IN THE SUPREME COURT OF MISSISSIPPI

NO. 2017-DR-01207-SCT

JAMES COBB HUTTO, III a/k/a JAMES C. HUTTO III a/k/a JAMES C. HUTTO a/k/a JAMES HUTTO III a/k/a JAMES HUTTO a/k/a JAMIE HUTTO a/k/a THE HITMAN a/k/a JAMES COBB HUTTO

v.

STATE OF MISSISSIPPI

DATE OF JUDGMENT:	05/28/2013
TRIAL JUDGE:	HON. WILLIAM A. GOWAN, JR.
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEYS FOR PETITIONER:	OFFICE OF POST-CONVICTION COUNSEL BY: BENJAMIN H. McGEE, III ALEXANDER D. M. KASSOFF
ATTORNEY FOR RESPONDENT:	OFFICE OF THE ATTORNEY GENERAL BY: LADONNA C. HOLLAND
NATURE OF THE CASE:	CIVIL - DEATH PENALTY - POST CONVICTION
DISPOSITION:	LEAVE TO SEEK POST-CONVICTION RELIEF DENIED - 10/03/2019
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

CHAMBERLIN, JUSTICE, FOR THE COURT:

¶1. James Cobb Hutto, III, was convicted of the capital murder of Ethel W. Simpson and was sentenced to death. This Court affirmed Hutto's conviction and sentence in ***Hutto v. State***, 227 So. 3d 963 (Miss. 2017).

¶2. Hutto now seeks post-conviction relief (PCR) from this Court or, in the alternative,

leave to proceed in the trial court, raising four issues:

I. Trial counsel did not present and explain the significance of all of the evidence available for mitigation.

II. Prosecutorial misconduct resulted in a verdict that was tainted by extraneous, inflammatory matters outside of the evidence.

III. Trial counsel was ineffective in failing to investigate the circumstances underlying the "prior violent felony" aggravator.

IV. Defense counsel was ineffective in failing to challenge a juror with cognitive impairments.

¶3. Finding that Hutto fails to present a substantial showing of the denial of a state or federal right, we deny his PCR petition. Hutto primarily raises ineffective-assistance-of-counsel claims. We will address each of these claims in turn.

ANALYSIS

¶4. "The procedural bars of waiver, different theories, and res judicata as well as the exceptions thereto contained in Miss. Code Ann. § 99-39-21(1)–(5) are clearly applicable to death penalty post-conviction relief applications." ***Moffett v. State***, 156 So. 3d 835, 844–45 (Miss. 2014) (internal quotation marks omitted) (quoting ***Powers v. State***, 945 So. 2d 386, 395 (Miss. 2006)). Hutto must demonstrate that his claims are not procedurally barred. ***Id.*** at 845 (citing Miss. Code Ann. § 99-39-21(6)). Thereafter, Hutto must make a substantial showing of the denial of a state or federal right. Miss. Code Ann. § 99-39-27(5) (Rev. 2015). Hutto raises a plethora of ineffective-assistance-of-counsel claims in his PCR.[1]

[1] "This Court will address such allegations on post-conviction review when, as here, petitioner was represented by same counsel at trial and on direct appeal and is represented by different counsel on petition for post-conviction review." ***Crawford v. State***, 867 So. 2d 196, 202 n.2 (Miss. 2003).

¶5. The standards applicable to any ineffective-assistance-of-counsel claims are long-established. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." ***McCoy v. State***, 147 So. 3d 333, 346 (Miss. 2014) (internal quotation marks omitted) (quoting ***Strickland v. Washington***, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

¶6. To prove counsel was ineffective, Hutto must "demonstrate that his counsels' performance was deficient and that the deficiency prejudiced the defense of his case." ***Havard v. State***, 988 So. 2d 322, 328 (Miss. 2008) (citing ***Strickland***, 466 U.S. at 687). "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." ***Stringer v. State***, 454 So. 2d 468, 477 (Miss. 1984) (citing ***Strickland***, 466 U.S. at 687). The focus of the inquiry must be whether counsel's assistance was reasonable considering all the circumstances. ***Strickland***, 466 U.S. at 687.

¶7. A strong presumption exists under the first prong of ***Strickland*** that "counsel's conduct falls within the wide range of reasonable professional assistance . . . ." ***Id.*** at 689. "[T]he defendant must 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, 164, 100 L. Ed. 83 (1955)). If deficient performance is shown, the petitioner must show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Id.*** at 687. In other

words, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

¶8. Hutto alleges that his counsel was deficient in four ways. First, he alleges that counsel was deficient by failing to present and explain all available mitigation evidence during the sentencing phase of trial. Second, Hutto asserts that his counsel was deficient by allowing prosecutorial misconduct during closing arguments of the sentencing phase, resulting in an unfair trial and unreliable sentence. Third, Hutto alleges that his counsel was deficient by failing to investigate the circumstances underlying his prior conviction of first-degree sexual abuse in Alabama and by failing to present the Alabama sexual-abuse conviction to the jury to mitigate its impact as an aggravating circumstance during sentencing. Finally, Hutto asserts that his counsel was deficient during jury selection by failing to question a juror about that juror's competence after the juror had disclosed that he suffered from "cognitive decline and dementia characteristics."

I. Whether defense counsel failed to present and explain all available mitigation evidence.

¶9. Hutto argues that defense counsel was ineffective for failing to present expert psychological testimony to explain to the jury how Hutto's particular life history led to his violent behavior as an adult. This argument merges with Hutto's additional claim that defense counsel was ineffective by providing little more than an overview of Hutto's traumatic childhood. Hutto further contends that his refusal to cooperate in the investigation and presentation of mitigation evidence does not excuse defense counsel's alleged ineffectiveness.

¶10. Under ***Strickland***, Hutto must show that counsel's failure to present expert testimony from a psychologist fell below an objective standard of reasonableness that resulted in serious prejudicial error depriving him of a fair trial and reliable result. ***Strickland***, 466 U.S. at 687. This Court has explained that "there 'is no prejudice when the new mitigating evidence "would barely have altered the sentencing profile presented" to the decisionmaker . . . .'" ***Chamberlin v. State***, 55 So. 3d 1046, 1054 (Miss. 2010) (quoting ***Sears v. Upton***, 561 U.S. 945, 954, 130 S. Ct. 3259, 177 L. Ed. 2d 1025 (2010)). "Hindsight, of course is always 20/20. It is easy to criticize counsel with the aid of 'backfocal' lenses." ***Cole v. State***, 666 So. 2d 767, 776 (Miss. 1995).

¶11. To support his claim, Hutto presents the affidavit of Dr. James Garbarino, a psychologist. Hutto argues that a psychological opinion like Dr. Garbarino's would have made the difference between life and death when compared to Dr. Julie Schroeder's expert testimony presented to the jury. After reading Dr. Garbarino's affidavit and evaluating defense counsel's conduct, we find that Hutto fails to make a sufficient showing under ***Strickland***.

¶12. During the sentencing phase, defense counsel called Dr. Julie Schroeder, who held a bachelor's degree in psychology and a PhD in social work. At trial, Dr. Schroeder was accepted as an expert in social work, human development and behavior. She testified about the sexual and physical abuse Hutto suffered and how it impacted his development.

¶13. At trial, Dr. Schroeder described how Hutto had been physically abused as a child by a stepfather who also abused his mother. She explained that Hutto's mother suffered from

bipolar disorder and substance abuse and that those struggles can lead to child neglect. Hutto was also physically abused by his stepmother and biological father. Dr. Schroeder even described one such incident when Hutto missed school for two weeks due to abuse injuries.

¶14. Dr. Schroeder explained how physical abuse, sexual abuse and neglect can affect a person's development. She stated, "[t]hey don't learn how to self-soothe or cope . . . because of the abuse . . . perpetuated against them as children." Dr. Schroeder went on to describe how Hutto's coping skills were very poor.

¶15. Dr. Schroeder further explained how children imitate the behavior they see by growing up to be abusers. She described how "[t]hey . . . are prone to aggression . . . . And aggression is a way to solve problems . . . because that's how they saw problems . . . solved." She explained how sexual abuse and physical violence culminate into impulsivity, poor self-control, anger and aggression. Dr. Schroeder maintained that Hutto exhibited several "textbook" examples of a symptom known as splitting, "whereby there's no middle ground." Dr. Schroeder explained how this personality problem causes a person to go from idealizing somebody one minute to devaluing them fifteen minutes later. She attributed Hutto's splitting to his having grown up receiving mixed signals from a bipolar mother who also abused substances.

¶16. Dr. Schroeder also described how Hutto was sexually abused by several family members and that sexual abuse had occurred to other members of his family. Hutto's Aunt Faye, who was his grandmother and aunt, sexually abused Hutto when he lived with her. Dr. Schroeder further explained how sexual abuse interferes with child development and

specifically affected Hutto's reaction to Simpson. Dr. Schroeder recounted that Hutto had said that Simpson had touched his back and leg and had said something that reminded him "'of the s— that Faye would say' to him and he just lost it." Even though the trial court did not allow Dr. Schroeder to testify regarding Hutto's potential for PTSD, Dr. Schroeder did explain how Hutto, who had never been treated for the abuse he suffered as a child, had a flashback and just "snapped" on Simpson.

¶17. Dr. Schroeder also discussed Hutto's bout as a fighter; he had participated in cage fighting and tough-man competitions when he was older. She explained that people who participate in such activities may have traumatic brain injuries. Dr. Schroeder described how traumatic brain injuries often impact the brain's executive function, "which is the part of our brain that helps us to do things that we don't even realize we're doing, like recognizing social cues and just random thoughts on how to act appropriately."

¶18. Like Dr. Schroeder, Dr. Garbarino classified Hutto "as an untreated traumatized child inhabiting an adult's body." He explained how Hutto's current state can be traced to his adaptation to severe psychological adversity during childhood by noting the maltreatment Hutto endured from a variety of family members and others in his social environment. Similar to Dr. Schroeder, Dr. Garbarino emphasized the traumatic sexual abuse Hutto suffered at the hands of family members.

¶19. Dr. Garbarino opined that abuse and neglect in childhood "stifles child development" and "can lead to pervasive psychological problems, . . . [including] . . . difficulties in managing emotions ('affective regulation') and engaging in socially competent decision-

making behavior ('executive function')[.]" He stated that "the key to understanding the severe dysfunction of [Hutto] as an adult is to be found in the role of severe and pervasive trauma. Understanding this trauma is central to understanding [Hutto's] impaired development." Dr. Garbarino linked Hutto's trauma to PTSD, which includes his outburst, flashbacks and uncontrollable anger. Dr. Garbarino concluded that

> the accumulation of [Hutto's] experiences of severe maltreatment and extreme childhood adversity encompasses multiple, significant factors that should be considered in any individualized sentencing decision. His history of being the victim of maltreatment and severe adversity produced substantial and emotional damage, as well as impairment of his moral reasoning. He thus exhibits the "moral" and "emotional" damage that are often at the heart of homicidal behavior. . . . All of this culminated in the crime for which he is being sentenced.

¶20. Despite Hutto's refusal to participate, Dr. Garbarino used Hutto's records and the Adverse Childhood Experience Scale, to grade Hutto a 10 out of 10 in childhood adversity. According to Dr. Garbarino, the score showed "that any normal child would have been developmentally damaged by experiencing such prolonged severe trauma[.]"

¶21. When compared to Dr. Schroeder's testimony, Dr. Garbarino's affidavit is cumulative. Dr. Garbarino's affidavit is essentially the same testimony presented at trial. As suggested by Dr. Garbarino, the jury considered Hutto's severe maltreatment and extreme childhood adversity and its impact through Dr. Schroeder's testimony. Hutto fails to show his sentence would have been different had Dr. Garbarino or any other psychologist testified.

¶22. We also note that Dr. Garbarino's opinion is based solely on collateral sources. Dr. Schroeder, however, met with Hutto three separate times for a total of five hours of interview. Dr. Garbarino has not personally evaluated or even spoken to Hutto—Hutto

refused to participate. Moreover, Dr. Garbarino, like Dr. Schroeder, did not diagnose Hutto with PTSD or any other psychological disorder. Instead, Dr. Garbarino merely opines that "*it is possible* that [Hutto's] brain development was affected adversely by the pervasive maltreatment he experienced . . . ." (Emphasis added.) Furthermore, Dr. Garbarino concluded generally that *any* child would have been developmentally damaged, without individually referencing Hutto.

¶23. Like Hutto's argument above concerning the lack of psychological expert testimony, he also contends that defense counsel was ineffective by presenting broad categories of evidence regarding the abuse Hutto suffered as a child. Hutto argues that counsel was deficient in failing to present specific, individualized details of his trauma.

¶24. In addition to Dr. Schroeder's testimony detailed above, Hutto's mother and his ex-wife also testified about Hutto's trauma and behavior. His mother, Phyllis Jones, testified that she was bipolar and that bipolar disorder runs in her family. Jones also stated that she was sure that Hutto had bipolar disorder, despite his not being diagnosed. She discussed the poor relationship Hutto had with his biological father, how he beat Hutto badly and told Hutto that he had been a mistake. Jones also described the abusive environment Hutto grew up in. She recounted the physical abuse she and Hutto had suffered from his stepfather. She personally suffered cracked ribs, a split lip, loss of teeth, and a black eye from his abuse.

¶25. Katherine Hutto, Hutto's ex-wife, also discussed how Hutto did not get along with his stepfather and had no relationship with his biological father. She was not allowed to mention the stories Hutto had told her about the abuse, because the stories were hearsay. She was

allowed to discuss the changes she witnessed in Hutto's behavior after he started boxing, saying that his anger would go on and off, "like a switch."

¶26. Hutto argues that the jury should have heard more details about his abuse. He contends that the social-history narrative completed by defense counsel's mitigation investigator Lela Hubbard should have been presented. Hubbard's report details abusive incidents involving Hutto and other abused family members. According to the report, Hutto provided Hubbard a list of the people who molested him and what they made him do. Hutto further contends that Sammy Duarte, Hutto's cousin, should have also been called to testify. Duarte submitted an affidavit, and Hubbard interviewed him. Duarte recounts the same family history Dr. Schroeder did, saying Hutto endured physical abuse and sexual abuse. Duarte adds, however, that Hutto was sexually abused by his stepfather's male friends, without providing any details of these events.

¶27. "Claims that additional witnesses should have been called are disfavored." ***Turner v. State***, 953 So. 2d 1063, 1074 (Miss. 2007). To prevail, Hutto must prove that "had the affiants been called to testify, there was a reasonable probability that the result of the proceeding would have been different." ***Moffett***, 156 So. 3d at 849 (citing ***Spicer v. State***, 973 So. 2d 184, 191 (Miss. 2007)). There "'is no prejudice when the new mitigating evidence "would barely have altered the sentencing profile presented" to the decisionmaker . . . .'" ***Chamberlin***, 55 So. 3d at 1054 (quoting ***Sears***, 561 U.S. at 954).

¶28. While Hubbard's report and Duarte could have provided a few more details and anecdotes about the abuse Hutto suffered as a child, the evidence would have been

cumulative. Additionally, Hutto fails to show that the verdict and sentence would have been different had additional witnesses testified. Thus, Hutto's claim is without merit.

¶29. Notwithstanding the cumulative nature of the mitigation evidence now offered by Hutto to support his ineffective-assistance-of-counsel claims above, we also note that Hutto himself directly curtailed the amount of mitigation evidence that his defense counsel presented at trial. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." ***Strickland***, 466 U.S. at 691. If the defendant instructs his counsel not to present certain mitigating evidence, the defendant cannot later claim counsel was ineffective for failing to present that evidence. ***Loden v. State***, 43 So. 3d 365, 381 (Miss. 2010); ***Bishop v. State***, 882 So. 2d 135 (Miss. 2004).

¶30. As discussed above, Hutto argues defense counsel was ineffective for calling Dr. Schroeder instead of a psychologist or psychiatrist. Twice, however, defense counsel arranged for Hutto to be interviewed and examined by psychologists, but Hutto refused to cooperate in the same way that he refused to cooperate with Dr. Garbarino. His refusal resulted in incomplete reports from the psychologists, who were unable to make a diagnosis and to testify. Thus, Hutto cannot claim counsel was ineffective for failing to call a psychologist.

¶31. Hutto also interfered with the presentation of mitigation evidence that he now claims should have been presented at trial. During defense counsel's proffer of Dr. Schroeder's trial testimony, Hutto announced, "I'm ready to go to Parchman. Take me to . . . death row. Let's

go. What the hell we waiting on?"

¶32. As to Hubbard's social-history narrative, Hutto specifically told the trial court and defense counsel that he did not want Lela Hubbard to help in his case:

> HUTTO: . . . I don't want Mr. Knapp, and I don't want [Andre De Gruy,] and I don't want Lela [Hubbard]. They've not done anything I've asked them to do. Nothing.

¶33. The record also makes clear that Hutto wanted as little as possible introduced about the history of sexual abuse of his family members, including Sammy Duarte. Hutto interrupted Dr. Schroeder's testimony and attempted to excuse her when she mentioned Duarte's name and the abuse they both suffered as children. Hutto asked defense counsel to drop the line of questioning while Dr. Schroeder was testifying about the sexual abuse Hutto and Duarte had suffered as children. When defense counsel attempted to continue the line of questioning, Hutto tried to excuse Dr. Schroeder:

> HUTTO: Your honor, we don't . . . have no further questions for the witness. She can be excused.
>
> . . . .
>
> HUTTO: You're going to keep asking her questions?
>
> DEFENSE: I'm going to take care of it.
>
> HUTTO: I don't want . . . to proceed. . . . Pass her to the prosecution and let's . . . get it over with.

¶34. Now, Hutto contends that his refusal to cooperate is no excuse for defense counsel's alleged ineffectiveness. It is true that this would not excuse complete dereliction of trial counsel's duty to present a case in mitigation. But "[t]he reasonableness of counsel's actions

may be determined or substantially influenced by the defendant's own statements or actions." ***Strickland***, 466 U.S. at 691. Here, Hutto specifically refused to be interviewed and examined by psychologists, he told the trial court and defense counsel that he did not want Hubbard's help in his case and he instructed defense counsel not to elicit any testimony concerning Sammy Duarte. These actions by Hutto limited defense counsel's options in presenting mitigation evidence. This is not a case in which counsel failed to offer any mitigating evidence; rather, Hutto's "counsel did all that they could, within the limitations placed on them by" Hutto. ***Bishop***, 882 So. 2d at 143.

II. Whether prosecutorial misconduct resulted in a verdict that was tainted by extraneous, inflammatory matters outside of the evidence.

¶35. Hutto asserts that prosecutorial misconduct during closing arguments during the sentencing phase resulted in his receiving an unfair trial and unreliable sentence. At the close of Hutto's sentencing phase, the prosecution's closing argument began as follows:

> STATE: After going through both phases of this trial, what resonates the most is James Hutto's lack of remorse and his lack of responsibility in the murder of Ethel Simpson. He's had no respect for this process, and that's based on his behavior during this trial and his actions during the entire proceeding, the gestures he's given to you, the gestures he's given, as you've seen, to everyone in this room including the family of Ethel Simpson.

¶36. Defense counsel immediately objected, approached the bench and argued that the comment on Hutto's lack of remorse was a comment on the his failure to testify. The trial court overruled the objection. After the bench conference and in the jury's presence, the following exchange took place:

COURT: Go have a seat, Mr. Hutto.

HUTTO: F—you, bitch. I don't have no respect for you or any of you son of a bitches in here, never have.

. . . .

COURT: Mr. Hutto, you've been warned numerous times during the course of the proceeding.

. . . .

COURT: And any further outburst . . . will result in you being removed from the courtroom.

HUTTO: That's it. Before I take anything back . . . I'll add more to it. F—you, f—you and f—you. Can I go?

¶37. Thereafter, Hutto was removed from the courtroom, and the prosecution continued its closing argument as follows:

STATE: Exactly. That's exactly what I'm talking about. His lack of remorse is also indicated by the statements that he gave the detectives . . . [Y]ou had those in the guilt phase . . . [H]is statements to detectives were increasingly evil and they were riddled with lies. "Charles Manson couldn't tote my gym bag." . . . "You don't know the same Ethel I do[.]" . . . "She was a horny old broad. I had sex with her the first day I met her." That doesn't sound like a man that's afraid of being molested by elderly women. . . . They want you to spare his life, but there's never been any responsibility for murdering her, rather mitigation testimony from several people.

¶38. Based on these comments by the prosecutor and the court's ruling, Hutto first argues that the trial court erred by allowing the prosecutor to improperly comment on his lack of remorse. Second, Hutto argues that defense counsel was ineffective for failing to object to the prosecutor's reference to Hutto's behavior during trial and for failing to request curative

instructions. We find that Hutto's first claim is procedurally barred and that both claims lack merit.

¶39. "Keeping in mind that the prosecutor is afforded broad latitude in closing arguments, the ultimate question is whether the prosecutor's remarks denied [Hutto] a fundamentally fair trial." ***Walker v. State***, 913 So. 2d 198, 240 (Miss. 2005) (citing ***Stringer v. State***, 500 So. 2d 928, 939 (Miss. 1986)). In this case, "[i]t is imperative that the statements be read in their appropriate context in light of that which the prosecutor was in fact arguing to the jury at the time." ***Id.*** at 240 (internal quotation marks omitted) (quoting ***Holland v. State***, 705 So. 2d 307, 347 (Miss. 1997)). "[T]he very purpose of an advocate is to help the jury draw conclusions from the evidence and to make suggestions as to a proper conclusion." ***Id.*** at 239 (internal quotation marks omitted) (quoting ***Evans v. State***, 725 So. 2d 613, 671 (Miss. 1997)). Furthermore, "[w]hen the defendant puts mitigating evidence before the jury during the penalty phase, the prosecution is allowed a counter-attack." ***Corrothers v. State***, 255 So. 3d 99, 109 (Miss. 2017) (internal quotation marks omitted) (quoting ***Finley v. State***, 725 So. 2d 226, 239 (Miss. 1998)).

A. Prosecutor's Lack-of-Remorse Comment

¶40. Hutto claims that the trial court committed reversible error by overruling defense counsel's objection. He maintains that the prosecution commented on his failure to testify, resulting in an unfair trial and unreliable sentence. Hutto did not raise the issue on direct appeal, nor does Hutto claim that counsel was ineffective for failing to do so.

¶41. "Failure . . . to raise objections, defenses, claims, questions, issues or errors either in

fact or law which were capable of determination at trial and/or on direct appeal . . . shall constitute a waiver thereof and shall be procedurally barred[.]" Miss. Code Ann. § 99-39-21(1) (Rev. 2015). *See* ***Grayson v. State***, 118 So. 3d 118, 132 (Miss. 2013). Accordingly, Hutto's claim is procedurally barred.

¶42. Procedural bar aside, Hutto fails to show cause and actual prejudice necessary to overcome waiver. *See* Miss. Code Ann. § 99-39-21(4) and (5) (Rev. 2015). A comment on a defendant's failure to testify violates the Fifth Amendment right against self-incrimination. ***Evans v. State***, 226 So. 3d 1, 32 (Miss. 2017); U.S. Const. amend. V.

¶43. Hutto compares the comments here to the prosecutor's comment in ***Griffin v. State***, 557 So. 2d 542 (Miss. 1990). In ***Griffin***, the prosecutor stated "[t]here is one person who could tell you what happened . . . ." ***Id.*** at 552. We reversed and remanded for a new trial after finding that the statement was an improper comment on the defendant's failure to testify. ***Id.*** But in ***Griffin***, the prosecution commented directly on the defendant's failure to testify. ***Id.***

¶44. Here, the prosecutor linked Hutto's lack of remorse to his statements to police and Hutto's outbursts in court. At sentencing, Hutto's witnesses pleaded for his life and recounted his traumatic childhood. To counter this mitigation evidence, the prosecutor focused on Hutto's statements to police. As stated, a prosecutor enjoys wide latitude in closing and may comment on the evidence. The prosecutor here commented on Hutto's mitigation evidence—the sexual abuse he suffered as a child—and the disparaging remarks he made about the victim. These comments were proper remarks on the weight of the

mitigation evidence and did not deprive Hutto of a fair trial.

B. Prosecutor's Comment on Hutto's In-Court Behavior

¶45. Hutto asserts that defense counsel should have objected and asked for a curative instruction in response to the prosecutor's comments on Hutto's in-court behavior. He contends that counsel's failures were deficient and prejudicial under ***Strickland*** because the prosecutor's remarks "drew the jury's attention to extraneous, inflammatory matters outside the evidence" and prejudiced the verdict.

¶46. Hutto failed to object on this ground at trial. An objection must be specific because failure to articulate the basis for the objection waives the issue on appeal. ***Ross v. State***, 954 So. 2d 968, 987 (Miss. 2007). Hutto also failed to raise the issue on direct appeal. Had he done so, this claim would have been procedurally barred from review. *See* Miss. Code Ann. § 99-39-21; *see also* ***Moffett***, 156 So. 3d at 854. Because Hutto claims ineffective assistance of counsel, we review its merits. *See* ***Crawford***, 867 So. 2d at 202 n.2.

¶47. Hutto had outbursts and made obscene gestures throughout his trial. In addition to the outbursts during the prosecution's closing argument detailed above, Hutto had several others, including one noted by this Court on Hutto's direct appeal:

> HUTTO: Don't give a f—about none of them, especially them—them or them—I don't care. F—all of y'all. See that? F—y'all.
>
> DEFENSE: He's asked us some questions . . . but they are just designed to embarrass the witness . . . .
>
> . . . .
>
> HUTTO: They're not telling you everything. There's other crimes, murders in Alabama and . . . attempted murders and all that in

> Alabama. Now, think about that and be fair about that. They're not going to be fair. I told y'all from the get-go what I wanted. I've been fighting my whole life. I'm tired of fighting the whole society . . . .
>
> . . . .
>
> HUTTO: You're wasting money. Go ahead. Y'all can kill me today. I don't care. Do it today. Do it today. No. No. I'm just saying they can do it today if that's what y'all want to do. Do it today and get it over with . . . .

Hutto, 227 So. 3d at 975–76.

¶48. PCR counsel admits that Hutto's behavior was "outlandish": he "was disruptive and insulting while court was in session, and the judge threw him out of the courtroom more than once." Counsel continues that "Hutto's behavior was often loud, always visible, and impossible not to notice."

¶49. We have declined to reverse when the comments had "a de minimus effect" and were "harmless error in light of the overwhelming evidence." ***Moffett***, 156 So. 3d at 854. In ***Moffett***, the petitioner failed to object to comments made about his demeanor during trial and failed to raise the issue on direct appeal. ***Id.*** at 853. In denying Moffett's request for post-conviction relief, we held,

> Moffett's counsel did not object to the prosecution's comments, and no admonishment was sought. The issue was not raised on direct appeal, and had it been, it would have been procedurally barred by waiver. *See* ***Doss v. State***, 709 So. 2d 369, 400 (Miss. 1996)[.]
>
> . . . .
>
> . . . We have reviewed the closing arguments by the prosecution, and in context of the entire argument, the fleeting comments complained of have a de minimus effect. Had we been asked to address this claim on direct appeal,

> the likely outcome would have been harmless error in light of the overwhelming evidence. The prosecutor's comments about Moffett's demeanor during the trial were made to a jury that had the opportunity to personally view his demeanor for themselves. The jurors had the opportunity to form their own opinions and were not required to rely on the prosecutor's opinions . . . .

Id.

¶50. We find that ***Moffett*** directly addresses Hutto's claim. The jury in this case witnessed Hutto's outbursts and obscene gestures firsthand throughout the trial. The jury had the opportunity to form its own opinion of Hutto.

¶51. The jury's death sentence was supported by overwhelming evidence. The jury found three aggravating circumstances: (1) Hutto committed a prior violent felony—his Alabama conviction for first-degree sexual abuse, which was proved by a certified copy of the order of conviction; (2) the crime was heinous, atrocious, or cruel and the pathologist testified to Simpson's injuries—blunt force trauma, bleeding of the brain, a skull fracture, a crushed windpipe and a broken neck; and (3) the capital offense was committed in the commission of a robbery. This factor was proved by video evidence of Hutto driving Simpson's car after her death; he attempted to sell her car, and police caught him in Simpson's car. Additionally, the trial court instructed the jury that it only could impose a death sentence based on the aggravating circumstances.

¶52. The prosecutor's comments about Hutto's outbursts in court had a de minimus effect and were harmless in light of the overwhelming evidence produced in the sentencing phase of trial. Accordingly, Hutto's claim is without merit.

III. Whether counsel failed to investigate the circumstances underlying Hutto's prior-violent-felony aggravator.

¶53. On direct appeal, this Court addressed Hutto's prior-violent-felony aggravator. ***Hutto***, 227 So. 3d at 992–93. "Before the sentencing phase, the parties presented arguments as to whether Hutto previously had been convicted 'of a felony involving the use or threat of violence.'" ***Id.*** at 992 (quoting Miss. Code Ann. § 99-19-101(5)(b) (Rev. 2015)). Hutto's defense counsel argued at trial and on appeal that Hutto's felony conviction in Alabama was legally insufficient to qualify as an aggravating circumstance in Mississippi. ***Id.*** at 993. This Court concluded that the felony conviction was legally sufficient, emphasizing Hutto's concession: "Hutto admits that his felony conviction under Section 13A-6-66 contained an element of violence, as an element of the Alabama crime is forcible compulsion." ***Id.***

¶54. Now, in his petition, Hutto makes two distinct arguments. Both of Hutto's arguments are predicated on his counsel's alleged ineffective assistance by not investigating the underlying facts and circumstances of Hutto's felony conviction. First, Hutto argues that it was ineffective for his counsel not to present the underlying facts to the trial court. Second, Hutto maintains that it was ineffective assistance for his counsel not to present the underlying circumstances of his conviction to the jury in order to mitigate the impact of the conviction as an aggravating circumstance. Both of these arguments fail under the first prong of ***Strickland*** because Hutto has not overcome the strong presumption that his counsel's performance was reasonable.

¶55. As we have mentioned, Hutto must demonstrate that his defense counsel's performance was deficient and that the deficient performance prejudiced his defense.

Strickland, 466 U.S. at 687. Again, in order to fairly assess an attorney's performance, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" ***Id.*** at 689 (quoting ***Michel***, 350 U.S. at 101).

¶56. It is a long-held principle that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . ." ***Foster v. State***, 687 So. 2d 1124, 1132 (Miss. 1996) (quoting ***Strickland***, 466 U.S. at 690). Hutto has not demonstrated that his counsel's decision not to factually attack the conviction or to present the circumstances of the conviction to the jury was anything other than strategic. Given the language of the indictment that Hutto subjected the victim "to sexual contact by forcible compulsion," defense counsel was certainly aware that the facts undergirding the conviction did not favor Hutto.

¶57. Hutto highlights the prosecutor's apparent lack of knowledge of the facts surrounding the Alabama conviction as a missed opportunity for his counsel to have capitalized on an advantage. There was no advantage to be had though because none of the facts underlying the conviction support Hutto's claim, aside from his own self-serving account.[2] Even his account of the facts, however, would have prejudiced the jury against him: he stated that he only wanted to teach the victim a lesson "about her dope habit and her screwing black guys down in Cordova." Hutto also admitted that he forced her to strip down to her panties so that

[2] We do note that Hutto's ex-wife testified that Hutto "was given a raw deal in Walker County." Her testimony, however, does not impeach the victim's account.

she would not get mud on his truck.

¶58. Further, had Hutto's counsel introduced Hutto's account to the jury, it would have opened the door to the victim's account and the account of an eyewitness. *See* ***Corrothers***, 255 So. 3d at 109. According to the victim in her statement to law enforcement, she had accepted a ride to a store from Hutto, whom she did not know. After a period of driving around, Hutto refused to take her home, removed her from the passenger-side of the vehicle, picked her up and threw her in a mud hole. The victim stated that after an eyewitness had gone to alert law enforcement, Hutto groped, fondled and kissed her.

¶59. In light of these underlying facts, Hutto has not overcome the strong presumption that his counsel's decision not to investigate and present the facts to the trial court or jury was strategic and reasonable. This issue is without merit.

IV. Whether defense counsel was ineffective for failing to challenge a juror with alleged cognitive impairments.

¶60. Hutto maintains that his defense counsel provided ineffective assistance of counsel by failing to challenge a juror with alleged cognitive impairments. Hutto argues that his Sixth Amendment right to an impartial and mentally competent jury was violated.

¶61. At the end of his jury questionnaire, Frank Edward Gill—one of Hutto's jurors—wrote, "I have cognitive decline and dementia characteristics."[3] Defense counsel did not question Gill about his cognitive abilities during individual voir dire, but the State, defense counsel and the trial court questioned Gill about his views on the death penalty.

[3] We note that Gill's jury questionnaire is not contained in the certified appellate record. It is attached as an exhibit to Hutto's PCR petition.

When defense counsel accepted Gill on the jury, the defense had four of its twelve peremptory strikes remaining. Hutto requests leave for a hearing to determine Gill's competence at trial. Because Hutto cannot show deficient performance or prejudice under ***Strickland***, we deny his request for leave.

¶62. Hutto has not demonstrated deficient performance by defense counsel. Gill's jury questionnaire was known by the State and defense counsel. In fact, based on Gill's questionnaire responses, the State, defense counsel and the trial court questioned Gill at length about his views on the death penalty during individual voir dire. Evidently, neither the State, defense counsel nor the trial court noticed any competency issues with Gill. When Gill was seated, defense counsel did not challenge him for cause and still had four peremptory strikes remaining. In light of defense counsel's remaining strikes, the decision to accept Gill on the jury was trial strategy. This Court has observed that the decision not to strike an otherwise competent juror "is a strategic one . . . ." ***Simon v. State***, 857 So. 2d 668, 692 (Miss. 2003).

¶63. Here, Hutto fails to demonstrate prejudice; he has not demonstrated that Gill was incompetent to serve on the jury. In preparing for the PCR motion, Hutto's PCR counsel attempted to interview Gill in August 2018. According to PCR counsel, Gill had little recollection of Hutto's trial and only knew that the trial was for a "bad guy." Hutto's PCR counsel determined that Gill was not competent to proceed further with the interview.

¶64. Mississippi Code Section 13-5-1 defines a competent juror. Miss. Code Ann. § 13-5-1 (Rev. 2012). Further, qualified jurors are required to serve unless an illness renders them

"incapable of performing jury service." Miss. Code Ann. § 13-5-23(1)(a) (Rev. 2012). The clerk of court may dismiss a juror from service upon receipt of "a certificate of a licensed physician, stating that the juror is ill and unfit for jury service." Miss. Code Ann. § 13-5-23(2) (Rev. 2012). Otherwise, "a judge . . . shall decide whether to excuse an individual under subsection (1)(a)." Miss. Code Ann. § 13-5-23(2).

¶65. Also, Hutto relies on ***Edgemon*** which requires "a high standard of proof . . . when an allegation of juror incompetence is made." ***Edgemon v. Lockhart***, 768 F.2d 252, 256 (8th Cir. 1985). The ***Edgemon*** court further held, "[a] petitioner is entitled to a hearing only if he produces substantial evidence of incompetence 'such as proof of an adjudication of insanity or mental incompetence made shortly before or after the trial.'" ***Id.*** (quoting ***United States v. Mauldin***, 714 F.2d 854, 855 (8th Cir. 1983)).

¶66. Hutto has provided no proof that Gill was mentally incompetent at or near the time of trial. PCR counsel represented that his conversation with Gill took place more than five years after the verdict. In contrast, the State, defense counsel and the trial court questioned Gill and personally observed his demeanor during voir dire. Further, Gill swore that he would follow the law during deliberations, and Gill's competency to serve went unchallenged.

¶67. Last, "[d]uring an inquiry into the validity of a verdict or indictment, a juror may not testify about . . . any juror's mental processes concerning the verdict. . . ." M.R.E. 606(b)(1).[4] A juror, though, may testify to "(A) extraneous prejudicial information . . .

[4] *See* ***Tanner v. United States***, 483 U.S. 107, 115–16, 125–27, 107 S. Ct. 2739, 97 L. Ed. 2d 90 (1987) (prohibiting jury impeachment of a verdict under Federal Rule of

improperly brought to the jury's attention; or (B) an outside influence . . . improperly brought to bear on any juror." M.R.E. 606(b)(2). Any alleged mental impairment of Gill, however, is not an extraneous influence for the purpose of impeaching the verdict.

¶68. Hutto does not demonstrate deficient performance or prejudice under ***Strickland***. ***Strickland***, 466 U.S. at 687. Thus, we deny Hutto's petition.

Conclusion

¶69. For the reasons stated, Hutto's petition for post-conviction relief is denied.

¶70. **LEAVE TO SEEK POST-CONVICTION RELIEF DENIED.**

RANDOLPH, C.J., KITCHENS AND KING, P.JJ., COLEMAN, MAXWELL, BEAM, ISHEE AND GRIFFIS, JJ., CONCUR.

Evidence 606(b) despite evidence that several jurors had consumed alcohol and drugs during the trial).