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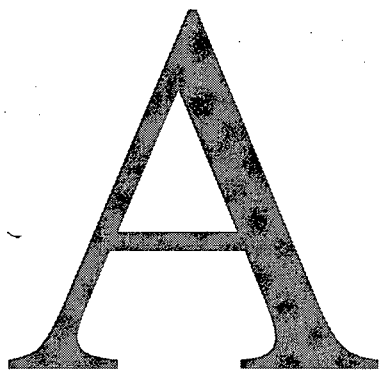

Appendix A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-15655-B

JOSE SOZA,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Jose Soza is a Florida prisoner serving a 22-year sentence after a jury found him guilty of sexual battery on a physically helpless person and lewd or lascivious battery. He seeks a certificate of appealability ("COA") and leave to proceed *in forma pauperis* ("IFP"), in order to appeal the denial in part, and dismissal in part, of his habeas corpus petition, 28 U.S.C. § 2254, in which he raised two claims for relief.

In order to obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted).

Claim One:

Soza argued that his counsel was ineffective for failing to argue that venue in Orange County was improper. Specifically, Soza asserted that he had provided counsel with evidence, including a VHS tape recording depicting the motel that the alleged offenses occurred at and a credit card statement establishing that he had rented a room at that motel, showing that his sexual activity with the teenage girls had actually occurred in Osceola County, but that counsel had failed to present any of the provided evidence to challenge the venue. While Soza acknowledged that he had agreed with counsel's decision to waive his right to trial in Osceola County in the hopes that he would have a more sympathetic judge and jury in Orange County, he argued that there was no reasonable basis, strategic or otherwise, to excuse counsel's failure to challenge venue. He further stated that his counsel's failure to challenge venue was based on an inadequate understanding of the law and inadequate trial preparation because there were no definable differences between trial and sentencing in Osceola and Orange Counties.

The state post-conviction court did not unreasonably apply clearly established federal law, or make an unreasonable determination of the facts, by denying this claim. This Court has recognized that trial counsel's calculated decision concerning the most advantageous venue is "the type of tactical decision that the Supreme Court has recognized that a criminal defendant's counsel may elect as a reasonable choice considering all of the circumstances and has cautioned courts against questioning." *Weeks v. Jones*, 26 F.3d 1030, 1046 n.13 (11th Cir. 1994) (concluding that no ineffective assistance occurred when trial counsel made a "strategic decision not to move the trial from Macon County because, based on experience, he thought that [the petitioner] had the best chance for acquittal there."). Accordingly, the state post-conviction court did not unreasonably apply *Strickland v. Washington*, 466 U.S. 668 (1984), by determining that

counsel's decision not to challenge venue was a strategic decision that counsel was entitled to make, especially in light of the strategic reasons counsel gave for making this determination. No COA is warranted for this claim.

Claim Two:

Soza argued that his counsel was ineffective for failing to argue that the jury was not properly instructed on the issues of consent and mental incapacity, based on the victim's involuntary consumption of alcohol. Specifically, he alleged that the jury should have been informed that, even if they found the victim to have been physically helpless, they were also required to determine that consent was not present and that any mental incapacity that temporarily removed the ability to consent had been the result of intoxication, involuntarily consumed. He argued that, because the jury was not given these complete instructions, their verdict of guilty did not reflect the effect of the victim's voluntary consumption of alcohol. He argued that this difference would have resulted in his acquittal. Finally, he conceded that this claim was not raised in state court, but he asserted that the fault rested with his post-conviction counsel for failing to properly exhaust it.

The district court did not err by dismissing Soza's claim as unexhausted. Soza was charged with sexual battery on a physically helpless person, in violation of Fla. Stat. Ann. § 794.011(4)(a). Accordingly, the state only needed to establish that the victim was physically helpless, not that she was mentally incapacitated. Soza did not dispute that the state carried its burden of proof in establishing the victim was physically helpless. As such, he failed to present a substantial claim of ineffective assistance of post-conviction counsel, as required to meet the *Martinez* exception to procedural default. *See Martinez v. Ryan*, 132 S. Ct. 1309, 1320 (2012) (explaining that a procedural default does not bar a federal habeas court from hearing a

substantial claim that counsel was ineffective at trial if post-conviction counsel failed to raise the claim on collateral review). Furthermore, Soza did not either allege or establish cause and prejudice or a fundamental miscarriage of justice. *See Bailey v. Nagle*, 172 F.3d 1299, 1302-03 (11th Cir. 1999) (explaining that a procedural default can be excused by establishing cause and prejudice or a fundamental miscarriage of justice). No COA is warranted for this claim.

Because Soza has not established that the state court either unreasonably applied clearly established federal law or made an unreasonable determination of the facts, his motion for a COA is DENIED, and his motion for IFP status is DENIED AS MOOT.

/s/ Kevin C. Newsom
UNITED STATES CIRCUIT JUDGE

B

Appendix B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JOSE SOZA,

Petitioner,

v. Case No: 6:16-cv-788-Orl-28GJK

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

Respondents.
_____/

ORDER

This matter comes before the Court on a petition for habeas corpus relief filed pursuant to 28 U.S.C. § 2254 by Jose Soza ("Petitioner" or "Soza"), a prisoner of the Florida Department of Corrections. (Doc. 1, filed May 9, 2016). Soza, proceeding *pro se*, attacks the conviction and sentence entered against him by the Ninth Judicial Circuit Court in Orange County, Florida for sexual battery on a physically helpless person. (*Id.*). Respondent filed a response to the petition. (Doc. 15). Soza filed a reply (Doc. 18), and the matter is now ripe for review.

Upon due consideration of the pleadings and the state court record, the Court concludes that each claim must be dismissed or denied.

I. Background and Procedural History

On February 5, 2007, the State of Florida charged Soza by information with sexual battery on a physically helpless person, in violation of Florida Statute § 794.011(4)(a)

(count one) and lewd or lascivious battery, in violation of Florida Statute § 800.04(4)(a) (count two). (Ex. A).[1] After a two-day trial, a jury found Soza guilty as charged on both counts. (Ex. C).[2] The trial court sentenced Soza as a sexual predator to twenty-two years in prison. (Ex. D). Florida's Fifth District Court of Appeal affirmed Soza's conviction and sentence. (Ex. E).

On July 29, 2010, Soza filed a post-conviction motion pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure ("Rule 3.850 motion"). (Ex. J). He filed an amended Rule 3.850 motion on October 29, 2010. (Ex. K). He filed a second amended Rule 3.850 motion on November 26, 2012. (Ex. M). The post-conviction court summarily denied grounds one, four, five, six, and seven of Soza's amended Rule 3.850 motion, and held an evidentiary hearing on grounds two and three. (Ex. p; Ex. Q). Following an evidentiary hearing, the post-conviction court denied the remaining claims. (Ex. R). Florida's Fifth District Court of Appeal *per curium* affirmed. (Ex. U).

II. Legal Standards

A. The Antiterrorism Effective Death Penalty Act ("AEDPA")

Pursuant to the AEDPA, federal habeas relief may not be granted with respect to a claim adjudicated on the merits in state court unless the adjudication of the claim:

---

[1] Unless indicated otherwise, citations to exhibits or appendices are to those filed by Respondents on January 27, 2017. (Doc. 19). The post-conviction evidentiary hearing, located in Exhibit Q will be cited as (EH at ___). The trial transcript, located in Exhibit B, will be cited as (T. at __).

[2] On June 11, 2010, count two was struck from Petitioner's judgment and sentence because of a double jeopardy violation. (Ex. I).

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). This standard is both mandatory and difficult to meet. *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014).

"Clearly established federal law" consists of the governing legal principles, rather than the *dicta*, set forth in the decisions of the United States Supreme Court at the time the state court issued its decision. *White*, 134 S. Ct. at 1702; *Carey v. Musladin*, 549 U.S. 70, 74 (2006) (citing *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). That said, the Supreme Court has also explained that "the lack of a Supreme Court decision on nearly identical facts does not by itself mean that there is no clearly established federal law, since 'a general standard' from [the Supreme Court's] cases can supply such law." *Marshall v. Rodgers*, 133 S. Ct. 1446, 1449 (2013) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). State courts "must reasonably apply the rules 'squarely established' by [the Supreme] Court's holdings to the facts of each case." *White*, 134 S. Ct. at 1706 (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009)). Notably, a state court's violation of state law is not sufficient to show that a petitioner is in custody in violation of the "Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); *Wilson v. Corcoran*, 562 U.S. 1, 16 (2010).

Even if there is clearly established federal law on point, habeas relief is only appropriate if the state court decision was "contrary to, or an unreasonable application

of," that federal law. 29 U.S.C. § 2254(d)(1). A decision is "contrary to" clearly established federal law if the state court either: (1) applied a rule that contradicts the governing law set forth by Supreme Court case law; or (2) reached a different result from the Supreme Court when faced with materially indistinguishable facts. *Ward v. Hall*, 592 F.3d 1144, 1155 (11th Cir. 2010); *Mitchell v. Esparza*, 540 U.S. 12, 16 (2003).

A state court decision involves an "unreasonable application" of the Supreme Court's precedents if the state court correctly identifies the governing legal principle, but applies it to the facts of the petitioner's case in an objectively unreasonable manner, *Brown v. Payton*, 544 U.S. 133, 134 (2005); *Bottoson v. Moore*, 234 F.3d 526, 531 (11th Cir. 2000), or "if the state court either unreasonably extends a legal principle from [Supreme Court] 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." *Bottoson*, 234 F.3d at 531 (quoting *Williams*, 529 U.S. at 406). The petitioner must show that the state court's ruling was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *White*, 134 S. Ct. at 1702 (quoting *Harrington v. Richter*, 562 U.S. 86 (2011)). Moreover, "it is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by [the Supreme] Court." *Knowles*, 556 U.S. at 122.

Even when the opinion of a lower state post-conviction court contains flawed reasoning, the federal court must give the last state court to adjudicate the prisoner's claim on the merits "the benefit of the doubt." *Wilson v. Warden, Ga. Diagnostic Prison*, 834

F.3d 1227, 1235 (11th Cir. 2016), *cert granted Wilson v. Sellers*, 137 S. Ct. 1203 (Feb. 27, 2017). A state court's summary rejection of a claim, even without explanation, qualifies as an adjudication on the merits which warrants deference. *Ferguson v. Culliver*, 527 F.3d 1144, 1146 (11th Cir. 2008). Therefore, to determine which theories could have supported the state appellate court's decision, the federal habeas court may look to a state post-conviction court's previous opinion as one example of a reasonable application of law or determination of fact; however, the federal court is not limited to assessing the reasoning of the lower court. *Wilson*, 834 F.3d at 1239.

Finally, when reviewing a claim under § 2254(d), a federal court must bear in mind that any "determination of a factual issue made by a State court shall be presumed to be correct[,]" and the petitioner bears "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) ("a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding") (dictum); *Burt v. Titlow*, 134 S. Ct. 10, 15-16 (2013) (same).

B. Ineffective Assistance of Counsel

In *Strickland v. Washington*, the Supreme Court established a two-part test for determining whether a convicted person is entitled to relief on the ground that his counsel rendered ineffective assistance. 466 U.S. 668, 687-88 (1984). A petitioner must establish that counsel's performance was deficient and fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense. *Id.* This is a

"doubly deferential" standard of review that gives both the state court and the petitioner's attorney the benefit of the doubt. *Burt*, 134 S. Ct. at 13 (citing *Cullen v. Pinholster*, 563 U.S. 170 (2011)).

The focus of inquiry under *Strickland*'s performance prong is "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688-89. In reviewing counsel's performance, a court must adhere to a strong presumption that "counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Id.* at 689. Indeed, the petitioner bears the heavy burden to "prove, by a preponderance of the evidence, that counsel's performance was unreasonable[.]" *Jones v. Campbell*, 436 F.3d 1285, 1293 (11th Cir. 2006). A court must "judge the reasonableness of counsel's conduct on the facts of the particular case, viewed as of the time of counsel's conduct," applying a "highly deferential" level of judicial scrutiny. *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000) (quoting *Strickland*, 466 U.S. at 690).

As to the prejudice prong of the *Strickland* standard, Petitioner's burden to demonstrate prejudice is high. *Wellington v. Moore*, 314 F.3d 1256, 1260 (11th Cir. 2002). Prejudice "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. That is, "[t]he defendant 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. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

C. Exhaustion and Procedural Default

The AEDPA precludes federal courts, absent exceptional circumstances, from granting habeas relief unless a petitioner has exhausted all means of available relief under state law. Exhaustion of state remedies requires that the state prisoner "fairly presen[t] federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights[.]" *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (citing *Picard v. Connor*, 404 U.S. 270, 275-76 (1971)). The petitioner must apprise the state court of the federal constitutional issue, not just the underlying facts of the claim or a similar state law claim. *Snowden v. Singletary*, 135 F.3d 732 (11th Cir. 1998).

In addition, a federal habeas court is precluded from considering claims that are not exhausted and would clearly be barred if returned to state court. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991) (if a petitioner has failed to exhaust state remedies and the state court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred, there is a procedural default for federal habeas purposes regardless of the decision of the last state court to which the petitioner actually presented his claims).

Finally, a federal court must dismiss those claims or portions of claims that have been denied on adequate and independent procedural grounds under state law. *Coleman*, 501 U.S. at 750. If a petitioner attempts to raise a claim in a manner not permitted by state procedural rules, he is barred from pursuing the same claim in federal court. *Alderman v. Zant*, 22 F.3d 1541, 1549 (11th Cir. 1994).

A petitioner can avoid the application of procedural default by establishing objective cause for failing to properly raise the claim in state court and actual prejudice from the alleged constitutional violation. *Spencer v. Sec'y, Dep't of Corr.*, 609 F.3d 1170, 1179–80 (11th Cir. 2010). To show cause, a petitioner "must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in state court." *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999); *Murray v. Carrier*, 477 U.S. 478 (1986). To show prejudice, a petitioner must demonstrate there is a reasonable probability the outcome of the proceeding would have been different. *Crawford v. Head*, 311 F.3d 1288, 1327–28 (11th Cir. 2002).

A second exception, known as the fundamental miscarriage of justice, only occurs in an extraordinary case, where a "constitutional violation has probably resulted in the conviction of one who is actually innocent[.]" *Murray v. Carrier*, 477 U.S. 478, 479-80 (1986). To meet this standard, a petitioner must "show that it is more likely than not that no reasonable juror would have convicted him" of the underlying offense. *Schlup v. Delo*, 513 U.S. 298, 327 (1995). "To be credible, a claim of actual innocence must be based on [new] reliable evidence not presented at trial." *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schlup*, 513 U.S. at 324).

III. Analysis

Soza was accused of sexually battering two teenage daughters of a family friend while on a trip to Walt Disney World (Ex. B). At Soza's trial, evidence was introduced that he and his wife took the girls from Miami to Orlando, provided them with alcohol, and sexually molested them at a hotel while they were too intoxicated to resist (Ex. B). In

the instant § 2254 petition, Soza raises the following claims: (1) Defense counsel Joe Castrofort ("Counsel") was ineffective for failing to argue at trial that venue was improper because the activity at issue did not occur in Orange County; and (2) Counsel was ineffective for failing to argue that the jury was not properly instructed on the issues of consent and mental incapacity (Doc. 1 at 5-8). These claims will be addressed separately.

A. Claim One

Soza asserts that Counsel was ineffective for failing to argue that venue in Orange County was improper. (Doc. 1 at 5; Doc. 2 at 6-7). He asserts that he provided Counsel with evidence showing that Soza's sexual activity with the teenage girls had actually occurred in Osceola County, but Counsel failed to present any of the provided evidence at trial. (*Id.*). Claim One is exhausted to the extent Soza raised it as ground three of his first Rule 3.850 motion. In that ground, Soza argued:

> During [Soza's] trial, trial counsel admitted to receiving from [Soza] a V.H.S. tape recording depicting the Motel that the alleged offenses occurred at and also a credit card statement which contained the appropriate information that the alleged offense did not occur in Orange County but instead occurred in Osceola County. A reasonable attorney would not neglect to review crucial pieces of evidence which would have established that the criminal offenses were being tried in the wrong venue. Without having reviewed the V.H.S. tape and the credit card statement in order to admit it into evidence, it was impossible for Movant's trial counsel to intelligently and meaningfully move for a change of venue. Additionally, had trial counsel reviewed the V.H.S. tape and the credit card statements prior to trial, trial counsel would have been able to prepare a defense based on this item and its contents.

> Movant's trial counsel was ineffective for not reviewing the V.H.S. tape or the credit card statement provided to him by Movant. Movant was prejudiced by his trial counsel's ineffectiveness as it resulted in trial counsel completely failing to present any defense based on this evidence. Moreover, there exists a strong reasonable probability that Movant's case would have been moved to the proper venue (Osceola County) had counsel presented to the trial court this important evidence. Movant is thereby entitled to a new trial.

(Ex. J at 6-7).[3] After holding an evidentiary hearing at which Soza and Counsel both testified, the post-conviction court denied this ground because Soza had waived venue, and because Counsel "made a strategic decision to refrain from challenging venue, because he believed [Soza] would be better off going to trial in Orange County." (Ex. P at 191-93). The trial court also noted that Counsel believed he could successfully argue the issue in a motion for judgment of acquittal. (*Id.*). Florida's Fifth District Court of Appeal affirmed without a written opinion. (Ex. U). The silent affirmance of the post-conviction court's ruling is entitled to deference. *Wilson v. Warden*, 834 F.3d 1227, 1235 (11th Cir. 2016).

Soza now argues that "[t]he State Court's treatment of [Soza's] challenge to trial counsel for his handling of this issue was unreasonable[.]" (Doc. 18 at 2). Upon review

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[3] In his memorandum in support of Claim One, Soza lists additional evidence that could have been offered during trial to prove that venue lay in Osceola County instead of Orange County. (Doc. 2). To the extent Soza attempts to raise a different claim than was raised in his Rule 3.850 motion in state court, the claim is unexhausted. Nevertheless, even if the unexhausted portion of Claim One is considered, it suffers from the same defect as his exhausted claim—Soza cannot demonstrate deficient performance under *Strickland* because Counsel made a strategic decision not to challenge venue. *See* discussion *infra* Claim One; 28 U.S.C. 2254(b)(2)("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.").

of the facts and the relevant law, and giving both the state court and Counsel the benefit of the doubt, this Court concludes that Soza is not entitled to relief on Claim One because he cannot satisfy *Strickland*'s performance prong.

Both Counsel and Soza testified at the post-conviction court's evidentiary hearing on this claim. (Ex. Q). Counsel testified that he was aware the victims said that the crimes had occurred in Orange County, but Soza showed him an American Express receipt with a charge to a hotel in Osceola County and a V.H.S. tape showing the front of the same Osceola County hotel.[4] Counsel testified that he discussed the issue of venue with Soza and his co-defendant, and they determined that venue was more advantageous in Orange County than in Osceola County. (E.H. at 36). Counsel stated that they had "discussed about what kind of jury pool was more beneficial to us, whether as a Hispanic being tried in Kissimmee, or a Hispanic being tried in Orange County." (*Id.* at 37, 48). Counsel also believed that Orange County had better judges. (*Id.* at 49). It was also determined that the defense could argue venue in a motion for judgment of acquittal. (*Id.* at 37-38). Counsel specifically affirmed that he made a conscious decision not to challenge venue until the judgment of acquittal. (*Id.* at 51). Counsel challenged venue after the close of the state's case, but his motion for a judgment of acquittal was denied. (T. at 451-52, 455).

Soza admitted that he made the decision, based on Counsel's advice, to leave venue in Orange County because he thought that he would receive a lighter sentence from the judges there. (E.H. at 60-61). Under Florida law, venue is a privilege that can

[4] It is undisputed that the V.H.S. tape was produced long after the crimes occurred. Accordingly, it is unclear why Petitioner believes the tape is relevant.

be waived. *Lane v. State*, 388 So. 2d 1022, 1026 (Fla. 1980) ("Venue . . . is merely a privilege which may be waived or changed under certain circumstances."); *Dean v. State*, 414 So.2d 1096, 1098–99 (Fla. 2d DCA 1982) (defendants waived right to challenge venue when they entered pleas in Manatee County even though they were aware that they had a right to be tried in DeSoto County where the crime had occurred); *McClellion v. State*, 858 So.2d 379, 382 (Fla. 4th DCA 2003) ("Clearly a defendant could have waived the venue problem by agreeing to a trial of all of the crimes in Broward County[.]").

Soza admits that Counsel's recommendation not to challenge venue in Orange County was based on strategy; he also admits that he agreed with Counsel's decision to waive his right to trial in Osceola County on the hopes that he would have a more sympathetic judge and jury in Orange County. However, he argues that there "is no reasonable basis[,] strategic or otherwise[,] to excuse [Counsel's] actions/inactions that appear to represent less than a full understanding of the law and most likely is based on his inadequate trial preparation." (Doc. 18 at 3). Soza also argues that "there is no definable difference between trial/sentencing in Osceola County and Orange County" and that the post-conviction court should have demanded proof of the soundness of Counsel's avowed strategic decision before denying this claim. (*Id.* at 3). Soza's arguments fail.

The Eleventh Circuit has specifically recognized that trial counsel's calculated decision concerning the most advantageous venue is "the type of tactical decision that the Supreme Court has recognized that a criminal defendant's counsel may elect as a reasonable choice considering all of the circumstances and has cautioned courts against

questioning." *Weeks v. Jones*, 26 F.3d 1030, 1046 n. 13 (11th Cir. 1994) (finding no ineffective assistance when trial counsel made a "strategic decision not to move the trial from Macon County because, based on experience, he thought that [the petitioner] had the best chance for acquittal there."); *Provenzano v. Singletary*, 148 F.3d 1327, 1332 (11th Cir. 1998) ("[T]he strategic choice Provenzano's trial attorney made not to pursue a change of venue was well within the broad boundaries of reasonableness staked out by decisional law in this area."); *Rolling v. Crosby*, 438 F.3d 1296 (11th Cir. 2006) (finding reasonable defense counsel's strategic determination that the jury venire in Alachua County was more likely to recommend a life sentence and consider Rolling's mitigation evidence more favorably than other venues in Florida).

Moreover, to the extent Soza now argues that he is entitled to federal habeas corpus relief because the state did not produce evidence showing that Orange County was actually a more favorable venue for sex offenders than Osceola County, he misunderstands the burden of proof in post-conviction proceedings. Once a defendant has exhausted direct review of a conviction, a presumption of finality and legality attach to the conviction, and for this reason the petitioner bears the burden on habeas review of making a prima facie case that his detention is in violation of some federal right. *Barefoot v. Estelle*, 463 U.S, 880, 887 (1983). The state courts reasonably concluded that Soza did not make his prima facie showing, and their conclusion that Soza did not demonstrate deficient performance under *Strickland* is entitled to deference. Claim One is denied.

B. Claim Two

Soza asserts that the jury was improperly instructed on the issues of "consent" and "mental incapacity." (Doc. 1 at 7). Specifically, he alleges that the jury should have been informed that:

> Even if they find the victim was physically helpless, they must also find that consent was not present and that any mental incapacity that temporarily removed the ability to consent had to have been the result of intoxication, involuntarily consumed. They were not, however, given these complete instructions so their verdict of guilty . . . does not reflect the effect of the complaint's voluntary consumption of alcohol- a difference that would have resulted in an acquittal.

(Doc. 2 at 7-8). Soza admits that this claim was not raised in state court, but he faults post-conviction counsel for his failure to properly exhaust it. (Doc. 18 at 9). Indeed, in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) the United State Supreme Court held:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Id. at 1320. Under *Martinez*, a petitioner must still establish that his underlying ineffective assistance claim is "substantial" – that it has "some merit" – before the procedural default can be excused. *Id.* at 1318-19.

Claim Two is not "substantial" and does not fall within *Martinez*' equitable exception to the procedural bar. Soza misstates the elements of the crime for which he was convicted. He was charged with sexual battery of a physical helpless person under Florida Statute § 794.011(4)(a) (2004). "Physically helpless" means "unconscious, asleep,

or for any other reason physically unable to communicate unwillingness to an act." *Id.* at § 794.011(e). The trial court read the following instruction to the jury:

> The crime of sexual battery upon a person 12 years of age or older under specified circumstances - the state must prove the following four elements beyond a reasonable doubt:
>
> One, [the victim] was 12 years of age or older.
>
> Two, Jose Soza committed an act upon [the victim] in which the sexual organ of Jose Soza penetrated or had union with the vagina of [the victim].
>
> Three, [the victim] was physically helpless to resist.
>
> Fourth, the act was committed without the consent of [the victim].
>
> Consent means intelligent, knowing, and voluntary consent, and does not include coerced submission.
>
> Union means contact.
>
> Physically helpless means that a person is unconscious or asleep or for any other reason, physically incapable to communicate an unwillingness to act.

(T. at 609-10). These instructions are a correct statement of the law as defined by Florida Statute § 794.011.

Soza does not argue that the state failed to produce evidence showing that the victim was physically unable to resist the sexual battery. To the contrary, he urges that "[t]he State introduced evidence which if believed by the jury demonstrated that the complainant was physically helpless." (Doc. 2 at 7). Rather, he urges that the state had to *also* prove that the victim was mentally incapacitated under Florida Statute § 794.011(4)(d) before the jury could find that the victim did not consent to the sexual activity. But, Soza argues, since the victim voluntarily consumed alcohol, the state cannot

make that showing. In other words, Soza now makes the incredible assertion that any victim who becomes "physically helpless" and unconscious as a result of voluntary alcohol consumption automatically consents to sexual activity.

No reasonable interpretation of the Florida Statues compels such a conclusion. Because Soza was not charged with the sexual battery of a mentally incapacitated person, it would have been error for Counsel to request a jury instruction on that crime, and the trial court would have denied the request. Accordingly, Petitioner satisfies neither *Strickland* prong. This ineffectiveness claim is not "substantial," and *Martinez* does not excuse Soza's failure to exhaust it in state court. 132 S. Ct. at 1318-20. Nor has Soza presented new, reliable evidence indicating that the actual innocence exception applies to excuse his default of this claim. Claim Two is dismissed as unexhausted.

Any of Soza's allegations not specifically addressed herein have been found to be without merit. Because the Petition is resolved on the record, an evidentiary hearing is not warranted. *See Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) (if the record refutes the factual allegations in the petition or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing).

IV. Certificate of Appealability

A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253(c)(1). Rather, a district court must first issue a certificate of appealability ("COA"). "A [COA] 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). To make such a showing, a petitioner must demonstrate that

"reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)), or that "the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El*, 537 U.S. at 335-36. Soza has not made the requisite showing in these circumstances.

Because Soza is not entitled to a certificate of appealability, he is not entitled to appeal *in forma pauperis*.

Accordingly, it is hereby **ORDERED** and **ADJUDGED** as follows:

1. Claim One of the 28 U.S.C. § 2254 petition for habeas corpus relief filed by Jose Soza is denied on the merits. Claim Two is dismissed as unexhausted. This case is dismissed with prejudice.

2. Petitioner is **DENIED** a certificate of appealability.

3. The **Clerk of Court** is directed to terminate any pending motions, enter judgment accordingly, and close this case.

DONE and **ORDERED** in Orlando, Florida on November 17, 2017.

JOHN ANTOON II
UNITED STATES DISTRICT JUDGE

SA: OrlP-4
Copies to: Jose Soza
Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JOSE SOZA,

Petitioner,

v. **Case No: 6:16-cv-788-Orl-28GJK**

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

Respondents.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Claim One of the 28 U.S.C. § 2254 petition for habeas corpus relief filed by Jose Soza is denied on the merits. Claim Two is dismissed as unexhausted. This case is dismissed with prejudice.

Date: November 20, 2017

ELIZABETH M. WARREN,
CLERK

s/S. M., Deputy Clerk

C

Appendix C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-15655-B

JOSE SOZA,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

Before: NEWSOM and JULIE CARNES, Circuit Judges.

BY THE COURT:

Jose Soza has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's order dated April 19, 2018, denying his *pro se* motion for a certificate of appealability and denying as moot his motion for leave to proceed *in forma pauperis* in the appeal of the denial of his petition for a writ of habeas corpus, 28 U.S.C. § 2254. Because Soza has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motion, his motion for reconsideration is DENIED.