapman is:

"before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt[,]" id. at 24, that is, a petitioner is "entitled to a trial free from the pressure of unconstitutional inferences." Id. at 26.

On direct appeal, Petitioner claimed, "the trial court erred in allowing the State to introduce irrelevant evidence that Mungin shot a collateral crime victim in the spine[.]" Mungin I at 1029 n.4. The FSC denied this ground finding any error was harmless as the state did not dwell on or unduly emphasize that the victim was shot in the spine. Id. at 1030 n.7. Petitioner urges this Court to find that the FSC erred in allowing the presentation of this evidence, arguing the introduction of the inflammatory and prejudicial evidence that Petitioner shot Mr. Rudd in the back was not harmless as Mr. Rudd was asked to step down from the stand and demonstrate how and where he was shot, emphasizing both the nature of the injury and the location of the shot. Second Amended Petition at 165-66.

The trial record demonstrates the following. The state called Mr. William W. Rudd, a cashier clerk for Bishop's Country Store and the victim in the Jefferson County case. Ex. I at 713-14. The prosecutor asked the witness to step down from the witness stand and indicate where he was shot. Id. at 721. He complied and said he was hit in his spine in the upper part of his

back. Id. Mr. Buzzell objected to the testimony as being irrelevant for purposes of identity or any other limited purpose under the Williams rule. Id. The prosecutor responded it will be relevant, and the court overruled the objection. Id. The prosecutor asked Mr. Rudd what happened after he was shot in the back, and Mr. Rudd responded that the shot to the spine paralyzed him, rendered him temporarily unconscious, but he woke up momentarily and saw Petitioner getting money out of the money box under the counter, a place for excessive money not placed in the cash register.[38] Id. at 721-22.

To the extent Petitioner is complaining about a ruling regarding the admissibility of evidence under Florida law, the claim is not cognizable in this federal habeas proceeding. See Baxter v. Thomas, 45 F.3d 1501, 1509 (11th Cir.) (federal habeas is not the proper vehicle to correct evidentiary ruling), cert. denied, 516 U.S. 946 (1995)). This Court must give state courts wide discretion in determining the admissibility of evidence. See Boykins v. Wainwright, 737 F.2d 1539, 1543 (11th Cir. 1984) (correction of erroneous state court evidentiary rulings in not the province of the federal courts), cert. denied, 470 U.S. 1059 (1985). Of import, "it is not the province of a federal habeas court to reexamine state-court determination on state-law questions." Estelle

38 Trial testimony revealed similar circumstances in the Duval County case, with money being placed in the Lil' Champ store in locations other than the register, the clerk being shot during the offense, and the count of the store's money being short afterwards.

v. McGuire, 502 U.S. 62, 67 (1991). Indeed, in reviewing evidentiary decisions, federal courts do not act as "super" state supreme courts. Shaw v. Boney, 695 F.2d 528, 530 (11th Cir. 1983) (per curiam) (citations omitted).

This Court is limited to determining whether the conviction violated the Constitution, law, or treaties of the United States. 28 U.S.C. § 2241. Thus, the fundamental question is whether an error was of such magnitude "as to deny fundamental fairness to the criminal trial." Alderman v. Zant, 22 F.3d 1541, 1555 (11th Cir.), cert. denied, 513 U.S. 1061 (1994). See Shaw, 695 F.2d at 530 (regarding state evidentiary rulings, the standard of fundamental fairness in habeas is whether the trial court error was "material in the sense of a crucial, critical, highly significant factor") (quoting Hills v. Henderson, 529 F.2d 397, 401 (5th Cir. 1976)). If a ruling denies fundamental constitutional protections it is the federal court's duty to enforce the constitutional guarantees.

Petitioner's brief on direct appeal appears to rely solely on a state harmless-error rule. Ex. W at 49-56. The specific claim set forth in Issue III of the brief is: "the trial court erred in allowing the state to show that Mungin shot collateral crime victim William Rudd in the back, hitting his spine. This evidence was irrelevant and not harmless." Id. at 49. Neither the Fifth nor Fourteenth Amendments are mentioned in the brief nor is any reference made

to rights guaranteed under the United States Constitution or citation to Chapman. See Chapman, 386 U.S. at 21 (a state harmless-error rule is a state question involving errors of state procedure or state law, not a federal question based on a federal constitutional guaranteed right).

In his appeal brief, Petitioner claimed reversible error relying on Amoras v. State, 531 So. 2d 1256, 1259-60 (Fla. 1988) (per curiam) (addressing the applicability of the Williams rule concerning admissibility of similar fact evidence of another crime codified in the Florida Evidence Code § 90.404(2)(a) and the test of relevancy contained in Fla. Stat. § 90.401)) and other Florida cases. In closing, Petitioner said remand was required without elaboration or contention of a federal constitutional violation and referenced State v. DiGuilio, 491 So. 2d 1129, 1135-36 (Fla. 1986), a case which references Chapman and its progeny in the context of reviewing a claim concerning comments on silence, a recognized high-risk error. Ex. W at 56.

Petitioner claims the trial court erred by allowing evidence to be admitted as Williams rule[39] evidence and the FSC erred in affirming that

39 "Under the Williams rule, evidence of collateral crimes is admissible '[i]f found to be relevant for any purpose save that of showing bad character or propensity.'" Green v. Sec'y, Dep't. of Corr., No. 8:15-cv-1259-T-35TGW, 2018 WL 10759184, at *4 n.3 (M.D. Fla. Sept. 12, 2018) (quoting Williams v. State, 110 So. 2d at 662).

decision as harmless.[40] He claims the FSC's analysis was itself contrary to or an unreasonable application of Supreme Court precedent, citing only Chapman. Second Amended Petition at 165. The focus of this contention appears to be on the fact that the state court did not in its decision affirming the trial court address whether the state met its burden to establish that error was harmless beyond a reasonable doubt. Petitioner argues that the FSC's analysis of harmless error should not be relied upon because the state court did not provide sufficient analysis to support its conclusion or use the magic words: "harmless beyond a reasonable doubt."[41] Id.

Petitioner seemingly relies on the Due Process Clause to support his contention of a constitutional violation; however, he fails to identify any Supreme Court case holding that the admission of collateral crime evidence in similar circumstances is unconstitutional. Since Petitioner has not identified a Supreme Court case making that particular holding, he cannot show that the

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40 In his Reply, Petitioner apparently construes the FSC's decision as actually finding error in the admission of alleged irrelevant evidence because the court went on to find harmlessness in its introduction. Reply at 35. Petitioner presumes too much. The FSC found: "[a]ny error in Issue 3 . . . was harmless." Mungin I at 1030 n.7. Admittedly, the FSC's decision is not a model of clarity, but the court's phraseology more readily supports an interpretation that the state court considered whether there was harm after assuming "any error," not necessarily finding error.

41 To some extent, Petitioner seems to be asking this court to second-guess the state court evidentiary decision, something this Court will not do as the scope of review is severely restricted in this habeas proceeding.

FSC's rejection of the underlying claim was contrary to, or an unreasonable application of clearly established federal law. See Woodward v. Sec'y, Fla. Dep't of Corr., No. 3:13-cv-155-J-34JRK, 2016 WL 1182818, at *13 (M.D. Fla. Mar. 28, 2016) (not reported in F. Supp.) (failure to identify a Supreme Court case holding that admission of collateral crime evidence in similar circumstances was unconstitutional is fatal to the habeas claim); Chase v. Sec'y, Fla. Dep't of Corr., No. 3:15-cv-571-J-34PDB, 2018 WL 6413357, at *7 (M.D. Fla. Dec. 6, 2018) (not reported in F. Supp.) (same).

Parsing the FSC's decision, it is not entirely clear whether the state court conducted its harmless error analysis under the Chapman standard. Nevertheless, this Court will proceed to address whether habeas relief should be granted solely under the Brecht standard (on collateral review, federal constitutional error is harmless unless the error had a substantial and injurious effect or influence on the jury's verdict, amounting to actual prejudice).

In Mansfield v. Sec'y, Dep't of Corr., 679 F.3d 1301, 1307 (11th Cir. 2012), cert. denied, 568 U.S. 1098 (2013), the Eleventh Circuit explained this Court's role under similar circumstances:

> "[I]n § 2254 proceedings a court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the 'substantial and

> injurious effect' standard set forth in Brecht, whether or not the state appellate court recognized the error and reviewed it for harmlessness under the 'harmless beyond a reasonable doubt' standard set forth in Chapman." Fry,[42] 551 U.S. at 121–22, 127 S. Ct. 2321. Because of the "[s]tates' interest in finality," the states' "sovereignty over criminal matters," and the limitation of habeas relief to those "grievously wronged," the Supreme Court set forth in Brecht a standard that is more favorable to and "less onerous" on the state, and thus less favorable to the defendant, than the Chapman harmless beyond a reasonable doubt standard. Brecht, 507 U.S. at 637, 113 S. Ct. 1710; accord Fry, 551 U.S. at 117, 127 S. Ct. 2321. The Supreme Court emphasized in Brecht that "collateral review is different from direct review," and, therefore, that "an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." Brecht, 507 U.S. at 633–34, 113 S. Ct. 1710.

Since Brecht determined that the harmless error standard set forth in Chapman is inapplicable on collateral review, district courts should apply the actual prejudice standard of Brecht even if the state court did not apply the Chapman standard of proof beyond a reasonable doubt that error complained of did not contribute to the verdict. Vining v. Sec'y, Dep't of Corr., 610 F.3d 568, 571 (11th Cir. 2010) (per curiam), cert. denied, 563 U.S. 977 (2011).

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42 Fry v. Pliler, 551 U.S. 112, 121-22 (2007) ("We hold that in § 2254 proceedings a court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the 'substantial and injurious effect' standard set forth in Brecht, supra, whether or not the state appellate court recognized the error and reviewed it for harmlessness under the 'harmless beyond a reasonable doubt' standard set forth in Chapman[.]").

Consequently, this Court, in considering Petitioner's claim, will apply the Brecht standard of "substantial and injurious effect" rather than the Chapman standard of "harmless beyond a reasonable doubt." See Hodges v. Att'y Gen., State of Fla., 506 F.3d 1337, 1343 (11th Cir. 2007) (citing Fry), cert. denied, 555 U.S. 855 (2008).

Undertaking a review of the total setting, the Court finds the admission of the testimony of Mr. Rudd that Petitioner shot him in the spine amounted to harmless error under the actual prejudice standard for collateral review set forth in Brecht. An explanation follows.

"To determine the effect on the verdict of a constitutional error, the Court must consider the error 'in relation to all else that happened' at trial." Trepal, 684 F.3d at 1114 (quoting Kotteakos v. U.S., 328 U.S. 750, 764 (1946)). In light of the weight of the properly admitted evidence and the isolated nature of this testimony concerning Petitioner shooting Rudd in the spine, the record of the trial cannot support a conclusion that this brief testimony had a substantial and injurious effect or influence in the determining the jury's verdict. Evidence of Petitioner's guilt was strong. Also, the nature of the challenged collateral crime evidence was limited.[43] Therefore, the error

43 The record demonstrates there was ample evidence against Petitioner, including but not limited to the testimony of Mr. Kirkland identifying Petitioner and placing him at the store carrying a paper bag, the testimony concerning the money missing from the store, and the

complained of was harmless under the applicable Brecht standard as the admission of the challenged testimony, even if erroneous, did not have a substantial and injurious effect or influence on the verdict, especially given the other evidence adduced at trial to support the conviction. As such, Petitioner is not entitled to habeas corpus relief on this ground.

Accordingly, it is now

ORDERED AND ADJUDGED:

1. The Court **strikes** the Motion to Strike contained in the Response (Doc. 31 at 5-6).

2. The Second Amended Petition for Writ of Habeas Corpus (Doc. 30) is **DENIED**.

3. This action is **DISMISSED WITH PREJUDICE**.

4. The **Clerk** shall enter judgment accordingly and close this case.

5. If Petitioner appeals the denial of his Second Amended Petition for Writ of Habeas Corpus (Doc. 30), **the Court denies a certificate of appealability**.[44] Because this Court has determined that a certificate of

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location of the gun used in the crime found with Petitioner and tied to the crime through strong ballistics evidence.

[44] 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

appealability is not warranted, the **Clerk** shall terminate from the pending motions report any motion to proceed on appeal as a pauper that may be filed in this case. Such termination shall serve as a denial of the motion.

DONE AND ORDERED at Jacksonville, Florida, this 15th day of August, 2022.

BRIAN J. DAVIS
United States District Judge

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Counsel of Record

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.