

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

David J. Smith
Clerk of Court

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May 09, 2018

Elizabeth Warren
U.S. District Court
207 NW 2ND ST
OCALA, FL 34475

Appeal Number: 18-10527-C

Case Style: Ricardo Lupian-Barajas v. Secretary, Department of Corr., et al

District Court Docket No: 5:15-cv-00463-WTH-PRL

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

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Walter Pollard, C
Phone #: (404) 335-6186

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-10527-C

RICARDO LUPIAN-BARAJAS,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF
CORRECTIONS,
FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

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

ORDER:

Ricardo Lupian-Barajas moves for a certificate of appealability (“COA”) and leave to proceed on appeal *in forma pauperis* (“IFP”), in order to appeal the denial of his 28 U.S.C. § 2254 petition for writ of habeas corpus. In order to obtain a COA, a petitioner must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The petitioner satisfies this requirement by demonstrating that “reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong,” or that the issues “deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation omitted). Because Lupian-Barajas has failed to make the requisite showing, his

motion for a COA is DENIED, and his motion for leave to proceed IFP on appeal is DENIED
AS MOOT

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

RICARDO LUPIAN-BARAJAS,

Petitioner,

v.

Case No. 5:15-cv-463-Oc-10PRL

SECRETARY, DEPT. OF
CORRECTIONS, et al.,

Respondents.

ORDER

Petitioner, a state prisoner proceeding *pro se*, initiated this case by filing a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (Doc. 1.) Respondents have filed a Response seeking denial of the Petition. (Doc. 16). Petitioner has filed a Reply. (Doc. 21). Because the Court may resolve the Petition on the basis of the record, an evidentiary hearing is not warranted. See Habeas Rule 8(a). The Petition is denied for the reasons discussed in this Order.

Background

In December 2009, Petitioner was indicted for first degree murder in Lake County, Florida. (Respondents' Appendix, Doc. 17, Exh. A, p. 21). According to the testimony at trial, Petitioner entered a home with a .357 Magnum revolver, stated "I'm going to kill you," and shot the victim once. (Exh. A, pp. 328, 337-338, 347-348, 550-551, 554-555). A witness to the shooting was able to subdue Petitioner until law enforcement arrived. The victim was found with two loaded handguns in his back waistband. (Exh. A at pp. 239,

245). At trial, Petitioner testified on his own behalf that he acted in self-defense. (Exh. A at pp. 537-555).

The jury found Petitioner guilty of the lesser included offense of second degree murder. (Exh. A pg. 75). On December 9, 2010, the Fifth Judicial Circuit Court in and for Lake County, Florida sentenced him to life imprisonment. (Exh. A p. 97). On March 23, 2011, Petitioner filed a notice of appeal. On June 17, 2011, the trial court resentenced Petitioner because it failed to orally announce imposition of the 25 year mandatory sentence required by Florida law. (Exh. A p. 136).

On December 29, 2011, Petitioner filed a *pro se* Rule 3.800(a) motion to prohibit re-sentencing because the pending appeal resulted in the lack of jurisdiction for the trial court. (Exh. D pp. 124-130). On August 29, 2012, the trial court again resentenced Petitioner. (Exh. D pp. 195-198). Petitioner appealed the re-sentencing and the Fifth District Court of Appeal *per curiam* affirmed without written opinion. (Exh. G).

On November 4, 2013, Petitioner, filed a *pro se* motion for post-conviction relief pursuant to Fla. R. Crim. P. 3.850, raising claims of ineffective assistance of counsel. (Exh. M). The trial court dismissed the motion but gave Petitioner leave to file a legally sufficient motion. (Exh. N). Petitioner filed an amended motion on January 7, 2014, which the trial court denied. (Exh. O). Petitioner appealed and the Fifth District Court of Appeal affirmed *per curiam* without written opinion. Lupian-Barajas v. State, 150 So. 3d 1172 (Fla. 5th DCA 2014); (Exh. S, U).

Petitioner, *pro se*, filed a timely federal habeas petition in this Court on September 4, 2015. (Doc. 1).¹ He alleges in Grounds 1 through 6 that his trial counsel was constitutionally ineffective. In Grounds 7 through 8, he alleges ineffective assistance of appellate counsel.

Standard of Review

The role of a federal habeas court when reviewing a state prisoner's application pursuant to 28 U.S.C. § 2254 is limited.² Specifically, a federal court must give deference to state court adjudications unless the state court's adjudication of the claim is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state proceeding."³ The "contrary to" and "unreasonable application" clauses provide separate bases for review.⁴ A state court's rejection of a claim on the merits is entitled to deference regardless of whether the state court has explained the rationale for its ruling.

Furthermore, under § 2254(d)(2), this Court must determine whether the state court's adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. The AEDPA directs that only clear and convincing evidence will rebut the presumption of

¹ Respondents concede that the Petition was timely filed. (Doc. 16).

² See Williams v. Taylor, 529 U.S. 362, 403-404, 120 S. Ct. 1495, 1518-19 (2000).

³ See 28 U.S.C. § 2254(d)(1)- (2).

⁴ Wellington v. Moore, 314 F.3d 1256, 1260-61 (11th Cir. 2002).

correctness afforded the factual findings of the state court. See § 2254(e)(1). Therefore, it is possible that federal review may determine that a factual finding of the state court was in error, but deny the Petition because the overall determination of the facts resulting in the adjudication was reasonable.⁵

Discussion

Ground 1: Ineffective assistance of trial counsel – failure to locate and interview potential witness

In Ground 1, Petitioner alleges that trial counsel provided ineffective assistance because he failed to investigate and locate Martin Matta, a key witness who would have supported his theory of self-defense. Petitioner argues that the witness could have testified that he saw the victim loading bullets into a gun in front of a trailer, which would have corroborated Petitioner's claim of self-defense.

Petitioner states that Mr. Matta notified Corporal Banasco of the Mascotte Police Department during an interview that he was riding his bike down the street earlier in the day when he saw a Hispanic male loading a gun magazine in front of a trailer. According to Petitioner, Mr. Matta said that he noticed that the person's right hand was deformed.

At trial, Petitioner contends that his attorney questioned Officer Banasco about the witnesses he interviewed and Mr. Matta's statement. The state objected to the testimony as hearsay. The trial judge inquired as to whether Mr. Matta was available as a witness and counsel responded "[t]he person is not available, as far as I can tell. I mean, I hadn't

⁵ See Valdez v. Cockrell, 274 F.3d 941, 951 n. 17 (5th Cir. 2001).

gone out and tracked him down, haven't gone driving around Mascotte looking for him."

The trial court sustained the objection and Mr. Matta's statements were excluded.

Petitioner argued in his 3.850 amended motion that he was prejudiced by counsel's failure to investigate and locate the witness "because his jury was deprived of the opportunity to hear exculpatory evidence when considering the Petitioner's claim of self-defense."

In rejecting this claim, the state court wrote:

During the trial, counsel explained he could not find Mr. Matta or serve him with a subpoena. He stated that he tried to get the evidence in through a 'round about way' (i.e. hearsay), but could not. (See exhibit A at 532-33). This Court concludes counsel tried to obtain Mr. Matta's testimony but could not. Therefore, Defendant has failed to establish counsel was ineffective.

Assuming arguendo that counsel was ineffective, this Court finds that the Defendant cannot prove he was prejudiced. The evidence at trial established the Defendant went to see the victim about the possibility of purchasing a weapon. (See exhibit B at 404-05). Defendant does not deny he shot the victim. Richard Conger testified emergency medical services prepared the victim to be transported to the hospital and discovered two weapons in the lower waistband of his pants. (See exhibit C at 238-39). The Defendant testified at trial he knew the guns were loaded. (See exhibit D at 550-51). Thus, the jury was aware the victim was in possession of two loaded guns at the time he was shot by the Defendant. Mr. Matta's testimony would not have added significant new information to the trial.

(Exh. P, pp. 3-4).

The trial court's ruling on this issue was affirmed by the Fifth District Court of Appeal. (Exh. V). In order to state a successful ineffective assistance of counsel claim, Petitioner must show that his attorney's performance fell below an objective standard of reasonableness and that the attorney's deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 468 (1984). Both prongs must be shown in order to succeed on an ineffective-assistance claim.

The Supreme Court has reminded us that in passing on ineffective assistance of counsel claims brought by state prisoners seeking habeas corpus relief subject to 28 U.S.C. § 2254(d)(1) and/or (2), the standard to be applied is “doubly deferential.” Cullen v. Pinholster, 131 S.Ct. 1388, 1403 (2011). The state and the defense counsel are entitled to the presumption of effective counsel created by Strickland, and are further entitled to the deference and presumption of reasonableness that is due to the state court decision under § 2254(d)(1) and/or (2). See Burt v. Titlow, 134 S.Ct. 10, 13 (2013) (citing Pinholster, 131 S.Ct. at 1403.).

Here, the Court finds that Petitioner has not shown that the state court’s conclusions were contrary to, or based upon an unreasonable application of Strickland. Petitioner has failed to show that he was prejudiced by any alleged deficiencies in the presentation of evidence in support of his claim of self-defense. Nor can Petitioner show that but for the failure to locate and present the witness in support of his defense, there is a reasonable probability the jury would have rendered a not guilty verdict.

In other words, Petitioner has failed to demonstrate that the state court’s rejection of this claim was contrary to, or an unreasonable application of federal law, or an unreasonable determination of the facts in light of the evidence adduced in state court.

Ground 1 is without merit.

Ground 2: Ineffective assistance of counsel – failure to object to prosecutorial misconduct

In Ground 2, Petitioner argues that his trial counsel was ineffective for failing “to object to the prosecutor’s misconduct when the prosecutor improperly commented on his opinion of the petitioner’s guilt.” Petitioner contends that trial counsel should have

objected during the prosecutor's closing arguments. Petitioner states that the prosecutor unduly influenced the jury by calling Petitioner a liar because he did not tell the police at the beginning of the interrogation that he acted in self-defense. Petitioner states that his counsel objected to "several of the improprieties, however, he failed to object to the prosecutor injecting into his argument his own experience about Petitioner's guilt." Petitioner argues that the failure to object was not a reasonable strategy "especially when the entire trial is one based on credibility."

In rejecting this claim, the state court wrote:

In his closing argument, the prosecutor stated it was his experience that innocent people did not need to lie to the police but guilty people do. Defendant argues it was improper for the prosecutor to express his opinion concerning the Defendant's guilt.

The Defendant's argument is generally without merit. Significantly, the Defendant chose to testify in this case. Florida courts have long held attacks upon the defendant's credibility are entirely proper. Burst v. State, 836 So.2d 1107, 1109 (Fla. 3d DCA 2003) (citations omitted). The consistency and reasonableness of a defendant's testimony are subjected to legitimate comment in closing argument. The Florida Supreme Court has stated: if a defendant voluntarily takes the stand and testifies as a witness in his own behalf, then he becomes subject to cross-examination as any other witness, and the prosecuting officer has the right to comment on his testimony, his manner and demeanor on the stand, the reasonableness or unreasonableness of his statements, and on the discrepancies which may appear in his testimony to the same extent as would be proper with reference to testimony of any other witness. Dabney v. State, 119 Fla. 341, 343, 161 So.380, 381 (1935). The prosecution is permitted to comment upon the essential unbelievability of the defendant's testimony....

In this instance, the prosecutor may have exceeded proper bounds by commenting on his experience as a prosecutor. He stated it was his experience that people lied to police who were guilty and those who were innocent usually did not lie to the police. This Court concludes, however, any error was harmless error. The jury had the Defendant's testimony at the trial and the transcript of the interrogation and could determine the honesty of the Defendant on that basis....

(Exh. P, pp. 7-8). The Fifth District Court of Appeal per curiam affirmed the ruling. (Exh. U).

Petitioner has failed to show that he was prejudiced by any alleged deficiencies in the presentation of the state's closing arguments. Petitioner has not shown that had defense counsel objected to these comments, there is a reasonable probability the jury would have rendered a not guilty verdict.

In sum, Petitioner has not demonstrated that the state court's determination was contrary to, or an unreasonable application of, federal law, as determined by the Supreme Court of the United States or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state proceeding.

Ground 2 is without merit.

Ground 3: Ineffective assistance of counsel – failure to locate and interview potential witnesses

In Ground 3, Petitioner argues that trial counsel was constitutionally ineffective for failing to secure at trial the presence of Apolinar Sanchez, Jr. Petitioner states that the state presented Pedro Castro Hinojosa who testified that he knew the victim for approximately 15 years and that the victim's right hand was deformed from birth. Petitioner contends that the state led the jury to believe that the victim could not use his right hand at all, and, therefore, could not have been reaching for one of the guns in his waist band. As a co-worker of the victim, Plaintiff argues that Mr. Sanchez would have testified to the fact that the victim using his deformed right hand to operate a forklift on a daily basis.

Petitioner alleges that had Mr. Sanchez testified, the jury would have been able to better understand his self-defense claim given the possibility the victim was able to use his right hand to reach for a gun.

The trial court rejected this claim as follows:

At trial, Pedro Hinojosa testified the victim had a deformed right hand and that he could not grasp anything with that hand or use it. (See exhibit F). The Defendant is attacking this testimony in particular. The court, however, finds the overwhelming weight of the evidence supports the Defendant's conviction. Rodolfo Zambrano testified that he was in the next room when he heard the Defendant tell the victim he was going to kill him. Mr. Zambrano then heard a gunshot and came running out of the room. (See exhibit G at 328-9). Eusebio Saavedra Torres testified he was sitting and eating in the same room as the victim when he saw the Defendant come in the trailer. He testified the Defendant told the victim that he was going to kill him and then shot him. (See exhibit H at 347-49). The testimony, including that of an eye witness, established the Defendant came into the trailer, threatened the victim and then shot him. The information that the victim could have used his right hand to operate levers at work does not establish a reasonable probability that the outcome would have been different.

(Exh. P, p. 5).

The Fifth District Court of Appeal per curiam affirmed the post-conviction court's ruling without written opinion. (Exh. U).

Again, the Court agrees that Petitioner has still failed to show that he was prejudiced by the absence of Mr. Sanchez's testimony at trial. As the state court noted, the eye witness testimony established that Petitioner entered the residence, threatened to kill the victim, and then shot him. Petitioner has failed to demonstrate that but for the omission of Mr. Sanchez's testimony, there is a reasonable probability the jury would have rendered a not guilty verdict. Further, "[w]hich witnesses, if any, to call and when to call them, is the epitome of a strategic decision, and it is one that [a reviewing court] will

seldom, if ever, second guess." Waters v. Thomas, 46 F.3d 1506, 1512 (11th Cir. 1995).

The Court will not do so here.

Petitioner has failed to demonstrate that the state court's rejection of his claim was contrary to, or an unreasonable application of Strickland, or an unreasonable determination of the facts in light of the evidence adduced in state court. Ground 3 is without merit.

Ground 4: Ineffective assistance of counsel – failure to object to the admission of police interrogation transcripts in the jury room during deliberations

In Ground 4, Petitioner argues that trial counsel was constitutionally ineffective for failing to object to the presence of police interrogation transcripts in the jury room during deliberations. Specifically, Petitioner states that the recording of his interrogation was translated and transcribed for the jury to be used as an aid at trial when listening to the audio tape. Petitioner provides that the recording was submitted into evidence and authenticated by Officer Banasco, who was the Spanish speaking officer conducting the interrogation. The recording was published to the jury along with copies of the transcript of the recording. Petitioner states that the recording was played for the jury while the transcripts were used as an aid and the prosecution moved for the admission of the transcripts of the recording into evidence without objection.

Petitioner argues that the failure to object to inadmissible documents in the jury room during deliberation amounted to deficient performance, which prejudiced him. Petitioner claims that the presence of the transcripts left the jury prone to overemphasize the transcribed statements.

Again, the trial court rejected the claim. The order provides:

The Court finds Defendant's argument to be without merit. This Court concludes his argument is little more than a conclusory allegation. Moreover, the questioning was important evidence and the only source as to its contents was the transcript. Because the recording of the interrogation was in Spanish, the jury could not rely on their memories for what was stated. This Court finds it was not error to allow the jury access to the transcript during deliberations.

Moreover, the Defendant cannot prove he was prejudiced. See Gutierrez v. State, 967 So.2d 322 (Fla. 3d DCA 2007). The Defendant does not contend the transcripts were inaccurate but only makes a general claim he was prejudiced. "[A]bsent a showing that the transcripts are inaccurate or that specific prejudice occurred, there is no error in allowing transcripts to go into the jury room." United States v. Brown, 872 F.2d 385, 392 (11th Cir. 1989).

(Exh. P.).

Upon due consideration, the Court finds that this argument is without merit. The trial court is correct that in this Circuit "[a]bsent a showing that the transcripts were inaccurate or that specific prejudice occurred, there is no error in allowing transcripts into the jury room." United States v. Williford, 764 F.2d 1493 (11th Cir. 1985) (citing United States v. Costa, 691 F.2d 1358 (11th Cir. 1982)). Petitioner has made no such showing. The claim is denied.

Ground 5: Ineffective assistance of counsel – failure to file a motion for new trial after the verdict

In Ground 5, Petitioner argues that trial counsel was constitutionally ineffective because he failed to file a motion for new trial. Petitioner contends that there were no eyewitnesses to the shooting, so his guilt or innocence is solely based on credibility. Had a motion for new trial been filed, Petitioner maintains he would have been able to highlight an error that occurred during trial.

The trial court found that Petitioner's claim was without merit. The court stated that Petitioner's statements amounted to "little more than conclusory allegations."

Further, the court stated that Saavedra Torres testified that he witnessed the shooting and, therefore, there was an eyewitness. The trial court found that Petitioner did not demonstrate that he was prejudiced. (Exh. P).

Upon due consideration, this claim is denied. It appears from the trial court's discussion that a new trial would not have been granted even if trial counsel moved for that relief. There is no showing that there is a reasonable probability that the result would have been different had he made the motion. Accordingly, the Court finds that Petitioner has failed to demonstrate that the state court's rejection of his claim was contrary to, or an unreasonable application of Strickland, or an unreasonable determination of the facts in light of the evidence adduced in state court. Ground 5 is without merit.

Ground 6: Ineffective assistance of counsel – failure to object to the prosecutor's closing arguments, which improperly bolstered the credibility of the state's witness

In Ground 6, Petitioner argues that trial counsel was constitutionally ineffective when he failed to object to the prosecutor's comments regarding the truthfulness of the state's witness "Eusebio Saavedra and Mr. Sambrano." Petitioner provides that the prosecutor stated "[w]e know that that's what happened from two independent witnesses who are friends of the Petitioner's. They have no reason to lie to get him to say something other than what they saw, what the truth is, what they remember."

Petitioner states that's that "[t]he prosecutor was arguing that the victim was sitting in chair when he was shot because Zambrano saw him falling from the chair in order to rebut the Petitioner's testimony that the victim was standing up reaching for a gun when he shot the victim in self-defense." Petitioner claims that his counsel failed to object to

the improper comments which bolstered the witnesses' credibility. Petitioner also argues again that the prosecutor improperly called him a liar.

The trial court rejected this claim as well finding that the prosecutor "generally stayed within the confines of proper argument." (Exh. P). The court found that [i]t is clear that the prosecutor argued the credibility of the witnesses based on the evidence." Id.

Upon due consideration, the Court rejects this claim. An improper comment must be considered in light of the entire proceeding, and relief is only appropriate if the remark prejudiced the defendant's substantial rights. Collins v. Sec'y, Dept. of Corr., 2017 U.S. Dist. LEXIS 43923 (M.D. Fla. 2017) (citing United States v. Beasley, 72 F.3d 1518, 1525 (11th Cir. 1996) ("Prosecutorial misconduct is a basis for reversal only if, in the context of the entire trial and in light of any curative instruction, the misconduct may have prejudiced the substantial rights of the accused.").

Petitioner has failed to demonstrate that the state court's rejection of his claim was contrary to, or an unreasonable application of Strickland, or an unreasonable determination of the facts in light of the evidence adduced in state court. Ground 6 is without merit.

Ground 7: Ineffective assistance of appellate counsel – failure to raise an erroneous manslaughter by act jury instruction

Petitioner raised this claim in his amended petition for writ of habeas corpus filed in the Fifth District Court of Appeal. Petitioner claims that the "manslaughter by act" instruction was erroneously given and appellate counsel failed to argue the claim on appeal. Petitioner states that the trial court instructed the jury as to first-degree murder, second-degree murder and manslaughter by act, and no objections were made.

Petitioner states that because the instruction did not include the language "intentionally committed an act or acts that caused the death of (victim)," fundamental error occurred. Petitioner claims that when choosing between second-degree murder and manslaughter by act the jury could have reasoned that the instruction for manslaughter sounded too much like excusable homicide because there was no element of intent to commit the act. Accordingly, Petitioner asserts that the "only logical conclusion would be to find guilt as to second-degree murder because they believed he intended to do something which caused the death of the victim."

The state filed a response to the petition and explained that the trial occurred on December 8, 2010. On April 8, 2010, the Florida Supreme Court declared that the standard jury instruction for manslaughter was fundamentally flawed. (Exh. I, citing State v. Montgomery, 39 So. 3d 252 (Fla. 2010). On April 8, 2010, the Florida Supreme Court contemporaneously issued interim instructions. Id. citing In Re: Standard Jury Instructions, 41 So. 3d 853 (Fla. 2010). The Florida Supreme Court issued the final and revised instructions in 2011. As such, Respondents persuasively argue that the jury was properly instructed on the interim instructions, such that (1) reasonable appellate counsel could have concluded that any argument about jury instructions was not likely to succeed; and/or (2) appellate counsel would not have prevailed on this argument.

Claims that appellate counsel provided ineffective assistance are analyzed under the two-part test set forth in Strickland, Smith v. Robbins, 528 U.S. 259, 285 (2000); Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir.1991).

To establish a claim, Petitioner must show that appellate counsel's performance was objectively unreasonable, and that there is a reasonable probability that, but for this

performance, Petitioner would have prevailed on his appeal. Smith, 528 U.S. at 285–86. Appellate counsel is not required to raise every non-frivolous issue on appeal. Heath, 941 F.2d at 1130–31. Furthermore, appellate counsel cannot be deemed ineffective for failing to raise issues “reasonably considered to be without merit.” United States v. Nyhuis, 211 F.3d 1340, 1344 (11th Cir.2000) (quoting Alvord v. Wainwright, 725 F.2d 1282, 1291 (11th Cir.1984)).

Here, the Fifth DCA *per curiam* denied the state habeas petition. (Exh. K). Upon review of this claim, the Court finds that Petitioner has failed to show that the state court’s determination was contrary to, or an unreasonable application of, federal law. Indeed, the summary nature of a state’s appellate decision does not lessen the deference that it is due. See Wright v. Moore, 278 F.3d 1245, 1254 (11th Cir. 2002).

Ground 8: Ineffective assistance of appellate counsel – failure to raise the prosecutor’s misconduct in closing arguments when he interjected his personal experience and improperly bolstered the states [sic] case

Petitioner also raised this claim in his state habeas petition. (Exh. H). Petitioner asserts appellate counsel should have argued on direct appeal that the prosecutor improperly interjected his personal opinions into the closing arguments, which prejudiced the jury.

As an initial matter, as the state argued in the response to the habeas petition filed in state court, appellate counsel cannot be deemed ineffective for failing to argue unpreserved claims. (Exh. I). To the extent that trial counsel failed to object to any of the improper comments, there is no merit to the claim that appellate court should have argued the issue on appeal. Atkins v. Singletary, 965 F.2d 952, 957 (11th Cir. 1992) (finding that

where an issue is not preserved for appellate review, appellate counsel's failure to raise the issue is not constitutionally deficient as it is based on the reasonable conclusion that the appellate court will not hear the issue on the merits.).

In any event, the Fifth DCA denied this claim and the Court finds that Petitioner has failed to show that the state court's determination was contrary to, or an unreasonable application of, federal law.

Conclusion

Accordingly, for the foregoing reasons, the Petition is **DENIED with prejudice**. The Clerk is directed to enter judgment accordingly. Any of Petitioner's allegations not specifically addressed herein have been found to be without merit. The Clerk is directed to terminate any pending motions, and close the file.

IT IS SO ORDERED.

DONE AND ORDERED at Ocala, Florida, this 17th day of November, 2017.

AT Genell Holguin

UNITED STATES DISTRICT JUDGE

Copies:
Petitioner
Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

RICARDO LUPIAN-BARAJAS,

Petitioner,

-vs-

Case No. 5:15-cv-463-Oc-10PRL

SECRETARY, DEPARTMENT OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL,

Respondents.

ORDER

Petitioner, a state inmate proceeding *pro se*, initiated this case by filing a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. By Order dated November 17, 2017, the Court denied the Petition. (Doc. 23).

Pending before the Court is Petitioner's Motion to Alter or Amend Judgment. (Doc. 25). Petitioner states that he is entitled to this relief because the Court failed to issue or deny a certificate of appealability when it denied the Petition. Id. Petitioner states that he was entitled to this ruling and requires an amended judgment in order to proceed with his appeal. Id.

Upon due consideration, Petitioner's Motion (Doc. 25) is **DENIED**. The Court should grant an application for a Certificate of Appealability only if the Petitioner makes a substantial showing of the denial of a constitutional right.¹ To make this showing, Petitioner "must demonstrate that the issues are debatable among jurists of reason" or "that a court could

¹ See Fed.R.Civ. P. 22; see also 28 U.S.C. § 2253.

resolve the issues [differently]."² In addition, Petitioner could show "the questions are adequate to deserve encouragement to proceed further."³

Here, Petitioner has not filed a Notice of Appeal or Motion for Certificate of Appealability, and, therefore, has made no showing that he is entitled to the requested relief.

IT IS SO ORDERED.

DONE and ORDERED at Ocala, Florida this 9th day of January, 2018.

W. Russell Hodges

UNITED STATES DISTRICT JUDGE

² Barefoot v. Estelle, 463 U.S. 880, 893 n.4, 103 S.Ct. 3383 (1983) (citation omitted).

³ Id.

APPENDIX C

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

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

David J. Smith
Clerk of Court

For rules and forms visit
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July 05, 2018

Ricardo Lupian-Barajas
Lake CI - Inmate Trust Fund
19225 US HWY 27
CLERMONT, FL 34715-9025

Appeal Number: 18-10527-C

Case Style: Ricardo Lupian-Barajas v. Secretary, Department of Corr., et al

District Court Docket No: 5:15-cv-00463-WTH-PRL

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause.

The enclosed order has been ENTERED.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Walter Pollard, C

Phone #: (404) 335-6186

MOT-2 Notice of Court Action

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-10527-C

RICARDO LUPIAN-BARAJAS,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF
CORRECTIONS,
FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

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

Before: MARCUS and ROSENBAUM, Circuit Judges.

BY THE COURT:

Ricardo Lupian-Barajas has filed a motion for reconsideration of this Court's order dated May 9, 2018, denying his motion for a certificate of appealability and leave to proceed *in forma pauperis* in his appeal of the district court's denial of his 28 U.S.C. § 2254 petition for writ of habeas corpus. Upon review, Lupian-Barajas's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

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