APPENDIX

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APPENDIX A

[FILED: MAY 6, 2025]

[DO NOT PUBLISH]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 23-10786

GARY RICHARD WHITTON,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Florida
D.C. Docket No. 4:15-cv-00200-RH

Before ROSENBAUM, NEWSOM, and BRASHER, Circuit Judges.

PER CURIAM:

In 1992, Petitioner-Appellant Gary Richard Whitton was convicted of murder and, based on a unanimous jury recommendation, sentenced to death. The victim was found stabbed to death in a blood-spattered motel room in Destin, Florida. A motel clerk testified that Whitton

helped the victim with check-in, and the clerk saw Whitton's car parked outside the victim's room later that night. At trial, the State presented the motel clerk's testimony, blood-spatter evidence from Whitton's boots, and circumstantial evidence that Whitton had robbed the victim and paid outstanding bills with the money. Plus, two jailhouse informants, Jake Ozio and Kenneth McCullough, testified that Whitton confessed to the murder.

But years after Whitton's conviction, both Ozio and McCullough sought to recant their testimony. And postconviction counsel collected additional evidence that could have been presented as mitigation in the penalty phase of Whitton's trial. That evidence included records, testimony from other family members and childhood acquaintances, and a more comprehensive psychological evaluation. So Whitton filed a petition for state postconviction relief and, after the Florida Supreme Court denied relief, a federal habeas petition.

After an evidentiary hearing, the district court denied relief. It granted a certificate of appealability on three claims, which we expanded to include one more (four total). Those claims assert that (1) the State presented Ozio's false testimony, in violation of *Giglio*;[1] (2) appellate counsel was constitutionally ineffective for failing to investigate McCullough's desire to recant; (3) trial counsel was constitutionally ineffective at the mitigation phase; and (4) the State improperly commented on Whitton's invocation of his right to silence, in violation of *Doyle*.[2]

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

[2] *Doyle v. Ohio*, 426 U.S. 610 (1976).

After careful consideration of Whitton's claims, and with the benefit of oral argument, we affirm the district court's denial of Whitton's petition for habeas corpus on all grounds.

I. BACKGROUND

A. Factual Background

1. Criminal Offense, Investigation, and Prosecution

On the morning of October 10, 1990, James Maulden[3] was found stabbed to death in his room at the Sun and Sand Motel in Destin, Florida. *Whitton v. State* ("*Whitton I*"), 649 So. 2d 861, 863 (Fla. 1994) (per curiam). Maulden's skull was fractured, and he sustained three fatal stab wounds to the chest, as well as stab wounds to his shoulder, cheek, neck, scalp, and back. *Id.* Blood splatter spanned the floor, furniture, walls, and ceiling of the motel room, consistent with "significant bleeding" and "violent combat" for a thirty-minute period. *Id.* at 866.

A motel clerk told police officers that Maulden had checked in the day before, after arriving in another man's car. The man had helped Maulden check in because Maulden was intoxicated. *Id.* After the man accompanied Maulden to his room, the man left. *Id.* But the clerk saw someone get into the man's car, parked near Maulden's room, later that night. *Id.* The clerk gave officers the car's license-plate number. That led them to Whitton's house in Pensacola. *Id.*

The next day, officers visited Whitton's home. He invited them inside, and they took Whitton to the police

[3] The State, as well as certain record documents, refer to the victim as "Mauldin." We use "Maulden" because Whitton and the district court use that spelling.

station for questioning. *Id.* Whitton told the officers he knew Maulden from rehab. He recounted that he had dropped Maulden off at the motel the previous afternoon. At first, Whitton denied having gone back to Maulden's room that night. But Whitton later admitted he had returned there. He said that when he had discovered Maulden dead, he had fled in a panic.

After three hours of questioning, Whitton invoked his right to remain silent. The officers then incarcerated him in the county jail. They seized his jeans and boots, as well as samples from the floor and seat of his car, to analyze for suspected blood stains. And they found $50 in cash in Whitton's possession.

Latent prints from miscellaneous items in Maulden's motel room (an ice bucket, a wine bottle, a sandwich wrapper, and a paper bag) matched neither Maulden's nor Whitton's. But law enforcement recovered Whitton's prints from a different bag found near Maulden's body.

Whitton's boots contained "medium velocity" blood "spatter" consistent with "a stabbing or a beating" and were targeted by "forceful bloodshed." The blood spatter traveled "from top to bot-tom" (not bottom up) inside the boots. This contrasted with Whitton's claim that blood from the motel seeped into his socks from "between his boot soles" and "uppers." Whitton also said that he took his socks off and threw them out the window of his car and that he cleaned his boots when he got home.

Over a year after Whitton's arrest, the State offered a plea deal to second-degree murder. But the prosecutor withdrew the plea offer and pursued a first-degree murder conviction and death sentence.

At trial, the State's theory was that Whitton stabbed Maulden after robbing him of cash. The State offered the

following evidence. On October 9, Maulden asked Whitton to drive him to Maulden's bank. At the bank, Maulden—who was intoxicated—withdrew his account's balance of $1,135.88. Then, when Maulden and Whitton arrived at the motel, Whitton wrote down a false license-plate number on the registration. The motel clerk noticed and corrected it. The next day, on October 10, Whitton bought gas in Pensacola and paid his car registration fee and two utility bills, totaling about $228. And blood stains on Whitton's boots and in his car matched Maulden's blood type. The motel clerk also testified to having seen Whitton's car parked near Maulden's room and a man get into that car. According to the motel clerk, anywhere from ten minutes to two hours could have elapsed between when he first saw the car back at the motel and when he saw someone enter it and leave.

The State also called two key witnesses—Jake Ozio and Kenneth McCullough[4]—who were incarcerated with Whitton at the Walton County Jail. Both testified that Whitton confessed to the murder.

Ozio was an eighteen-year-old high-school student from Texas who was on spring break in Florida when he was arrested and jailed for burglary and possession of a short-barrel shotgun. Shortly before Whitton's trial, Ozio was released on probation, and his firearm charge was reduced to a misdemeanor. At trial, Ozio testified that he overheard Whitton tell McCullough that he had "stabbed the bastard."

For his part, McCullough, who was serving a 15-year sentence for 7 felony convictions, corroborated Ozio's account. He testified that he did not expect or receive

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[4] Portions of the record spell the last name as "McCollough." We adopt Whitton's spelling: "McCullough."

favorable treatment for his testimony. But he did admit that he was a "close personal friend" of the prosecutor's mother.

Whitton testified in his own defense. He claimed that he gave a false license-plate number at the motel out of fear that he would be liable for any damage that Maulden caused. Whitton also said that after he left the motel, he stopped at Maureen Fitzgerald's house, and Fitzgerald told him that Maulden's mother was looking for him. Whitton continued, testifying that he and Fitzgerald tried to call Maulden's mother but could not reach her. Whitton claimed that he returned to the motel to tell Maulden that his mother was looking for him but fled after he found Maulden dead. He said he didn't call the police because he was in shock and didn't want to get involved. As to the bills, Whitton explained that Debra Sims, the former occupant of his house, had recently given him $200 to pay off utility bills incurred during her tenancy.

The defense also called Shirley Zeigler, a DNA analyst from the Florida Department of Law Enforcement. Zeigler testified that although the blood on Whitton's boots was Maulden's blood type, the DNA matched neither Maulden's nor Whitton's.[5]

Besides Whitton and Zeigler, the defense called James "Bill" Graham. Graham had interviewed the motel clerk shortly after the murder. Graham testified that the clerk had told him that only ten to fifteen minutes had

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[5] The State retested the blood on Whitton's boots in 2002. The inside of the right boot contained blood from a "mixture of two or more individuals" with the "major donor" matching "the DNA profile of James Maulden." The testing also identified Maulden as a DNA contributor to one area on the left boot and a possible contributor to another area on the right boot.

gone by between his sightings of the car and the man entering it.

The jury found Whitton guilty of murder and robbery. *Whitton I*, 649 So. 2d at 864.

2. The Penalty Phase

At the penalty phase, the State called three witnesses: McCullough, a parole officer, and a forensic pathologist. McCullough testified that Whitton said he had to kill Maulden because Whitton was on parole and did not want Maulden testifying against him. The parole officer confirmed that Whitton was on parole for a robbery conviction at the time. The pathologist testified that the initial blows did not leave Maulden unconscious and that Maulden had defensive wounds on his hand and arm.

For its part, the defense called a mental-health expert, Dr. James Larson. He testified that Whitton had an IQ of 84 (low to normal), a history of alcohol abuse, and was physically and emotionally abused as a child. Whitton's brother Royal and his aunt Ruth McGuinness testified that Whitton's parents were alcoholics, and they abused and neglected him. The defense also called Renee Sims and Shirley George, acquaintances of Whitton, to testify that they trusted Whitton with their children and grandchildren. And Dorothy McGuire testified that Whitton had supported her husband's rehabilitation program.

The advisory jury unanimously recommended a death sentence. The sentencing court imposed the death penalty. In support, it found five aggravating circumstances: (1) Whitton was on parole; (2) Whitton had a previous felony conviction involving the use or threat of violence; (3) Whitton committed the murder for the

purpose of avoiding lawful arrest; (4) Whitton committed the murder for pecuniary gain; and (5) the crime was especially heinous, atrocious, or cruel. The court also found several non-statutory mitigating factors. Those included Whitton's history of child abuse, poverty, and neglect; Whitton's alcoholism; Whitton's low IQ and performance at a sixth-grade level; Whitton's motivation to seek help for his problems; and Whitton's employment and help of others.

On direct appeal, Whitton argued (among other claims) that the State violated his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and its progeny by commenting on Whitton's invocation of his right to silence during the police interrogation. *Whitton I*, 649 So. 2d at 864–66. The Florida Supreme Court rejected that argument. It found that there was "no reasonable possibility that the improper comment[s] contributed to Whitton's conviction." *Id.* at 864. It also rejected Whitton's challenges to the heinous, atrocious, or cruel aggravator and avoiding-arrest aggravator. *Id.* at 867. So it affirmed Whitton's conviction and sentence. *Id.*

3. Postconviction Developments

The postconviction record includes several developments that Whitton argues undermine the validity of his conviction.

First, during Whitton's direct appeal, his appellate counsel received two letters from McCullough expressing his desire to recant his testimony. In the first, McCullough wrote that he would "sign a sworn statement" saying that (1) the prosecutor "made him a deal to testify"; (2) the prosecutor "told him everything to say" in his testimony; and (3) Whitton "did not teel [*sic*] him anything about the crime." Whitton's trial counsel eventually met with McCullough. During that meeting,

Whitton's trial counsel apparently told McCullough that he "would help in [McCullough's perjury] prosecution." So in his second letter, McCullough wrote that "he would only talk to" Whitton's "appellate counsel and an investigator." Despite telling Whitton that she would "pursue" McCullough's recantation, appellate counsel never contacted McCullough, and he died before the start of Whitton's habeas proceedings.

Second, George Broxson, McCullough's cellmate, testified that McCullough "made an offer to the state attorney's office and the sheriff and worked out a deal" to keep his sex-related criminal charges from becoming widely known. Whitton's habeas counsel later learned McCullough and the prosecutor's mother, Inez Adkinson, were engaged to be married and moved in together after McCullough's release.

Third, in 2000, Ozio swore in an affidavit that his trial testimony was false. He affirmed that he did not hear Whitton confess to McCullough. According to Ozio, after officers told him that he would spend five years in Florida prison for his crimes, Ozio made up the confession to try to help himself. Ozio initially agreed to travel to Florida to testify in postconviction proceedings—even making it to the airport—before learning he could face prosecution for perjury because of contradictory statements. The State refused to provide assurances that Ozio would not be prosecuted. Ozio consulted a lawyer and then refused to board his flight, saying, "I do not want to be prosecuted; I'm not coming."

Whitton sought to compel Ozio's testimony through Washington state court, where Ozio lived. The postconviction court certified that Ozio was a crucial out-of-state witness. But the Washington court declined to compel Ozio to travel to Florida. Instead, the Washington

court concluded that the perjury charges against Ozio constituted undue hardship under state law. The court agreed to oversee a deposition or remote testimony. But at the State's request, the postconviction court excluded any out-of-state testimony. The court reasoned that allowing such a deposition to proceed would thwart Florida's perjury laws.

But Ozio's codefendant, Kevin Wallace, did testify in state postconviction proceedings. He corroborated Ozio's sworn affidavit's account of their dealings with officers. Wallace explained that Ozio was somehow responsible for their lenient treatment in Walton County.

In response, Clayton Adkinson, the State prosecutor, testified. Adkinson denied making any deals or promises for specific testimony. And he said that he "would be surprised" if any officers encouraged Ozio or McCullough to elicit a confession.

Also in the postconviction proceedings, a cab driver testified that Maulden, intoxicated and still drinking, asked him for help finding a sex worker. After Maulden pulled out a large roll of bills to pay the fare, the cab driver warned him to be careful carrying so much cash around. The cab driver said he told Maulden, "[Y]ou're just making yourself a target." Another postconviction witness added that Maulden told her he had been robbed by a sex worker days before his murder.

B. Procedural History

1. State Postconviction Proceedings

In 1997, Whitton filed a petition for state postconviction relief. *See* FLA. R. CRIM. P. 3.851. He later filed three amendments to that petition. Whitton's last amendment contained 29 claims, and he filed it in

November 2004.[6] As relevant here, Whitton claimed that (1) Ozio and McCullough's false testimony violated his *Giglio*/due-process rights; (2) appellate counsel was ineffective by failing to investigate McCullough's desire to recant his false testimony; and (3) trial counsel was ineffective at the penalty phase. *Whitton v. State* ("*Whitton IV*"), 161 So. 3d 314, 322–34 (Fla. 2014) (per curiam). The state postconviction court summarily denied eleven claims and conducted an evidentiary hearing on the remaining eighteen claims. *Id.* at 321–22.

To support his penalty-phase mitigation arguments, Whitton presented the report of Dr. George Woods, a neuropsychiatrist. Dr. Woods diagnosed Whitton with Fetal Alcohol Spectrum Disorder, brain damage from left frontal-lobe impairment, alcoholism, and Post-Traumatic Stress Disorder.

Whitton also called two of his childhood teachers, Max Bovee and Irene Erickson. They described the abuse and neglect to which Whitton's parents subjected him and his siblings. Erickson testified that the neglect Whitton endured was the worst she had seen in 28 years of teaching. Similarly, Whitton called his aunt and uncle, Kathy Robinson and Charles Jesmer, and foster parent, Lois Langworthy. They also described the child abuse and neglect, as well as Whitton's brother Michael's "mysterious" death. Beyond these witnesses, Whitton presented affidavits corroborating the abuse from other teachers, siblings, and friends.

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[6] Also, in summary dismissals, the Florida Supreme Court twice declined to intervene to prevent the State from re-testing Whitton's boots. *See, e.g.*, *Whitton v. State* ("*Whitton II*"), 824 So. 2d 171 (Fla. 2002) (denying mandamus to prevent retesting); *Whitton v. State* ("*Whitton III*"), 838 So. 2d 560 (Fla. 2003) (dismissing nonfinal-order appeal to prevent retesting).

The state postconviction court denied relief. And the Florida Supreme Court affirmed. *Whitton IV*, 161 So. 3d at 322.

Beginning with the *Giglio* claim, the court found that Whitton "failed to demonstrate that" Ozio's testimony "was false" because "Ozio refused to testify and Whitton did not seek to have Ozio's affidavit submitted into evidence." *Id.* at 323. And "even if Ozio's trial testimony was false, Whitton ha[d] not demonstrated that the State was aware that Ozio intended to present false testimony," the court said. *Id.* at 324.

Second, the Florida Supreme Court held that Whitton's appellate counsel was not constitutionally ineffective in failing to further investigate McCullough's recantation. *See id.* at 334. It determined that counsel did not perform deficiently, and Whitton could not establish prejudice given the "overwhelming evidence against" him. *Id.*

Third and finally, as to Whitton's ineffective-mitigation claim, the Florida Supreme Court concluded that the additional evidence was "cumulative," and Whitton could not establish prejudice. *See id.* at 332. The court reasoned that "trial counsel is not deficient simply because postconviction counsel could find a more favorable expert." *Id.* at 333.

Whitton filed a successive state habeas petition based on *Hurst v. Florida*, 577 U.S. 92 (2016). The state court denied relief, and the Florida Supreme Court affirmed. *Whitton v. State* ("*Whitton V*"), 238 So. 3d 724, 725 (Fla. 2018) (per curiam), *cert. denied, Whitton v. Florida*, 139 S. Ct. 328 (2018). Whitton then sought federal habeas relief.

2. Federal Habeas Proceedings

In April 2015, Whitton filed a federal habeas petition. In that petition, he reiterated several claims. Among them were the following: (1) the *Giglio* claim regarding Ozio's false testimony; (2) the *Strickland* claim as to appellate counsel's failure to investigate McCullough's recantation; (3) the *Strickland* claim as to mitigation; and (4) the *Miranda/Doyle* claim related to the State's comments on Whitton's silence. In 2016, the district court stayed proceedings until the Florida Supreme Court decided whether *Hurst* applied retroactively on collateral review and until Whitton exhausted his *Hurst* claims in state court.

A few years later, in March 2021, the district court lifted the stay, held oral argument on the *Giglio* claim, and entered an order allowing limited discovery to obtain Ozio's testimony. After Ozio's deposition, the district court ordered additional briefing and oral argument. It then ordered an evidentiary hearing. In doing so, it found that the Florida Supreme Court's resolution of Whitton's Ozio-related *Giglio* claim was unreasonable under § 2254(d) and that Whitton did not fail to develop the factual basis in state court under § 2254(e)(2).

In September 2022, the district court held the evidentiary hearing. Ozio testified remotely. He said that the officers assigned to Whitton's case took Ozio out of jail several times, including to the pawn shops where Ozio had sold his stolen jewelry. The officers mentioned the five-year mandatory minimum on the firearm charge. But they also mentioned Whitton's case. Ozio believed that he could avoid prison, but only if he "completely cooperate[d]" with the officers on Whitton's case. Based on the officers' "continuous" conversations, Ozio "picked up most everything that they wanted to hear . . . and just regurgitated it back in a different way." But, Ozio testified, he "really didn't have any information to give

until [he] overheard it from them." Ozio testified that, in fact, he had never heard Whitton testify to stabbing anyone.

Once Ozio agreed to testify against Whitton, Ozio continued, "it was a night and day change." The officers moved Ozio to a new cell and gave him special privileges. And they took him from the jail additional times and provided him with alcohol and marijuana. In fact, the officers even took him to "a conjugal visit with a girl that [he] had never met before." Plus, Ozio and Wallace abruptly received probation, and they were released and allowed to return home to Texas.

As for Ozio's testimony at Whitton's trial, Ozio explained how that occurred. Ozio said that before he testified at Whitton's murder trial, he met with a State representative for "three or four hours of grilling." The representative was "to the point" and told Ozio, "This is what I need. No, don't say this. No, that's not the direction we're going." Ozio "was told not to mention" his juvenile record. The representative also told Ozio not to testify to a "knife detail" to which Ozio had alluded in his previous deposition and which apparently came from another case that Ozio had "mixed up."[7] Ozio testified that the

[7] In his 1992 pretrial deposition, Ozio testified that he heard Whitton mention a knife that was located in a ravine or a canal behind Whitton's parents' house in Pensacola. But Whitton's parents lived in New York, not Pensacola. The "knife detail" apparently came from another Walton County capital case pending at the time, *Suggs v. State*, No. 1990-CF-338. Whitton filed a motion for judicial notice of the state-court docket and filings in *Suggs*. In 2022, Suggs filed a state postconviction motion citing newly discovered evidence that Clayton Adkinson (also Whitton's prosecutor) had coached jailhouse informants' trial testimony. *See Suggs v. State*, No. 1990-CF-338, Doc. 194 (Walton Cnty. Cir. Ct. May 16, 2022). The informants also claimed that Sheriff McMillan offered them favorable treatment in exchange for their testimony.

prosecutor was "telling [him] to give testimony that was untrue" and "knew pointblank that [he] wasn't telling the truth." Ozio was "scared" and "looking for an out" from the mandatory minimum. And, Ozio testified, he was never served with conditions of probation; it was "almost like it didn't exist."

Ozio confirmed that he would have testified consistently with his affidavit at the state postconviction hearing; he wanted to clear his conscience. But Ozio did not travel to Florida because he was concerned about being arrested and incarcerated for a probation violation. Importantly, Ozio acknowledged that neither the officers nor the prosecutor explicitly "promise[d]" him anything in exchange for his testimony; it was only "implied." He did testify, however, that prosecutors were aware of his juvenile record.

Whitton called two other witnesses: Ozio's former attorney, Mark Davis, and a former probation officer, Troy Miller. Davis testified that Ozio was sentenced "below the guidelines" range and received a "good" outcome given the charges he faced. Miller testified that Ozio's presentence investigation report ("PSI") and sentencing scoresheet reflected neither Ozio's juvenile record nor his arrest for "terroriz[ing]" his family.

The State called several former officers—Fred Mann, Glenn Adkinson, Brad Trusty, Bill Chapman, Steve Sunday, Allen Cotton, John Peaden, and former Sheriff Quinn McMillan. They testified that they had minimal memory of Whitton's case but would not have made improper deals or encouraged a witness to lie at trial. Still, Trusty testified that, "[o]n occasion," he had "gone to the state attorney's office on behalf of inmates to determine if they could have some sort of break on their case for information." The officers also testified that

conjugal visits, alcohol, and marijuana were not allowed, even for trustees, the officers' label for cooperating inmates. Former prosecutor Clayton Adkinson died before the hearing.

On November 30, 2022, the district court denied relief but granted a COA on three claims: (1) the *Giglio* claim about Ozio's false testimony; (2) the *Strickland* claim as to mitigation; and (3) the *Miranda/Doyle* claim related to the State's comments on Whitton's silence. We expanded the COA to include Whitton's *Strickland* claim on appellate counsel's failure to investigate McCullough's recantation.

II. STANDARDS OF REVIEW

We review a district court's denial of habeas relief de novo. *McNair v. Campbell*, 416 F.3d 1291, 1297 (11th Cir. 2005). We also review mixed questions of law and fact de novo. *Pye v. Warden, Georgia Diagnostic Prison*, 50 F.4th 1025, 1034 (11th Cir. 2022) (en banc). But we review district courts' factual findings for clear error. *Campbell*, 416 F.3d at 1297. That is a highly deferential standard of review. "A finding that is plausible in light of the full record—even if another is equally or more so—must govern." *In re Wagner*, 115 F.4th 1296, 1305 (11th Cir. 2024) (cleaned up).

III. DISCUSSION

Beyond these traditional standards of review, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") further limits our role in reviewing state criminal convictions. A federal court "shall not" grant habeas relief on a "claim that was adjudicated on the merits in State court proceedings" unless the State decision (1) "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) "was based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. §2254(d); *see generally Williams v. Taylor*, 529 U.S. 362 (2000).

As to the first prong of § 2254(d), a "state court decision is contrary to clearly established federal law if the state court either arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or decides a case differently than the Supreme Court has on a set of materially indistinguishable facts." *Davis v. Sellers*, 940 F.3d 1175, 1185 (11th Cir. 2019) (cleaned up). A state court decision is an "unreasonable application of Supreme Court precedent if it identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the petitioner's case." *Id.* (cleaned up). This is a high standard—the "state court's ruling" must be "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

The second prong of § 2254(d) "requires that we accord the state trial court substantial deference" with respect to its factual determinations. *Brumfield v. Cain*, 576 U.S. 305, 314 (2015). We can't grant relief "even if some of the state court's individual factual findings were erroneous—so long as the decision, taken as a whole, doesn't constitute an unreasonable determination of the facts and isn't based on any such determination." *Pye*, 50 F.4th at 1035 (internal quotation marks omitted). And "a determination of a factual issue made by a State court shall be presumed to be correct," rebuttable by a petitioner only upon "clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

Also, when state-court decisions rest on independently dispositive reasons, all "are due AEDPA deference." *Hammond v. Hall*, 586 F.3d 1289, 1332 (11th Cir. 2009). And habeas relief "is due to be rejected" unless every independent reason contravenes or unreasonably applies Court precedent. *Id.* We may go beyond the state court's "particular justifications" for reaching its holding and "consider additional rationales that support the state court's" decision. *Pye*, 50 F.4th at 1038. Or we may skip altogether the question whether the state court acted unreasonably—and thus whether AEDPA's deferential standard of review applies—if the petitioner "cannot show prejudice under *de novo* review, the more favorable standard of review." *Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010).

We apply these principles to the four claims in Whitton's Certificate of Appealability: (1) the State presented Ozio's false testimony in violation of *Giglio*; (2) appellate counsel was constitutionally ineffective for failing to investigate McCullough's desire to recant; (3) trial counsel was constitutionally ineffective at the mitigation phase; and (4) the State improperly commented on Whitton's invocation of his right to silence in violation of *Doyle*.

A. Whitton's Giglio *claims fail because he has not shown that the State knew or should have known that its prosecutors knowingly elicited false testimony and because he cannot establish harmful error.*

Giglio error is a type of *Brady* error. It happens when the evidence the government failed to disclose shows that "the prosecution's case included perjured testimony and that the prosecution knew, or should have known, of the perjury." *United States v. Stein*, 846 F.3d 1135, 1147 (11th

Cir. 2017) (quoting *Ford v. Hall*, 546 F.3d 1326, 1331 (11th Cir. 2008)); *see also Giglio v. United States*, 405 U.S. 150, 153 (1972); *Brady v. Maryland*, 373 U.S. 83, 87 (1963). To prove his *Giglio* claim, Whitton must show two things: "(1) the prosecutor knowingly used perjured testimony or failed to correct what he subsequently learned was false testimony; and (2) such use was material *i.e.*, that there is any reasonable likelihood that the false testimony could have affected the judgment." *Stein*, 846 F.3d at 1147 (quoting *Ford*, 546 F.3d at 1331–32). *Giglio*'s traditional "materiality standard is more defense-friendly than *Brady*'s," requiring the State to show that "the false testimony was harmless beyond a reasonable doubt." *Guzman v. Sec'y, Dep't of Corr.*, 663 F.3d 1336, 1348 (11th Cir. 2011) (cleaned up).

But on collateral review, a petitioner must meet the more onerous standard in *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Under this standard, we may grant relief "only if the federal court has grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict." *Davis v. Ayala*, 576 U.S. 257, 267–68 (2015) (internal quotation marks omitted). There must be "more than a reasonable possibility that the error was harmful." *Id.* at 268 (internal quotation marks omitted).

If we "cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error," we "must conclude that the error was not harmless." *Granda v. United States*, 990 F.3d 1272, 1293 (11th Cir. 2021) (quoting *Trepal v. Sec'y, Fla. Dep't of Corr.*, 684 F.3d 1088, 1114 (11th Cir. 2012)). So "*Brecht* can prevent a petitioner from obtaining habeas relief even if he can show that, were he raising a *Giglio* claim in the first instance on direct appeal

before a state appellate court, he would be entitled to relief." *Rodriguez v. Sec'y, Fla. Dep't of Corr.*, 756 F.3d 1277, 1302 (11th Cir. 2014). The Supreme Court has explained that we apply such an onerous standard because states should "not be put to the arduous task of retrying a defendant based on mere speculation that the defendant was prejudiced by trial error." *Ayala*, 576 U.S. at 268 (cleaned up).

Whitton argues the State violated *Giglio* when it introduced three false pieces of testimony that prejudiced the outcome of his case: (1) that Ozio overheard Whitton confess to "stabb[ing] the bastard"; (2) that Ozio received no benefits from the State in exchange for his testimony; and (3) that Ozio had no criminal history. And Whitton challenges the Florida Supreme Court's disposition of his *Giglio* claim as both an unreasonable application of *Giglio*, *see* 28 U.S.C. § 2254(d)(1), and based on an unreasonable determination of the facts, *see id.* § 2254(d)(2). He claims the Florida Supreme Court erred in six ways—two legal and four factual. And he argues we should not afford AEDPA deference to the Florida Supreme Court's decision.

But for two reasons, we need not consider his arguments that the Florida Supreme Court acted unreasonably. First, most of Whitton's claims do not survive de novo review. *See Berghuis*, 560 U.S. at 390. And second, we can't say that the Florida Supreme Court unreasonably concluded that, even without both Ozio's and McCullough's confessions, the State marshalled "overwhelming evidence against Whitton." *Whitton IV*, 161 So. 3d at 334. In other words, the alleged errors did not prejudice Whitton.

1. Whitton failed to establish a material *Giglio* violation.

We take each of the alleged *Giglio* violations in turn: (1) the State knew or should have known Ozio fabricated Whitton's confession; (2) the State knew or should have known Ozio lied about not receiving favorable treatment for his cooperation; and (3) the State knew or should have known that Ozio had a criminal history.

i. Whitton failed to show that the State knew or should have known that Ozio falsely testified about Whitton's purported confession.

We assume without deciding that Ozio falsely testified that he overheard Whitton's confession that he killed Maulden, as the district court found. Whitton then bears the burden of showing "the prosecutor knowingly used [that] perjured testimony or failed to correct what he subsequently learned was false testimony." *Stein*, 846 F.3d at 1147 (quoting *Ford*, 546 F.3d at 1332).

The Florida Supreme Court concluded that Whitton failed to meet that burden. That is, it determined he failed to show "that the State was aware that Ozio intended to present false testimony." *Whitton IV*, 161 So. 3d at 324. The district court reached the same conclusion. It explained that "the state did not know, and had no way of knowing," that Ozio's "testimony was false" and that, at the time Ozio testified, there was not "a high probability that" his testimony "was false."

Whitton disputes these findings and conclusions. He claims the district court found only that the prosecution team lacked actual knowledge and did not resolve the issue of constructive knowledge, which the record supported. In Whitton's view, "[t]he only plausible inference" from Ozio's postconviction testimony is that the prosecutors elicited his trial testimony with "reckless disregard for [the alleged confession's] falsity."

But neither our precedent nor the facts support Whitton's position. To understand why, we must quickly review some basic *mens rea* principles. Criminal law typically employs four levels of *mens rea*: purposefulness, knowledge, recklessness, and negligence. MODEL PENAL CODE § 2.02(2) (Am. L. Inst. 1962). As for knowledge, its routine application is self-explanatory: a person actually knows a relevant fact. "By contrast, a reckless [individual] is one who merely knows of a substantial and unjustified risk" that a relevant fact is true. *Glob.-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 770 (2011) (internal citations omitted).

And "a negligent [individual] is one who should have known of a similar risk but, in fact, did not," *id.*, because the individual deviated from the relevant standard of care that a reasonable person would observe, *see* MODEL PENAL CODE § 2.02(2)(d).

That said, this articulation of the negligence standard spurs the parties' dispute because it resembles the *Giglio* standard—knew or should have known, *Stein*, 846 F.3d at 1147—that we've recounted. And Whitton argues that we've endorsed a *mens rea* standard akin to negligence: "constructive knowledge based on red flags to falsity." The State argues otherwise. It asserts our "should have known" language refers to actual knowledge that we impute as a matter of law to the prosecutors, not a duty to resolve the potential falsity of each witness's testimony. Both parties are partially correct. But ultimately, under our precedent, Whitton failed to show the State "should have known" that Ozio's testimony was false.

Whitton is correct that our "should have known" standard may apply to more than just cases of imputed actual knowledge. We impute state agents' actual knowledge to the prosecutor because "the individual

prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). So we deem a prosecutor's "constructive knowledge" to be as extensive as any actual knowledge a prosecutor would have acquired had she adequately performed her relevant duties, *see United States v. Robinson*, 627 F.3d 941, 951–52 (4th Cir. 2010) (describing the "duty to learn" as "constructive knowledge"); *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998) (same), such as studying all relevant case files, *see Glossip v. Oklahoma*, 145 S. Ct. 612, 627 (2025) (explaining "the prosecution knew Sneed's statements were false as he testified to them" in part because the "prosecution almost certainly had access to Sneed's medical file," which would have disproved his testimony).

But the State is correct about the dispositive legal question: a prosecutor does not have the duty to ensure the accuracy of a witness's testimony when the prosecutor does not "believe[] the testimony to be false or perjured." *United States v. Brown*, 634 F.2d 819, 827 (5th Cir. 1981) (adding "it is not enough that the testimony is challenged by another witness or is inconsistent with prior statements"); *see United States v. Noriega*, 117 F.3d 1206, 1221 (11th Cir. 1997) (explaining "willful blindness . . . might establish constructive knowledge"); *see also Glob.-Tech Appliances*, 563 U.S. at 770 (noting "willful blindness . . . surpasses recklessness and negligence" because "the defendant must take deliberate actions to avoid learning of" a relevant "fact").[8]

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[8] All decisions the Fifth Circuit issued by the close of business on September 30, 1981, are binding precedent in this Court. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

We've been clear that prosecutors are not guilty of misconduct simply by adducing evidence that is not completely uncontradicted by other evidence. For instance, we've explained that "a prior statement that is merely inconsistent with a government witness's testimony is insufficient to establish prosecutorial misconduct." *United States v. McNair*, 605 F.3d 1152, 1208 (11th Cir. 2010); *see also United States v. Michael*, 17 F.3d 1383, 1385 (11th Cir. 1994) ("We refuse to impute knowledge of falsity to the prosecutor where a key government witness' testimony is in conflict with another's statement or testimony."). And we've held that "witnesses' capacity to remember events" or witnesses' "possible motives and individual relationships with" other relevant characters "may be considered as factors in weighing their testimony." *United States v. Lopez*, 985 F.2d 520, 524 (11th Cir. 1993). But the fact that witnesses remember "incidents and participants differently" and tell "different stories falls far short of establishing that the government had knowledge of false testimony being presented to the jury." *Id.* Those considerations go to "credibility," which the "defense" may challenge in its "case." *Id.*

On the other hand, the prosecution does have a duty to disclose impeachment "evidence affecting" witnesses' "credibility." *Giglio*, 405 U.S. at 154. Unless the prosecution—or someone from whom the prosecution has a "duty to learn"—has knowledge of testimony's falsity, then the government may present that evidence so long as it has disclosed to the defense relevant impeachment material. *See Ventura v. Att'y Gen., Fla.*, 419 F.3d 1269, 1276 (11th Cir. 2005) (explaining *Giglio* error occurs when "*undisclosed evidence* demonstrates that the prosecution's case included perjured testimony"

(emphasis added) (citation omitted)). The jury may then judge the veracity of the alleged false testimony.

But Whitton does not argue that the prosecution failed to disclose relevant impeachment material. Instead, Whitton argues the prosecution knew Whitton did not confess to Ozio when Ozio testified to the opposite effect. And under our precedent governing false-testimony claims, the statements Ozio made before and during trial—which Whitton claims include inconsistencies as to the timing, content, and language of the alleged confession—do not give rise to such a *Giglio* violation. That's so because Whitton hasn't shown that either the prosecutors or any relevant state official actually knew Ozio fabricated Whitton's confession when he testified to it. *Cf. Glossip*, 145 S. Ct. at 627 (finding a due-process violation where "the prosecution knew Sneed's statements were false as he testified to them").

To be sure, Whitton argues the prosecution knew Ozio's testimony was false. But he bases his argument on the following four circumstances: (a) Ozio had a motive to fabricate a confession to obtain favorable treatment, (b) officers, in discussing Whitton's case with Ozio, influenced Ozio's understanding of Whitton's case, (c) Ozio included in his recounting of Whitton's confession a false knife detail that actually occurred in another case Clayton Adkinson was also prosecuting, and (d) the prosecution coached Ozio to testify to information Ozio said was false. And the district court rejected those arguments and found that "the circumstances did not show conclusively or with a high probability that" Ozio's testimony "was false." We can't say that finding was clearly erroneous.

As to Ozio's motive to provide false testimony, knowledge of a motive to falsify testimony does not equal knowledge of false testimony. Witnesses routinely testify

on behalf of the government after pleading guilty—even after pleading to lesser charges or receiving lenient sentences. But that fact does not mean a witness's testimony is false, much less make a prosecutor guilty of misconduct by eliciting it. Rather, a witness's motive for his testimony is a bias the defense may explore on cross-examination. *See, e.g.*, *United States v. Thayer*, 204 F.3d 1352, 1355 (11th Cir. 2000) (per curiam). And here, the district court found that no officer or prosecutor offered Ozio favorable treatment in return for specific testimony, like Whitton's confession. So the district court did not clearly err in discounting Ozio's motive to obtain beneficial treatment in finding the prosecutors did not have actual knowledge that Ozio testified falsely.

Nor did the district court clearly err in finding that the state officers who accompanied Ozio to pawn shops to collect stolen property did not know Ozio's testimony was false. That is a "plausible" finding on this record. *In re Wagner*, 115 F.4th at 1305.

Although the officers could have influenced Ozio's recollection of Whitton's alleged crime in their conversations on the way to the pawn shops, this record does not establish that the officers knew Ozio was lying about Whitton's confession. As the district court found, "[n]o officer told Mr. Ozio anything the officer did not believe was true," and "[n]o officer suggested to Mr. Ozio that he should provide false testimony."

Nor did Ozio's conversations with the officers appear to influence the substance of his testimony. In fact, Ozio could not distinguish among which information he gathered from his conversation with the officers who drove him to the pawn shops, from correctional officers in the jail, or from other detainees. The only detail about Whitton's case that Ozio could link to his car ride to the

pawn shop was about the blood on Whitton's clothes. But Ozio testified that he also overheard that detail from Whitton while in jail. Plus, Whitton's confession—the "I stabbed the bastard" comment—did not originate in Ozio's ride-along conversations. So the record does not reveal that the officers knew of anything that contradicted the core of Ozio's testimony about Whitton's confession.

For similar reasons, neither the false knife detail in Ozio's testimony nor the prosecution's preparation with Ozio for his testimony establish that the prosecution knew Ozio was lying, either. Ozio recounted that, in preparing him to testify at Whitton's trial, the prosecution frequently "correct[ed] [him] about dates and . . . about [the] sequence of events." And when Ozio brought up his recollection of Whitton tossing a knife into a ravine, the prosecution suggested that Ozio not volunteer that detail.

But Ozio also explained to the district court that the prosecution never asked Ozio to testify to false information, and the team never instructed Ozio to lie if asked directly about the knife. So the district court found that the prosecution reasonably could have believed that Ozio "heard talk of this around the jail and mixed up the cases."

The district court had a plausible basis for finding that the prosecution did not know Ozio's testimony was false. Knowledge of testimony that is inconsistent with other evidence and testimony—and witness preparation de-emphasizing those inconsistencies—is not the same thing as knowledge that a witness testified falsely. *See Jacobs v. Singletary*, 952 F.2d 1282, 1287 (11th Cir. 1992) (explaining "the fact that state detectives failed to corroborate her testimony after interviewing three other cellmates . . . rendered [her] testimony only less credible, not incredible"); *cf. Alcorta v. Texas*, 355 U.S. 28, 31 (1957)

(finding a due-process violation where a prosecutor elicited testimony that "gave the jury the false impression" that a witness's relationship with the defendant's wife was that of casual friendship although the prosecutor "knew" it was, in fact, sexual).[9]

Finally, even considering each of these facts together, they do not show that the district court clearly erred in concluding the prosecution neither knew nor should have known that Ozio's testimony was false. Ozio confirmed that no member of the prosecution team suggested that he testify that Whitton confessed to the crime. And Ozio was consistent that Whitton confessed to the murder. Plus, at the time, McCullough corroborated that Whitton confessed to the murder. So the prosecutors could have believed that Whitton confessed to the murder, even if they were unsure Ozio had a firm grasp of some relevant details about Whitton's crime.

Whitton failed to establish his first alleged *Giglio* violation because he didn't establish that the prosecution

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[9] This is not to say prosecutors should attempt to correct or influence a witness to testify to something other than what the witness believes to be true, even if the prosecutors believe they are aligning a witness's inaccurate testimony to the truth. They shouldn't. *See In re Eldridge*, 82 N.Y. 161, 171 (1880) ("[An attorney's] duty is to extract the facts from the witness, not to pour them into him; to learn what the witness does know, not to teach him what he ought to know."); *Geders v. United States*, 425 U.S. 80, 90 n.3 (1976) ("An attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it."). And we repeat the district court's admonition against such behavior. Indeed, that misconduct may jeopardize the validity of a conviction. *See, e.g.*, *Kyles*, 514 U.S. at 443 (concluding disclosure of a witness's original statement, which contained "adjustments" at trial, would have "destroy[ed] confidence in [his] story and rais[ed] a substantial implication that the prosecutor had coached him to give it"). But for the reasons we've explained, on this record, it does not establish the asserted *Giglio* violations.

team knew or should have known Ozio falsified Whitton's confession when the prosecution elicited the confession at trial.

ii. Whitton failed to show the State agreed to a deal that Ozio testify against Whitton in exchange for benefits, and he failed to show that the State adduced material, false testimony when it allowed Ozio to disclaim his subjective anticipation of benefits from the State.

Whitton next argues the State failed to correct Ozio's testimony about the benefits he received from the State in exchange for his testimony against Whitton.

To recap, at trial, Ozio testified that state officers did not "promise or offer [him] any help for [his] statement." Ozio further testified that he "never at any time" thought that testifying against Whitton "was going to help [him] in any way" and that he "didn't think [he'd] be going to prison, [that] being [his] first offense." But in his postconviction affidavit and testimony, Ozio recounted the various benefits he received from the State in exchange from his testimony: his "trustee" privileges, reduced misdemeanor charges, a sentence of probation, and even a conjugal visit and access to alcohol and marijuana.

Ozio testified at his postconviction deposition that he was "fear[ful] of [the mandatory minimum] charge," and he said that officers "portrayed it as a situation that [he] probably wasn't going to get out of." That said, at the federal evidentiary hearing, Ozio acknowledged that neither the officers nor the prosecutor explicitly "promise[d]" him anything in exchange for his testimony; any promise was "implied," Ozio clarified, because the officers "informed [him] that the only way [he] was going

to get any actual help was to completely cooperate" regarding "Whitton's case."

These facts prompt two theories of potential *Giglio* violations. First, the State could have presented false testimony had the State and Ozio reached some form of agreement. And second, the prosecutors could have presented false testimony if they knew Ozio was testifying with the hope of receiving benefits from the State. The district court rejected both those theories. And we find neither error in its conclusions nor clear error in its findings.

Starting first with the theory that the State and Ozio reached an agreement about leniency and other benefits in exchange for Ozio's testimony against Whitton, the district court found that Ozio "testified truthfully that he was promised nothing in exchange for the false testimony." So it concluded no *Giglio* violation had occurred. The district court reasoned that Ozio "*hoped* to obtain favorable treatment, and in fact he *did* obtain favorable treatment," but "a unilateral hope is much different from an offer, promise, or mutual agreement."

Whitton argues the district court erred because *Giglio* "applies not only to undisclosed explicit promises from the State in exchange for testimony, but also to undisclosed implicit agreements or understandings." And that is true. We've reasoned, "*Giglio* does not require that the word 'promise' . . . must be specifically employed." *Brown v. Wainwright*, 785 F.2d 1457, 1464–65 (11th Cir. 1986). But a *Giglio* violation contemplates at least a "bilateral agreement" or an offer "subject to acceptance." *Id.*; *see Alderman v. Zant*, 22 F.3d 1541, 1554–55 (11th Cir. 1994) (concluding the *Giglio* "rule states that there must be a full disclosure of any agreements" but "does not address nor require the disclosure of all factors which may

motivate a witness to cooperate"); *cf. Haber v. Wainwright*, 756 F.2d 1520, 1524 (11th Cir. 1985) (remanding for further factfinding on whether a prosecutor's "advice . . . amounted to a grant of immunity or otherwise constituted an agreement or understanding between Brandt and the state").

Here, though, the district court found no such agreement—a finding we can't say is clearly erroneous. The only testimony that calls into question the district court's finding is Ozio's assertion that state officers, on pawn-shop rides, informed Ozio "the only way [he] was going to get any actual help was to completely cooperate." But we've upheld district courts' findings that similar statements did not amount to an implicit, mutual agreement.

In *Traver v. Hopper*, for instance, a prosecutor stated, "any cooperation [the witness] gave us and if he told the truth in this matter would be taken into consideration," and the prosecutor subjectively believed (but did not convey) that the witness would not be tried for capital murder if the witness testified for the prosecution. 169 F.3d 710, 716 (11th Cir. 1999). Under those facts, we accepted the district court's finding—"because it [was] not clearly erroneous"—"that whatever exchange may have taken place between" the prosecutor and the witness "did not ripen into a sufficiently definite agreement" that would require disclosure under *Giglio*. *Id.* at 717. "Some promises, agreements, or understandings do not need to be disclosed," we added, "because they are too ambiguous, or too loose or are of too marginal a benefit to the witness to count." *Id.* And confirmation that a witness's testimony would be "taken into consideration" was "too preliminary and ambiguous to demand disclosure." *Id.*; *see also Depree v. Thomas*, 946

F.2d 784, 797–98 (11th Cir. 1991) (holding promise to "take care" of witness does not require disclosure).

So here, although the officers who drove Ozio to the pawn shops gave Ozio the impression that they wished for him to provide any information he possessed implicating Whitton, the district court did not clearly err in finding those impressions did not "ripen into a sufficiently definite agreement before" Whitton's trial. *Traver*, 169 F.3d at 717. To be sure, it's plausible that Whitton was "merely trying to cooperate in hopes of improving [his] bargaining position later." *Id.* But under our binding precedent, Ozio's "hope[s]" that his testimony against Whitton "would result in more favorable treatment" do "not convert ambiguous statements by the State"—like impressions, as the district court put it—"into promises that [he] would, in fact, receive more favorable treatment." *Depree*, 946 F.2d at 798; *see, e.g.*, *id.* at 797 (discussing a promise to "take care" of the witness); *Traver*, 169 F.3d at 716 (addressing prosecutor's "consideration" of a witness's cooperation).

Indeed, even though Ozio received favorable treatment after the fact, and even if the State subjectively intended to give favorable treatment to Ozio after the fact, under our precedent, those considerations do not transform infirm statements about leniency or benefits into real agreements within the scope of *Giglio*. *See, e.g.*, *Hays v. Alabama*, 85 F.3d 1492, 1499 (11th Cir. 1996) (rejecting argument that Alabama's failure to prosecute a witness after giving favorable testimony amounted to proof of an agreement with the State); *Traver*, 169 F.3d at 716–17 (upholding finding of no agreement even though prosecutor "believed" the witness "would not be tried for capital murder if" the witness "testified for the prosecution").

So as to the first theory of a potential *Giglio* violation, Whitton failed to prove the existence of an implicit agreement that would make the State guilty of misconduct.

As for Whitton's second theory that the State knew Ozio cooperated with the hope of receiving favorable treatment but permitted him to testify otherwise—specifically, that the State allowed Ozio to falsely state he didn't think testifying against Whitton "was going to help [him] in any way"—the district court rejected it. It found that the prosecution "did not know" Ozio's "testimony" concerning his anticipation of benefits "was false—only Mr. Ozio had personal knowledge of his own motives."

Whitton contests that finding as clearly erroneous. He says the ride-along officers impressed upon Ozio that he could benefit from testifying against Whitton, and the State prosecutor, Adkinson, knew of the "condition" of probation placed on Ozio to "return to testify truthfully in [the] Whitton case." We agree that suggests the State knew Ozio testified with the hope of receiving favorable treatment. But even so, on this record, it does not amount to a *material Giglio* violation.

Defense counsel cross-examined Ozio about his reduced charges and sentence of probation, as well as his desire to "help" himself. Whitton's counsel emphasized that before Ozio reported to Florida authorities that Whitton confessed, Ozio faced numerous charges, some of which included mandatory minimum sentences of five years each. Then, after Ozio implicated Whitton, the defense emphasized, the State allowed Ozio to plead guilty to lesser charges that did not include any mandatory minimum sentence. And ultimately, in closing, the prosecution admitted that "perhaps [Ozio] received a break in regards to probation versus the maximum of

three and a half that he could have gotten in prison," even though it argued that Ozio received leniency because he was a first-time offender. So the jury had the facts to infer that the prosecution and Ozio reached some type of an agreement in exchange for his testimony.

And Ozio's refusal to acknowledge an agreement, or even a selfish motivation on his part to testify against Whitton, could have further undermined his credibility. As the district court put it, "[a] cooperating witness's denial of any desire for favorable treatment rarely helps the proponent of the testimony." So the testimony Ozio gave at trial was, at a minimum, just as persuasive, if not less persuasive, than it would have been had he candidly explained he hoped the prosecution would look favorably upon his reporting of Whitton's confession. At bottom, defense counsel's impeachment of Ozio on his motivation to testify makes any related *Giglio* violation immaterial. *See McNair*, 605 F.3d at 1211 (finding no reversable error, in part, because the jury was aware the witness "had made a plea deal and that the government's assessment of his cooperation would impact his eventual sentence").

iii. Whitton failed to show Ozio's false testimony that he had no criminal history would have had a substantial and injurious effect or influence on the jury's verdict.

Lastly, Whitton argues the State failed to correct Ozio's testimony on cross-examination that he had "never been arrested before." That testimony was false: Ozio's juvenile records show he was charged with assault with bodily injury against his father, terroristic threats against his mother, and at least one other burglary. The State also had those records, as the district court found. And

Whitton adds, the State capitalized on the false testimony by portraying Ozio as a young kid with no criminal past. *See DeMarco v. United States*, 928 F.2d 1074, 1077 (11th Cir. 1991) ("[T]he prosecutor's argument to the jury capitalizing on the perjured testimony reinforced the deception of the use of false testimony and thereby contributed to the deprivation of due process.").[10]

Still, the district court concluded that any such *Giglio* violation would not have made a difference because, in Florida, juvenile criminal records are generally inadmissible to attack a witness's credibility. *See* Fla. Stat. § 90.610(1)(b) (1977); *Benedit v. State*, 575 So. 2d 236, 237 (Fla. 3d DCA 1991). This conclusion was erroneous. There is no indication the trial court would have used Section 90.610 to bar the use of Ozio's juvenile records after Ozio opened the door to such evidence. Florida courts admit juvenile records when a "witness, by volunteering that he had never been in trouble before, . . . open[s] the door to [prior] conviction[s], which would not have otherwise been admissible." *Cullen v. State*, 920 So. 2d 1155, 1156 (Fla. 4th DCA 2006); *see also Mosley v. State*, 739 So.2d 672, 677 (Fla. 4th DCA 1999) (collecting cases where a witness was impeached after minimizing his criminal past).

And impeachment concerning Ozio's juvenile record would have undermined his credibility: it would have shown Ozio perjured himself. It also may have solidified the inference that the prosecution struck a deal with Ozio by eliminating the prosecution's argument that Ozio

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[10] The State also contends that Whitton failed to exhaust this claim. But because the claim fails on the merits, we do not address the State's exhaustion arguments.

received leniency because he was a first-time offender.[11] Although the prosecution admitted that Ozio caught "a break" by receiving a lenient sentence, it attempted to brush off suggestions of any deals by proffering the applicable sentencing guidelines for a first-time offender like Ozio. Had the jury learned Ozio was not a first-time offender, the prosecution could not have made such an argument. And the jury would have known that Ozio lied on the stand. Such a combination of impeachment by perjury and a deal for favorable treatment, we've held, can destroy a witness's credibility. *See, e.g.*, *United States v. Sanfilippo*, 564 F.2d 176, 178 (5th Cir. 1977) (explaining a propensity for dishonesty, combined with evidence of promised favorable treatment, "might well have" caused the jury to conclude the witness "had fabricated testimony in order to protect himself against another criminal prosecution"); *accord Brown*, 785 F.2d at 1466; *cf. Ventura*, 419 F.3d at 1292 & n.9.

So we cannot affirm the district court's decision on its finding of harmless error. Still, we cannot reverse the district court, either, because we must affirm on the other basis the State advances, *see Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1256 (11th Cir. 2001)—that Ozio's testimony, overall, was immaterial to the jury's verdict.

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[11] Potentially, the pattern of prosecutorial misconduct could have caused the jury to doubt the credibility of the prosecutors themselves. *See Brecht*, 507 U.S. at 638 n.9 (addressing the "unusual case" where "a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict"). But Whitton references this issue in a single-sentence footnote, so we do not address it. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014) ("We have long held that an appellant abandons a claim when he either makes only passing references to it or raises it in a perfunctory manner without supporting arguments and authority.").

See McNair, 605 F.3d at 1208 ("When a government lawyer elicits false testimony that goes to a witness's credibility, we will consider it sufficiently material to warrant a new trial only when the estimate of the truthfulness and reliability of the given witness may well be determinative of guilt or innocence." (citation and internal quotation marks omitted)). For the reasons we discuss in the next section, we owe deference to the Florida Supreme Court's determination that, even without Whitton's confession, the State marshalled overwhelming evidence that would have caused the jury to reach the same result.

2. Assuming Whitton established *Giglio* violations that materially undermined the veracity of Ozio's testimony, the Florida Supreme Court did not unreasonably determine that overwhelming evidence supported the jury's conviction.

Under AEDPA, we owe deference to a state court's prejudice determinations. *See Pye*, 50 F.4th at 1041–42. So to pierce AEDPA's veil, Whitton must show the state court's determination that he did not suffer prejudice was an unreasonable application of, or contrary to, federal law. *See id.* In other words, even if we may disagree with the state court's conclusion and would have reached a different one had we taken the first look, we cannot overturn the state court's decision unless it was "so obviously wrong that its error lies beyond any possibility for fairminded disagreement." *Id.* (quoting *Shinn v. Kayer*, 592 U.S. 111, 118 (2020)); *see also Harrington*, 562 U.S. at 101.

The Florida Supreme Court considered the weight of the evidence against Whitton, albeit in a roundabout way. It did not directly address prejudice flowing from Ozio's

testimony when it considered Whitton's *Giglio* claims. *See Whitton IV*, 161 So. 3d at 323–24 (addressing falsity of Ozio's testimony and the State's knowledge). But in assessing whether a jury could sustain Whitton's conviction without McCullough's testimony, the court described the weight of the evidence against Whitton, independent of both confessions, and found it to be "overwhelming." The court said,

> Further, Whitton cannot establish prejudice. As discussed above, recantations are not credible. Without McCollough's testimony, Ozio's testimony would still have provided the jury with evidence that Whitton admitted to murdering Mauldin. That, coupled with *the overwhelming evidence against Whitton*, makes it extremely unlikely that McCollough's recantation would have changed the outcome of the trial.

Id. at 334 (emphasis added). Unless unreasonable, the Florida Supreme Court's conclusion that the non-confession evidence was "overwhelming" binds us and is dispositive of the prejudice question here. We address this legal conclusion and then delve into the reasonableness of the Florida Supreme Court's holding that the evidence against Whitton, independent of the confession, was "over-whelming."

First, the Florida Supreme Court's conclusion that, even without considering the confessions, there was still "overwhelming evidence against Whitton" binds us. That's so because AEDPA requires us to review "the specific reasons given by the state court and defer[] to those reasons if they are reasonable." *Wilson v. Sellers*, 584 U.S. 122, 125 (2018). Plus, to ignore the Florida Supreme Court's determination that the State presented "overwhelming evidence" against Whitton would bypass

our rationale in *Pye* that we should not accept readings of AEDPA that "strictly limit[]" a state court "to the particular justifications" it "memorialized in its written opinion." 50 F.4th at 1039. As we've made clear, we owe deference to a state court's implicit yet reasonable findings and conclusions. *See Blankenship v. Hall*, 542 F.3d 1253, 1272 (11th Cir. 2008) (explaining "implicit findings of fact are entitled to deference under § 2254(d) to the same extent as explicit findings of fact"). And here, they are reasonable.

Second, a lack-of-prejudice holding immediately follows from the Florida Supreme Court's conclusion that, even without Ozio's and McCullough's testimony that Whitton confessed, the State still introduced "overwhelming evidence against Whitton." We've repeated that errors are harmless "under the *Brecht* standard where . . . other evidence of guilt is overwhelming." *Mansfield v. Sec'y, Dep't of Corr.*, 679 F.3d 1301, 1313 (11th Cir. 2012); *accord Trepal*, 684 F.3d at 1114; *Prevatte v. French*, 547 F.3d 1300, 1304 (11th Cir. 2008); *Grossman v. McDonough*, 466 F.3d 1325, 1340 (11th Cir. 2006); *see also Lamb v. Jernigan*, 683 F.2d 1332, 1342 (11th Cir. 1982); *Cape v. Francis*, 741 F.2d 1287, 1294–95 (11th Cir. 1984); *Davis v. Kemp*, 752 F.2d 1515, 1521 (11th Cir. 1985); *Tucker v. Kemp*, 762 F.2d 1496, 1501 (11th Cir. 1985); *United States v. Harriston*, 329 F.3d 779, 789 (11th Cir. 2003). So if the Florida Supreme Court reasonably determined that overwhelming evidence supported Whitton's conviction, we must give deference to its ultimate decision to reject Whitton's habeas petition. *See Pye*, 50 F.4th at 1042 (explaining "some debatable calls as to the weight" of certain "pieces of evidence" did not render unreasonable the "ultimate decision to deny relief").

Third, the Florida Supreme Court reasonably determined that the record contained "overwhelming evidence" of Whitton's guilt. The undisputed facts place Whitton at the scene of the crime the night that Maulden was killed, and evidence suggests Whitton committed the murder: the motel clerk saw Whitton's car parked at the motel, and Whitton admitted he was at the motel; Whitton's boots and his car were stained with blood that, after later retesting, matched Maulden's DNA; the blood stains on and inside Whitton's boots are consistent with "a stabbing or a beating"; Whitton could not explain the downward blood spatter on the inside of his boots; and Whitton's car contained a power and gas receipt and a car wash ticket for 2:37 a.m. October 10, 1990, the night of the murder.

To be sure, portions of the State's case rely on credibility determinations on which the jury could easily side with Whitton. For instance, the State posits that Whitton murdered Maulden because Whitton was behind on his bills, was about to lose electricity, and knew that Maulden had over $1,000 cash. Yet Whitton testified that he received money from the prior occupant, Debra Sims, because the bills had been incurred during her tenancy. And the State was neither able to recover Maulden's cash nor prove what Whitton spent that money on.

Similarly, as to the State's arguments that Whitton did not report the death of his "pretty close" friend and that Whitton told several lies,[12] Whitton argues that the

[12] The State argues it proved Whitton lied about the following: that Whitton did not know how much money Maulden had despite helping Maulden withdraw his money; that Whitton tried to contact Maulden's mother when she never received a call; that Whitton told the police he did not go back to the hotel when he in fact did; and that Whitton lied to his boss about why he did not show up to work.

jury could have believed his allegedly untruthful and irrational actions were driven by panic and fear. And he urges, that's a credibility question that is front and center after we discount Ozio's and McCullough's testimony.

Then, as to the supposed persuasiveness of the overall case, Whitton highlights the state prosecutors' conduct. He notes that after discovering Whitton's purported confessions, the State withdrew a plea deal to "stand mute . . . with a guidelines sentence" to second-degree murder and robbery. Instead, the State sought either life imprisonment or the death penalty. And after learning of Zeigler's potentially exculpatory DNA testimony, the prosecution team engineered what the district court called an "inexcusable attempt to block" it through verbal and physical assault. Had the State viewed the evidence against Whitton as "overwhelming," he suggests, the prosecution would not have acted the way it did.

A jury may well find some of these points to be persuasive. But we cannot say that the state court was "so obviously wrong," *Pye*, 50 F.4th at 1042, in concluding the non-confession evidence against Whitton is "overwhelming." In particular, Whitton can't rebut the State's blood-spatter evidence. The inside of Whitton's boots contained blood matching the victim's type and were the "target for forceful bloodshed" and "medium velocity" blood spatter consistent with "a stabbing or a beating." Evidence also suggested that the blood traveled from the top of Whitton's boots to the bottom, directly contradicting Whitton's testimony that he was in Maulden's room for only a minute before fleeing. Notably, the State's expert rebutted Whitton's theory that blood seeped into his boots through their bottoms by testifying that some of the downward blood spatter had dried before Whitton put his boots back on; Whitton could not have

been wearing his boots when "the blood spatter occurred on the interior of" them.

Whitton responds that the State could not explain the limited amounts of blood on Whitton clothes, boots, and in his car, considering the extremely bloody scene—officers reported that blood covered at least three walls. To this, Whitton adds that the DNA evidence matched a third party, not Maulden or Whitton. But the State introduced expert testimony that effective washing can eliminate traces of blood, as well as evidence that Whitton attempted to wash away the blood he collected in Maulden's motel room. Indeed, Whitton purchased a car wash ticket, dated 2:37 a.m. on the night of the murder. And an officer reported that Whitton said he washed his boots, although Whitton disclaims making such a statement.

Also, after retesting the DNA on Whitton's boots, *see, e.g.*, *Whitton II*, 824 So. 2d at 171; *Whitton III*, 838 So. 2d at 560, the State confirmed that the inside of Whitton's right boot contained blood from a "mixture of two or more individuals" with the "major donor" matching "the DNA profile of James Maulden." In short, the blood-spatter evidence ties Whitton directly and firmly to Maulden's murder.

So we can't say it was unreasonable for the State court to conclude there was "overwhelming evidence against Whitton." *Whitton IV*, 161 So. 3d at 334. Nor does Supreme Court precedent preclude the prejudice finding the State made on these facts. Rather, even if the "call[]" is ultimately "debatable," it's within the realm of fair-minded disagreement, *Pye*, 50 F.4th at 1042, that blood spatter evidence—which has no explanation other than one that is consistent with the defendant's guilt—will surely convince a jury of the defendant's guilt, *see Brecht*,

507 U.S. at 638. *See, e.g.*, *State v. Perkins*, 1999 WL 334974, at *3 (Ohio Ct. App. May 28, 1999) (holding "blood spattered" on defendant's "T-shirt and jeans," as well as DNA testing proving the spatter matched the victim, "presented overwhelming evidence of" the defendant's guilt).

Because the state court's prejudice determination "wasn't contrary to or an unreasonable application of the Supreme Court's precedents, based on an unreasonable determination of the facts, or 'so obviously wrong that its error lies beyond any possibility for fairminded disagreement,'" AEDPA requires us to defer to its "weighing of the evidence" and "cumulative-prejudice conclusion." *Pye*, 50 F.4th at 1056 (quoting *Shinn*, 592 U.S. at 118); *see also Harrington*, 562 U.S. at 102 ("If this standard is difficult to meet, that is because it was meant to be.").

B. Whitton's appellate counsel was not prejudicially ineffective.

We next turn to Whitton's claim that his appellate counsel was ineffective for failing to investigate McCullough's recantation.

The same standards that apply to trial counsel under *Strickland* also govern claims of ineffective assistance of appellate counsel. *Brooks v. Comm'r, Ala. Dep't of Corr.*, 719 F.3d 1292, 1300 (11th Cir. 2003). To prevail on a claim of ineffective assistance of counsel, a petitioner must show that his counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and that the deficient performance prejudiced the defendant by depriving him of a fair trial with a reliable result. *Raheem v. GDCP Warden*, 995 F.3d 895, 908 (11th Cir. 2021) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

An ineffective-assistance showing involves two prongs: performance and prejudice. Under this framework, a petitioner must show both that (1) counsel's representation was objectively unreasonable, and (2) a reasonable probability exists that, without counsel's unprofessional errors, the proceeding's result would have differed. *Id.* We evaluate an attorney's performance by whether it was reasonable "under prevailing professional norms," and we judge that "on the facts of the particular case." *Strickland*, 466 U.S. at 688, 690. In performing our review, we apply "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

And when we perform a *Strickland* analysis within the AEDPA framework, which requires us to defer to state rulings that are not unreasonable, our deference to the state court's determination that counsel has performed adequately is "doubly deferential." *Dunn v. Reeves*, 594 U.S. 731, 739 (2021) (quoting *Burt v. Titlow,* 571 U.S. 12, 15 (2013)); *see also Raulerson v. Warden*, 928 F.3d 987, 996–97 (11th Cir. 2019) ("Because *Strickland* provides a most deferential standard for assessing the performance of counsel, when we combine it with the extra layer of deference that § 2254 provides, the result is double deference." (cleaned up)).

Whitton argues that his appellate counsel, Paula Saunders, was constitutionally ineffective in failing to reasonably investigate McCullough's recantation and press for a new trial. But we do not decide the issue of deficient performance because, in any case, Whitton has failed to show that the Florida Supreme Court's prejudice determination was unreasonable.

To establish prejudice based on failure to file a motion, a petitioner must show both that (1) the motion

was "meritorious" and (2) a reasonable probability exists that the outcome of the proceeding would have been different if the motion had been granted. *Taylor v. Sec'y, Fla. Dep't of Corr.*, 64 F.4th 1264, 1271 (11th Cir. 2023).

Whitton argues that, had McCullough submitted an affidavit or otherwise recanted his testimony, Saunders could have moved to remand the case for a new trial. Even if the result of the direct appeal would have been unchanged, he adds, Saunders's failure to investigate "caused irreparable harm to" Whitton's postconviction proceedings. In particular, he points to the fact that the Florida Supreme Court found McCullough's recantation unreliable because it was never memorialized. *See Whitton IV*, 161 So. 3d at 323. What's more, Whitton continues, the state trial court "based its finding" of the avoid-arrest aggravator entirely on McCullough's testimony. *Whitton I*, 649 So. 2d at 867. So had Whitton received a new trial, he posits, it is reasonably possible that the trial court would have found one less aggravator at sentencing.

The State responds that it is objectively unlikely the Florida Supreme Court would have granted any motion to relinquish its jurisdiction and remand for a hearing on McCullough's affidavit. Rather, it argues, Whitton's prejudice argument rests on a chain of "speculative events": (1) the Florida Supreme Court would have had to grant Whitton's motion to relinquish jurisdiction to pursue the McCullough-recantation issue; (2) McCullough would have had to give a sworn statement recanting and maintain that recantation at the hearing despite his perjury fears; (3) the trial court would have had to find McCullough's recantation credible; and (4) the Florida Supreme Court would have had to reverse Whitton's judgment on direct appeal.

To be sure, we don't know whether a court would find McCullough's recantation to be credible, especially given his extensive criminal history. And McCullough may have refused to testify out of fear of a perjury prosecution. But we assume for the sake of argument that there is a reasonable probability that the first three "speculative events" would have occurred.

Even so, though, given the substantial evidence against Whitton—the blood spatter, the motel clerk's testimony, Whitton's own admission that he returned to the motel, and other circumstantial evidence—we can't say the Florida Supreme Court unreasonably found that McCullough's recantation was insufficient to warrant a new trial. As we've covered, the Florida Supreme Court concluded Whitton could not establish prejudice on his *Strickland* claim because (1) "recantations are not credible"; (2) "[w]ithout McCollough's testimony, Ozio's testimony would still have provided the jury with evidence that Whitton admitted to murdering Mauldin"; and (3) Ozio's testimony, "coupled with the overwhelming evidence against Whitton, makes it extremely unlikely that McCollough's recantation would have changed the outcome of the trial." *Whitton IV*, 161 So. 3d at 334. And for the same reasons we explained in the last section, we can't say the Florida Supreme Court's prejudice determination was unreasonable.

Next, we address Whitton's contention that Saunders's failure to investigate and memorialize McCullough's recantation prejudiced Whitton's postconviction proceedings. For this claim, Whitton trains his arguments on the wrong proceeding. The relevant inquiry is whether Saunders's deficient performance prejudiced Whitton's *appeal*, not his future postconviction proceedings. *See Heath v. Jones*, 941 F.2d 1126, 1132 (11th Cir. 1991) (holding prejudice is shown if "the

neglected claim would have a reasonable probability of success *on appeal*" (emphasis added)); *cf. also Purvis v. Crosby*, 451 F.3d 734, 739 (11th Cir. 2006) (explaining "when the claimed error of counsel occurred at the guilt stage of a trial (instead of on appeal) we are to gauge prejudice against the outcome of the trial: whether there is a reasonable probability of a different result at trial, not on appeal"). True, trial and appellate counsel in death-penalty cases *should* act with an eye towards postconviction litigation. As a practical matter, though, a holding that the prejudice prong may be satisfied through an adverse impact on future postconviction litigation would expand the scope of cognizable *Strickland* claims. So we cannot say the Florida Supreme Court ran afoul of clearly established federal law. *See* 28 U.S.C. § 2254(d)(1).

And in any event, even if McCullough had signed a sworn statement and testified in the postconviction proceedings, a postconviction court may well have found that recantation not to be credible. Or a postconviction court may well have decided any *Giglio* claim the way the district court decided the Ozio-related *Giglio* claim here. In other words, we don't find a reasonable probability that, based on McCullough's recantation alone, Whitton would have obtained postconviction relief.

Even taking McCullough's recantation and Ozio's recantation together, we can't say that "there is a reasonable probability that . . . the result of the [postconviction] proceeding would have been different." *Strickland*, 466 U.S. at 694. That's so because, as we've discussed, the Florida courts determined that otherwise "overwhelming evidence [existed] against Whitton." *Whitton IV*, 161 So. 3d at 334; *cf. also Green v. Sec'y, Dep't of Corr.*, 28 F.4th 1089, 1151 (11th Cir. 2022) (concluding "it would not be unreasonable for a jury to credit these

witnesses' original testimony and discredit their new versions, just as the [state court] did").

And as to the avoid-arrest aggravator, the sentencing court found four other aggravators: (1) Whitton was on parole; (2) Whitton had a previous felony conviction involving the use or threat of violence; (3) the murder was committed for pecuniary gain; and (4) the crime was especially heinous, atrocious, or cruel. Based on these other findings and this record, we don't see a reasonable probability that the sentencing jury and court would have declined to impose a death sentence in the absence of the avoid-arrest aggravator. The Florida Supreme Court, after all, has said that the heinous, atrocious, and cruel aggravator "is among the weightiest . . . in the statutory scheme." *Rigterink v. State*, 66 So. 3d 866, 900 (Fla. 2011).

Having rejected each of Whitton's prejudice arguments, we cannot conclude that the Florida Supreme Court's prejudice determination was an unreasonable application of *Strickland*. *See* 28 U.S.C. § 2254(d)(1). We thus affirm the district court's denial of habeas relief on Whitton's claim that Saunders was constitutionally ineffective on appeal.

C. Whitton's trial counsel was not prejudicially ineffective in marshalling mitigatory evidence in the penalty phase.

Whitton next argues that his trial counsel was constitutionally ineffective at the penalty and mitigation phase of trial.

Penalty-phase counsel has an "obligation to conduct a thorough investigation of the defendant's background" for potential mitigation evidence. *Williams*, 529 U.S. at 396. When we determine the constitutional adequacy of counsel's performance, we look to the practices a typical,

adequate counsel undertakes "in preparing for the sentencing phase of a capital trial." *Rompilla v. Beard*, 545 U.S. 374, 380 (2005). Defense counsel's main goal is to counter the State's alleged aggravating circumstances with "evidence in mitigation." *Id.* at 381. Still, to perform adequately, counsel need not "investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." *Wiggins v. Smith*, 539 U.S. 510, 533 (2003).

As for prejudice, we consider "whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. Prejudice may occur when newly adduced descriptions and details about the defendant's "depth of abuse . . . far exceeded what the jury was told." *Johnson v. Sec'y, DOC*, 643 F.3d 907, 936 (11th Cir. 2011).

We agree with Whitton that counsel could have presented a more compelling mitigation case here. But even so, we can't say that the Florida Supreme Court's no-prejudice determination was an unreasonable application of *Strickland*. To explain why, we first recount the relevant mitigation evidence from trial and from postconviction proceedings. Then we discuss the Florida Supreme Court's application of *Strickland*'s prejudice principles.

1. Additional mitigation evidence from postconviction proceedings

James Tongue handled Whitton's penalty-phase defense. Tongue had worked at the public defender's office for less than three years and had only second-chaired a capital case. He was in private practice beforehand and had never handled a felony criminal case.

In postconviction proceedings, he testified that his mitigation strategy was to humanize Whitton and focus on his present good deeds.

According to his notes, Tongue spoke to three family members, all on the same day, but did not attempt to contact any of Whitton's other (seven) siblings. Tongue did not find it necessary to travel to New York (where Whitton grew up) to speak to Whitton's family members. He did not contact Whitton's teachers, foster parents, aunts and uncles (besides his aunt Ruth), or other childhood acquaintances. Nor did he request welfare or foster-care records, records of Whitton's brother's death, or other records from Whitton's childhood.

At the penalty phase of trial, Whitton's brother Royal testified that their parents drank daily, someone was whipped daily, their mother Dot would put their heads in the toilet, and their father Roy threw Whitton into a wall once. Royal said the kids tore plaster off the walls of their room to burn for heat. The children slept on the floor or in a bed in one large room with a broken window. And sometimes there was snow on the bed. Royal testified that Whitton was "lucky" because Royal got most of the abuse in the family.

Whitton's aunt Ruth testified at trial that she never saw Whitton's father abuse him. And though she testified to specific incidents of Whitton's mother's abuse, only one involved Whitton directly: When Whitton was four or five, his mother forced him to sit outside in the snow in wet clothing rather than come into the house. Ruth also testified that Whitton's mother fed her babies paregoric and wine and would often slap, hit, or throw her children.

Valerie Brookins, Whitton's sister, attended the trial. But the defense did not call her as a witness. Instead, the defense told her, "We don't need you." Yet Tongue

testified that had a family member with potentially helpful testimony attended the trial, he would have called that family member.

Tongue also called a mitigation expert, Dr. Larson. Dr. Larson spoke to Whitton for only two hours. His primary task was to evaluate Whitton for competency. Dr. Larson believed that he could not opine on non-statutory mitigators because Whitton "denie[d] any wrongdoing relative to the charges."

After Whitton's conviction, two of Whitton's siblings swore in affidavits that they believed Whitton's mother killed their brother Michael by beating him to death, based on stories from other relatives. Dr. LeRoy Riddick, a forensic pathologist who reviewed Michael's autopsy, testified at the postconviction hearing that Michael "died from blunt force injuries" and "child abuse."

Other Whitton siblings confirmed that their father beat his children with "belts, branches, and fists—anything [he] could get his hands on." In his affidavit, Timothy Whitton recounted a time his father "threw [him] head first through a wall," after which he had to wear an eye patch. The children were starved and in constant fear of their parents. Their father sexually abused Valerie, and their uncle sexually abused several of the Whitton siblings.

Neighbors "describe[d] the Whitton family as the worst family in terms of loving their children, taking care of their children, providing for their children that they had ever seen." The house had no indoor plumbing, and the beds were constantly urine-soaked. A former babysitter, who reported the parents to the Department of Social Services, recounted "mice and rats running around." Whitton's aunt recounted the "filthy" and "vermin infested" living conditions and lack of health care,

even when the children fell ill. The children were teased for poor hygiene and lack of clothing.

The family moved closer to Whitton's great aunt for help with childcare after Michael's death. The parents continued to drink and abuse their children. For example, Dot would sit them in a plastic chair with "wrought iron handles . . . about . . . [the] length of a love seat. . . . [A]nd she would tie them on there with rope." She would also make "them kneel on a five-pound bag of sugar for hours or mak[e] them stand in the corner with a pound brick of butter in each hand with their arms extended."

Whitton's parents separated, and his father requested that the children be put in foster care. By that point, the children were essentially unsupervised; they would ask neighbors to "use the phone frequently in the evenings to call local bars looking for their mother." Dot did not cooperate with the foster-care workers but continued "gallivanting and le[aving] her children alone." Roy "abandoned his job and left," for which the court placed him under a child-support order.

The children bounced around from place to place. Lois Langworthy, Roy's former co-worker, took in the children. At the time, Whitton was "dirty and smelly and virtually without clothes." But under Langworthy's care, Whitton "began to fit in" and "to improve in school," even attending church. Frustrating these improvements, Roy would pick up Whitton and take him to a "booze joint," providing Whitton with alcohol.

As for Whitton's cognitive functioning, his elementary-school principal, Max Bovee, testified that the school nurse and teachers were concerned about Whitton's motor skills and attention-deficit problems. Bovee opined that Whitton had brain damage and

cognitive dysfunction based on his lack of coordination, learning difficulties, and hyperactivity.

Whitton's postconviction expert, Dr. Woods, diagnosed Whitton with Fetal Alcohol Spectrum Disorder, left frontal lobe impairment, alcoholism, and Post-Traumatic Stress Disorder. Dr. Woods opined that Whitton "clearly has impairments of memory sequencing and [in his] ability to weigh and deliberate," indicative of "brain damage." In Dr. Woods's view, the "documented depravity" that Whitton experienced "impairs one cognitively as well as the soul."

Based on his review of Whitton, Dr. Woods testified that, "to a reasonable degree of neuropsychiatric certainty," Whitton qualified for two statutory mitigators: (1) a "substantially impaired" capacity to conform his conduct to the law and (2) an "extreme mental or emotional disturbance." Dr. Woods further opined that Dr. Larson had not diagnosed Whitton with these impairments because he lacked the necessary social and medical information.

Another neuropsychologist, Dr. Barry Crown, opined that Whitton "has a significant neuropsychological impairment impacting language-based critical thinking, information storage and retrieval."

2. The Florida Supreme Court reasonably determined that missed mitigating evidence did not prejudice Whitton's penalty-phase case.

Whitton argues that Tongue "had no viable strategic reason for not delving into Petitioner's childhood and ensuing trauma" to the extent that postconviction counsel did. And, he claims, a reasonable probability exists that he would have received a different sentence if the mitigation

evidence uncovered postconviction had been before the court at sentencing.

The State argues that we cannot reach the additional records and affidavits under AEDPA because they were not admitted as substantive evidence; rather, "they were only admitted for the limited purpose of showing what Dr. Woods relied on in reaching his conclusions." They cannot, in the State's view, support an ineffective-assistance claim. And even if we can consider it as substantive evidence, the State asserts, the additional lay-mitigation evidence was cumulative. The State also argues that the expert claim is "a non-cognizable claim of ineffective-assistance-of-expert."

The Florida Supreme Court characterized both the childhood and mental-health-expert evidence as "cumulative" to that presented at the penalty phase, so it found that Whitton could not establish prejudice. *Whitton IV*, 161 So. 3d at 332. In the district court's view, this finding was not unreasonable because Tongue "presented a substantial mitigation case" and "[h]e made his point." We affirm that holding.

To make a prejudice determination under *Strickland*, courts must "evaluate the totality of the available mitigating evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence in aggravation." *Williams*, 529 U.S. at 397–98. As for our role, we must ensure the Florida Supreme Court did not unreasonably apply federal law, as the Supreme Court of the United States has clearly established it. *See Pye*, 50 F.4th at 1041–42. After considering all the evidence, we conclude that Whitton's case is materially distinguishable from the cases in which we and the Supreme Court have found ineffective penalty-phase assistance and on which

Whitton relies—*Williams*, *Wiggins*, *Rompilla*, *Sears*, and *Porter*.

We begin with *Williams*. There, penalty-phase counsel entirely "failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood." 529 U.S. at 395. This failure, the Court held, was constitutionally deficient performance. *See id.* at 396. And as for prejudice, the Court found that the "graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability." *Id.* at 398. Here, by contrast, counsel did not altogether fail to undertake a mitigation investigation. And although the presented mitigating evidence was certainly not as comprehensive as Whitton's postconviction evidence was, the jury did hear "graphic description[s]," *see id.*, of Whitton's childhood abuse.

Similarly, in *Wiggins v. Smith*, the Court found that "[c]ounsel's decision not to expand their [mitigation] investigation beyond the PSI and the [Department of Social Services] records" was constitutionally deficient. 539 U.S. 510, 524 (2003). That failure was prejudicial, the Supreme Court concluded, because the "sentencing jury heard only one significant mitigating factor"—"that Wiggins had no prior convictions." *Id.* at 537. And had "the jury been able to place petitioner's excruciating life history on the mitigating side of the scale," it reasoned, there was "a reasonable probability that at least one juror would have struck a different balance." *Id.* But unlike in *Wiggins*, Whitton's penalty-phase jury unanimously recommended a death sentence even after hearing Royal's and Ruth's testimony about his child abuse. And Whitton's sentencing court credited that testimony, as well as several other mitigating factors; Whitton was not

limited to just "one" theory of mitigation, as Wiggins was. Given the several aggravators and grisly details of the murder, and the fact that the jury was already aware of Whitton's troubled childhood (albeit in less detail), this case differs from *Wiggins*.

And in *Rompilla*, the Court found that penalty-phase counsel was constitutionally deficient for failing to investigate the defendant's criminal history, on which the State intended to rely as an aggravator. *See* 545 U.S. at 390. It was "uncontested" that review of the defendant's criminal record would have triggered "a range of mitigation leads that no other source had opened up," including information about "Rompilla's childhood and mental health" that differed "from anything defense counsel had seen or heard." *Id.* at 390. But here, and unlike in *Rompilla*, Tongue's penalty-phase evidence did not paint a "benign" picture of Whitton's "upbringing and mental capacity." *Id.* at 391. Nor did Tongue make only a "few naked pleas for mercy," *id.* at 393; he presented a mitigation case related to Whitton's upbringing. And he showed that Whitton had had a difficult childhood, complete with abuse and deprivation. *Rompilla* does not help Whitton here—if anything, it supports the State's position.

Porter v. McCollum, is even further afield. 558 U.S. 30 (2009) (per curiam). There, penalty-phase counsel "failed to uncover and present any evidence of [the defendant's] mental health or mental impairment, his family background, or his military service." *Id.* at 40. That deficient performance, the Court concluded, was prejudicial because the "judge and jury at Porter's original sentencing heard almost nothing that would humanize Porter or allow them to accurately gauge his moral culpability." *Id.* at 41; *cf. Ferrell v. Hall*, 640 F.3d 1199, 1236 (11th Cir. 2011) (finding prejudice where "the

jury heard absolutely nothing about the substantial mitigating evidence"); *Hardwick v. Sec'y, Fla. Dep't of Corr.*, 803 F.3d 541, 559 (11th Cir. 2015) (finding prejudice where "jury and the trial judge, however, heard none of" the "powerful mitigating evidence," which "enabled the prosecutor to emphasize repeatedly in closing arguments that there were no mitigating circumstances in Hardwick's case"); *Daniel v. Comm'r, Ala. Dep't of Corr.*, 822 F.3d 1248, 1254 (11th Cir. 2016) (similar).

But here, Tongue did not fail to "present any evidence," *Porter*, 558 U.S. at 40, of Whitton's abusive childhood. And although additional mitigation evidence could have painted a more sympathetic picture, the sentencing court heard from multiple witnesses who attempted to "humanize," *id.* at 41, Whitton.

Most recently, in *Sears v. Upton*, the Court found both deficient performance and prejudice where "evidence relating to [the defendant's] cognitive impairments and childhood difficulties was not brought to light at the time he was sentenced to death." 561 U.S. 945, 946 (2010) (per curiam). Penalty-phase counsel "presented evidence describing [the defendant's] childhood as stable, loving, and essentially without incident," but the opposite was true. *Id.* at 947–48. Here, though, Tongue did no such thing. He portrayed Whitton's childhood as difficult.

The sentencing court explicitly afforded substantial weight to Whitton's background mitigation. And Whitton's postconviction evidence, while certainly compelling, told a "more detailed version of the same story told at trial," not an entirely new story. *Holsey v. Warden, Georgia Diagnostic Prison*, 694 F.3d 1230, 1261–64, 1266 (11th Cir. 2012) (finding no prejudice where "the basic story of his troubled, abusive childhood was

nonetheless known to the sentencing court," even if postconviction counsel presented "more details" and "different examples" (cleaned up)); *Cullen v. Pinholster*, 563 U.S. 170, 200 (2011) (same, where the "'new' evidence," including school records and testimony from additional siblings as to child abuse, "largely duplicated the mitigation evidence at trial"); *Ferguson v. Comm'r, Ala. Dep't of Corr.*, 69 F.4th 1243, 1261 (11th Cir. 2023) ("While more mitigation witnesses could have presented more details or different examples of these unfortunate aspects of [the defendant's] life, these aspects were nonetheless known to the sentencing jury and judge."). Not only that, but we have "repeatedly held that even extensive mitigating evidence wouldn't have been reasonably likely to change the outcome of sentencing in light of a particularly heinous crime and significant aggravating factors." *Pye*, 50 F.4th at 1049 (collecting cases). And that was the case here.

To be sure, "counsel's effort to present some mitigation evidence" does not "foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant." *Sears*, 561 U.S. at 955. But a defendant is not prejudiced just because counsel could have presented more mitigation evidence. And although we may not have necessarily characterized the powerful and disturbing evidence uncovered in postconviction as "cumulative," the Florida Supreme Court's determination to that effect was not an unreasonable application of *Strickland*. *See* 28 U.S.C. § 2254(d)(1). As the district court found, Tongue "made his point," and the Sixth Amendment does not require him to have made it as persuasively or comprehensively as possible. *Cf. King v. Warden, Ga. Diagnostic Prison*, 69 F.4th 856, 875 (11th Cir. 2023) (ex-plaining "counsel is not

ineffective whenever more witnesses could have been called").

As to Whitton's claim that Dr. Larson was inadequate, Whitton conflates ineffective assistance of counsel with ineffective assistance of an *expert*. True, we have recognized the "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." *United States v. Fessel*, 531 F.2d 1278, 1279 (5th Cir. 1979). But *Fessel* involved counsel's failure to obtain expert psychiatric testimony altogether, not an argument that the expert's report was not sufficiently comprehensive. And because evidence that Whitton had some mental defects was already before the jury, we cannot conclude that Tongue's failure to obtain a more comprehensive psychological evaluation was prejudicial. *Cf. Thornell v. Jones*, 602 U.S. 154, 166–71 (2024) (finding no prejudice where state court already received testimony that the defendant "suffers from a major mental illness" and has "cognitive impairment," even if not in the same level of detail, in light of the "weighty aggravating circumstances present"); *Sochor v. Sec'y Dep't of Corr.*, 685 F.3d 1016, 1031 (11th Cir. 2012) (same, where petitioner "fail[ed] to explain why the judge and jury would have been any more likely to accept such a theory when the underlying mental health issue" was one diagnosis as opposed to another).

In sum, we affirm the district court's conclusion that the Florida Supreme Court's application of *Strickland* was not unreasonable.

D. Whitton cannot show any Doyle *violations prejudiced the outcome of his trial.*

Finally, Whitton argues that three references to his invocation of his right to remain silent violated his *Doyle* rights and were not harmless. Those references occurred

during (1) Officer Cotton's testimony, (2) Whitton's testimony, and (3) the prosecutor's closing argument.

First, Officer Cotton's testimony contained the following exchange:

> A: [. . .] And at 0515 a.m., he decided, once we were getting much closer to what we felt was the truth and we were tightening down on him being at the murder scene, he decided he did not want to talk to us anymore.
>
> Q: Did he tell you he went to the police at midnight on the 2nd (sic) and said, "Hey, I found a body in a room; my friend is dead."?
>
> A: No, sir, he did not.

Second, during Whiton's testimony, the prosecutor asked,

> Q: And what did you do when you told him, what did you do after that when you told him you didn't go back there?
>
> A: I told him --
>
> Q: You didn't say anymore, did you?
>
> A: Excuse me?
>
> Q: You didn't say anymore then, did you?
>
> A: No, I did tell him after awhile that I did go back there.
>
> Q: And when you told him that, then you didn't say nothing else.
>
> A: No, sir.

Defense counsel did not object to either line of questioning.

And third, in his closing statement at trial, the prosecutor said the following:

> But in the last part of that interview, before the defendant says, "I'm not talking to you anymore," he tells him, "I went back over there, I walked in, and I saw my friend dead, and I left." Then he doesn't say anything else. He realizes at that point, "Uh-oh."

Defense counsel objected and moved for a mistrial based on those "improper comments" as to Whitton's invocation of his right to remain silent. The court denied the defense's motion for a mistrial but offered to give a curative instruction. Defense counsel declined so as not to "call[] attention to exactly what he's done" and "compound[] the problem." The court did, however, instruct the jury at the start of trial that it could not "draw any inference of guilt" from "the exercise of a defendant's right to remain silent."

On direct appeal, the Florida Supreme Court concluded that there was "no reasonable possibility that the improper comment[s] contributed to Whitton's conviction," especially given the "substantial amount of permissible evidence that conclusively proves Whitton's guilt." *Whitton I*, 649 So. 2d at 864–66. On federal habeas review, the district court held that this finding was not unreasonable given "the overall strength of the evidence as well as what Mr. Whitton said before invoking his right to remain silent."

Whitton argues that this conclusion was based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d)(2). In response, the State contends, he has abandoned any challenge under § 2254(d)(1). Also, in the State's view, because defense counsel refused a curative instruction at trial, "law and justice do not permit [Whitton] to take advantage of his refusal in federal court

decades later." But regardless of whether § 2254(d)(1) or (d)(2) is the operative provision, or whether the State's "law and justice" argument has merit, Whitton's challenge fails because he cannot prove prejudice.

To briefly recap the relevant law, a prosecutor cannot use a defendant's invocation of his right to remain silent to impeach his exculpatory testimony. *See Doyle v. Ohio*, 426 U.S. 610, 619 (1986). The *Doyle* rule "rests on the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial." *Wainwright v. Greenfield*, 474 U.S. 284, 291 (1986) (citation and internal quotation marks omitted). But *Doyle* errors are subject to *Brecht*'s harmlessness inquiry. *See, e.g.*, *Hill v. Turpin*, 135 F.3d 1411, 1416 (11th Cir. 1998).

On the one hand, "we have declined to find *Doyle* error harmless in those cases where the prosecutor returned repeatedly to the defendant's post-*Miranda* silence throughout trial to impeach a plausible exculpatory story offered by the defendant." *Id.* at 1417.

For example, in *Hill*, "on four separate occasions during [the defendant's] trial, the prosecution brought to the jury's attention Hill's post-*Miranda* silence and request for counsel," in violation of the court's order *in limine*. *Id.* at 1414. The court admonished the prosecutor and gave two curative instructions. *See id.* at 1415. But the prosecutor continued to reference the defendant's invocation of his *Miranda* rights, though his "remarks during closing argument [were] somewhat ambiguous." *See id.* at 1415 n.4. We held that the *Doyle* violations were not harmless given "the importance of Hill's credibility to his defense, the repeated and deliberate nature of the prosecution's *Doyle* violations, and the significant

weaknesses in the state's case against Hill." *Id.* at 1416–17; *see also United States v. Tenorio*, 69 F.3d 1103, 1107 (11th Cir. 1995) (*Doyle* error not harmless where the defendant's "silence was the touchstone of the government's case-in-chief, its cross-examination of the defendant, and its closing argument" and "could reasonably have been the basis for the [jury's] guilty verdict").

On the other hand, "we have repeatedly held *Doyle* error harmless where the violation consisted of only a single reference to the defendant's post-*Miranda* silence during the course of a trial at which the government's evidence was otherwise overwhelming." *Hill*, 135 F.3d at 1417 (first citing *United States v. Gabay*, 923 F.2d 1536, 1541 (11th Cir. 1991); then citing *United States v. Ruz–Salazar*, 764 F.2d 1433, 1437 (11th Cir. 1985); and then citing *Sullivan v. Alabama*, 666 F.2d 478, 485 (11th Cir. 1982)); *see also Prevatte v. French*, 547 F.3d 1300, 1305 (11th Cir. 2008) (finding *Doyle* error to be harmless where we were "overwhelmed by the evidence of [the defendant's] guilt, separate and apart from any evidence of his post-arrest silence"); *United States v. Miller*, 255 F.3d 1282, 1286 (11th Cir. 2001) (same, where improper questioning "took only moments of the trial" and "the government's evidence of guilt was strong"). That includes cases where the *Doyle* violation was "'isolated' or 'unintentional' or promptly addressed by a curative instruction from the trial court." *Hill*, 135 F.3d at 1417.

Whitton contends the *Doyle* violations here "were repeated throughout the trial, and were used to show both consciousness of guilt and to impeach Petitioner's plausible explanation for not initially wanting to admit he returned to the motel."

But we conclude this case is closer to *Brecht* itself, where the Supreme Court found the *Doyle* errors to be harmless because they "were infrequent, comprising less than two pages of the 900–page trial transcript," and "the State's evidence of guilt was, if not overwhelming, certainly weighty." 507 U.S. at 639.

Just as in *Brecht*, Whitton cites three comments throughout the entire trial, contrasted with the substantial evidence of his guilt: the blood spatter on his boots, the motel clerk's testimony, his own admission that he returned to the motel (and originally lied about it to the police), and other circumstantial evidence. (That is, of course, ignoring Ozio and McCullough's testimony that Whitton confessed to the murder). Although the prosecutor's "Uh-oh" comment was certainly improper, it was five lines in 30 pages of closing argument. And defense counsel declined a curative instruction—a declination that was a deliberate, strategic decision to not call more attention to the matter. Given this case's resemblance to *Brecht*, we conclude that Whitton cannot meet his burden to show that the Florida Supreme Court's harmless-error conclusion was based on an unreasonable determination of the facts or the law. *See* 28 U.S.C. § 2254(d)(1)–(2). We thus affirm the district court's denial of relief on Whitton's *Doyle* claim.

IV. CONCLUSION

Accordingly, we affirm the district court's denial of Whitton's federal habeas petition.

AFFIRMED.

APPENDIX B

[FILED: NOVEMBER 30, 2022]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

GARY RICHARD WHITTON,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

_____/

CASE NO. 4:15cv200-RH

ORDER DENYING THE PETITION

By petition for a writ of habeas corpus under 28 U.S.C. § 2254, Gary Richard Whitton challenges his state-court conviction and death sentence. The most substantial issues arise from a jailhouse snitch's recanted testimony, the prosecutor's improper comments on silence, and the penalty-phase attorney's failure to present additional mitigating evidence. This order denies the petition but grants a certificate of appealability on these issues.

The order sets out the essential facts in section I, summarizes the proceedings in section II, and sets out the standard of review in section III. In sections IV through XVIII, the order addresses Mr. Whitton's claims in this sequence: guilt phase, penalty phase, sentencing, appeal. The order addresses a certificate of appealability in section XIX and concludes in section XX.

I. Facts and Proceedings

A. Chronology

In 1989, Mr. Whitton met the victim, James S. Maulden—the record sometimes spells it "Mauldin"—at a halfway house for recovering alcoholics in Pensacola, Florida. They became friends and stayed in contact. Mr. Maulden left for a stint working offshore and returned to Pensacola on October 6, 1990. He stayed one night at a motel, then stayed at Mr. Whitton's home on the nights of October 7 and 8.

On Tuesday, October 9, Mr. Whitton drove Mr. Maulden to a bank in Destin, Florida, a little over an hour away. Mr. Whitton entered the bank with Mr. Maulden, who withdrew his account's balance of $1,135.88. Mr. Whitton then drove Mr. Maulden to a small, inexpensive motel in Destin, probably arriving there before noon.

Mr. Maulden was intoxicated. Perhaps for that reason, Mr. Whitton completed the registration paperwork. The clerk thought this strange and mentioned it to his brother-in-law, who was in the office. As Mr. Whitton moved his car from the office to the assigned room, the brother-in-law told the clerk that the car had an Alabama license plate. The clerk knew, though, that on the registration form, Mr. Whitton listed a Florida license plate. As it turns out, Mr. Whitton also listed an incorrect plate number. The clerk later went out, obtained the correct information, and recorded it on the registration form.

In the meantime, Mr. Whitton and Mr. Maulden entered the assigned room. After talking briefly, they went across the street to a gas station and convenience store, where Mr. Maulden bought cigarettes and a bottle of wine. They returned to the room, smoked, and talked

briefly before Mr. Whitton left. On his way back to Pensacola, Mr. Whitton stopped at a mutual friend's residence and told her he had left Mr. Maulden at the motel. The friend told Mr. Whitton that Mr. Maulden's mother was looking for Mr. Maulden.

At some point that afternoon, Mr. Maulden asked the motel clerk to call a cab so he could go into Destin. The clerk did so. The record does not show where Mr. Maulden went, what he did there, or how long he was gone from the motel.

Only two of the motel's rooms were rented that night. The motel clerk went to bed in his own room at the motel at about 10:30 p.m. Later—the clerk isn't sure how much later—he heard a car door shut. He looked out and saw Mr. Whitton's car back at the motel but parked four rooms away from Mr. Maulden's room. The clerk went back to bed. At perhaps 12:20 a.m.—now after midnight so very early on Wednesday, October 10—the clerk again heard a car door. The clerk looked out and saw someone sitting in the same car. The person got out, opened the trunk, got back in the car, and started it. The clerk again went back to bed. The clerk did not know it, but by that time Mr. Maulden had been viciously murdered, and his money was gone. The clerk does not know how much time passed between the first and second times he was awakened by the car door.

At 2:37 a.m. on October 10, Mr. Whitton bought gas in Pensacola. Later that day—during business hours on October 10—Mr. Whitton renewed his car registration and paid his overdue gas and electric bills with cash. He had dinner with friends.

B. Forensics

At about 11:00 a.m. on October 10, the clerk found Mr. Maulden's body in his room and contacted law enforcement. The responding officer found Mr. Maulden's pockets turned out and no currency anywhere. Blood spatter all around the room indicated there had been a struggle. Mr. Maulden had numerous injuries and stab wounds, including three to the heart and one into the brain. His skull was fractured. He had wounds to his arms and hands consistent with attempts to defend himself.

The medical examiner put the time of death at 11:00 p.m. or later. He said Mr. Maulden's movements around the room during the attack indicated he was conscious even though he had a blood alcohol level of .34. The medical examiner said the struggle and death occurred within a period of 30 minutes at most.

Several items in the room—an ice bucket, wine bottle, sandwich wrapper, and paper bag—had fingerprints that did not match Mr. Maulden or Mr. Whitton. Like most but not all individuals, Mr. Maulden and Mr. Whitton were "secretors"—they secreted material in their saliva that allowed blood typing. Officers found cigarette butts in the room with saliva matching Mr. Maulden's blood type, others matching Mr. Whitton's blood type, and one that could not be matched to any blood type, perhaps but not necessarily indicating the smoker was not a secretor.

Based on the license-plate number provided by the motel clerk, law enforcement officers identified Mr. Whitton. Officers seized his boots. There were blood spatters on both the outside and inside. A state serologist said the blood matched Mr. Maulden's blood type, but a state DNA expert said the blood on a swab she was provided did not match either Mr. Whitton or Mr. Maulden.

Officers located trace amounts of blood in Mr. Whitton's car. The state serologist again said the blood matched Mr. Maulden's blood type. No DNA analysis was done on that blood.

C. Mr. Whitton's Post-Miranda Statements

Officers contacted Mr. Whitton after midnight on October 10—that is, in the early morning hours of October 11. The officers advised Mr. Whitton of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), including the right to remain silent. They questioned him from about 2:00 to 5:15 a.m. Mr. Whitton said he took Mr. Maulden to the motel on Tuesday morning and helped him check in but soon left and never returned. After further questioning, Mr. Whitton admitted that he returned to the motel that night. He said he did this to advise Mr. Maulden that his mother was looking for him. Mr. Whitton said he went into the room, walked in blood on the floor, found Mr. Maulden dead, and left.

Mr. Whitton said there were holes in his boots—this might explain blood on the inside as well as outside of the boots but apparently would not explain splatters—and that he threw away his blood-soaked socks on his way back to Pensacola.

After making these and other statements, Mr. Whitton invoked his right to remain silent. Officers asked no more questions.

D. Jailhouse Snitches

Mr. Whitton was detained prior to trial. Two cellmates, Jake Ozio and Kenneth Wayne McCollough, testified that they heard Mr. Whitton admit that he committed the murder—that he "stabbed the bastard." Mr. Ozio has recanted, and Mr. McCollough apparently

said he intended to recant, but he did not do so before he died.

E. State-Court Proceedings

An indictment charged Mr. Whitton with first-degree murder and robbery. The state's case in chief at trial included most of the evidence set out above, with the notable exception of the DNA evidence. Mr. Whitton presented the DNA evidence during the defense case. More importantly, Mr. Whitton testified. He admitted he first told officers he did not return to Mr. Maulden's room, but he said, as he eventually told the officers, that in fact he *did* return to the room. He said Mr. Maulden was dead when he got there. He said he went into the room, walked in blood on the floor, found Mr. Maulden dead, and left. Mr. Whitton said he did not report the death because he did not wish to get involved.

Mr. Whitton testified that his boots were old, had holes in them, and that after leaving the room, his feet felt wet. Nobody asked him about his socks. He neither admitted nor denied telling officers he threw his socks away en route back to Pensacola.

Mr. Whitton said the reason he returned to the room—driving all the way from Pensacola—was to advise Mr. Maulden that his mother was looking for him. Mr. Whitton said he tried numerous times that day to call Mr. Maulden's mother to tell her where Mr. Maulden was but she never answered her phone. Nobody asked Mr. Whitton why he didn't call Mr. Maulden to tell him his mother was looking for him.

In its rebuttal case, the state presented Mr. Maulden's mother's testimony that she was home when Mr. Whitton said he tried to call, that to her knowledge

her phone was working, and that Mr. Whitton never called.

The jury found Mr. Whitton guilty as charged. After a penalty-phase proceeding, the same jury unanimously recommended a death sentence. The judge sentenced Mr. Whitton to death. The judge found five statutory aggravating factors: (1) Mr. Whitton committed the murder while on parole; (2) Mr. Whitton was previously convicted of another felony involving use or threat of violence; (3) the murder was committed to avoid arrest; (4) the murder was committed for pecuniary gain; and (5) the murder was especially heinous, atrocious, or cruel. The judge found nonstatutory mitigating factors, including Mr. Whitton's deprived childhood, childhood abuse by alcoholic parents, unstable personality, alcoholism, good work ethic, charitable and humanitarian acts toward others, and potential for rehabilitation. The judge concluded that the aggravators outweighed the mitigators.

Mr. Whitton appealed. The Florida Supreme Court affirmed. *Whitton v. State*, 649 So. 2d 861, 867 (Fla. 1995) ("*Whitton I*").

In 1997, Mr. Whitton moved for postconviction relief in the state circuit court under Florida Rule of Criminal Procedure 3.850. After amendments, Mr. Whitton asserted 29 claims. The court—sometimes referred to in this order as the 3.850 court—held an evidentiary hearing in 2005 on 18 of the claims. The court denied all the claims in 2011.

Mr. Whitton appealed to the Florida Supreme Court and also filed there a petition for a writ of habeas corpus alleging ineffective assistance of appellate counsel. The court affirmed the denial of postconviction relief and

denied the petition. *Whitton v. State*, 161 So. 3d 314 (Fla. 2014) ("*Whitton II*").

Mr. Whitton filed a successive postconviction motion in state circuit court challenging the constitutionality of the Florida sentencing procedure—a challenge based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that a defendant is entitled to a jury trial on any fact that increases the maximum sentence that could be imposed on a charged offense), *Ring v. Arizona*, 536 U.S. 584 (2002) (applying *Apprendi* to any fact that makes a defendant eligible for a death sentence), and *Hurst v. Florida*, 577 U.S. 92 (2016) (holding the Florida death-penalty procedure unconstitutional under *Ring*). The court denied the claim, and the Florida Supreme Court affirmed. *Whitton v. State*, 238 So. 3d 724, 725 (Fla.) ("*Whitton III*"), *cert. denied*, *Whitton v. Florida*, 139 S. Ct. 328 (2018).

F. Federal Proceedings

Mr. Whitton filed this federal § 2254 petition raising multiple claims. The case was stayed pending adjudication of the successive state-court petition. After the state court's ruling, an evidentiary hearing was conducted in this court on one issue: the state's presentation of, or failure to correct, Mr. Ozio's allegedly false testimony.

II. Standard of Review

Because Mr. Whitton filed this federal petition after the effective date of the Antiterrorism and Effective Death Penalty Act, the Act applies. *See, e.g.*, *(Michael) Williams v. Taylor*, 529 U.S. 420, 429 (2000). Relief is available only on the ground that Mr. Whitton "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). And relief is available only if the violation had a "substantial and

injurious effect or influence" on the conviction or sentence. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

In addition, for a claim the state court rejected on the merits, relief is available only if the ruling "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)–(2). This order sometimes refers to this as "AEDPA deference." A long and ever-growing line of cases addresses this standard. *See, e.g.*, *Shinn v. Kayer*, 141 S. Ct. 517, 523 (2020); *Raheem v. GDCP Warden*, 995 F.3d 895, 907 (11th Cir. 2021).

III. Ozio Testimony

Mr. Ozio was charged with burglary, theft, and possession of a short-barrel shotgun. He was detained pending trial in the same cell as Mr. Whitton and Mr. McCollough. Mr. Ozio testified he heard Mr. Whitton say to Mr. McCollough, "I stabbed the bastard," a clear reference to Mr. Maulden. Mr. Ozio testified that the state offered him nothing in exchange for this testimony.

Mr. Whitton asserts Mr. Ozio's testimony was false in both respects: first, that Mr. Ozio did not hear Mr. Whitton say he stabbed Mr. Maulden; and second, that the state promised Mr. Ozio favorable treatment in his own case in exchange for his testimony against Mr. Whitton. Mr. Whitton asserts the state—that is, the prosecutor or another member of the prosecution team—knew or should have known the testimony was false in both respects.

If the state knew the testimony was false in *either* respect, presenting or failing to correct the testimony

would have been a clear violation of *Giglio v. United States*, 405 U.S. 150 (1972). Under *Giglio*, a prosecutor must not present—and must not fail to correct—evidence known by the prosecutor or any member of the prosecution team to be false. The Eleventh Circuit has said it is enough if undisclosed evidence shows the prosecution "knew, or should have known," a witness committed perjury. *Ventura v. Att'y Gen.*, 419 F.3d 1269, 1276-77 (11th Cir. 2005) (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1976)).

As it turns out, Mr. Ozio's testimony was false only in the first respect—he did not hear Mr. Whitton say he committed the murder. Mr. Ozio's testimony was true in the second respect—he was promised nothing in exchange for the testimony. The state's presentation of Mr. Ozio's false testimony about Mr. Whitton's statement was not a *Giglio* violation, because the state did not know, and had no way of knowing, the testimony was false.

This is the same result but a markedly different analysis than adopted in the state courts. Mr. Whitton raised this claim in his 3.850 motion; the court conducted an evidentiary hearing and rejected the claim; and the Florida Supreme Court affirmed. But the court's analysis "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," and "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). This is explained in this court's order of June 20, 2022. *See* ECF No. 82 at 6–10.

An evidentiary hearing thus was conducted in this court. I find the following facts, partly based on affirmative evidence, and partly based on the absence of

credible evidence to support any finding more favorable to Mr. Whitton, who has the burden of proof.

Mr. Ozio, an 18-year-old visiting from Texas, was facing burglary, theft, and firearm charges. He was guilty and promptly admitted it. He believed—correctly as it turns out—that cooperating with authorities might lead to favorable treatment. He agreed to cooperate by going with officers to locate the shops where he pawned stolen property.

Mr. Ozio was detained prior to trial in the same jail where Mr. Whitton and Mr. McCollough were detained. Mr. Ozio heard multiple discussions of the murder Mr. Whitton was accused of committing, including some by the officers who drove Mr. Ozio to pawn shops, some by correctional officers at the jail, and some by other detainees. ECF No. 116 at 109. Mr. Ozio has no clear recollection of who told him what—understandable because he heard so many things from so many sources.

No officer told Mr. Ozio anything the officer did not believe was true. *Id.* No officer suggested to Mr. Ozio that he should provide false testimony. No officer promised Mr. Ozio anything. But by discussing Mr. Whitton's case in Mr. Ozio's presence, the officers who drove him to pawn shops gave Mr. Ozio the impression that they wished for him to provide any information he possessed implicating Mr. Whitton. Mr. Ozio believed—partly because of the officers' discussion and partly based on his own independent analysis of his circumstances—that implicating Mr. Whitton might lead to favorable treatment. *Id.*

Mr. Ozio did not hear Mr. Whitton admit committing the murder. He falsely told officers he heard Mr. Whitton do so—that he heard Mr. Whitton tell Mr. McCollough, "I stabbed the bastard." The state called Mr. Ozio as a

witness at Mr. Whitton's trial, and Mr. Ozio so testified. Mr. Ozio also testified he was promised nothing for his testimony.

The prosecutor and the officers comprising the prosecution team did not know whether Mr. Ozio's testimony about Mr. Whitton's statement was true. On the one hand, Mr. Ozio said he heard the statement. Mr. McCollough, the only other alleged eyewitness to the statement, gave a similar account. On the other hand, a witness who hopes to obtain more favorable treatment in the witness's own case may have a reason to make a false statement, as the prosecutor and officers surely knew. *See* Eleventh Circuit Pattern Jury Instructions, Criminal Cases S1.2 (noting that plea bargaining is lawful but that "a witness who hopes to gain more favorable treatment may have a reason to make a false statement in order to strike a good bargain with the Government").

It was not a *Giglio* violation for the state to present Mr. Ozio's testimony about Mr. Whitton's statement. This was eyewitness (or ear witness) testimony that was not known to be false, and the circumstances did not show conclusively or with a high probability that it was false. A reasonable prosecutor could have chosen not to present the testimony. But a reasonable prosecutor also could have chosen, as this one did, to present the testimony and let the jury evaluate its credibility. *Giglio* does not require a prosecutor to forgo admissible testimony just because there are inconclusive grounds to question its credibility.

It also was not a *Giglio* violation for the state to let stand Mr. Ozio's testimony that he was promised nothing for his cooperation. The testimony was true—Mr. Ozio was *promised* nothing. He *hoped* to obtain favorable treatment, and in fact he *did* obtain favorable treatment.

But a unilateral hope is much different from an offer, promise, or mutual agreement.

Other considerations do not undermine this conclusion.

First, Mr. Ozio testified at the trial that when he led officers to pawn shops, he was motivated by a desire for favorable treatment, but that when he told officers about Mr. Whitton's statement, the prospect of favorable treatment never crossed his mind. That testimony was false; Mr. Ozio was seeking favorable treatment when he implicated Mr. Whitton. But the prosecutor and prosecution team did not know the testimony was false—only Mr. Ozio had personal knowledge of his own motives. Moreover, the false denial of motivation probably served to undermine, not support, Mr. Ozio's credibility. A cooperating witness's denial of any desire for favorable treatment rarely helps the proponent of the testimony.

Second, Mr. Ozio was sentenced to time served and probation shortly before Mr. Whitton's trial. This was probably more favorable treatment—at least an earlier time-served sentence—than Mr. Ozio would have received absent his cooperation. But expediting the sentencing so that the state's witness would be out of custody before the trial suggests nothing more sinister than the state's desire for its witness to appear as credible as possible. Mr. Whitton asserts the favorable treatment shows that Mr. Ozio was promised favorable treatment in exchange for his testimony—that in fact there was a deal worked out in advance. But that is not so. A benefit can be bestowed even in the absence of an agreement. Mr. Ozio's testimony at the evidentiary hearing in this court was that he was *promised* nothing; that he nonetheless provided false information about Mr. Whitton; and that he obtained

a favorable result in his own case despite the absence of any quid pro quo.

Third, when Mr. Ozio was sentenced to time served, he was allowed to leave Florida and return to Texas. This put him beyond Florida's subpoena authority, but a condition of probation required him to return to testify at Mr. Whitton's trial. This was hardly surprising; he was a material witness in a murder trial. Like the time-served sentence, this was favorable treatment, but nothing indicates Mr. Ozio was promised this treatment in exchange for his testimony. Mr. Ozio's own testimony at the evidentiary hearing in this court was to the contrary.

Fourth, Mr. Ozio had a codefendant, Kelvin Mark Wallace. Like Mr. Ozio, Mr. Wallace was detained pending trial. Mr. Wallace did not cooperate with authorities but received the same sentence as Mr. Ozio—a more lenient sentence than Mr. Wallace expected. When they were released, Mr. Ozio said to Mr. Wallace, "If it wasn't for me, we would still be in there." ECF No. 73-11 at 140. Mr. Whitton asserts this shows Mr. Ozio was promised and received favorable treatment in exchange for his testimony, but it shows only that Mr. Ozio *received* favorable treatment after the fact and believed the reason was his cooperation, not that he was promised that treatment in advance.

Fifth, Mr. Ozio told at least one member of the prosecution team—an individual who was preparing Mr. Ozio to testify—that Mr. Whitton said something to the effect that he discarded a knife into a ravine behind his parents' house. The preparer told Mr. Ozio not to bring this up but to answer truthfully if asked about it. The preparer did not wish for Mr. Ozio to bring this up because the story was plainly false and its telling would undermine Mr. Ozio's credibility. The state's theory in a

different murder case pending against a different defendant was that that defendant discarded a weapon in a ravine behind his parents' house. Mr. Ozio plainly heard talk of this around the jail and mixed up the cases. This came up in Mr. Ozio's state-court deposition in 1992, before the trial, so the information was available to the defense. The state of course has a duty to disclose evidence that is material and favorable to the accused, *see Brady v. Maryland*, 373 U.S. 83 (1963), but the defense had this information, so there was no *Brady* violation. Mr. Whitton's petition does not assert a *Brady* claim on this basis. That Mr. Ozio provided false information about the knife did not indicate the testimony at issue in this proceeding—the testimony that Mr. Whitton said he killed Mr. Maulden—was false.

The bottom line is this. Mr. Ozio testified falsely that Mr. Whitton said he killed Mr. Maulden. But Mr. Whitton has not carried the burden to show that any representative of the state—the prosecutor, any member of the prosecution team, or even any law enforcement officer or correctional officer—knew or should have known, or believed, the testimony was false. Mr. Ozio testified truthfully that he was promised nothing in exchange for the false testimony. Mr. Whitton has not shown that presenting or failing to correct Mr. Ozio's testimony was a *Giglio* violation.

Mr. Whitton also complains that Mr. Ozio testified he had never previously been arrested. In fact, Mr. Ozio had a juvenile record, and the state's files included this information. A person can be adjudicated a delinquent without an arrest, and a juvenile arrest or delinquency order ordinarily would not be admissible to impeach a witness. This testimony, even if false, could not have made a difference.

IV. McCollough Testimony

Mr. McCollough, too, testified at trial that Mr. Whitton said he stabbed Mr. Maulden. Mr. McCollough said he had nothing to gain from this testimony. It turns out Mr. McCollough, unlike Mr. Ozio, gained nothing from his testimony.

Mr. Whitton claims the testimony was false and the state knew or should have known it was false. If so, this would have been a *Giglio* violation. But after the 3.850 hearing, the court found that Mr. Whitton failed to carry the burden of proof on this issue—failed to prove that Mr. McCollough's testimony was false. The Florida Supreme Court upheld the decision. The ruling was not contrary to, and did not involve an unreasonable application of, clearly established federal law, and the ruling was not based on an unreasonable determination of the facts in light of the state-court record.

To be sure, Mr. Whitton presented testimony at the 3.850 hearing that Mr. McCollough was a liar and had a reputation as such. This does not, however, establish that Mr. McCollough was lying about Mr. Whitton's statement. Even liars occasionally tell the truth. And even more clearly, Mr. McCollough's reputation for lying does not mean the state knew or should have known he was lying on this occasion.

In asserting the contrary, Mr. Whitton relies primarily on three things: Mr. McCollough's alleged intent to recant; Mr. McCollough's interest in obtaining favorable treatment on charges against him showing sexual deviance; and Mr. McCollough's relationship with the prosecutor's mother.

A. Intent to Recant

At the 3.850 hearing, fellow inmate Billy Thomas Key testified that Mr. McCollough said he intended to recant. Mr. McCollough died before the hearing—indeed, before being contacted by Mr. Whitton's counsel—so Mr. Key's testimony is the only evidence that Mr. McCollough intended to recant. The state postconviction court held that Mr. Key's testimony was inadmissible hearsay.

The Florida Supreme Court agreed. *See Whitton II*, 161 So. 3d at 323. The court did not explain why this was not admissible under the hearsay exception for a declarant's statement of intent. *See* Fla. Stat. § 90.803(3)(a); *see also Mut. Life Ins. Co. of N.Y. v. Hillmon*, 145 U.S. 285 (1892) (famously holding admissible a statement of intent to travel with a specific individual as proof of the identity of a body later found at Crooked Creek). But under Florida law, a statement of intent qualifies for the hearsay exception only if other evidence supports an inference that the person acted on the intent. *See Ibar v. State*, 938 So. 2d 451, 465 (Fla. 2006). And in any event, this was the Florida Supreme Court's holding on the admissibility of this evidence—an issue of state law on which that court's decision is controlling. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."); *Agan v. Vaughn*, 119 F.3d 1538, 1549 (11th Cir. 1997); s*ee also Osborne v. Wainwright*, 720 F.2d 1237, 1238 (11th Cir. 1983); *Jameson v. Wainwright,* 719 F.2d 1125, 1126 (11th Cir. 1983).

Moreover, a statement of intent to recant falls far short of establishing that the original testimony was false. That Mr. Ozio did not hear Mr. Whitton say he killed Mr. Maulden—as established only after an evidentiary hearing in this court—of course does not mean *Mr.*

McCollough did not hear Mr. Whitton say he killed Mr. Maulden.

B. Sexually Deviant Offense

At the 3.850 hearing, fellow inmate George Broxson testified Mr. McCollough had committed a sexually deviant offense and would do anything to cover it up. Earlier, Mr. McCollough's ex-wife had given police a taped statement about prostitution she engaged in at Mr. McCollough's urging; the statement described sexual acts by Mr. McCollough that could be the "deviant" conduct referred to by Mr. Broxson. The ex-wife testified that Mr. McCollough was a liar. But neither Mr. Broxson nor the ex-wife testified to any knowledge that Mr. McCollough lied at this trial.

Mr. Whitton surmises that Mr. McCollough falsely implicated Mr. Whitton in exchange for prosecutorial leniency on Mr. McCollough's own sexually deviant offense—treatment that prevented disclosure of the sexually deviant conduct. But this is rank speculation. The evidence does not show that the prosecutor offered Mr. McCollough any benefit for his testimony.

Mr. Whitton says, though, that he could have cross-examined Mr. McCollough on this subject, and that the state's failure to disclose the information was a *Brady* violation. The 3.850 court said, in effect, that this was not so—that the court was "unable to surmise a situation in which the details of Mr. McCollough's previous crime would have been explored on the record." ECF No. 73-13 at 511. This is again a definitive determination of state evidence law. And cross-examination on this subject surely would have made no difference anyway. There were already abundant grounds for doubting Mr. McCollough's credibility, including his seven felony convictions and the possibility that he was angling for

beneficial treatment—he had a pending motion to modify his sentence.

C. Relationship with the Prosecutor's Mother

Mr. McCollough had a close personal relationship with the prosecutor's mother, Inez Adkinson. She visited him at jail. Mr. McCollough admitted this on cross-examination. Mr. Whitton now says, though, that the state violated *Brady* by failing to disclose additional details, including that jail records listed Ms. Adkinson as Mr. McCollough's girlfriend or fiancé. Mr. Whitton did not raise any such *Brady* claim in his 3.850 motion. The Florida Supreme Court held the claim barred. The holding is unassailable.

The claim would fail even on the merits. To prevail on a *Brady* claim, a petitioner must show that the state failed to disclose information that was both favorable to the defense and "material." Information is material, for this purpose, "if it is reasonably probable that a different outcome would have resulted" had the information been disclosed. *Ponticelli v. Sec'y, Fla. Dep't of Corr.*, 690 F.3d 1271, 1292 (11th Cir. 2012). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* (quoting *Ferguson v. Sec'y for the Dep't of Corr.*, 580 F.3d 1183, 1205–06 (11th Cir. 2009) (cleaned up).

Mr. Whitton's assertion, in effect, is that Mr. McCollough lied to support his girlfriend's son. The assertion is barely stronger than the assertion fully pursued at trial: that Mr. McCollough lied to support a close personal friend's son. The jury knew, in any event, that Mr. McCollough might have a different, perhaps stronger motive to lie—the possibility of more lenient treatment in his own case—and that Mr. McCollough denied any improper motivation. Failure to disclose that

Ms. Atkinson was Mr. McCollough's girlfriend or fiancé, if indeed she was, was not material. And the failure to disclose could not have had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (holding that federal habeas relief is available based on a state court's trial error only if this standard is met).

D. With Certainty

Before moving on, a word is in order about the Florida Supreme Court's use of the language "with certainty" in its ruling on this claim. A 3.850 movant must establish the factual basis for a claim by competent, substantial evidence, not with certainty. *See, e.g.*, *Hurst v. State*, 18 So. 3d 975, 991 (Fla. 2009). In an inexplicable passage, the Florida Supreme Court said Mr. Whitton had not "demonstrated with certainty" that Mr. McCollough's testimony was false or the state knew it was false. *Whitton II*, 161 So. 3d at 323. But the court also correctly set out the *Giglio* standard, noted the absence of evidence showing Mr. McCollough's testimony was false, and concluded that the 3.850 court's rejection of the *Giglio* claim was "supported by competent, substantial evidence." *Id.* at 322-23. This is the standard by which Florida state-court findings of fact are reviewed.

The "with certainty" language was most likely a meaningless oversight in a long, per curiam opinion. But even if deemed contrary to settled federal law, thus removing AEDPA deference for the Florida Supreme Court's decision on this issue, the result would be the same. On de novo review, this order still would hold that Mr. Whitton has failed to establish a *Giglio* or *Brady* violation related to Mr. McCollough's testimony.

The bottom line is this. For Mr. McCollough, as for Mr. Ozio, there is no evidence that the state knew or

should have known Mr. McCollough's testimony implicating Mr. Whitton was false, even if it was. The denial of this claim was not contrary to, and did not involve an unreasonable application of, clearly established federal law, and the ruling was not based on an unreasonable determination of the facts in light of the state-court record.

V. Comments on Silence

On the night after the murder, officers contacted Mr. Whitton. They advised him of his *Miranda* rights, including the right to remain silent. Mr. Whitton answered officers' questions for more than three hours. He then invoked his right to remain silent, cutting off further questioning, as he was entitled to do. Commendably, officers asked no more questions.

While testifying at trial, an officer volunteered that Mr. Whitton "decided he did not want to talk to us anymore." ECF No. 73-3 at 25. The prosecutor repeated this moments later: "And he didn't tell you anything else." *Id.* at 30. When Mr. Whitton testified, the prosecutor asked him, "You didn't say anymore, did you?" *Id.* at 142. And the prosecutor repeated the question: "You didn't say anymore then, did you?" *Id.* at 143.

In closing argument, the prosecutor noted Mr. Whitton's decision not to talk to officers further, and the prosecutor asserted, in effect, that this showed consciousness of guilt: "Then he doesn't say anything else. He realizes at that point, 'Uh-oh.'" ECF No. 73-3 at 215. The court sustained an objection and offered to give a curative instruction, but Mr. Whitton's attorney declined, saying he did not wish to emphasize the matter.

This was a violation of the principle established by *Doyle v. Ohio*, 426 U.S. 610, 619 (1986). There the Court

held that when a suspect is told of the right to remain silent, the state cannot use against him the fact that he invoked that right. An initial decision to talk does not waive the right to stop talking, and the *Doyle* principle precludes the state from asserting the defendant's decision to stop talking shows consciousness of guilt. *See United States v. Roy*, 582 F. App'x 835, 838 (11th Cir. 2014); *United States ex rel. Allen v. Franzen*, 659 F.2d 745, 747 (7th Cir. 1981). Here the testifying officer should not have volunteered that Mr. Whitton invoked his right to stop talking, and even more clearly, the prosecutor should not have continued to bring it up, time and again. The closing argument suggesting this showed consciousness of guilt was a *Doyle* violation.

To be sure, *Doyle* does not preclude impeachment of a testifying defendant with statements the defendant made before invoking the right to remain silent. When appropriate, the impeachment may include the fact that the defendant said nothing further. *See United States v. Beechum*, 582 F.2d 898 (5th Cir. 1979) (en banc); *Lofton v. Wainwright*, 620 F.2d 74 (5th Cir. 1980). But that is not the use the state made of Mr. Whitton's silence. The prosecutor asserted Mr. Whitton's silence showed consciousness of guilt—precisely that use of his silence that *Doyle* held unconstitutional.

The state notes that there were no contemporaneous objections to the prosecutor's improper questions and the testimony. There was, however, a contemporaneous objection to the improper closing argument, and the Florida Supreme Court addressed the entire issue on the merits. The claim in this court is not barred by procedural default.

The Florida Supreme Court held the violation harmless. The court cited *State v. DiGuilio*, 491 So. 2d

1129 (Fla. 1986), which in turn relied on the harmless-error standard from *Chapman v. California*, 386 U.S. 18 (1967). This was a ruling on the merits of the federal claim—Mr. Whitton's contrary assertion is incorrect—so AEDPA deference applies. The ruling was not contrary to or an unreasonable application of clearly established federal law, and the ruling was not based on an unreasonable determination of the facts in light of the evidence presented.

Important factors supporting this conclusion include the overall strength of the evidence as well as what Mr. Whitton said before invoking his right to remain silent—first that he did not return to the motel room, then that he did. The jurors probably gave far more weight to this than to any inference they might have drawn—improperly—from Mr. Whitton's later decision to stop talking.

Still, reasonable jurists could disagree with the conclusion that this violation was harmless. Reasonable jurists could conclude further that the violation had a "substantial and injurious effect or influence" on the verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). This order thus grants a certificate of appealability on this issue.

VI. Interference with Zeigler Testimony

A local officer swabbed blood from Mr. Whitton's boots and sent it to the Florida Department of Law Enforcement. FDLE analyst Shirley Zeigler performed a DNA analysis and concluded the blood did not match Mr. Maulden or Mr. Whitton. This was favorable to Mr. Whitton; it tended to neutralize the state's assertion that blood splatter inside the boots came from Mr. Maulden.

The state made an inexcusable attempt to block Ms. Zeigler from testifying. Had the state succeeded, the

conviction would now be vacated. Period. The only issue would be which officer or attorney should be sanctioned, and how. Any officer or attorney involved in these shenanigans would do well to heed the time-honored maxim that the government always wins when justice is done: "It is as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88 (1935).

Happily, the state did not succeed. The defense was aware of Ms. Zeigler's analysis and called her in the defense case. She testified fully and fairly. The jury had her testimony, along with all the other evidence, when it made its decision. The state's attempts to block the testimony came to nothing.

This was not a *Brady* violation, because no evidence was withheld from the defense. It was not a *Giglio* violation, because no false evidence was presented. It is not a ground for relief, because the state's actions did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. 619, 637 (1993).

In reaching this conclusion, I have not overlooked Mr. Whitton's suggestion that the state should have fully disclosed its efforts to block Ms. Zeigler's testimony and that evidence of the efforts should have been admitted into evidence at the trial to undermine the state's case. Not so. The relevant evidence was Ms. Zeigler's analysis, which was properly admitted. The state's efforts to block that evidence say nothing about whether Mr. Whitton did or did not commit this murder, and a trial court would properly exclude evidence of the state's efforts, even if

deemed relevant, under Florida Statutes § 90.403—the state analog of Federal Rule of Evidence 403.

The Florida Supreme Court rejected this claim on the merits. Relief thus could be granted here only if the ruling was contrary to or involved an unreasonable application of clearly established federal law or if the ruling was based on an unreasonable determination of the facts in light of the state-court record. Mr. Whitton has not met that standard and is not entitled to relief.

In asserting the contrary, Mr. Whitton says the Florida Supreme Court did not address this claim on the merits, so review should be de novo. That is wrong; the Florida Supreme Court did address the claim on the merits. This would not matter anyway. I would reject the claim even on de novo review.

VII. Substance of Zeigler Testimony

Lonnie Ginsberg, a forensic serologist from FDLE's Pensacola office, determined that Mr. Maulden's blood was type A, Mr. Whitton's was type O, and blood found inside Mr. Whitton's boots was type A. The Pensacola office did not have the ability to perform DNA testing at that time, so Mr. Ginsberg sent a gauze pad with blood he swabbed from the boots to FDLE's Jacksonville office. There Ms. Zeigler performed the test that found the blood matched neither Mr. Maulden's nor Mr. Whitton's DNA. Nobody asked Mr. Ginsburg whether he swabbed blood from the same location inside the boots where he found type A blood. Ms. Zeigler did not know what locations on the boots were swabbed.

The prosecutor addressed this in closing argument. He said Mr. Ginsburg and Ms. Zeigler tested "[d]ifferent samples." ECF No. 73-3 at 251. That was true. The prosecutor said Ms. Zeigler did not know where the blood

she tested came from and that she did not say blood inside the boots was not Mr. Maulden's. That was true. The prosecutor did *not* say the samples were taken from different locations—an assertion that would have been neither supported nor refuted by the evidence, other than inferentially. He said photographs showed downward splatters, that blood inside the boots was type A, and that the jurors should use their common sense. All of that was fair argument.

Mr. Whitton claims the state's handling of this was a *Giglio* or *Brady* violation. The linchpin of the claim is that Ms. Zeigler tested blood from the splatter inside the boots—the same blood Mr. Ginsberg said was type A. But even today, there is no evidence that that is so. The record still does not show the locations Mr. Ginsberg swabbed with the pad that was sent to Ms. Zeigler.

The 3.850 court correctly analyzed this claim and denied it on the merits. The Florida Supreme Court bungled the analysis, incorrectly concluding Mr. Whitton asserted on appeal that Ms. Zeigler and Mr. Ginsburg tested blood from different locations—exactly the opposite of what Mr. Whitton asserted. Based on this mistaken view, the court held the claim procedurally defaulted. Because the claim was not procedurally defaulted and the court did not address it on the merits, review here is de novo. *See, e.g.*, *Reaves v. Sec'y, Fla. Dep't of Corr.*, 872 F.3d 1137, 1151 (11th Cir. 2017); *Muhammad v. Sec'y, Fla. Dep't of Corr.*, 733 F.3d 1065, 1071 (11th Cir. 2013).

On de novo review, the result is the same. The state did not violate *Brady* or *Giglio* in its handling of Mr. Ginsberg's and Ms. Zeigler's testimony.

VIII. Serological Research Institute DNA Testing

After learning of Ms. Zeigler's test results, Lt. Fred Mann, a member of the prosecution team, discussed with a representative of Serological Research Institute the possibility of obtaining additional DNA testing. An audiotape of the discussion that was not turned over to the defense shows that Mr. Mann believed Mr. Whitton was guilty and that Ms. Zeigler's analysis was mistaken. Proving this would not have helped Mr. Whitton.

The state ultimately decided not to retain Serological. Mr. Whitton says failure to disclose all this to the defense was a *Brady* violation. It plainly was not. The 3.850 court properly rejected the claim, and the Florida Supreme Court properly upheld the ruling.

Good prosecutors, like all good attorneys, make strategic decisions in the run up to a trial. They consider options, pursue some, and abandon others. Prosecutors are not required to tell the defense every strategy they consider. That the state considered but decided not to obtain a DNA analysis from Serological did not matter and, if disclosed to the defense, would not have been admissible.

IX. Cellmark DNA Testing

The state obtained a DNA analysis from a different provider, Cellmark. The state disclosed Cellmark's report to the defense. The report concluded no DNA analysis could be provided for a sample provided from Mr. Whitton's boots because the sample contained an "insufficient amount of high molecular weight human DNA." The report said no conclusion could be reached for that sample or another taken from the passenger seat of Mr. Whitton's car. ECF No. 73-16 at 188–99.

Mr. Whitton says the state violated *Brady* by failing to turn over a cryptic note of a conversation in which a

Cellmark analyst said the DNA test results were "inconclusive." That seems an apt summary of the report's findings. In any event, to prevail on a *Brady* claim, a petitioner must show that the undisclosed information was material—that "it is reasonably probable that a different outcome would have resulted" had the state disclosed the information. *Ponticelli*, 690 F.3d at 1292. This note was not material.

The 3.850 court reached the same conclusion on somewhat different reasoning—the court said the note would have made no difference because Mr. Whitton admitted he walked in blood in the room and got Mr. Maulden's blood inside his boots. The Florida Supreme Court upheld the ruling. The ruling was not contrary to or an unreasonable application of clearly established federal law, and the ruling was not based on an unreasonable determination of the facts in light of the evidence presented. And I would reach the same result on de novo review. The note was not material.

X. Ineffective Assistance of Trial Counsel

Mr. Whitton asserts his trial attorney rendered ineffective assistance in many respects. To prevail on an ineffective-assistance claim, a petitioner must show both deficient performance and prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Considerable deference is owed an attorney's decisions on how to proceed. Review of a state court's rejection of a deficient-performance allegation is thus doubly deferential, combining deference to the attorney with AEDPA deference to the state-court decision. "When a habeas petitioner in state custody raises a *Strickland* claim in federal court, the commands of *Strickland* and § 2254(d) operate in tandem so that our review is 'doubly deferential.' " *Tharpe v. Warden*, 834

F.3d 1323, 1338 (11th Cir. 2016) (quoting *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003)).

Only AEDPA deference, not double deference, applies to a state court's prejudice ruling. *See Evans v. Sec'y, Dep't of Corr.*, 703 F.3d 1316, 1333 (11th Cir. 2013) (Jordan, J., concurring). But AEDPA deference is substantial, even standing alone.

A. Fingerprints in the Sandwich Wrapper

The inside of a sandwich wrapper found in Mr. Maulden's motel room had two finger or palm prints that matched neither Mr. Maulden nor Mr. Whitton. The state's fingerprint expert said the prints could have been left not just by the person who opened the sandwich but by the person who wrapped the sandwich for sale. Mr. Whitton asserts the attorney did not adequately investigate whether this was possible. Mr. Whitton's theory was that the prints showed someone else had been in the room—the real killer.

In support of his 3.850 petition, Mr. Whitton submitted an affidavit from a production manager for the company that distributed the sandwich. The manager opined that it would be "essentially impossible" for a print to get on the inside of a wrapper during the production process.

The 3.850 court concluded the failure to develop and introduce this testimony at trial was not deficient and that the testimony, if introduced, would have made no difference. The court noted that there were other items in the room with unidentified prints—an ice bucket, a wine bottle, a paper bag—and this did not dissuade the jury from finding Mr. Whitton guilty.

The Florida Supreme Court upheld the ruling. The ruling was not contrary to or an unreasonable application

of clearly established federal law, and the ruling was not based on an unreasonable determination of the facts in light of the evidence presented. The ruling is supported further by common sense: production processes do not always run smoothly, workers do not always perform the same acts the same way, and any juror who lives in the real world would not think it impossible for someone to have touched this wrapper at some point in the process prior to sale of the sandwich.

B. Zeigler Testimony

Mr. Whitton asserts the trial attorney rendered ineffective assistance by failing to present evidence of the state's efforts to block Ms. Zeigler from testifying. As set out above, any such evidence would properly have been excluded. The 3.850 court held there was neither deficient performance nor prejudice. The Florida Supreme Court agreed.

The ruling was not contrary to or an unreasonable application of clearly established federal law, and the ruling was not based on an unreasonable determination of the facts in light of the evidence presented. I would reach the same result even on de novo review.

C. Additional DNA Testing

Mr. Whitton asserts the trial attorney should have introduced evidence that the state sought alternative DNA tests. This, Mr. Whitton asserts, showed the lengths to which the state would go to obtain a conviction. But as the 3.850 court noted, offering such evidence would have highlighted the state's doubt about the accuracy of Ms. Zeigler's results. The court concluded that Mr. Whitton had shown neither deficient performance nor prejudice. The Florida Supreme Court agreed.

The ruling was not contrary to or an unreasonable application of clearly established federal law, and the ruling was not based on an unreasonable determination of the facts in light of the evidence presented. I would reach the same result even on de novo review.

D. Time of Death

The motel clerk saw Mr. Whitton's car at the motel—four doors down from Mr. Maulden's room—twice on the night of the murder. The first was after the clerk went to bed at 10:30 p.m. The clerk initially said it was "a little bit" after 10:30, ECF No. 73-2 at 653, but the clerk acknowledged that he did not know how long after—he said, in effect, that it could have been not long after 10:30 but could have been as late as 12:05 or 12:10 a.m. The second time he saw the car that night he looked at the clock; it was at 12:20 a.m. Because the clerk did not know the time at which he first saw the car that night, he did not know how long the car was there.

The medical examiner, Dr. Richard Kielman, testified, in effect, that the time of death was 11:00 p.m. or later. At the 3.850 hearing, Mr. Whitton presented the testimony of a different pathologist, Dr. Larry Riddick, who put the time of death at between 5:00 p.m. and 11:00 p.m. Dr. Riddick based this in substantial part on Lt. Mann's testimony that the body was in full rigor mortis when discovered at 11:00 a.m. the next morning. Dr. Riddick acknowledged that if the body was not yet in full rigor at that time, the time of death could have been later.

Mr. Whitton asserts the trial attorney rendered ineffective assistance by failing to develop and present testimony like Dr. Riddick's. The 3.850 court held that Mr. Whitton had shown neither deficient performance nor prejudice. The Florida Supreme Court agreed.

The ruling was not contrary to or an unreasonable application of clearly established federal law, and the ruling was not based on an unreasonable determination of the facts in light of the evidence presented. Dr. Riddick's testimony that the time of death was not later than 11:00 p.m. relied on Lt. Mann's unreliable determination of full rigor mortis. And the clerk's testimony did not exclude the possibility that Mr. Whitton was at the motel before 11:00 p.m.

Dr. Riddick's testimony would have favored the defense, but a court could reasonably conclude, as the Florida courts did, that failing to develop and present this testimony was not constitutionally deficient. A court could also reasonably conclude, as the Florida courts did, that this testimony would not make it "reasonably probable that a different outcome would have resulted." *Ponticelli*, 690 F.3d 1271, 1292 (11th Cir. 2012).

E. Financial Motive

The state's theory was that Mr. Whitton went back to the motel to steal Mr. Maulden's cash. An undisputed fact supported the theory: Mr. Whitton knew Mr. Maulden had withdrawn more than $1,000 in cash from his bank that day. Other, less-clearly-established facts also supported the theory. Mr. Whitton apparently had abandoned his job—he was terminated the day after the murder for not showing up on the day before and day of the murder—and had overdue bills that he paid in cash the day after the murder.

Mr. Whitton asserts his trial attorney rendered ineffective assistance on this issue. Pay stubs would have shown he had wages of roughly $1,000 beginning in August. He had been approved for an $800 loan. A friend said she gave him $200 toward his unpaid bills the weekend before the murder "because he didn't have the

money" to pay them. ECF No. 73-11 at 168–69. He told that friend and another that he had a new job lined up—statements the state courts said would be inadmissible hearsay.

These facts fall far short of showing Mr. Whitton was financially secure. Indeed, the fact that he was given $200 shortly before the murder because he had bills he was unable to pay would have confirmed—not undermined—the conclusion that he needed money. For a person who smokes and drinks and has unpaid bills, $200 does not go far.

The 3.850 court held that Mr. Whitton had shown neither deficient performance nor prejudice. The Florida Supreme Court agreed. The ruling was not contrary to or an unreasonable application of clearly established federal law, and the ruling was not based on an unreasonable determination of the facts in light of the evidence presented. I would reach the same result even on de novo review.

F. Blood in the Car

A very small amount of blood was found on a seat in Mr. Whitton's car. At trial, his attorney argued that if Mr. Whitton had committed the murder, there would have been much more blood in the car. Mr. Whitton now says the argument was not enough—that the attorney should have argued that any blood in the car was consistent with Mr. Whitton's explanation that he walked through blood in the room when he found Mr. Maulden already dead. Mr. Whitton also apparently asserts in this court—unlike in state court—that the attorney should have presented expert testimony supporting the claim that the blood in the car was consistent with Mr. Whitton's testimony.

The blood in the car was on the seat, not on the floor, so walking through blood would not explain it. In any event, the trial attorney's framing of the argument was a reasonable strategic decision.

The 3.850 court held that Mr. Whitton had shown neither deficient performance nor prejudice. The Florida Supreme Court agreed. The ruling was not contrary to or an unreasonable application of clearly established federal law, and the ruling was not based on an unreasonable determination of the facts in light of the evidence presented. I would reach the same result even on de novo review.

G. Conduct of Investigation

Mr. Whitton asserts that too soon after the murder, law enforcement officers allowed relatives of Mr. Maulden to enter the motel room, where they removed hair and flesh, and that officers released property to the relatives, including a gym bag, address book, and suitcase containing knives. At the 3.850 hearing, Mr. Whitton failed to prove the allegations about the hair and flesh, gym bag, or address book. And he failed to prove the trial attorney knew or should have known about the knives.

The 3.850 court held that Mr. Whitton had not shown deficient performance for the knives and had shown neither deficient performance nor prejudice for the other items. The Florida Supreme Court upheld the deficient-performance ruling and did not address prejudice. The ruling was not contrary to or an unreasonable application of clearly established federal law, and the ruling was not based on an unreasonable determination of the facts in light of the evidence presented. I would reach the same result even on de novo review—and would hold further that Mr. Whitton has not shown prejudice for the knives.

H. Alternative Suspect

As is undisputed, on the afternoon before the murder, Mr. Maulden asked the motel clerk to call a cab. At the 3.850 hearing, Mr. Whitton presented the cab driver's testimony that he took Mr. Maulden to a liquor store and that Mr. Maulden repeatedly asked the driver to find him a prostitute. The driver did not do so. The driver said Mr. Maulden pulled out a huge roll of cash when paying for the ride.

Mr. Whitton also introduced testimony of an individual who heard Mr. Maulden tell Mr. Whitton on October 7, two days before the murder, that Mr. Maulden had recently been "rolled" by a prostitute, apparently a reference to being robbed. Another witness heard Mr. Maulden say on October 7 that $500 was stolen from him the night before.

Mr. Whitton claims his trial attorney rendered ineffective assistance by failing to introduce this evidence. He suggests Mr. Maulden may have flashed his cash or contacted a prostitute and this may have led someone other than Mr. Whitton to rob and kill Mr. Maulden. The 3.850 court rejected the claim, noting that the proffered evidence of Mr. Maulden's October 7 statements was likely inadmissible hearsay and that the suggestion that Mr. Maulden was again rolled by a prostitute or someone else, who killed him, was rank speculation. The court concluded failure to present this evidence caused no prejudice.

The Florida Supreme Court agreed. It said, too, that at the 3.850 hearing, Mr. Whitton presented no credible evidence that anyone else killed Mr. Maulden.

The ruling was not contrary to, and did not involve an unreasonable application of, clearly established federal

law, and the ruling was not based on an unreasonable determination of the facts in light of the state-court record.

I. The Motel Clerk

The motel clerk's testimony about when he saw Mr. Whitton's car at the motel was fully developed at the trial, as set out above. The motel clerk eventually said the first time he saw the car after going to bed could have been as late as 12:10 a.m. This was fully consistent with Mr. Whitton's theory of the case—that he arrived after the death and stayed only briefly—and fully consistent with Mr. Whitton's own testimony about when he left Pensacola en route to Destin.

Mr. Whitton asserts his trial attorney rendered ineffective assistance on this issue, but he has not suggested anything the attorney could have done to make the testimony any better for the defense. Nor do Mr. Whitton's other criticisms of the attorney's handling of this witness suggest deficient performance.

The 3.850 court rejected this claim, concluding Mr. Whitton had not shown prejudice, and apparently concluding he also had not shown deficient performance. The Florida Supreme Court held that the record did not show deficient performance. The ruling was not contrary to or an unreasonable application of clearly established federal law, and the ruling was not based on an unreasonable determination of the facts in light of the evidence presented.

J. Ozio and McCollough Testimony

Mr. Whitton asserts his trial attorney should have done more to counter the testimony of Mr. Ozio and Mr. McCollough. But Mr. Whitton has suggested nothing the attorney could have done that was likely to make any

difference. The witnesses said what they said. The attorney challenged their credibility, including by pointing out what was obvious anyway: they had a motive to fabricate to obtain favorable treatment in their own cases.

The 3.850 court concluded that Mr. Whitton had not shown deficient performance or prejudice. The Florida Supreme Court held that the record did not show deficient performance. The ruling was not contrary to or an unreasonable application of clearly established federal law, and the ruling was not based on an unreasonable determination of the facts in light of the evidence presented.

K. Curative Instruction

Law enforcement officers contacted Mr. Whitton a little more than 12 hours after discovering the body. They gave warnings under *Miranda v. Arizona*, 384 U.S. 436 (1966). Mr. Whitton spoke to officers at length but then invoked his right to remain silent, as he was entitled to do.

The prosecutor and a testifying officer made repeated, plainly improper references during the trial to Mr. Whitton's invocation of his right to remain silent. *See Doyle v. Ohio*, 426 U.S. 610, 619 (1986). When the prosecutor suggested in closing argument that Mr. Whitton's invocation of his right to remain silent showed consciousness of guilt, Mr. Whitton's attorney objected. The court sustained the objection and offered to give a curative instruction. The attorney declined the offer, saying he did not wish to highlight the issue.

Mr. Whitton asserts declining the curative instruction was deficient performance. This claim was not exhausted in state court and thus is procedurally barred. And the claim is unfounded in any event. Declining a

curative instruction is the kind of strategic decision good attorneys routinely make. Nothing in this record suggests this was anything other than a reasonable strategic decision. *See Wertz v. Vaughn*, 228 F.3d 178, 205 (3d Cir. 2000) (recognizing that not seeking a curative instruction can be a reasonable strategy to avoid highlighting the objectionable matter).

The 3.850 court and Florida Supreme Court did not squarely address the curative-instruction issue. The Supreme Court did, however, find that the improper references to silence were harmless. Even on de novo review, I find that declining a curative was not deficient performance and caused no prejudice.

XI. Jury Notes

Mr. Whitton asserts the handling of five jury notes denied him due process. The assertion is much ado about nothing. The trial judge and defense attorneys testified about this at the 3.850 hearing, and while their recollection was understandably limited—the hearing occurred long after the trial, and the notes were unremarkable—nothing in their testimony suggests the handling of the notes was improper.

The trial judge described her ordinary practice for dealing with juror notes and questions. The practice as described was spot on. Other than something like a request to adjust the temperature, any juror communication would be disclosed to the attorneys, who would be given an opportunity to be heard. If a court reporter was unavailable, as might happen during deliberations, the discussion with the attorneys would go forward only with both sides' consent; otherwise the discussion would await the availability of a court reporter. Nothing in the record suggests there was any deviation in this case from the judge's standard practice.

Note one said the jury had an "uneasy feeling" about a member of the audience taping part of the trial. Nothing apparently came of this. Florida law allows even televising of trials, and nothing in federal law prohibits it. The record does not show what, if anything, was done in response to the note. A good guess, especially based on the fact that neither the judge nor the attorneys remembered this, is that the taping stopped on its own and nothing needed to be done. But this is only a guess. What is important here is that the record includes no evidence that anything improper was done or that this affected the trial in any way.

Note two asked for a list of the judge's jury instructions. The record does not show what, if anything, was done in response to the note. The record includes no evidence that anything improper was done or that this affected the trial in any way. Indeed, it is hard to conceive of anything improper that *could* have been done in response to this note.

Note three, almost certainly submitted during the penalty-phase deliberations, asked how soon Mr. Whitton could get out of prison with gain time if he was a model prisoner. Note four apparently was the judge's response: "please refer to the jury instructions." One of the defense attorneys remembered the note, so Mr. Whitton's assertion that the note was not disclosed is incorrect. The response—refer to the instructions—is the kind of response often given on a subject covered in the original instructions, as this subject was. There was no contemporaneous objection, and no reason for one. The original instructions said if the jury did not find aggravating circumstances justifying the death penalty, the sentence should be life "without possibility of parole for twenty-five years."

Note five was a juror's request for a footstool; her feet were swelling. The request was discussed on the record. A footstool was provided.

In sum, nothing in the record suggests the jury notes were mishandled. Mr. Whitton says he nonetheless should have been allowed to conduct juror interviews to inquire about this. Not so. When, as here, there are no grounds to believe anything improper happened, a defendant is not entitled to interview jurors in search of impropriety. Juror interviews are disfavored, and properly so.

The 3.850 court held there was no violation. The Florida Supreme Court agreed. Mr. Whitton says the court addressed the issue only under state law and that review of the federal claim in this court thus is de novo. That is probably wrong—the Florida Supreme Court cited a United States Supreme Court decision for the proposition that harmless-error analysis applies to any improperly undisclosed communication between judge and jury—but this would not matter anyway. Even on de novo review, this order would reject the claim that juror notes were mishandled or that juror interviews should have been allowed.

XII. Ineffective Assistance of Penalty-Phase Counsel

Mr. Whitton asserts his penalty-phase attorney rendered ineffective assistance by failing to investigate, obtain, and present further mitigation evidence. Mr. Whitton says the attorney should have traveled to New York to interview more relatives and teachers and to review social-services records. Mr. Whitton says the attorney should have obtained more information on the abuse and neglect Mr. Whitton suffered as a child. And Mr. Whitton says the attorney should have presented

additional expert testimony about his likely brain damage due to fetal alcohol syndrome.

This is not a case, though, in which a penalty-phase attorney presented little or no mitigation evidence. Dr. James D. Larsen, a psychologist, met with Mr. Whitton several times and conducted cognitive and personality tests. Dr. Larsen testified that Mr. Whitton showed personality instability associated with growing up in chaotic environments and associated with alcohol abuse or drug addiction. Dr. Larsen said Mr. Whitton was an alcoholic, as he admitted, that he had been in treatment three times, and that he had good insight and motivation to get better. Dr. Larsen said that both of Mr. Whitton's parents were alcoholics and were physically and emotionally abusive to Mr. Whitton and his siblings. Dr. Larsen said Mr. Whitton was moved from place to place and his "whole childhood . . . was inundated with his being in an alcoholic family, being emotionally abused, physically abused, and life was a real struggle for him in that way." ECF No. 73-3 at 434.

Dr. Larsen testified about the effects of Mr. Whitton's mother's alcoholism during her pregnancy and said it probably had some effect in terms of fetal alcohol syndrome, which caused diffuse brain damage. Dr. Larsen said he provided a report discussing Mr. Whitton's limited intellectual ability, educational deprivation, neglect, cultural deprivation, emotional deprivation, physical and emotional abuse, possible fetal alcohol syndrome, alcohol abuse, deficiency in childhood role models, and no prior violent history.

Mr. Whitton's brother testified about their abusive, alcoholic, and neglectful parents. He described the abuse in detail and the deprivation of normal childhood activities. He described their home as lacking interior

walls, beds, and proper bathroom facilities. There were nine children in the family, and they slept four or five to a mattress on the floor. The brother left home when Mr. Whitton was about 16 years old.

Mr. Whitton's aunt testified about the abuse he suffered in the childhood home. She said the home was dirty and smelled terrible from lack of bathroom facilities and from bedwetting.

Current friends of Mr. Whitton testified that he was helpful to others who were struggling with substance abuse. One friend testified that he was close to her family and that her children called him "uncle." He was kind to them and gave them good advice. She said she recognized his need for family support, and they "kind of adopted each other." ECF No. 73-3 at 460.

Despite this evidence, the jury unanimously recommended a death sentence. The judge found aggravating and mitigating circumstances. The mitigating circumstances included family background, abuse and deprivation as a child, mental and physical abuse by alcoholic parents, that Mr. Whitton was a hard worker when employed and a good employee, potential for rehabilitation, working toward success in Alcoholics Anonymous, charitable or humanitarian deeds in helping others with alcoholism, sensitivity to the feelings of others, willingness to help others in need, patience with children, alcoholism, low average range of intellectual function, unstable personality, and that Mr. Whitton was a human being and child of God. The judge found that the aggravators outweighed the mitigators. ECF No. 73-1 at 700–06; ECF No. 73-15 at 251–57.

At the 3.850 hearing, Mr. Whitton presented the testimony of one of his New York school principals, one of his teachers, a former employee of his father, an aunt, and

an uncle who lived next door to Mr. Whitton's family in New York. This testimony expanded on the details of Mr. Whitton's childhood deprivation, lack of heat in the winter, lack of proper clothing, lack of hygiene, physical abuse, and bullying by the other students. The teacher testified that Mr. Whitton would sometimes shower at school and put on borrowed clothes to help avoid the teasing and bullying.

The aunt testified that Mr. Whitton's mother committed an act of violence on one of his brothers, causing his death, and Mr. Whitton's father covered it up. The aunt also testified to the abuse of Mr. Whitton and his siblings by his mother, who was drunk most of the time. Mr. Whitton's uncle testified about the extreme alcoholism of Mr. Whitton's parents and the abuse of the children, including being tied up in the house so the parents could go out and drink.

The major component of the additional mitigation Mr. Whitton contends his attorney should have discovered and presented was contained in the testimony of Dr. George Woods, a physician specializing in neuropsychiatry. He testified that he evaluated Mr. Whitton and investigated his background, including social-services records, medical records of Mr. Whitton's deceased brother, and interviews of people familiar with family history. Dr. Woods opined that Mr. Whitton suffers from fetal alcohol syndrome and meets the definition of static encephalopathy and post-traumatic stress disorder. Dr. Woods testified that the discipline inflicted on the children was cruel and led the children not to know how to respond properly, interact socially, and function in relationships. He said that the Whitton children were essentially "feral" and left to take care of themselves to survive. ECF No. 73-10 at 695.

Dr. Woods testified that observation of Mr. Whitton's anatomy and his facial bone structure were indicative of fetal alcohol syndrome and were consistent with static encephalopathy, which impairs Mr. Whitton's ability to appreciate the criminality of his conduct or conform it to the law, a statutory mitigator. Dr. Woods opined that neuropsychological testing disclosed Mr. Whitton's difficulty understanding cause and effect, inability to change his behavior depending on the situation, impulsivity, and attention deficits. He testified that Mr. Whitton has significant neuropsychological impairment with multiple functions leading to disabilities in the areas of reasoning, judgment, and impulse control. Dr. Woods opined that when the capital felony was committed, Mr. Whitton was under the influence of extreme mental or emotional disturbance, another statutory mitigator, because of his "static disorder neuropsychiatrically." ECF No. 73-11 at 91. Dr. Woods noted that when Dr. Larsen testified at trial, he did not have the benefit of neuropsychological testing or the expanded social history and social-services records, including for Mr. Whitton's time in foster care.

The penalty-phase attorney testified at the 3.850 hearing that he recognized the importance of having some family members testify, and so he did. He did not think it was necessary to go to New York to investigate other family members. He said his goal was to prove nonstatutory mitigators and that he was able to do so with the testimony he presented, as evidenced by the trial court's findings. The attorney said the crux of the defense was to show that Mr. Whitton had problems but that he was a worthy human being whose life had value and that he helped others. The attorney said he was trying to "humanize" Mr. Whitton and would not have excluded the testimony of a family member if he thought it would be

helpful. ECF No. 73-12 at 49, 53. He explained that medical records of Mr. Whitton's brother and his family members' testimony related to Mr. Whitton's past, but that his goal was to get the jury to see Mr. Whitton as an adult who was helping others and who could continue to help others if he received a life sentence. The attorney believed he let the jury see both aspects of Mr. Whitton's life—his traumatic past and his beneficial actions as an adult. ECF No. 73-12 at 61. The 3.850 court held that the penalty-phase attorney did not render ineffective assistance. The court said, "Just because postconviction counsel can now produce more witnesses and more detail regarding Defendant's social history, after having many years to investigate, does not render trial counsel's performance ineffective." ECF No. 73-13 at 568. The court noted the considerable evidence of Mr. Whitton's horrific childhood presented at the 3.850 hearing but said the penalty-phase attorney presented the same kind of evidence at trial without rebuttal. The court also said it "was not persuaded that if the jury had heard the testimony presented at the evidentiary hearing, which was largely cumulative of the evidence heard at the penalty phase, the jury would have recommended a sentence of life." ECF No. 73-13 at 569. In sum, the court found no deficient performance and no prejudice.

The Florida Supreme Court upheld the ruling, separately discussing the expert and nonexpert testimony that Mr. Whitton presented at the 3.850 hearing. The court apparently upheld the ruling on nonexpert testimony based only on the failure to show prejudice; the court apparently did not decide one way or the other whether failing to develop and present that testimony was deficient. The court said it was "not likely" Mr. Whitton "would have received a lesser sentence if counsel had

presented the additional witnesses." *Whitton II*, 161 So. 3d at 333.

The court upheld the ruling on expert testimony—on the claim that the penalty-phase attorney should have introduced testimony of the kind provided by Dr. Wood—based on both failure to show deficient performance and failure to show prejudice.

The ruling was not contrary to or an unreasonable application of clearly established federal law, and the ruling was not based on an unreasonable determination of the facts in light of the evidence presented. *See, e.g.*, *Raheem v. GDCP Warden*, 995 F.3d 895 (11th Cir. 2021); *see also Shinn v. Kayer*, 141 S. Ct. 517 (2020).

Even so, reasonable jurists could disagree. This order thus grants a certificate of appealability on this issue.

In rejecting this claim, I have not overlooked the cases cited by Mr. Whitton. None of the cases granting relief based on ineffective assistance on mitigation involve circumstances quite like these. This attorney presented a substantial mitigation case. He made his point. But this was a brutal murder. And it was the murder of an ostensible friend for about $1,000. The jury and judge found the aggravators outweighed the mitigators. On collateral review, the state courts concluded that the proffered additional mitigation would not have made a difference. The conclusion was reasonable.

XIII. Heinous, Atrocious, or Cruel

The penalty-phase jury instructions included the standard Florida instruction on the statutory aggravating factor that the murder was "especially heinous, atrocious, or cruel." Mr. Whitton says the instruction was unconstitutionally vague. The settled law of the circuit is to the contrary. *See Marquard v. Sec'y for Dept. of Corr.*,

429 F.3d 1278, 1315–16 (11th Cir. 2005) (holding this same instruction constitutional); *see also Proffitt v. Florida*, 438 U.S. 242 (1976). The stabbing murder in this case was very similar to the stabbing murder at issue in *Marquard*, making clear that this aggravator could properly be applied here, just as it was in *Marquard*. *See id.* at 1316.

Even on de novo review, the law of the circuit would plainly require rejection of the challenge to application of this instruction and to any failure by Mr. Whitton's attorneys to preserve the challenge.

XIV. Avoiding Arrest

The penalty-phase jury instructions also included the standard Florida instruction on the statutory aggravating factor that the murder was committed "for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." The judge stumbled slightly over the wording, but promptly corrected himself; the stumble made no difference.

In *Riley v. State*, 366 So. 2d 19 (Fla. 1978), the Florida Supreme Court held that unless the victim is a law enforcement officer, the "mere fact of death" is not enough for application of this aggravator. Instead, proof of the "requisite intent to avoid arrest and detection must be very strong." *Id.* at 22. The aggravator applies to the murder of a potential witness who is not a law enforcement officer—a person like Mr. Maulden—when "the factfinder determines that the dominant motive of the murder was for the elimination of witnesses." *Herzog v. State*, 439 So.2d 1372, 1379 (Fla.1983). Mr. Whitton asserts the jury should have been so instructed.

The Florida Supreme Court rejected the claim, concluding that this aggravator's terms are not "so vague as to leave the jury without sufficient guidance for

determining the absence or presence of the factor." *Whitton I* at 867 n.10. This misses the point. The problem is not that the terms, viewed alone, are too vague, but that they are insufficient to convey the actual meaning of the aggravator.

This order assumes that Mr. Whitton is correct—that a jury cannot apply this aggravator unless accurately instructed on the limitation the Florida Supreme Court has adopted. Even so, it is unlikely this would have made a difference to the jury. This is so for two reasons. First, the jury probably would have found this aggravator applicable even on instructions that included the Florida Supreme Court's limitation. Second, and more importantly, the jury probably found other aggravators applicable and gave them more weight—the murder was, after all, particularly brutal. The suggestion that this avoid-arrest aggravator was what controlled the verdict—and that without it the jury would not have recommended the death penalty—is unrealistic.

There also is another reason why Mr. Whitton is not entitled to relief on this claim. In *Bolender v. Singletary*, 16 F.3d 1547, 1569-70 (11th Cir. 1994), a Florida jury did not recommend the death sentence, but the trial court imposed it anyway, as was permissible at that time. The court relied in part on the avoid-arrest aggravator. The Eleventh Circuit upheld the death sentence, saying the sentencing judge was "presumed to know and apply" the Florida Supreme Court's "appropriate, narrow construction" of the avoid-arrest aggravator, and that there was no reason to doubt that the sentencing judge properly did so. *Id.* at 1569–70. The same is true here: there is no reason to doubt the sentencing judge properly applied the Florida Supreme Court's narrowing construction of this aggravator. The judge, not the jury,

imposed the death sentence, further insulating the sentence from the allegedly insufficient jury instruction.

Federal habeas relief from a state conviction and sentence is available only for a violation of federal law that has a "substantial and injurious effect or influence in determining" the outcome. *Brecht*, 507 U.S. at 623. Any error in the avoid-arrest jury instruction or in the overall application of this aggravator almost surely made no difference. Mr. Whitton is not entitled to relief on this claim.

XV. Proportionality

Until recently, Florida law required a "proportionality review" of any death sentence to ensure the sentence was imposed "for only the most aggravated and least mitigated of first-degree murders." *Urbin v. State*, 714 So. 2d 411, 416 (Fla. 1998). But in *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020), the court held that Florida law does *not* require proportionality review.

Mr. Whitton was sentenced when proportionality review was required. The Florida Supreme Court held his sentence proportional. Mr. Whitton challenges that ruling, but this is an issue of state law and thus not a ground on which relief could be granted in this court, even if proportionality review was still required and the Florida Supreme Court got it wrong. *See Pulley v. Harris*, 465 U.S. 37 (1984) (holding that the Constitution does not require proportionality review of death sentences); *Mendoza v. Sec'y, Fla. Dept. of Corr.*, 659 F. App'x 974, 981 & n.3 (11th Cir. 2016) (finding not cognizable a claim that the Florida Supreme Court engaged in only a cursory or rubber-stamp proportionality review); *Engle v. Isaac*, 456 U.S. 107, 120-21 (1982) (holding federal habeas relief unavailable based

only on violations of state law); *Branan v. Booth*, 861 F.2d 1507, 1508 (11th Cir. 1989) (same).

Mr. Whitton is not entitled to relief on this claim.

XVI. Hurst

In *Ring v. Arizona*, 536 U.S. 584 (2002), the Supreme Court held that a defendant is entitled to a jury trial on any fact that makes a defendant eligible for a death sentence. It took 14 years, but in *Hurst v. Florida*, 577 U.S. 92 (2016), the Supreme Court held the Florida's death-penalty process, under which a jury made only a recommendation, unconstitutional under *Ring*. Mr. Whitton's death penalty was imposed under the process *Hurst* held unconstitutional.

This does not help Mr. Whitton, because his sentence was final on direct review long before these cases were decided. In *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004), the Supreme Court held *Ring* not retroactively applicable on collateral review. In *McKinney v. Arizona*, 140 S. Ct. 702, 708 (2020), the Court extended the holding to *Hurst*: "*Ring* and *Hurst* do not apply retroactively on collateral review." The Eleventh Circuit had already reached the same result. *See Knight v. Fla. Dep't of Corr.*, 936 F.3d 1322, 1337 (11th Cir. 2019). End of story.

Mr. Whitton says, though, that *Caldwell v. Mississippi*, 472 U.S. 320 (1985), requires a different result. There the Court held it unconstitutional to tell a death-penalty jury its verdict will be advisory if it will be binding. Mr. Whitton's jury was told its sentencing verdict would be advisory, but that was an accurate statement based on the law in effect at that time—*Hurst* had not yet been decided.

Caldwell does not help Mr. Whitton. The explanation, largely copied from my decision in *Guardado v. Secretary,*

Florida Department of Corrections, No. 4:15cv256-RH (N.D. Fla. Jan. 19, 2022), at *49, is this. *Caldwell*, like *Ring* and *Hurst*, is not retroactively applicable on collateral review. *See Sawyer v. Smith*, 497 U.S. 227 (1990). To be sure, *Caldwell* was decided before Mr. Whitton was sentenced. But it was only *Hurst*—not *Caldwell* itself—that exposed the constitutional flaw in telling the jury that its decision would be advisory. The Eleventh Circuit has said, albeit in an unpublished and thus nonbinding decision, that a defendant "cannot use *Caldwell* as an end run around federal retroactivity law." *Miller v. Comm'r, Ala. Dep't of Corr.*, 826 F. App'x 743, 750 (11th Cir. 2020). It would be an odd result indeed if two nonretroactive decisions—*Hurst* and *Caldwell*—could combine to allow an after-the-fact challenge to an instruction that was proper when given.

This order rejects the *Ring-Hurst-Caldwell* claim on the ground that under *McKinney*, *Hurst* does not apply retroactively on collateral review, and that, under *Sawyer* and *McKinney*, *Caldwell* does not apply on collateral review based on an instruction that was accurate when given and was shown to be erroneous only by *Hurst*.

Mr. Whitton also asserts his attorneys rendered ineffective assistance by failing to raise these issues at the trial or on direct appeal. Raising the issues at that time would have been futile—*Ring* was still years in the future. As is settled, an attorney does not render ineffective assistance by failing to anticipate a change in the law. *See, e.g.*, *Rambaran v. Sec'y, Dept. of Corr.*, 821 F.3d 1325, 1334 (11th Cir. 2016). And this change, more than most, would have been hard to anticipate.

XVII. Ineffective Assistance of Appellate Counsel

Mr. Whitton contends his appellate attorney rendered ineffective assistance on three issues. "Claims of

ineffective assistance of appellate counsel are governed by the same standards applied to trial counsel under *Strickland*." *Philmore v. McNeil*, 575 F.3d 1251, 1264 (11th Cir. 2009). To prevail, the ineffective assistance must relate to an issue on which a defendant had a reasonable chance of success on appeal. *See Heath v. Jones*, 941 F.2d 1126, 1132 (11th Cir. 1991).

A. McCollough Recantation

Mr. Whitton's appellate attorney, an assistant public defender, testified at the 3.850 hearing that she learned from a colleague that an inmate, Billy Thomas Key, provided the colleague a letter indicating Mr. McCollough wished to recant his testimony. The appellate attorney so advised Mr. Whitton's guilt-phase trial attorney and the organization that routinely represented Florida death-sentenced defendants on collateral review. The appellate attorney testified that she learned from the trial attorney that he contacted Mr. McCollough, who was concerned that any recantation would result in a perjury charge and thus was not cooperative. The trial attorney testified at the 3.850 hearing that he did not recall contacting Mr. McCollough after the trial.

Mr. Whitton raised this claim using the proper procedure—a writ of habeas corpus in the Florida Supreme Court. The court concluded the appellate attorney's performance was not deficient and caused no prejudice, both because there was no evidence Mr. McCollough would actually have recanted and because the jury would have convicted Mr. Whitton anyway, even without Mr. McCollough's testimony.

One can lead a horse to water but can't make him drink. There is no evidence the appellate attorney—or any of Mr. Whitton's other attorneys—could have done anything to persuade Mr. McCollough to recant, even if

his original testimony was indeed false, as it might well have been. Nor is it clear the appellate attorney had an obligation to do more than alert the trial and collateral-review attorneys and rely on the trial attorney's report of Mr. McCollough's refusal to cooperate. Finally, an attorney need not anticipate the imminent death of a witness not known to be ill.

The Florida Supreme Court's rejection of this claim was not contrary to or an unreasonable application of clearly established federal law, and the ruling was not based on an unreasonable determination of the facts in light of the evidence presented. Even on de novo review, the claim would be rejected.

B. Jury Notes

Mr. Whitton claims the appellate attorney rendered ineffective assistance by failing to discover the jury notes addressed above—they were sealed—and failing to ensure they were in the appellate record. The Florida Supreme Court rejected this claim on the ground that the trial court's handling of the notes was not improper. Mr. Whitton says the court's ruling was based only on state law, but this makes no difference. The ruling was correct as a matter of both state and federal law. The appellate attorney did not render ineffective assistance by failing to properly assert the unfounded claim based on the notes.

C. Duplicative Aggravators

Mr. Whitton asserts that two of the five aggravators on which his death sentence was based were unconstitutionally duplicative. The 3.850 court held the claim procedurally barred because it was not raised on direct appeal. Mr. Whitton now claims his appellate attorney rendered ineffective assistance by failing to raise

the issue. The ineffective-assistance claim, too, is unexhausted and thus procedurally barred.

The claim is plainly unfounded on the merits. The allegedly duplicative aggravators were that Mr. Whitton committed the murder while on parole and that he had a prior conviction for a violent felony. He was on parole for the prior violent felony, so the aggravators are indeed related. But these are distinct aggravators—one can be on parole without a prior violent-felony conviction, and one can have a prior violent-felony conviction without being on parole. Under Florida law, both aggravators could properly be considered. *See Banks v. State,* 700 So. 2d 363 (Fla. 1997) (allowing multiple aggravators "so long as they are separate and distinct aggravators and not merely restatements of each other"). Nothing in federal law is to the contrary.

Both the ineffective-assistance claim and any underlying duplicative-aggravators claim are unfounded on the merits. The claims would be rejected even on de novo review.

XVIII. Cumulative Error

Finally, Mr. Whitton asserts that all the errors in these proceedings, viewed cumulatively, undermine confidence in the conviction and death sentence. On a list of capital cases most worthy of confidence, this one would not be near the top.

Mr. Ozio testified falsely, and Mr. McCollough well might have. The prosecutor repeatedly commented on Mr. Whitton's post-*Miranda* invocation of his right to remain silent. The state tried to block its own DNA expert from testifying. Mr. Whitton's attorney did not render ineffective assistance, but more could have been done on

the time of death and mitigation. Mr. Whitton was not entitled to a perfect trial, and he did not get one.

Even so, the only constitutional violation was commenting on silence. Mr. Whitton is not entitled to relief based on that violation, as set out above, and that is so even when the violation is considered in combination with the other flaws in these proceedings.

The evidence of guilt was not as strong in this case as in some. But it was substantial—easily enough to support a finding of guilt beyond a reasonable doubt. Mr. Whitton needed money and knew Mr. Maulden had cash and was drunk. After leaving Mr. Maulden at a motel in Destin and returning to Pensacola, Mr. Whitton drove all the way back to the motel. When confronted by law enforcement officers, Mr. Whitton initially denied going back, but then admitted it, eventually offering an explanation for going back that made no sense. It turned out Mr. Maulden was not such an easy target; he put up quite a fight.

To be sure, someone else could have seen Mr. Maulden with cash and decided he was an easy target. But what then: follow the cab to the motel and knock on the door? Perhaps. This is all rank speculation, and most importantly, it does not explain these undisputed, highly inculpatory facts: Mr. Whitton went back to the motel, has offered no reasonable explanation for doing so, and lied about it to law enforcement officers. It is not surprising the jury found Mr. Whitton guilty.

Mr. Whitton has identified no federal violation that alone or in combination with any other aspect of these proceedings had a "substantial and injurious effect or influence" on the conviction or sentence. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). He is not entitled to relief.

XIX. Certificate of Appealability

Rule 11 of the Rules Governing § 2254 Cases requires a district court to "issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Under 28 U.S.C. § 2253(c)(2), a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." *See Miller-El v. Cockrell*, 537 U.S. 322, 335-38 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983); *see also Williams v. Taylor*, 529 U.S. 362, 402-13 (2000) (setting out the standards applicable to a § 2254 petition on the merits). As the Court said in *Slack*:

> To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot*, includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were " 'adequate to deserve encouragement to proceed further.' "

529 U.S. at 483-84 (quoting *Barefoot*, 463 U.S. at 893 n.4). Further, to obtain a certificate of appealability when dismissal is based on procedural grounds, a petitioner must show, "at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* at 484.

Mr. Whitton has made the required showing only on the issues set out below.

XX. Conclusion

Mr. Whitton is not entitled to relief.

IT IS ORDERED:

1. The clerk must enter judgment stating, "The petition is denied with prejudice."

2. A certificate of appealability is granted on these issues:

(a) False testimony of Mr. Ozio;

(b) Comments on Mr. Whitton's post-*Miranda* invocation of his right to remain silent;

(c) Ineffective assistance on mitigation.

3. The clerk must close the file.

SO ORDERED on November 30, 2022.

/s/Robert L. Hinkle
United States District Judge

APPENDIX C

[FILED: OCTOBER 9, 2014]

161 So.3d 314

Supreme Court of Florida.

Gary Richard WHITTON, Appellant,

v.

STATE of Florida, Appellee.

Gary Richard Whitton, Petitioner,

v.

Michael D. Crews, etc., Respondent.

Nos. SC11-2083, SC12-2522.

|

Oct. 9, 2014.

|

Rehearing Denied April 2, 2015.

PER CURIAM.

Gary Richard Whitton appeals an order of the circuit court denying his motion to vacate his conviction of first-degree murder and sentence of death filed under Florida Rule of Criminal Procedure 3.851 and petitions this Court for a writ of habeas corpus. We have jurisdiction. *See* art. V, § 3(b)(1), (9), Fla. Const.

FACTS

Whitton was convicted for the 1990 murder of James Mauldin. On direct appeal, this Court summarized the events leading to Mauldin's murder, and Whitton's subsequent arrest and conviction as follows:

The evidence presented at trial revealed that Whitton and James S. Mauldin met each other in March 1989, while receiving alcohol treatment at a halfway house in Pensacola. After leaving the halfway house, they continued to see each other at occasional Alcoholics Anonymous meetings. On October 6, 1990, Mauldin arrived at Whitton's Pensacola home in a taxicab. Whitton then gave Mauldin a ride to the halfway house where they originally met. On Sunday October 7, an intoxicated Mauldin returned to Whitton's home. He stayed with Whitton that day, as well as Monday, October 8.

On October 8, Whitton drove Mauldin to a bank in Destin so Mauldin could withdraw some money. The two men went to Mauldin's bank in Destin rather than a bank in Pensacola because Mauldin had lost his passbook and he believed he needed it to withdraw money from a bank other than his own. Mauldin's bank was closed when the two men arrived, but they returned to the bank on October 9. Upon their arrival, a teller told Mauldin he could not make a withdrawal without his passbook. Upset by this information, Mauldin closed his account and obtained $1135.88 in cash. Whitton assisted Mauldin in completing the transaction because Mauldin, who was apparently intoxicated, was unable to complete it himself.

Whitton then took Mauldin to a motel in Destin at Mauldin's request. Whitton completed the motel registration forms due to Mauldin's intoxication, but provided the motel clerk with false information about his own vehicle's license plate number. The motel clerk noticed the discrepancy and put Whitton's correct license plate number on the form. Whitton then assisted Mauldin to his room and left the motel sometime before noon.

Whitton originally told investigators that he did not revisit Mauldin that night. He later admitted returning to the motel and stated that he did so to tell Mauldin his mother was looking for him. Whitton claimed Mauldin was dead when he arrived and that he remained in the room for only a few moments. The motel clerk, however, testified that he saw Whitton's car arrive at approximately 10:30 p.m. that night and leave at around 12:30 a.m.

The same motel clerk discovered Mauldin's body the next day. An officer called to the scene testified that Mauldin's pockets had been turned inside out and that no money, other than a few coins, remained in the room. The officer testified that the blood found throughout the room made it appear as though a struggle had taken place. Blood spatter evidence confirmed the officer's conclusion. An expert in bloodstain analysis testified that the initial bloodshed began on the south bed, then continued to the foot of that bed, then to the floor between the beds, and finally ended between the north bed and north wall.

An autopsy revealed that Mauldin sustained numerous injuries during the attack which caused his death. Mauldin's skull was fractured and he suffered stab wounds to his shoulder, cheek, neck, scalp, and back. In addition, Mauldin sustained three fatal stab wounds to the heart. The medical examiner testified that these wounds prevented Mauldin's heart from beating properly and, consequently, caused his death. The medical examiner also testified that Mauldin had wounds to his arms and hands consistent with his attempting to defend himself. Accordingly, the medical examiner concluded that Mauldin was conscious during the attack, although a blood alcohol

test indicated Mauldin's blood alcohol level was .34 at the time of death.

The correct license plate number ascertained by the alert motel clerk led the police to Whitton's home. At approximately 1:30 a.m. on October 11, several officers knocked on Whitton's door after observing his car parked outside the house. Whitton invited the officers inside. Although the officers explained that Whitton was not under arrest and that he was not required to answer their questions, Whitton agreed to talk with them. After about twenty minutes, during which Whitton changed from his night clothes, he also agreed to accompany the officers to the police station. At the police station, several officers continued questioning Whitton regarding Mauldin's death until he invoked his right to remain silent.

A subsequent search of Whitton's home revealed a pair of boots stained with blood matching Mauldin's blood type. A search of his car revealed blood stains matching Mauldin's blood type, as well as receipts indicating that Whitton paid several overdue bills on October 10. In addition, a receipt indicating that Whitton obtained a car wash on October 10 at 2:37 a.m. was found in his car. Consequently, Whitton was charged with first-degree murder and robbery.

While incarcerated and awaiting trial, Whitton confessed to another inmate that he went back to the motel the night Mauldin was murdered to get the money Mauldin had withdrawn from the bank, that a fight ensued, and that he stabbed and killed Mauldin. Whitton told the inmate he had to commit the murder in order to prevent Mauldin from testifying against him in any parole violation proceeding that might occur as a result of the robbery. This confession was

> overheard by a third inmate and both inmates testified at Whitton's murder trial. A jury found Whitton guilty of murder and robbery.
>
> In the penalty-phase proceeding the jury unanimously recommended the death sentence. The trial judge followed the jury's recommendation and sentenced Whitton to death for the murder conviction and to a consecutive nine-year sentence for the robbery conviction. In support of the death penalty the judge found five aggravating factors: (1) Whitton committed the crime while on parole for a 1981 armed robbery conviction; (2) Whitton was previously convicted of another felony involving the use or threat of violence; (3) the crime was committed to avoid arrest; (4) the crime was committed for pecuniary gain; and (5) the crime was heinous, atrocious, or cruel. The judge also found a number of nonstatutory mitigating factors [:(1) Whitton suffered a deprived childhood and poor upbringing; (2) Whitton was abused as a child; (3) Whitton was abused by his two alcoholic parents; (4) Whitton was a hard worker when employed; (5) Whitton had shown potential for rehabilitation; (6) Whitton had performed various humanitarian deeds; (7) Whitton was an alcoholic; (8) Whitton had an unstable personality consistent with alcoholism and child abuse; (9) Whitton is a human being and child of God,] but determined they did not outweigh the aggravating factors.

Whitton v. State, 649 So.2d 861, 862–64 (Fla.1994) (footnotes omitted).

Whitton raised seven issues on appeal.[1] This Court did not grant relief on any of Whitton's claims and affirmed his convictions and sentences. *Id.* at 867.

On March 26, 1997, Whitton filed a shell motion for postconviction relief pursuant to rule 3.850. Whitton subsequently filed three amendments to his motion; the third and last was filed on November 1, 2004. Whitton raised twenty-nine claims. The court summarily denied eleven claims and conducted an evidentiary hearing on the remaining eighteen claims. After the evidentiary hearings held on October 31 through November 3, 2005, the court denied each of Whitton's remaining claims in a 102–page order issued on June 2, 2011.

Whitton appeals the denial of five claims, and has filed a petition for a writ of habeas corpus, raising two additional claims. Because we find that Whitton has failed to establish that he is entitled to relief on any of his claims, we affirm the postconviction court's denial and deny Whitton's petition for a writ of habeas corpus.

DISCUSSION

Brady and *Giglio*

[1] (1) The trial court erred in denying Whitton's motion for mistrial after the prosecutor commented on his post-arrest silence during closing argument; (2) the trial court erred in denying in part Whitton's motion to suppress statements he made to officers because the statements were allegedly the product of an illegal arrest; (3) the heinous, atrocious, or cruel instruction provided by the court was unconstitutionally vague; (4) the trial court erred in finding that the murder was especially heinous, atrocious, or cruel; (5) the trial court erred in failing to give a limiting instruction with respect to the avoiding arrest circumstance; (6) the trial court erred in finding that the murder was committed to avoid arrest; and (7) the death sentence is not proportionate in this case.

In his first issue on appeal, Whitton raises several claims purported to be violations of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Whitton's claims appear to be a mixture of *Brady, Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), and improper argument claims. The theme of Whitton's claims is that, overall, the prosecution was corrupt and sought to convict him by any necessary means. In each of these claims, Whitton fails to establish each of the prongs necessary to maintain a claim. Accordingly, we find that the postconviction court properly denied these claims.

Standards of Review

To successfully raise a *Brady* violation claim, Whitton must show that: (1) the evidence was favorable to him, either because it was exculpatory or impeaching; (2) the evidence was suppressed by the State; and (3) that the suppression resulted in prejudice. *Conahan v. State,* 118 So.3d 718, 729 (Fla.2013) (citing *Strickler v. Greene,* 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); *Johnson v. State,* 921 So.2d 490, 507 (Fla.2005); *Rogers v. State,* 782 So.2d 373, 378 (Fla.2001)). "To establish the materiality element of *Brady,* the defendant must demonstrate a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Conahan,* 118 So.3d at 730 (quoting *Guzman v. State,* 868 So.2d 498, 506 (Fla.2003)) (internal quotation marks omitted). The review of a postconviction court's denial of this claim is under a mixed standard where this Court defers to the lower court's factual findings that are supported by competent, substantial evidence and reviews the application of law de novo. *Id.* at 730 (quoting *Sochor v. State,* 883 So.2d 766, 785 (Fla.2004)).

Likewise, there are three elements to a successful *Giglio* claim, Whitton must demonstrate that (1) the testimony was false; (2) the prosecutor knew it was false; and (3) the testimony was material. *See Conahan,* 118 So.3d at 728 (citing *Guzman,* 868 So.2d at 505). If Whitton successfully demonstrates the first two elements, "the State bears the burden of proving that the testimony was not material by showing that there is no reasonable possibility that it could have affected the verdict because it was harmless beyond a reasonable doubt." *Id.* at 728–29 (citing *Johnson v. State,* 44 So.3d 51, 64–65 (Fla.2010); *Guzman,* 868 So.2d at 506–07). And, the claim carries the same mixed standard of review. *Id.* at 729 (citing *Suggs v. State,* 923 So.2d 419, 426 (Fla.2005)).

Kenneth McCollough

Whitton's claims regarding McCollough are that: (1) the State coerced him into providing false testimony at Whitton's trial, and (2) the State suppressed knowledge of McCollough's crimes and relationship with the prosecutor's mother, Inez Adkinson. Whitton fails to establish that McCollough presented false testimony at his trial or that the State was aware that any testimony was false. Second, the record refutes Whitton's assertion that the State suppressed knowledge of McCollough's relationship with Mrs. Adkinson because trial counsel impeached McCollough on the basis of this knowledge.

Whitton's *Giglio* claim is that the State knowingly presented McCollough's false testimony at trial. McCollough testified at trial that Whitton had confessed to him that he killed Mauldin. Because McCollough's testimony concerned Whitton's confession, this evidence is clearly material. *See Shellito v. State,* 121 So.3d 445, 460 (Fla.2013) ("False evidence is material 'if there is any reasonable likelihood that the false testimony could have

affected the judgment of the jury.' " (quoting *Guzman*, 868 So.2d at 506)). However, Whitton has not demonstrated with certainty that the testimony McCollough provided was false, nor that the State knew it to be false.

At the evidentiary hearing, witnesses testified generally about McCollough's reputation as a known snitch and liar. However, no witness provided admissible evidence that McCollough lied specifically about Whitton's confession. Billy Key testified that McCollough intended to recant his trial testimony. George Broxon testified that he knew McCollough had committed a sexually deviant crime that he wanted to cover up. Broxon did not testify that he had specific knowledge that McCollough had lied at Whitton's trial in order to secure a deal with the prosecution. Whitton also introduced the testimony of Sheila Lowe (formerly McCollough), stating that McCollough was a liar and that she would not believe anything he said. She did not testify specifically about Whitton's case or that she had any specific knowledge that McCollough had lied during his testimony at Whitton's trial. Whitton also produced a transcript of Lowe's police interview describing the nature of McCollough's crimes. Additionally, McCollough never executed an affidavit prior to his death. It seems that the only evidence that McCollough may have wanted to recant his trial testimony was hearsay evidence presented by a third party. Accordingly, the postconviction court's ruling that Whitton failed to demonstrate that a *Giglio* violation occurred is supported by competent, substantial evidence.

Next, Whitton alleges that the State suppressed knowledge of McCollough's relationship with the prosecutor's mother in violation of *Brady*. This claim is procedurally barred and refuted by the record. Whitton failed to raise this claim as a *Brady* violation in his motion

for postconviction relief and, therefore, the postconviction court did not address it. Accordingly, Whitton is procedurally barred from raising this claim here.

Jake Ozio

Whitton's claim regarding Ozio is similar to his McCollough claim. Whitton alleges that Ozio recanted his trial testimony that Whitton confessed to him in prison. However, Whitton failed to present any evidence in support of his claim. Accordingly, the postconviction court properly denied this claim.

First, Whitton has failed to demonstrate that the evidence was false. Ozio refused to testify and Whitton did not seek to have Ozio's affidavit submitted into evidence. Additionally, this Court has stated that recantations are highly unreliable. *See Spann v. State,* 91 So.3d 812, 816 (Fla.2012) (stating that because recanting testimony is so unreliable, a new trial will be granted only when it appears that the witness's testimony changes to such an extent as to render a probable different verdict) (citing *Armstrong v. State,* 642 So.2d 730 (Fla.1994)). The only testimony presented at the evidentiary hearing to support this claim was from Kevin Wallace, Ozio's co-defendant, who never stated that Ozio lied at trial. Wallace testified that Ozio told him that Ozio was the only reason they had gotten out of jail. Furthermore, even if Ozio's trial testimony was false, Whitton has not demonstrated that the State was aware that Ozio intended to present false testimony. Accordingly, the lower court properly denied this claim.

Shirley Ziegler

Whitton alleges that the prosecutor and sheriff's office threatened Ziegler and that this deprived him of a fair trial. This is neither a *Brady* nor *Giglio* claim because Whitton does not allege that the State either presented

false testimony or suppressed evidence, but rather alleges that the State attempted to suppress evidence or coerce Ziegler into testifying falsely about her laboratory results.

Even if we were to address this claim on the merits, the record demonstrates that defense counsel was aware of the alleged threats during trial. Further, Ziegler testified at the evidentiary hearing that she testified truthfully and did not withhold any information. Accordingly, Whitton's claim is refuted by the record and without merit.

DNA Samples

Whitton additionally claims that the blood that Ziegler tested was from a different location than that tested by the State's expert, Lonnie Ginsberg. During his postconviction proceedings, it appears that Whitton argued the opposite—that the State attempted to discredit Ziegler's testimony by stating that she tested a different location than Ginsberg. Because Whitton's claim on appeal is different from his claim below, it is procedurally barred.

The Other DNA Lab

Whitton also alleges that the State suppressed its attempt to secure additional DNA testing and an audio-taped conversation between Lt. Mann and Brian Wraxall at the Serological Research Institute. The postconviction court listened to the audiotape and determined that there was no exculpatory evidence contained on it. On the tape, Lt. Mann opines that Ziegler probably performed part of the testing process incorrectly, which altered the results. Thereafter, the postconviction court found that Whitton's claim was refuted by the record and properly denied this claim.

Cellmark

Whitton alleges that the State suppressed the Cellmark report stating that the test results were inconclusive. Alternatively, Whitton argues that the State presented false testimony stating that the Cellmark report concluded that there was insufficient material to test. Whitton has failed to establish either a *Brady* or *Giglio* violation because he presented no evidence in support of this claim.

First, Whitton has not demonstrated that this evidence would be exculpatory. Zeigler testified at trial that the blood sample in question did not match that of Whitton or the victim. Further, Whitton admitted that the victim's blood was on his boots because, according to Whitton's version of events, he walked through the victim's blood in his hotel room after he had been murdered. Whitton's admission makes it impossible for him to demonstrate prejudice. Likewise, Whitton has not established that any false evidence was presented at trial. Accordingly, the postconviction court properly denied this claim.

Car Wash Ticket

Whitton next alleges that the State presented false testimony regarding a car wash ticket found in Whitton's vehicle. Whitton has not established that the evidence was false, that the State was aware that it was false, or that he was prejudiced.

The car wash ticket was purchased at 2:37 a.m. at a Conoco gas station on October 10, 1990. Such tickets were given when anyone purchased at least eight gallons of gasoline at that particular service station. A person who purchased regular grade gasoline would get one car wash, but a person who purchased mid- or super-grade gasoline

would receive a double car wash. The testimony at trial established that Whitton's ticket was a double wash ticket. Accordingly, Whitton's argument that the ticket's use by Lt. Mann proves that Whitton could not have used the ticket is incorrect. Furthermore, the ticket was not used to demonstrate that Whitton had washed his car to remove evidence. The ticket was presented at trial to establish Whitton's whereabouts during the time of the murder because Whitton alleged that he was at home when Mauldin was murdered. The car wash ticket demonstrates that Whitton was not at home and that he was in the vicinity of the victim's hotel.

Whitton has not established that the State presented false testimony. At the evidentiary hearing, Whitton presented a report written by Lt. Mann who concluded that Whitton did not use the car wash. However, in light of the testimony that Whitton's receipt was valid for a double wash, this evidence is insufficient to establish that the State's argument at trial was improper. Further, because it was not used to demonstrate that Whitton attempted to wash blood off of his car, Whitton cannot demonstrate that the State knew the evidence to be false. Finally, Whitton cannot demonstrate prejudice.

Maureen Fitzgerald

Whitton appears to raise another improper argument claim under the guise of *Brady* and *Giglio.* Whitton does not allege that Fitzgerald lied at trial, but that the State improperly argued that Whitton lied to Fitzgerald about Mauldin's whereabouts. To the extent that this represents an improper argument claim, it is procedurally barred because it should have been raised on direct appeal. To the extent that this is a *Brady* or *Giglio* argument, the postconviction court properly denied this claim.

Fitzgerald testified at trial that Whitton called her on October 8 or 9, 1990, and told her that Mauldin was staying at a hotel in Destin. She testified that she was uncertain of the name, but that she had likely written it down and thought the name might be "Sun Den." Whitton testified that he did not pay attention to the name of the hotel and was not certain what name he had given to Fitzgerald. She was not certain of the name of the hotel and gave several different names. During closing arguments, the State argued that Whitton had misrepresented the hotel's name to Fitzgerald and gave her a different name than the "Sun and Sand" where Mauldin was actually staying.

Whitton cannot raise an improper argument claim as proper grounds for postconviction relief. Because this claim should have been raised on direct appeal, it is procedurally barred. *See Jennings v. State,* 123 So.3d 1101, 1102 (Fla.2013) (citing *Spencer v. State,* 842 So.2d 52, 60 (Fla.2003)).

To the extent that Whitton is alleging a violation of *Giglio,* Whitton does not argue and cannot demonstrate that the evidence presented was false, nor that the State knew it to be false. Finally, because Whitton also testified that he was uncertain of the name of the hotel, he cannot establish prejudice. Accordingly, the postconviction court properly denied this claim.

The "Corrupt" Prosecution

Here, Whitton argues that the overall corruptness of the prosecution in his trial warrants a reversal. Treating this claim as a claim of cumulative error, Whitton has failed to demonstrate that he is entitled to relief. *See Merck v. State,* 124 So.3d 785, 802 (Fla.2013) (" '[W]here individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error

must fail.' ") (quoting *Griffin v. State*, 866 So.2d 1, 22 (Fla.2003)).

Ineffective Assistance of Trial Counsel

In his second claim, Whitton alleges multiple instances of ineffective assistance of trial counsel. In addition to reasserting the claims above as ineffective assistance of counsel, Whitton raises novel claims that involve his assertion that trial counsel failed in multiple respects to establish an alternative theory of the crime by: (1) failing to call an expert to testify that a fingerprint could not have been deposited on the inside of a sandwich bag during manufacturing, (2) failing to call a forensic pathologist to dispute the length of time it took the victim to die, (3) failing to establish a different time of death, (4) failing to establish that the State's theory of motive was not supported, (5) failing to argue that the crime scene was not properly processed, (6) failing to argue that the victim was "looking to get rolled," and (7) failing to impeach John Maleszewski's testimony. Because Whitton has failed to establish deficiency or prejudice for each of these sub claims, his claim of ineffective assistance of counsel in the guilt phase fails.

Standard of Review

In accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), this Court employs the following standard of review:

> First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of

> the proceeding that confidence in the outcome is undermined.

Long v. State, 118 So.3d 798, 805 (Fla.2013) (quoting *Bolin v. State,* 41 So.3d 151, 155 (Fla.2010)). Additionally,

> There is a strong presumption that trial counsel's performance was not deficient. *See Strickland,* 466 U.S. at 690, 104 S.Ct. 2052. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689, 104 S.Ct. 2052. The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* (quoting *Michel v. Louisiana,* 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* "[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Occhicone v. State,* 768 So.2d 1037, 1048 (Fla.2000). Furthermore, where this Court previously has rejected a substantive claim on the merits, counsel cannot be deemed ineffective for failing to make a meritless argument. *Melendez v. State,* 612 So.2d 1366, 1369 (Fla.1992).
>
> In demonstrating prejudice, the defendant must show a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in

> the outcome." *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052.

Long, 118 So.3d at 805–06 (parallel citations omitted) (quoting *Johnston v. State,* 63 So.3d 730, 737 (Fla.2011)).

> Because both prongs of the *Strickland* test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing the circuit court's legal conclusions de novo.

Shellito, 121 So.3d at 451 (citing *Mungin v. State,* 79 So.3d 726, 737 (Fla.2011); *Sochor,* 883 So.2d at 771–72).

Merits

In this claim, Whitton raises several instances where he argues that trial counsel was ineffective. For each of the subclaims, Whitton has failed to establish both prongs of the *Strickland* test. Accordingly, the postconviction court properly denied his claims.

Car Wash Ticket

Whitton first alleges that counsel was deficient for failing to introduce Lt. Mann's report at trial, which contained Lt. Mann's opinion that Whitton did not use the car wash. Because Lt. Mann's report would have constituted hearsay evidence, and Whitton did not call Lt. Mann to testify at the evidentiary hearing, Whitton cannot establish that counsel was deficient. Additionally, as discussed above, the jury heard testimony that Whitton's ticket was a "double car wash" ticket, meaning that Lt. Mann's conclusion that Whitton did not use the ticket was based on an erroneous assumption. Accordingly, even if counsel had submitted the report into

evidence, Whitton cannot establish that it would have affected the outcome of his trial. Therefore, the postconviction court properly denied relief on this claim.

Fingerprint on the Sandwich Bag

Whitton argues that counsel was deficient for failing to call an expert witness to testify that a fingerprint could not have been deposited inside the sandwich bag during the manufacturing process. The postconviction court properly denied this claim because Whitton cannot establish prejudice or deficiency.

At trial Florida Department of Law Enforcement agent Tom Simmons testified that fingerprints not matching the victim or defendant were found on several items in the room. Simmons further testified that the print on the sandwich bag could have been placed there by the person who opened the bag. Lastly, during closing arguments, defense counsel argued that the prints created reasonable doubt. Accordingly, counsel was not deficient for failing to call an expert witness to testify that the prints could not have resulted from the manufacturing process and the postconviction court properly denied this claim.

Failure to Question Zeigler

Whitton alleges that counsel was deficient for failing to question Zeigler about the threats she received in front of the jury. Whitton argues that this would have been compelling evidence for the jury to consider. However, Whitton cannot establish that counsel was deficient nor can he establish that he was prejudiced because Zeigler did not testify untruthfully at trial. Zeigler stated that she testified truthfully and her testimony was favorable to Whitton. Counsel moved for dismissal based on the threats Zeigler received, but the court denied the motion.

Counsel then moved for a new trial which was also denied. However, counsel does not appear to have followed up. Counsel addressed the issue to the extent available at trial. Accordingly, Whitton cannot establish that counsel was deficient or that he was prejudiced, and the postconviction court properly denied his claim.

Cellmark and Additional DNA Testing

Whitton alleges that trial counsel were deficient for failing to produce evidence that the State attempted to obtain DNA testing at another lab. Whitton's claim here contravenes his claim above that the State suppressed the evidence of such attempt. Whitton cannot establish that counsel was deficient. The FDLE results were favorable to the defense and it was sound trial strategy not to call attention to the State's attempt to obtain additional testing that might have caused the jury to doubt the credibility of the results. Further, Whitton cannot establish prejudice because the results were favorable to him and it is not likely that the outcome of the trial would have been different. Accordingly, the postconviction court properly denied this claim.

Forensic Pathologist

Whitton alleges that trial counsel were ineffective for failing to present evidence to rebut the coroner's determination that Mauldin struggled for thirty minutes before he died from his injuries. Whitton further alleges that counsel were ineffective for failing to present evidence that there were likely two weapons used and two people involved in Mauldin's murder. Whitton presented the evidence of Dr. Leroy Riddick at the evidentiary hearing. Dr. Riddick disagreed with the trial testimony of Dr. Edmund Kielman.

Whitton cannot establish prejudice. Although Dr. Riddick's testimony differed from that of Dr. Kielman, there was nothing presented at the evidentiary hearing that affected Whitton's guilt. It is therefore not likely that Whitton would have been found not guilty if counsel had presented Dr. Riddick's testimony at trial. Further, Dr. Riddick's testimony would not have negated the trial court's finding of the HAC aggravator. Therefore, it is also not likely that Whitton would have received a lesser sentence. Accordingly, the postconviction court properly denied relief on this claim.

Time of Death

Whitton alleges that counsel were deficient for failing to more extensively cross-examine Dr. Kielman regarding Mauldin's time of death. The only evidence presented at the evidentiary hearing to support this claim was Dr. Riddick's testimony that the struggle was likely approximately five minutes rather than the thirty minutes Dr. Kielman opined elapsed. Dr. Riddick opined that the time of death was between 5:00 p.m. and 11:00 p.m. on October 9. Dr. Kielman's trial testimony provided that the time of death could have been from 11:00 a.m. on October 9 to 11:00 a.m. on October 10, 1990. Accordingly, Dr. Riddick's testimony did not contradict Dr. Kielman's. Whitton cannot establish that he was prejudiced, and the postconviction court properly denied this claim.

Motive

Whitton alleges that trial counsel was deficient for failing to present the testimony of Debra Sims at trial to rebut the State's theory of Whitton's motive for killing Mauldin. Whitton alleges that Sims would have testified that she gave him money to pay his bills and that he was not affected by losing his job because he had another job lined up. As it relates to the testimony that Whitton had

another job, such testimony would have been hearsay. Counsel cannot be deemed deficient for failing to submit inadmissible evidence at trial. Further, Whitton cannot establish prejudice. Sims' testimony that she gave him $200 would not likely have changed the outcome of the trial. At trial, evidence was presented that Whitton's past due bills were paid on the day after the murder. It is not likely that the jury would have reached a different verdict if it had heard Sims' testimony. Accordingly, the postconviction court properly denied this claim.

Blood Evidence Testimony

Whitton alleges that trial counsel were ineffective for failing to argue that the blood evidence found in his car was consistent with his story that he walked through Mauldin's blood when he found Mauldin's body. Whitton's claim is disputed by the record. Counsel argued during closing that only three drops of blood were found in Whitton's car and that the person who committed the murder would have been covered in blood. Whitton has failed to demonstrate that this was deficient. Accordingly, the postconviction court properly denied this claim.

Crime Scene

Whitton alleges that counsel were ineffective for failing to present evidence that the crime scene was not properly processed. By Whitton's own allegation, counsel were not aware that any evidence was returned to the victim's family without being tested. Counsel cannot be deficient for failing to introduce evidence that was unknown at the time of trial. Further, Whitton failed to present evidence to support this claim. *See Dennis v. State,* 109 So.3d 680, 694–95 (Fla.2012) (finding that defendant's failure to allege which experts should have been hired, what these experts would have testified, and how the failure prejudiced the defendant, was sufficient to

support denial of the defendant's postconviction claim.). Accordingly, the postconviction court properly denied this claim.

Alternate Theory of Crime

Whitton alleges that counsel were deficient for failing to present testimony that Mauldin was flashing his money, had previously been "rolled" by a prostitute, and was seeking the services of a prostitute on the night of his murder. The evidence presented at the evidentiary hearing does not support Whitton's claim. Whitton argues that Mauldin could have been "rolled" by a prostitute; however, at the evidentiary hearing, the cab driver testified that he did not. Whitton, therefore, cannot establish that he was prejudiced by counsel's failure to present evidence to support this theory at trial. Whitton did not produce any credible evidence at the evidentiary hearing that someone else murdered Mauldin. Accordingly, the postconviction court properly denied this claim.

John Maleszewski

Whitton argues that counsel were ineffective for failing to impeach hotel clerk Maleszewski's inconsistent testimony. Whitton's argument here is refuted by the record. The record demonstrates that trial counsel impeached Maleszewski extensively. Accordingly, Whitton has not established that counsel were deficient, and the postconviction court properly denied this claim.

Investigation and Impeachment of Snitches

Whitton alleges that trial counsel were ineffective for failing to interview jail inmates to find witnesses to refute Ozio's and McCollough's testimony. Whitton failed to present any evidence that would have been admissible at trial. Further, the record demonstrates that both

McCollough and Ozio were impeached extensively at trial. Whitton failed to demonstrate that counsel were deficient. Accordingly, the postconviction court properly denied this claim.

Juror Communication

Juror Notes

Whitton alleges that the trial judge and bailiff communicated with the jury outside the presence of the defendant and counsel in violation of Florida Rule of Criminal Procedure 3.410.[2] Whitton's allegation is based on five notes from the jury of which he says he was unaware until recently. Whitton's claim is refuted by the record and thus without merit. Additionally, two of the notes do not comprise communication within the scope of rule 3.410, and therefore do not constitute error.[3]

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[2]Rule 3.410 provides:

> After the jurors have retired to consider their verdict, if they request additional instructions or to have any testimony read or played back to them they may be conducted into the courtroom by the officer who has them in charge and the court may give them the additional instructions or may order the testimony read or played back to them. The instructions shall be given and the testimony presented only after notice to the prosecuting attorney and to counsel for the defendant. All testimony read or played back must be done in open court in the presence of all parties. In its discretion, the court may respond in writing to the inquiry without having the jury brought before the court, provided the parties have received the opportunity to place objections on the record and both the inquiry and response are made part of the record.

Fla. R.Crim. P. Rule 3.410 (last amended November 8, 2012).

[3] The first note in the record states, "Is it to our understanding that a lady in the audience has a tape recorder recording this? We the jury object. It gives us an uneasy feeling." In the trial record, this

note appears to have been presented at the beginning of the defense's portion of the penalty phase, right before counsel Tongue began questioning Dr. Larson. The trial judge responded in open court, stating, "Let me make a general announcement before you call your first witness, and that would be simply to advise the jury that I have dealt with the situation that you brought to my attention. And I will, for the record, just file this note with the clerk."

Whitton's claim regarding this note fails for several reasons. First, as demonstrated by the record, this communication did not fall under the scope of rule 3.140 because it was not a request from the jury for additional instruction during deliberations. Second, the note was addressed in open court with counsel for the defense, the State, the defendant, and the jury present. Accordingly, Whitton is not entitled to relief.

The fifth note in the record states, "I understand you may have a question. If so, please write it down and Tim will hand it to me." L. Melvin, Judge. On the same page, the jury appears to have written its response, "Mrs. Keyser's feet cannot touch floor in jury box which is causing feet to swell—could I get a box to prop up feet." This exchange was captured in the trial record. The trial judge and counsel discussed the procedure for notes at length:

> The Court: I've just gotten a note that reads: "Some of the jurors want to ask a question. May they write it down?" The note was handed to me by my bailiff. I will—If they're going to ask a question, I want it written down. I don't want them to simply verbalize it in the courtroom. Logistically, I think I need to bring them in and tell them that if they have a question they need to write it down and hand it to the bailiff.
>
> Mr. Bishop: Judge, for the record, we would just allow Mr. Crenshaw to deliver that message. I mean, we are all here in the courtroom. I think, that for purposes of the record, we can lay out that the jury room door is located in front of the Court, that we would be able to observe Mr. Crenshaw enter the room, he can deliver the pad, come back, pick the message up from them, and we can just find out what it is at that time. We would have no objection to, the defense, handling it that way.
>
> The Court: All right. Does the State have any objection?
>
> Mr. Adkinson: (Indicating in the negative)

Whitton's claim fails because these communications do not fall within the scope of rule 3.410. *See Mendoza v. State,* 700 So.2d 670, 674 (Fla.1997).

> This Court has held that, where ... there are communications between the judge and the juror outside the express notice requirements of rule 3.410, Florida Rules of Criminal Procedure, a harmless error analysis applies. *See Williams v. State,* 488 So.2d 62, 64 (Fla.1986). Indeed, the United States

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> The Court: I will then write a note for the bailiff to hand into the jury room and wait outside for them to write a response back.
>
> Mr. Bishop: Do you want to go forward with the testimony, or take a break at this point?
>
> The Court: Let me see what they say. My note to the jury reads: "I understand you may have a question. If so, please write it down and Tim will hand it to me."
>
> [an apparent break while they await the response]
>
> The Court: What makes makes (sic) this funny is an inside joke. I'm sitting in the burgundy chair now instead of the big one because my feet don't touch the floor in the big brown one. This note says, "Mrs. Keyser's feet cannot touch the floor in the jury box, which is causing her feet to swell. Could I get a box to prop up my feet?" And, so we do need to get her something to prop her feet up on.

This exchange happened during the State's case-in-chief prior to the direct examination of Dr. Kielman. Accordingly, the communication does not fall within the scope of rule 3.140. Therefore, the note is subject to harmless error analysis. *See Lebron v. State,* 799 So.2d 997, 1015 (Fla.2001). As indicated by the record, the communication happened in open court and counsel did not object. Indeed, defense counsel Bishop testified at the evidentiary hearing that he remembered the note about the juror's feet not being able to reach the floor. Additionally, this portion of the record appears to demonstrate that the process for juror notes was agreed upon by counsel for the defense, counsel for the State, and the trial judge. Whitton cannot demonstrate that any error occurred or that the error was prejudicial.

> Supreme Court has held that, even where such communications are not recorded ... and are not subsequently disclosed to counsel ... they are still subject to a harmless error analysis. *See Rushen v. Spain,* 464 U.S. 114, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983).

Lebron v. State, 799 So.2d 997, 1015 (Fla.2001).

While the remaining notes[4] appear to fall within the scope of rule 3.410, we agree with the postconviction court that these claims are refuted by the record. Whitton's argument that he was unaware of the notes is refuted by counsel's testimony that he remembered the content of at least two of the notes.

We have stated that:

> Violations of rule 3.410 are per se reversible because communication between the judge and the jury, without notice to and outside the presence of the prosecutor, defense counsel, and the defendant, is too possibly prejudicial to be tolerated. *Bradley v. State,* 513 So.2d 112 (Fla.1987); *Williams v. State,* 488 So.2d 62 (Fla.1986); *Curtis v. State,* 480 So.2d 1277 (Fla.1985); *Ivory v. State,* 351 So.2d 26 (Fla.1977).

Brown v. State, 538 So.2d 833, 834 (Fla.1989). However, as we stated in *Thomas v. State,* 730 So.2d 667, 668

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[4] The second note in the record states, "List of her (Judge Melvin's) instruction (sic) to the jury."

The third note in the record states, "What is the soonest possible time he could get out of prison? Gain time? Model prisoner? etc. Or is 25 yrs the soonest he could get out?"

The fourth note in the record appears to be Judge Melvin's response to the note above. It states, "With regard to your question, please refer to the jury instructions. L. Melvin, Judge."

(Fla.1998), "The per se reversible error rule announced in *Ivory* is prophylactic in nature and must be invoked by contemporaneous objection at trial. Where counsel communicates to the trial judge his acceptance of the procedure employed, the issue will be considered waived." *Id.* at 668 (footnotes and emphasis omitted); *see also, Lebron,* 799 So.2d at 1017 n. 2; *Mendoza,* 700 So.2d at 674. Here, Whitton's counsel remembered several of the notes, including the one regarding Whitton's sentence. Accordingly, on the entire record before us, it appears that counsel could have objected contemporaneously. *See Thomas,* 730 So.2d at 668. We note, however, the importance of ensuring a complete record during trial and admonish trial judges to remember:

> Any communication with the jury outside the presence of the prosecutor, the defendant, and defendant's counsel is so fraught with potential prejudice that it cannot be considered harmless....
>
> ... it is prejudicial error for a trial judge to respond to a request from the jury without the prosecuting attorney, the defendant, and defendant's counsel being present and having the opportunity to participate in the discussion of the action to be taken on the jury's request.

Ivory, 351 So.2d at 28.

Juror Interviews

The second part of Whitton's juror communication claim is that the postconviction court erred by denying him an opportunity to interview the jury. This issue is reviewed for an abuse of discretion. *Marshall v. State,* 976 So.2d 1071, 1076 (Fla.2007) (citing *Boyd v. State,* 910 So.2d 167, 178 (Fla.2005)). This Court has stated:

> "Juror interviews are not permissible unless the moving party has made sworn allegations that, if true, would require the court to order a new trial because the alleged error was so fundamental and prejudicial as to vitiate the entire proceedings." *Johnson v. State,* 804 So.2d 1218, 1224 (Fla.2001) (citing *Baptist Hosp. of Miami, Inc. v. Maler,* 579 So.2d 97, 100 (Fla.1991)).

Power v. State, 886 So.2d 952, 957 (Fla.2004). Because there was no fundamental or prejudicial error, the postconviction court properly denied juror interviews.

Investigation of Mitigation

In his fourth issue on appeal, Whitton alleges that trial counsel failed to properly investigate mitigation. The trial court found in mitigation that Whitton suffered a deprived childhood and poor upbringing, that he was abused as a child, specifically that he was abused by his alcoholic parents, and that Whitton had an unstable personality consistent with parental alcoholism and child abuse. Because the evidence presented at the evidentiary hearing was cumulative to that considered during Whitton's penalty phase, he cannot establish that counsel's failure to talk to additional members of his family created prejudice. Accordingly, the postconviction court properly denied this claim.

This Court has stated that trial counsel has a duty to investigate mitigation. " 'In reviewing a claim that counsel's representation was ineffective based on a failure to investigate or present mitigating evidence, the Court requires the defendant to demonstrate that the deficient performance deprived the defendant of a reliable penalty phase proceeding.' " *Simmons v. State,* 105 So.3d 475, 503 (Fla.2012) (quoting *Hoskins v. State,* 75 So.3d 250, 254 (Fla.2011)).

> "It is unquestioned that under the prevailing professional norms ... counsel ha[s] an 'obligation to conduct a thorough investigation of the defendant's background.' " Moreover, counsel must not ignore pertinent avenues for investigation of which he or she should have been aware. "[I]t is axiomatic that 'counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.' "

Id. Here, counsel spoke to several of Whitton's family members who resided in Florida. Their combined information supplied sufficient evidence for the trial court to find multiple mitigating factors relating to Whitton's childhood. Admittedly, counsel did not travel to New York to inquire further into Whitton's background.

Relating to the evidence in support of mitigation, the trial court found:

> The evidence is clear that the Defendant is an adult child of two alcoholic parents, that he was physically and mentally abused by his parents, and that he suffered a deprived childhood and poor upbringing. The evidence also demonstrated that other siblings from this same family environment are productive, law abiding citizens. The Court finds that these mitigating circumstances have been established and they are given considerable weight by this court.

The jury recommended the sentence of death in a unanimous verdict. Whitton cannot establish that he was prejudiced. As noted, the additional testimony provided at the evidentiary hearing was cumulative to that presented at trial. It is therefore not likely that he would have received a lesser sentence if counsel had presented the

additional witnesses. Accordingly, the lower court properly denied this claim.

Whitton next alleges that counsel was deficient for failing to appoint experts to testify regarding his likely fetal alcohol syndrome. Whitton's claim is refuted by the record. Counsel appointed Dr. James Larson, who testified "that the Defendant had a full scale IQ of 84, indicating that his level of intellectual functioning was in the Low Average range.... that the Defendant does not have a major mental illness, but that he does have an unstable personality, consistent with alcoholism and child abuse." Pursuant to Dr. Larson's testimony, the trial court found mental problems as a mitigating factor and gave them some weight. *Id.* This Court has stated that trial counsel is not deficient simply because postconviction counsel could find a more favorable expert. *See Hoskins v. State,* 75 So.3d 250, 255 (Fla.2011) (" 'This Court has repeatedly held that counsel's entire investigation and presentation will not be rendered deficient simply because a defendant has now found a more favorable expert.' " (quoting *Card v. State,* 992 So.2d 810, 818 (Fla.2008))). Accordingly, just because Whitton has found an expert who would diagnose him as having fetal alcohol syndrome does not mean that counsel provided deficient performance at the trial. Further, even if this Court finds that counsel was deficient, because the evidence would be stronger, but cumulative to that provided at trial, Whitton cannot establish prejudice. Therefore, the postconviction court properly denied this claim.

Cumulative Error

In his final claim on appeal, Whitton argues that the cumulative effect of the errors in his trial entitle him to a new trial. The postconviction court denied this claim below, finding that Whitton was not entitled to cumulative

relief where there had been no error found. The lower court is correct. As discussed above, Whitton is not entitled to relief on any of his claims and is therefore not entitled to relief based on cumulative error. *See Merck,* 124 So.3d at 802.

PETITION FOR WRIT OF HABEAS CORPUS

In Whitton's first habeas issue, he refashions one of his postconviction claims into an ineffective assistance of appellate counsel claim. In his postconviction motion, he alleged both that the State had offered false testimony through McCollough and Ozio, and had suppressed evidence relating to McCollough. Whitton argues that appellate counsel was ineffective for failing to follow up on McCollough's recantation.

Claims of ineffective assistance of appellate counsel are properly raised in a petition for writ of habeas corpus. *See Jackson v. State,* 127 So.3d 447, 476 (Fla.2013) (citing *Freeman v. State,* 761 So.2d 1055, 1069 (Fla.2000)). "In raising such a claim, the defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based." *Id.* (internal quotation marks and alterations omitted). Consistent with the *Strickland* standard, to grant habeas relief based on ineffective assistance of counsel, this Court must determine:

> first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.

Pope v. Wainwright, 496 So.2d 798, 800 (Fla.1986); *see also Freeman*, 761 So.2d at 1069; *Thompson v. State*, 759 So.2d 650, 660 (Fla.2000). In raising such a claim, "[t]he defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based." *Freeman*, 761 So.2d at 1069; *see also Knight v. State*, 394 So.2d 997, 1001 (Fla.1981).

Whitton has not established that appellate counsel's omission constitutes a substantial deficiency outside the range of professionally acceptable performance. Saunders testified that she received the communication from Billy Key that McCollough wished to issue a statement recanting his trial testimony. She contacted trial counsel, who asked her to secure the statement. Saunders attempts were thwarted because McCollough refused to issue a statement unless the State agreed that he would not be prosecuted for perjury. Because Saunders could not overcome his refusal, McCollough did not submit a statement. Whitton does not provide any caselaw to support his assertion that Saunders owed him a greater duty.

Further, Whitton cannot establish prejudice. As discussed above, recantations are not credible. Without McCollough's testimony, Ozio's testimony would still have provided the jury with evidence that Whitton admitted to murdering Mauldin. That, coupled with the overwhelming evidence against Whitton, makes it extremely unlikely that McCollough's recantation would have changed the outcome of the trial.

Because we determine that the specific error alleged is not one for which Whitton is entitled to relief, we find that counsel is not deficient for failing to raise a meritless argument. "If a legal issue 'would in all probability have

been found to be without merit' had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective." *Rutherford v. Moore,* 774 So.2d 637, 643 (Fla.2000) (quoting *Williamson v. Dugger,* 651 So.2d 84, 86 (Fla.1994)).

In Whitton's second habeas issue, he argues that appellate counsel was ineffective for failing to ensure the record was complete by ensuring that the notes to and from the jury were included in the record. As with the previous issue, this claim is properly raised and the standard is as discussed above. *See Jackson,* 127 So.3d at 476. Because we determined that Whitton would not have been entitled to relief on this issue, we likewise determine that counsel was not deficient. *See Rutherford, supra.*

CONCLUSION

For the foregoing reasons, we affirm the postconviction court's denial of Whitton's 3.851 motion and deny his petition for a writ of habeas corpus.

It is so ordered.

LEWIS, QUINCE, CANADY, POLSTON, and PERRY, JJ., concur.

LABARGA, C.J., concurs with an opinion, in which PARIENTE, J. concurs.

LABARGA, C.J., concurring.

I concur with the majority opinion. I write separately, however, to address the lack of clarity in the record with respect to the notes submitted by the jury and to emphasize the need for trial courts to fully comply with the requirements of Florida Rule of Criminal Procedure 3.410. Rule 3.410 establishes a procedure for trial courts to follow when jurors request that additional instructions

be provided or that testimony be read or played back. This rule serves the dual purpose of protecting the interests of parties and preserving the record. Its purpose is clear.

Jury deliberations are sacrosanct, and the impact of a jury's deliberations cannot be overstated. It is of paramount importance that both parties be made aware of any inquiries from the jurors and that the treatment of these inquiries is fully reflected in the record. Although not every juror inquiry that falls within the scope of rule 3.410 will result in the jury being brought back into open court to receive additional instructions or a read-back or play-back of testimony, the rule is clear that every inquiry will result in notice to counsel for both parties. Moreover, rule 3.410 envisions that the record will clearly reflect the discussion and the resolution of the juror inquiry, which necessarily involves input from both parties.

When the trial court receives an inquiry from the jury, after notifying the prosecuting attorney and counsel for the defendant, the court should go on the record and read the note aloud in the presence of the defendant, defense counsel, and the prosecuting attorney. Then, still on the record, the trial court should invite input from both parties as to how to respond to the inquiry. The trial court should not respond to any inquiry from the jurors without first discussing the matter on the record with both parties. Strict adherence to this procedure is necessary to protect the defendant and the State, preserve the record, and assist the appellate court upon review.

PARIENTE, J., concurs.

APPENDIX D

[FILED: JULY 15, 2025]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 23-10786

GARY RICHARD WHITTON,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Florida
D.C. Docket No. 4:15-cv-00200-RH

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

Before ROSENBAUM, NEWSOM, and BRASHER, Circuit Judges.

PER CURIAM:

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

APPENDIX E

28 U.S. Code § 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

> **(A)** the applicant has exhausted the remedies available in the courts of the State; or
>
> **(B)(i)** there is an absence of available State corrective process; or
>
> > **(ii)** circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> **(2)** An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
>
> **(3)** A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that

was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to

support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

APPENDIX F

Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Appointment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or

as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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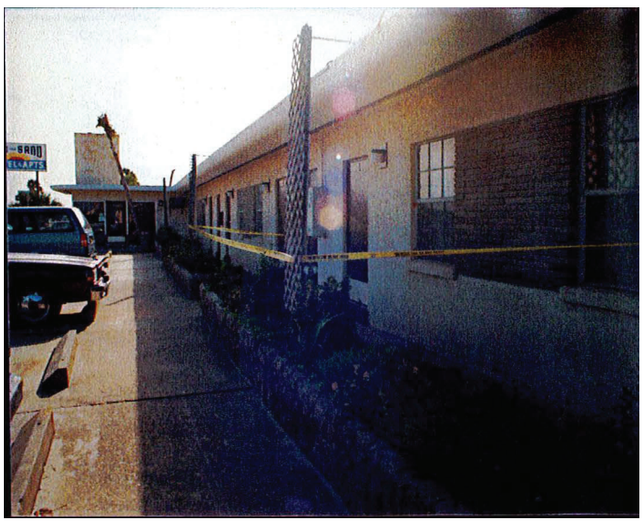


Photo of the exterior of the motel. Photo taken Oct. 10, 1990. (Source: Walton County Sheriff's Office, Case # 590-2733-10, Evidence Box 1294, FF 2)

Photo of the exterior of the motel. Photo taken Oct. 10, 1990. (Source: Walton County Sheriff's Office, Case # 590-2733-10, Evidence Box 1294, FF 1)

Photo of the interior of the motel. Photo taken Oct. 10, 1990. (Source: Walton County Sheriff's Office, Case # 590-2733-10, Evidence Box 1294, FF 2)

Photo of the interior of the motel. Photo taken Oct. 10, 1990. (Source: Walton County Sheriff's Office, Case # 590-2733-10, Evidence Box 1294, FF 1)

Photo of James Mauldin between north bed and north wall of motel room. Photo taken Oct. 10, 1990. (Source: Walton County Sheriff's Office, Case # 590-2733-10)

Photo of James Mauldin's feet near north bed of motel room. Photo taken Oct. 10, 1990. (Source: Walton County Sheriff's Office, Case # 590-2733-10, Evidence Box 1294, FF 1)

Photo of motel room's north bed and north wall. Photo taken Oct. 10-11, 1990. (Source: Walton County Sheriff's Office, Case # 590-2733-10, Evidence Box 1294, FF 2)

Photo of area between north bed and north wall of motel room. Photo taken Oct. 10-11, 1990. (Source: Walton County Sheriff's Office, Case # 590-2733-10, Evidence Box 1294, FF 3)

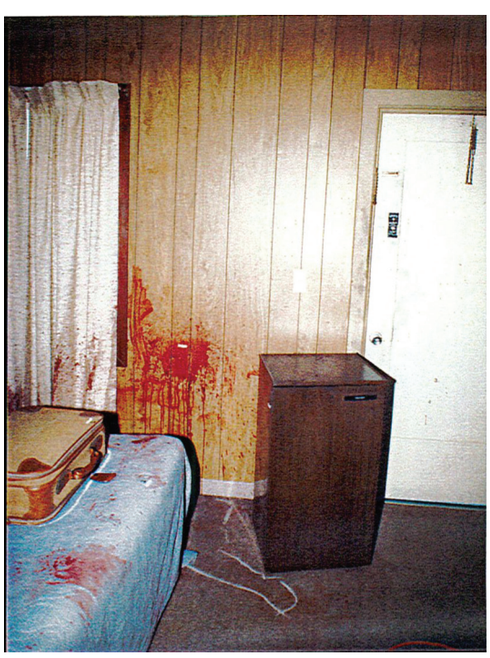


Photo of motel room's north bed and north wall. Photo taken Oct. 10-11, 1990. (Source: Walton County Sheriff's Office, Case # 590-2733-10, Evidence Box 1294, FF 2)

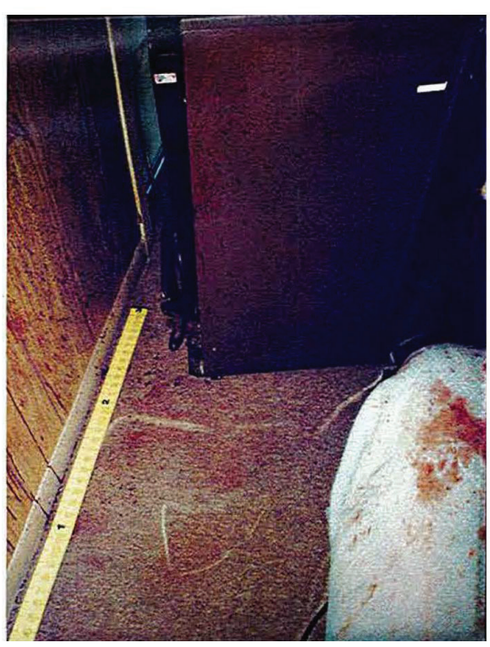


Photo of area between north bed and north wall of motel room. Photo taken Oct. 10-11, 1990. (Source: Walton County Sheriff's Office, Case # 590-2733-10, Evidence Box 1294, FF 3)

Photo of north wall of motel room. Photo taken Oct. 10-11, 1990. (Source: Walton County Sheriff's Office, Case # 590-2733-10, Evidence Box 1294, FF 3)

Photo of north wall of motel room. Photo taken Oct. 10-11, 1990. (Source: Walton County Sheriff's Office, Case # 590-2733-10, Evidence Box 1294, FF 3)

Photo of north wall of motel room. Photo taken Oct. 10-11, 1990. (Source: Walton County Sheriff's Office, Case # 590-2733-10, Evidence Box 1294, FF 3)

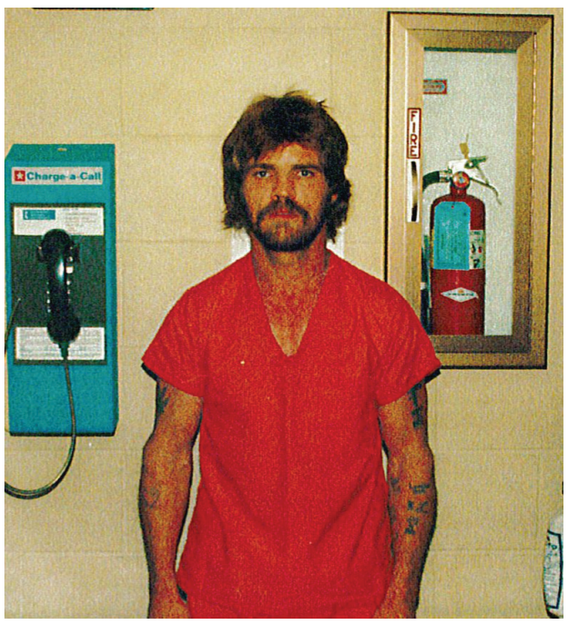


Photo of Gary Whitton during intake on Oct. 11, 1990. (Source: Walton County Sheriff's Office, Case # 590-2733-10, Evidence Box 1294, FF 1)

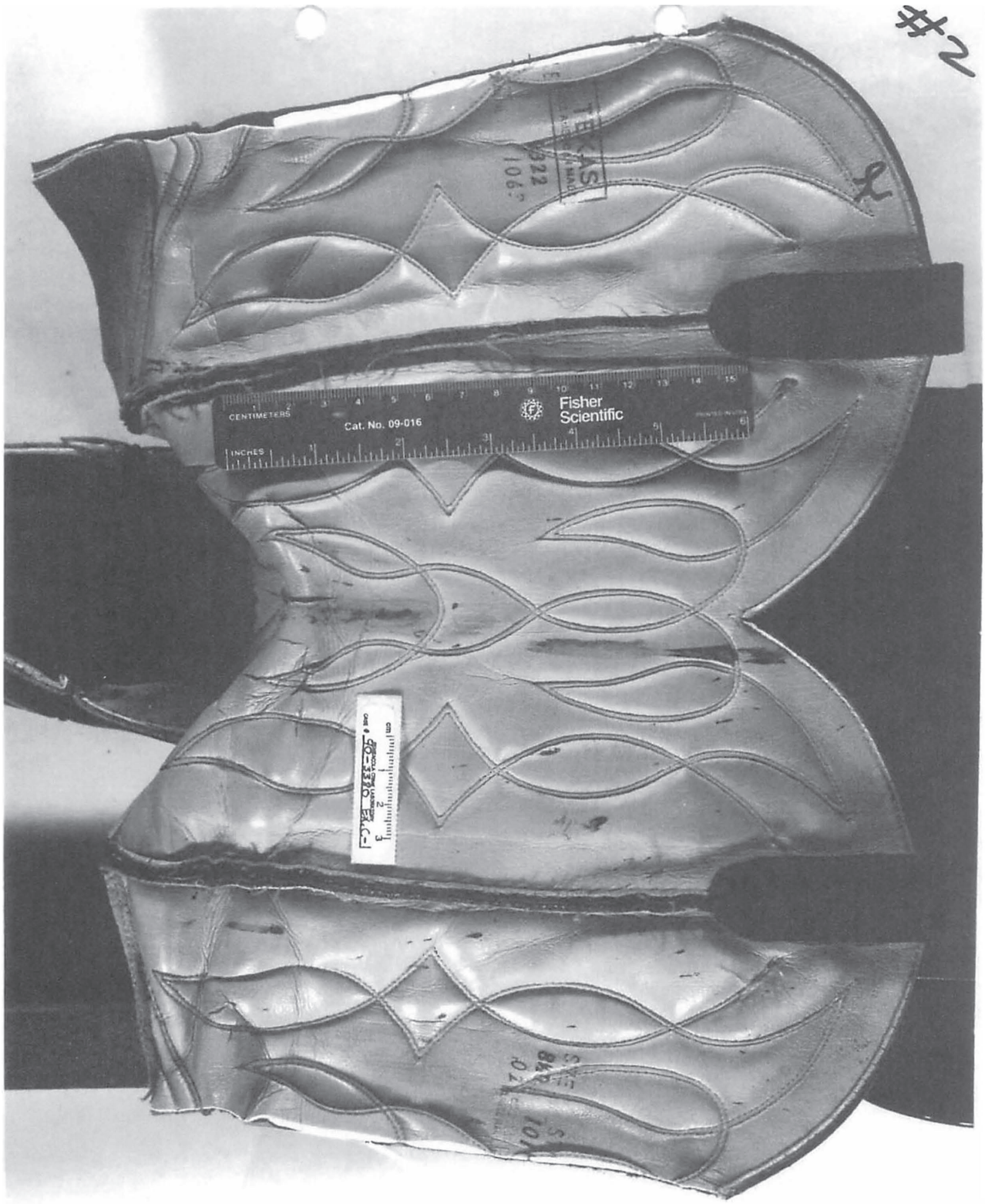
Photo of Gary Whitton during intake on Oct. 11, 1990. (Source: Walton County Sheriff's Office, Case # 590-2733-10, Evidence Box 1294, FF 1)

Photo of Gary Whitton during intake on Oct. 11, 1990. (Source: Walton County Sheriff's Office, Case # 590-2733-10, Evidence Box 1294, FF 1)

"1991 FDLE Photo 1 of Boots," State's Exhibit W at Evidentiary Hearing. Photo taken on Oct. 11, 1990. (Case 4:15-cv-00200-RH, Document 114-4, p. 18)

"1991 FDLE Photo 2 of Boots," State's Exhibit X at Evidentiary Hearing. Photo taken on Oct. 11, 1990. (Case 4:15-cv-00200-RH, Document 114-4, p. 20)

"1991 FDLE Photo 1 of Cut-Open Boot," State's Exhibit Y at Evidentiary Hearing. (Case 4:15-cv-00200-RH, Document 114-4, p. 22)



"1991 FDLE Photo 2 of Cut-Open Boot," State's Exhibit Z at Evidentiary Hearing. (Case 4:15-cv-00200-RH, Document 114-4, p. 24)

Photo of Gary Whitton's boot. (Source: Photo taken by Federal Defender investigator on Nov. 8, 2025)

Photo of Gary Whitton's boot. (Source: Photo taken by Federal Defender investigator on Nov. 8, 2025)