

No. 24-5308

In the
Supreme Court of the United States

CHARLES GROVER BRANT,

Petitioner,

v.

RICKY D. DIXON,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

Petitioner, a state prisoner, seeks certiorari review of an unpublished order from the Eleventh Circuit Court of Appeals denying his motion for a certificate of appealability (COA) in a federal habeas corpus proceeding. *See* 28 U.S.C. § 2253(c).

The questions raised in the Petition, reframed for clarity, are as follows:

1. Whether the Eleventh Circuit's order contradicts prior decisions by this Court regarding the standard for obtaining a COA.
2. Whether the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984), requires a reviewing court to aggregate all errors by counsel that are found to satisfy the deficient performance prong.

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The opinion from which Petitioner seeks certiorari review is the Eleventh Circuit's order denying his motion for a COA, which appears as *Brant v. Secretary, Department of Corrections*, No. 23-13124, 2024 WL 1187330 (11th Cir. Feb. 29, 2024), *recons. denied* (Apr. 10, 2024). The COA, in turn, was sought from an order by the district court denying Petitioner's petition for a writ of habeas corpus, which appears as *Brant v. Secretary, Department of Corrections*, No. 8:16-cv-2601, 2023 WL 2648167 (M.D. Fla. Mar. 27, 2023), *reh'g denied* (Aug. 23, 2023).

STATEMENT OF JURISDICTION

Petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. § 1254. Respondent agrees that this Court has the authority to grant review under that statute but denies that this is an appropriate case for the exercise of this Court's discretionary jurisdiction, as the Eleventh Circuit's order does not conflict with any decision by this Court or another United States court of appeals, nor does it decide any important or unsettled question of federal law. *See* Sup. Ct. R. 10(a), (c).

STATEMENT OF THE CASE AND FACTS

Petitioner, Charles Grover Brant, is a Florida prisoner under a sentence of death. The sentence was imposed for the murder of 21-year-old Sara Radfar, whom Petitioner raped, strangled, and suffocated to death in 2004. Petitioner's conviction and death sentence were affirmed on direct appeal by the Florida Supreme Court. *See Brant v. State*, 21 So. 3d 1276 (Fla. 2009). Petitioner subsequently filed a motion for postconviction relief under Fla. R. Crim. P. 3.851. The state postconviction court denied the Rule 3.851 motion, and the Florida Supreme Court affirmed that decision

on appeal. *See Brant v. State*, 197 So. 3d 1051 (Fla. 2016). After that, Petitioner initiated the present federal proceeding by filing a petition for writ of habeas corpus under 28 U.S.C. § 2254. *See Brant*, 2023 WL 2648167, at *1.

Convictions and Death Sentence

On July 2, 2004, Radfar's body was discovered by law enforcement officers inside her home. *Brant*, 21 So. 3d at 1277. When the officers found Radfar, she was lying in a bathtub with the water running over her. *Id.* Her head was covered by a plastic bag, and her neck was wrapped in a dog leash, an electrical cord, and a woman's stocking. *Id.* During a subsequent autopsy, the medical examiner found bruises on the body that appeared to be defensive wounds, and hemorrhages around the victim's eyes and eyelids that were indicative of strangulation. *Id.* Semen was recovered from a swab of the victim's vagina. *Id.* at 1278.

On the same day the body was discovered, two officers spoke with Petitioner, who was one of Radfar's neighbors, while conducting a canvas of the neighborhood. *Id.* at 1277. During that conversation, Petitioner denied any knowledge of the homicide and claimed to have seen Radfar with another man the night before. *Id.* As part of the investigation, however, the officers collected Petitioner's garbage from outside his home, in which they found Radfar's debit card and other items related to the murder. *Id.* Two days later, Petitioner was interviewed by a detective. *Id.* at 1278. At first, Petitioner continued to deny any knowledge of the homicide. *Id.* But after he was confronted with the evidence from his garbage, he changed his story, admitted to killing Radfar, and provided a detailed account of the murder. *Id.*

Petitioner's account was as follows. On the night of July 1, 2004, Petitioner went to Radfar's duplex for the ostensible purpose of photographing her tile floor (which he had installed) for his portfolio. *Id.* Soon after Radfar let him in, however, he grabbed her and dragged her to a bedroom, where he violently raped her. *Id.* During the sexual assault, Petitioner stuffed a sock into Radfar's mouth to keep her quiet. *Id.* Petitioner then choked and suffocated her. *Id.* When Radfar eventually lost consciousness, Petitioner left her in the bedroom and began walking around the house. *Id.* But Radfar subsequently regained consciousness and attempted to flee through the front door. *Id.* At that point, Petitioner dragged her back to the bedroom and again began to choke and suffocate her. *Id.* As Radfar hiccupped and breathed shallowly, Petitioner took her to the bathroom, where he placed her in the bathtub and wrapped a stocking, a dog leash, and an electrical cord from a heating pad around her neck. *Id.* Petitioner left Radfar in the bathtub with water running over her. *Id.* Radfar died in the bathtub. *Id.* Petitioner then cleaned up the house, changed into clothes he found there, moved Radfar's car, and walked home. *Id.* The next day, he went back to Radfar's residence to try to wipe away his fingerprints. *Id.*

On May 25, 2007, Petitioner pled guilty to first-degree murder, sexual battery, kidnapping, grand theft of a motor vehicle, and burglary. *Id.* at 1277. After a failed attempt to select a penalty-phase jury (which ended with the trial court striking the entire venire after multiple prospective jurors strongly indicated that they would impose the death penalty regardless of the penalty-phase evidence), Petitioner elected to waive a jury recommendation and to proceed with the penalty phase as a

bench trial. *Brant*, 197 So. 3d at 1075-76. Petitioner was represented at his penalty phase by attorney Bob Fraser, a veteran criminal defense lawyer who, at the time of Petitioner's case, had been handling court-appointed cases for nearly 20 years and had tried approximately 25 first-degree murder cases. *Id.* at 1064.

During the penalty phase, the trial court received a transcript of Petitioner's July 4, 2004, confession and heard testimony from the detective who conducted that interview. *Brant*, 21 So. 3d at 1277-78. The medical examiner who performed the autopsy, the officers who spoke with Petitioner the day after the murder, and one of Petitioner's neighbors who spoke with him that day also testified. *Id.* at 1277. The parties stipulated, as well, that a DNA analysis of the semen found in the victim's vagina showed that it matched Petitioner's DNA. *Id.* at 1278.

In addition, the State called Petitioner's ex-wife, Melissa McKinney, who was married to Petitioner from June 1991 to December 2004. *Id.* at 1278-79. McKinney described Petitioner's long history of drug abuse that resulted in multiple separations over the course of their marriage. *Id.* at 1279. About six months before the murder, Petitioner had started using methamphetamine, which would cause him to go for days at a time without sleep and also made him "obsessed with sex." *Id.* McKinney further testified that beginning around 2000, Petitioner had become interested in sex games involving simulated rape. *Id.* The games became more violent over time and worsened after Petitioner began using methamphetamine. *Id.* On the night of June 30, 2004—the night before the murder—Petitioner attacked McKinney when she entered their bedroom, put her face-down on the bed, bound her hands, and tried to

put a sock in her mouth. *Id.* McKinney managed to get away, but she warned him the next morning that she would go to the police if the games didn't stop. *Id.*

The defense's witnesses included Petitioner's mother, Crystal Coleman, and his older sister, Sherry Brant-Coleman, who testified regarding Petitioner's family background and troubled childhood. *Id.* at 1280. Other lay witnesses testified about Petitioner's history of drug abuse, his personal character, and the remorse he had expressed following his arrest. *Id.* The defense also called two expert witnesses: Dr. Michael Scott Maher, a physician and psychiatrist; and Dr. Valerie R. McClain, a psychologist and expert in forensic neuropsychology. *Id.* at 1280-81. Both experts diagnosed Petitioner with a variety of mental health conditions, described the effects of alcohol and drug use on his brain functioning and behavior, and opined that his capacity to conform his conduct to the requirements of the law was substantially impaired at the time of the murder. *Id.* The State called Dr. Donald R. Taylor, Jr., an expert in forensic psychiatry, as a rebuttal witness. *Id.* at 1282-83.

Following the penalty phase, the trial court sentenced Petitioner to death. *Id.* at 1283. It found that two aggravating factors applied to the murder: (1) the murder was heinous, atrocious, and cruel; and (2) the murder was committed while Petitioner was engaged in the commission of a sexual battery. *Id.* Both factors were given great weight. *Id.* The trial court also found and assigned weight to three statutory and ten non-statutory mitigating circumstances;¹ however, it concluded that the mitigating

¹ As statutory mitigation, the trial court found that (1) Petitioner had no significant history of prior criminal activity (little weight); (2) his capacity to appreciate the criminality of his conduct or to conform his conduct to the

evidence did not outweigh the aggravating circumstances of the crime. *Id.*; *Brant*, 2023 WL 2648167, at *2. The Florida Supreme Court affirmed Petitioner's convictions and death sentence on direct appeal. *Brant*, 21 So. 3d at 1283-89.

State Postconviction Proceedings

Petitioner filed his Rule 3.851 motion in 2011, raising seven collateral claims. *Brant*, 197 So. 3d at 1062-63. Pertinent here, Petitioner alleged in Claim 2 of his motion that his penalty-phase counsel rendered ineffective assistance by failing to: (1) learn and present evidence that he was conceived during a rape; (2) present a methamphetamine expert; (3) present a prison expert; (4) present images from his PET scan and additional experts to describe the findings from the PET scan; and (5) conduct an adequate background and mental health investigation. *Id.*; *Brant v. Sec'y, Dep't of Corr.*, No. 8:16-cv-2601, Doc. 55-6 at 233-59 (M.D. Fla. Mar. 25, 2021). In 2013, the postconviction court held an evidentiary hearing on the motion, at which it heard testimony from over 40 witnesses. *Brant*, 197 So. 3d at 1063. The court later

requirements of law was substantially impaired (moderate weight); and (3) he was 39 years old at time of the offense (little weight). *Brant*, 21 So. 3d at 1283. As non-statutory mitigation, the trial court found that (1) Petitioner is remorseful (little weight); (2) he cooperated with law enforcement officers, admitted the crimes, pleaded guilty, and waived a penalty-phase jury (moderate weight); (3) he has borderline verbal intelligence (little weight); (4) he has a family history of mental illness (little weight); (5) he is not a sociopath or psychopath and does not have antisocial personality disorder (little weight); (6) he has diminished impulse control and exhibits periods of psychosis due to methamphetamine abuse, recognized his drug dependence problem, sought help for his drug problem, and used methamphetamine before, during, and after the murder (moderate weight); (7) he has been diagnosed with chemical dependence and sexual obsessive disorder, and he has symptoms of attention deficit disorder (moderate weight); (8) he is a good father (little weight); (9) he is a good worker and craftsman (little weight); and (10) he has a reputation of being a nonviolent person (little weight). *Id.*

entered a 119-page order denying relief on all claims. *Id.*; *Brant v. Sec’y, Dep’t of Corr.*, No. 8:16-cv-2601, Doc. 55-9 at 182-303 (M.D. Fla. Mar. 25, 2021).

On appeal, the Florida Supreme Court affirmed the denial of postconviction relief. *Brant*, 197 So. 3d at 1056-57. Before addressing the lower court’s ruling on Claim 2, the Florida Supreme Court recited the legal standard governing claims of ineffective assistance of counsel, as follows:

Under *Strickland v. Washington*, 466 U.S. 668, 686-88, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984), a defendant alleging that he received ineffective assistance of counsel has the burden to demonstrate that counsel’s performance fell below an objective standard of reasonableness. In order to prevail on a claim of ineffective assistance of counsel, a defendant must show both that trial counsel’s performance was deficient and that the deficient performance prejudiced the defendant. [*Id.*] at 687

As to the first prong, the defendant must establish “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* Generally, a court reviewing the second prong must determine whether “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

Id. at 1063. The Florida Supreme Court proceeded to address Petitioner’s claim of ineffective assistance of penalty-phase counsel and held, as to each subclaim, that Petitioner failed to satisfy either *Strickland* prong. *Id.* at 1066-75.

Petitioner’s Conception: Petitioner first alleged that his penalty-phase counsel was ineffective for failing to discover that his mother’s ex-husband, Eddie Brant, was not his biological father, and that he was conceived when his mother was raped by another man. *Id.* at 1067. Previously, Petitioner’s mother, Crystal, had testified at the penalty phase that Eddie was Petitioner’s father. *Id.* She continued to insist that

Eddie was his father even after Petitioner's postconviction counsel confronted her in 2012 with DNA test results showing that Petitioner and his sister Sherry were only half-siblings. *Id.* Eventually, Crystal admitted that Eddie was not Petitioner's father. *Id.* She testified that she lied at the penalty phase because she did not want Petitioner or anyone else to know how Petitioner was conceived. *Id.*

The postconviction court held, and the Florida Supreme Court agreed, that Petitioner's penalty-phase counsel, Fraser, did not perform deficiently, since Fraser had no reason to question Petitioner's paternity, and Crystal had testified under oath that Eddie was Petitioner's father. *Id.*; Doc. 55-9 at 281-82. The Florida Supreme Court also found no reasonable possibility that such evidence would have resulted in a different sentence, since any mitigating value in the evidence would have been negligible given that Petitioner himself was unaware of the circumstances of his conception at the time of the murder. *Brant*, 197 So. 3d at 1067-68.

Methamphetamine Expert: Petitioner next claimed that Fraser was deficient for failing to retain an expert in methamphetamine to testify about the effects of methamphetamine use on Petitioner's brain. *Id.* at 1068. At the postconviction evidentiary hearing, Petitioner called Dr. William Alexander Morton, an expert in psychopharmacology and addiction, who opined that Petitioner's methamphetamine use was causing psychotic symptoms and that he was under an extreme emotional disturbance at the time of the murder. *Id.* at 1068-69.

The Florida Supreme Court approved the postconviction court's finding that Fraser did not render deficient performance. *Id.* at 1069; Doc. 55-9 at 284-85. The

Florida Supreme Court observed that Fraser “presented expert testimony regarding the extent of [Petitioner]’s methamphetamine use, the effects of it, and the behavior of persons who abuse methamphetamine through Dr. Maher—who was deemed by the trial court to be an expert in that field—and Dr. McClain.” *Brant*, 197 So. 3d at 1069; *see Brant*, 21 So. 3d at 1280-82. The Florida Supreme Court reasoned that Fraser could not be found ineffective for failing to present expert testimony that would have been mostly cumulative. *Brant*, 197 So. 3d at 1069.

As to *Strickland*’s prejudice prong, the Florida Supreme Court found that Petitioner failed to show that there was a reasonable possibility that he would have received a life sentence if Fraser had presented a different expert. *Id.* On that point, it observed that although Dr. Morton, unlike Dr. Maher, had concluded that Petitioner was under an extreme emotional disturbance at the time of the murder, that statutory mitigator would have been rebutted by the testimony of Petitioner’s ex-wife that shortly after he committed the murder, Petitioner “was able to interact pleasantly with her, wash dishes, clean up the kitchen, watch the evening news, and sleep in bed next to her.” *Id.*; *see Brant*, 21 So. 3d at 1279-80.

Prison Adjustment Expert: In his third subclaim, Petitioner alleged that his counsel was ineffective for failing to present testimony from a prison adjustment expert about his ability to adjust positively to a prison environment. *Brant*, 197 So. 3d at 1069-70. At the postconviction evidentiary hearing, he called James Aiken as an expert in prison operations and inmate adaptability to prison settings. *Id.* at 1070. Aiken opined that, based on his review of Petitioner’s jail records and interviews of

Petitioner and jail correctional staff, Petitioner would adjust well to a prison environment and would not pose an unusual risk to staff, inmates, or the public. *Id.* Petitioner also called as a witness Dr. Mark Cunningham, a clinical and forensic psychologist, who opined that it was unlikely that Petitioner would commit serious violence if he were sentenced to life in prison. *Id.*

The postconviction court concluded that in light of the weighty aggravating circumstances, there was no reasonable probability that Petitioner would have received a life sentence if such testimony had been presented. *Id.*; Doc. 55-9 at 282. The Florida Supreme Court approved that conclusion and held, as well, that Fraser did not render deficient performance. *Brant*, 197 So. 3d at 1070-71. It observed that although Fraser did not call a prison adjustment expert, he did present evidence of Petitioner's positive ability to adjust to prison life through two lay witnesses who testified that Petitioner was a nonviolent person who did not have any problems getting along with others, and through Petitioner's jail records showing that he was made a trustee at the jail despite being charged with capital murder. *Id.*

Brain Damage and PET Scan Evidence: Next, Petitioner claimed that Fraser was ineffective for failing to present images from his PET scan showing that he has brain damage, and expert testimony to interpret the PET scan results. *Id.* at 1071. The postconviction evidence established that, at Dr. McClain's recommendation, Fraser had retained Dr. Frank Wood, a clinical neuropsychologist and forensic psychologist, to conduct the PET scan, and had consulted with Dr. Joseph Chong Sang Wu, an expert in brain imaging technology, about the results of the PET scan.

Id. However, Fraser ultimately decided not to call Drs. Wood and Wu as witnesses and elected, instead, to present evidence of Petitioner's PET scan through Dr. Maher. *Id.* Fraser testified at the postconviction hearing that there were several reasons why he decided not to call Drs. Wood and Wu, which he documented in a 2007 memo to his file (a copy of which was entered into evidence at the postconviction hearing). *Id.* at 1072. Specifically, Fraser believed that Dr. Wood would be a poor witness because he was egotistical and had a tendency toward long-winded responses, that Dr. Wu would be a poor witness because his accent made him difficult to understand, and that both doctors would lose in any credibility contest with the State's PET scan expert Dr. Mayberg, whom Fraser had deposed. *Id.* at 1072-73.

The postconviction court found Fraser's testimony credible and held that his decision not to present images from the PET scan or testimony from Drs. Wood and Wu, and to instead present evidence of the PET scan through Dr. Maher, was a reasonable strategic decision. *Id.* at 1073; Doc. 55-9 at 283-84. The Florida Supreme Court agreed. *Brant*, 197 So. 3d at 1073. It recounted that at the penalty phase, Dr. Maher had testified that the PET scan showed suppressed glucose intake in four areas of the brain that are important to impulse control and good judgment, and that Dr. McClain had testified that Petitioner suffers from a cognitive disorder and that there are areas of his brain with very significant impairment. *Id.* at 1071; *see Brant*, 21 So. 3d at 1281-82. In reaching those conclusions, Drs. Maher and McClain both relied on the work of Drs. Wood and Wu. *Brant*, 197 So. 3d at 1071.

The Florida Supreme Court pointed out that based on the testimony of Drs. Maher and McClain, the trial court found that Petitioner's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired and that he had a diminished ability to control his impulses. *Id.* at 1073. It concluded that "[b]ecause counsel was able to establish the existence of the intended mitigating circumstances without presenting Drs. Wood and Wu or the actual images from the PET scan, there was no deficient performance even if Drs. Wood and Wu would have testified in more detail or presented the images." *Id.* It further held that because any testimony by Drs. Wood and Wu (who both testified at the postconviction hearing) would have been largely cumulative to Dr. Maher's testimony, there was no reasonable probability that Petitioner would have received a life sentence even if they had testified. *Id.* at 1071, 1073-74.

Background and Mental Health Investigation: Last, Petitioner claimed that Fraser was ineffective for "failing to conduct a reasonable investigation into his childhood, family, and multi-generational background of addiction, abuse, neglect, and sexual exposure." *Id.* at 1074. In its order denying postconviction relief, before addressing the merits of Claim 2, the postconviction court summarized the testimony presented at the postconviction evidentiary hearing that was relevant to that claim, which included testimony by members of Petitioner's family and by friends and acquaintances of Petitioner and his family. Doc. 55-9 at 221-37. The postconviction court also summarized the mitigation testimony that was presented by the defense during the penalty phase, which included testimony from Petitioner's mother and

sister about his childhood and family background, and from several other witnesses about his struggles with drug addiction. Doc. 55-9 at 264-77.

The postconviction court found that much of Petitioner's postconviction evidence was cumulative of matters that were addressed at the penalty phase. Doc. 55-9 at 280-81. It observed that during the penalty phase, the trial judge heard evidence of: Petitioner's maternal family's history of mental health issues, alcohol abuse, and violence; verbal and physical abuse of Petitioner and his mother by Petitioner's stepfather Marvin Coleman; Marvin's sexual abuse of Petitioner's sister; Marvin's alcohol and substance abuse; Petitioner's birth complications; Petitioner's mother's separation from and lack of bonding with Petitioner; Petitioner's history of attention deficit disorder; Petitioner's substance abuse history; Petitioner's use of methamphetamine at the time of the offenses and its effects; Petitioner's brain abnormalities and difficulties with impulse control; Petitioner's diagnosis of a sexual disorder and the genetic and environmental factors associated with such disorders; Petitioner's diagnosis and history of depression; and Petitioner's remorse for the murder. *Id.* Consequently, the postconviction court concluded that Petitioner had failed to establish deficient performance. Doc. 55-9 at 281.

Again, the Florida Supreme Court agreed, finding that the record established that Fraser did conduct a reasonable investigation into Petitioner's background and that substantial evidence regarding his family history and mental health was in fact presented at the penalty phase. *Brant*, 197 So. 3d at 1074-75. Concerning *Strickland's* prejudice prong, the Florida Supreme Court further stated that its "confidence in the

outcome [was] not undermined by the few pieces of noncumulative evidence presented at the [postconviction] evidentiary hearing.” *Id.* at 1075.

The District Court’s Denial of Federal Habeas Relief

Petitioner re-raised his claim of ineffective assistance of penalty phase counsel as Ground Two of his federal habeas petition. *See Brant*, 2023 WL 2648167, at *8-9. Before addressing the merits of the claim, the district court explained that the claim was governed in federal court by the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Id.* at *4. Under AEDPA, when a claim has previously been adjudicated on the merits in state court, federal habeas relief may not be granted on the claim unless the state court’s adjudication: “(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” *Id.* at *4-5 (quoting 28 U.S.C. § 2254(d)). The district court continued:

For purposes of § 2254(d)(1), the phrase “clearly established Federal law” encompasses the holdings only of the United States Supreme Court “as of the time of the relevant state-court decision.” *Williams v. Taylor*, 529 U.S. 362, 412 (2000). Section 2254(d)(1) “defines two categories of cases in which a state prisoner may obtain federal habeas relief with respect to a claim adjudicated on the merits in state court.” *Id.* at 404. First, a decision is “contrary to” clearly established federal law “if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts.” *Id.* at 413. Second, a decision involves an “unreasonable application” of clearly established federal law “if the state court identifies the correct governing legal principle from [the Supreme] Court’s decisions but unreasonably applies that principle to the facts of

the prisoner's case." *Id.* AEDPA was meant "to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002). Accordingly, "[t]he focus . . . is on whether the state court's application of clearly established federal law is objectively unreasonable, and . . . an unreasonable application is different from an incorrect one." *Id.* at 694. As a result, to obtain relief under the AEDPA, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011); *see also Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) ("The 'unreasonable application' clause requires the state court decision to be more than incorrect or erroneous. The state court's application of clearly established law must be objectively unreasonable.").

Id. at *5 (original alterations).

The district court next described the two-part *Strickland* standard for claims of ineffective assistance of counsel. *Id.* at *6. The district court further explained that when such claims are raised on federal habeas review following an adjudication on the merits in state court, "[t]he question . . . is not whether a federal court believes the state court's determination under the *Strickland* standard was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Id.* (quotation marks omitted) (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)). "Consequently, federal petitioners rarely prevail on claims of ineffective assistance of counsel because '[t]he standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so.'" *Id.* (original alteration) (quoting *Richter*, 562 U.S. at 105).

The district court observed that because both the state postconviction court and the Florida Supreme Court had correctly "recognized that *Strickland* governs a

claim of ineffective assistance of counsel,” Petitioner could not “meet the ‘contrary to’ standard under § 2254(d)(1).” *Id.* As a result, Petitioner could only obtain habeas relief by showing “that the state courts either unreasonably applied *Strickland* or based their decision on an unreasonable determination of fact.” *Id.*

Proceeding to the merits, the district court summarized the Florida Supreme Court’s reasons for denying each of the five subclaims that Petitioner had raised in Ground Two of his petition. *Id.* at *8-9. It concluded as to Ground Two (as well as Grounds One and Three) that Petitioner was not entitled to habeas relief because he was ultimately claiming that his trial attorneys had made “strategic errors,” and “[s]trategic choices . . . are virtually unchallengeable” under *Strickland*. *Id.* at *10 (ellipsis in original) (quoting *Strickland*, 466 U.S. at 690). Continuing, the district court explained that for purposes of § 2254(d), “the only question that matters’ is whether the state court’s decision was ‘so obviously wrong as to be beyond any possibility for fairminded disagreement.” *Id.* at *11 (some quotation marks omitted) (quoting *Shinn v. Kayer*, 592 U.S. 111, 124 (2020)). Finding that lofty standard unmet, the district court denied relief on Ground Two. *Id.*

The Eleventh Circuit’s Denial of a Certificate of Appealability

Because the district court also declined to issue a COA, *id.* at *14, Petitioner applied to the Eleventh Circuit for authorization to appeal. *Brant*, 2024 WL 1187330, at *1; see 28 U.S.C. § 2253(c)(1). The Eleventh Circuit, via an unpublished and unreported order by United States Circuit Judge Andrew L. Brasher, denied the application. *Brant*, 2024 WL 1187330, at *1.

In its order, the Eleventh Circuit explained that a COA may be issued “only if the applicant has made a substantial showing of the denial of a constitutional right.” *Id.* at *3 (quoting *Jones v. Sec’y, Dep’t of Corr.*, 607 F.3d 1346, 1349 (11th Cir. 2010)) (quoting 28 U.S.C. § 2253(c)(2)). To meet that standard, the petitioner must demonstrate “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.” *Id.* (quoting *Jones*, 607 F.3d at 1349) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 326 (2003)).

The Eleventh Circuit, like the district court, summarized Petitioner’s five subclaims of ineffective assistance of penalty-phase counsel and the Florida Supreme Court’s reasons for denying each subclaim. *Id.* at *8-10. And it determined, as to each subclaim, that no reasonable or fair-minded jurist would debate the district court’s conclusion that the Florida Supreme Court’s rejection of the subclaim was reasonable under AEDPA. *Id.* On that basis, the Eleventh Circuit concluded that Petitioner had failed to make “a substantial showing of the denial of a constitutional right or that his claim deserves further encouragement.” *Id.* at *8.

As a “final point” in its discussion of Ground Two, the Eleventh Circuit took issue with Petitioner’s argument that the Florida Supreme Court “should not have separately analyzed each of [his] separate allegations about mitigating evidence.” *Id.* at *11. The Eleventh Circuit noted that while “*Strickland* directs reviewing courts to evaluate the totality of counsel’s errors in evaluating deficient performance and the totality of those errors in assessing prejudice[,] . . . nothing in the Supreme Court’s

case law tells lower courts how to write their opinions in the light of a habeas petitioner’s arguments.” *Id.* It noted, as well, that Petitioner’s “penalty-phase arguments do not lend themselves to a combined deficient performance analysis because they allege separate failings on the part of trial counsel—for example, there is no connection between trial counsel’s failure to hire a prison-adjustment expert and their failure to find out that [Petitioner] was allegedly conceived by rape.” *Id.* The Eleventh Circuit continued: “In any event, no fair-minded jurist would debate whether the state courts were reasonable in concluding that [Petitioner]’s counsel were not ineffective, even if some jurists would have written the state court opinion differently.” *Id.* Thus, the Eleventh Circuit ruled that Petitioner “cannot make out a substantial showing of the denial of a constitutional right and cannot meet his burden to receive a certificate of appealability on Ground Two.” *Id.*

Petitioner sought reconsideration, *see* 11th Cir. R. 22-1(c), which a three-judge panel of the Eleventh Circuit unanimously denied without opinion. *Brant v. Sec’y, Dep’t of Corr.*, No. 23-13124, Doc. 14-1 (11th Cir. Apr. 10, 2024).

REASONS FOR DENYING THE PETITION

I. The Eleventh Circuit’s Order Does Not Conflict with Any Decision by This Court.

Petitioner first argues that this Court should grant his petition for a writ of certiorari because the Eleventh Circuit’s order denying his application for a COA conflicts with this Court’s decisions regarding the standard for obtaining a COA. Petitioner specifically cites to *Miller-El v. Cockrell*, 537 U.S. 322 (2003), *Banks v. Dretke*, 540 U.S. 668 (2004), *Tennard v. Dretke*, 542 U.S. 274 (2004), and *Buck v.*

Davis, 580 U.S. 100 (2017), as examples of cases where this Court has reversed the denial of a COA. Petitioner acknowledges that in the order at issue, the Eleventh Circuit cited and discussed the correct legal standard. Even so, he contends that the order improperly ruled on the merits of his *Strickland* claim in lieu of addressing whether “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.” *Miller-El*, 537 U.S. at 327.

Petitioner is incorrect. Importantly, each of the five subclaims of ineffective assistance of penalty-phase counsel that Petitioner raised in Ground Two of his federal habeas petition had previously been raised before, and adjudicated on the merits by, the Florida Supreme Court. *See Brant*, 197 So. 3d at 1066-75. Therefore, the relevant question for purposes of Petitioner’s COA request was not whether reasonable jurists could debate the merits of Petitioner’s *Strickland* claim. It was, instead, whether reasonable jurists could debate whether the Florida Supreme Court’s rejection of the claim “was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Richter*, 562 U.S. at 103.

Reviewing the Florida Supreme Court’s opinion, the Eleventh Circuit correctly determined that that standard was not met. The Florida Supreme Court: set out the proper standard under *Strickland* for evaluating claims of ineffective assistance of counsel; individually addressed each of Petitioner’s five subclaims of ineffective assistance of penalty-phase counsel that were later raised in Ground Two; and gave

rational and legally valid reasons for rejecting each subclaim under both *Strickland* prongs. *Brant*, 197 So. 3d at 1063, 1066-75. On its face, the Florida Supreme Court’s denial of relief was clearly not “so lacking in justification” as to be “beyond any possibility for fairminded disagreement.” *Richter*, 562 U.S. at 103; *see also Mays v. Hines*, 592 U.S. 385, 391-92 (2021) (explaining that under § 2254(d), relief is not authorized unless the state court, “notwithstanding its substantial ‘latitude to reasonably determine that a defendant has not [shown prejudice],’ still managed to blunder so badly that every fairminded jurist would disagree” with its decision) (original alteration) (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)). Consequently, the Eleventh Circuit properly found that reasonable jurists would not debate the district court’s conclusion that federal habeas relief was not warranted. And on that basis, the Eleventh Circuit held—consistent with the standard set out by this Court—that Petitioner could not “meet his burden to receive a certificate of appealability on Ground Two.” *Brant*, 2024 WL 1187330, at *11.

There is no conflict between the Eleventh Circuit’s order and the opinions of this Court that are cited in the Petition. Each cited case involved a distinct question or set of questions that, in the context of that case, was fairly debatable among jurists of reason and warranted further development through a COA. None of those cases involved a similar question or similar facts to those presented here.

In *Miller-El*, 537 U.S. at 326, the petitioner alleged that the state violated *Batson v. Kentucky*, 476 U.S. 79 (1986), when the prosecutors at his capital murder trial used peremptory strikes to exclude over 90% of the black prospective jurors who

were eligible to serve on his jury. The claim was rejected in state court after an evidentiary hearing and by a federal district court on federal habeas review. *Id.* at 328-30. Following the denial of federal habeas relief, the petitioner applied to the Fifth Circuit for a COA, which was denied. *Id.* at 330-31. In holding that the denial of a COA was error, this Court found that the Fifth Circuit erroneously focused on the merits of the *Batson* claim rather than on whether the district court's denial of relief was debatable. *Id.* at 341-42. And based on the extensive evidence of intentional racial discrimination that was presented to the state courts, this Court further found that it was at least debatable whether the district court erred by denying habeas relief, and thus, that a COA should have been granted. *Id.* at 342-48.

In *Banks*, 540 U.S. at 703-05, this Court held that the Fifth Circuit erred by denying a COA on the unsettled question of whether Fed. R. Civ. P. 15(b) applies in a federal habeas proceeding, which this Court found was "surely" debatable among jurists of reason. In *Tennard*, 542 U.S. at 288-89, the Court determined that because reasonable jurists could find that the petitioner's low IQ was relevant mitigating evidence that the jury should have been allowed to consider under *Penry v. Lynaugh*, 492 U.S. 302, 322 (1989) (holding that Texas's capital sentencing scheme provided a constitutionally inadequate vehicle for jurors to consider evidence of mental retardation and childhood abuse as mitigation), it was debatable whether the district court erred by denying habeas relief, and the Fifth Circuit again erred by denying a COA. Finally, in *Buck*, 580 U.S. at 118-28, this Court ruled that the petitioner had presented two fairly debatable questions to the Fifth Circuit that warranted a COA:

first, whether the petitioner's trial counsel rendered ineffective assistance by calling an expert witness who gave indisputably improper testimony that the petitioner's race was a factor that made him more likely to act violently in the future; and second, whether the petitioner had shown extraordinary circumstances that warranted reopening his federal habeas proceeding under Fed. R. Civ. P. 60(b)(6).

The Eleventh Circuit's denial of a COA in this case does not conflict with any of the foregoing decisions by this Court. Here, the question presented to the Florida Supreme Court was whether Petitioner's penalty-phase counsel rendered ineffective assistance by failing to present certain evidence as mitigation. The Florida Supreme Court, reviewing each subclaim, found that some of the new evidence concerned a matter that counsel had no reason to discover (Petitioner's conception), that counsel had made a reasonable strategic decision not to present other evidence cited by Petitioner (the PET scan images and experts), and that all of the new evidence was either of little mitigating value or redundant of other evidence that was in fact presented at the penalty phase. *Brant*, 197 So. 3d at 1066-75.

Under § 2254(d), the district court could only have granted federal habeas relief if no fairminded jurist could have denied Petitioner's *Strickland* claim. *Mays*, 592 U.S. at 391-92. In light of the Florida Supreme Court's thorough and well-reasoned opinion, which was fully supported by the underlying state-court records, the district court correctly found that standard unmet. *Brant*, 2023 WL 2648167, at *8-11. The Eleventh Circuit, in turn, properly found that because reasonable jurists could not debate the district court's conclusion that the Florida Supreme Court's

rejection of the *Strickland* claim was reasonable under AEDPA, there was no basis for a COA on that issue. *Brant*, 2024 WL 1187330, at *8-11.

In short, the Eleventh Circuit cited the correct standard for the granting of a COA and fairly and reasonably applied it to this case. There is no conflict between the order below and any opinion of this Court, nor was there any error that would warrant this Court's intervention and correction.

II. The Eleventh Circuit's Order Is Not Binding Precedent and Does Not Conflict with Any Decision by Another United States Court of Appeals.

Next, Petitioner contends that the Eleventh Circuit's decision has resulted in a circuit split regarding the *Strickland* prejudice analysis. According to Petitioner, four federal circuits (the Fifth, Sixth, Seventh, and Tenth Circuits) have held that prejudice must be assessed in the aggregate,² in purported conflict with the Eleventh Circuit's approval of the Florida Supreme Court's individual consideration of his five subclaims of ineffective assistance of penalty-phase counsel.

There is no circuit split. As a threshold matter, the Eleventh Circuit's order is unpublished. Therefore, it is not considered binding precedent under the rules of the Eleventh Circuit. *See* 11th Cir. R. 36-2 ("Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority."). In published authority, the Eleventh Circuit has acknowledged that in cases where a defendant establishes multiple instances of deficient performance by his counsel, prejudice

² However, the only such case Petitioner points to that purportedly originates in the Sixth Circuit is actually an opinion from the Seventh Circuit. *See Goodman v. Bertrand*, 467 F.3d 1022 (7th Cir. 2006).

should be assessed in the aggregate. *See Evans v. Sec’y, Fla. Dep’t of Corr.*, 699 F.3d 1249, 1269 (11th Cir. 2012) (“While the prejudice inquiry should be a cumulative one as to the effect of all of the failures of counsel that meet the performance deficiency requirement, only the effect of counsel’s actions or inactions that do meet that deficiency requirement are considered in determining prejudice.”).

Regardless, the Eleventh Circuit’s unpublished order in this case does not conflict with that principle. In the portion of the order Petitioner is referring to, the Eleventh Circuit was responding to Petitioner’s argument, in his motion for a COA, that the Florida Supreme Court had erred by individually analyzing his claims as to both deficiency and prejudice. The Eleventh Circuit pointed out that “nothing in the Supreme Court’s case law tells lower courts how to write their opinions,” and it observed that “[h]ere, [Petitioner]’s penalty-phase arguments do not lend themselves to a combined deficient performance analysis because they allege separate failings on the part of trial counsel.” *Brant*, 2024 WL 1187330, at *11. The Eleventh Circuit did not state that an aggregate prejudice analysis would not have been appropriate if Petitioner had proven multiple instances of deficient performance.

Moreover, because the Florida Supreme Court reasonably found that counsel was not deficient for any of the reasons alleged by Petitioner, there was no basis for that court (or, for that matter, the district court or the Eleventh Circuit) to conduct an aggregate prejudice analysis. *See Evans*, 699 F.3d at 1269 (“Because Evans has failed to show any deficiency in counsel’s performance . . . there is no deficiency to accumulate in order to establish prejudice.”). In the cases from other circuits that

Petitioner cites, by contrast, those courts conducted aggregated prejudice analyses only after they had found multiple instances of deficient performance. *See Moore v. Johnson*, 194 F.3d 586, 619-22 (5th Cir. 1999) (examining the effects of multiple instances of deficient performance and concluding that “trial counsel’s cumulative errors rendered the result of Moore’s punishment phase unreliable”); *Goodman*, 467 F.3d at 1030 (“While each of [counsel’s] errors considered in isolation may not have been prejudicial to Goodman, viewed in their totality, they create a clear pattern of ineffective assistance.”); *Cook v. Foster*, 948 F.3d 896, 908-09 (7th Cir. 2020) (finding “three significant errors” by counsel that together resulted in prejudice); *Cargle v. Mullin*, 317 F.3d 1196, 1206 (10th Cir. 2003) (conducting a cumulative error analysis after finding “many instances of constitutionally deficient performance by counsel”); *Fisher v. Gibson*, 282 F.3d 1283, 1307 (10th Cir. 2002) (assessing prejudice after finding counsel deficient for “numerous shortcomings, omissions, and [instances of] outright disloyalty”); *cf. Stouffer v. Reynolds*, 168 F.3d 1155, 1165-68, 1173 (10th Cir. 1999) (holding that neither *Strickland* prong could be resolved without an evidentiary hearing and remanding for the district court to conduct one).

Again, Petitioner fails to establish the existence of any conflict, let alone one that would warrant this Court’s intervention to resolve. Accordingly, there is no circuit split that would justify certiorari review.

CONCLUSION

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

Respectfully submitted,

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