ATTACHMENT A

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-13124

CHARLES GROVER BRANT,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:16-cv-02601-KKM-JSS

ORDER:

Charles Grover Brant is a Florida inmate sentenced to death. He seeks a certificate of appealability to appeal the denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. Brant claims that his trial counsel was ineffective. But the record reflects beyond any reasoned debate that Brant's experienced trial counsel made reasonable strategic judgments and provided a fulsome presentation of mitigating evidence. Because Brant has failed to make "a substantial showing of the denial of a constitutional right" as required by 28 U.S.C. § 2253(c)(2), I **DENY** Brant's application for a certificate of appealability.

I.

In 2004, Charles Grover Brant sexually assaulted and brutally strangled his neighbor Sara Radfar to death. He confessed to the crime and described the sexual assault and murder in detail. After he had sexually assaulted Radfar in her house, he choked and suffocated Radfar to the point that he thought she was dead. But Radfar was just unconscious. She regained consciousness and ran to the front door of her house, but Brant dragged her back and choked and suffocated her again until she was dead. Physical evidence, including his DNA matching the semen on the victim and Radfar's debit card in Brant's garbage, also supported his conviction.

According to the postconviction testimony of Brant's guilt-phase counsel Rick Terrana, Brant wanted to plead guilty from day one. After an unsuccessful attempt to suppress the confession, Terrana—who had tried between fifteen and twenty-five death penalty

cases and had only one client receive the death penalty when he had been penalty-phase counsel—advised Brant to plead guilty.

Terrana and penalty-phase counsel Bob Fraser thought that Brant's confession was extremely hurtful to his case and that it would upset the jury more to hear him describe the sexual assault and murder twice—at both the guilt and penalty phases. Like Terrana, Fraser was an experienced criminal defense lawyer; he had been litigating court-appointed cases for almost twenty years and had tried about twenty-five first-degree murder cases. Terrana and Fraser also thought that if Brant pleaded guilty the jury might be more generous in considering mitigating circumstances at the penalty phase. In postconviction proceedings, however, jury consultant Toni Blake testified that it would not have been bad to expose the jury to Brant's confession twice because the jury would have become desensitized to the crime by repeatedly being exposed to the disturbing facts of the crime, potentially leading to a lighter sentence.

In any event, in a contemporaneous letter, "Fraser explained to Brant the negative aspects of pleading guilty, the right to testify, and the unavailability of a voluntary intoxication defense." *Brant v. State* (*Brant II*), 197 So. 3d 1051, 1064 (Fla. 2016). Terrana and Fraser both testified during postconviction proceedings that the letter accurately summarized discussions they had with Brant regarding pleading guilty.

On May 25, 2007, Brant pleaded guilty to first-degree murder, sexual battery, grand theft of a motor vehicle, and burglary

with assault or battery; and he pleaded *nolo contedere* to a kidnapping charge. Brant later claimed during postconviction proceedings that he was just doing what his attorneys told him to do, but the postconviction court found that Brant was not credible—in part because his plea colloquy contradicted his postconviction testimony. The Supreme Court of Florida likewise reasoned that Brant's plea colloquy "demonstrates that the decision to plead guilty was Brant's alone, that he was fully aware of the consequences of his plea, and that he was satisfied with the representation provided by his attorneys." *Id.* at 1066.

Terrana attempted to negotiate a life sentence for Brant's guilty plea, but the state refused. Consequently, Brant proceeded to the sentencing phase without a deal in place. "After a failed attempt to seat a penalty-phase jury in August 2007" in which potential jury members suggested that they would likely give Brant the death penalty, Brant decided to waive a sentencing phase jury and be sentenced through a bench trial. *Id.* at 1057.

At the bench trial, Brant introduced significant mitigating evidence. This presentation included the testimony of Brant's family members, such as his mother and older sister. Brant's counsel also presented other family-history-related testimony regarding Brant's grandparents' and great-grandmother's problems with mental health, substance abuse, domestic violence, and low intelligence. Additionally, Brant's counsel presented evidence of Brant's life in utero and as a child—including the abuse and neglect he suffered and the sexual abuse he witnessed—through testimony from

family members, friends, peers, a professional associate, and spiritual advisors and through school records and other information. Brant's counsel also presented expert testimony about his mental health and drug use through Dr. Maher and Dr. McClain. For example, Dr. Maher testified that Brant was hallucinating at the time of the murder but was not suffering from an extreme emotional disturbance. Brant's counsel also introduced the results of Brant's expert-conducted PET scan through Dr. Maher. Lastly, Brant's counsel introduced evidence that Brant was a well-behaved prisoner—by virtue of his trustee status at the jail—got along well with others, and had a reputation for being nonviolent.

The state, of course, presented its evidence of the gruesome nature of the rape and murder, including Brant's confession, and evidence of his behavior surrounding the time of the crime through his former wife.

Based on this evidence, the judge found two aggravating circumstances and a significant number of mitigating circumstances. "The trial court concluded that two aggravating circumstances were proven beyond a reasonable doubt: (1) the murder was heinous, atrocious, or cruel (HAC) (great weight); and (2) the capital felony was committed while engaged in the commission of a sexual battery (great weight)." *Id.* at 1062. The trial court also found that there were three statutory mitigating circumstances: (1) Brant did not have a significant history of prior criminal activity (little weight), (2) Brant had substantially impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the

requirements of law (moderate weight), and (3) Brant was thirty-nine at time of the offense (little weight). *See id.* at 1062 n.1. The trial court found ten non-statutory mitigating circumstances: (1) "Brant is remorseful (little weight)"; (2) "he cooperated with law enforcement officers, admitted the crimes, pleaded guilty, and waived a penalty-phase jury (moderate weight)"; (3) "he has borderline verbal intelligence (little weight)"; (4) "he has a family history of mental illness (little weight)"; (5) "he is not a sociopath or psychopath and does not have antisocial personality disorder (little weight)"; (6) "he has diminished impulse control and exhibits periods of psychosis due to methamphetamine abuse, recognized his drug dependence problem, sought help for his drug problem, and used methamphetamine before, during, and after the murder (moderate weight)"; (7) "he has been diagnosed with chemical dependence and sexual obsessive disorder, and he has symptoms of attention deficit disorder (moderate weight)"; (8) "he is a good father (little weight)"; (9) "he is a good worker and craftsman (little weight)"; and (10) "he has a reputation of being a nonviolent person (little weight)." *Id.* at 1062 & n.2.

Because the sentencing judge heavily weighted the heinous nature of the crime and Brant's commission of the sexual battery, he found that the aggravating circumstances outweighed the mitigating circumstances and imposed a sentence of death. More specifically, "the trial court sentenced Brant to death for the murder, concurrent terms of life imprisonment for the sexual battery, kidnapping, and burglary, and five years' imprisonment for the grand theft." *Id.* at 1062. The Supreme Court of Florida upheld Brant's

first-degree murder conviction and sentence of death on direct review. *See Brant v. State* (*Brant I*), 21 So. 3d 1276, 1289 (Fla. 2009).

As relevant here, Brant then brought ineffective assistance of counsel claims under *Strickland v. Washington*, 466 U.S. 668 (1984), in state court on postconviction review. Broadly speaking, Brant challenged his counsel's effectiveness in both the guilt phase and the sentencing phase. The state courts, culminating in the Supreme Court of Florida, denied Brant relief on these claims.

The Supreme Court of Florida concluded that Brant failed to establish both deficient performance and prejudice on the issues that became part of Brant's federal Ground One and on the issues that became Brant's federal Ground Two. *See Brant II*, 197 So. 3d at 1065, 1067–75. The Supreme Court of Florida also concluded that Brant had failed to establish deficient performance on the issues that became Brant's federal Ground Three. *See id.* at 1076. Notably, the Supreme Court of Florida did not address one aspect of what became Brant's federal Ground One.

In 2017, Brant filed a successive postconviction motion in state court, arguing that his death sentence was unconstitutional under *Hurst v. Florida*, 577 U.S. 92 (2016). *See Brant v. State* (*Brant III*), 284 So. 3d 398, 399 (Fla. 2019). The state court denied Brant relief on this claim, and the Supreme Court of Florida affirmed that denial. *See id.* at 400.

Later, Brant filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in federal court. Among other claims not relevant here, Brant brought the ineffective assistance of counsel claims

related to his counsel's guilt-phase effectiveness (Ground One) and penalty-phase effectiveness (Grounds Two and Three) that had been decided by the Supreme Court of Florida. Brant also brought an additional subclaim relevant here that had not been decided by the Supreme Court of Florida: that his counsel's guilt-phase performance prejudiced him in the sentencing phase (part of Ground One).

The district court denied the petition. It held that the new issue was procedurally defaulted because it was not exhausted in state court and could not be exhausted now. The district court then denied the remainder of Ground One and all of Grounds Two and Three on the merits. It also denied a certificate of appealability.

Brant then moved under Federal Rule of Civil Procedure 59(e) to alter or amend the judgment. The district court denied Brant's Rule 59(e) motion and denied a certificate of appealability on that issue too.

Brant now seeks a certificate of appealability from this Court.

II.

A prisoner must receive a certificate of appealability to appeal the denial of a petition for a writ of habeas corpus. *See* 28 U.S.C. § 2253(c)(1). We "will issue a certificate of appealability 'only if the applicant has made a substantial showing of the denial of a constitutional right.'" *Jones v. Sec'y, Dep't of Corr.*, 607 F.3d 1346, 1349 (11th Cir. 2010) (quoting 28 U.S.C. § 2253(c)(2)). "A petitioner

satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.* (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 326 (2003)). This standard applies to claims resolved on the merits under the analysis required by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and to claims resolved on procedural grounds. *See id.* (quoting *Lott v. Att'y Gen., Fla.*, 594 F.3d 1296, 1301 (11th Cir. 2010)); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

To be issued a certificate of appealability on a claim resolved on procedural grounds, the applicant must establish that reasonable jurists would find it debatable (A) "whether the district court was correct in its procedural ruling" and (B) "whether the petition states a valid claim of the denial of a constitutional right." *See Slack*, 529 U.S. at 484. That is, when we are asked to review a procedural disposition, we are not limited to the review of the procedural question; we must also consider the potential validity of the petitioner's claim on the merits. *See id.* When evaluating the merits of a petitioner's claims, "we review 'the last state-court adjudication on the merits.'" *Sears v. Warden GDCP*, 73 F.4th 1269, 1280 (11th Cir. 2023) (quoting *Greene v. Fisher*, 565 U.S. 34, 40 (2011)).

III.

Brant seeks a certificate to appeal the district court's denials of Grounds One, Two, and Three from his habeas petition and the district court's subsequent denial of his Rule 59(e) motion to alter

or amend the order denying his claims. I will address Brant's claims in numerical order. Then, I will address Brant's request to appeal the denial of his Rule 59(e) motion. On all fronts, Brant's arguments fail.

A.

Brant's first claim is an ineffective assistance of counsel claim about the way his counsel's performance at the guilt phase of trial affected the penalty phase of trial. Specifically, he argues that his counsel's ineffective assistance at the guilt phase of trial caused him to plead guilty and then waive a penalty-phase jury too. The district court concluded that the part of Ground One related to waiving the penalty-phase jury is procedurally barred and that the rest of Ground One fails on the merits. I analyze each of these portions of Ground One in turn.

1.

I'll begin with the part of Brant's claim that the district court held to be procedurally barred. Brant claims that his counsel's deficient performance in advising him to plead guilty prejudiced him in the penalty phase by causing him to waive a penalty-phase jury. The idea is that his decision to plead guilty angered the prospective penalty-phase jury so that he was forced to waive the penalty-phase jury to avoid the jury's wrath. The district court concluded that Brant procedurally defaulted on this part of Ground One because he never presented this claim to the state postconviction court.

Brant cannot meet his burden to receive a certificate of appealability on this part of Ground One. A state prisoner must raise his federal habeas claims in state court before raising them in a federal habeas petition. *See* 28 U.S.C. § 2254(b); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999) ("[T]he state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition."). The petitioner must have presented the same claim to the state court that he raises in federal court. *See Duncan v. Henry*, 513 U.S. 364, 366 (1995) ("[M]ere similarity of claims is insufficient to exhaust."); *Picard v. Connor*, 404 U.S. 270, 276 (1971) ("[W]e have required a state prisoner to present the state courts with the same claim he urges upon the federal courts."). To satisfy this requirement, the petitioner must have fairly presented the claim to the state's highest court with proper jurisdiction and have alerted that court of the federal nature of the claim. *See Ward v. Hall*, 592 F.3d 1144, 1156 (11th Cir. 2010).

Brant erroneously contends that he presented a claim in state court about the prejudicial effect on the penalty phase of trial counsel's deficient performance in advising him to plead guilty. Specifically, in the "Summary of Argument" section of his initial brief to the Supreme Court of Florida during the postconviction relief process, Brant said that his "counsel rendered ineffective assistance in advising him to enter a guilty plea because the jury would be less likely to be angry with him." Dist. Ct. Doc. 55-12 at 75. He continued that his counsel's advice was ineffective:

> Counsel gave this advice without consulting a jury expert or doing any investigation on jury decision

> making. Counsel was wrong and the jurors were irate that Brant had pled guilty and still wanted a penalty phase trial. As a result, Brant then waived a penalty phase jury. But for counsel's deficient performance, Brant would not have pled guilty but would have exercised his right to a trial.

Dist. Ct. Doc. 55-12 at 75. This is the only part of the brief where Brant mentioned the effect of his decision to plead guilty on the penalty phase of trial. The other parts of his brief that discuss deficient performance at the guilt phase—including Page 77, which Brant specifically pointed to below—do not mention prejudice at the penalty phase. And the portions of his brief about prejudice at the penalty phase were related to alleged deficient performance at the penalty phase.

I agree with the district court that Brant did not sufficiently present this issue to the state courts. Brant simply never made this claim to the Supreme Court of Florida. That is, Brant never discussed the prejudicial effect of counsel's guilt-phase performance on the penalty phase. The two relevant sentences in the Summary of Argument portion of his brief are insufficient to say that Brant fairly raised the penalty-phase prejudice argument. *See Sweet v. State*, 810 So. 2d 854, 870 (Fla. 2002) ("[B]ecause on appeal Sweet simply recites these claims from his postconviction motion in a sentence or two, without elaboration or explanation, we conclude that these instances of alleged ineffectiveness are not preserved for appellate review."); *Shere v. State*, 742 So. 2d 215, 217 n.6 (Fla. 1999) (declining to address issues presented in a brief's headings). It is

unsurprising, therefore, that the Supreme Court of Florida did not address this issue in its decision on Brant's state postconviction petition. And the district court's order simply acknowledges this and the fact that the Supreme Court of Florida would not entertain this argument now because it would be an untimely successive state petition without any change in facts or information. *See* Fla. R. Crim. P. 3.851(d); *Mungin v. State*, 320 So. 3d 624, 626 (Fla. 2020) ("Because all claims raised in Mungin's [] successive postconviction motion became discoverable through due diligence more than a year before the motion was filed, Mungin's claims are procedurally barred as untimely.").

No reasonable jurist would find this disposition debatable. A claim is procedurally barred if the prisoner failed to exhaust his remedies in state court and those remedies are now unavailable. *See McNair v. Campbell*, 416 F.3d 1291, 1305 (11th Cir. 2005); 28 U.S.C. § 2254(b)–(c). That is the case here. And Brant has not attempted to overcome the procedural default by arguing in the district court or here that an exception to procedural default applies. *See Smith v. Jones*, 256 F.3d 1135, 1138 (11th Cir. 2001) ("If the petitioner has failed to exhaust state remedies that are no longer available, that failure is a procedural default which will bar federal habeas relief, unless either the cause and prejudice or the fundamental miscarriage of justice exception is established." (citing *Boerckel*, 526 U.S. at 848–49; *Coleman v. Thompson*, 501 U.S. 722, 750–51 (1991))). Accordingly, Brant does not deserve a certificate of appealability on this claim.

But even if the district court's procedural default ruling were debatable, I would still deny Brant a certificate of appealability because Brant has not established that it is also debatable that he states a valid claim of the denial of a constitutional right. *See Slack*, 529 U.S. at 484. He does not argue this point in his application for a certificate of appealability and for good reason. Jurists of reason would not debate whether Brant's counsel was ineffective for advising him to plead guilty. Even if we assume that advising Brant to plead guilty somehow made it so that he needed to also waive a penalty-phase jury, Brant in fact benefitted in the penalty phase by pleading guilty. Although the Supreme Court of Florida was deciding the issue of ineffective assistance of counsel during the guilt phase, it explained that "counsel's advice and Brant's decision to follow that advice provided a benefit to Brant because the trial court considered his guilty plea to be a mitigating circumstance of moderate weight." *Brant II*, 197 So. 3d at 1065.

Moreover, as I detail in Part III.A.2 below, Brant's counsel was obviously not deficient for advising him to plead guilty in the face of the overwhelming evidence against him and his own wish to plead guilty. Brant cannot establish that he has a debatably valid constitutional claim, and this issue deserves no further encouragement.

2.

I will turn to the part of the claim that Brant raised in state court—that Brant's counsel was ineffective during the guilt phase by advising him to plead guilty "without conducting a reasonable

investigation [and] without consulting a jury expert or doing any investigation, research or reading on the basics of jury decision making." Dist. Ct. Doc. 1 at 11. The state courts adjudicated this claim on the merits, and the district court denied this portion of Ground One on the merits.

The district court's resolution of this habeas claim is not debatable, and it deserves no further encouragement. *See Jones*, 607 F.3d at 1349 (quoting *Miller-El*, 537 U.S. at 326). Under AEDPA, "[t]he power of the federal courts to grant a writ of habeas corpus setting aside a state prisoner's conviction on a claim that his conviction was obtained in violation of the United States Constitution is strictly circumscribed." *Green v. Sec'y, Dep't of Corr.*, 28 F.4th 1089, 1093 (11th Cir. 2022). If a claim was adjudicated in state court—like this one was—a federal court may not grant a writ of habeas corpus under 28 U.S.C. § 2254 unless the state court's merits-based "adjudication of the claim . . . resulted in a decision that was" (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) . . . based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). "An unreasonable application occurs when a state court identifies the correct governing legal principle from th[e] [Supreme] Court's decisions but unreasonably applies that principle to the facts of [the] petitioner's case." *Rompilla v. Beard*, 545 U.S. 374, 380 (2005) (internal quotation marks omitted) (quoting *Wiggins v. Smith*, 539 U.S. 510, 520 (2003)). "That is, 'the state court's decision must have been [not only] incorrect or

erroneous [but] objectively unreasonable.'" *Id.* (alterations in original) (quoting *Wiggins*, 539 U.S. at 520–21). "To meet that standard, a prisoner must show far more than that the state court's decision was 'merely wrong' or 'even clear error.'" *Shinn v. Kayer*, 592 U.S. 111, 118 (2020) (quoting *Virginia v. LeBlanc*, 582 U.S. 91, 94 (2017)). "The prisoner must show that the state court's decision is so obviously wrong that its error lies 'beyond any possibility for fairminded disagreement.'" *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

The constitutional standard for ineffective assistance of counsel layers an additional degree of deference on the state court's decision. "Ineffective assistance under *Strickland* is deficient performance by counsel resulting in prejudice, with performance being measured against an 'objective standard of reasonableness' 'under prevailing professional norms.'" *Rompilla*, 545 U.S. at 380 (citations omitted) (quoting *Strickland*, 466 U.S. at 688). The Supreme Court has "recognized the special importance of the AEDPA framework in cases involving *Strickland* claims." *Shinn*, 592 U.S. at 118. "[B]ecause the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Id.* (alteration in original) (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)). "Applying AEDPA to *Strickland*'s prejudice standard, we must decide whether the state court's conclusion that [counsel's] performance . . . didn't prejudice [petitioner]—that there was no 'substantial likelihood' of a different result—was 'so obviously wrong that its error lies beyond any possibility for fairminded disagreement.'" *Pye v. Warden,*

Ga. Diagnostic Prison, 50 F.4th 1025, 1041–42 (11th Cir. 2022) (en banc) (quoting *Shinn*, 592 U.S. at 118–21). "Establishing deficient performance under *Strickland* has this same high bar under AEDPA deference." *Mungin v. Sec'y, Fla. Dep't of Corr.*, 89 F.4th 1308, 1317 (11th Cir. 2024).

The Supreme Court of Florida concluded that Brant had failed to establish both deficient performance and prejudice for his guilt-phase ineffective assistance of counsel claim that became the federally cognizable part of Ground One. *See Brant II*, 197 So. 3d at 1065. The district court concluded that the Supreme Court of Florida's decision on both grounds was reasonable. No fair-minded jurist would debate the district court's conclusion.

As to the performance element of *Strickland*, the Supreme Court of Florida reasoned that "[c]ounsel's decision to advise Brant to plead guilty was reasonable given that the original defense strategy to attack the confession was unsuccessful, the advice was given after alternatives were considered and rejected, and the State was proceeding on theories of both premeditated and felony murder with very strong evidence." *Id.* The district court held that this analysis was reasonable.

No reasonable jurist could debate this conclusion. Brant had confessed to a gruesome sexual assault and murder. After the strategy to suppress that confession failed, it was entirely reasonable for trial counsel to advise Brant to plead guilty—especially because the state had significant physical evidence too.

Brant argues that, contrary to his counsel's testimony, his lawyers advised him to plead guilty *before* the disposition of the motion to suppress. But the postconviction court credited Brant's counsel's testimony, and the Supreme Court of Florida agreed with Brant's counsel. No reasonable jurist could conclude that the Supreme Court of Florida was so wrong about this fact that it committed clear error. *See Shinn*, 592 U.S. at 118. Because that is not debatable, I cannot engage in Brant's counterfactual.

Moreover, Brant had the benefit of an experienced attorney. Rick Terrana, the attorney advising Brant to plead guilty, had tried between fifteen and twenty-five death penalty cases and only had one client receive the death penalty when he was penalty-phase counsel. Brant's penalty-phase counsel Bob Fraser was also very experienced. Additionally, Brant's intent to plead guilty from day one influenced counsel's actions. *See Strickland*, 466 U.S. at 691. Because it was objectively reasonable to advise Brant to plead guilty and Brant wanted to plead guilty, it is impossible to say that the Supreme Court of Florida's decision on this point is unreasonable.

As to the prejudice element of *Strickland*, the Supreme Court of Florida concluded that Brant's counsel's advice to plead guilty did not prejudice him. Most importantly, the large amount of evidence against Brant, including his confession and the physical evidence, makes it unimaginable that he would not have been convicted had he gone to trial. The district court rightly concluded that the Supreme Court of Florida was reasonable to think that Brant could not show that the result of the guilt phase would have likely

been different had he gone to trial. No reasonable jurist would debate this point, and it deserves no further encouragement.

In his motion for a certificate of appealability, Brant nitpicks the district court's opinion but does not meaningfully grapple with its bottom-line conclusion. For example, Brant argues that the district court cited outdated case law about an attorney's strategic choices. But the district court cited these precedents merely to illustrate how difficult it is to prove ineffective assistance of counsel when challenging a lawyer's strategic judgment; the district court did not foreclose relief based on an incorrect view of the law. In any event, the question at this juncture is not whether the district court's opinion is well written; it is whether Brant has made a substantial showing of the denial of a constitutional right. And, on that issue, I am convinced that there is no ground for debate.

Brant cannot receive a certificate of appealability on Ground One of his habeas petition.

B.

Brant's second claim is an ineffective assistance of counsel claim related to the evidence presented at the penalty phase of trial. Brant argues that his counsel was ineffective during the penalty phase by failing to thoroughly investigate the case and present various pieces of mitigation evidence. The Supreme Court of Florida analyzed five forms of alleged deficient performance that Brant argued supported this claim and denied each subclaim on both *Strickland*'s performance and prejudice elements. *See Brant II*, 197 So. 3d at 1067–75. The district court also denied this claim on the merits,

concluding that the Supreme Court of Florida's decision was reasonable.

Based on the case law laid out above in Part III.A.2, Brant has not established a substantial showing of the denial of a constitutional right or that his claim deserves further encouragement. *See Jones*, 607 F.3d at 1349. Brant faults his counsel for failing to introduce five types of evidence: (1) evidence from his mother that he was conceived by rape, (2) the testimony of a methamphetamine expert about that drug's effects, (3) testimony from a prison expert about how well Brant would likely perform serving a life sentence, (4) additional evidence of brain damage, and (5) miscellaneous evidence of his upbringing and background. I'll walk through each type of evidence.

First, Brant claims that his counsel should have investigated and presented mitigation evidence about his conception via rape. Brant's mother testified in postconviction proceedings that she had kept his conception from a rape a secret until long after Brant was convicted and sentenced to death. In fact, she testified at trial that Brant's father was her ex-husband, Eddie Brant. That is, although Brant's mother was the only source of this information besides distant relatives and DNA testing, she kept it a secret and even testified contrary to it.

The Supreme Court of Florida concluded that Brant's counsel was not ineffective for failing to discover and introduce this information. As to deficient performance, the Supreme Court of Florida reasoned that "[c]ounsel had no reason to believe Eddie was not

Brant's father, and [Brant's mother] testified several times under oath that Eddie was Brant's father" and reasoned that Brant's counsel could not be expected to perform DNA testing or verify paternity through other family members on the off chance of discovering a different paternity. *Brant II*, 197 So. 3d at 1067. As to prejudice, the Supreme Court of Florida reasoned that the information was insignificant because (1) Brant did not know about his conception by rape at the time he committed the murder, so it could not have had a meaningful effect on his mental state; and (2) "even without knowing about the rape, the trial court found as mitigating that Brant had an abusive childhood." *Id.*

Based on the record and state supreme court's decision, the district court rejected Brant's claim on the merits. That conclusion is not subject to fair-minded disagreement. The record supports the Supreme Court of Florida's description of the evidence, and no reasonable jurist would debate that the Supreme Court of Florida's view of that evidence is reasonable under AEDPA.

Second, Brant claims that his counsel should have presented testimony from a methamphetamine expert about methamphetamine's effect on his brain—in addition to the testimony his counsel presented from two other mental health experts. The Supreme Court of Florida rejected this claim on both elements of *Strickland*. As to deficient performance, it reasoned that "[t]estimony from a 'specialist expert' on methamphetamine would have been mostly cumulative" and that "trial counsel is not ineffective for failing to present cumulative evidence." *Id.* at 1069. "Trial counsel presented

expert testimony regarding the extent of Brant's methamphetamine use, the effects of it, and the behavior of persons who abuse methamphetamine through Dr. Maher—who was deemed by the trial court to be an expert in that field—and Dr. McClain." *Id.* "As a result, the trial court found that multiple mitigating circumstances relating to Brant's methamphetamine use were established and gave those circumstances moderate weight." *Id.* As to prejudice, the Supreme Court of Florida rejected the idea that Brant's postconviction methamphetamine expert, Dr. Morton, "could have established the existence of the extreme emotional disturbance mitigating circumstance based on Brant's report of 'being suspicious and paranoid and agitated.'" *Id.* Dr. Maher testified at the penalty phase that Brant was hallucinating at the time of the murder but was not suffering from an extreme emotional disturbance; and Brant's former wife testified "that he was able to interact pleasantly with her, wash dishes, clean up the kitchen, watch the evening news, and sleep in bed next to her the night he committed the murder." *Id.*

The district court rejected this claim on the merits. And I see no basis for fair-minded disagreement. "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." *Wiggins*, 539 U.S. at 533. The fact that postconviction counsel has found additional evidence that could have been introduced does not make trial counsel deficient. *See Waters v. Thomas*, 46 F.3d 1506, 1514 (11th Cir. 1995) (en banc) ("The mere fact that other witnesses might have been available or that other

testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel." (quoting *Foster v. Dugger*, 823 F.2d 402, 406 (11th Cir. 1987))). Reasonable jurists would not debate this conclusion.

Third, Brant claims that his counsel should have presented testimony from a prison adjustment expert about his ability to adjust positively to a prison environment. The Supreme Court of Florida reasoned that this evidence would be cumulative. Brant's trial counsel had already introduced "that Brant was a well-behaved prisoner—by virtue of his trustee status at the jail—got along well with others, and had a reputation for being nonviolent was evidence of a positive ability to adjust to a prison environment." *Brant II*, 197 So.3d at 1070 (citing *Skipper v. South Carolina*, 476 U.S. 1, 7 n.2 (1986)). Thus, there was no deficient performance. *See id.* Moreover, the Supreme Court of Florida concluded that Brant was not prejudiced because Brant had not established that there was a reasonable probability of a life sentence instead of a death sentence from specific testimony that he was generally nonviolent. *See id.* at 1070–71.

Again, the district court concluded that Brant's federal habeas claim based on this issue fails on the merits. And, again, I cannot see how any fair-minded jurist could debate this result.

Fourth, Brant claims that his counsel failed to reasonably investigate and present mitigation evidence that he has brain damage. "Specifically, Brant asserts that counsel was deficient in failing to present images from his PET scan at the penalty phase and in

failing to identify and inform defense experts of his risk factors for brain damage"—that is, "head banging, ingestion of plaster and lead paint as a toddler, and a head injury in 2001." *Id.* at 1071. "Trial counsel retained Dr. Frank Wood, a clinical neuropsychologist and forensic psychologist, to conduct the PET scan and also consulted with Dr. Joseph Chong Sang Wu, an expert in brain imaging technology, regarding the results of the PET scan." *Id.* "Trial counsel ultimately decided not to have Drs. Wood or Wu testify at the penalty phase and [] introduce[d] the results of the PET scan through Dr. Maher instead." *Id.*

The Supreme Court of Florida rejected this claim on the merits. It reasoned that "[b]ecause counsel was able to establish the existence of the intended mitigating circumstances without presenting Drs. Wood and Wu or the actual images from the PET scan, there was no deficient performance even if Drs. Wood and Wu would have testified in more detail or presented the images." *Id.* at 1073. The Supreme Court of Florida also concluded that Brant failed to establish prejudice because the PET scan evidence was introduced through Dr. Maher, and "there is no reasonable probability that Brant would have received a life sentence had counsel presented the testimony of Drs. Wood and Wu or introduced the PET scan images themselves." *Id.* at 1073–74.

As with Brant's other penalty phase claims, the district court denied this claim on the merits; and no fair-minded jurist could debate that disposition. Counsel hired multiple mental health experts, followed those experts' advice to secure a PET scan, and then

introduced the PET scan evidence. This claim is wholly insubstantial, so Brant fails to meet his burden.

Finally, Brant claims that his counsel failed, as a general matter, to conduct a reasonable background and mental health investigation. That is, Brant argues that his counsel did not reasonably investigate "his childhood, family, and multi-generational background of addiction, abuse, neglect, and sexual exposure." *Id.* at 1074. The Supreme Court of Florida rejected this claim, holding that "[t]he record reflects that counsel did conduct a reasonable investigation into Brant's childhood, family, and multi-generational background of addiction, abuse, neglect, and sexual exposure." *Id.* at 1075. The state supreme court explained, for example, that "[c]ounsel presented testimony at the penalty phase regarding Brant's grandparents and great-grandmother and their problems with regard to mental health, substance abuse, domestic violence, and low intelligence." *Id.* And the state supreme court pointed out that "[t]he trial court took notice of this testimony and as one of the mitigating circumstances found that Brant had a family history of mental illness." *Id.* Moreover, the Supreme Court of Florida stated that the record reflects that trial counsel investigated and presented evidence at the penalty phase of "the circumstances of Brant's life in utero and during his childhood, including the abuse and neglect he suffered and the sexual abuse he witnessed." *Id.* This evidence came in the form of "testimony from family members, friends, peers, a professional associate, and spiritual advisors" and in the form of "academic records and a plethora of information regarding Brant's struggles with substance abuse." *Id.* In short, the

Supreme Court of Florida determined "that trial counsel conducted a reasonable mitigation investigation" and that Brant failed to establish deficient performance. *Id.*

As to prejudice, the Supreme Court of Florida concluded that its "confidence in the outcome is not undermined by the few pieces of noncumulative evidence presented at the evidentiary hearing." *Id.* That is, the state supreme court effectively determined that Brant did not present sufficient extra background and mental health evidence in postconviction proceedings to make it likely that the result would have been a life sentence instead of a death sentence had all of the background and mental health evidence been presented during his penalty phase.

The district court rejected this claim on the merits, and its conclusion is not open to fair-minded debate. It is always possible for postconviction counsel to uncover additional evidence into a defendant's background or family life. But the mere existence of that additional evidence does not establish that trial counsel was ineffective. "To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable." *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000) (en banc). And nothing about this new evidence changes the overall picture of Brant's upbringing or mental health from the picture that his trial counsel presented to the sentencing judge.

One final point. Brant spends much of his application for a certificate of appealability arguing that the Supreme Court of

Florida should not have separately analyzed each of Brant's separate allegations about mitigating evidence. This argument misunderstands *Strickland*. *Strickland* directs reviewing courts to evaluate the totality of counsel's errors in evaluating deficient performance and the totality of those errors in assessing prejudice. But nothing in *Strickland* requires that a state supreme court declare that deficient performance or prejudice exists either overall or not at all. *See Mungin*, 89 F.4th at 1317–18 (affirming where the Supreme Court of Florida had split apart subclaims and then split its analysis along performance and prejudice lines). And, perhaps more to the point, nothing in the Supreme Court's case law tells lower courts how to write their opinions in the light of a habeas petitioner's arguments. Here, Brant's penalty-phase arguments do not lend themselves to a combined deficient performance analysis because they allege separate failings on the part of trial counsel—for example, there is no connection between trial counsel's failure to hire a prison-adjustment expert and their failure to find out that Brant was allegedly conceived by rape. In any event, no fair-minded jurist would debate whether the state courts were reasonable in concluding that Brant's counsel were not ineffective, even if some jurists would have written the state court opinion differently.

Brant cannot make out a substantial showing of the denial of a constitutional right and cannot meet his burden to receive a certificate of appealability on Ground Two.

C.

Brant's third claim is that his counsel failed to sufficiently advise him about the consequences of waiving a sentencing phase jury because, among other things, his counsel did not hire a jury consultant or develop a better rapport with him. The Supreme Court of Florida denied this claim by concluding that Brant's counsel had not deficiently performed under *Strickland* in these respects. Based on trial counsel's testimony at the postconviction hearing, it concluded that Brant's counsel "had a long discussion with Brant during which they laid out all the pros and cons of waiving a jury recommendation, but neither of them advised Brant to do so." *Brant II*, 197 So. 3d at 1076. The district court denied this claim on the merits.

Nothing about the district court's disposition of this claim is debatably incorrect, and this claim does not deserve further encouragement. *See Jones*, 607 F.3d at 1349. There is no support in this extensive record that Brant's counsel failed to develop a rapport with him. There is also no evidence—and Brant does not even argue that there is in his application for a certificate of appealability—that Brant's counsel failed to advise him about mitigation evidence. Finally, there is no basis for Brant's claim that experienced counsel must hire a jury consultant before advising a client about whether to request a penalty-phase jury.

Brant cannot meet his burden to receive a certificate of appealability on Ground Three.

D.

Brant also seeks a certificate of appealability regarding the district court's denial of his Federal Rule of Civil Procedure 59(e) motion. A Rule 59(e) motion to amend a judgment is treated as part of the original habeas petition rather than a second or successive petition. *See Banister v. Davis*, 140 S. Ct. 1698, 1702 (2020). Thus, it was properly before the district court; and the district court had jurisdiction to deny it. A certificate of appealability is required to appeal the denial of a Rule 59(e) motion in a habeas proceeding under § 2254. *See Perez v. Sec'y, Fla. Dep't of Corr.*, 711 F.3d 1263, 1264 (11th Cir. 2013) (citing 28 U.S.C. § 2253(c)(1)); *Jackson v. Albany Appeal Bureau Unit*, 442 F.3d 51, 54 (2d Cir. 2006); *Williams v. Thaler*, 602 F.3d 291, 300 (5th Cir. 2010), *abrogated on other grounds by Thomas v. Lumpkin*, 995 F.3d 432 (5th Cir. 2021); *United States v. Lambros*, 404 F.3d 1034, 1036 (8th Cir. 2005); *Williams v. Woodford*, 384 F.3d 567, 585 n.4 (9th Cir. 2005); *Gonzalez v. Sec'y for the Dep't of Corr.*, 366 F.3d 1253, 1263–64 (11th Cir. 2004) (en banc)). Therefore, I apply our usual application for a certificate of appealability standard of review to the Rule 59(e) issue.

The district court concluded that Brant's Rule 59(e) motion effectively asked the district court to reread his petition for a writ of habeas corpus and redo the analysis. But "[a] Rule 59(e) motion [cannot be used] to relitigate old matters, raise argument[,] or present evidence that could have been raised prior to the entry of judgment." *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007) (second alteration in original) (quoting *Michael Linet, Inc. v. Vill. of*

Wellington, 408 F.3d 757, 763 (11th Cir. 2005)). Jurists could not debate denying Brant's Rule 59(e) motion, and this issue does not deserve further encouragement.

IV.

Brant's application for a certificate of appealability is **DENIED**.

/s/ Andrew L. Brasher
UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

David J. Smith
Clerk of Court

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February 29, 2024

Marie-Louise Samuels Parmer
Parmer DeLiberato, PA
PO BOX 18988
TAMPA, FL 33679

Appeal Number: 23-13124-P
Case Style: Charles Grover Brant v. Secretary, Department of Corrections, et al
District Court Docket No: 8:16-cv-02601-KKM-JSS

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Any pending motions are now rendered moot in light of the attached order.

Clerk's Office Phone Numbers

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

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

ATTACHMENT B

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-13124

CHARLES GROVER BRANT,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:16-cv-02601-KKM-JSS

Before NEWSOM, LAGOA, and BRASHER, Circuit Judges.

BY THE COURT:

Appellant's motion for reconsideration of the February 29, 2024, single judge's order denying motion for a certificate of appealability is **DENIED**.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

David J. Smith
Clerk of Court

For rules and forms visit
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April 10, 2024

Marie-Louise Samuels Parmer
Parmer DeLiberato, PA
PO BOX 18988
TAMPA, FL 33679

Appeal Number: 23-13124-P
Case Style: Charles Grover Brant v. Secretary, Department of Corrections, et al
District Court Docket No: 8:16-cv-02601-KKM-JSS

The enclosed order has been ENTERED.

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

Clerk's Office Phone Numbers

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Case Administration:	404-335-6135	Capital Cases:	404-335-6200
CM/ECF Help Desk:	404-335-6125	Cases Set for Oral Argument:	404-335-6141

MOT-2 Notice of Court Action