No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

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CURTIS NAIRN – PETITIONER
(Your Name)

vs.

JULIE JONES, et. al. – RESPONDENT(S)

INDEX TO APPENDIX

Curtis Nairn # L67295
Everglades Correctional Inst.
1599 S.W. 187th Avenue
Miami, Florida 33194

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 18-10336-K

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CURTIS NAIRN,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

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ORDER:

To merit a certificate of appealability, appellant 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 appellant has failed to make the requisite showing, his motion for a certificate of appealability is DENIED.

Appellant's motion for leave to proceed *in forma pauperis* is DENIED AS MOOT.

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

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 18-10336-B

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CURTIS NAIRN,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

---

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

---

Before: WILLIAM PRYOR and JORDAN, Circuit Judges.

BY THE COURT:

Curtis Nairn has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's May 11, 2018, order denying his motions for a certificate of appealability and leave to proceed *in forma pauperis*. Upon review, Nairn's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

Nairn's motions for appointment of counsel and leave to proceed *in forma pauperis* are DENIED AS MOOT.

No. _____

_____

**IN THE**

**SUPREME COURT OF THE UNITED STATES**

_____

CURTIS NAIRN – PETITIONER
(Your Name)

vs.

JULIE JONES, et. al. – **RESPONDENT(S)**

**PROOF OF SERVICE**

I, CURTIS NAIRN, do swear or declare that on this date, September, 2018, as required by Supreme Court rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Attorney General Office, 1515 North Flagler Drive, Suite 900, West Palm Beach, Florida 33401

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on 17th September, 2018.

_____
(Signature)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-60874-CIV-LENARD/WHITE

**CURTIS NAIRN,**

Petitioner,

**v.**

**JULIE L. JONES and**
**PAMELA JO BONDI,**

Respondents.
_____/

**FINAL JUDGMENT**

**THIS CAUSE** is before the Court following the Court's Order Denying Petitioner Curtis Nairn's Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus. Pursuant to Rule 58(a) of the Federal Rules of Civil Procedure, it is hereby **ORDERED AND ADJUDGED** that:

1. **FINAL JUDGMENT** shall be entered in favor of Respondent United States of America; and

2. This case is now **CLOSED.**

**DONE AND ORDERED** in Chambers at Miami, Florida this 29th day of November, 2017.

Joan A. Lenard

**JOAN A. LENARD**
**UNITED STATES DISTRICT JUDGE**

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 16-60874-CIV-LENARD/WHITE

**CURTIS NAIRN,**

Petitioner,

**v.**

**JULIE L. JONES and**
**PAMELA JO BONDI,**

Respondents.
_____/

**ORDER ADOPTING REPORT OF THE MAGISTRATE JUDGE (D.E. 26), DISMISSING AS TIME-BARRED—OR, ALTERNATIVELY, DENYING ON THE MERITS—AMENDED PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS (D.E 9), DENYING CERTIFICATE OF APPEALABILITY, AND CLOSING CASE**

**THIS CAUSE** is before the Court on the Report of Magistrate Judge Patrick A. White, issued May 30, 2017, ("Report," D.E. 26), recommending that the Court dismiss as time-barred Petitioner Curtis Nairn's Amended Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus, ("Petition," D.E. 9), or, alternatively, deny it on the merits. On July 12, 2017, Petitioner filed Amended Objections to Judge White's Report,[1] ("Objections," D.E. 28), followed by a Supplement on July 19, 2017, (D.E. 29). Upon review of the Report, Objections, Supplement, and the record, the Court finds as follows.

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[1] Petitioner originally filed objections to Judge White's Report on or about June 13, 2017, (D.E. 27), filed his Amended Objections on July 12, 2017, (D.E. 28), and filed a "Supplement" on July 19, 2017. Then, on or about August 10, 2017, Petitioner filed a Motion for Leave to File Amended Objections, requesting that the Court consider his previously-filed Amended Objections. (D.E. 30.) That Motion is **GRANTED**.

## I. Background

Petitioner has filed this pro se petition for writ of habeas corpus, challenging the constitutionality of his conviction for second-degree murder entered after a jury verdict in Broward County Circuit Court, Case No. 06-8303-CF10A. (Report at 1.) Because the Court cannot improve upon Judge White's recitation of the facts adduced at Petitioner's trial, the Court repeats it here for consistency:

> . . . In the early morning hours of May 10, 2006, Ja'Vaughn Hobson ("Hobson" or "the victim") was fatally stabbed in the parking lot of the Venice Cove Apartment Complex in Fort Lauderdale, Florida. (T.1598,1632-45).[2] A tenant of the apartment complex, Iris Heath ("Heath"), testified that she called 9-1-1 after she saw the victim in the parking [lot]. (T.1602-03, 2536). At that time, the victim was on her knees, trying to scream out, before she collapsed onto the ground. (T.1602-03). Heath recalled there was a trail of blood from the victim's Honda Civic to the spot where the victim finally collapsed. (T.2312). At trial, it was established that the 9-1-1 call was received around 1:33 a.m. (T.2536).
>
> Evidence further established that the victim sustained nine stab wounds, with the fatal stab wound sustained to the right side of the base of the neck, penetrating down into the chest. (T.1662-65). The fatal wound made it difficult for the victim to speak because her chest cavity filled with blood. (T.1662). It was also established that the victim sustained defensive stab wounds to her right hand, right thumb, right forearm, and left hip. (T.1701-09). The victim received incised, shallow wounds to her left cheek, nose, and the right side of her face. (T.1701-09). From the evidence, it was established that the victim was alive when she received these injuries, and in fact, some of the shallow wounds followed the contours of the victim's face. (T.1707-08). There were, however, no witnesses to the actual stabbing and the murder weapon was never found. (T.2981).

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[2] Judge White's citation to the transcript of the state court proceedings is denoted "T.[page number]." The transcript—which is more than 3,000 pages long—is located at Docket Entries 13-5 (beginning at page 463), 13-6, 13-7, 13-8, and 13-9. For consistency, the Court will cite to the transcript in the same manner as Judge White.

According to FLPD Detective Mark Shotwell ("Det. Shotwell"), the victim was found near the mailboxes within the apartment complex where she lived, and her cellular phone was found in petitioner's possession at the time of his arrest. (T.2475, 2497). Det. Shotwell examined the victim's phone and testified that calls were made from that phone on May 10, 2006 to Shawn Kerr at 1:27 a.m., to Crystal Mackey at 1:31 a.m., and to George Archer at 2:17 a.m. (T.2508-18). Before the 9-1-1 call, there were a number of calls between petitioner's phone and the victim's phone that day. (T.2530).

A DNA specialist testified at trial that the victim's blood and DNA were found on the victim's cellular phone, which was found in petitioner's possession at the time of his arrest. (T.2418). Petitioner post-arrest videotape statement to law enforcement was introduced and played for the jury at trial. (T.2599). During that interview, petitioner admitted that he was present when the victim was bleeding. (T.2859, 2909). He also did not deny taking her cellular phone and claims to have made the calls on it, requesting that individuals check up the victim. (T.2725, 2754, 2798, 2854, 2860). However, petitioner refused to explain how the victim sustained her injuries. (T.2875).

Nicole Tinker ("Tinker") testified that she knew the petitioner for approximately 8 years, and during that time, petitioner stated he was "really in love" with the victim. (T.1724). At the time, the petitioner, who was married and twenty years older than the victim, asked Tinker to speak with the victim on his behalf, but Tinker refused to do so. (T.1728-29). Eric Abraham ("Abraham"), a neighbor living in the same apartment complex as the victim, testified that on the day of the stabbing, he saw the victim between the hours of 5:30 p.m. and 6:30 p.m. (T.1921-26). Abraham overheard the victim telling the petitioner that things were not "going to work out," but the petitioner insisted he needed to speak with her, and was going to come see her. (T.1926-27).

Pauline Mackey, a good friend of the petitioner for over twenty years, testified that on the night of the murder, petitioner went to Mackey's house, complaining that he was tired of the victim, and all the money he had spent on her. (T.1767-81). Mackey recalled the petitioner telling her that he was "gonna kill her tonight." (T.1770). The following morning, around 2:00 to 2:20 a.m., petitioner told Mackey over the phone that he had killed the victim, explaining that he had "cut her throat and stabbed her chest three times." (T.1776-77). He also told Mackey that if the victim was not dead, then she was still in her car by the mailbox, and that he was going to get in his boat and leave to the Bahamas. (T.1777-78).

Mackey's daughter, Crystal Mackey ("Crystal"), testified that petitioner called from the victim's cellular phone to tell her that he had just stabbed and killed the victim. (T.1859-61, 1873-74). When Crystal asked the petitioner if he was serious, petitioner responded, "I swear to God on my dead mother's P-U-S-S-Y." (T.1861). He then stated he was at the harbor and was going to the Bahamas. (T.1862). Crystal also recalled listening to a voice message left by petitioner on the victim's answering machine a week before the murder, in which he stated that he "loved her to death, and if he couldn't have her, nobody could have her." (T.1896).

Peggy Thompkins ("Peggy") testified that she was dating the petitioner during the same time period as the victim. (T.1818-20). At around 2:40 a.m. on the morning of the murder, petitioner called Peggy crying, declaring his love for her and saying that "something happened." (T.1800). Constance Lestrade, who lived with petitioner at the time of the murder, testified that petitioner called her at 2:00 [a].m. on the morning of the murder, stating "I did it I did it." (T.1991).

Shawn Kerr ("Shawn") testified he met the victim two days prior to her murder, and had gone to dinner with the victim on the night she was murdered. (T.1933-37). After dinner, the victim drove herself home. (T.1938). Kerr recalled that he called the victim at 1:38 a.m., but a male voice answered, questioning whether he knew the victim. (T.1940-41, 1946). When Kerr responded that he did, the individual told him, in a serious tone, to come get the victim because he had just cut her throat, and was leaving to the Bahamas. (T.1931). George Archer also testified at trial that he knew the victim, and he too received a call from a man who stated that he had just "hooked up," meaning stabbed/killed, the victim. (T.1964). Archer recalled being told that the victim was in the parking lot, and that "You all can have her now." (T.1965-66,1968).

Detective Charles Morrow ("Det. Morrow") with the Fort Lauderdale Police Department ("FLPD"), testified that, on May 12, 2006, the petitioner was driving on N.W. 31 Avenue, when Det. Morrow activated his lights and siren, at which time the petitioner accelerated and attempted to flee. (T.2315-2319). A short chase ensued, and eventually the petitioner's vehicle was blocked, and petitioner was apprehended as he exited the car and tried to flee on foot. (T.2320-22).

(Id. at 28-32.) Although the State charged Petitioner with first-degree murder, the jury ultimately found him guilty of second-degree murder as a lesser included offense. (Id. at 3.) The trial court sentenced him to life imprisonment. (Id.)

After exhausting his state court remedies, Petitioner filed a federal habeas petition in this court, raising the following claims:

1. Petitioner was denied effective assistance of counsel where his lawyer failed to investigate the time line of the fatal injury as suggested by the prosecution's medical expert. (Amended Petition, D.E. 9 at 4.)

2. Petitioner was denied effective assistance of counsel where his lawyer failed to investigate whether the bloody prints belonged to the victim, as suggested by the prosecution, or to another perpetrator, as set forth by Petitioner in his theory of defense. (Id. at 5.)

3. Petitioner was denied effective assistance of counsel where his lawyer requested a factually and legally inapplicable jury instruction on the independent acts doctrine. (Id. at 6.)

4. Petitioner was denied the effective assistance of counsel on appeal where his appellate lawyer failed to assign as error that the court gave a factually and legally inapplicable jury instruction on independent acts. (Id. at 7.)

5. Petitioner's right to a fair and impartial disposition of his pending claims in state court is being abridged by the prosecution and the court which has failed to resolve his pending claims in a timely and expeditious manner. (Id. at 9.)

Judge White found that (1) all the claims are time-barred, and, in any event, (2) Claim 5 is unexhausted and (3) all of the claims fail on the merits. (Report at 69.) Petitioner purports to object to each of these findings.

## II. Legal Standards

Upon receipt of the Magistrate Judge's Report and Petitioner's Objections, the Court must "make a de novo determination of those portions of the report or specified

proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1); accord Fed. R. Civ. P. 72(b)(3). The court must conduct a de novo review of any part of the Report that has been "properly objected to." Fed. R. Civ. P. 72(b)(3); see 28 U.S.C. § 636(b)(1) (providing that the district court "shall make a de novo determination of those portions of the [R & R] to which objection is made"). "Parties filing objections to a magistrate's report and recommendation must specifically identify those findings objected to. Frivolous, conclusive, or general objections need not be considered by the district court." Marsden v. Moore, 847 F.2d 1536, 1548 (11th Cir. 1988). The Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1).

Because this case was filed after April 24, 1996, the Court's review of Petitioner's claims is circumscribed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996). See Abdul-Kabir v. Quarterman, 550 U.S. 233, 246 (2007); Davis v. Jones, 506 F.3d 1325, 1331 n.9 (11th Cir. 2007). Under 28 U.S.C. § 2254(d), as Amended by AEDPA, a federal court may grant habeas relief from a state court judgment only if the state court's decision on the merits of the issue was (1) contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States; or (2) was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d); Evans v. Sec'y, Dep't of Corrs., 703 F.3d 1316, 1325 (11th Cir. 2013) (citing Johnson v. Upton, 615 F.3d 1318, 1329 (11th Cir. 2010) (quoting Berghuis v. Thompkins, 560 U.S. 370, 380 (2010))).

Insofar as Petitioner's claims involve allegations of ineffective assistance of counsel, the two-pronged test established in Strickland v. Washington, 466 U.S. 668 (1984) applies. "First, the defendant must show that counsel's performance fell below a threshold level of competence. Second, the defendant must show that counsel's errors due to deficient performance prejudiced his defense such that the reliability of the result is undermined." Tafero v. Wainwright, 796 F.2d 1314, 1319 (11th Cir. 1986). Under the first prong of the Strickland test, Petitioner "must establish that no competent counsel would have taken the action that his counsel did take." Chandler v. United States, 218 F.3d 1305, 1315 (11th Cir. 2000) (en banc). Under the second prong, Petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

## III. Discussion

### a. Timeliness

As previously noted, because Petitioner filed his federal habeas petition after April 24, 1996, AEDPA governs this proceeding. See Wilcox v. Fla. Dep't of Corr., 158 F.3d 1209, 1210 (11th Cir. 1998) (per curiam). AEDPA imposed for the first time a one-year statute of limitations on petitions for writ of habeas corpus filed by state prisoners. See 28 U.S.C. § 2244(d)(1) ("A 1-year period of limitation shall apply to an application for a writ of habeas corpus . . . ."). Specifically, AEDPA provides that the limitations period shall run from the latest of —

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

The limitations period is statutorily tolled, however, for "[t]he time during which a properly filed application for post-conviction or other collateral review with respect to the pertinent judgment or claim is pending . . . ." 28 U.S.C. § 2244(d)(2); see also Rich v. Sec'y for Dep't of Corrs., 512 F. Appx. 981, 982-83 (11th Cir. 2013); Newbitt v. Danforth, No. CV413–141, 2014 WL 61236, at *1 (S.D. Ga. Jan. 7, 2014). An application is properly filed "when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee." Artuz v. Bennett, 531 U.S. 4, 8, (2000) (footnote omitted); see also Rich, 512 F. App'x at 983; Everett v. Barrow, 861 F. Supp. 2d 1373, 1375 (S.D. Ga. 2012). Consequently, if Petitioner sat on any claim or created any time gaps in the review process, the one-year clock would continue to tick. Kearse v.

Sec'y, Fla. Dep't of Corrs., 736 F.3d 1359, 1362 (11th Cir. 2013); Nesbitt, 2014 WL 61236 at *1.

Moreover, "[a]n application that is untimely under state law is not 'properly filed' for purposes of tolling AEDPA's limitations period." Garby v. McNeil, 530 F.3d 1363, 1367 (11th Cir. 2008) (citation omitted). A motion filed past the deadline for filing a federal habeas petition cannot toll the limitations period. See Hutchinson v. Florida, 677 F.3d 1097, 1098 (11th Cir. 2012) ("In order for . . . § 2244(d)(2) statutory tolling to apply, the petitioner must file his state collateral petition before the one-year period for filing his federal habeas petition has run."); Webster v. Moore, 199 F.3d 1256, 1259 (11th Cir. 2000); Nesbitt, 2014 WL 61236 at *1.

Judge White found that the Petition is time-barred because the limitations period ran untolled for a total of 409 days from the date Petitioner's conviction became final until he filed his first federal habeas Petition. (Report at 3-8, 11.) Judge White's finding was based, in relevant part, on the fact that the state court denied as untimely Petitioner's Rule 3.850 Motion to Rule on Newly Discovered Evidence. (Id. at 7-8.) As such, the Motion was not "properly filed" for purposes of tolling AEDPA's limitations period. (Id.)

Petitioner argues that Judge White incorrectly relied on the state court's determination that his Rule 3.850 Motion was untimely. (Obj. at 2.)

To begin with, Petitioner did not argue in his federal habeas Petition or any of his pleadings to Judge White that the state court incorrectly found his Rule 3.850 Motion was untimely. Accordingly, the Court declines to consider the argument here. See Williams

v. McNeil, 557 F.3d 1287, 1292 (11th Cir. 2009) (holding that "a district court has discretion to decline to consider a party's argument when that argument was not first presented to the magistrate judge").

However, even if the Court were to consider the argument, the claim fails on its merits. To fall within AEDPA's tolling provision, a state court motion for post-conviction relief must have been "properly filed." 28 U.S.C. § 2244(d)(2). The Supreme Court has stated that "an application is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings." Artuz, 531 U.S. at 8 (emphasis in original). "Because the state court rejected petitioner's [Rule 3.850 Motion] as untimely, it was not 'properly filed,' and he is not entitled to statutory tolling under § 2244(d)(2)."[3] Pace v. DiGuglielmo, 544 U.S. 408, 417 (2005).

Consequently, the Court adopts Judge White's Report and finds that the 2254 Petition is untimely because the limitations period ran untolled for a total of 409 days between the date Petitioner's conviction became final until the date he filed his original federal habeas petition.

**b. Exhaustion**

Judge White further found that even if the Petition was timely filed, Claim 5 is procedurally barred because it was not exhausted in state court. (Report at 18-21.) He further found that it would be futile to dismiss the claim and allow Petitioner an opportunity to exhaust the claim it state court because it is now procedurally barred under

[3] Judge White further found that Petitioner was not entitled to equitable tolling of AEDPA's limitations period. (Report at 12- 18.) Petitioner did not object to this finding.

Florida law. (Id. at 21.) Finally, he found that Petitioner has failed to establish cause for and actual prejudice from the default, or that a failure to a review the claim would result in a fundamental miscarriage of justice. (Id. at 21-26.)

In his Objections, Petitioner argues that Claim 5 is not procedurally barred. (D.E. 28 at 13.) He argues that the claims raised in his "habeas petition/3.850(b)(3) and the newly discovered evidence motion 3.850(b)(1)" were exhausted in state court. (Id.)

"Before bringing a § 2254 habeas petition in federal court, a petitioner must exhaust all state court remedies that are available for challenging his conviction, either on direct appeal or in a state post-conviction motion." Mauk v. Lanier, 484 F.3d 1352, 1357 (11th Cir. 2007) (citing 28 U.S.C. § 2254(b), (c)). "A state habeas corpus petitioner who fails to raise his federal claims properly in state court is procedurally barred from pursuing the same claim in federal court absent a showing of cause for and actual prejudice from the default." Bailey v. Nagle, 172 F.3d 1299, 1302 (11th Cir. 1999) (citing Wainwright v. Sykes, 433 U.S. 72, 87 (1977)). "[I]f the petitioner simply never raised a claim in state court, and it is obvious that the unexhausted claim would now be procedurally barred due to a state-law procedural default, the federal court may foreclose the petitioner's filing in state court; the exhaustion requirement and procedural default principles combine to mandate dismissal." Id. (citing Snowden v. Singletary, 135 F.3d 732, 737 (11th Cir. 1998)).

Petitioner never raised the issue asserted in Claim 5 in state court—Claim 5 was not raised in Petitioner's first state court petition for writ of habeas corpus, (D.E. 13 Ex. 13 (D.E. 13-1 at 150-161)); his first Rule 3.850 Motion for post-conviction relief, (D.E.

13 Ex. 17 (D.E. 13-1 at 174-191)); any of the Supplements to his first Rule 3.850 Motion, (D.E. 13 Ex. 19 (D.E. 13-2 at 15-26), Ex. 20 (D.E. 13-2 at 28-31), Ex. 21 (D.E. 13-2 at 33-37), Ex. 24 (D.E. 13-2 at 44-48), Ex. 25 (D.E. 13-2 at 50-57), Ex. 26 (D.E. 13-2 at 59-62), Ex. 27 (D.E. 13-2 at 64-69)); his "Comprehensive Motion for Postconviction Relief" under Rule 3.850, (D.E. 13 Ex. 30 (D.E. 13-2 at 76-91, 13-3 at 1-5)); his second state court petition for writ of habeas corpus, (D.E. 13 Ex. 80 (D.E. 13-5 at 269-288)); his Rule 3.850(b)(1) Motion for Summary Judgment on Newly Discovered Evidence, (D.E. 13 Ex. 86 (D.E. 13-5 at 308-317)); or his Motion for Judicial Estoppel and Rule on Newly Discovered Evidence Motion and Summary Judgment Motion, (D.E. 13 Ex. 88 (D.E. 13-5 at 351-355)).

Consequently, the Court adopts Judge White's Report and finds that Claim 5 is procedurally barred because it was not exhausted in state court; it would be futile to dismiss the claim and allow Petitioner an opportunity to exhaust the claim in state court because it is now procedurally barred under Florida law; and Petitioner has failed to establish cause for and actual prejudice from the default, or that a failure to a review the claim would result in a fundamental miscarriage of justice.

**c. Merits**

Judge White found that even if the Petition had been timely filed, and even if Claim 5 was not procedurally barred, all of the claims fail on their merits. (Report at 48-67.)

### 1. Claims 1 through 4: ineffective assistance of counsel

Claims 1 through 4 allege ineffective assistance of counsel. (See Pet. at 4-7.) To prevail on a claim of ineffective assistance of counsel, Petitioner must demonstrate that: (1) counsel's performance was deficient, i.e., the performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) he suffered prejudice as a result of that deficient performance. Strickland, 466 U.S. at 687-88.

Here, the Court need not determine whether counsel's performance fell below an objective standard of reasonableness under prevailing professional norms because, even assuming arguendo that it did, Petitioner cannot satisfy Strickland's prejudice prong. See Duren v. Hopper, 161 F.3d 655, 660 (11th Cir. 1998) ("[I]f if a defendant cannot satisfy the prejudice prong, the court need not address the performance prong."); see also Boyd v. Allen, 592 F.3d 1274, 1309 (11th Cir. 2010) ("[W]e need address only the Strickland prejudice prong because we are 'convinced that the prejudice prong cannot be satisfied.'") (quoting Waters v. Thomas, 46 F.3d 1506, 1510 (11th Cir. 1995)).

Under Strickland's prejudice prong, Petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694. Petitioner cannot satisfy this prong because the "overwhelming evidence presented at trial establishing his guilt far outweighs whatever detriment, if any, [Petitioner] may have suffered as a result of his counsel's defense." Duren, 161 F.3d at 660; see also Stephens v. Sec'y, Fla. Dep't of Corrs., 678 F.3d 1219, 1227 (11th Cir. 2012) (finding that state court's determination

voicemail Petitioner left for Hobson about one week before her murder in which Petitioner professed his love for Hobson and stated that "he loved her to death, and if he couldn't have her, nobody could have her." (T. 8965-96.)

Peggy Thompkins testified that she was dating Petitioner during the same time as Hobson. (T. 1818-20.) After 2:00 a.m. on the morning of the murder, Petitioner called Peggy crying and declaring his love for her, stating: "something happened." (T. 1800.)

Constance Lestrade, who lived with Petitioner at the time of the murder, testified that Petitioner called her around 2:00 a.m. on the morning of the murder, telling her: "I did it, I did it." (T. 1991.)

In light of the overwhelming evidence of Petitioner's guilt, the Court finds that even assuming arguendo that counsel was constitutionally deficient for the reasons asserted in Claims 1 through 4, he was not prejudiced by counsel's performance. That is, there is no reasonable probability that the outcome of the proceeding would have been different but-for counsel's deficient performance. See Duren, 161 F.3d at 660. Consequently, the Court concludes that the state court's resolution of Claims 1 through 4 was neither an unreasonable application of, nor contrary to, clearly established federal law.

**2. Claim 5: due process**

In Claim 5, Petitioner argues that his right to a fair and impartial disposition of his pending claims in state court is being abridged by the prosecution and the court which has failed to resolve his pending claims in a timely and expeditious manner. (Pet. at 9.)

Judge White found that to the extent Petitioner is requesting mandamus relief, he has not made the requisite showing entitling him to such relief. (Id. at 64-65.) And to the extent that Petitioner is seeking a ruling on his petition for writ of habeas corpus filed in 2014 in state court, and later administratively stayed pending resolution of a then-pending appeal, such relief is not available in these federal habeas proceedings. (Id. at 63, 66.)

Petitioner did not object to these findings, and the Court finds that they are not clearly erroneous. See Cuevas on Behalf of Juarbe v. Callahan, 11 F. Supp. 2d 1340, 1342 (M.D. Fla. 1998) ("[P]ortions of the R & R that are not objected to will be evaluated by the district court judge under a clearly erroneous standard of review.") (citation omitted); see also Macort v. Prem, Inc., 208 F. App'x 781, 784 (11th Cir. 2006) ("Most circuits agree that '[i]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'") (quoting Diamond v. Colonial Life & Accident Ins., 416 F.3d 310, 315 (4th Cir. 2005)). Consequently, the Court finds that Petitioner is not entitled to relief for Claim 5.

## IV. Conclusion

For the foregoing reasons, the Court finds that Petitioner's Section 2254 Petition was untimely; even if it was timely, Claim 5 is procedurally barred; and in any event, all the claims fail on the merits.

Accordingly, it is **ORDERED AND ADJUDGED** that:

1. The Report of the Magistrate Judge (D.E. 26) issued May 30, 2017 is **ADOPTED**;

2. Petitioner Curtis Nairn's Amended Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus (D.E. 9) is **DISMISSED as time-barred**;

3. Alternatively, Petitioner's Section 2254 Petition is **DENIED on the merits**;

4. A Certificate of Appealability **SHALL NOT ISSUE**;

5. All pending motions are **DENIED AS MOOT**; and

6. This case is now **CLOSED**.

**DONE AND ORDERED** in Chambers at Miami, Florida this 29th day of November, 2017.

Joan A. Lenard

**JOAN A. LENARD**
**UNITED STATES DISTRICT JUDGE**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-60874-Civ-LENARD
MAGISTRATE JUDGE P.A. WHITE

CURTIS NAIRN,

Petitioner,

v.

JULIE JONES,

Respondent.
_____/

**REPORT OF MAGISTRATE JUDGE**

## I. Introduction

**Curtis Nairn** has filed this *pro se* petition for writ of habeas corpus, pursuant to 28 U.S.C. §2254, challenging the constitutionality of his conviction for second degree murder, entered following a jury verdict in **Broward County Circuit Court, case no. 06-8303-CF10A.**

This Cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. §636(b)(1)(B) and Rules 8 and 10 of the Rules Governing Section 2254 Cases in the United States District Courts.

For its consideration of the operative, amended petition (DE#9), the court has the state's response to this court's order to show cause with supporting appendix (DE#13), containing copies of relevant state court pleadings, including copies of the trial, sentencing, and post-conviction evidentiary hearing transcripts,[1]

[1]The letter "T" in this Report, followed by a page number, refers to the trial transcripts filed by the respondent. The transcripts are part of the Appendix, docketed on CM/ECF at DE#18.

together with the petitioner's traverse (DE#11).

## II. Claims

Because the petitioner is *pro se*, he has been afforded liberal construction under Haines v. Kerner, 404 U.S. 419 (1972). As can best be discerned, the petitioner raises the following **five grounds** for relief:

1. He was denied effective assistance of counsel, where his lawyer failed to investigate the time line of the fatal injury as suggested by the prosecution's medical expert. (DE#1:4).,

2. He was denied effective assistance of counsel, where his lawyer failed to investigate whether the bloody prints belonged to the victim, as suggested by the prosecution, or to another perpetrator, as set forth by the petitioner in his theory of defense. (DE#1:5).

3. He was denied effective assistance of counsel, where his lawyer requested a factually and legally inapplicable jury instruction on independent acts doctrine. (DE#1:6).

4. He was denied effective assistance of counsel on appeal, where his lawyer failed to assign as error that the court gave a factually and legally inapplicable jury instruction on independent acts. (DE#1:7).

5. His right to a fair and impartial disposition of his pending claims in state court is being abridged by the prosecution and the court whom have failed to resolve the petitioner's pending claims in a timely and

expeditious manner. (DE#1:9).

## III. Procedural History

On May 31, 2006, petitioner was charged by Indictment with murder in the first degree. (DE#13:Ex.2). He proceeded to trial, where he was found guilty of second degree murder, as a lesser included offense. (DE#13:Ex.3). He was adjudicated guilty and sentenced to a term of life imprisonment. (DE#13:Ex.4).

Petitioner prosecuted a direct appeal, raising multiple claims of trial court error: (1) in denying defendant's motion for mistrial; (2) in finding no discovery violation where prosecution did not inform petitioner of a statement by him that it intended to introduce at trial; (3) for refusing to consider petitioner's motion to discharge counsel; and, (4) for failing to make inquiry of a juror who became emotionally distraught during deliberations. (DE#13:Ex.6). On **April 19, 2008,** the Fourth District Court of Appeal affirmed the petitioner's judgment in a published opinion. Nairn v. State, 978 So.2d 268 (Fla. 4 DCA 2008); (DE#13:Ex.8). Rehearing was denied on **June 2, 2008.** (DE#13:Ex.11). The appeal concluded with the issuance of the mandate on **June 2, 2008.** (DE#13:Ex.12).

It does not appear that petitioner sought discretionary review with the Florida Supreme Court. The time for doing so expired, at the latest, thirty days after rehearing was denied, or no later than **July 2, 2008.**[2] Since he did not seek discretionary review to

[2]Pursuant to Fla.R.App.P. 9.120(b), a motion to invoke discretionary review must be filed within 30 days of rendition of the order to be reviewed. As applied here, under Fed.R.Civ.P. 6(a)(1), "in computing any time period specified in ...

the Florida Supreme Court, he is not entitled to an additional ninety days to file a petition for a writ of certiorari in the United States Supreme Court. Gonzalez v. Thaler, ___ U.S. ___, 132 S.Ct. 641, 646 (2012).[3] Therefore, petitioner's judgment of

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any statute that does not specify a method of computing time ... [the court must] exclude the day of the event that triggers the period[,] count every day, including intermediate Saturdays, Sundays, and legal holidays[, and] include the last day of the period," unless the last day is a Saturday, Sunday, or legal holiday. Where the dates fall on a weekend, the Undersigned has excluded that day from its computation.

[3]In applying the Supreme Court's Gonzalez opinion to this case, the petitioner here is not entitled to the 90-day period for seeking certiorari review with the United States Supreme Court, because after his judgment was affirmed on direct appeal, petitioner did not attempt to obtain discretionary review by Florida's state court of last resort-the Florida Supreme Court, nor did he seek rehearing with the appellate court. See Gonzalez v. Thaler, ___ U.S. ___, 132 S.Ct. 641, 653-54, 181 L.Ed.2d 619 (2012)(holding that conviction becomes final upon expiration of time for seeking direct review); Jimenez v. Quarterman, 555 U.S. 113, 118-21, 129 S.Ct. 681, 685-86, 172 L.Ed.2d 475 (2009)(explaining the rules for calculating the one-year period under §2244(d)(1)(A)). See also Clay v. United States, 537 U.S. 522, 527, 123 S.Ct. 1072, 155 L.Ed.2d 88 (2003)(holding that "[f]inality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires."); Chavers v. Secretary, Florida Dept. of Corrections, 468 F.3d 1273 (11th Cir. 2006)(holding that one-year statute of limitations established by AEDPA began to run 90 days after Florida appellate court affirmed habeas petitioner's conviction, not 90 days after mandate was issued by that court). In other words, where a state prisoner, who pursues a direct appeal, but does not pursue discretionary review in the state's highest court after the intermediate appellate court affirms his conviction, the conviction becomes final when time for seeking such discretionary review in the state's highest court expires. Gonzalez, __ U.S. ___, 132 S.Ct. 641 (2012).

For purposes of 28 U.S.C. §2244(d)(1)(A), where a state prisoner does not seek discretionary review in the state's highest court of the decision of the intermediate appellate court, the judgment becomes "final" for purposes of §2244(d)(1)(A) on the date the time for seeking such review expires. Courts were initially split on when a judgment becomes final in the event the state prisoner did not seek discretionary review in the state's highest court of the intermediate state appellate court's decision. In Gonzalez v. Thaler, 132 S.Ct. 641 (2012), the U.S. Supreme Court resolved the split in circuits, explaining that scouring each state's laws and cases to determine how the state defined finality would contradict the uniform meaning of "conclusion of direct review" accepted by the Court in prior cases. The Court further rejected the argument that the limitations period does not commence running until the expiration of the 90-day period for filing a petition for writ of certiorari, where the petitioner does not seek review in the state's highest court. Id. The Supreme Court explained that it can only review judgments of a "state court of last resort" or of a lower state court if the "state court of last resort" has denied discretionary review. See Gonzalez v. Thaler, 132 S.Ct. 641 (2012)(citing Sup.Ct.R. 13.1 and 28 U.S.C. §1257(a)).

conviction became final on **July 2, 2008,** when time expired for seeking discretionary review to the Florida Supreme Court. He does not get the benefit of the 90-day period for seeking review to the U.S. Supreme Court because the appellate court issued a published opinion affirming his conviction, and he did not seek discretionary review with Florida's highest court, the Florida Supreme Court. See Gonzalez v. Thaler, supra.

Before his conviction became final, on June 25, 2008,[4] the petitioner next filed a state petition for writ of habeas corpus, with the Florida Fourth District Court of Appeal, assigned **case no. 4D08-2653,** raising claims challenging appellate counsel's effectiveness. (DE#13:Ex.13). On August 6, 2008, the petition was denied on the merits. (DE#13:Ex.14). Rehearing was denied on **September 29, 2008.** (DE#13:Ex.16).

Prior to conclusion of his state habeas corpus petition, the petitioner returned to the state trial court, filing his first motion for post-conviction relief, pursuant to Fla.R.Cr.P. 3.850, on **September 1, 2008,** raising claims challenging counsel's effectiveness. (DE#13:Ex.17). During the pendency of this Rule 3.850 motion, petitioner filed six amendments thereto, with the latest amendment being filed on **June 1, 2010.** (DE#13:Exs.19-21,24-27). The state filed a motion to strike the initial motion as legally insufficient, as well as, the numerous amendments thereto, arguing that petitioner had raised a claim challenging counsel's failure to call an alibi witness at trial, but had failed to allege the witness was available to testify at trial, relying on Spera v.

[4]It appears that the petition was file stamped twice by the prison authorities or that the identical petition was handed to prison authorities for mailing on two separate occasions. Regardless, the proceedings on the petition concluded on September 28, 2008, when the appellate court denied rehearing.

State, 971 So.2d 754 (Fla. 2007). (DE#13:Ex.28). On **June 17, 2010,** the trial court found the motion legally insufficient for failure to meet the pleading requirements. (DE#13:Ex.29). In accordance with Spera v State, 971 So.2d 754 (Fla. 2007), the petitioner was afforded the opportunity to file a single, comprehensive, facially and legally sufficient Rule 3.850 within thirty (30) days. (Id.).

Since the motion was dismissed in its entirety, the motion was no longer "pending" for purposes of tolling the federal limitations period. See Overton v. Jones, 2016 WL 145826, at *8 (S.D. Fla. Jan. 12, 2016)(concluding defendant's postconviction motion, struck as legally insufficient, was no longer "pending" as of the date of the trial court's order striking same and thus the statute of limitations expired).[5] Consequently, this proceeding concluded on **June 17, 2010.**

Although the procedures articulated in Spera v. State, 971 So.2d 754 (Fla. 2007) allows a defendant an opportunity to amend facially insufficient post-convictions claims unless they cannot be corrected, under Federal law, the filing of an amended Rule 3.850 motion which corrected or superseded the dismissed motion, thereby correcting the invalid oath, has been held not to relate back to the initial Rule 3.850 motion. See Sibley v. Culliver, 377 F.3d 1196, 1204 (11th Cir. 2004); Jones v. Sec'y, Fla. Dep't of Corr's, 499 Fed.Appx. 945, 951 (11th Cir. 2012). Accordingly, even if properly filed, the proceeding concluded when the trial court struck the motion, and not when the petitioner filed an amended,

[5]In so finding, the court found the Eleventh Circuit's decision in Stafford v. Thompson, 328 F.3d 1302, 1305 (11 Cir. 2003) persuasive. In Stafford, the Eleventh Circuit determined that a state has petition that was voluntarily dismissed did not toll the limitations period because "there was nothing for the state to 'consider' until he [the petitioner] filed his second state habeas corpus claim" and "there was nothing 'pending' before the state court during the interim period." Stafford, supra.

comprehensive Rule 3.850 motion.

The federal limitations period ran untolled for **57 days**, from the time the foregoing Rule 3.850 motion was stricken on **June 17, 2010** until **August 13, 2010**, when petitioner filed a comprehensive amended Rule 3.850 motion. (DE#13:Ex.30). Following evidentiary hearings, the trial court entered a lengthy, detail order on **September 23, 2013**, denying the motion on the merits. (DE#13:Exs.47,54). That denial was subsequently *per curiam* affirmed by the Florida Fourth District Court of Appeal in a decision without written opinion. Nairn v. State, 160 So.3d 450 (Fla. 4 DCA 2015)(table); (DE#13:Ex.78). Rehearing was denied, and the proceeding concluded with the issuance of the mandate on **May 1, 2015**.[6] (DE#13:Ex.87).

Next, on **August 7, 2015**, petitioner returned to the trial court, filing a motion for judicial estoppel and to rule on newly

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[6]It is worth mentioning that during the pendency of this amended Rule 3.850 motion, petitioner filed numerous petitions for writs of mandamus in the appellate and Florida Supreme Court. See DE#13:Exs.22,32,39,52,64. However, it is well settled that the mandamus petitions, did not toll the limitations period as it did not seek review of the judgment of conviction. In Florida, the scope and purpose of mandamus are consistent with its generally understood use. Under Florida law: "[m]andamus is a narrow, extraordinary writ used to coerce an official to perform a clear legal duty." Sica v. Singletary, 714 So.2d 1111, 1112 (Fla. 2 DCA 1998). Its purpose is to "compel[ ] recalcitrant officials to perform clear legal duties." City of Winter Garden v. Norflor Const. Corp., 396 So.2d 865, 867 (Fla. 5 DCA 1981). From review of the mandamus petition, it is clear that Green was not challenging the judgment of conviction, nor was he requesting any relief from the criminal convictions or sentences. Under these circumstances, the mandamus application was not a "properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment," and thus did not toll the federal limitations period. See Moore v. Cain, 298 F.3d 361, 366-68 (5th Cir. 2002) (state prisoner's application to Louisiana Supreme Court for writ of mandamus, which requested that trial court be directed to rule on prisoner's state habeas petition, was not an "application for collateral review" with respect to prisoner's conviction, and therefore, mandamus application did not toll federal habeas statute of limitations); see also Crompton v. Crosby, 2005 WL 3527298, at *9 (N.D. Fla. Dec. 21, 2005); Robinson v. McDonough, 2007 WL 809783 (N.D. Fla. 2007).

discovered evidence and for summary judgment. (DE#13:Ex.88). The trial court denied the motion on **August 10, 2015**, finding the motion was not timely, having been filed more than two years after entry of petitioner's judgment, and because it did not concern a legitimate claim of newly discovered evidence, fundamental change in law, or illegal sentence, citing Paez v. State, 512 So.2d 263 (Fla. 3 DCA 1987).[7] (DE#13:Ex.92). The foregoing motion, however, was not properly filed, having been explicitly denied as untimely. See Pace v. DiGuglielmo, 544 U.S. 408, 417 (2005); Gorby v. McNeil, 530 F.3d 1363, 1368 (11 Cir. 2008); see also, Sweet v. Sec'y, Dep't of Corr's, 467 F.3d 1311, 1315 (11th Cir. 2006), cert. den'd, 550 U.S. 922 (2007); Ousley v. Sec'y for Dep't of Corr's, 269 Fed.Appx. 884, 886 (11 Cir. 2008)(accord); Pace v. DiGuglielmo, 544 U.S. 408, 414, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005) (quotation and alteration omitted). Therefore, it did not serve to toll the federal statute of limitations.

Thus, from the time the mandate issued on **May 1, 2015**, the limitations ran unchecked for **352 days** until petitioner then came to this court filing his initial federal habeas petition on **April 18, 2016**, when petitioner signed and then handed the petition to prison authorities for mailing in accordance with the mailbox rule. (DE#1:1). His amended federal petition was filed on **May 5, 2016**. (DE#9:12). It appears that the claims raised therein relate back to the initial federal habeas petition, in accordance with Davenport v. United States, 217 F.3d 1341 (11 Cir. 2000). In all, there were **409 days** of untolled time during which no properly filed post-conviction motions were pending so as to toll the federal one-year

[7]In Paez, the court found motion based on newly discovered evidence filed more than two years after judgment of conviction became final was not timely filed and thus properly dismissed.

limitations period.

## IV. Threshold Issues

### A. Timeliness

The respondent argues correctly that this federal petition is time-barred. (DE#13:3; DE#19). Since petitioner filed his federal habeas petition after April 24, 1996, the Antiterrorism and Effective Death Penalty Act ("AEDPA") governs this proceeding. See Wilcox v. Fla.Dep't of Corr., 158 F.3d 1209, 1210 (11th Cir. 1998)(*per curiam*). The AEDPA imposed for the first time a one-year statute of limitations on petitions for writ of habeas corpus filed by state prisoners. See 28 U.S.C. §2244(d)(1)("A 1-year period of limitation shall apply to an application for a writ of habeas corpus...."). Specifically, the AEDPA provides that the limitations period shall run from the latest of –

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

See 28 U.S.C. §2244(d)(1).

The limitations period is tolled, however, for "[t]he time during which a properly filed application for post-conviction or other collateral review with respect to the pertinent judgment or claim is pending...." 28 U.S.C. §2244(d)(2). Consequently, this petition is time-barred, pursuant to 28 U.S.C. §2244(d)(1)(A), unless the appropriate limitations period was extended by properly filed applications for state post-conviction or other collateral review proceedings. See 28 U.S.C. §2244(d)(2); see also, Rich v. Sec'y for Dep't of Corr's, 512 Fed.Appx. 981, 982-83 (11th Cir. 2013); Nesbitt v. Danforth, 2014 WL 61236 at *1 (S.D. Ga. Jan. 7, 2014).

An application is properly filed "when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee." Artuz v. Bennett, 531 U.S. 4, 8, 121 S.Ct. 361, 148 L.Ed.2d 213 (2000)(footnote omitted); see also, Rich, 512 Fed.Appx. at 983; Everett v. Barrow, 861 F.Supp.2d 1373, 1375 (S.D. Ga. 2012). Consequently, if the petitioner sat on any claim or created any time gaps in the review process, the one-year clock would continue to tick. Kearse v. Sec'y, Fla. Dep't of Corr's, 736 F.3d 1359, 1362 (11th Cir. 2013); Nesbitt v. Danforth, 2014 WL 61236 at *1.

Further, "[a]n application that is untimely under state law is not 'properly filed' for purposes of tolling AEDPA's limitations period." Gorby v. McNeil, 530 F.3d 1363, 1366 (11th Cir. 2008)(citation omitted), cert. den'd, ___ U.S. ___, 129 S.Ct. 1592, 173 L.Ed.2d 684 (2009). A motion filed past the deadline for filing a federal habeas petition cannot toll the limitations period. See Hutchinson v. Florida, 677 F.3d 1097, 1098 (11th Cir. 2012)("In

order for...§2244(d)(2) statutory tolling to apply, the petitioner must file his state collateral petition before the one-year period for filing his federal habeas petition has run."); Webster v. Moore, 199 F.3d 1256, 1259 (11th Cir. 2000); Nesbitt, 2014 WL 61236 at *1.

**1. Statutory Tolling Under §2244(d)(1)(A)**

As noted previously in this Report, there was **409 days** untolled, from the time petitioner's conviction became final until he filed this federal petition. In his petition, petitioner appears to suggest that this habeas petition was timely instituted because his conviction did not become final until time expired for seeking certiorari review with the United States Supreme Court. However, that argument is now foreclosed by the Supreme Court, in Gonzalez v. Thaler, __ U.S. __, 132 S.Ct. 641,646 (2012), requiring a petitioner to seek review to the state's highest court following affirmance of a conviction on appeal by written opinion, as opposed to, a *per curiam* affirmance. Petitioner also argues that his petition is timely because there was no untolled time between the date when petitioner's initial Rule 3.850 motion with amendments was stricken under Spera, supra and the filing of his 2010 comprehensive amended Rule 3.850 motion. However, as noted previously, in order for the time to be tolled, there must be Pending a properly filed application for post-conviction relief.

As discussed in detail previously, there was no proceeding pending between the trial courts order striking the initial filing and the date that petitioner filed his amendment thereto. This period was thus not tolled for purposes of the limitations period because there was nothing pending which would serve to stop the clock from running. Further, to the extent petitioner suggests that

his mandamus petitions or the motion for judicial estoppel, statutorily tolled the limitations period, that argument is also devoid of merit. the motion for judicial estoppel was not timely filed and thus did not statutorily toll the limitations period. Thus, as explained in detail above, there was, in fact, well in excess of **one year** during which there were no properly filed state post-conviction proceedings pending that would serve to stop the federal limitations period from expiring. As a result, the federal one year limitations period elapsed, making this federal petition time-barred.

## 2. Equitable Tolling

That, however, does not end the inquiry. Given the long and detailed procedural history narrated above, this federal habeas proceeding is due to be dismissed unless the petitioner can establish that equitable tolling of the statute of limitations is warranted.

The one-year limitations period set forth in §2244(d) "is subject to equitable tolling in appropriate cases." Holland v. Florida, 560 U.S. 631, 645, 130 S.Ct. 2549, 2560, 177 L.Ed.2d 130 (2010). In that regard, the Supreme Court has established a two-part test for equitable tolling, stating that a petitioner "must show '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevent timely filing." Lawrence v. Florida, 549 U.S. 327, 336, 127 S.Ct. 1079, 166 L.Ed.2d 924 (2007); Holland v. Florida, 560 U.S. at 649 (quoting Pace v. DiGuglielmo, 544 U.S. 408 418, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005)); see also, Brown v. Barrow, 512 F.3d 1304, 1307 (11th Cir. 2008)(noting that the Eleventh Circuit "has held that an inmate bears a strong burden to show specific facts to

support his claim of extraordinary circumstances that are both beyond his control and unavoidable with diligence, and this high hurdle will not be easily surmounted. Howell v. Crosby, 415 F.3d 1250 (11th Cir. 2005); Wade v. Battle, 379 F.3d 1254, 1265 (11th Cir. 2004)(citations omitted).

Equitable tolling "is an extraordinary remedy 'limited to rare and exceptional circumstances and typically applied sparingly.'" Cadet v. Fla. Dep't of Corr's, 742 F.3d 473, 477 (11th Cir. 2014)(quoting Hunter v. Ferrell, 587 F.3d 1304, 1308 (11th Cir. 2009)). The petitioner bears the burden of establishing the applicability of equitable tolling by making specific allegations. See Cole v. Warden, Ga. State Prison, 768 F.3d 1150, 1158 (11th Cir. 2014)(citing Hutchinson v. Fla., 677 F.3d 1097, 1099 (11th Cir. 2012)).

"The diligence required for equitable tolling purposes is reasonable diligent, not maximum feasible diligence." Holland, 560 U.S. at 653 (citation and quotation marks omitted). Determining whether a circumstance is extraordinary "depends not on 'how unusual the circumstance alleged to warrant tolling is among the universe of prisoners, but rather how severe an obstacle it is for the prisoner endeavoring to comply with AEDPA's limitations period.'" Cole, 768 F.3d at 1158 (quoting Diaz v. Kelly, 515 F.3d 149, 154 (2d Cir. 2008)). Further, a petitioner must show a causal connection between the alleged extraordinary circumstances and the late filing of the petition." San Martin v. McNeil, 633 F.3d 1257, 1267 (11th Cir. 2011)(citing Lawrence v. Fla., 421 F.3d 1221, 1226-27 (11th Cir. 2005)); Drew v. Dep't of Corr's, 297 F.3d 1278, 1286 (11th Cir. 2002).

Petitioner has not demonstrated that he was diligent in

pursuing post-conviction relief. While the record reveals that the petitioner was a proactive litigant, filing post conviction collateral attacks in the state courts, here he has not established any fact to support a finding that he is "entitled to the rare and extraordinary remedy of equitable tolling." See Drew v. Dep't of Corr's, 297 F.3d 1278, 1289 (11th Cir. 2002). This court is not unmindful that petitioner pursued collateral relief in the state forum. However, it is evident that there was well over one year of untolled time during which no properly filed postconviction proceedings were pending which would act to toll the federal limitations period. As a result of petitioner's failure to properly and diligently pursue his rights, he has failed to demonstrate that he qualifies for equitable tolling of the limitations period. See Webster v. Moore, 199 F.3d 1256, 1258-60 (11 Cir.)(holding that even properly filed state court petitions must be pending in order to toll the limitations period), cert. den'd, 531 U.S. 991 (2000).

The time-bar is ultimately the result of the petitioner's failure to timely and properly pursue state post-conviction proceedings and then this federal habeas corpus proceeding. Since this habeas corpus proceeding instituted on **April 18, 2016** is untimely, the petitioner's claim challenging the lawfulness of his judgment is now time-barred pursuant to 28 U.S.C. §2244(d)(1)-(2) and should not be considered on the merits.

Finally, to the extent petitioner attempts to argue that he is entitled to equitable tolling of the limitations period, in that the failure to review his challenges on the merits will result in a fundamental miscarriage of justice, that claim also warrants no relief. The law is clear that a petitioner may obtain federal habeas review of a procedurally defaulted claim, without a showing of cause or prejudice, if such review is necessary to correct a

fundamental miscarriage of justice. See Edwards v. Carpenter, 529 U.S. 446, 451 (2000); Henderson v. Campbell, 353 F.3d 880, 892 (11th Cir. 2003). This exception is only available "in an extraordinary case, where a constitutional violation has resulted in the conviction of someone who is actually innocent." Henderson, 353 F.2d at 892.

As a threshold matter, the Eleventh Circuit has never held that Section 2244(d)'s limitations period carries an exception for actual innocence, and it has declined to reach the issue whether the absence of such an exception would violate the Constitution. See Taylor v. Sec'y, Dep't of Corr's, 230 Fed. Appx. 944, 945 (11th Cir. 2007)("[W]e have never held that there is an 'actual innocence' exception to the AEDPA's one-year statute of limitations, and we decline to do so in the instant case because [the petitioner] has failed to make a substantial showing of actual innocence."); Wyzykowski v. Dep't of Corr's, 226 F.3d 1213, 1218-19 (11th Cir. 2000)(leaving open the question whether the §2244 limitation period to the filing of a first federal habeas petition constituted an unconstitutional suspension of the writ). But cf. United States v. Montano, 398 F.3d 1276, 1284 (11th Cir. 2000)("Actual innocence is not itself a substantive claim, but rather serves only to lift the procedural bar caused by appellant's failure to timely file his §2255 motion."). However, several other circuits have recognized such an exception. See, e.g., Souter v. Jones, 395 F.3d 577 (6th Cir. 2005); Flanders v. Graves, 299 F .3d 974 (8th Cir. 2002). Assuming, without deciding, that a petitioner's actual innocence might support equitable tolling of the limitation period, notwithstanding, petitioner has failed to make a substantial showing of actual innocence.

Even if there were an "actual innocence" exception to the

application of the one-year limitations provisions of §2244, the Court would still be precluded from reviewing the claims presented in the instant petition on the merits. "To establish actual innocence, [a habeas petitioner] must demonstrate that ... 'it is more likely than not that no reasonable [trier of fact] would have convicted him.' Schlup v. Delo, 513 U.S. 298, 327-328, 115 S.Ct. 851, 867-868, 130 L.Ed.2d 808 (1995)." Bousley v. United States, 523 U.S. 614, 623 (1998). "[T]he Schlup standard is demanding and permits review only in the "'extraordinary' case." House v. Bell, 547 U.S. 518, 538 (2006).

Courts have emphasized that actual innocence means factual innocence, not mere legal insufficiency. Id.; see also High v. Head, 209 F.3d 1257 (11 Cir. 2000); Lee v. Kemna, 213 F.3d 1037, 1039(8 Cir.2000); Lucidore v. New York State Div. of Parole, 209 F.3d 107 (2 Cir. 2000)(citing Schlup v. Delo, 513 U.S. 298, 299, (1995); Jones v. United States,153 F.3d 1305 (11 Cir. 1998)(holding that appellant must establish that in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him). See also Bousley, 523 U.S. at 623-624; Doe v. Menefee, 391 F.3d 147, 162 (2 Cir. 2004)("As Schlup makes clear, the issue before [a federal district] court is not legal innocence but factual innocence.").

To be credible, a claim of actual innocence requires the petitioner to "support his allegations of constitutional error with new reliable evidence--whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence--that was not presented at trial." Schlup v. Delo, 513 U.S. at 324. All things considered, the evidence must undermine the Court's confidence in the outcome of the trial. Id. at 316. No such showing has been made here. Even if such an exception exists, the

petitioner has failed to make the requisite showing of actual innocence that would support consideration of his untimely §2254 petition on the merits.[8]

On the record before this court, no fundamental miscarriage of justice will result by time-barring the claims raised in this habeas proceeding.[9] In other words, petitioner has not presented sufficient evidence to undermine the court's confidence in the outcome of his criminal proceedings sufficient to show that a fundamental miscarriage of justice will result if the claim(s) are not addressed on the merits. See Milton v. Sec'y, Dep't of Corr's, 347 Fed.Appx. 528, 531-532 (11th Cir. 2009)(holding that affidavits proffered by *pro se* habeas petitioner were insufficient to establish actual innocence of murder, as would allegedly have created an exception to one-year limitations period, because affidavits were presented more than ten years after murder and

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[8]Even if this petition was not barred by the one-year limitations period, Petitioner would not be entitled to federal habeas relief. For the reasons stated by the respondent in the thorough and well-reasoned response to the order to show cause, the conviction and sentence were not entered in violation of petitioner's constitutional rights. See Response to Order to Show Cause at 16-30 (DE#13). Since petitioner has not shown that the adjudications of the claims raised in this federal petition by the state courts were contrary to or an unreasonable application of clearly established federal law or that the rulings were based on an unreasonable determination of the facts, he is not entitled to habeas corpus relief. 28 U.S.C. §2254(d)(1); Williams v. Taylor, 529 U.S. 362 (2000). See also Mitchell v. Esparza, 540 U.S. 12, 16 (2003)("[A] state court's decision is not "contrary to ... clearly established Federal law" simply because the court did not cite [Supreme Court] opinions.... [A] state court need not even be aware of [Supreme Court] precedents, 'so long as neither the reasoning nor the result of the state-court decision contradicts them.'")(*quoting* Early v. Packer, 537 U.S. 3, 7-8 (2002).

[9]The petitioner is cautioned that any attempt to provide due diligence in objections to this Report should not be considered in the first instance by the district court since the petitioner should have raised any and all arguments, in the first instance, before the undersigned. See Starks v. United States, 2010 WL 4192875 at *3 (S.D. Fla. 2010); United States v. Cadieux, 324 F.Supp. 2d 168 (D.Me. 2004). This is so because "[P]arties must take before the magistrate, 'not only their best shot but all of the shots.'" Borden v. Sec'y of Health & Human Servs., 836 F.2d 4, 6 (1st Cir. 1987)(quoting Singh v. Superintending Sch. Comm., 593 F.Supp. 1315, 1318 (D.Me. 1984)).

eight years after petitioner's trial, the affiants were in most cases aware of the alleged facts to which they attested before petitioner's trial, the affidavits were either not new evidence or were of questionable reliability, and none of the evidence negated petitioner's confession or his taped conversation with the victim's mother wherein he implicated another individual in the murder)(unpublished). It is evident that petitioner's arguments raised herein were readily available to him within a year of when his proceedings became final. Consequently, under the totality of the circumstances present here, this federal petition is not timely.

**B. Exhaustion and Procedural Default**

Next, the respondent argues correctly that **claims 1 through 4** of this federal petition, as listed above, were properly exhausted in the state forum, because they were raised by petitioner in his amended Rule 3.850 motion and/or in his state habeas corpus petition. However, the respondent argues that **claim 5** of this federal petition, as listed above, is procedurally defaulted from review here, because it was raised in the state forum in petitioner's untimely motion for judicial estoppel. (DE#13).

It well-settled that an applicant's federal writ of habeas corpus will not be granted unless the applicant exhausted his state court remedies. 28 U.S.C. §2254(b),(c).[10] See Mauk v. Lanier, 484

[10]The terms of 28 U.S.C. §2254(b) and (c) provide in pertinent part as follows:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –
>
> (A) the applicant has exhausted the remedies

F.3d 1352, 1357 (11th Cir. 2007). It has long been determined required that, prior to filing a §2254 petition, a petitioner must have exhausted his available state court remedies, thereby giving the state the the "'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights" Duncan v. Henry, 513 U.S. 364, 365, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995) (quoting Picard v. Connor, 404 U.S. 270, 275, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971).

To provide the state with the necessary "opportunity," the prisoner must "fairly present" his claim in each appropriate state court thereby alerting that court to the federal nature of the claim. Baldwin v. Reese, 541 U.S. 27, 29-30 (2004); Duncan v. Henry, 513 U.S. 364, 365-366 (1995). See also O'Sullivan v. Boerckel, 526 U.S. 838 (1999). In other words, proper exhaustion of a claim must be "serious and meaningful," requiring the petitioner to "afford the State a full and fair opportunity to address and resolve the claim on the merits." Kelley v. Sec'y for Dep't of Corr's, 377 F.3d 1317, 1343-44 (11th Cir. 2004). Further, a claim must be presented to the highest court of the state to satisfy the exhaustion of state court remedies requirement. O'Sullivan v. Boerckel, 526 U.S. 838 (1999); Richardson v. Procunier, 762 F.2d 429, 430 (5th Cir. 1985); Carter v. Estelle, 677 F.2d 427, 443 (5th Cir. 1982), cert. denied, 460 U.S. 1056 (1983).

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available in the courts of the State; or

(B) (i) there is absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

. . .

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

In Florida, exhaustion is ordinarily accomplished on direct appeal. If not, it may be accomplished by the filing of a Rule 3.850 motion, and an appeal from its denial; Leonard v. Wainwright, 601 F.2d 807, 808 (5th Cir. 1979), or, in the case of a challenge to a sentence, by the filing of a Rule 3.800 motion, and an appeal from its denial. See Caraballo v. State, 805 So.2d 882 (Fla. 2d DCA 2001). Claims of ineffective assistance of trial counsel are generally not reviewable on direct appeal, but are properly raised in a Rule 3.850 motion for post-conviction relief. See Kelley v. State, 486 So.2d 578, 585 (Fla.), cert. den'd, 479 U.S. 871, 107 S.Ct. 244, 93 L.Ed.2d 169 (1986). Further, in Florida, claims concerning representation received by appellate counsel are properly brought by way of a petition for habeas corpus relief to the appropriate district court of appeal. State v. District Court of Appeal, First District, 569 So.2d 439 (Fla. 1990). Exhaustion also requires that an ineffective assistance of trial counsel claim not only be raised in a Rule 3.850 motion, but the denial of the claim be presented on appeal. See Leonard v. Wainwright, 601 F.2d at 808.

Where an issue was not presented to the state court, since petitioner has already filed one Rule 3.850 motion, it is considered procedurally defaulted or barred from federal review. See Bailey v. Nagle, 172 F.3d 1299, 1302-03 (11th Cir. 1999); Kelley v. Secretary for Dept. of Corr., 377 F.3d 1317, 1351 (11th Cir. 2004)("[W]hen it is obvious that the unexhausted claims would be procedurally barred in state court due to a state-law procedural default, [the district court] can forego the needless 'judicial ping-pong' and just treat those claims now barred by state law as no basis for federal habeas relief."(internal quotation marks omitted)); Canif v. Moore, 269 F.3d 1245, 1247 (11th Cir. 2001)("[C]laims that have been held to be procedurally defaulted

under state law cannot be addressed by federal courts."); Chambers v. Thompson, 150 F.3d 1324, 1326-27 (11th Cir. 1998)(applicable state procedural bar should be enforced by federal courts even as to a claim which has never been presented to a state court).

As applied here, it would be futile to dismiss this case to give petitioner the opportunity to exhaust **claim 5**, in the state forum, because it could have been, but was not raised by petitioner during his initial Rule 3.850 motion and appeal therefrom. The petitioner's unexhausted claim is now incapable of exhaustion at the state level and would be procedurally barred under Florida law. Petitioner cannot now file a timely, second Rule 3.850 motion for post-conviction relief or state habeas corpus petition. Therefore, there is no longer a remedy available in state court.[10]

Even when a claim has been procedurally defaulted in the state courts, a federal court may still consider the claim if a state habeas petitioner can show either (1) cause for and actual prejudice from the default; or (2) a fundamental miscarriage of justice. Maples v. Thomas, 565 U.S. 266, 276, 132 S.Ct. 912, 922, 181 L.Ed.2d 807 (2012)(citations omitted); In Re Davis, 565 F.3d 810, 821 (11th Cir. 2009)(citation omitted). See also Martinez v. Ryan, 566 U.S. 1, 9-10, 132 S.Ct. 1309, 1316, 182 L.Ed.2d 272 (2012).

For a petitioner to establish cause, the procedural default "must result from some objective factor external to the defense

[10]The Florida procedural rule deeming as waived or abandoned claims for which an appellant had not presented any argument in his initial brief, even when the post-conviction evidentiary hearing was limited in scope to some but not all post-conviction claims and the appellant's insufficiently presented claims were summarily denied by the trial court, is a firmly established and regularly followed procedural rule for purposes of federal habeas. See Thomas v. Crews, 2013 WL 3456978, *14 n.8 (N.D.Fla. 2013)(compiling cases).

that prevented [him] from raising the claim and which cannot be fairly attributable to his own conduct." McCoy v. Newsome, 953 F.2d 1252, 1258 (11th Cir. 1992)(quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397). In Martinez v. Ryan, the Supreme Court created a narrow exception to the rule that an attorney's errors in a postconviction proceeding do not qualify as cause for a procedural default. The 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.

Martinez, 132 S.Ct. at 1320. To establish prejudice, a petitioner must show that "the errors at trial actually and substantially disadvantaged his defense so that he was denied fundamental fairness." Id. at 1261 (quoting Carrier, 477 U.S. at 494, 106 S.Ct. 2639, 91 L.Ed.2d 397).

Careful review of the state court record reveals that the petitioner failed to raise **claim 5** in his initial amended Rule 3.850 motion. He has thus procedurally defaulted this claim. To the extent petitioner attempts to suggest he is ignorant of the law, that does not excuse his failure to properly exhaust the claims raised herein in the state forum. Petitioner's attempt to excuse the his procedural default based upon the Supreme Court's decision in Martinez v. Ryan, supra, warrants no relief.

In Martinez v. Ryan, 566 U.S. 1, 9, 132 S.Ct. 1309, 1318, 182 L.Ed.2d 272 (2012), the Supreme Court held that if "a State requires a prisoner to raise an ineffective-assistance-of-trial-

counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim ..." when (1) "the state courts did not appoint counsel in the initial-review collateral proceeding, where the claims should have been raised, was ineffective, pursuant to Strickland [v. Washington, 466 U.S. 668 (1984)]." Martinez v. Ryan, 566 U.S. at 9, 132 S.Ct. at 1318. In this regard, the petitioner "must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." Id.

In other words, in Martinez v. Ryan, 566 U.S. 1, 11, 132 S.Ct. 1309, 1320 (2012), the Supreme Court explained that "[W]here, 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.**" Martinez v. Ryan, supra. (emphasis added). Therefore, relief is available if (1) state procedures make it virtually impossible to actually raise ineffective assistance of trial counsel claims on direct appeal; and (2) the petitioner's state collateral counsel was ineffective for failing to raise ineffective assistance of trial counsel claims in the state proceedings. See Lambrix v. Sec'y, Fla. Dep't of Corr., 756 F.3d 1246, 1261 n.31 (11th Cir. 2014).

The claim of ineffective assistance must be a "substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." Martinez, 132 S.Ct. at 1318. The Eleventh Circuit held in Trevino v. Thaler, 133 S.Ct. 1911 (11th Cir. 2013),

that the exception recognized in Martinez applies when a State's procedural framework makes it highly unlikely that a defendant in a typical case will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal.

In Hittson v. GDCP Warden, 759 F.3d 1210, 1262 (11th Cir. 2014), the Eleventh Circuit explained Martinez' "substantial claim" requirement, reiterating that:

> To overcome the default, a prisoner must ... demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit. Cf. Miller-El v. Cockrell, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003)(describing standards for certificates of appealability to issue).

Martinez, ___ U.S. at _____, 132 S.Ct. at 1318-19. In Miller-El, the Supreme Court explained that "[a] petitioner satisfies this standard by demonstrating ... that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. at 327, 123 S.Ct. at 1034. Where the petitioner has to make a "substantial showing" without the benefit of a merits determination by an earlier court, he must demonstrate that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1594, 1604, 146 L.Ed.2d 542 (2000). "[A] claim can be debatable even though every jurist of reason might agree, after the ... case has received full consideration, that petitioner will not prevail." Id.

The Eleventh Circuit in Hittson also observed that the

foregoing standard is similar to the preliminary review standard set forth in Rule 4 of the Rules Governing §2254 Proceedings, which allows district courts to summarily dismiss a petition "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief." See Hittson, 759 F.3d at 1269-70 (footnotes omitted). Thus, the Eleventh Circuit instructs that the §2254 petition must be examined to determine whether "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right...." Hittson, supra.

As applied here, the respondent is correct, that **claim 5** is procedurally defaulted from review here. Nevertheless, Martinez v. Ryan, supra., provides an exception to the procedural default rule, allowing review of such claim if petitioner can demonstrate that his claims of ineffective assistance of counsel are "substantial." In other words, petitioner must make a showing of a "substantial" claim of ineffective assistance of trial or appellate counsel which will be addressed in the Discussion section, *infra*.

Further, actual innocence may "serve as a gateway through which a petitioner may pass whether the impediment is a procedural bar... or ... expiration of the statute of limitations." McQuiggen v. Perkins, 133 S.Ct. 1924, 1928 (2013); see Carrier, 477 U.S. at 496 ("in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."). This exception requires the petitioner to persuade the district court that, in light of new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt. Id.; Rozzelle v. Sec'y, Fla. Dep't of Corr's, 672 F.3d 1000, 1011 (11th

Cir. 2012).

In making this assessment, the timing of the petition is a factor bearing on the reliability of the evidence purporting to show actual innocence. Schlup v. Delo, 513 U.S. 298, 327 (1995). To successfully plead actual innocence, a petitioner must show that his conviction resulted from a "constitutional violation." Id. at 327. "Actual innocence" means factual innocence, not mere legal insufficiency. Johnson v. Fla. Dep't of Corr's, 513 F.3d 1328, 1334 (11th Cir. 2008). This exception is exceedingly narrow in scope and requires proof of actual innocence, not just legal innocence. Johnson v. Alabama, 256 F.3d 1156, 1171 (11th Cir. 2001); Spencer, 609 F.3d at 1180. No such showing is made here. Rather, he is raising a legal defense to his conviction. Regardless, even if he is attempting to assert a free-standing claim of factual innocence, petitioner cannot prevail on that basis.

It is noted that, even if the claim was not procedurally barred for the reasons stated immediately above, careful review of the record shows that petitioner would still not be entitled to review, let alone relief, on the ineffective assistance of counsel claim now raised. This is so, because the claim is meritless, as asserted by the Respondent.[10] See Strickland v. Washington, 466 U.S. 668 (1984). Accordingly, petitioner cannot show prejudice to overcome the procedural bar.

In the absence of a showing of cause and prejudice, a petitioner may nevertheless receive consideration on the merits of a procedurally defaulted claim if he can establish a fundamental miscarriage of justice otherwise would result (*i.e.*, the continued

[10] See Response to Order to Show Cause-DE#13.

incarceration of one who is actually innocent). See Ward v. Hall, 592 F.3d 1144, 1155-57 (11th Cir. 2010), *cert. denied*, ____ U.S. ___, 131 S.Ct. 647, 178 L.Ed.2d 513 (2010). "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." Johnson v. Alabama, 256 F.3d 1156, 1171 (11th Cir. 2001)(quoting Schlup v. Delo, 513 U.S. 298, 327, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995)), *cert. denied*, 535 U.S. 926, 122 S.Ct. 1295, 152 L.Ed.2d 208 (2002).

Additionally, "'[t]o be credible,' a claim of actual innocence must be based on reliable evidence not presented at trial." Calderon v. Thompson, 523 U.S. 538, 559, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998)(quoting Schlup, 513 U.S. at 324). Such evidence is rare, relief on such a basis is extraordinary. Schlup, 513 U.S. at 327. Petitioner has not alleged, let alone demonstrated, that he is entitled to review under the fundamental miscarriage of justice exception.[11] Schlup v. Delo, 513 U.S. at 321-322. Not having shown that the fundamental miscarriage of justice exception applies, the claim is procedurally barred from federal review.

Also, where applicable, any further exhaustion and procedural default arguments are addressed below, in relation to the claim. When judicial economy dictates, where the merits of the claim may

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[11]The petitioner must support an actual innocence claim "with new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence-that was not presented at trial." Schlup v. Delo, 513 U.S. 298, 324 (1995)). The Supreme Court emphasized that actual innocence means factual innocence, not mere legal insufficiency. Id. See also High v. Head, 209 F.3d 1257 (11th Cir. 2000); Lee v. Kemna, 213 F.3d 1037, 1039 (8th Cir. 2000); Lucidore v. New York State Div. of Parole, 209 F.3d 107 (2d Cir. 2000)(citing Schlup v. Delo, 513 U.S. 298, 299, (1995); Jones v. United States, 153 F.3d 1305 (11th Cir. 1998)(holding that appellant must establish that in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him).

be reached and readily disposed of, judicial economy has dictated reaching the merits of the claim while acknowledging the procedural default and bar in the alternative.[12] See Lambrix v. Singletary, 520 U.S. 518 (1997). See also Barrett v. Acevedo, 169 F.3d 1155, 1162 (8th Cir. 1999)(stating that judicial economy sometimes dictates reaching the merits if the merits are easily resolvable against a petitioner and the procedural bar issues are complicated), cert. denied, 528 U.S. 846 (1999); Chambers v. Bowersox, 157 F.3d 560, 564 n. 4 (8th Cir. 1998)(stating that "[t]he simplest way to decide a case is often the best.").

## V. Relevant Facts

### A. Facts Adduced at Trial

For an appreciation of this case and the claims raised herein, a full review of the facts adduced at trial is warranted. In the early morning hours of May 10, 2006, Ja'Vaughn Hobson ("Hobson" or "the victim") was fatally stabbed in the parking lot of the Venice Cove Apartment Complex in Fort Lauderdale, Florida. (T.1598,1632-45). A tenant of the apartment complex, Iris Heath ("Heath"), testified that she called 9-1-1 after she saw the victim in the parking trying. (T.1602-03,2536). At that time, the victim was on her knees, trying to scream out, before she collapsed onto the ground. (T.1602-03). Heath recalled there was a trail of blood from the victim's Honda Civic to the spot where the victim finally collapsed. (T.2312). At trial, it was established that the 9-1-1

[12]Even if certain claims are technically unexhausted, the Court has exercised the discretion now afforded by Section 2254, as amended by the AEDPA, which permits a federal court to deny on the merits a habeas corpus application containing unexhausted claims. See Johnson v. Scully, 967 F.Supp. 113 (S.D.N.Y. 1996); Walker v. Miller, 959 F.Supp. 638 (S.D. N.Y. 1997; Duarte v. Miller, 947 F.Supp. 146 (D.N.J. 1996).

call was received around 1:33 a.m. (T.2536).

Evidence further established that the victim sustained nine stab wounds, with the fatal stab wound sustained to the right side of the base of the neck, penetrating down into the chest. (T.1662-65). The fatal wound made it difficult for the victim to speak because her chest cavity filled with blood. (T.1662). It was also established that the victim sustained defensive stab wounds to her right hand, right thumb, right forearm, and left hip. (T.1701-09). The victim received incised, shallow wounds to her left cheek, nose, and the right side of her face. (T.1701-09). From the evidence, it was established that the victim was alive when she received these injuries, and in fact, some of the shallow wounds followed the contours of the victim's face. (T.1707-08). There were, however, no witnesses to the actual stabbing and the murder weapon was never found. (T.2981).

According to FLPD Detective Mark Shotwell ("Det. Shotwell"), the victim was found near the mailboxes within the apartment complex where she lived, and her cellular phone was found in petitioner's possession at the time of his arrest. (T.2475,2497). Det. Shotwell examined the victim's phone and testified that calls were made from that phone on May 10, 2006 to Shawn Kerr at 1:27 a.m., to Crystal Mackey at 1:31 a.m., and to George Archer at 2:17 a.m. (T.2508-18). Before the 9-1-1 call, there were a number of calls between petitioner's phone and the victim's phone that day. (T.2530).

A DNA specialist testified at trial that the victim's blood and DNA were found on the victim's cellular phone, which was found in petitioner's possession at the time of his arrest. (T.2418). Petitioner post-arrest videotape statement to law enforcement was

introduced and played for the jury at trial. (T.2599). During that interview, petitioner admitted that he was present when the victim was bleeding. (T.2859,2909). He also did not deny taking her cellular phone and claims to have made the calls on it, requesting that individuals check up the victim. (T.2725,2754,2798,2854,2860). However, petitioner refused to explain how the victim sustained her injuries. (T.2875).

Nicole Tinker ("Tinker") testified that she knew the petitioner for approximately 8 years, and during that time, petitioner stated he was "really in love" with the victim. (T.1724). At the time, the petitioner, who was married and twenty years older than the victim, asked Tinker to speak with the victim on his behalf, but Tinker refused to do so. (T.1728-29). Eric Abraham ("Abraham"), a neighbor living in the same apartment complex as the victim, testified that on the day of the stabbing, he saw the victim between the hours of 5:30 p.m. and 6:30 p.m. (T.1921-26). Abraham overheard the victim telling the petitioner that things were not "going to work out," but the petitioner insisted he needed to speak with her, and was going to come see her. (T.1926-27).

Pauline Mackey, a good friend of the petitioner for over twenty years, testified that on the night of the murder, petitioner went to Mackey's house, complaining that he was tired of the victim, and all the money he had spent on her. (T.1767-81). Mackey recalled the petitioner telling her that he was "gonna kill her tonight." (T.1770). The following morning, around 2:00 to 2:20 a.m., petitioner told Mackey over the phone that he had killed the victim, explaining that he had "cut her throat and stabbed her chest three times." (T.1776-77). He also told Mackey that if the victim was not dead, then she was still in her car by the mailbox,

and that he was going to get in his boat and leave to the Bahamas. (T.1777-78).

Mackey's daughter, Crystal Mackey ("Crystal"), testified that petitioner called from the victim's cellular phone to tell her that he had just stabbed and killed the victim. (T.1859-61,1873-74). When Crystal asked the petitioner if he was serious, petitioner responded, "I swear to God on my dead mother's P-U-S-S-Y." (T.1861). He then stated he was at the harbor and was going to the Bahamas. (T.1862). Crystal also recalled listening to a voice message left by petitioner on the victim's answering machine a week before the murder, in which he stated that he "loved her to death, and if he couldn't have her, nobody could have her." (T.1896).

Peggy Thompkins ("Peggy") testified that she was dating the petitioner during the same time period as the victim. (T.1818-20). At around 2:40 a.m. on the morning of the murder, petitioner called Peggy crying, declaring his love for her and saying that "something happened." (T.1800). Constance Lestrade, who lived with petitioner at the time of the murder, testified that petitioner called her at 2:00 .m. on the morning of the murder, stating "I did it I did it." (T.1991).

Shawn Kerr ("Shawn") testified he met the victim two days prior to her murder, and had gone to dinner with the victim on the night she was murdered. (T.1933-37). After dinner, the victim drove herself home. (T.1938). Kerr recalled that he called the victim at 1:38 a.m., but a male voice answered, questioning whether he knew the victim. (T.1940-41,1946). When Kerr responded that he did, the individual told him, in a serious tone, to come get the victim because he had just cut her throat, and was leaving to the Bahamas. (T.1931). George Archer also testified at trial that he knew the

victim, and he too received a call from a man who stated that he had just "hooked up," meaning stabbed/killed, the victim. (T.1964). Archer recalled being told that the victim was in the parking lot, and that "You all can have her now." (T.1965-66,1968).

Detective Charles Morrow ("Det. Morrow") with the Fort Lauderdale Police Department ("FLPD"), testified that, on May 12, 2006, the petitioner was driving on N.W. 31 Avenue, when Det. Morrow activated his lights and siren, at which time the petitioner accelerated and attempted to flee. (T.2315-2319). A short chase ensued, and eventually the petitioner's vehicle was blocked, and petitioner was apprehended as he exited the car and tried to flee on foot. (T.2320-22).

**B. Rule 3.850 Evidentiary Hearing Testimony**

A detailed recitation of the facts adduced at the April 23, 2013, Rule 3.850 evidentiary hearing is warranted given the nature of the first four claims raised by the petitioner in this habeas proceeding. (DE#13:Ex.47). The petitioner called Gerald S. Cole ("Cole"), as an expert latent fingerprint examiner. (Id.:T.10-12). After providing background information regarding his expertise in the field, Cole testified that he examined evidence at the FLPD headquarters in the presence of the petitioner, defense counsel, and representative of the state. (Id.:T.13-14). At the time, Cole recalled being shown a series of five photographs depicting certain latent prints, several of which appeared to be palm prints, and others which appeared to possibly be fingerprints. (T.14-15,22). Cole explained that the known prints he examined belonged to the deceased. (T.14).

After examination of the items presented, he concluded that

that the photographs depicted that the surface material was touched more than once, causing a "overlay" or "double impression." (T.14-15). With such impressions, a latent examiner must then ascertain if there is a sufficient area and clarity therein from which an identification can be determined. (T.15). When comparing the photographs provided with the victim's known prints, Cole determined that one impression was suitable for identification. (T.17). After examining the one impression, Cole concluded that the one impression did not belong to the victim. (T.17). The other areas examined, however, were either of "no comparison value," meaning they are not suitable for identification purposes, or they were just "inconclusive," meaning an insufficient area in the known exemplars existed so as to conduct a conclusive comparison and identification. (T.17).

Next, petitioner testified that, after he was appointed Attorney Greitzer to represent him at trial, he did not think he and counsel ever had a discussion about his participation or lack thereof in the events of May 9 or 10, 2006, which resulted in his conviction. (T.36). Petitioner then stated, however, he was "quite sure" that during several discussions with counsel, he told counsel where he was at the time the murder was alleged to have been committed. (T.36). Petitioner testified that he asked counsel to interview and depose certain individuals, and even recalled filing *pro se* motions seeking to take depositions to establish that he was not with the victim between 1:00 and 2:00 a.m. on the day of the murder. (T.37).

When asked during cross-examination whether he recalled witnesses testifying at his trial and explaining that he had called to tell them that he had killed the victim, the petitioner at first indicated that his motion "isn't predicated on hearsay stuff," and

then refused to answer those questions, because his motion was based on counsel's ineffectiveness. (T.41-42). Thereafter, the court instructed the petitioner that, even if not directly related to the claim, it may be part of the background of the trial, and ordered petitioner to answer the question. (T.42). When petitioner was again asked whether or not witnesses had testified that he had called them to say that he had just killed the victim, the petitioner responded, "The best evidence is the record, sir." (T.43). When asked to answer the question, petitioner then stated, "Yes, sir." (T.43).

Petitioner stated, however, that he was not "listening" to one of the witness' testimony, specifically Paulene Mackey's, because it was all a bunch of "lies." (T.48,50). Petitioner explained that he believed Paulene lied at trial, because his former counsel, Attorney Greitzer, told him the record contradicts Paulene and Crystal Mackey's testimony. (T.50).

Petitioner did not dispute that the victim's phone was found in his possession at the time of his arrest, but claims that, while the phone was in her name, it actually belonged to him. (T.56-57). When asked about the victim's DNA evidence on the phone, petitioner denied any knowledge, only acknowledging that the the state's expert was saying the victim's DNA was on the phone. (T.57). Petitioner conceded that there were several Nelson[13] inquiries and disagreed with the court's finding that counsel was effective, but "reluctantly" agreed to remain with Attorney Greitzer rather than hire his own attorney or proceed *pro se*. (T.59-60). Petitioner also

[13]In brief, *Nelson* stands for the proposition that an inquiry by the trial court is appropriate when an indigent defendant attempts to discharge current, and obtain new, court-appointed counsel prior to trial due to ineffectiveness. Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973). See also Handpick v. State, 521 So.2d 1071 (Fla.), cert. denied, 488 U.S. 871 (1988).

acknowledged that during a pretrial hearing he indicated that he would not waive his right to a speedy trial; and, as a result, the state asked for the death penalty. (T.63). Even though he was facing the death penalty, petitioner explained he was unconcerned and ignored much of the trial testimony, because he considered himself an "innocent man," stating that they "killed Christ" and he was "innocent." (T.64).

Next, Dr. Mark Shuman ("Dr. Shuman"), an associate medical examiner with Miami-Dade County, testified as a forensic pathologist, that he could not form an opinion regarding how long the entire attack on the victim took. (T.67-68). He could also not form a specific opinion on the time the victim remained alive after the fatal injury, but her death would have been rather quick, "in the low minutes range" because a large blood vessel was struck, and with a 30% blood loss, shock and then death occurs unless immediate treatment is given. (T.69). Dr. Shuman did not disagree, however, as to the cause and manner of death, as testified to by Dr. Motte, and as set forth in Dr. Motte's report. (T.70).

Howard Greitzer, Esquire ("Attorney Greitzer"), testified that he has been a member of the Florida Bar since 1978 and has specialized in criminal defense trials, having tried approximately 19 to 20 capital cases where the defendant was facing a 25-year minimum mandatory term of imprisonment. (T.78). Attorney Greitzer recalled that he was appointed as a special public defender to represent the petitioner on a first degree murder charge in state court. (T.80). Counsel stated that, at the time the case went to trial, if the defendant did not put on any witnesses, the defendant would have the right to "sandwich the state," meaning they would have the right to speak first and last before the court instructs the jury and they start deliberations. (T.80-81).

According to Attorney Greitzer, he met with the petitioner several times, but "never had a conversation" with him until jury selection, because the petitioner refused to confer with him or with Attorney Halpern, the petitioner's death penalty counsel, or the three investigators, Valerie Rivera, Wendy Perez, and Paul Smerechniak, on any occasion. (T.81-82). Counsel recalled going to the prison facility with the others, only to be told that the petitioner was refusing to see them. (T.82).

In fact, counsel explained there were numerous Faretta[14] hearings and during one such proceeding, an order was entered requiring the petitioner to be examined in order to determine whether he was malingering, or attempting to "gain the system." (T.82-83). The only thing Attorney Greitzer did recall with certainty was that the petitioner insisted he wanted a speedy trial. (T.84). As a result, the parties conducted discovery on an expedited basis, in order to get ready for trial. (T.84). By the time the case went to trial, counsel felt he had completed the required pretrial discovery. (T.85).

Attorney Greitzer also explained that, at some point during the case, petitioner mentioned something about being at the Mint at the time of the murder. (T.86). In response, Attorney Greitzer had investigators go to the Mint and try to find witnesses that may have seen the petitioner at that location on the day of the murder. (T.86). However, two investigators, Wendy Perez and Paul Smerechniak, investigated the issue and reported that no one at the Mint had any recollection of seeing the petitioner at that location on the date and time in question, or at any time for that matter. (T.86).

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[14]Faretta v. California, 422 U.S. 806 (1975).

Although he had no independent recollection of Alice Benitez' testimony at the petitioner's trial, after reviewing the trial testimony, Attorney Greitzer recalled that the victim was stabbed numerous times while inside her vehicle, where she "bled out a great deal." (T.87). The testimony further established the victim got out of her car, and a blood trail continued until her body came to rest some six or eight feet from the rear of her car. (T.87). Counsel confirmed that there were no eyewitnesses to the murder, nor was there any fingerprint evidence introduced at trial linking the petitioner to the blood. (T.87). Counsel further recalled that, upon petitioner's arrest, the victim's cellular phone, with her blood on it, was recovered from the petitioner's vehicle. (T.88).

Counsel explained that he requested an independent act instruction in order to attempt to "dazzle" and/or otherwise confuse the jury in an effort to gain an edge with them, especially given the testimony that came out at trial, especially from the three witnesses regarding the phone calls with the petitioner. (T.88-89). Since there were no eyewitnesses placing petitioner at the crime scene, and no fingerprint evidence placing petitioner at the scene, during closing counsel argued that there was insufficient evidence to convict the petitioner. (T.90).

It was strategically important to counsel to keep the "last word" during closing argument, in order to attempt to sway the jury especially given his uncooperative client, who refused to testify, coupled with the heinous nature of the crime, where the victim was brutally stabbed. (T.89-90). Regarding retaining an expert and losing the sandwich closing, counsel explained that he found it counterproductive to obtain an expert to testify and/or otherwise opine consistent with the state's expert. (T.91).

Regarding whether he conducted investigation to ascertain or otherwise pinpoint the time the fatal wound was inflicted, counsel recalled deposing the medical examiner, who testified that there were a lot of superficial wounds, but the initial blow may have cut her carotid artery, and did most of the damage. (T.95). Counsel, could not, however, recall what, if anything, he did with the medical examiner's testimony thereafter. (Id.). For some reason, counsel specifically recalled that the amount of blood in the victim's car was extensive, and there was a blood trail going from the car door to where the victim died some six feet to the rear of her vehicle, where a pool of blood was also found. (T.95-96). Counsel did not think that the timing of the stabbing was "terribly" important. (T.96).

Although counsel acknowledged that evidence of a bloody fingerprint not matching the petitioner or the victim retrieved from the crime scene "could have been" important, he explained that the print could just have easily belonged to anyone first arriving at the scene, like a police officer, a neighbor trying to assist the victim after the 9-1-1 call, EMS, fire rescue, etc.; and, in fact, it could have been anyone's fingerprint at all. (T.101). During closing, counsel attempted to suggest an alibi defense, and although he was aware there was no evidence to support such a defense, as a matter of style, he hoped he could "sell" it to the jury and give them "food for thought," because he did not have "anything" to offer. (T.103).

Counsel also stated that the cell tower and fingerprint evidence was only one portion of the state's case, but what he found extremely troubling was the substance of the phone calls petitioner made at or around the time of the murder. (T.109-11-). He recalled testimony came in at trial from individuals who

recalled receiving telephone calls from petitioner wherein he admitted to having committed the homicide, so that the location from where the petitioner made those calls was not as important to him as the substance of the conversations. (Id.).

## VI. Standard of Review

### A. Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")

This federal habeas petition is governed by 28 U.S.C. §2254(d), as amended by the 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 adjudication of the claim:

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

28 U.S.C. §2254(d). This standard is both mandatory and difficult to meet. White v. Woodall, ___ U.S. ____, ___, 134 S.Ct. 1697, 1702, 188 L.Ed.2d 698 (2014); see also, Debruce v. Commissioner, Alabama Dept. of Corrections, 758 F.3d 1263, 1265-66 (11th Cir. 2014). The AEDPA imposes a highly deferential standard for reviewing the state court rulings on the merits of constitutional claims raised by a petitioner. 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).

"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 issues its decision. White v. Woodall, 134 S.Ct. at 1702; Carey v. Musladin, 549 U.S. 70, 74, 127 S.Ct. 649, 166 L.Ed.2d 482 (2006)(citing Williams v. Taylor, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). 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, 124 S.Ct. 7, 157 L.Ed.2d 263 (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, 125 S.Ct. 1432, 161 L.Ed.2d 334 (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 unreasonable application inquiry "requires the state court decision to be more than incorrect or erroneous," rather, it must be "objectively unreasonable." Lockyer v. Andrade, 538 U.S. 63, 75-77, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003) (citation omitted); Mitchell, 540 U.S.

at 17-18; Ward, 592 F.3d at 1155. 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, 131 S.Ct. 770, 786-787, 178 L.Ed.2d 624 (2011)).

It is also well settled that the state court is not required to cite, or even have an awareness of, governing Supreme Court precedent, "so long as neither the reasoning nor the result of [its] decision contradicts them." Early v. Packer, 537 U.S. 3, 8, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002); *cf.* Harrington, 562 U.S. at 98, 131 S.Ct. at 785 (reconfirming that "§2254(d) does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits'" and entitled to deference); Mitchell v. Esparza, 540 U.S. 12, 16 (2003)("[A] state court's decision is not 'contrary to ... clearly established Federal law' simply because the court did not cite [Supreme Court] opinions.... [A] state court need not even be aware of [Supreme Court] precedents, 'so long as neither the reasoning nor the result of the state-court decision contradicts them.'") (*quoting* Early v. Packer, 537 U.S. at 7-8).

Thus, state court decisions are afforded a strong presumption of deference even when the state court adjudicates a petitioner's claim summarily—without an accompanying statement of reasons. Harrington, 562 U.S. at 91-99, 131 S.Ct. at 780-84 (concluding that the summary nature of a state court's decision does not lessen the deference that it is due); Gill v. Mecusker, 633 F.3d 1272, 1288 (11th Cir. 2011)(acknowledging the well-settled principle that summary affirmances are presumed adjudicated on the merits and warrant deference, citing Harrington, 562 U.S. at 98-99, 131 S.Ct.

at 784-85 and Wright v. Sec'y for the Dep't of Corr., 278 F.3d 1245, 1254 (11th Cir. 2002)). See also Renico v. Lett, 559 U.S. 766, 773, 130 S.Ct. 1855, 1862, 176 L.Ed.2d 678 (2010)("AEDPA ... imposes a highly deferential standard for evaluating state-court rulings ... and demands that state-court decisions be given the benefit of the doubt.")(citations and internal quotation marks omitted).

The Supreme Court has also stated that "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[.]" Miller-El v. Cockrell, 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (*dictum*). 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); see, e.g., Burt v. Titlow, ____ U.S. ___, ___, 134 S.Ct. 10, 1516, 187 L.Ed.2d 348 (2013); Miller-El, 537 U.S. at 340 (explaining that a federal court can disagree with a state court's factual finding and, when guided by AEDPA, "conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence").

Further, the Supreme Court has recognized that the AEDPA imposes a highly deferential standard for evaluating state-court rulings and requires that state-court decisions be given the benefit of the doubt. Burt v. Titlow, _____ U.S. _____, __, 134 S.Ct. 10, 15 (2013)(stating, "AEDPA recognizes a foundational principle of our federal system: State courts are adequate forums for the vindication of federal rights."); Hardy v. Cross, 565

U.S. ___, ___, 132 S.Ct. 490, 491, 181 L.Ed.2d 468 (2011)(noting that the AEDPA "imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt.")(quoting Felkner v. Jackson, 562 U.S. 594, 131 S.Ct. 1305, 1307, 179 L.Ed.2d 374 (2011)). Thus, "[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner 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." Harrington v. Richter, 562 U.S. 86, 101-102, 131 S.Ct. 770, 786-87, 178 L.Ed.2d 624 (2011). See also Greene v. Fisher, ___ U.S. ___, ___, 132 S.Ct. 38, 43, 181 L.Ed.2d 336 (2011)(The purpose of AEDPA is "to ensure that federal habeas relief functions as a guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction.")(internal quotation marks omitted).

As pointed out by the Eleventh Circuit, "the standard of §2254(d) is 'difficult to meet .... because it was meant to be.'" Downs v. Sec'y, Fla. Dep't of Corr's, 748 F.3d 240 (11th Cir. 2013)(*quoting*, Titlow, 134 S.Ct. at 16). This "highly deferential standard" demands that "[t]he petitioner carries the burden of proof," Id., quoting, Cullen v. Pinholster, 563 U.S. 170, 180, 131 S.Ct. 1388, 1398, 1403, 179 L.Ed.2d 557 (2011)(internal quotation marks omitted) and "'that state-court decisions be given the benefit of the doubt,' Woodford v. Visciotti, 537 U.S. 19, 24, 123 S.Ct. 357, 360, 154 L.Ed.2d 279 (2002).'" Id.

Review under §2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. See Cullen v. Pinholster, 563 U.S. 170, 180-90, 131 S.Ct. 1388, 1398-1400, 1403, 179 L.Ed.2d 557 (2011)(holding new evidence

introduced in federal habeas court has no bearing on Section 2254(d)(1) review). And, a state court's factual determination is entitled to a presumption of correctness. 28 U.S.C. §2254(e)(1). Under 28 U.S.C. §2254(e)(1), this Court must presume the state court's factual findings to be correct unless the petitioner rebuts that presumption by clear and convincing evidence. See id. §2254(e)(1). As recently noted by the Eleventh Circuit in Debruce, 758 F.3d at 1266, although the Supreme Court has "not defined the precise relationship between §2254(d)(2) and §2254(e)(1)," Burt v. Titlow, ____ U.S. ____, ____, 134 S.Ct. 10, 15, 187 L.Ed.2d 348 (2013), the Supreme Court has emphasized "that a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." Burt, Id. (*quoting* Wood v. Allen, 558 U.S. 290, 301, 130 S.Ct. 841, 849, 175 L.Ed.2d 738 (2010)).

**B. Ineffective Assistance of Counsel Standard**

Petitioner also claims that trial counsel provided constitutionally ineffective assistance. This Court's analysis begins with the familiar rule that the Sixth Amendment affords a criminal defendant the right to "the Assistance of Counsel for his defense." U.S. CONST. amend. VI. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In Strickland, the Supreme Court established a two-part test to determine whether a convicted person is entitled to habeas

relief on the grounds that his or her counsel rendered ineffective assistance: (1) whether counsel's representation was deficient, i.e., "fell below an objective standard of reasonableness" "under prevailing professional norms," which requires a showing that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"; and (2) whether the deficient performance prejudiced the defendant, i.e., there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, which "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 688; see also Bobby Van Hook, 558 U.S. 4, 8, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009); Cullen v. Pinholster, 563 U.S. 170, 185, 131 S.Ct. 1388, 1403 179 L.Ed.2d 557 (2011).

"[T]he Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices." Bobby Van Hook, 558 U.S. at 9 (internal quotations and citations omitted). A court must adhere to a strong presumption that "counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. Strategic choices made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable. Id. at 690-91. To uphold a lawyer's strategy, the Court need not attempt to divine the lawyer's mental processes underlying the strategy. "There are countless ways to provide effective assistance in any given case." Strickland, 466 U.S. at 689. No lawyer can be expected to have considered all of the ways. Chandler v. United States, 218 F.3d 1305, 1316 (11th Cir. 2000)(*en banc*), cert. den'd, 531 U.S. 1204 (2001). If the petitioner cannot meet one of Strickland's prongs, the court does

not need to address the other prong. Strickland, 466 U.S. at 697. See also Butcher v. United States, 368 F.3d 1290, 1293 (11th Cir. 2004); Holladay v. Haley, 209 F.3d 1243, 1248 (11th Cir. 2000).

The Strickland test applies to claims involving ineffective assistance of counsel during the punishment phase of a non-capital case. See Glover v. United States, 531 U.S. 198 (2001)(holding "that if an increased prison term did flow from an error [of counsel] the petitioner has established Strickland prejudice"). Prejudice is established if "there is a reasonable probability that but for trial counsel's errors the defendant's non-capital sentence would have been significantly less harsh." Spriggs v. Collins, 993 F.2d 85, 88 (5th Cir. 1993). The standard is also the same for ineffective assistance of appellate counsel claims, requiring petitioner to demonstrate deficient performance and prejudice. Philmore v. McNeil, 575 F.3d 1251, 1264 (11th Cir. 2009)(citing Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991)); Smith v. Robbins, 528 U.S. 259, 285-86, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000); Roe v. Flores-Ortega, 528 U.S. at 476-77.

If the Court finds there has been deficient performance, it must examine the merits of the claim omitted on appeal. If the omitted claim would have had a reasonable probability of success on appeal, then the deficient performance resulted in prejudice. Eagle, 279 F.3d at 943. See also Digsby v. McNeil, 627 F.3d 823, 831 (11th Cir. 2010)(holding that to determine whether the petitioner's appellate counsel rendered ineffective assistance, the court must assess the strength of the claim that the petitioner asserts his appellate counsel should have raised in his state direct appeal and only if failure to bring the claim both rendered counsel's performance deficient and resulted in prejudice to the petitioner was there ineffective assistance); Joiner v. United

States, 103 F.3d 961, 963 (11th Cir. 1997). Non-meritorious claims which are not raised on direct appeal do not constitute ineffective assistance of counsel. Diaz v. Sec'y for the Dep't of Corr's, 402 F.3d 1136, 1144-45 (11th Cir. 2005).

Further, the Supreme Court has held that the Sixth Amendment does not require appellate attorneys to press every non-frivolous issue that the client requests to be raised on appeal, provided that counsel uses professional judgment in deciding not to raise those issues. Jones v. Barnes, 463 U.S. 745 (1983). In considering the reasonableness of an attorney's decision not to raise a particular issue, this Court must consider "all the circumstances, applying a heavy measure of deference to counsel's judgments." Eagle v. Linahan, 279 F.3d 926, 940 (11th Cir. 2001), quoting, Strickland, 466 U.S. at 691.

Keeping these principles in mind, the Court must now determine whether counsel's performance was both deficient and prejudicial under Strickland. As indicated, Courts must be highly deferential in reviewing counsel's performance, and must apply the strong presumption that counsel's performance was reasonable. "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689. See also Chandler v. United States, 218 F.3d at 1314. "Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284, 297 (2010). See also Osborne v. Terry, 466 F.3d 1298, 1305 (11th Cir. 2006)(citing Chandler v. United States, 218 F.3d at 1313).

A habeas court's review of a claim under the Strickland standard is "doubly deferential." Knowles v. Mirzayance, 556 U.S.

111, 123, 129 S.Ct. 1411, 1420, 173 L.Ed.2d 251 (2009), citing, Yarborough v. Gentry, 540 U.S. 1, 5-6, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003)(per curiam). The relevant question "is not whether a federal court believes the state court's determination under the Strickland standard was incorrect but whether that determination was unreasonable-a substantially higher threshold." Knowles, 556 U.S. at 123, 129 S.Ct. at 1420. (citations omitted). Finally, "because the Strickland standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." Id

Under AEDPA, a habeas petitioner must establish that the state court's application of Strickland was unreasonable under 28 U.S.C. §2254(d). "Where the highly deferential standards mandated by Strickland and AEDPA both apply, they combine to produce a doubly deferential form of review that asks only 'whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.'" Gissendaner v. Seaboldt, 735 F.3d 1311, 1323 (11th Cir. 2013)(quoting Harrington, 562 U.S. at 103, 131 S.Ct. at 788).

## VII. Discussion

In **claim 1**, petitioner asserts that he was denied effective assistance of counsel, where his lawyer failed to investigate the time line of the fatal injury as suggested by the prosecution's medical expert. (DE#1:4). He maintains that had counsel followed up on the advice provided by the state medical examiner to seek a second opinion regarding the time line as to the murder, the investigation would have led to evidence to support the petitioner's alibi defense at trial. (Id.). Petitioner suggests counsel could have established that he was not present at the crime scene at the time the fatal wound was inflicted. (Id.).

When the identical claim was raised in the Rule 3.850 proceeding, it was denied by the trial court, following an evidentiary hearing, on the following basis:

> ...The Defendant's general argument is that trial counsel should have pursued several possible avenues to narrow the time frame of the murder, to establish that the Defendant could not have been at the scene of the crime when the victim received the fatal wound, and to further bolster the Defendant's alibi defense. The specific items of evidence include: (1) the testimony of an expert such as Dr. Shuman that the victim could only have lived for a short time after receiving the fatal wound; (2) the grand jury testimony of Dr. Motte, the State's medical examiner, regarding the approximate time of the victim's death; and (3) the records of several 911 calls from the night of the murder.
>
> The Defendant's post-conviction counsel detailed the argument in her post-hearing brief as follows: The police were dispatched to the victim's residence in the city of Fort Lauderdale based on a 911 call from Iris Heath at 1:35 a.m. on the morning of May 10. At trial, Ms. Heath testified that she heard strange noises for two to five minutes, then saw the victim on her hands and knees before falling, then waited another two to five minutes before calling 911. Dr. Shuman testified at the evidentiary hearing that the victim would have died very quickly, within five minutes, after receiving the fatal wound. Assuming a time of death of 1:30 a.m., the fatal wound therefore had to have been inflicted no earlier than 1:25 a.m., which is consistent with Ms. Heath's testimony. Yet cell phone records show a series of calls made by the Defendant beginning around 1:00 a.m., originating from several different cell towers, showing that he was traveling south from the victim's residence toward Miami-Dade County. The defense focuses on a call placed by the Defendant from the victim's phone at 1:27 a.m. which originated from a cell tower near the Calder Racetrack in Miramar, approximately 20 minutes away from the victim's residence and the scene of the murder. The Defendant argues this evidence should have been introduced to show that he absolutely could not have been at the scene of the crime when the victim received the fatal wound.

For several reasons, the Court finds the Defendant has failed to establish any deficiency of counsel as to this claim. First, the Defendant's argument is flawed because there is no testimony anywhere in the record that the victim's exact time of death was 1:30 a.m. The Defendant claims Dr. Motte testified to that fact at the grand jury proceeding; however, the Court has reviewed the portion of Dr. Motte's testimony attached to the Defendant's Motion, and finds Dr. Motte did not actually testify as the Defendant claims. Dr. Motte was asked, "assuming this occurred approximately 1:30 a.m. on the morning of the 10th," whether the victim's stomach contents were consistent with having eaten around 10:30 or 11:00 the night before. He answered in the affirmative, but that is in no way an absolute statement that the victim's exact time of death was 1:30 a.m. (See attached transcript, 14-15).

Second, the argument relies heavily on Dr. Shuman's testimony that the victim would have died within five minutes after receiving the fatal wound. Without that testimony, it would be entirely possible for the jury to conclude that the Defendant wounded the victim at approximately 1:00 a.m., before leaving the scene, and that she was still alive when Ms. Heath heard and saw her at approximately 1:25 a.m. At trial, Dr. Motte testified he could not say how long the victim lived after receiving the fatal wound. (Tr. 1709, attached.). The Defendant alleges his attorney deposed Dr. Motte and therefore knew he would not provide an opinion on that matter, and should have retained an independent expert. However, the fact that the Defendant was able to obtain such a favorable expert for the post-conviction proceedings does not necessarily mean counsel was ineffective for not doing so for the trial. *See Jennings v. State*, ___ So.3d ___, 2013 WL 321442, *8 (Fla. June 27, 2013); *Darling v. State*, 966 So.2d 366, 377 (Fla. 2007); *Peede v. State*, 955 So.2d 480, 494 (Fla. 2007); *Jones v. State*, 928 So.2d 1178, 1188 (Fla. 2006); *Davis v. State*, 875 So.2d 359, 372 (Fla. 2003); *Asay v. State*, 769 So.2d 974, 985 (Fla. 2000); *see also Strickland*, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight...."); *Cherry*, 659 So.2d at 1073 ("The standard is not how present could would have proceeded, in hindsight....").

> Finally, and most importantly, as explained above, Mr. Greitzer decided not to present a case in chief and instead to take advantage of "sandwich" arguments to emphasize reasonable doubt and lack of physical evidence. Mr. Greitzer did specifically argue during his closing arguments that the Defendant could not be guilty based on the time line of events that night, even though he did not present any substantive evidence as to those facts. (Tr. 3020-34,3064-74, attached.). Again, there is no evidence in the record to suggest the Defendant disagreed with this strategy at the time of trial and the Defendant did not elicit any testimony from Mr. Greitzer at the evidentiary hearing regarding this decision or any conversations they might have had regarding it. As explained above, this was an entirely valid and reasonable defense strategy based on the procedural rules and prevailing professional standards at the time of the trial. *See Beasley, Evans,* and *Van Poyck, supra.* Therefore, the Defendant has failed to establish either deficiency or prejudice under *Strickland,* and this ground must be denied.

(DE#13:Ex.54:17-19). That denial was subsequently *per curiam* affirmed on appeal in a decision without written opinion. Nairn v. State, 160 So.3d 450 (Fla. 4 DCA 2015)(table); (DE#13:Ex.78).

As will be recalled, given the facts adduced at trial, coupled with counsel's testimony at the Rule 3.850 proceeding, and the trial court's rejection of the claim as summarized above, it is evident that the petitioner has not demonstrated either in the state forum or this habeas proceeding that he is entitled to relief on this claim. Petitioner has not demonstrated either deficient performance or prejudice under Strickland. He has not shown that even if the time frame of the murder had been further investigated in relation to the petitioner's location thereafter, this information would have, in fact, conclusively established he did not commit the murder and was not at the crime scene on or around the time the victim was repeatedly stabbed by her assailant. This is especially true in

light of the testimony of the various witnesses introduced at trial, including witnesses that claimed to know the petitioner, coupled with petitioner's own post-arrest statement, wherein he admitted to having killed the victim, taken together with the fact that the petitioner was in possession of the victim's cellular phone at the time of his arrest--which still had the victim's DNA and blood on it.

Briefly, at 1:27 a.m., evidence adduced at trial established petitioner called one of the victim's friends, and when that person called back at 1:28 a.m., petitioner informed them he had "just cut [the victim's] throat." (DE#101:T.1941,1946). Petitioner called a second friend of the victim at 1:31 a.m. and told that person he had just killed the victim. (T.1859-63). The 9-1-1 caller, Heath, testified she saw the victim on her knees, and dialed the 9-1-1 operator "probably five minutes" later. (T.1602-03, 1619-20). Records show the call was, in fact, placed to 9-1-1 at 1:35 a.m., and police arrived at the scene at 1:40 a.m. (T.1655-1656). Meanwhile, at 2:17 a.m., petitioner called yet another one of the victim's friends, from the victim's cellular phone, and said that he had just "hooked," meaning stabbed her. (T.1965). The medical examiner could not determine exactly how long it took for the victim to die after the fatal injury was inflicted, because "[i]t depends on how quickly she's bleeding and how fast her heart is beating." (T.1709). Finally, the evidence further established that it was possible to drive within 30 minutes from the crime scene to where the 1:28 a.m. call was placed by petitioner. (T.2509).

Petitioner suggests that counsel's strategy was flawed because strategically deciding against presenting any witnesses at trial in order to maintain "sandwich" closing argument is disingenuous since Florida law allowing for the defense to do so had been repealed by

the time petitioner went to trial. (DE#17:12). The record reveals that closing arguments occurred on November 30, 2006. (DE#13:Ex.101:2960). Petitioner's counsel made initial and rebuttal closing arguments. (DE#13:Ex.101:T.3020-34,3064-74). The amendment to the Florida Rules of Criminal Procedure suggested by the petitioner did not take effect until 2007, after petitioner's trial had concluded. See In re Amend. to the Fla. Rules of Cr. P. - Final Arguments, 957 So.2d 1164 (Fla. 2007). Consequently, petitioner has again failed to establish that counsel's decision was unreasonable. No deficient performance or prejudice under Strickland has been established in this regard. Therefore, relief on this basis is not warranted.

Under the totality of the circumstances present here, petitioner has not demonstrated that counsel's failure to investigate and secure an expert to testify as to the time line of the murder in relation to the petitioner's location would have supported an alibi defense, or would have otherwise demonstrated that the petitioner was not present at the time the victim received the fatal stab wound. His representation here that such investigation would have led to exculpatory evidence is, at best, speculative. Thus, petitioner has not shown that further investigation by counsel would have undermined the prosecution's evidence at trial, resulting in an acquittal of the charge. The trial court's conclusions, following an evidentiary hearing, was not an unreasonable application of Strickland and is entitled to deference in this habeas proceeding. Consequently, the petitioner is not entitled to habeas corpus relief on this claim.

In **claim 2**, petitioner asserts that he was denied effective assistance of counsel, where his lawyer failed to investigate whether the bloody prints belonged to the victim, as suggested by

the prosecution, or to another perpetrator, as set forth by the petitioner in his theory of defense. (DE#1:5). Petitioner claims counsel had a duty to investigate the bloody prints found at the scene because it belongs to the person who actually committed the homicide. (Id.). According to petitioner, had counsel conducted further investigation, exculpatory evidence would have been unearthed that would have resulted in an acquittal of the charge. (Id.).

As with claim 1 above, neither in the state forum nor this habeas proceeding has the petitioner conclusively established that further investigation would have pointed to an alternative perpetrator. To the contrary, the evidence adduced at trial clearly has petitioner admitting to numerous individuals that he killed the victim. He was also in possession of her bloodied cellular phone. He did not deny being at the scene of the stabbing while the victim was purportedly still alive, yet left the scene before help arrived.

Regardless, as will be recalled, at trial, through strong cross-examination, it was established that the bloody fingerprints retrieved from the victim's car, excluded the petitioner. (DE#101:2118-19). At the Rule 3.850 proceeding, counsel explained he strategically felt no need to obtain a second expert that would merely corroborate the state's expert, from which he was able to gain favorable testimony for the defense. (DE#47:96-97).

When the identical claim was raised during the Rule 3.850 proceeding, it was rejected by the trial court, following an evidentiary hearing, on the following basis:

> In ground six, the Defendant claims trial counsel was ineffective for failing to object to testimony

elicited by the State concerning evidence that was not disclosed prior to trial. State's Exhibit Y, which was never entered into evidence and the Defendant alleges was never disclosed prior to trial, was a report that revealed several bloody fingerprints retrieved from a car at the crime scene. Alice Benitez, the State's fingerprint expert, testified at trial that she analyzed Exhibit Y and did not make any positive identification, but excluded the Defendant. (Tr.2117-19).

The Defendant argues that trial counsel should have asked for a continuance in order to have the Exhibit analyzed by an independent expert. At the evidentiary hearing, the defense presented the testimony of Gerald Cole, who testified there was one portion of the Exhibit that he could state did not belong to the victim. The Defendant argues that if similar testimony had been presented at trial, in addition to Mr. Benitez' testimony, it would have supported his claim that there was a third person at the crime scene, and would have given the jury an alternate suspect, providing them an opportunity to find reasonable doubt.

Mr. Greitzer testified at the evidentiary hearing that he did not hire an independent fingerprint expert to testify at trial because he wanted to take advantage of "sandwich" closing arguments. He further testified that the Defendant was extremely uncooperative and refused to communicate with him or his investigators until after the trial had commenced, except to express his wish for a speedy trial. Mr. Greitzer testified that he felt the State's case was weak, in terms of physical evidence, and therefore he decided not to present a case in chief and instead to take advantage of "sandwich" arguments to emphasize reasonable doubt and lack of evidence. This was an entirely valid and reasonable defense strategy based on the procedural rules and prevailing professional standards at the time of the trial. *See Beasley v. State*, 18 So.3d 473, 491-92 (Fla. 2009); *Evans v. State*, 995 So.2d 933, 945 n.16 (Fla. 2008); *Van Poyck v. State*, 694 So.22d 686, 697 (Fla. 1997). There is no evidence in the record to suggest the Defendant disagreed with this strategy at the time of trial, and the Defendant did not elicit any testimony from Mr. Greitzer at the evidentiary hearing regarding how these strategic decisions were made.

> The Court further notes that Ms. Benitez's testimony was actually favorable to the Defendant, since she was able to exclude him as a source of the fingerprints, and trial counsel used this fact to argue reasonable doubt during closing argument. (Tr.3025,3031-32, attached.). The Court finds that Mr. Greitzer made a reasonable strategic decision not to relinquish the last word at closing arguments in order to call another fingerprint expert to testify, especially since the State's expert eliminated the Defendant as the person who left the fingerprints on the car. Therefore, the Defendant has failed to establish any deficiency of counsel under *Strickland*, and this ground must be denied.

(DE#13:Ex.54:17-19). That denial was subsequently *per curiam* affirmed on appeal in a decision without written opinion. Nairn v. State, 160 So.3d 450 (Fla. 4 DCA 2015)(table); (DE#13:Ex.78).

Given the record before this court, it is evident that the trial court's rejection of the claim was neither contrary to nor an unreasonable application of Strickland. It is worth mentioning that even had counsel further investigated the issue as suggested, at best, by petitioner's own admissions, the information would have been cumulative to that elicited by counsel through the testimony of Benitez, which excluded petitioner as the source of the fingerprints.

Petitioner cannot demonstrate that his post-conviction counsel was ineffective, much less that he suffered prejudice therefrom arising from counsel's failure to investigate and retain an expert to testify as proffered. While such proffered testimony at first blush appears to support petitioner's alibi defense, it does not provide with specificity that there was no possible way petitioner could have committed the stabbing on the day in question, much less that he did not later admit to numerous individuals having done so.

The law is well settled that counsel is not required to call additional witnesses to present redundant or cumulative evidence. See e.g., Brown v. United States, 720 F.3d 1316, 1327 (11th Cir. 2013) (rejecting an ineffective-assistance claim when much of the newly proffered evidence was cumulative); Ford v. Hall, 546 F.3d 1326, 1338 (11th Cir. 2008)("Counsel is not required to call additional witnesses to present redundant or cumulative evidence."); Ford v. Hall, 546 F.3d 1326, 1338 (11th Cir. 2008); Jennings v. McDonough, 490 F.3d 1230, 1244 (11th Cir. 2007), cert. den'd, ___ U.S. ___, 128 S.Ct. 1762, 170 L.Ed.2d 544 (2008); Marquard v. Sec'y for Dep't of Corr's, 429 F.3d 1278, 1307-1308 (11th Cir. 2005).

Even if such investigation and alleged testimony were not cumulative, the proposed testimony would not have affected the outcome of the trial. For example, petitioner has not shown that the calls made from the victim's cellular phone on the day of the murder, as testified to by the numerous state witnesses at trial, was made by anyone other than the petitioner. To the contrary, some testified they knew the petitioner and he called stating he had, in fact, killed the victim. Moreover, evidence showed that, at the time of his arrest, he was in possession of the victim's cellular phone, which not only had the victim's DNA, but still had her blood on it. Petitioner did not dispute this evidence during the Rule 3.850 proceeding, and instead argued that the phone actually belonged to him, even though it was in the victim's name.

Petitioner has not presented whether any further investigation of the prints would have led to the identity of another individual involved in the offense. As explained by counsel during the Rule 3.850 proceeding, it could well have been caused by EMT personnel, witnesses at the scene trying to lend aid to the fallen victim, etc. Even if it would have supported the petitioner's theory, his

suggestion that it would have discredited the state's theory that the bloody prints belonged to the victim, is pure speculation. Petitioner admits that the evidence established that some of the bloody prints recovered, in fact, were those of the victim. Merely because the identity of one of the fingerprints could not be ascertained as belonging to either the victim or the petitioner does not establish that the petitioner was not the assailant.

Contrary to petitioner's representations here, the state did not inform the jury that the blood prints belonged solely to the victim, but rather indicated that Benitez testified she could not exclude the victim as being the person who left the prints. (DE#13:Ex.101:T.3054). Petitioner here speculates that further investigation and examination would have definitively established that the assailant was anyone other than the petitioner. Thus, such a speculative, conclusory representation warrants no habeas relief.

Even if it could be construed as alleged by petitioner, the jury would have been free to weigh the credibility of the petitioner's witness and the witness' motive for testifying in reaching its verdict. Counsel's failure to call this witness to testify at trial should not be second-guessed here. Having failed to establish prejudice under Strickland, petitioner is not entitled to relief on this basis. Under such circumstances, the petitioner is entitled to no relief on this claim given the settled federal principle that tactical or strategic choices by counsel cannot support a collateral claim of ineffective assistance. McNeal v. Wainwright, 722 F.2d 674 (11 Cir. 1984); United States v. Costa, 691 F.2d 1358 (11 Cir. 1982); Coco v. United States, 569 F.2d 367 (5 Cir. 1978).

If such a decision in retrospect appears incorrect, it can

constitute ineffective assistance only "if it was so patently unreasonable that no attorney would have chosen it," Adams v. Wainwright, 709 F.2d 1443, 1445 (11 Cir.), cert. denied, 464 U.S. 1663 (1984), or if the petitioner can demonstrate a "reasonable probability that the verdict [otherwise] would have been different." Kimmelman v. Morrison, 477 U.S. 365, 375 (1986). Neither showing has been made here.

In **claim 3**, petitioner asserts that he was denied effective assistance of counsel, where his lawyer requested a factually and legally inapplicable independent acts jury instruction. (DE#1:6). In support thereof, petitioner explains that since there was no co-defendant in his case, it was error for counsel to have requested such an instruction. (Id.). Petitioner suggests that the rejection of this claim was unreasonable in that there was no reasonable strategy for counsel to have requested an inapplicable jury instruction. (Id.). He suggests the instruction attributed liability to him for a crime he did not commit and thus nullified his alibi theory of defense. (DE#17:18-19).

When the identical claim was raised during the Rule 3.850 proceeding, it was denied by the trial court, following an evidentiary hearing, on the following basis:

> ...The Defendant argues that this instruction was factually and legally inapplicable because he never claimed there was a "co-conspirator" or "co-felon" who killed the victim unforeseeably outside the scope of a criminal agreement. Further, the Defendant argues the statement "If you find the defendant was not present when the crime of (crime alleged) occurred, that, in and of itself, does not establish that the (crime alleged) was an independent act of another" conflicted with his alibi defense by informing the jury they could find that he was not present at the scene of the crime and still find him

guilty.

In his statement to law enforcement, the Defendant claimed he had been at the scene of the murder and had an encounter with a third person that ended in a pushing match, and then left before the victim was wounded or killed. (Tr.2708-38). Trial counsel cross-examined one of the detectives about a person named Eric, who never gave a police statement. (Tr.2972). At the evidentiary hearing, Mr. Greitzer testified that he requested the independent act instruction in order to give the jury an opportunity to find the Defendant not guilty based on a theory involving this third person. The trial court granted the instruction "in an abundance of caution" in order to allow Mr. Greitzer's theory regarding the "mystery third person." (Tr.3006-07, attached.).

Strategic decisions by trial counsel do not constitute ineffective assistance of counsel if counsel's decision was reasonable under the norms of professional conduct, and the post-conviction court should not second-guess counsel's strategic decisions in hindsight. Furthermore, trial counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decision. *See Strickland*, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight...."); *Cherry v. State*, 659 So.2d 1069, 1073 (Fla. 1995)("The standard is not how present counsel would have proceeded, in hindsight...."); *see also Johnson v. State*, 769 So.2d 990, 1000-01 (Fla. 2000); *Occhicone v. State*, 768 So.2d 1037, 1048-49 (Fla. 2000); *Rutherford v. State*, 727 So.2d 216, 223-24 (Fla. 1998); *State v. Bolender*, 503 So.2d 1247, 1250 (Fla. 1987).

The Court finds that trial counsel's strategic decision to request the independent act instruction was a valid and reasonable attempt to create reasonable doubt in the minds of the jury regarding the third person the Defendant claims was present at the scene of the crime. The Defendant has failed to establish any deficiency of counsel under *Strickland*, and this ground therefore must be denied.

(DE#13:Ex.54:17-19). That denial was subsequently *per curiam*

affirmed on appeal in a decision without written opinion. Nairn v. State, 160 So.3d 450 (Fla. 4 DCA 2015)(table); (DE#13:Ex.78).

Contrary to the petitioner's representation here and in the state forum, during trial his post-arrest statement was admitted into evidence. (DE#13:Ex.101:T.2707). In his statement, petitioner advised police that there was an unknown man at the scene of the murder with whom he had fought. (Id.:2707,2735-41). In fact, petitioner stated at the time that, "it was three of us." (T.2707). When asked if he knew who stabbed the victim, the petitioner responded, "I don't know him." (T.2829). Since another individual might have been present at the time of the murder, the court gave the requested instruction. (T.2957-58,3006-07,3091-92).

Further, as will be recalled, Attorney Greitzer testified at the Rule 3.850 hearing that he asked for the instruction because there had been mention made of an individual named "Eric" with whom petitioner had had a dispute at the location where the homicide occurred. (DE#13:Ex.47:94). Counsel further testified that he requested the independent act instruction in order to attempt to "dazzle" and/or otherwise confuse the jury in an effort to gain an edge with them, especially given the testimony that came out at trial, especially from the three witnesses regarding their conversation with petitioner on the day of the murder. (T.88-89). Given the evidence at trial, it was not unreasonable for counsel to strategically ask for the the instruction in order to lend credibility to the notion that it was a third party who actually committed the homicide.

Even if it was error to have requested the instruction, petitioner cannot demonstrate that the giving of the instruction resulted in his conviction at trial. In other words, he cannot

demonstrate prejudice under Strickland. Even absent the instruction, given the testimony of the various witnesses, together with the fact that the bloody cellular phone was found in petitioner's possession, coupled with the fact that the victim was overheard that day telling petitioner not to come over that things were not going to work between them, petitioner has not shown here nor in the state forum that the error complained of resulted in his conviction. Having failed to show that the outcome of the proceeding would have been different, but for the alleged deficient performance, petitioner cannot prevail on this claim. Thus, the trial court's rejection of the claim in the Rule 3.850 proceeding was not unreasonable in light of the record, and should not be disturbed here. Williams v. Taylor, supra.

In **claim 4**, petitioner asserts that he was denied effective assistance of counsel on appeal, where his lawyer failed to assign as error that the court gave a factually and legally inapplicable jury instruction on independent acts. (DE#1:7). For the reasons previously stated in relation to claim 3 above, petitioner cannot demonstrate deficient performance or prejudice arising from appellate counsel's failure to challenge on appeal the trial court's instruction to the jury on independent acts which was not factually or legally applicable to the petitioner's case. See Matire v. Wainwright, 811 F.2d 1430, 1435 (11 Cir. 1987).

It is well settled that appellate counsel has no duty to raise nonmeritorious issues on appeal. Matire v. Wainwright, 811 F.2d 1430, 1435 (11 Cir. 1987). Further, under Florida law, when a party invites the error at trial, he cannot then take advantage of the error on appeal. See Terry v. State, 668 So.2d 954, 962 (Fla. 1996). Consequently, since the defense asked for the instruction, whether error or not, petitioner cannot fault appellate counsel for failing

to raise the issue as one of trial court error. Moreover, like federal courts, issues challenging counsel's effectiveness in the state forum are properly raised by Rule 3.850 motion and not on direct appeal. Therefore, the rejection of this claim on the merits during petitioner's state habeas corpus petition should not be disturbed here. Williams v. Taylor, supra.

In **claim 5**, petitioner asserts that his right to a fair and impartial disposition of his pending claims in state court is being abridged by the prosecution and the court whom have failed to resolve the petitioner's pending claims in a timely and expeditious manner. (DE#1:9). As will be recalled, petitioner does not contest that this claim is unexhausted.

Federal courts are also bound by a state court's interpretation of its own rules of evidence and procedure. Machin v. Wainwright, 758 F.2d 1431, 1433 (11 Cir. 1985). Admission of prejudicial evidence may support habeas corpus relief only where the evidence is "material in the sense of a crucial, critical, highly significant factor." Id., (*quoting* Osborne v. Wainwright, 720 F.2d 1237, 1238-39 (11 Cir. 1983)). In Machin, the Eleventh Circuit found that the "surprise" disclosure did not rise to the level of a constitutional due process violation. 758 F.2d at 1433, 1434.

Moreover, the manner in which a state trial court conducts state court proceedings is a matter of state law and not cognizable in a writ of habeas corpus unless the hearing and ultimate ruling rendered the trial fundamentally unfair. See e.g., Alderman v. Zant, 22 F.3d 1541, 1555 (11 Cir. 1994); Lynd v. Terry, 470 F.3d 1308, 1314 (11 Cir. 2006). See also Baxter v. Thomas, 45 F.3d 1501, 1509 (11 Cir. 1985)(federal habeas corpus is not vehicle to correct evidentiary rulings); Boykins v. Wainwright, 737 F.2d 1539, 1543 (11

Cir. 1984)(federal courts are not empowered to correct erroneous evidentiary rulings in state court except where rulings deny petitioner fundamental constitutional protections).

Here, the petitioner has not overcome the procedural default of the claim. Even if he had, he is still entitled to no relief on this claim. Construed liberally, if petitioner is raising a claim seeking mandamus relief, asking this court to order the state court to comply and/or otherwise resolve any and all pending motions filed by petitioner, the petitioner is also entitled to no relief herein on such an argument.

A federal district court has jurisdiction under 28 U.S.C. §1361, which provides: "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." Mandamus is the traditional writ designed to compel government officers to perform nondiscretionary duties. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 168-69, 2 L.Ed. 60 (1803).

However, mandamus is an extraordinary remedy reserved for extraordinary situations. United States v. Coy, 19 F.3d 629, 635 (11th Cir. 1994). In order to establish that mandamus relief is proper, a petitioner must demonstrate the following: (1) a clear right to the relief sought; (2) a clear duty by the respondent to do the particular act requested; and (3) the lack of any other adequate remedy. In re Stone, 118 F.3d 1032, 1034 (5th Cir. 1997); Green v. Heckler, 742 F.2d 237, 241 (5th Cir. 1984). To qualify for mandamus relief, the respondent must owe the party a clear, non-discretionary duty to perform a particular act. Heckler v. Ringer, 466 U.S. 602, 606 (1984). No such showing has been made in this

case.

Significantly, application of the mandamus remedy to require a public official to perform a duty imposed upon him in his official capacity is not limited by sovereign immunity. In Houston v. Ormes, the Supreme Court held that suits to compel federal officers "'to perform some ministerial duty imposed upon them by law, and which they wrongfully neglect or refuse to perform . . . would not be deemed suits against the United States within the rule that the Government cannot be sued except by its consent.'" 252 U.S. 469, 472-73 (1920) (quoting Minnesota v. Hitchcock, 185 U.S. 373, 386 (1902)).

Federal Rule of Civil Procedure 81(b) provides, "[R]elief heretofore available by mandamus . . . may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules." Fed.R.Civ.P. 81(b); Norton v. Rathmann, 2006 WL 1517146, at *1 (M.D.Fla. May 24, 2006). The generic "civil action" of the new rules, see Fed.R.Civ.P. 2, provides the form of action in which mandamus relief is now available. Congress confirmed the availability of relief "in the nature of mandamus" with the passage of the Mandamus and Venue Act, 28 U.S.C. §1361.

The relief, however, is available only to compel a government officer to perform a duty that is "ministerial, clearly defined, and peremptory" as opposed to duties within the officer's discretion. See, e.g. Carpet, Linoleum & Resilient Tile Layers, Local Union No. 419 v. Brown, 656 F.2d 564, 566 (10 Cir. 1981) (quoting Schulke v. United States, 544 F.2d 453, 455 (10 Cir. 1976)). Here, petitioner does not allege any "ministerial, clearly defined, and peremptory" duty owed to him to justify granting mandamus relief. Moreover, the plaintiff is seeking mandamus against state actors which is not a

remedy through the use of mandamus.

Further, to the extent petitioner seeks a ruling on the petition for writ of habeas corpus filed in 2014 in the state trial court, and later administratively stayed pending resolution of a then pending appeal, as noted previously, federal habeas corpus relief does not lie when challenging the state courts' administration of their own rules and proceedings. Petitioner may file a motion with the state trial court seeking to lift the stay and for ruling on the petition. This court, however, takes no position on the merits of such a position, which in any event, is not cognizable here.[15]

Under the totality of the circumstances present here, petitioner has not demonstrated that his constitutional rights were violated, much less that counsel was deficient under Strickland for any of the reasons stated, or that petitioner suffered prejudice arising therefrom. Consequently, relief must be denied. Thus, whether or not any of the grounds raised herein were properly exhausted in the state forum, since they fails on the merits or are otherwise not cognizable in this proceeding, the rejection or lack thereof should not be altered here. Williams v. Taylor, supra.

In conclusion, the record reflects that the petitioner received vigorous and able representation more than adequate under the Sixth Amendment standard. See Strickland v. Washington, 466 U.S. 668 (1984). Defense counsel made a reasonable investigation of the facts, was well-prepared for trial, conducted full and extensive cross-examination of the state's witnesses, made appropriate

[15]It is worth noting that the petitioner has been banned by the appellate court from continuing to file frivolous motions. The state trial court, however, has entered no such order.

objections, moved for judgment of acquittal, and presented a forceful closing argument. In fact, given counsel's preparation and trial strategy, it will be recalled that the jury returned a verdict of second degree murder, as a lesser included offense of first degree murder, as originally charged in the Indictment. Petitioner has, therefore, failed to demonstrate that he was deprived of constitutionally effective assistance of counsel for any or all of the reasons alleged above. Petitioner is not entitled to federal habeas corpus relief on any of the claims presented.

Finally, this court has considered all of the petitioner's claims for relief, and arguments in support thereof. See Dupree v. Warden, 715 F.3d 1295 (11th Cir. 2013)(citing Clisby v. Jones, 960 F.2d 925 (11th Cir. 1992)). For all of his claims, petitioner has failed to demonstrate how the state courts' denial of his claims, to the extent they were considered on the merits in the state forum, were contrary to, or the product of an unreasonable application of, clearly established federal law. To the extent they were not considered in the state forum, and a *de novo* review of the claim conducted here, as discussed in this Report, none of the claims individually, nor the claims cumulatively, warrant relief. Thus, to the extent a precise argument, subsumed within any of the foregoing grounds for relief, was not specifically addressed herein or in the state forum, all arguments and claims were considered and found to be devoid of merit, even if not discussed in detail herein.

## VIII. Evidentiary Hearing

Petitioner's request for an evidentiary hearing must be denied. To determine whether an evidentiary hearing is needed, 'The pertinent facts of this case are fully developed in the record before the Court. Because this Court can "adequately assess

[Petitioner's] claim[s] without further factual development," Turner v. Crosby, 339 F.3d 1247, 1275 (11th Cir. 2003), cert. den'd, 541 U.S. 1034 (2004), an evidentiary hearing is not warranted.

## IX. Certificate of Appealability

As amended effective December 1, 2009, §2254 Rule 11(a) provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. §2253(c)(2)." A timely notice of appeal must still be filed, even if the court issues a certificate of appealability. Rules Governing §2254 Proceedings, Rule 11(b), 28 U.S.C. foll. §2254.

After review of the record, petitioner is not entitled to a certificate of appealability. "A 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). To merit a certificate of appealability, Petitioner must show that reasonable jurists would find debatable both (1) the merits of the underlying claims and (2) the procedural issues he seeks to raise. Slack v. McDaniel, 529 U.S. 473, 478, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). See also Eagle v. Linahan, 279 F.3d 926, 935 (11th Cir. 2001). Because the claims raised are clearly without merit, petitioner cannot satisfy the *Slack* test. Slack, 529 U.S. at 484.

As now provided by Rules Governing §2254 Proceedings, Rule 11(a), 28 U.S.C. foll. §2254: "[B]efore entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." If there is an objection to this recommendation by either party, that party may bring this argument

to the attention of the district judge in the objections permitted to this report and recommendation.

## X. Conclusion

Based upon the foregoing, it is recommended that the federal habeas petition be DISMISSED as time-barred; and, alternatively DENIED on the merits; that a certificate of appealability be DENIED; and, the case be closed.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report.

SIGNED this 30th day of May, 2017.

UNITED STATES MAGISTRATE JUDGE

cc: Curtis Nairn, Pro Se
DC#L-67295
Everglades Correctional Institution
Inmate Mail/Parcels
1599 S.W. 187 Avenue
Miami, FL 33194

Mark John Hamel, Asst Atty Gen'l
Florida Attorney General's Office
1515 N. Flagler Dr. #900
West Palm Beach, FL 33401
Email: CrimAppWPB@MyFloridaLegal.com

## State of Florida Vs. Nairn, Curtis

**Broward County Case Number:** 06008303CF10A

**State Reporting Number:** 062006CF008303A88810

**Court Type:** Felony

**Case Type:** Felony

**Filing Date:** 05/17/2006

**Case Status:** Disposition Entered

**Court Location:** Central Courthouse

**Judge ID / Name:** Duffy - FD, Barbara R.

**Magistrate Id / Name:** N/A

**BCCN:** 0663557

+ Party(ies) Total: 2

+ Citation(s) Total: 0

+ Charge(s) Total: 1

+ Warrant(s) Total: 0

+ Bond(s) Total: 0

+ Arrest(s) Total: 3

+ Disposition(s) Total: 1

+ Collection(s) Total: 1

- Event(s) & Document(s) Total: 420

| Date | Description | Additional Text | View | Pages |
|---|---|---|---|---|
| 06/03/2016 | File Letter | fwd to archive | | 1 |
| 04/25/2016 | File Supreme Court Of Florida Order | SC15-2259PETITION TO INVOKE ALL WRITS JURISDICTION IS DISMISSED FOR LACK OF JURISDICTION BECAUSE T E PETITIONER HAS FAILED TO CITE AN INDEPENDENT BASIS THAT WOULD ALLOW THE COURT TO EXERCISE ITS ALL WRITS AUTORITY AND NO SUCH BASISIS APPARENT ON THE FACE OF THE PETITION. NO MOTION FOR REHEARIN WILL BE ENTERTAINED BY THIS COURT. | | 1 |
| 03/18/2016 | File Notice | of Action | | 2 |
| 03/18/2016 | File Notice | of Action | | 2 |
| 03/07/2016 | File Letter | A True Copy | | 1 |
| 03/02/2016 | File Supreme Court Of Florida Order | SC15-2259 PETITION TO INVOKE ALL WRITS JURISDICTION IS DISMISSED FOR LACK OF JURISDICTION | | 1 |
| 02/09/2016 | File Supreme Court Of Florida Order | SC15-2153 PETITION FOR WRIT OF MANDAMUS IS DISMISSED BECAUSE THE COURT WILL NOT CONSIDER T HE REPE ITIVE PETITIONS OF PERSONS WHO HAVE ABUSED THE JUDICIAL PROCESSES OF THE LOWER COURTS SUCH THAT HEY HAVE BEEN BARRED FROM FILING CERTAIN ACTIONS THERE. NO MOTIONS FOR REHEARING WILL BE ENTERTAIN D BY THIS COURT. | | 1 |
| 01/07/2016 | Appeal Completed | & sent to AG & 4DCA | | |
| 12/09/2015 | File Supreme Court Of Florida Order | SC15-2259 | | 1 |
| 12/01/2015 | File Supreme Court Acknowledgment | SC15-2153 -- Petition for Writ of Mandamus | | 1 |

| Date | Description | Additional Text | View | Pages |
|---|---|---|---|---|
| 11/16/2015 | File Pro-Se 3.850 Notice Of Appeal | NO HEARING -- BCT | | 1 |
| 11/16/2015 | File Directions To The Clerk | | | 2 |
| 11/13/2015 | File Letter | RE: Judge response from Deft letter | | 3 |
| 10/29/2015 | File Notice | Pro Se / Notice to Court | | 1 |
| 10/29/2015 | File Notice | Pro Se | | 1 |
| 10/16/2015 | File Document | Certificate of Clerk - Order Denying M/Rehearing | | 1 |
| 10/15/2015 | File Order Denying Def Motion For Rehearing | Signed 101415 | | 1 |
| 10/15/2015 | File Defense Motion To Compel | a Response from the State | | 3 |
| 10/13/2015 | File Defense Motion To Compel | a Response from State | | 2 |
| 09/11/2015 | File Defense Motion For Rehearing | | | 4 |
| 09/02/2015 | File Defense Motion For Rehearing | | | 4 |
| 08/17/2015 | File Defense Motion | Pro Se / Motion for Judicial Estoppel and Rule on Newly Discovered Evidence Motion and Summary Judgment Motion | | 5 |
| 08/12/2015 | File Order Denying Def Motion | Signed 081015; M/for Summary Judgment on Newly Discovered Evidence | | 2 |
| 07/27/2015 | File Letter From Defendant | Re: Violation of rights | | 3 |
| 07/16/2015 | File Letter From Defendant | re: Counsel | | 4 |
| 06/24/2015 | File Defense Notice Of Inquiry | | | 3 |

| Date | Description | Additional Text | View | Pages |
|---|---|---|---|---|
| 06/10/2015 | **File Document** | MANDATE/FROM: FOURTH DISTRICT COURT OF APPEALS | | 3 |
| 05/01/2015 | **File Mandate - Affirmed** | 4D13-3755 / SG | | 2 |
| 04/30/2015 | **File Defense Motion** | for Sumary Judgment on Newly Discovered Evidence and Grant Evidentiary Hrg on Habeas Corpus | | 41 |
| 04/29/2015 | **File Defense Motion** | for Summary Judgment on Newly Discovered Evidence and Grant Evidentiary Hrg on Habeas Corpus | | 41 |
| 04/23/2015 | **File Fourth District Court Of Appeals Order** | 4D15-1058 / SRG; ORDERED that on March 25, 2015, this Court ordered Petitioner to show cause why... he Clerk of this Court is directed to no longer accept any paper filed by Curtis Nairn (DOC #L67295 unless the document has been reviewed and signed by a member in good standing of the Florida Bar w o certifies that a good faith basis exists for each claim presented, further | | 1 |
| 03/07/2015 | **Sent To Law Firm For Colle ctions** | Linebarger | | |
| 11/21/2014 | **File Supreme Court Of Flor ida Order** | SC14-1787 THE PETITION FOR MANDAMUS IS DENIED. | | 1 |
| 10/17/2014 | **File Supreme Court Ackno wledgment** | | | 2 |
| 10/07/2014 | **File Letter** | Correspondence - priority | | 1 |
| 09/16/2014 | **File Petition For Writ Of M andamus** | | | 32 |
| 08/04/2014 | **File Order Denying Def Mo tion** | Signed 080114; M/Lift Stay and Rule | | 1 |
| 07/18/2014 | **File Defense Motion** | To Lift Stay and Rule | | 8 |
| 07/17/2014 | **File Defense Motion** | to Lift Stay and Rule *PRO SE* | | 7 |
| 07/01/2014 | **File Fourth District Court Of Appeals Order** | 4D13-3755 / SRW; Aplnt. mot. to relinquish jurisdiction is DENIED... | | 1 |

| Date | Description | Additional Text | View | Pages |
|---|---|---|---|---|
| 05/21/2014 | **File Fourth District Court Of Appeals Order** | 4D13-3755 /SRW; ORDERED that appellee's motion filed May 19, 2014, for extension of time is grante , and appellee shall serve the answer brief within sixty (60) days... | | 1 |
| 05/19/2014 | **File Order Granting Motion For Stay Pending Appeal** | | | 1 |
| 05/01/2014 | **File Defense Motion For P ost Convict Relief/3.850** | | | 5 |
| 03/24/2014 | **File Fourth District Court Of Appeals Order** | 4D13-3755 / SRW; ORDERED that appellate counsel's motion to withdraw is granted. See Gantt v. State, 714 So. 2d 1 124 (Fla. 4th DCA 1998); further, ORDERED that appellant has thirty (30) days from the date of this order to file a pro se initial brief... | | 1 |
| 01/30/2014 | **Order** | Signed 012914; Of Stay of Proceedings Pending Issuance of Mandate by the 4th DCA | | 1 |
| 01/28/2014 | **File States Motion** | For Stay of Proceedings Pending Resolution of Appeal 4D13-3755 | | 3 |
| 01/22/2014 | **File Petition For Writ Of Ha beas Corpus** | | | 17 |
| 01/22/2014 | **File Fourth District Court Of Appeals Order** | 4D13-3755 / SRW; ORDERED sua sponte, aplnt's. "Mot. to Abate: file Jan. 21, 2014, is hereby stricken as unauthorized. Aplnt's. has counsel. | | 1 |
| 01/17/2014 | **File Order Requesting Stat e To Respond** | Signed 011714; 90 Days to Petition for Writ of Habeas Corpus | | 1 |
| 01/17/2014 | **File Petition For Writ Of Ha beas Corpus** | | | 17 |
| 01/11/2014 | **Appeal Completed** | & sent to AG, 4/DCA & 15th PD | | |
| 12/06/2013 | **File Exhibit List** | | | |
| 11/14/2013 | **File Pro-Se 3.850 Notice Of Appeal** | SRW (Attorney represented) | | |
| 11/14/2013 | **File Directions To The Cler k** | SRW (Attorney represented) | | |

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, 1525 PALM BEACH LAKES BLVD., WEST PALM BEACH, FL 33401

April 23, 2015

**CASE NO.: 4D15-1058**
L.T. No.: 06-8303 CF10A

CURTIS NAIRN v. STATE OF FLORIDA

Appellant / Petitioner(s) Appellee / Respondent(s)

**BY ORDER OF THE COURT:**

ORDERED that on March 25, 2015, this Court ordered Petitioner to show cause why sanctions should not be imposed. Having considered Petitioner's response, we determine that sanctions are appropriate. For the reasons set forth in the order to show cause, we now impose sanctions pursuant to *State v. Spencer*, 751 So. 2d 47 (Fla. 1999). The Clerk of this Court is directed to no longer accept any paper filed by Curtis Nairn (DOC #L67295) unless the document has been reviewed and signed by a member in good standing of the Florida Bar who certifies that a good faith basis exists for each claim presented; further,

ORDERED that the Clerk is directed to forward a certified copy of this order to the appropriate institution for consideration of disciplinary procedures. *See* § 944.279(1), Fla. Stat. (2014).

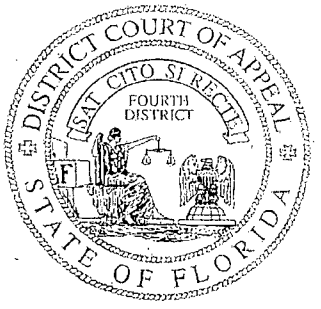
Served:

cc: Attorney General-W. P. B. Curtis Nairn Clerk Broward
Francisco Acosta, Warden

kb

Lonn Weissblum

LONN WEISSBLUM, Clerk
Fourth District Court of Appeal



IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, 1525 PALM BEACH LAKES BLVD., WEST PALM BEACH, FL 33401

April 15, 2015

CASE NO.: 4D13-3755
L.T. No.: 06008303CF10A

CURTIS NAIRN v. STATE OF FLORIDA

Appellant / Petitioner(s) Appellee / Respondent(s)

**BY ORDER OF THE COURT:**

ORDERED that appellant's motion for rehearing filed March 19, 2015 is denied.

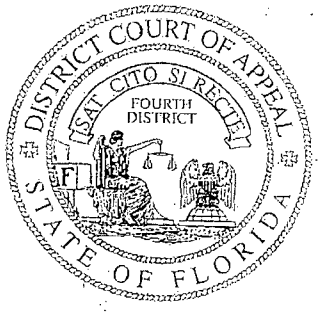
Served:

cc: Attorney General-W. P. B. Mark John Hamel Curtis Nairn

kb

Lonn Weissblum

LONN WEISSBLUM, Clerk
**Fourth District Court of Appeal**



IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, 1525 PALM BEACH LAKES BLVD., WEST PALM BEACH, FL 33401

March 25, 2015

**CASE NO.: 4D15-1058**
L.T. No.: 06-8303 CF10A

CURTIS NAIRN v. STATE OF FLORIDA

Appellant / Petitioner(s) Appellee / Respondent(s)

**BY ORDER OF THE COURT:**

ORDERED that the petition alleging ineffective assistance of appellate counsel filed March 16, 2015 is denied; further

ORDERED that Appellant Curtis Nairn has filed numerous successive, meritless postconviction motions and appeals (*see, e.g.*, 4D06-5042; 4D08-2653; 4D09-344; 4D09-1675; 4D12-1475; 4D12-1935; 4D12-2499; 4D12-2912; 4D13-3294; 4D13-3755; 4D13-4536; 4D14-795; 4D14-796). Appellant was warned against frivolous filing in 4D12-2912 and 4D14-795. This petition, which attempts to relitigate an issue raised and rejected in 4D08-2653, is frivolous. Within twenty (20) days of this order, Appellant shall file a response and show cause why this Court should not impose the sanction of no longer accepting his *pro se* filings and why Appellant should not be referred to prison officials for disciplinary proceedings. *State v. Spencer*, 751 So. 2d 47 (Fla. 1999); § 944.279(1), Fla. Stat. (2014).

STEVENSON, MAY and CONNER, JJ., Concur.

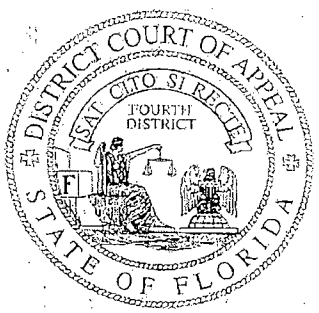
Served:

cc: Attorney General-W. P. B. Curtis Nairn *w*

dl

Lonn Weissblum

LONN WEISSBLUM, Clerk
Fourth District Court of Appeal



IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

CURTIS NAIRN,

Defendant.
_____/

CASE NO.: 06-8303CF10A

JUDGE: BERNARD I. BOBER

DIVISION: FD

**ORDER DENYING DEFENDANT'S MOTIONS FOR REHEARING**

THIS CAUSE having come before the Court upon the Defendant's Motion for Rehearing, dated October 8, 2013, and Amended Motion for Rehearing, dated October 9, 2013, of this Court's Order Denying Defendant's Motion for Post-Conviction Relief, dated September 23, 2013, and the Court having reviewed same, together with the Court files, it is accordingly

ORDERED AND ADJUDGED that the Defendant's Motion for Rehearing and Amended Motion for Rehearing are hereby **denied.** Defendant has thirty (30) days from the date of this order to appeal the Court's ruling.

DONE AND ORDERED in Chambers this ____ day of _____, 2013, at Fort Lauderdale, Broward County, Florida.

TRUE COPY

OCT 2 1 2013

BERNARD I. BOBER

BERNARD I. BOBER
Circuit Judge

Copies furnished:
Joel Silvershein, Esq., Assistant State Attorney, Appeals Division

Defendant, DC #L67295, Okaloosa Correctional Institution, 3189 Colonel Greg Malloy Road, Crestview, Florida 32539

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

CURTIS NAIRN,

Defendant.
_____/

CASE NO.: 06-8303CF10A

JUDGE: BOBER



**ORDER ON DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF**

THIS CAUSE is before the Court upon the Defendant's Motion for Post-Conviction Relief, filed pursuant to Florida Rule of Criminal Procedure 3.850. The Court has carefully considered the Motion, the court file including the trial record, the testimony presented at the evidentiary hearing, and the applicable law, and hereby finds as follows:

## PROCEDURAL BACKGROUND

The Defendant was convicted of second degree murder on December 1, 2006, following a jury trial. On January 9, 2007 he was sentenced by predecessor Judge Eileen O'Connor to life in prison. The Fourth District Court of Appeal affirmed the conviction and sentence on April 9, 2008, with a mandate issued on June 2, 2008. *See Nairn v. State*, 978 So.2d 268 (Fla. 4th DCA 2008) (case number 4D06-5042).

The Defendant's original Motion for Post-Conviction Relief was filed on September 8, 2008. He also filed a Supplemental Motion on December 19, 2008; an Amended Motion on November 30, 2009; an Amended Motion on December 23, 2009; and a Supplemental Motion on

June 2, 2010. In April 2009, he filed in the Fourth District Court of Appeal a petition for writ of mandamus, which is still pending, regarding the Motion (case number 4D09-1675). On June 7, 2010, the State filed a Motion to Strike the Defendant's Motion for Post-Conviction Relief, arguing that one of the claims was legally insufficient. On June 17, 2010, the Court entered an order granting the State's Motion to Strike and allowing the Defendant 30 days to file an amended, comprehensive motion. The Defendant subsequently filed a motion for extension of time, which the Court granted on August 16, 2010, allowing the Defendant until September 13, 2010 to file the new motion.

The Defendant filed his amended, comprehensive Motion for Post-Conviction Relief on August 18, 2010, setting forth ten grounds for relief. He then retained counsel, who filed another motion for extension of time. The Court granted counsel's motion, allowing until October 15, 2010 to file a new motion, but counsel never filed another motion. The Defendant, *pro se*, subsequently filed a Supplemental Ground Eleven on April 12, 2011; an Amended Supplemental Ground Eleven on April 15, 2011; and a Supplemental Ground Twelve on April 29, 2011. The State filed a Response on July 15, 2011, conceding the need for an evidentiary hearing. On July 19, 2011, the Court entered an order granting the Defendant's Motion for Post-Conviction Relief, to the extent he was entitled to an evidentiary hearing.

## EVIDENTIARY HEARING

The evidentiary hearing was held on April 23, 2013. The Defendant was represented by attorney Tamara Curtis. The defense presented the testimony of the Defendant, Gerald Cole; and Dr. Mark Shuman; the State presented the testimony of Howard Greitzer, the Defendant's trial attorney. At the close of the hearing, the Court requested that both parties file memoranda.

On May 8, 2013, the State filed a Memorandum of Law in Opposition to the Defendant's Motion for Post-Conviction Relief. Also on May 8, 2013, defense counsel filed a Brief in Support of the Motion, along with a request that the Defendant be allowed to file a separate *pro se* brief. The Defendant filed a *pro se* Supplemental Brief on May 20, 2013 and a *pro se* Motion for Full and Fair Hearing on May 30, 2013.

The Defendant has also filed in the Fourth District Court of Appeal, on or about September 3, 2013, another petition for writ of mandamus regarding the Motion for Post-Conviction Relief (case number 4D13-3294).

## FACTUAL AND LEGAL FINDINGS

The Defendant's Motion for Post-Conviction Relief sets forth twelve distinct claims of ineffective assistance of trial counsel. In order to sustain these claims, the Respondent must satisfy the two-prong test of *Strickland v. Washington*, 466 U.S. 668 (1984). First, he must demonstrate particular acts or omissions by counsel that are shown to be outside the range of reasonable assistance under prevailing professional standards. *Id.* at 690. Second, he must prove prejudice, by establishing a reasonable probability that the outcome of the case would have been different but for counsel's deficient performance. *Id.* at 694. The Defendant bears the burden during the evidentiary hearing of proving the allegations of error set forth in his Motion, as well as prejudice resulting from those errors. *See Pagan v. State*, 29 So.3d 938 (Fla. 2009); *State v. Barnes*, 24 So.3d 1244 (Fla. 1st DCA 2009); *Rodriguez-Lara v. State*, 18 So.3d 1194 (Fla. 4th DCA 2009). With this standard in mind, the Court will consider each of the Defendant's twelve grounds for relief.

**Ground One**

In ground one, the Defendant claims trial counsel was ineffective for failing to request a statement of particulars. The indictment in this case alleged that the victim was killed on or about May 9, 2006 through May 10, 2006. The State in its opening statement argued that the victim was killed in the midnight hours of May 9 into May 10. The Defendant relied on an alibi defense based on cell phone records showing he was in Miami-Dade County during a portion of the early morning hours of May 10. In this claim for relief, the Defendant argues that counsel should have filed a motion for a statement of particulars, requiring the State to narrow the time frame of the offense in order to make the Defendant's alibi defense more effective. He argues that allowing the State to proceed on such a broad time frame prejudiced his defense because the time frame included periods of time for which he had no alibi evidence.

The Court finds this claim to be without merit. The indictment was narrowed to a sufficient period of time that it would not be subject to a motion to dismiss. *See Dell'Orfano v. State*, 616 So.2d 33 (Fla. 1993). Furthermore, the Defendant failed to present any testimony or argument at the evidentiary hearing to show that a motion for statement of particulars would have been granted. Therefore, the Defendant has failed to establish either deficiency or prejudice under *Strickland*, and this ground for relief must be denied.

The Defendant's appointed post-conviction counsel further argues, in the portion of her post-hearing brief regarding ground one, that if trial counsel had pursued a statement of particulars, even if it hadn't been granted, he would have seen the need to retain an expert to testify regarding how long the victim would have lived following the fatal wound. This claim is closely tied to other specific claims made in ground twelve, regarding the general argument that trial counsel should have pursued several possible avenues to establish that the Defendant could

not have been at the scene of the crime when the victim received the fatal wound. The Court finds it would be more appropriate to discuss this specific claim below, along with the other specific claims made in ground twelve.

**Ground Two**

In ground two, the Defendant claims trial counsel was ineffective for failing to call Wendy Braynen as a witness. He alleges Ms. Braynen was available to testify as to the Defendant's physical location in Miami at the time he argues the victim was killed, further bolstering his alibi defense.

The Defendant failed to present any testimony or argument at the evidentiary hearing as to this claim, and did not address it in any of the post-hearing briefs. Therefore, the Defendant has failed to establish either deficiency or prejudice under *Strickland*, and this ground for relief must be denied.

**Ground Three**

In ground three, the Defendant claims trial counsel was ineffective for failing to object to allegedly improper remarks made by the prosecutor during closing argument. He points out four specific remarks: (1) that the Defendant was "living a life of lies with five different women" (Tr. 3035); (2) that he was an "obsessed, sick man" (Tr. 3042); (3) that he refused to answer certain questions from law enforcement during an interrogation (Tr. 3057); and (4) that he had engaged in a "one block California TV chase" (Tr. 3062).

In order to prevail on this claim, the Defendant must first show that the comments were improper or objectionable and that there was no tactical reason for failing to object; then he must

show prejudice. *See Hildwin v. State*, 84 So.3d 180, 191 (Fla. 2011). A prosecutor's comments do not merit a new trial unless they are of such a nature as to deprive the defendant of a fair trial, materially contribute to his conviction, are so harmful or fundamentally tainted so as to require a new trial, or are so inflammatory that they might have influenced the jury to reach a more severe verdict than they would have reached otherwise. *Lopez v. State*, 555 So.2d 1298 (Fla. 3d DCA 1990). A considerable degree of latitude is allowed in closing argument; all logical inferences and deductions from the evidence are permissible, and the prosecutor is permitted to argue the State's case with passion and conviction. *See Breedlove v. State*, 413 So.2d 1, 8 (Fla. 1982); *Diaz v. State*, 797 So.2d 1286, 1287 (Fla. 4th DCA 2001) (the prosecutor's closing argument is not limited to "flat, robotic recitations of 'just the facts'").

The Court finds the Defendant's claims to be without merit. None of the prosecutor's comments were outside the wide latitude permitted in closing argument; they were all permissible inferences and deductions from the evidence. First, the comment regarding the Defendant "living a life of lies with five different women" was a fair comment on the evidence that the Defendant was married and had several girlfriends, including the victim in this case. (Tr. 2615-16, 2638, attached.) Second, the comment that the Defendant was an "obsessed, sick man," when taken in context, was a permissible inference from the evidence of the number and frequency of phone calls made by the Defendant surrounding the victim's death. (Tr. 3042, attached.) Third, the comment regarding a "one block California TV chase" was a fair comment on the evidence of how the Defendant was apprehended by law enforcement. (Tr. 2316-23, attached.)

Finally, the statement that the Defendant refused to answer certain questions from law enforcement during an interrogation was also permissible. The prosecutor stated: "You've seen

the evidence that's in front of you. And I ask you, five, ten, fifteen, twenty, twenty-five, thirty, thirty-five, forty, forty-five, fifty, fifty-five, sixty, sixty-five, seventy – up to seventy-three times, assuming what he said was true, that I called Crystal and told her to check on [the victim] – seventy-three times he's asked. And you now know what his answer was." (Tr. 3057, attached.) The Defendant correctly argues that a prosecutor may not make comments on the defendant's right to remain silent, risking that the jury might infer guilt from the defendant's silence. *See, e.g.*, *State v. DiGuilio*, 492 So.2d 1129, 1139 (Fla. 1986); *Janiga v. State*, 713 So.2d 1102, 1103 (Fla. 2d DCA 1998). However, the Defendant does not argue, and the record does not show, that the Defendant invoked his right to remain silent at any point during interrogation. *See Smith v. State*, 754 So.2d 54, 56 (Fla. 3d DCA 2000); *see also DiGuilio*, 492 So.2d at 1131.

Furthermore, the Defendant failed to demonstrate at the evidentiary hearing how these comments prejudiced him to the extent the outcome of the trial was rendered unfair. Therefore, the Defendant has failed to establish either deficiency or prejudice under *Strickland*, and this ground must be denied.

**Ground Four**

In ground four, the Defendant claims trial counsel was ineffective for requesting Florida Standard Jury Instruction 3.6(*l*) regarding an "independent act" defense. The "independent act" jury instruction is as follows:

> If you find that the crime alleged was committed, an issue in this case is whether the crime of (crime alleged) was an independent act of a person other than the defendant. An independent act occurs when a person other than the defendant commits or attempts to commit a crime.

1. which the defendant did not intend to occur, and
2. in which the defendant did not participate, and
3. which was outside of and not a reasonably foreseeable consequence of the common design or unlawful act contemplated by the defendant.

If you find the defendant was not present when the crime of (crime alleged) occurred, that, in and of itself, does not establish that the (crime alleged) was an independent act of another.

If you find that the (crime alleged) was an independent act of [another] [(name of individual)], then you should find (defendant) not guilty of the crime of (crime alleged).

If the name of the other person is known, it should be inserted here; otherwise, use the word "another."

The Defendant argues this instruction was factually and legally inapplicable because he never claimed there was a "co-conspirator" or "co-felon" who killed the victim unforeseeably outside the scope of a criminal agreement. Further, the Defendant argues the statement "If you find the defendant was not present when the crime of (crime alleged) occurred, that, in and of itself, does not establish that the (crime alleged) was an independent act of another" conflicted with his alibi defense by informing the jury they could find he was not present at the scene of the crime and still find him guilty.

In his statement to law enforcement, the Defendant claimed he had been at the scene of the murder and had an encounter with a third person that ended in a pushing match, and then left before the victim was wounded or killed. (Tr. 2706-38.) Trial counsel cross-examined one of

the detectives about a person named Eric, who never gave a police statement. (Tr. 2972.) At the evidentiary hearing, Mr. Greitzer testified that he requested the independent act instruction in order to give the jury an opportunity to find the Defendant not guilty based on a theory involving this third person. The trial court granted the instruction "in an abundance of caution" in order to allow Mr. Greitzer's theory regarding the "mystery third person." (Tr. 3006-07, attached.)

Strategic decisions by trial counsel do not constitute ineffective assistance of counsel if counsel's decision was reasonable under the norms of professional conduct, and the post-conviction court should not second-guess counsel's strategic decisions in hindsight. Furthermore, trial counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions. *See Strickland*, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight...."); *Cherry v. State*, 659 So.2d 1069, 1073 (Fla. 1995) ("The standard is not how present counsel would have proceeded, in hindsight...."); *see also Johnson v. State*, 769 So.2d 990, 1000-01 (Fla. 2000); *Occhicone v. State*, 768 So.2d 1037, 1048-49 (Fla. 2000); *Rutherford v. State*, 727 So.2d 216, 223-24 (Fla. 1998); *State v. Bolender*, 503 So.2d 1247, 1250 (Fla. 1987).

The Court finds that trial counsel's strategic decision to request the independent act instruction was a valid and reasonable attempt to create reasonable doubt in the minds of the jury regarding the third person the Defendant claims was present at the scene of the crime. The Defendant has failed to establish any deficiency of counsel under *Strickland*, and this ground therefore must be denied.

**Ground Five**

In ground five, the Defendant claims trial counsel was ineffective for failing to request Florida Standard Jury Instruction 3.6(i) regarding an alibi defense. The alibi jury instruction is as follows:

> An issue in this case is whether defendant was present when the crime allegedly was committed.
>
> If you have a reasonable doubt that the defendant was present at the scene of the alleged crime, it is your duty to find the defendant not guilty.

Counsel can be considered ineffective for failing to request a specific jury instruction when it is consistent with the evidence and the theory of the case. *See Griggs v. State*, 821 So.2d 1139 (Fla. 4th DCA 2002); *Moragne v. State*, 761 So.2d 440 (Fla. 2d DCA 2000). However, the Court finds that counsel's failure to do so in this case did not prejudice the Defendant to the extent required by *Strickland*. Counsel thoroughly argued the alibi defense in both portions of his closing argument, in addition to challenging the time line set forth by the State and arguing reasonable doubt due to the lack of physical evidence at the crime scene. (Tr. 3020-34, 3064-74, attached.) The fact that the jury was not given the alibi instruction does not mean they did not consider the alibi defense, and is not a sufficient basis to undermine this Court's confidence in the outcome of the case. The Defendant has failed to establish prejudice under *Strickland*, and therefore this ground for relief must be denied.

**Ground Six**

In ground six, the Defendant claims trial counsel was ineffective for failing to object to testimony elicited by the State concerning evidence that was not disclosed prior to trial. State's

Exhibit Y, which was never entered into evidence and the Defendant alleges was never disclosed prior to trial, was a report that revealed several bloody fingerprints retrieved from a car at the crime scene. Alice Benitez, the State's fingerprint expert, testified at trial that she analyzed Exhibit Y and did not make any positive identification, but excluded the Defendant. (Tr. 2117-19.)

The Defendant argues that trial counsel should have asked for a continuance in order to have the Exhibit analyzed by an independent expert. At the evidentiary hearing, the defense presented the testimony of Gerald Cole, who testified there was one portion of the Exhibit that he could state did not belong to the victim. The Defendant argues that if similar testimony had been presented at trial, in addition to Ms. Benitez's testimony, it would have supported his claim that there was a third person at the crime scene, and would have given the jury an alternate suspect, providing them an opportunity to find reasonable doubt.

Mr. Greitzer testified at the evidentiary hearing that he did not hire an independent fingerprint expert to testify at trial because he wanted to take advantage of "sandwich" closing arguments. He further testified that the Defendant was extremely uncooperative and refused to communicate with him or his investigators until after the trial had commenced, except to express his wish for a speedy trial. Mr. Greitzer testified that he felt the State's case was weak, in terms of physical evidence, and therefore he decided not to present a case in chief and instead to take advantage of "sandwich" arguments to emphasize reasonable doubt and lack of evidence. This was an entirely valid and reasonable defense strategy based on the procedural rules and prevailing professional standards at the time of the trial. *See Beasley v. State*, 18 So.3d 473, 491-92 (Fla. 2009); *Evans v. State*, 995 So.2d 933, 945 n.16 (Fla. 2008); *Van Poyck v. State*, 694 So.2d 686, 697 (Fla. 1997). There is no evidence in the record to suggest the Defendant

disagreed with this strategy at the time of trial, and the Defendant did not elicit any testimony from Mr. Greitzer at the evidentiary hearing regarding how these strategic decisions were made.

The Court further notes that Ms. Benitez's testimony was actually favorable to the Defendant, since she was able to exclude him as a source of the fingerprints, and trial counsel used this fact to argue reasonable doubt during closing argument. (Tr. 3025, 3031-32, attached.) The Court finds that Mr. Greitzer made a reasonable strategic decision not to relinquish the last word at closing arguments in order to call another fingerprint expert to testify, especially since the State's expert eliminated the Defendant as the person who left the fingerprints on the car. Therefore, the Defendant has failed to establish any deficiency of counsel under *Strickland*, and this ground must be denied.

**Ground Seven**

In ground seven, the Defendant claims trial counsel was ineffective for eliciting damaging testimony from certain witnesses during cross-examination. The Defendant asserts that he specifically told his attorney during a pretrial hearing, at which his attorney filed a motion seeking the return of the Defendant's property, that none of his clothing was being held by law enforcement. However, at trial, the Defendant claims counsel cross-examined several witnesses about blood-stained clothing allegedly recovered from the Defendant. The Defendant argues this line of questioning confirmed to the jury that the clothing in fact belonged to the Defendant.

The Court first doubts the Defendant told his attorney anything about the clothing at a pretrial hearing, since Mr. Greitzer testified credibly that the Defendant refused to speak with him until after the trial had commenced. But regardless, the Defendant's allegation is refuted by the record, because the clothing was never actually linked to him at trial. (Tr. 2433, attached.)

Therefore, the Defendant has failed to establish either deficiency or prejudice under *Strickland*, and this ground must be denied.

**Ground Eight**

In ground eight, the Defendant claims trial counsel was ineffective for failing to object to prosecutorial misconduct. During the direct examination of Detective Cabrera, the prosecutor asked, "what factors or circumstances affect, -- if it's me, me leaving prints in a car or on a scene, what factors affect just the fact whether I left them or not?" (Tr. 2237.) The Defendant alleges the prosecutor then took a pair of disposable gloves from a courtroom table, shook them, and placed them on the podium in front of the witness stand. Detective Cabrera then answered, "The most obvious is either you are wearing gloves, therefore, you are not going to leave any [fingerprints]." (Tr. 2237.) The Defendant claims this demonstration was highly prejudicial and allowed the jury to conclude, without any supporting evidence, that the Defendant must have been wearing gloves when he committed the crime.

The Court finds the prosecutor's questions alone were not improper. The prosecutor was permitted to elicit testimony as to why the Defendant's fingerprints might not be found at the scene, and why that fact does not necessarily mean he did not commit the crime. In addition to his answer regarding gloves, Detective Cabrera also opined that the Defendant could have cleaned up the scene, that certain types of surfaces at the scene might not have been conducive to leaving prints, or that the Defendant could be a "non-secretor" who doesn't produce the proper substance to leave fingerprints. (Tr. 2237-38, attached.) Regarding the Defendant's allegation that the prosecutor made some physical demonstration with the gloves, the Defendant presented no testimony at the evidentiary hearing to support this claim. Therefore, the Defendant has

failed to establish either deficiency or prejudice under *Strickland*, and this ground must be denied.

**Ground Nine**

In ground nine, the Defendant claims trial counsel was ineffective for failing to object to the State improperly shifting the burden of proof to the defense during closing argument. The Defendant alleges the prosecutor's argument that the victim was staggering and struggling to stay alive and left a brush of blood on the car, and his statement that "they [the defense] want you to speculate that that's someone else's," improperly implied to the jury that the defense had to prove whose blood and fingerprints were on the side of the car.

Again, a considerable degree of latitude is allowed in closing argument; all logical inferences and deductions from the evidence are permissible, and the prosecutor is permitted to argue the State's case with passion and conviction. *See Breedlove* and *Diaz, supra*. The Court has reviewed the prosecutor's closing argument (Tr. 3034-64, attached) and finds that at no point did the prosecutor attempt to shift the burden of proof to the Defendant. Furthermore, the Defendant did not present any testimony or argument at the evidentiary hearing as to this claim. Therefore, the Defendant has failed to establish either deficiency or prejudice under *Strickland*, and this ground must be denied.

**Ground Ten**

In ground ten, the Defendant sets forth a claim of cumulative error. For the sake of clarity, the Court will address this claim at the end of the order, after all individual claims of error have been considered.

Ground Eleven

As an initial matter, the Court questions whether ground eleven should be considered timely filed. Florida Rule of Criminal Procedure 3.850(b) requires all motions for post-conviction relief to be filed within two years after the judgment and sentence become final. In this case, the judgment and sentence became final on June 2, 2008, when mandate issued on the direct appeal. *See, e.g., Beaty v. State*, 701 So.2d 856 (Fla. 1997). Therefore, the deadline under Rule 3.850(b) was June 2, 2010. The Defendant's initial Motion for Post-Conviction Relief, filed on September 8, 2008, was stricken on June 17, 2010. At that time, pursuant to *Spera v. State*, 971 So.2d 754 (Fla. 2007), the Defendant was allowed 30 days to file an amended, comprehensive motion. The Defendant filed one motion for extension of time, which the Court granted, allowing him until September 13, 2010 to file the new motion. The Defendant filed the new motion on August 18, 2010, setting forth ten grounds for relief. He then retained counsel, who filed another motion for extension of time. The Court granted counsel's motion, allowing until October 15, 2010 to file a new motion, but counsel never filed another motion.

Ground eleven was not introduced until the Defendant *pro se* filed "Supplemental Ground Eleven" on April 12, 2011 and then "Amended Supplemental Ground Eleven" on April 15, 2011. The Court notes these pleadings were filed well outside the time allowed by Rule 3.850(b), and well beyond the leave allowed by the Court. While a defendant is entitled to amend existing claims at any time before the court rules on a motion for post-conviction relief, *see Pritchett v. State*, 884 So.2d 417 (Fla. 2d DCA 2004), there is no entitlement to add new claims once the allowed time period has passed. However, since the parties have argued and briefed this claim, and in the interest of making a thorough record, the Court will consider the claim's merits.

In the first portion of ground eleven, the Defendant claims trial counsel was ineffective for misadvising the Defendant regarding whether to request a lesser included offense of manslaughter. The Defendant was originally indicted for first degree premeditated murder. During the charge conference, the State requested and received a lesser included offense of second degree murder. The Defendant claims the trial judge told him she would also grant a lesser included offense of manslaughter if he requested it. The Defendant claims counsel advised him not to request manslaughter as a lesser included offense because it would appear to be an admission of guilt, and the Defendant maintained his absolute innocence. The Defendant agreed and waived the lesser included offense of manslaughter. At one point during deliberation, the jury sent a note saying they were split on what degree murder they should find. The Defendant claims he asked counsel if the manslaughter charge could be added at that time, and counsel said no. The Defendant claims this was misadvice, and counsel should have requested the manslaughter charge at that time since he knew the jury wanted to convict the Defendant of some offense.

The Court finds this claim to be wholly without merit. First, the Defendant did not elicit any testimony from Mr. Greitzer at the evidentiary hearing regarding any advice or conversations regarding the lesser included offense of manslaughter. Second, the Court has reviewed the record and finds the trial judge conducted a colloquy regarding the Defendant's right to have the jury instructed on lesser included offenses, including manslaughter. The Defendant stated that he only wanted the jury to be instructed on first degree murder. (Tr. 3001-06, attached.) Third, regarding the Defendant's allegation that trial counsel misadvised him regarding adding the manslaughter offense once the jury sent the note, even assuming the Defendant's allegation is true, that would not have been misadvice. The Defendant's opportunity to have the jury consider

manslaughter was at the charge conference, before the jury's deliberation began. The Defendant has failed to establish any deficiency of counsel under *Strickland*, and therefore this portion of the ground for relief must be denied.

In the second portion of ground eleven, the Defendant claims counsel was ineffective for allowing the jury to be instructed on justifiable and excusable homicide in a way the Defendant claims was confusing. He argues the jury was instructed on justifiable and excusable homicide, but was never informed what degrees of homicide could be found justifiable or excusable. He claims his counsel should have objected to this instruction being given in this way.

This claim is refuted by the record; the trial court properly instructed the jurors on justifiable and excusable homicide. (Tr. 3082-83, attached.) Furthermore, even if the Defendant's claim was true, there would have been no prejudice, because neither justifiable nor excusable homicide was a defense in this case. The Defendant has failed to establish either deficiency or prejudice under *Strickland*, and therefore this portion of the ground for relief must be denied.

**Ground Twelve**

Again, as an initial matter, the Court questions whether ground twelve should be considered timely filed. Ground twelve was not introduced until the Defendant *pro se* filed "Supplemental Ground Twelve" on April 29, 2011. As discussed above pertaining to ground eleven, this was well outside the time allowed by Rule 3.850(b), and well beyond the leave allowed by the Court. However, it is arguable that the claims set forth in ground twelve could be amendments to ground one. Regardless, as with ground eleven, since the parties have argued

and briefed this ground for relief, and in the interest of making a thorough record, the Court will consider the claim's merits.

In ground twelve (and in portions of ground one as briefed by post-conviction counsel following the evidentiary hearing), the Defendant claims trial counsel was ineffective for failing to present certain items of allegedly exculpatory evidence. The Defendant's general argument is that trial counsel should have pursued several possible avenues to narrow the time frame of the murder, to establish that the Defendant could not have been at the scene of the crime when the victim received the fatal wound, and to further bolster the Defendant's alibi defense. The specific items of evidence include: (1) the testimony of an expert such as Dr. Shuman that the victim could have only lived for a short time after receiving the fatal wound; (2) the grand jury testimony of Dr. Motte, the State's medical examiner, regarding the approximate time of the victim's death; and (3) the records of several 911 calls from the night of the murder.

The Defendant's post-conviction counsel detailed the argument in her post-hearing brief as follows: The police were dispatched to the victim's residence in the city of Fort Lauderdale based on a 911 call from Iris Heath at 1:35 a.m. on the morning of May 10. At trial, Ms. Heath testified that she heard strange noises for two to five minutes, then saw the victim on her hands and knees before falling, then waited another two to five minutes before calling 911. Dr. Shuman testified at the evidentiary hearing that the victim would have died very quickly, within five minutes, after receiving the fatal wound. Assuming a time of death of 1:30 a.m., the fatal wound therefore had to have been inflicted no earlier than 1:25 a.m., which is consistent with Ms. Heath's testimony. Yet cell phone records show a series of calls made by the Defendant beginning around 1:00 a.m., originating from several different cell towers, showing that he was travelling south from the victim's residence toward Miami-Dade County. The defense

specifically focuses on a call placed by the Defendant from the victim's phone at 1:27 a.m., which originated from a cell tower near the Calder Racetrack in Miramar, approximately 20 minutes away from the victim's residence and the scene of the murder. The Defendant argues this evidence should have been introduced to show that he absolutely could not have been at the scene of the crime when the victim received the fatal wound.

For several reasons, the Court finds the Defendant has failed to establish any deficiency of counsel as to this claim. First, the Defendant's argument is flawed because there is no testimony anywhere in the record that the victim's exact time of death was 1:30 a.m. The Defendant claims Dr. Motte testified to that fact at the grand jury proceeding; however, the Court has reviewed the portion of Dr. Motte's testimony attached to the Defendant's Motion, and finds Dr. Motte did not actually testify as the Defendant claims. Dr. Motte was asked, "assuming this occurred approximately 1:30 a.m. on the morning of the 10th," whether the victim's stomach contents were consistent with having eaten around 10:30 or 11:00 the night before. He answered in the affirmative, but that is in no way an absolute statement that the victim's exact time of death was 1:30 a.m. (See attached transcript, 14-15.)

Second, the argument relies heavily on Dr. Shuman's testimony that the victim would have died within five minutes after receiving the fatal wound. Without that testimony, it would be entirely possible for the jury to conclude that the Defendant wounded the victim at approximately 1:00 a.m., before leaving the scene, and that she was still alive when Ms. Heath heard and saw her at approximately 1:25 a.m. At trial, Dr. Motte testified he could not say how long the victim lived after receiving the fatal wound. (Tr. 1709, attached.) The Defendant alleges his attorney deposed Dr. Motte and therefore knew he would not provide an opinion on that matter, and should have retained an independent expert. However, the fact that the

Defendant was able to obtain such a favorable expert for the post-conviction proceedings does not necessarily mean counsel was ineffective for not doing so for the trial. *See Jennings v. State*, ___ So.3d ___, 2013 WL 3214442, *8 (Fla. June 27, 2013); *Darling v. State*, 966 So.2d 366, 377 (Fla. 2007); *Peede v. State*, 955 So.2d 480 S.2d 480, 494 (Fla. 2007); *Jones v. State*, 928 So.2d 1178, 1188 (Fla. 2006); *Davis v. State*, 875 So.2d 359, 372 (Fla. 2003); *Asay v. State*, 769 So.2d 974, 985 (Fla. 2000); *see also Strickland*, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight…."); *Cherry*, 659 So.2d at 1073 ("The standard is not how present counsel would have proceeded, in hindsight….").

Finally, and most importantly, as explained above, Mr. Greitzer decided not to present a case in chief and instead to take advantage of "sandwich" arguments to emphasize reasonable doubt and lack of physical evidence. Mr. Greitzer did specifically argue during his closing arguments that the Defendant could not be guilty based on the time line of events that night, even though he did not present any substantive evidence as to those facts. (Tr. 3020-34, 3064-74, attached.) Again, there is no evidence in the record to suggest the Defendant disagreed with this strategy at the time of trial and the Defendant did not elicit any testimony from Mr. Greitzer at the evidentiary hearing regarding this decision or any conversations they might have had regarding it. As explained above, this was an entirely valid and reasonable defense strategy based on the procedural rules and prevailing professional standards at the time of the trial. *See Beasley*, *Evans*, and *Van Poyck*, *supra*. Therefore, the Defendant has failed to establish either deficiency or prejudice under *Strickland*, and this ground must be denied.

**Claim of Cumulative Error**

In ground ten, the Defendant alleges that the cumulative errors of trial counsel constitute a sufficient basis to grant post-conviction relief. Because the Court has found that no individual errors were committed, this claim of cumulative error must be denied. *See Atwater v. State*, 788 So.2d 223, 228 n.5 (Fla. 2001); *Downs v. State*, 740 So.2d 506, 509 n.5 (Fla. 1999).

**Claim of Ineffective Assistance of Post-Conviction Counsel**

In his supplemental brief filed May 20, 2013 and Motion for Full and Fair Hearing filed May 30, 2013, the Defendant appears to allege several claims that his appointed post-conviction counsel was ineffective. However, claims of ineffective assistance of post-conviction counsel are not cognizable under Rule 3.850 or otherwise. *See Kokal v. State*, 901 So.2d 766, 777 (Fla. 2005); *Foster v. State*, 810 So.2d 910, 917 (Fla. 2002); *King v. State*, 808 So.2d 1237, 1245 (Fla. 2002); *Waterhouse v. State*, 792 So.2d 1176, 1193 (Fla. 2001); *Lambrix v. State*, 698 So.2d 247, 248 (Fla. 1996); *see also Petit-Frere v. State*, 108 So.3d 681, 683 (Fla. 2d DCA 2013). Therefore, the Court has not considered these claims.

## CONCLUSION

The Court has carefully considered the Defendant's Motion, the court file including the trial record, the testimony presented at the evidentiary hearing, and the applicable law. The Court has found that each of the Defendant's claims must be denied. Accordingly, it is hereby

ORDERED AND ADJUDGED that the Defendant's Motion for Post-Conviction Relief is DENIED. The Defendant has a right to appeal this order within **30 days** of its rendition.

DONE AND ORDERED on this 23 day of September, 2013 in Chambers at Fort Lauderdale, Broward County, Florida.

BERNARD I. BOBER
CIRCUIT COURT JUDGE

pc 9/23

Copies furnished to:
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Tamara Curtis, Esq., Office of the Public Defender, Appeals Division (by inter-office mail)
Curtis Nairn (L67295), c/o Okaloosa Correctional Institution, 3189 Little Silver Road, Crestview, FL 32539-6708
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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEACH, FL 33402

September 29, 2008

**CASE NO.: 4D08-2653**
L.T. No. : 06-8303 CF10A

CURTIS NAIRN v. STATE OF FLORIDA

Appellant / Petitioner(s), Appellee / Respondent(s).

**BY ORDER OF THE COURT:**

ORDERED that petitioner's motion filed August 29, 2008, for rehearing is hereby denied.

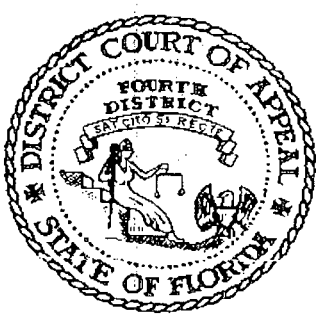
I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Curtis Nairn Attorney General-W.P.B.

kb

Marilyn Beuttenmuller
MARILYN BEUTTENMULLER, Clerk
Fourth District Court of Appeal



IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, 1525 PALM BEACH LAKES BLVD., WEST PALM BEACH, FL 33401

August 6, 2008

**CASE NO.: 4D08-2653**
L.T. No. : 06-8303 CF10A

CURTIS NAIRN v. STATE OF FLORIDA

Appellant / Petitioner(s), Appellee / Respondent(s).

**BY ORDER OF THE COURT:**

ORDERED that the petition for writ of habeas corpus filed June 30, 2008, is hereby denied.

GROSS, TAYLOR and HAZOURI, JJ., Concur.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Curtis Nairn Attorney General-W.P.B.

dl

Marilyn Beuttenmuller
MARILYN BEUTTENMULLER, Clerk
Fourth District Court of Appeal