IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-15866-C

CHARLES VERNON HARRIS, JR.,

Petitioner-Appellant,

versus

WARDEN,
ATTORNEY GENERAL STATE OF ALABAMA,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

Before: WILLIAM PRYOR and JORDAN, Circuit Judges.

BY THE COURT:

Charles Harris, Jr., has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's June 13, 2017, order denying his motion for a certificate of appealability and denying as moot his motion for leave to proceed on appeal *in forma pauperis*. Upon review, Harris's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

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WARDEN,
ATTORNEY GENERAL STATE OF ALABAMA,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

ORDER:

Charles Harris, Jr. moves for a certificate of appealability in order to appeal the denial of his 28 U.S.C. § 2254 habeas corpus petition and subsequent Fed. R. Civ. P. 59(e) motion for reconsideration. To merit a certificate of appealability, Harris must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Because he has failed to make the requisite showing, the motion for a certificate of appealability is DENIED. Harris's motion for leave to proceed on appeal *in forma pauperis* is DENIED AS MOOT.

/s/ William H. Pryor Jr.
UNITED STATES CIRCUIT JUDGE

FILED
2016 Aug-03 PM 03:04
U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CHARLES VERNON HARRIS, JR.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**CASE NO. 5:14-CV-1871-SLB-TMP**
	)	
WARDEN DEWAYNE ESTES; ATTORNEY GENERAL OF THE STATE OF ALABAMA,	)	
	)	
Respondents.	)	

FINAL JUDGMENT

In accordance with the Memorandum Opinion entered herewith, petitioner's Objections to the Report and Recommendation are **OVERRULED** and the Recommendation of the Magistrate Judge, (doc. 22), is **ACCEPTED**. The Application for Habeas Corpus Under 28 U.S.C. § 2254, (doc. 1), is hereby **DENIED** and **DISMISSED WITH PREJUDICE**. A Certificate of Appealability is **DENIED**.

DONE this 3rd day of August, 2016.

Sharon Lovelace Blackburn

SHARON LOVELACE BLACKBURN
SENIOR UNITED STATES DISTRICT JUDGE

FILED
2016 Aug-03 PM 03:02
U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CHARLES VERNON HARRIS, JR.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**CASE NO. 5:14-CV-1871-SLB-TMP**
	)	
WARDEN DEWAYNE ESTES; ATTORNEY GENERAL OF THE STATE OF ALABAMA,	)	
	)	
Respondents.	)	

MEMORANDUM OPINION

This case is presently before the court on Objection to Magistrate Putnam's April 18th, 2016, Report and Recommendation filed by petitioner Charles Vernon Harris, Jr. [Objections]. (Doc. 25.)[1] Mr. Harris, who is proceeding pro se, filed an Application for Habeas Corpus Under 28 U.S.C. § 2254 [Application], (doc. 1), which he later amended, (doc. 13). After respondents filed their Answer and opposition, (docs. 8 and 18), the Magistrate Judge entered a Report and Recommendation, recommending that Mr. Harris's Application be denied, (doc. 22.)

The district court reviews de novo those parts of a Report and Recommendation to which a party objects. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3)("The district judge must determine de novo any part of the magistrate judge's disposition that has been

[1]Reference to a document number, ["Doc. ___"], refers to the number assigned to each document as it is filed in the court's record.

properly objected to."). The court may review the other parts of the Report and Recommendation for plain error or manifest injustice. United States v. Slay, 714 F.2d 1093, 1095 (11th Cir. 1983)(citing Nettles v. Wainwright, 677 F.2d 404, 410 (11th Cir. 1982)). On review, "The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3). In this case, the court has reviewed the entire record before the Magistrate Judge as well as the Report and Recommendation and Mr. Harris's Objections and, for the reasons set forth herein, the court finds the Objections are due to be **OVERRULED** and the Recommendation is due to be **ACCEPTED**. Mr. Harris's Application will be denied and this matter will be dismissed.

I. HABEAS REVIEW STANDARD

"The writ of habeas corpus stands as a safeguard against imprisonment of those held in violation of the law." *Harrington v. Richter*, 562 U.S. 86, 91. "Judges must be vigilant and independent in reviewing petitions for the writ, a commitment that entails substantial judicial resources. Those resources are diminished and misspent, however, and confidence in the writ and the law it vindicates undermined, if there is judicial disregard for the sound and established principles that inform its proper issuance." *Id.* at 91-92. "The statutory authority of federal courts to issue habeas corpus relief for persons in state custody is provided by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)." *Id.* at 97.

Pursuant to 28 U.S.C. § 2254(a), a federal district court is prohibited from entertaining "[a]n application for a writ of habeas corpus [on] behalf of a person in custody pursuant to the judgment of a State court" unless the petitioner alleges "he is in custody in violation of the Constitution or laws or treaties of the United States." In other words, this court's review of habeas claims is limited to federal constitutional questions. Claims pertaining solely to questions of state law fall outside the parameters of this court's authority to provide relief under § 2254. Thus, to the extent Mr. Harris claims he is entitled to relief based on violations of the Alabama Constitution and state law, this court may not provide him relief.

When Congress enacted the AEDPA, it limited the circumstances under which a habeas petitioner could obtain relief. Indeed, under the AEDPA, a petitioner is entitled to relief on a federal claim only if he shows that the state court's adjudication of his claim on the merits "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or that the state court's adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[2]

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[2]Section 2254(d) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

28 U.S.C. § 2254(d); s*ee also Brown v. Payton*, 544 U.S. 133, 141 (2005); *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005); *Williams v. Taylor*, 529 U.S. 362, 404 (2000); *Putman v. Head*, 268 F.3d 1223, 1241 (11th Cir. 2001). "Moreover, a state court's factual determinations are presumed correct unless rebutted by clear and convincing evidence." *McNair v. Campbell*, 416 F.3d 1291, 1297 (11th Cir. 2005)(citing 28 U.S.C. § 2254(e)(1)).

"A state court's decision is not 'contrary to . . . clearly established Federal law' simply because the court did not cite [Supreme Court] opinions. [The Court has] held that a state court need not even be aware of [its] precedents, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Mitchell v. Esparza*, 540 U.S. 12, 16 (2003)(internal quotations and citations omitted). "Federal courts are not free to presume that a state court did not comply with constitutional dictates on the basis of nothing more than a lack of citation." *Bell v. Cone*, 543 U.S. 447, 455 (2005).

"A decision that does not rest on procedural grounds alone is an adjudication on the merits, regardless of the form in which it is expressed." *Williams v. Allen*, 598 F.3d 778, 797 (11th Cir. 2010)(internal quotations and citation omitted). Section 2254(d) requires that "any claim that was adjudicated on the merits in State court proceedings" be accorded deference in the federal courts. *See* 28 U.S.C. § 2254(d).

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

28 U.S.C. § 2254(d).

> As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings. It preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents. It goes no farther. Section 2254(d) reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal. As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.
>
> The reasons for this approach are familiar. Federal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights. It disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.
>
> Section 2254(d) is part of the basic structure of federal habeas jurisdiction, designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions.

Harrington, 562 U.S. at 102-03 (internal citations and quotations omitted).

A state court's adjudication of a claim will be sustained under § 2254(d)(1), unless it is "contrary to" clearly established, controlling Supreme Court precedent, or it is an "unreasonable application" of that law. These are two different inquiries, not to be confused, nor conflated, as the Supreme Court explained in *Williams*:

> Section 2254(d)(1) defines two categories of cases in which a state prisoner may obtain federal habeas relief with respect to a claim adjudicated on the merits in state court. Under the statute, a federal court may grant a writ of habeas corpus if the relevant state-court decision was either (1) "*contrary to* . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "*involved an unreasonable application of* ... clearly

> established Federal law, as determined by the Supreme Court of the United States."

Williams v. Taylor, 529 U.S. at 404 (emphasis in *Williams*).

Section 2254(d)(1) limits the source of "clearly established Federal law" to "holdings, as opposed to the dicta, of the [Supreme] Court's decisions as of the time of the relevant state-court decision." *Id.* at 412. A state-court determination can be "contrary to" clearly established Supreme Court precedent in either of two ways:

> First, a state-court decision is contrary to this Court's precedent if the state court arrives at a conclusion opposite to that reached by this Court on a question of law. Second, a state-court decision is also contrary to this Court's precedent if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours.

Id. at 405. Likewise, a state-court determination can be an "unreasonable application" of clearly established Supreme Court precedent in either of two ways:

> First, a state-court decision involves an unreasonable application of this Court's precedent if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case. Second, a state-court decision also involves an unreasonable application of this Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.

Id. at 407. Whether a particular application of Supreme Court precedent is "reasonable" turns on whether the application of Supreme Court precedent at issue was "objectively unreasonable." Therefore, the question is not whether the state court "correctly" decided the issue, but whether its determination was "reasonable," even if incorrect. *See Bell*, 535 U.S.

at 694. "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Harrington*, 562 U.S. at 101(internal citations and quotations omitted).

II. DISCUSSION

Mr. Harris raises three objections to the Magistrate Judge's Report and Recommendation: (1) the Magistrate Judge erred in finding the amendment of his Indictment without his consent and without resubmitting it to the grand jury was constitutional; (2) the Magistrate Judge erred by failing to find Ala. Code § 13A-6-69.1 is unconstitutional because it fails to state the mental intent necessary to violate the statute and the statute is overbroad and vague; and (3) the Magistrate Judge erred in failing to provide him a hearing to present evidence supporting his ineffective assistance claims. (See generally doc. 25.) These Objections are without merit for the reasons set forth below. Moreover, the court has found no plain error warranting habeas relief based on its review of the entire record.

A. AMENDED INDICTMENT

Mr. Harris alleges two errors of constitutional dimensions with regard to the amendment of his Indictment: (1) changing the enumerated code section shortly before trial to substitute a Class B felony for a Class C felony denied him due process, and (2) his right to be charged by a grand jury was denied when the amended charge was not resubmitted to the grand jury.

1. Due Process

The Supreme Court has held:

> Our prior cases indicate that an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense. Hagner v. United States, 285 U.S. 427, 52 S. Ct. 417, 76 L. Ed. 861 (1932); United States v. Debrow, 346 U.S. 374, 74 S. Ct. 113, 98 L. Ed. 92 (1953). It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.' United States v. Carll, 105 U.S. 611, 612, 26 L. Ed. 1135 (1882).

Hamling v. United States, 418 U.S. 87, 117 (1974).

In his Objections, Mr. Harris alleges that, because § 13A-6-66 and § 13A-6-69.1 describe the same offense but with different punishments, the amendment of the Indictment to change the offense to the one with a stiffer penalty violated his right to notice. He states, "The Court of Criminal Appeals[']s decision ignores or overlooks the obvious in this case. Both § 13A-6-66(a)(3) and § 13A-6-69.1(a) are worded virtually identical[ly], but a violation of § 13A-6-66 is a Class C felony, where a violation of 13A-6-69.1 is a Class B felony." (Doc. 25 at 9 [emphasis added].) However, Mr. Harris is simply wrong about the language of the two statutes on the date of his offense. Before July 1, 2006 –

§ 13A-6-66, Ala. Code 1975, provided, in pertinent part:

> "(a) A person commits the crime of sexual abuse in the first degree if:
>
> ". . . .

> "(3) He, being 16 years old or older, subjects another person to sexual contact who is less than 12 years old.
>
> "(b) Sexual abuse in the first degree is a Class C felony."
>
> Effective July 1, 2006, § 13A-6-66 was amended to remove subsection (a)(3) .... See Act No. 2006–575, Ala. Acts 2006. Section 13A-6-69.1, Ala. Code 1975, was enacted by the same act and contains comparable language to the language previously in § 13A-6-66(a)(3); § 13A-6-69.1(b), Ala. Code 1975, makes the sexual abuse of a child under 12 years old a Class B felony.

M.H. v. State, 6 So. 3d 41, 48-49 (Ala. Crim. App. 2008)(emphasis added). In Alabama, "It is well settled that the law in effect at the time of the commission of the offense controls the prosecution." Id. at 49 (quoting Minnifield v. State, 941 So. 2d 1000, 1001 (Ala. Crim. App. 2005)).

The Indictment charged, "CHARLES VERNON HARRIS, JR., . . . being sixteen years of age or older, did, on or about April 27, 2007, subject to sexual contact [LNM] who was less than twelve years of age, in violation of Section 13A-6-66 of the Code of Alabama ...." (Doc. 25-3 [emphasis added].) The Indictment was amended to change the Alabama Code section from § 13A-6-66 to § 13A-6-69.1. (Id.; doc. 25-4.) Mr. Harris objected to the amendment because he alleged it changed the charged offense from a Class C felony to a Class B felony. The Alabama Court of Criminal Appeals held, in part –

> "[T]he reference to a statutory source in an indictment is considered a ""matter of convenience and not of substance."" . . . It is the language describing the offense that apprises the accused of the charge against him, not the Code citation." Hopper v. City of Prattville, 781 So. 2d 346, 353 (Ala. Crim. App. 2000)(quoting Griffin v. State, 428 So. 2d 213, 215 (Ala. Crim. App. 1983). Here, Harris was always charged with first-degree sexual abuse

> of a child less than the age of twelve. This allegation was not altered by the August 7, 2008, amendment.
>
> Additionally, because the citation to § 13A-6-66 was a miscitation of what should have been a citation to § 13A-6-69.1, Harris's consent to amend the code section was not required. See, Rule 13.5(a), Ala. R. Crim. P.[3] Moreover, Harris could not and did not show that he suffered actual prejudice due to the correction of the code section. "[I]n the absence of a showing of actual prejudice to the defendant, reference to the erroneous code section will be treated as mere surplusage." Ex parte Bush, 431 So. 2d 563, 564 (Ala.) Harris's claim that the amendment forced him to defend a greater offense is incorrect because, as stated above, Harris was always charged with first-degree sexual abuse of a child less than the age of twelve. Thus, Harris was always charged with a Class B felony. Because there being no amendment to the allegations in the indictment, Harris has no valid claim that his substantial rights were prejudiced. See, Rule 13.5(a), Ala. R. Crim. P.

(Doc. 8-19 at 3-4 [footnote added].) Prior to July 1, 2006, § 13A-6-66(a)(3) was the statute criminalizing sexual contact with a child of less than 12 years old by a person age 16 or older; however, on April 27, 2007, the date of the offense, the statute criminalizing such conduct was § 13A-6-69.1. (See doc. 8-19 at 3 and n.1.)

On the date of the offense, Alabama had only one statute specifically criminalizing sexual contact by a person over the age of 16 with a child younger than 12, as charged in the Indictment, and that statute was § 13A-6-69.1. At all times, from warrant to conviction, Mr. Harris was aware that Alabama was prosecuting him for sexual contact with a child under

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[3]Rule 13.5(a) states: "A charge may be amended by order of the court with the consent of the defendant in all cases, except to change the offense or to charge new offenses not contemplated by the original indictment. The court may permit a charge to be amended without the defendant's consent, at any time before verdict or finding, if no additional or different offense is charged and if the substantial rights of the defendant are not prejudiced." Ala. R. Crim. P. 13.5(a).

the age of twelve. At the time of the crime made the basis of his prosecution, the Alabama law criminalizing such conduct was § 13A-6-69.1. Although before July 1, 2006, § 13A-6-66(a)(3) had criminalized sexual contact between a child younger tha 12 and a perpetrator of older than 16, on April 27, 2007, the date of Mr. Harris's criminal conduct, that code section no longer existed and § 13A-6-69.1, a Class B felony, criminalized the conduct described in the Indictment.

The court finds the Indictment "fairly informed" Mr. Harris of the charge against him sufficient to satisfy his right to due process. Thus, his Application will be denied as to this ground for relief.

2. Grand Jury

Mr. Harris contends that the amendment of his Indictment to charge him with a violation of Ala. Code § 13A-6-69.1 "destroyed the Petitioner's substantial right to be tried only on the charge presented in the indictment returned by the Grand Jury, his right to have the Grand Jury make the charge on its own judgment, [and] also resulted in the Petitioner being convicted of § 13A-6-69.1, a charge the Grand Jury never made against him . . . ." (Doc. 25 at 14 [citations omitted].) However, the Supreme Court has long held that there is no federal right to a grand jury in state prosecutions. See also Alexander v. Louisiana, 405 U.S. 625, 633 (1972)("Although the Due Process Clause guarantees petitioner a fair trial, it does not require the States to observe the Fifth Amendment's provision for presentment or indictment by a grand jury," and "the Court has never held that federal concepts of a 'grand jury,' binding on the federal courts under the Fifth Amendment, are obligatory for the

States." (citing Hurtado v. California, 110 U.S. 516, 538 (1884))). Moreover, because federal law does not provide a state-court criminal defendant with a constitutional "right to be indicted by a grand jury, so [his] allegation that an indictment amendment violated his right to be indicted by a grand jury should not be sufficient grounds to grant habeas corpus." Bae v. Peters, 950 F.2d 469, 477 (7th Cir. 1991); see also Major v. Deloach, No. CIV. A. 98-0148-AH-L, 2001 WL 102394, *7 (S.D. Ala. Jan. 23, 2001)("To the extent that the petitioner's claim is that the indictment should have been amended by a grand jury, it fails to state a constitutional claim cognizable under 28 U.S.C. § 2254. The Fifth Amendment's guarantee of indictment by grand jury has not been applied to the states through the Fourteenth Amendment and therefore the sufficiency of the indictment is primarily a matter of state law. See Alexander v. Louisiana, 405 U.S. 625, 633 (1972).").

Mr. Harris has not alleged a right to habeas relief on this ground of his Application.

Based on the foregoing, the court finds that the Indictment provided notice to Mr. Harris of the specific crime with which he was charged sufficient to satisfy his right to due process. Also, because the Supreme Court has held that state criminal defendants have no federal constitutional right to be indicted by a grand jury, the amendment to Mr. Harris's Indictment without presentation to the Grand Jury provides no basis for habeas relief. Having failed to demonstrate that he was entitled to relief under 28 U.S.C. § 2254(d), Mr. Harris was not entitled to a hearing in this court.

The court will accept the Recommendation of the Magistrate Judge and deny this ground for relief as set forth in Mr. Harris's Application.

B. CONSTITUTIONALITY OF § 13A-6-69.1

Mr. Harris alleges that the Magistrate Judge erred in finding that § 13A-6-69.1 contains a culpable mental state and for ignoring the fact that the state courts had failed to address his claims that § 13A-6-69.1 is unconstitutionally vague and overbroad. (Doc. 25 at 19-26.) The court disagrees.

Section 13A-6-69.1(a) states, "A person commits the crime of sexual abuse of a child less than 12 years old if he or she, being 16 years old or older, subjects another person who is less than 12 years old to sexual contact." Ala. Code § 13A-6-69.1(a)(emphasis added). Section 13A-6-60 provides the definitions applicable to sexual offenses, including § 13A-6-69.1. It defines "sexual contact" as "Any touching of the sexual or other intimate parts of a person not married to the actor, done for the purpose of gratifying the sexual desire of either party." Ala. Code § 13A-6-60(3)(emphasis added). Generally, "'purpose' corresponds loosely with the common-law concept of specific intent." See United States v. Bailey, 444 U.S. 394, 405 (1980). Thus, section 13A-6-69.1 requires a specific intent to have sexual contact with a child for the purpose of gratifying a sexual desire. Although the state court found that the intent necessary to commit sexual abuse of a child is provided by case law, this court finds that the required intent, "the intent to gratify sexual desire," is provided by law defining "sexual contact."

Therefore, § 13A-6-69.1 is not unconstitutional under federal law and this ground for relief will be denied.

Mr. Harris also contends that § 13A-6-69.1 is unconstitutional because it is vague and/or overbroad.[4] The court rejects this argument.

With regard to whether § 13A-6-69.1 is overbroad, "The crucial question . . . is whether the [statute] sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." Grayned v. City of Rockford, 408 U.S. 104, 114-15 (1972). Therefore, "[t]he first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." United States v. Williams, 553 U.S. 285, 293 (2008). The court finds that § 13A-6-69.1 prohibits sexual contact, as defined above, between a child under the age of

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[4]Mr. Harris alleged that "[§] 13A-6-69.1 is unconstitutional" because:

> (1) it encourages arbitrary and erratic arrests and convictions . . . [,]
>
> (2) it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute and what accompanying mental state is in violation . . . ,
>
> (3) it fails to give fair notice of the offending conduct . . . ,
>
> (4) it fails to protect citizens, especially the poor, from being caught in the sexual abuse net by failing to contain an element of intent . . . ,
>
> (5) it sets a net large enough to catch all possible offenders, and leaves it to the courts to step inside and say who can be rightfully detained and who should be set at large . . . .

(Doc. 25 at 23 [internal citations omitted].)

12 and a perpetrator over the age of sixteen. Clearly and without equivocation, this court states that such sexual contact – for the purpose of gratifying a sexual desire – is not, under any imaginable fact scenario, "innocent" or constitutionally-protected activity. Therefore, the court finds Ala. Code § 13A-6-69.1 is not overbroad and this ground for habeas relief is due to be denied.

Also, the court finds that the section is not "vague." The Supreme Court has held, "Our cases establish that the Government violates [the due-process] guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." Johnson v. United States, 135 S. Ct. 2551, 2556 (2015)(citing Kolender v. Lawson, 461 U.S. 352, 357-58 (1983)). "The prohibition of vagueness in criminal statutes 'is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law,' and a statute that flouts it 'violates the first essential of due process.'" Id. at 2556-57 (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)). Again, without any equivocation, the court states that § 13A-6-69.1 – prohibiting sexual contact between a child younger than 12 years old and the perpetrator sixteen years or older – establishes the conduct it punishes in such a manner that an individual of ordinary intelligence knows precisely what conduct is prohibited and law enforcement has clear minimal guidelines for enforcement. Having failed to demonstrate

that he was entitled to relief under 28 U.S.C. § 2254(d), Mr. Harris was not entitled to a hearing in this court.

The court will accept the Recommendation of the Magistrate Judge and deny this ground for relief as set forth in Mr. Harris's Application.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

In his Objections, Mr. Harris argues, "The Magistrate [Judge] abused his discretion and erred to reversal in his Report and Recommendation in asserting that Petitioner's claims of ineffective assistance of counsel had been adjudicated on the merits in state court and the Petitioner had not shown that the Alabama Court of Criminal Appeals' decision was contrary to, or involved an unreasonable application of, clearly established federal law." (Doc. 25 at 30.) The Alabama Court of Criminal Appeals held that "Harris's claims alleging ineffective assistance of trial counsel were not sufficiently pleaded." (Doc. 25-8 at 10.) It also held that Mr. Harris failed to adequately plead his claim of ineffective assistance of appellate counsel. (Id. at 19.) In this Circuit, "an Alabama court's consideration of the sufficiency of the pleadings concerning a federal constitutional claim contained in a Rule 32 petition necessarily entails a determination on the merits of the underlying claim . . . . [This court] therefore must review the merits determination of the Court of Criminal Appeals under the deferential standards set forth in AEDPA . . . ." Borden v. Allen, 646 F.3d 785, 816 (11th Cir. 2011).

Thus, contrary to Mr. Harris's Objections, the decision of the Alabama Court of Criminal Appeals, holding that he had failed to adequately plead his ineffective assistance of counsel claims, was a decision by that court on the merits.

Mr. Harris also contends that the Magistrate Judge "erred and abused his discretion in issuing his report and recommendation in this case without affording this Petitioner an evidentiary hearing under Cullen, 131 S. Ct. at 1403 . . . ." (Doc. 25 at 31 [other citations omitted].)[5]

The Supreme Court has held that, when the state court issues a decision on the merits, the federal habeas court must determine whether the petitioner has established his right to habeas relief pursuant to § 2254(d) based on the record before the state court. Cullen, 563 U.S. at 185; see also Landers v. Warden, Atty. Gen. of Ala., 776 F.3d 1288, 1295 (11th Cir. 2015). This court may conduct an evidentiary hearing only when "(1) the federal claim was adjudicated on the merits in state court; (2) there is a determination based only on the state court record that the petitioner has cleared the § 2254(d) hurdle; and (3) the habeas petitioner tried, but was not given the opportunity[,] to develop the factual bases of the claim in state

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[5]The page of the Cullen v. Pinholster decision cited by Mr. Harris contains a discussion of the Strickland standard and not any discussion regarding a habeas petitioner's right to a hearing in the district court. See Cullen v. Pinholster, 563 U.S. 170, 189-190, 131 S. Ct. 1388, 1403 (2011). The Court discussed the issue of a hearing in federal court and held, "[E]vidence introduced in federal court has no bearing on § 2254(d)(1) review. If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court." Id., 563 U.S. at 185.

court within the meaning of 28 U.S.C. § 2254(e)(2)." Madison v. Comm'r, Alabama Dep't of Corr., 761 F.3d 1240, 1249-50 (11th Cir. 2014).

To determine whether Mr. Harris "has cleared the § 2254(d) hurdle," this court "examine[s] the reasonableness of the Court of Criminal Appeals's adjudication of [Mr. Harris's] claims based upon the allegations contained in his [Rule 32 petition]," to determine "whether the Court of Criminal Appeals's determination [–] that [Mr. Harris's] relevant ineffective assistance of counsel claims were due to be dismissed for failure to state a claim with sufficient specificity under Rule 32.6 (b) [–] was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,'" Borden, 646 F.3d at 816-18 (quoting 28 U.S.C. § 2254(d)(1)), or whether its decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. 2254(d)(2).

Mr. Harris alleges that "he is entitled to habeas relief pursuant to 28 U.S.C. § 2254 (b)(1)(B)(ii)[6] and (d)(2) because . . . he was never afforded an evidentiary hearing in the state

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[6]This section states:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that —
>
> . . .
>
> (B)(i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

courts to prove his claims of ineffective assistance of counsel . . . and build a proper record for appellate review or review by this court." (Doc. 25 at 31 [footnote added].) Because his claims of ineffective assistance of counsel were adjudicated on the merits, subsection (b)(1)(B)(ii), which excuses certain procedural defaults, is not applicable to Mr. Harris's claims.

Moreover, the "facts" that form the basis of the state court's opinion are undisputed; the relevant facts are limited to Mr. Harris's statements in his third Rule 32 petition. As the Eleventh Circuit has held, "AEDPA limits our review to whether the state court's determination that [the petitioner] failed to plead sufficient facts in his Rule 32 petition to support a claim of ineffective assistance of counsel was contrary to or an unreasonable application of Supreme Court precedent. Thus, [the court] look[s] only to the allegations in [the petitioner's] Rule 32 petition and whether those allegations sufficiently state a claim for ineffective assistance of counsel." Powell v. Allen, 602 F.3d 1263, 1273 (11th Cir. 2010).(emphasis added). And, having reviewed Mr. Harris's relevant Rule 32 petition, this court finds no error in the Court of Criminal Appeals statement of Mr. Harris's allegations in his third Rule 32 petition. Therefore, Mr. Harris is not entitled to habeas relief pursuant to § 2254(d)(2).

The Alabama Court of Criminal Appeals decided that Mr. Harris failed to adequately allege his ineffective assistance claims, and, as this decision was based on the pleading

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28 U.S.C. § 2254(b)(1)(B).

alone, Mr. Harris was not constitutionally entitled to an evidentiary hearing in the state courts. Moreover, because he has not shown that he was entitled to relief under § 2254(d)(2) based on the record before the state court, Mr. Harris is not entitled to an evidentiary hearing in this court.

The court will accept the Recommendation of the Magistrate Judge and deny this ground for relief as set forth in Mr. Harris's Application.

CONCLUSION

Based on the foregoing, Mr. Harris's Objections to the Magistrate Judge's Report and Recommendation, (doc. 25), are **OVERRULED**. The Recommendation of the Magistrate Judge is **ACCEPTED**, and Mr. Harris's Application for Habeas Relief § 2254, as amended, (docs. 1 and 13), will be denied in a separate Order.

CERTIFICATE OF APPEALABILITY

Rule 11 of the Rules Governing § 2254 Proceedings, provides, "The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." The applicant for habeas corpus relief "cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c)." Fed. R. App. P. 22(b)(1). And, the "certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2)(emphasis added). To make a substantial showing of the denial of a constitutional right, the applicant must show "that reasonable jurists could debate whether

(or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller–El v. Cockrell, 537 U.S. 322, 336 (2003)(citations and internal quotations omitted).

For the reasons set forth above, the court finds that Mr. Harris has not demonstrated that he was denied any constitutional right or that the issues he raises are reasonably debatable and/or deserve encouragement to proceed further. Therefore, the court finds the issuance of a certificate of appealability is not warranted in this case.

The Certificate of Appealability will be denied.

DONE this 3rd day of August, 2016.

Sharon Lovelace Blackburn

SHARON LOVELACE BLACKBURN
SENIOR UNITED STATES DISTRICT JUDGE

FILED
2016 Apr-18 AM 08:38
U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CHARLES VERNON HARRIS, JR.,	)	
Petitioner,	)	
v.	)	Case No. 5:14-cv-01871-SLB-TMP
DEWAYNE ESTES, *et al.*,	)	
Respondents.	)	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

This is an action filed by an Alabama state prisoner pursuant to 28 U.S.C. § 2254, challenging the constitutional validity of the conviction he received in the Limestone County Circuit Court in Athens, Alabama. Charles Vernon Harris, Jr. ("Petitioner") filed his *pro se* petition for writ of *habeas corpus* on September 26, 2014.[1] In accordance with the usual practices of this court and 28 U.S.C. § 636(b), the matter was referred to the undersigned magistrate judge for a preliminary review and recommendation.

PROCEDURAL HISTORY

The petitioner was convicted of sexual abuse of a child under 12 years old in the Limestone County Circuit Court on August 13, 2008. On October 16, 2008, he was sentenced to twenty-five years of imprisonment. The petitioner's appeal was dismissed as untimely filed on

[1] Under the "prison mailbox rule," the petition is deemed filed on the day it was signed and delivered to prison authorities for mailing. Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245 (1988).

February 18, 2009, and a certificate of final judgment was entered by the Alabama Court of Criminal Appeals on the same day. (Doc. 8-3). His motion to reinstate the appeal was dismissed on March 12, 2009. (Doc. 8-5). The petitioner filed his first Rule 32 petition attacking his conviction on July 20, 2009. (Doc. 8-6, p. 2). The circuit court dismissed the Rule 32 petition on August 13, 2009. (Doc. 8-6, p. 32). The petitioner appealed, and the Alabama Court of Criminal Appeals remanded the case to the circuit court on March 8, 2010. (Doc. 8-11). On June 18, 2010, the Alabama Court of Criminal Appeals dismissed the petitioner's first Rule 32 petition by memorandum, because the petitioner was granted relief on return to remand. (Doc. 8-12). On remand, the circuit court determined that the petitioner's motion for an out-of-time appeal was due to be granted. (Doc. 8-8).

While the out-of-time appeal was pending, petitioner filed a second Rule 32 petition on August 26, 2010, which was summarily dismissed by the circuit court. (Doc. 8-36, p. 1). The petitioner appealed the dismissal, and the Alabama Court of Criminal Appeals determined that the circuit court lacked jurisdiction to dismiss the second Rule 32 petition because the case then on direct appeal. (Doc. 8-36, p. 2). Accordingly, on October 18, 2011, the appeals court ordered the circuit court to vacate its ruling "and hold that Rule 32 petition in abeyance until after this Court [of Criminal Appeals] has issued the certificate of judgment" on the then-pending, out-of-time direct appeal. (Id.)

Ultimately, the petitioner's conviction was affirmed by memorandum on February 3, 2012, and his application for rehearing was denied on February 24, 2012. His petition for writ of *certiorari* was denied by the Alabama Supreme Court and a certificate of judgment was entered on May 11, 2012, by the Alabama Court of Criminal Appeals. (Doc. 8-21). The petitioner then

moved for dismissal of the second Rule 32 petition being held in abeyance, which the circuit court granted in June of 2012.[2]

The petitioner filed his third and final Rule 32 petition on December 11, 2012. The circuit court dismissed the petition on March 12, 2013. (Doc. 8-24). The Alabama Court of Criminal Appeals issued a memorandum affirming the circuit court's dismissal on December 13, 2013. (Doc. 8-28). The petitioner filed an application for rehearing, which was denied on February 14, 2014. (Doc. 8-30). His petition for *certiorari* in the Alabama Supreme Court was denied on May 16, 2014, and a Certificate of Final Judgment was issued by the Alabama Court of Criminal Appeals on the same day. (Doc. 8-32).

The instant *habeas* petition was filed on September 26, 2014. (Doc. 1). After a Motion for Extension of Time, which was granted by the court, the respondents filed an Answer to the petition on November 21, 2014. (Doc. 8). On December 19, 2014, the petitioner moved to amend his petition. The court granted the motion, and the petitioner filed his amendment on February 12, 2015. (Doc. 13). After a Motion for Extension of Time, which was granted by the court, the respondents filed an Answer to the amendment on December 1, 2015. (Doc. 18). The petitioner filed his reply to the Answer on December 23, 2015. (Doc. 20).

[2] It is unclear the exact date on which the circuit court dismissed the petitioner's second Rule 32 petition, but for purposes of calculating timeliness, the court will presume the date was June 30, 2012, to allow the petitioner the benefit of the entire month of June for tolling purposes.

DISCUSSION

In his original petition, the petitioner asserts the following claims:

1) His Fourteenth Amendment Due Process rights were violated when the district attorney was allowed to amend the indictment four days prior to trial, without the petitioner's consent or sufficient notice;

2) His Fourteenth Amendment Due Process rights were violated because the circuit court lacked subject matter jurisdiction to render judgment against the petitioner pursuant to an unconstitutional statute;

3) He received ineffective assistance of counsel because his counsel failed to:

    a. raise the issue of the constitutionality of the statute under which the petitioner was convicted:

    b. request a preliminary hearing, but instead waived such hearing;

    c. object to the state's failure to disclose evidence to the defense concerning Rebecca Beers, a key witness for the prosecution;

    d. object to and timely raise the issue of the state's deliberate loss of DNA evidence; and

    e. properly confront and cross examine the prosecution's key witness, the alleged victim.

(Doc. 1-1).

With leave of the court, the petitioner filed an amendment to his petition, which was received by the court on February 12, 2015. (Doc. 13). In his amendment, the petitioner amends some of the issues raised in his original petition and asserts new claims for relief. In the amendment, the petitioner asserts that his trial counsel was ineffective because counsel:

    f. failed to assert on the record that the trial judge and prosecutor had created a conflict of interest "situation" for the defense counsel and failed to notify the petitioner of such conflict;

    g. did not move for the trial judge recuse himself from the petitioner's case;

h. suggested that the circuit court "include elements not contained within § 13A-6-69, Ala. Code (1975), nor charged in the indictment;"

i. failed to timely and properly object to the prosecutor's alleged improper bolstering of the alleged victim's credibility;

j. did not request a jury instruction on attempted sexual abuse as a lesser included offense.

Finally, the petitioner also asserts that his appellate counsel[3] was ineffective because he failed to ensure that the trial transcript was complete and accurate before filing an appellate brief. (Doc. 13).

Due Process Claim Exhausted on Out-of-Time Appeal

The petitioner's first claim, that his Due Process rights were violated when the district attorney was allowed to amend the indictment four days prior to trial, was fully exhausted in state court. The petitioner raised the issue in his out-of-time appeal, and the Alabama Court of Criminal Appeals determined as follows:

> Charles Vernon Harris, Jr., appeals from his conviction for first-degree sexual abuse of a child less than the age of twelve while Harris was more than sixteen years old, a violation of § 13A-6-69.1, Ala. Code 1975. Harris was sentenced as a habitual felon to serve 25 years' imprisonment.

[3] The petitioner was represented by two different attorneys for appellate purposes. On the petitioner's first direct appeal, which was dismissed as untimely filed and later became the subject of the petitioner's first Rule 32 petition, he was represented by J. Thomas Conwell, Jr. According to the petitioner's amendment to his petition, Conwell moved to withdraw as the petitioner's counsel in June of 2011. The court granted the motion and appointed Douglas L. Patterson as counsel for the petitioner. The petitioner's complaints of ineffective appellate counsel appear to be based on Patterson's representation, while the complaints of ineffective assistance at trial are directed at Conwell.

Because Harris claims only that the trial court erred in granting the State's motion to amend his indictment, a recitation of the facts is unnecessary.

On September 20, 2007, Harris was indicted as follows:

> "CHARLES VERNON HARRIS, whose name is otherwise unknown to the grand jury, being sixteen years of age or older, did, on or about April 27, 2007, subject to sexual contact [L.N.M.] who was less than twelve years of age, in violation of section 13A-6-66 of the Code of Alabama, AGAINST THE PEACE AND DIGNITY OF THE STATE OF ALABAMA."

(C. 12.)

On August 7, 2008, the District Attorney filed a written motion to amend the above indictment. That motion stated:

> "Comes now Kristi A. Vails, District Attorney for the Thirty-Ninth Judicial Circuit of Alabama, pursuant to Rule 13.5, Alabama Rules of Criminal Procedure, and moves this Honorable Court to amend the Indictment as follows:
>
> "1. To substitute '13A-6-69.1' in lieu of '13A-6-66.'
>
> "2. The language of the Code Section has been correctly followed; however, the Code Section was incorrectly cited.
>
> "3. No additional or different offense's changed and the substantial rights of the defendant are not prejudiced."

(C. 26.)

Also on August 7, 2008, the trial court granted the prosecutor's motion to amend the indictment stating in pertinent part that the "Code section is hereby amended to '13A-6-69.1'" (C. 26.)

On August 11, 2008, Harris filed a written objection to amending the indictment. (C. 29.) Harris asserted: 1) the amendment was illegal because Harris did not consent to the amendment as required by Rule 13.5, Ala. R. Crim. P.; 2) the amendment elevated the charge from a Class C felony to a Class B felony and thus "impair[ed] the ability of the defense counsel to advise the

defendant of his charges and range of punishment." (C. 30); 3) the original arrest warrant was obtained for sexual abuse as stated in § 13A-6-66. The trial court denied this motion. Trial began on August 12, 2008. The jury returned a verdict of guilty to the charge alleged in the indictment. On October 16, 2008, Harris filed a motion for a new trial in which he argued that the trial court erred when it granted the prosecutor's motion to amend the indictment. (C. 67.)

On appeal Harris reiterates his claim that the trial court erred in amending the indictment, and due to the erroneous amendment, lacked jurisdiction to render judgment and impose his sentence.

While the original indictment did cite to § 13A-6-66, Ala. Code 1975, by tracking the language of § 13A-6-69.1, Ala. Code 1975, the indictment correctly charged Harris with sexual abuse of a child less than twelve years old. Sexual abuse of a child less than twelve years old is defined in § 13A-6-69.1 as:

> "(a) A person commits the crime of sexual abuse of a child less than 12 years old if he or she, being 16 years old or older, subjects another person who is less than 12 years old to sexual contact.
>
> "(b) Sexual abuse of a child less than 12 years old is a Class B felony."

"[T]he reference to a statutory source in an indictment is considered a ' " 'matter of convenience and not of substance.'" ' . . . . It is the language describing the offense that apprises the accused of the charge against him, not the Code citation." Hopper v. City of Prattville, 781 So. 2d 346, 353 (Ala. Crim. App. 2000) (quoting Griffin v. State, 428 So. 2d 213, 215 (Ala. Crim. App. 1983). Here, Harris was always charged with first-degree sexual abuse of a child less than the age of twelve. This allegation was not altered by the August 7, 2008, amendment.

Additionally, because the citation to § 13A-6-66 was a miscitation of what should have been a citation to § 13A-6-69.1, Harris's consent to amend the code section was not required. See, Rule 13.5(a), Ala. R. Crim. P. Moreover, Harris could not and did not show that he suffered actual prejudice due to the correction of the code section. "[I]n the absence of a showing of actual prejudice to the defendant, reference to the erroneous code section will be treated as mere surplusage." Ex parte Bush, 431 So. 2d 563, 564 (Ala.) Harris's claim that the amendment forced him to defend a greater offense is incorrect because, as stated above, Harris was always charged with first-degree sexual abuse of a child less than the age of twelve. Thus, Harris was always charged with a Class B felony. Because there being no amendment to the allegations in the indictment, Harris has

> no valid claim that his substantial rights were prejudiced. See, Rule 13.5(a), Ala. R. Crim. P.
>
> Based on the above, Harris's conviction is affirmed.

(Doc. 8-19) (internal notes omitted). The petitioner filed an application for rehearing, which was overruled by the Alabama Court of Criminal Appeals on February 24, 2012. (Doc. 8-20). A Certificate of Judgment affirming the petitioner's conviction was entered on May 11, 2012. (Doc. 8-21). The petitioner filed a petition for *certiorari* with the Alabama Supreme Court (Respondents' Ex. P, Doc. 8-20) regarding his direct appeal, which was denied on May 11, 2012.

According to the respondent's brief, the petitioner raised the same argument regarding improper amendment of the indictment in his second Rule 32 petition, filed in August of 2010.[4] (Doc. 8, p. 9). Although the circuit court summarily denied the petition as successive, the Alabama Court of Criminal Appeals voided the dismissal and ordered the circuit court to "hold that Rule 32 petition in abeyance until after this Court has issued the certificate of judgment" in the direct appeal. (Doc. 8-36, p. 2). In June of 2012, the petitioner filed a motion in the circuit court to dismiss his second Rule 32 petition (doc. 8-24, p. 59), which was granted. (Doc. 8-28, p. 2).

Regardless of whether the due process claim was raised in petitioner's second Rule 32 petition, he exhausted the claim by raising it during the out-of-time direct appeal and seeking discretionary review of it before the Alabama Supreme Court. Petitioner's are required to fully

[4] The court was unable to locate within the record the petitioner's second Rule 32 petition or discussion of the contents thereof by the circuit court or Alabama Court of Criminal Appeals.

exhaust their habeas claims, but they are not required to raise and present them more than once in a procedurally proper posture. A petitioner who exhaust a habeas claim on direct appeal is not required to relitigate the claim in a post-conviction petition. Moreover, the fact that the petitioner raises a fully exhausted claim in a collateral petition does not make it unexhausted. The Eleventh Circuit has explained:

> [Petitioner] appears to have exhausted his speedy trial claim on direct appeal. If [he] properly exhausted his speedy trial claim on direct appeal, the fact that he raised it again in two later-filed Rule 3.850 postconviction motions that he did not appeal does not render the claim unexhausted. See Cone v. Bell, 556 U.S. 449, 467, 129 S. Ct. 1769, 1781, 173 L. Ed. 2d 701 (2009) ("A claim is procedurally barred when it has not been fairly presented to the state courts for their initial consideration—not when the claim has been presented more than once.")....

Castillo v. Florida, 630 F. App'x 1001, 1004 (11th Cir. 2015); see also Owen v. Sec'y for Dep't of Corr., 568 F.3d 894, 914-15 (11th Cir.2009); Spencer v. Sec'y, Dep't of Corr., 609 F.3d 1170, 1181 (11th Cir. 2010). Because the petitioner raised and exhausted his due process claim on direct appeal, it is exhausted.

Nevertheless, because the claim was resolved on the merits by the Alabama courts, petitioner is not entitled to habeas relief on it. As quoted above from the opinion of the Alabama Court of Criminal Appeals, the appellate court concluded that the indictment was not improperly amended because nothing of substance was changed. The amendment was nothing more than a correction of an erroneous citation of the statute under which the described charged was brought. The indictment clearly alleged the offense of sexual abuse of a child under twelve years of age, but it erroneously referred to Alabama Code § 13A-6-66 as the legal basis for the charge, when in fact the proper statute was § 13A-6-69.1. The state courts correctly determined that the

statutory reference was mere surplusage and a correction of the citation did not deprive the petitioner of fair notice of the charge against him.

Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the petitioner can obtain relief on this claim only if he shows that the Alabama Supreme Court=s adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1) and (2). See Williams v. Taylor, 529 U.S. 362, 404, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000); Brown v. Payton, 544 U.S. 133, 125 S. Ct. 1432, 161 L. Ed. 2d 334 (2005); Miller El v. Dretke, 545 U.S. 231, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005); Putman v. Head, 268 F.3d 1223, 1241 (11th Cir. 2001). "[A] state court's factual determinations are presumed correct unless rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1)." McNair v. Campbell, 416 F.3d 1291 (11th Cir. 2005). This standard of review is strict, and federal courts are required to give "greater deference to the determinations made by state courts than they were required to under the previous law." Verser v. Nelson, 980 F. Supp. 280, 284 (N.D. Ill. 1997)(quoting Spreitzer v. Peters, 114 F.3d 1435, 1441 (7th Cir. 1997)).

The state-court determination of an issue will be sustained under § 2254(d)(1) unless it is "contrary" to clearly established, controlling Supreme Court law or is an "unreasonable application" of that law. These are two different inquiries, not to be confused. The Supreme Court has explained:

> Section 2254(d)(1) defines two categories of cases in which a state prisoner may obtain federal habeas relief with respect to a claim adjudicated on the merits in state court. Under the statute, a federal court may grant a writ of habeas corpus if the relevant state court decision was either (1) "*contrary* to ... clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "*involved an unreasonable application* of ... clearly established Federal law, as determined by the Supreme Court of the United States." (Emphases added.)

Williams v. Taylor, 529 U.S. 362, 404, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). The statute limits the source from which "clearly established Federal law" can be drawn to "holdings, as opposed to the dicta, of the [Supreme] Court's decisions as of the time of the relevant state court decision." Williams v. Taylor, 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000); see Jones v. Jamrog, 414 F.3d 585 (6th Cir. 2005); Sevencan v. Herbert, 342 F.3d 69 (2nd Cir. 2003); Warren v. Kyler, 422 F.3d 132, 138 (3rd Cir. 2005) ("[W]e do not consider those holdings as they exist today, but rather as they existed 'as of the time of the relevant state court decision.'").

A state-court determination is "contrary" to clearly established law in either of two ways:

> First, a state court decision is contrary to this Court's precedent if the state court arrives at a conclusion opposite to that reached by this Court on a question of law. Second, a state court decision is also contrary to this Court's precedent if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours.

Williams v. Taylor, 529 U.S. 362, 405, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). Likewise, a state-court determination can be an "unreasonable application" of clearly established law in two ways:

> First, a state court decision involves an unreasonable application of this Court's precedent if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case. Second, a state court decision also involves an unreasonable application of this Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.

Id. at 407; see Putman v. Head, 268 F.3d 1223 (11th Cir. 2001). Whether the application is "reasonable" turns not on subjective factors, but on whether it was "objectively unreasonable." The question is not whether the state court "correctly" decided the issue, but whether its determination was "reasonable," even if incorrect. See Bell v Cone, 535 U.S. 685, 694, 122 S. Ct. 1843, 1850, 152 L. Ed. 2d 914 (2002).

The Supreme Court has explained that § 2254(d) requires that decisions by the state courts "be given the benefit of the doubt," and noted that "[r]eadiness to attribute error is inconsistent with the presumption that state courts know and follow the law." Holland v. Jackson, 542 U.S. 649, 124 S. Ct. 2736, 2739, 159 L. Ed. 2d 683 (2004). Moreover, federal courts are not permitted to substitute their own judgment for the judgment of the state court. The Eleventh Circuit Court of Appeals has noted that federal *habeas* relief is not available "simply because that court concludes in its independent judgment that the state-court decision applied [the governing legal principle] incorrectly." Ventura v. Attorney General of the State of Florida, 419 F. 3d 1269, 1286 (11th Cir. 2005), quoting Woodford v. Visciotti, 537 U.S. 19, 24-25, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002). In Woodford, the Supreme Court stated that "[a]n unreasonable application of federal law is different than an incorrect application of federal law." 537 U.S. 24-25. It has been noted that "[e]ven clear error, standing alone, is not a ground for

awarding *habeas* relief" under the "unreasonable application" standard of § 2254(d). Stephens v. Hall, 407 F. 3d 1195, 1202 (11th Cir. 2005), citing Lockyer v. Andrade, 538 U.S. 63, 75, 123 S. Ct. 1166, 1175, 155 L. Ed. 2d 144 (2003). The remainder of the petitioner's claims have been addressed on the merits in state court, and will be discussed one-by-one.

The determination by the state courts in this case that petitioner was not denied due process because a statutory citation in the indictment was changed is not objectively unreasonable. Federal criminal law also provides that erroneous citations to statutes do not invalidate an indictment unless it affirmatively misleads the defendant. For example:

> Rule 7(c)(3), Fed.R.Crim.P., [now found at Rule 7(c)(2)], expressly provides that an error in the citation of a statute does not invalidate an indictment unless the error misleads the defendant to his prejudice. See Theriault v. United States, 434 F.2d 212 (5th Cir. 1970), cert. denied, 404 U.S. 869, 92 S. Ct. 124, 30 L. Ed. 2d 113 (1971); Georges v. United States, 262 F.2d 426 (5th Cir. 1959); Enzor v. United States, 262 F.2d 172 (5th Cir. 1958), cert. denied, 359 U.S. 953, 79 S. Ct. 740, 3 L.Ed.2d 761 (1959). Appellant contends that the citation in the indictment to 18 U.S.C. § 371 (the general conspiracy statute) led him to believe that he was subject to a maximum five-year sentence, and thereby influenced his decision to plead not guilty. We cannot accept this argument. Examination of this indictment reveals that although the caption refers to the general conspiracy statute, the body of the indictment charged appellant with conspiracy to violate federal narcotics laws. In pertinent part, the indictment charged that appellant:
>
> > wilfully [sic] and knowingly did combine, conspire, confederate and agree together with divers other persons, to commit an offense against the United States, that is, to knowingly or intentionally manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense a Schedule I controlled substance, to wit: heroin, in violation of Title 21, United States Code, Section 841(a)(1).
>
> This court has held:
>
> > The statute on which an indictment is founded is to be determined from the facts charged in the indictment, and the facts pleaded may

> bring the offense within one statute, although another statute is referred to in the indictment.

Enzor, supra, at 174.

United States v. Kennington, 650 F.2d 544, 545-46 (5th Cir. 1981). Petitioner in the instant case cannot establish that he was misled to his prejudice by the reference of § 13A-6-66, rather than § 13A-6-69.1, because the "facts charged in the indictment" clearly described sexual abuse of a child younger than twelve. The statutory citation was unnecessary to the sufficiency of the indictment, and an amendment to correctly denominate the statute did not deprive petitioner of fair notice of the actual charge against him. That resolution by the state courts is not objectively unreasonable and, therefore, this court is precluded from reviewing the merits of that resolution of the claim by 28 U.S.C. § 2254(d)(1).

Other Claims Adjudicated on the Merits in State Court

Once it is determined that a claim pleaded in the *habeas* petition was resolved on the merits by the state courts, the provisions of § 2254(d)(1), explained above, require the federal *habeas* court to honor that resolution, unless it was contrary to or an unreasonable application of Supreme Court precedent. The court will address petitioner's remaining claims under this standard.

Constitutionality of the Alabama Code § 13A-6-69.1

The petitioner argues that the circuit court lacked subject matter jurisdiction over the petitioner's case because the statute under which he was convicted, Alabama Code § 13A-6-69.1

(1975), is unconstitutional. The Alabama Court of Criminal Appeals decided this claim in the petitioner's appeal of the trial court's denial of his third Rule 32 petition:

> Harris asserts that the circuit court erred in dismissing his claim that § 13A-6-69.1, Ala. Code 1975, contains no culpable mental state and is, therefore, unconstitutional. The circuit court correctly dismissed Harris's claim.
>
> In dismissing this claim, the circuit court found "that the statute under which Harris was convicted contained a culpable mental state pursuant to Alabama case law." (C. 188.) Section 13A-6-69.1(a), Ala. Code 1975, provides that "[a] person commits the crime of sexual abuse of a child less than 12 years old if he or she, being 16 years old or older, subjects another person who is less than 12 years old to sexual contact."
>
> Section 13A-2-4(b), Ala. Code 1975, provides:
>
> > "Although no culpable mental state is expressly designated in a statute defining an offense, an appropriate culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such culpable mental state. A statute defining a crime, unless clearly indicating a legislative intent to impose strict liability, states a crime of mental culpability."
>
> We have instructed that, "'when prosecuting sexual abuse . . . the State must prove an element of intent, i.e., the intent to gratify sexual desire.'" Marshall v. State, 992 So. 2d 762, 772 (Ala. Crim. App. 2007) (quoting D.D.C. v. State, 928 So. 2d 327, 329 (Ala. Crim. App. 2005), quoting, in turn, Stafford v. State, 873 So. 2d 1168, 1170 (Ala. Crim. App. 2003).
>
> Because the State is required to prove intent when prosecuting sexual abuse, the circuit court did not abuse its discretion in summarily dismissing Harris's claim.

(Doc. 8-28, pp. 8-9). The petitioner has not shown that the Alabama Court of Criminal Appeals' decision was contrary to, or involved an unreasonable application of, clearly established federal

law. Accordingly, the state court's determination is due deference under § 2254(d), and the claim is due to be denied and dismissed with prejudice.

Ineffective Assistance of Counsel

All of the petitioner's claims of ineffective assistance of counsel were addressed in his third Rule 32 petition. The Alabama Court of Criminal Appeals addressed the ineffective assistance claims as follows:

> Harris also argues that it was error for the circuit court to summarily dismiss his claim that his trial and appellate counsel were ineffective.
>
> The trial court's order, as noted, found that his claim of ineffective assistance of trial counsel was successive. That finding, however, was erroneous, because (1) Harris was granted an out-of-time appeal as a result of his first Rule 32 petition and the remaining claims in that petition were not addressed, and (2) his second Rule 32 petition was not addressed on the merits. Even so, "[i]f the circuit court is correct for any reason, even though it may not be the stated reason, we will not reverse its denial of the petition." Reed v. State, 748 So. 2d 231 (Ala. Crim. App. 1999). We find that Harris's claims alleging ineffective assistance of trial counsel were not sufficiently pleaded and were, therefore, properly dismissed.
>
> The Supreme Court of Alabama has explained:
>
> "'[I]t is important to distinguish between a petitioner's burden to plead and a petitioner's burden to prove.
>
> > "'"[A]t the pleading stage of Rule 32 proceedings, a Rule 32 petitioner does not have the burden of proving his claims by a preponderance of the evidence. Rather, at the pleading stage, a petitioner must only provide 'a clear and specific statement of the grounds upon which relief is sought.' Rule 32.6(b), Ala. R. Crim. P. Once a petitioner has met his burden of pleading so as to avoid summary disposition pursuant to Rule 32.7(d), Ala. R. Crim. P., he is then entitled to an opportunity to present evidence in order to satisfy his burden of proof."'"

> "'Ford v. State, 831 So. 2d 641, 644 (Ala. Crim. App. 2001). A claim may not be summarily dismissed because the petitioner failed to meet his burden of proof at the initial pleading stage, a stage at which the petitioner has only a burden to plead. See Smith v. State, 581 So. 2d 1283, 1284 (Ala. Crim. App. 1991) ("When the state does not respond to a petitioner's allegations, the unrefuted statement of facts must be taken as true. Chaverst v. State, 517 So. 2d 643, 644 (Ala. Crim. App. 1987). Further, when a petition contains matters which, if true, would entitle the petitioner to relief, an evidentiary hearing must be held. Ex parte Boatwright, 471 So. 2d 1257, 1258 (Ala. 1985).")."'

Ex parte Hodges, [Ms. 1100112, Aug. 26, 2011] ___ So. 3d ___, ___ (Ala. 2011) (quoting Johnson v. State, 835 So. 2d 1077, 1079-80 (Ala. Crim. App. 2001)). Also,

> "[t]he burden of pleading under Rule 32.3 and Rule 32.6(b) is a heavy one. Conclusions unsupported by specific facts will not satisfy the requirements of Rule 32.3 and Rule 32.6(b). The full factual basis for the claim must be included in the petition itself. If, assuming every factual allegation in a Rule 32 petition to be true, a court cannot determine whether the petitioner is entitled to relief, the petitioner has not satisfied the burden of pleading under Rule 32.3 and Rule 32.6(b). See Bracknell v. State, 883 So.2d 724 (Ala. Crim. App. 2003). To sufficiently plead an allegation of ineffective assistance of counsel, a Rule 32 petitioner not only must 'identify the [specific] acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment,' Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), but also must plead specific facts indicating that he or she was prejudiced by the acts or omissions, i.e., facts indicating 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' 466 U.S. at 694, 104 S. Ct. 2052. A bare allegation that prejudice occurred without specific facts indicating how the petitioner was prejudiced is not sufficient."

Hyde v. State, 950 So. 2d 344, 356 (Ala. Crim. App. 2006).

In his petition, Harris contended that his trial counsel was ineffective because: (1) he failed to raise the issue that § 13A-6-69.1, Ala. Code 1975, contains no mental element, (2) he waived the preliminary hearing in Harris's case, (3) he did not "object to the state's failure to disclose evidence to the defense concerning . . . a key state's witness," (4) he failed to object to "the state's deliberate loss of DNA evidence in the case", (5) he failed to effectively cross-examine the victim, L.M., (6) he failed to put on the record that the trial judge and

prosecutor "had created a conflict of interest situation for the defense counsel," (7) he failed to move the circuit judge to recuse himself after the conflict of interest developed, (8) he suggested that the circuit court "include elements not contained within [§ 13A-6-69.1, Ala. Code 1975) nor charged in the Petitioner's indictment," (9) he failed to object to the prosecutor's alleged improper bolstering of L.M.'s credibility, (10) during cross-examination he questioned defense witnesses' knowledge of Harris's prior convictions, and (11) he "failed to request a jury instruction on attempted sexual abuse in the first degree". (C. 103-37.) Harris also alleged, as discussed below, that his appellate counsel was ineffective.

A.

We first address Harris's claims that his trial counsel was ineffective. In its order dismissing Harris's petition, the circuit court made no specific mention of Harris's trial counsel. The circuit judge ruled, however, that it would not "entertain this petition in that it is a successive petition." Because the circuit court had pretermitted discussion of issues in Harris's first Rule 32 petition and we had held that the circuit court was without jurisdiction to rule on Harris's second petition, we conclude that the instant petition was not successive. We may, however, affirm a circuit court's judgment if it was correct for any reason and we conclude that the circuit court correctly dismissed Harris's claim.

1.

In his petition, Harris first alleged that his trial counsel was ineffective because he failed to argue that § 13A-6-69.1, Ala. Code 1975, contains no mental element. Having concluded in part III of this memorandum that § 13A-6-69.1, Ala. Code 1975, does contain a mental element, we likewise conclude that this claim was without merit, and Harris is due no relief. See, e.g., Lee v. State, 44 So. 3d 1145, 1173 (Ala. Crim. App. 2009) (counsel cannot be ineffective for failing to raise a claim that has no merit).

2.

Harris contends that his trial counsel was ineffective for waiving the preliminary hearing in his case and for not having "a court reporter present to transcribe/record the proceedings." (C. 97.)

In Davis v. State, 9 So. 3d 539 (Ala. Crim. App. 2008), we concluded that the circuit court correctly denied a similar claim. In Davis, we concluded that the petitioner had "made no attempt to show how he was prejudiced by counsel's failure to have the preliminary hearing . . . recorded." Davis, 9 So. 3d at 551. We

also instructed that: "'[i]t is incumbent upon [petitioner] to show some prejudice from the failure to transcribe the preliminary hearing testimony before it may be claimed to be ineffective assistance of counsel. Spilman v. State, 633 P.2d 183 (Wyo. 1981).' Jennings v. State, 806 P.2d 1299, 1307 (Wyo. 1991)." Id.

In the instant case, Harris failed to plead facts demonstrating how he was prejudiced by the waiving of the preliminary hearing or by lack of a transcription from the preliminary hearing. He argues that "[b]y failing to diligently pursue a preliminary hearing, and waiving the hearing, [trial counsel] not only did not actually know what was likely to develop at trial, but also deprived himself of tools necessary for meaningful and effective confrontation and cross-examination of [the] state's witnesses." (C. 102.) He does not, however, allege how the information he would have received at a preliminary hearing would have differed from the discovery he received in his case. Moreover, he fails to allege how the use of any additional information gained during a preliminary hearing would have changed the outcome of his trial.

3.

Harris argued that his trial counsel was ineffective because he did not object to an alleged failure of the state to disclose evidence regarding a State's witness. Harris asserts that L.M.'s aunt had been subpoenaed by the State but did not come to trial. After the trial judge issued a bench warrant, the aunt was brought to court, and she testified on behalf of the State. Harris appears to contend that his counsel should have objected to the State failing to disclose why the witness did not willingly comply with her subpoena. His argument on this point consists, however, of conclusions which are not supported by specific facts. For example, he argued that "[o]ne can rest assured that [the District Attorney] questioned [the witness] as to why she had refused to appear in court" and that "one can rest assured that [the District Attorney's] investigator threatened, implied threats, or intimidated [the witness] into not changing her statement or story." (C. 105.) His claim, which relied on mere speculation, was not sufficiently pleaded, and he is due no relief on this claim. See Hyde, 950 So. 2d at 356; see also Rule 32.3 and 32.6(b), Ala. R. Crim. P.

4.

Harris also argued that his trial counsel was ineffective because he failed to object to "the state's deliberate loss of DNA evidence." (C. 107.) Harris acknowledges that the detective in the case testified at trial that no DNA tests were conducted "because there was no penetration." (C. 107.) This allegation, however, does not indicate that the State deliberately lost any DNA evidence, and Harris has not alleged any other facts to support a claim that the State deliberately

lost DNA evidence. Because this claim was not sufficiently pleaded he is due no relief on this claim. See Hyde, 950 So. 2d at 356; see also Rule 32.3 and 32.6(b), Ala. R. Crim. P.

5.

Harris asserted that his trial counsel was ineffective because he allegedly failed to effectively cross-examine L.M. As best we can discern, Harris contends that his trial counsel was ineffective for not using a statement, which L.M. made to law enforcement, to impeach L.M. In his petition, Harris asserted that, in her statement to law enforcement, L.M. "did not make any such statement or allegation" that Harris had slid his penis down the victim's back and that it felt "gooey." (C. 110.) In her statement that he attached to his petition, however, the [redacted]-year-old victim wrote that Harris "tried to put his hand down [her] underware [sic] and with the other hand he got his thing and tried to put it down there." (C. 148.) The statement attached to his petition is not necessarily inconsistent with the victim's testimony at trial. Thus, Harris has failed to plead facts establishing that his trial counsel was deficient in not using the statement to cross-examine L.M.

6.

Harris also contended that his trial counsel was ineffective in failing to put on the record that the trial judge and District Attorney "had created a conflict of interest" for defense counsel. (C. 114.) Harris asserts that during a recess the circuit judge called the District Attorney and defense counsel into chambers and that when defense counsel emerged he said, "If I scratch their back, they will scratch mine." (C. 115.) Harris makes only conclusory statements regarding the import or meaning of this comment and failed to plead facts establishing that a conflict of interest arose during the recess. He is, therefore, due no relief on this claim. See Hyde, 950 So. 2d at 356; see also Rule 32.3 and 32.6(b), Ala. R. Crim. P.

7.

Harris argued that his trial counsel was ineffective for failing to move the circuit judge to recuse himself after the alleged conflict of interest developed. Having concluded in the above section that Harris failed to plead facts establishing that a conflict of interest arose, we likewise conclude that he is due no relief on this claim.

8.

Harris also asserted that his trial counsel was ineffective for "request[ing] that that [sic] the statute be extended impermissibly to include elements not contained within the statute nor charged in the Petitioner's indictment." (C. 124.)

Having concluding, in part III of this memorandum, that § 13A-6-69.1, Ala. Code 1975, does contain a requirement of a culpable mental state we likewise conclude that defense counsel was not ineffective in requesting the jury instruction at issue. See Lee, supra.

9.

Harris argued that his trial counsel was ineffective because he failed to object to the prosecutor's alleged improper bolstering of L.M.'s credibility. Harris appeared to argue that, by asking L.M. whether she had told the truth to family members and law-enforcement officials and whether she had told the truth in court, the prosecutor "attempt[ed] to bolster a witness [sic] by vouching for her credibility." (C. 130).

We have written:

> "'Attempts to bolster a witness by vouching for his credibility are normally improper and error.' United States v. Ellis, 547 F.2d 863, 869 (5th Cir. 1977). The test for improper vouching is whether the jury could reasonably believe that the prosecutor was indicating a personal belief in the witness' credibility. United States v. Roberts, 618 F.2d [530], 537 (9th Cir. 1980) (citing Ellis, supra). This test may be satisfied in two ways. First, the prosecution may place the prestige of the government behind the witness, by making explicit personal assurances of the witness' veracity. See United States v. Lamerson, 457 F.2d 371, 372 (5th Cir. 1972); Gradsky v. United States, 373 F.2d 706, 709-10 (5th Cir. 1967). Secondly, a prosecutor may implicitly vouch for the witness' veracity by indicating that information not presented to the jury supports the testimony. See United States v. Booklier, 685 F.2d 1208, 1218 (9th Cir. 1982) (explaining United States v. Roberts, 618 F.2d 530 (9th Cir. 1980))."

Parker v. State, 587 So. 2d 1072, 1094 (Ala. Crim. App. 1991) (quoting United States v. Sims, 719 F.2d 375, 377 (11th Cir. 1983), cert. denied, 465 U.S. 1034, 104 S. Ct. 1304, 79 L. Ed. 2d 703 (1984)).

In the instant case, the prosecutor merely asked the witness whether she had told the truth. "The test for improper vouching is whether the jury could reasonably believe that the prosecutor was indicating a personal belief in the witness' credibility." Brown v. State, 11 So. 3d 866, 910-11 (Ala. Crim. App. 2007), aff'd, Ex parte Brown, 11 So. 3d 933 (Ala. 2008), cert. denied, Brown v. Alabama, 557 U.S. 938 (2009). Harris did not plead facts establishing that the prosecutor in Harris's case was indicating a personal belief in L.M.'s credibility, and Harris is due no relief on this claim.

. . .

11.

Harris also contended that his trial counsel was ineffective for "fail[ing] to request a jury instruction on attempted sexual abuse in the first degree." (C. 137.)

We have explained that:

> "[E]ven if there were some basis for instruction on lesser-included offenses, it is well-settled that 'a "request for jury instructions is a matter of trial strategy and, absent a clear showing of improper or inadequate representation, is to be left to the judgment of counsel."' Maxwell v. State, 620 So. 2d 93, 97 (Ala. Crim. App. 1992) (quoting Parker v. State, 510 So. 2d 281, 286 (Ala. Crim. App. 1987)). 'Trial counsel should have the broadest discretion in all matters of trial strategy.' Vinson v. State, 494 So. 2d 175, 177 (Ala. Crim. App. 1986). Thus, 'even if the evidence supports jury instructions on lesser included offenses, the failure of counsel to request charges on the pertinent lesser included offenses does not necessarily render counsel's assistance ineffective.' Parker, 510 So. 2d at 286. See also Saffold v. State, 570 So. 2d 727 (Ala. Crim. App. 1990). In discussing the presumption that trial counsel was competent in its representation, the United States Court of Appeals for the Eleventh Circuit has noted:
>
> > "'The presumption impacts on the burden of proof and continues throughout the case, not dropping out just because some conflicting evidence is introduced. "Counsel's competence . . . is presumed, and the [petitioner] must rebut this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Kimmelman v. Morrison, 477 U.S. 365, 106 S. Ct. 2574, 2588, 91 L. Ed. 2d 305 (1986) (emphasis added) (citations omitted). An ambiguous or silent record is not sufficient

> to disprove the strong and continuing presumption. Therefore, "where the record is incomplete or unclear about [counsel]'s actions, we will presume that he did what he should have done, and that he exercised reasonable professional judgment." Williams [v. Head,] 185 F. 3d [1223,] 1228 [(11th Cir. 1999)]; see also Watters [v. Thomas,] 46 F.3d [1506,] 1516 [(11th Cir. 1995)] (en banc) (noting that even though testimony at habeas evidentiary hearing was ambiguous, acts at trial indicate that counsel exercised sound professional judgment).'
>
> "Chandler v. United States, 218 F.3d 1305, 1314 n. 15 (11th Cir. 2000)."

Whitson v. State, 109 So. 3d 665, 674 (Ala. Crim. App. 2012).

Harris's conclusory allegations regarding this claim do not establish facts rebutting the presumption that his trial counsel's decision was reasonable, and he is due no relief on this claim. Moreover, Harris did not allege facts indicating that the facts of the case would have warranted a jury instruction on attempted sexual abuse in the first degree.

B.

Finally, Harris argued that his appellate counsel provided ineffective assistance. He specifically argues that two transcripts of his trial were produced, that the transcripts had an unequal number of pages, and that his appellate counsel should have known that one of the transcripts had "to be a falsified transcript of record, or a fraud." (C. 143.)

He failed, however, to plead any facts that demonstrate that the two transcripts were materially different, that one was "falsified," or that his appellate counsel's performance was deficient. He was, therefore, due no relief on this claim.

Based on the foregoing reasons the judgment of the circuit court is affirmed.

(Doc. 8-28, pp. 9-19) (internal notes omitted).

The petitioner's claims of ineffective assistance of counsel have been adjudicated on the merits in state court, and he has not shown that the Alabama Court of Criminal Appeals' decision was contrary to, or involved an unreasonable application of, clearly established Federal law.

Accordingly, the state court's determination is due deference under § 2254(d), and the claim is due to be denied and dismissed with prejudice.

CONCLUSION

For the reasons set forth herein the undersigned RECOMMENDS that the *habeas* petition be DENIED and DISMISSED WITH PREJUDICE.[5]

Notice of Right to Object

Any party may file specific written objections to this report and recommendation. Any objections must be filed with the Clerk of Court within fourteen (14) calendar days from the date the report and recommendation is entered. Objections should specifically identify all findings of fact and recommendations to which objection is made and the specific basis for objection. Failure to object to factual findings will bar later review of those findings, except for plain error. See 28 U.S.C. § 636(b)(1)(C); Thomas v. Arn, 474 U.S. 140 (1985), reh'g denied, 474 U.S. 1111 (1986); Dupree v. Warden, 715 F.3d 1295, 1300 (11th Cir. 2013). Objections also should specifically identify all claims contained in the complaint which the report and recommendation fails to address. Objections should not contain new allegations, present additional evidence, or repeat legal arguments.

On receipt of objections, a United States District Judge will make a de novo determination of those portions of the report and recommendation to which objection is made

[5] The petitioner filed a Motion for Evidentiary Hearing and Motion to Appoint Counsel. (Doc. 21). The motion is DENIED.

and may accept, reject, or modify in whole or in part, the findings of fact and recommendations made by the magistrate judge. The district judge also may refer this action back to the magistrate judge with instructions for further proceedings.

The parties may not appeal the magistrate judge's report and recommendation directly to the United States Court of Appeals for the Eleventh Circuit. A party may only appeal from a final judgment entered by a district judge.

The Clerk is DIRECTED to mail a copy of the foregoing to the petitioner.

DONE this 15th day of April, 2016.

T. MICHAEL PUTNAM
UNITED STATES MAGISTRATE JUDGE

Additional material from this filing is available in the Clerk's Office.