No._____

_____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

JEFFREY ALLEN WARE – *Petitioner*

vs.

STATE OF FLORIDA - *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEAL

APPENDIX TO PETITION FOR CERTIORARI

Jeffrey A. Ware
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Raiford, FL. 32083

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13323-B

JEFFREY ALLEN WARE,

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: WILSON and ROSENBAUM, Circuit Judges.

BY THE COURT:

Jeffrey Ware has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's March 14, 2018, order denying a certificate of appealability and leave to proceed *in forma pauperis*, in his underlying habeas corpus petition, 28 U.S.C. § 2254. Upon review, Ware's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

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APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13323-B

JEFFREY ALLEN WARE,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

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 satisfy *Slack*'s test, the motion for a certificate of appealability is DENIED.

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

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

A

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

JEFFREY ALLEN WARE,

Petitioner,

v. **Case No: 5:15-cv-79-Oc-10PRL**

SECRETARY, DEPARTMENT OF CORRECTIONS and FLORIDA ATTORNEY GENERAL

Respondents.

JUDGMENT IN A CIVIL CASE

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

IT IS ORDERED AND ADJUDGED

Pursuant to the Court's order entered on June 19, 2017, the Petition for Writ of Habeas Corpus is dismissed with prejudice.

ELIZABETH M. WARREN,
ACTING CLERK

s/E. Norvell, Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

JEFFREY ALLEN WARE,

Petitioner,

v. Case No. 5:15-cv-079-Oc-10PRL

SECRETARY, DEPARTMENT OF CORRECTIONS and FLORIDA ATTORNEY GENERAL,

Respondents.
_____/

ORDER

Jeffrey Ware is a state prisoner serving a life sentence followed by eleven consecutive 60 year terms and two consecutive 5 year terms. He has filed a Petition under 28 U.S.C. § 2254 presenting six claims in support of his quest to set aside his convictions and sentences. (Doc. 1). The State responded in opposition to the Petition and filed an appendix consisting of the record in the state courts. (Doc. 10). ~~Petitioner~~ filed a Reply. (Doc. 14). Because this case may be decided on the basis of that record, no evidentiary hearing is required. After careful review, the Court has decided that none of Ware's claims have any merit. The Petition will be dismissed in its entirety, with prejudice.

Background

Ware was charged, by Information, in Citrus County, Florida, on October 12, 2009. (R. page 66-77).[1] The Information was amended numerous times and ultimately Ware was charged in the Amended Information as follows:

- Count I – Continuing Criminal Enterprise;
- Count II – RICO Act – Criminal;
- Count III – Conspiracy to Commit RICO Act – Criminal;
- Count IV – Conspiracy to Commit Trafficking in Controlled Substance;
- Count V – Conspiracy to Commit Unlawful Acquire or Attempt to Acquire Possession of Controlled Substance by Fraud;
- Counts VI, VII, VIII, IX, X, XI, XII, and XIII – Trafficking in Controlled Substance as a Principal;
- Count XIV – Attempted Trafficking in Controlled Substance as a Principal;
- Counts XV, XVI – Unlawful Acquire or Attempt to Acquire Possession of Controlled Substance by Fraud as a Principal; and
- Count XVII – Trafficking in Controlled Substance as a Principal.

(R. 942-958).

Ware entered pleas of not guilty to all counts of the final Amended Information and, with counsel, proceeded to a jury trial. The trial began on February 14, 2011 and concluded on February 22, 2011. Ware was convicted on all counts (R. 1073-1090), and was sentenced as follows:

- Count I – Life imprisonment as a habitual felony offender (HFO);
- Counts II and III – Sixty years imprisonment as a HFO;
- Count VI – Sixty years imprisonment as a HFO, with a 15 year mandatory minimum term;

[1] Citation to the record will be made to the sequential page numbers (pages 1-3721) assigned to the Appendix attached to the State's response. (Doc. 10).

- Counts VII, VIII, X, XI, XII, XIII, and XVII – Sixty years imprisonment as a HFO, with 15 year mandatory minimum terms;
- Count IX – Sixty years imprisonment as a HFO, with a 3 year mandatory minimum term;
- Count XIV – Sixty years imprisonment as a HFO, with a 15 year mandatory minimum term;
- Counts XV and XVI – Five years imprisonment as a HFO.

(R. 1109-1145). The sentences were all set to run consecutive to each other. (R. 1146).

In the initial brief to the Fifth District Court of Appeal, the case and evidence produced at trial were summarized as follows:

> The Appellant was charged with leading a continuing criminal enterprise, (CCE), operating a racketeer influenced corrupt organization, (RICO), conspiracy to violate the RICO statute, conspiracy to traffic in Oxycodone, conspiracy to acquire prescription medications by fraud, six counts of trafficking in Oxycodone, one count of attempted trafficking, and one count of attempting to acquire prescription medication by fraud. The charging document included 39 counts, 17 of which were charged against the Appellant. The remaining counts were charges against the Appellant's various co-defendants, all of whom admitted participation in the RICO conspiracy/continuing criminal enterprise headed by the Appellant. A jury trial commenced on February 14, 2011, wherein the following evidence was received:
>
> The State's witnesses testified that between May and August of 2009, they traveled with the Appellant to numerous pharmacies in central Florida, passing forged prescriptions for Oxycodone. The co-defendants stated that the Appellant had a supply of blank prescriptions, which he wrote as if he were a doctor, using the name of the co-defendant as the patient. Before entering a pharmacy, the codefendants supplied the Appellant with a driver's license or identity card, and the Appellant recorded that information so that he could refer to it if the pharmacy called to verify a prescription. The co-defendants testified that they would receive either cash or a portion of the medications dispensed by the pharmacy as compensation for passing a forged prescription.
>
> The State's witnesses testified that the Appellant used blank prescription paper to print out prescriptions listing the name, address and telephone number of various physicians. Witnesses testified that the doctors' telephone number printed on prescriptions was actually the number for the Appellant's cell phone. According to the witnesses, this was done so that when pharmacists called for verification, they would reach the

> Appellant, not a doctor's office. Several codefendants witnessed either the Appellant or his wife responding to calls from a pharmacist, whereupon the Appellant or his wife posed as a member of the doctor's staff, and provided verification of the prescription.
>
> The jury found the Appellant guilty of all 17 offenses as charged. The State dismissed Counts IV and V, (conspiracy to traffic in Oxycodone, and conspiracy to acquire medications by fraud), in order to avoid double jeopardy violations. The Appellant was declared an habitual felony offender, (HO), and was sentenced to life imprisonment for the CCE conviction. Sixty year prison terms were imposed for the RICO and RICO conspiracy convictions, (Counts II and III), and sixty year prison terms were imposed for all drug trafficking convictions. Five year prison terms were imposed for the attempted trafficking and the attempt to acquire medications by fraud. All sentences are consecutive.

(R. 3266-3269) (internal citations omitted). Appellate counsel raised two points on appeal (1) that the convictions for the CCE and RICO crimes (Counts I-III) violate double jeopardy and (2) that the trafficking convictions violate the Due Process Clause because § 893.13, as amended by § 893.101, was ruled to be facially unconstitutional by a Federal District Court in Shelton v. Secretary, Dept. of Corr., 802 F. Supp. 2d 1289 (M.D. Fla. 2011). Florida's Fifth District Court of Appeal (DCA) affirmed the convictions and sentences without an opinion. (R. 3312); Ware v. State, 144 So. 3d 556 (Fla. 5th DCA 2012) (Table).

On August 5, 2013, Ware filed a *pro se* Petition for Writ of Habeas Corpus in the Fifth DCA alleging ineffective assistance of appellate counsel. (R. 3315-3331). Ware claimed his appellate counsel was ineffective for failing to raise the following issues: (1) that the trial court erred in denying Defendant's motion for judgment of acquittal after the close of the State's case because the evidence was insufficient to support a conviction for CCE and RICO; (2) the trial court abused its discretion in allowing a number of collateral crimes and character evidence as it

was cumulative, prejudicial and the admission of it was not harmless error; and (3) his sentence violated the Eighth Amendment's protection against cruel and unusual punishment. Id. The State filed a Response to Order to Show Cause Why Petition Alleging Ineffective Assistance of Appellate Counsel Should Not be Granted. (R. 3333-3363). Ware filed a Reply to Respondent's Response to Order to Show Cause. (R. 3365-3370). The Petition was denied and the Fifth DCA denied Petitioner's Motion for Rehearing and Request for Opinion. (R. 3372).

On May 5, 2014, Ware filed a motion for postconviction relief under Florida's Rule of Criminal Procedure 3.850. (R. 3374-3577). The motion raised five claims of ineffective assistance of counsel: counsel failed to (1) convey a plea offer; (2) file a motion to suppress; (3) sufficiently argue the motion for judgment of acquittal; (4) properly challenge the Williams rule evidence; and (5) cumulative errors. Id. The motion was denied without a hearing. (R. 3579-3640). On appeal, Ware challenged the trial court's rulings as to grounds 2, 3 and 4. (R. 3642-3713). The State filed a Response. (R. 3715-3718). The Fifth DCA *per curiam* affirmed the trial court's ruling. (R. 3720).

Ware then filed his pending petition in this court under 28 U.S.C. § 2254. (Doc. 1). The State does not assert a statute of limitations defense and concedes the timeliness of the petition. The Court will therefore treat the petition as timely filed. The State does contend, however, that the claims are without merit or were not decided contrary to, or were unreasonable applications of, clearly established

federal law. The Court will examine each of the six claims in the sequence that Ware has presented them.

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

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[2] See Williams v. Taylor, 529 U.S. 362, 403-404 (2000).

[3] See 28 U.S.C. § 2254(d)(1)-(2).

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

the presumption of 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]

State court rulings on ineffective assistance of counsel claims are governed by Strickland v. Washington, 466 U.S. 668 (1984). "Ineffective assistance under Strickland is deficient performance by counsel resulting in prejudice . . . with performance being measured against an 'objective standard of reasonableness' under 'prevailing professional norms.'"[6]

The Supreme Court has recently 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."[7] 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).[8]

Discussion

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

[6] Rompilla v. Beard, 545 U.S. 374, 380 (2005) (quoting Strickland, 466 U.S. at 688) (internal citations omitted).

[7] Cullen v. Pinholster, 131 S. Ct. 1388, 1403 (2011).

[8] See Burt v. Titlow, 134 S. Ct. 10, 13 (2013) (citing Pinholster, 131 S. Ct. at 1403).

Claim One. Ware claims that his convictions for Continuing Criminal Enterprise (CCE) and for operating an organization prohibited by the Racketeer Influenced and Corrupt Organizations Act (RICO) constitute a double jeopardy violation. (Doc. 1 at 5-6). This claim corresponds with Point I of the Initial Brief of his direct appeal. (R. 3270, 3272-3279). The Fifth DCA rejected Ware's claim without a written opinion. (R. 3312).

At the outset of Ware's sentencing hearing, the prosecutor addressed the potential double jeopardy issues that arose due to the jury's verdicts:

> Defendant was convicted as charged in the Information. I think there was a lesser on one of the weights; however, based on doing some research, I am able, legally - - or the Court is able to legally sentence him on the RICO, the CCE, and the conspiracy to commit CCE.
>
> Cases I'm referring to - - I have provided them to Defense - - are U.S. v. Hoyle, 122 F.3d 48;[9] U.S. v. Crosby, 20 F.3d 480;[10] and U.S. v. Love, 767 F.2d 1042,[11] the last one is a Fourth Circuit out of 1985.
>
> . . .
>
> Yes. I cannot legally ask the Court to sentence the Defendant on the conspiracy to traffic, on the conspiracy to acquire a controlled substance because they are subsumed in the CCE count.
>
> . . .
>
> CCE inherently has an agreement among the Defendant and five other people that he was supervising, so I can't have him sentenced on CCE and conspire to traffic in and acquiring.
>
> . . .
>
> So, pursuant to the jury's verdict, at this point, I'm going to ask the Court to vacate those two convictions, the conspire to traffic oxy and a conspiracy to acquire a controlled substance, because they are both subsumed - -
>
> . . .
>
> It would be double jeopardy to sentence him on both.

---

[9] United States v. Hoyle, 122 F.3d 48 (D.C. Cir. 1997).

[10] United States v. Crosby, 20 F.3d 480 (D.C. Cir. 1994).

[11] United States v. Love, 767 F.2d 1052 (4th Cir. 1985).

(R. 3209-3211). In his appellate brief, Ware cites Florida statutes, case law, and rules of procedure to support his claim that the two convictions violate double jeopardy. (R. 3272-3279).

The Florida Statute that defines a continuing criminal enterprise requires that it "must be interpreted in concert with its federal analog, 21 U.S.C. s. 848." § 893.20(5), Fla. Stat. Under federal law, there is no double jeopardy bar for convictions for both CCE and RICO. See U.S. v. Gonzales, 921 F.3d 1530, 1537 fn. 7 (11th Cir. 1991).[12]

In U.S. v. Hoyle, 122 F.3d 48, 49-50 (D.C. Cir. 1997) it was argued that a RICO conspiracy is a lesser included offense of CCE, and, thus, the imposition of cumulative sentences for these two crimes violated the Fifth Amendment's prohibition against double jeopardy. The Court noted that CCE's requirement that the defendant have organized or supervised five or more persons is not matched by any of the RICO conspiracy elements, but acknowledged that the real question at hand was not whether the offenses were identical – only whether if a CCE violation is shown, a RICO conspiracy is also necessarily proven. The government contended that the one element of RICO not subsumed within CCE is the requirement of a Showing of a criminal enterprise. Citing federal authority, the

[12] The CCE statute, like RICO, relies on a list of predicate offenses, and a violation of the statute requires a series of these predicate violations undertaken in the context of a criminal enterprise. Both "series" and "enterprise" are defined in the statute. See 21 U.S.C. § 848(b)(1)—(b)(2)(A). Prosecutions for CCE and RICO are often brought together. See e.g., United States v. Boldin, 772 F.2d 719 (11th Cir. 1985) *cert. denied*, 475 U.S. 1048 (1986); United States v. Bascaro, 742 F.2d 1335 (11th Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985); United States v. Grayson, 795 F.2d 278 (3rd Cir.1986), *cert. denied*, 479 U.S. 1054 (1987).

court ruled that the RICO statute is not subsumed within the CCE statute, joining seven other circuits in holding that a CCE violation does not require proof of the existence of a RICO enterprise. Id. Thus, Ware is incorrect in arguing that one convicted of CCE must have necessarily committed all the acts required for a RICO conspiracy or completed offense.

The convictions for CCE and RICO did not violate the Fifth Amendment's prohibition against double jeopardy. There was no constitutional violation of Blockburger v. United States, 284 U.S. 299 (1932) or its progeny in this case.

Claim Two. Ware claims that his convictions for drug trafficking are invalid based on Shelton v. Sec'y, DOC, 802 F. Supp. 2d 1289 (M.D. Fla. 2011). (Doc. 1 at 6-8). This claim corresponds with Point II of the Initial Brief of his direct appeal. (R. 3271, 3280-3284). The Fifth DCA rejected Ware's claim without a written opinion. (R. 3312).

In Shelton, § 893.13, Fla. Stat., as amended by § 893.101, was found to violate due process of law and was facially unconstitutional. However, Shelton was overturned on appeal. See Shelton v. Sec'y, DOC, 691 F.3d 1348 (11th Cir. 2012). This claim therefore fails because there is no showing that the decision of the state court was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d)(1). In his Reply, Ware concedes that no federal habeas relief can be obtained on this ground. (Doc. 14 at 9).

Claim Three. Ware claims that his appellate counsel was ineffective for failing to raise two issues on direct appeal. (Doc. 1 at 8-12). First, he claims that appellate counsel should have raised a claim that the trial court erred when denying his motion for judgment of acquittal based on insufficient evidence to support a conviction for the CCE, RICO, and conspiracy counts. (Doc. 1 at 8-9). Second, he claims that appellate counsel should have raised a claim that the trial court abused its discretion in allowing collateral crime and character evidence to be admitted into evidence. (Doc. 1 at 9-12). This claim corresponds with Point One and Point Two of Ware's State Petition for Writ of Habeas Corpus. (R. 3315-3325). The Fifth DCA rejected those claims. See R. 3372.

Ware claims that the State failed to prove each element for the RICO and CCE offenses. Specifically as to the CCE count, Ware claims that the State failed to present proof of substantial assets gained in the commission of the enterprise and that he acted as a principal to trafficking in controlled substances. (Doc. 1 at 8). Ware further claims that the State failed to prove that there was a conspiracy to racketeer. (Doc. 1 at 9). The trial court ruled on the motion for acquittal as follows:

> Well, the standard is a little different on a JOA about this, about whether or not it goes to the jury. And I have heard sufficient testimony, not the least of which was the claims - I believe there was at least one claim by your client at one point during a phone conversation - I would have to defer to the attorneys - about the substantial - I know the focus of this was the substantial assets, the resources from these acts.
>
> As it pertains to the CCA (sic), there was something to the effect that - I don't know who he was talking to; it may have been his wife or somebody - but claiming- they had, quote, gone through millions.

> But when you look at the overall evidence that has been produced, as it pertains to the 12,500-some pills at the various prices between - oh, where was that - between 10 and - $10, $12, to $15 here in Florida. It is either 102,000, 123,000, or $153,000-worth of assets from - oh, that's just from the Oxycontins.
>
> But if they were actually transited up to Massachusetts, it jumped up at $30 - this is just the claims. And your client, having shared most of this information with his co-conspirators at this point, the claim could have been as much as $307,000 if the pills were going for $30 as - a pop up there.
>
> But, nonetheless, there was enough claim by your client through the various co-defendants that this case is sufficient to go to the jury.
>
> Judgment of acquittal motions will be denied on all counts.

(R. 2904-2905). The trial court's ruling on the motion for judgment of acquittal was not contrary to, and did not involve an unreasonable application of clearly established Federal law, nor was it based on an unreasonable determination of the facts. See 28 U.S.C. § 2254(d)(1) and (2). Had this issue been raised on direct appeal there would have been no difference in the outcome of this case.

Ware also claims that the trial court improperly admitted collateral crime and character evidence and that appellate counsel was ineffective for failing to raise that claim on appeal. Specifically, Ware challenges (1) the admission of evidence of his cocaine habit to support the substantial asset element of the CCE conviction; (2) the admission of evidence that he sold oxycodone obtained from the enterprise to his codefendants; (3) the admission of evidence relating to casinos and gambling; and (4) the admission of uncharged crimes in other jurisdictions. (Doc. 1 at 9-11). This evidence was the subject of the State's Williams[13] Rule Notice.

[13] Williams v. Florida, 110 So. 2d 654 (Fla. 1959); § 90.404(2)(a), Fla. Stat.

(R. 459-462). The state court ruled on the admissibility of the Williams Rule evidence as follows:

> I'm looking at 90.404, Subsection 1. It says, "Evidence of a person's character or a trait of character is inadmissible to prove action in conformity with it on a particular occasion, except" - and then we look over to 2 - "except: Other crimes, wrongs, or acts," which of course is a classic Williams Rule.
>
> So, I'm looking at the first photograph here. "The assertions are that there is a cocaine addiction and an addiction to oxycodone." Well, um, I think it is - it is just common sense. I don't need an expert witness to tell me I need air to breathe, and I don't need an expert to tell me that cocaine can never be prescribed.
>
> Cocaine is not a medicine and as such - unlike oxycodone, cannot be prescribed. And the fact of the matter is that if a person charged with this kind of stuff decides he wants to put all his money in gold bars until his wall safe looks like Fort Knox, that's one thing.
>
> If he wants to take all of this – if a person, arguendo, wants to run all this cocaine and the profits derived from it up his nose in cocaine or squander it at a casino somewhere, then there is not - this is not saying that there are not substantial assets generated from the enterprise.
>
> And they are inextricably intertwined as it pertains to subparagraph 2. And the fact that all these apparently co-defendants have all thrown him under the wheels of the bus. Telling him that, you know, they - we got - we were all part of Mr. Ware's ongoing criminal enterprise here, and he was the leader of the pack.
>
> That's just - that - you kind of lay down with dogs, you are going to come up with fleas. And that's exactly what Mr. Ware's – you know the assertions here - I'm looking at the proffer. We are talking about subparagraph 3, the plans on introducing other prescriptions, even if they occurred before the dates in evidence, classically fits within the argument of - and also, of course, this is relevant testimony - relevant evidence, under 90.401, is "evidence tending to prove or disprove a criminal fact." Well, within - of the things that the State has to prove in this heightened and very, very complicated type of a case is to prove the mens rea, the intent, the operation, the plan, the ongoing criminal enterprise, and what better way to do that than with all the matters here that are referenced in this subparagraph 3 and on the next page.
>
> I counted no less than 13 different factors that courts are supposed to consider in drug cases like this, and I'll just read right off the verbatim list that the Defendant chose the pharmacy - I mean, this is based on the proffer.
>
> He chose the pharmacy. He chose - drove to the pharmacy. He provided the money, filled out the prescriptions - they were the same as passed in Citrus - the same doctors, the same prescriptions. Number 8,

> The same telephone numbers and even more - I mean, the State kind of limited it just by putting the word "et cetera" in there because you guys know what the evidence out there is all about.
>
> I'm just looking at one of the - almost a - it is basically fingerprint evidence in this kind of case with the number of similarities.
>
> Number 9, Defendant provided the money. Defendant would enter the pharmacy, um - co-defendant would enter the pharmacy. Defendant would get the filled prescription, disburse the pills.
>
> And No. 13, He would drive away. He was calling all the shots." And as such that's classically why the State is allowed to bring these matters in to show proof of motive, opportunity, intent, and the preparation - my goodness, the preparation was extraordinary - the plan, the knowledge, the identity, absence of mistake or accident. You know, basically trying to say, "Oh, it was somebody else who was trying to pass all these scripts.
>
> So, it is for those reasons – that is the Williams Rule notice filed January 19th - will be, in fact, approved.

(R. 3166-3169).

In response to this issue as it was raised in Ware's State Petition for Writ of Habeas Corpus, the State argued the following:

> Ware also claims that the admission of all the Williams Rule evidence should have been an issue on appeal. The fact that Ware carried this enterprise out in various counties and paid many of his "patients" with some of the drugs that were obtained by them through the fraudulent prescription was relevant and admissible. Ware recruited addicts who would accept part of the prescription as payment. Ware admitted he was "detoxing" after his arrest and these "patients" testified that Ware was also a user. The State argued that this evidence was relevant because Ware did not live in a "mansion" and did not drive "exotic" sports cars or pilot cigarette boats - something to be expected from a criminal enterprise that handled "millions" of dollars. The fact that his personal use of drugs consumed his profits was relevant and probative. This rationale also made relevant the evidence of Ware's gambling, which is not a crime and cannot be considered prejudicial. The trial court ruling was that this evidence was inextricably intertwined with the CCE and RICO operation, and was not even Williams Rule evidence, (Id.) Thus, raising the claim that Williams Rule evidence was more prejudicial than probative would not have been successful and would not have changed the outcome of the appeal.

(R. 3335) (internal citations omitted).

The Court concludes that Claim Three does not warrant federal habeas corpus relief because Ware cannot show that the state courts' rejection of this claim resulted in a decision that is contrary to, or involved an unreasonable application of, clearly established federal law, or resulted in decisions that were based on an unreasonable determination of the facts in light of the evidence presented in the state proceedings.

Claim Four. Ware's fourth claim is that his trial counsel was ineffective for failing to move to suppress the evidence obtained during the search of his vehicle and his cell phone. (Doc. 1 at 12-14). Ware presented this same argument to the state court as "Omission Two" of his postconviction motion under Florida's Rule 3.850. (R. 3378-3381). The state court found:

> In Issue Two, Defendant alleges his trial counsel was ineffective for failing to file a motion to suppress. Defendant argues that evidence used at trial was obtained illegally by law enforcement officers. Specifically, Defendant claims the blank prescription paper, cell phone and fraudulent prescriptions were obtained by illegal search of his vehicle.
>
> Motion to suppress is filed to suppress evidence gained improperly or illegally. See Fla. R. Crim. P. 3.190(g) (2013). In a claim for ineffective assistance of counsel based on counsel's failure to file a motion to suppress, a defendant must allege facts sufficient to show that counsel had a valid basis for filing a motion to suppress and that there is a reasonable probability it would be granted. See Zakrezewski v. State, 866 So. 2d 688, 694 (Fla. 2003).
>
> In the instant case, the Defendant consented to the search of his vehicle. Upon his being arrested his vehicle was searched. Subsequent to his arrest he revoked his consent. However, much of the items had already been discovered based on the Defendant's consent. Additionally, the Court ordered on April 7, 2010 release of telephone information as to Jacklyn Ware's telephone number and April 28, 2010 the Court ordered release of telephone records as to the Defendant's telephone numbers. Therefore, there was no evidence that law enforcement officers obtained evidence illegally and trial counsel had no basis to file a motion to suppress. Accordingly, Defendant's Issue Two are conclusively refuted by the record.

(R. 3581-3582) (internal citations omitted). Ware appealed this ground to the Fifth DCA as Issue One. (R. 3642-3652). Prior to ruling on the appeal, the Appellate Court ordered the State to respond to this issue. See R. 3715. The State argued the following:

> The State first responds by noting that Ware initially gave consent to search his vehicle. Also, it will be helpful to analyze the items that Ware suggests should have been suppressed: the contents of the cell phone found on his person and the blank prescription paper and fraudulent prescriptions found in the toolbox located in the cargo area of Ware's pickup truck.
>
> The trial court denied this ground based upon the fact that Ware gave consent to search the vehicle at the scene. Moreover, the trial court attached a transcript of the testimony of the officer who obtained the consent showing that because Ware was arrested, an inventory search of the vehicle would be conducted regardless of the consent. The fact that Ware subsequently revoked his consent had no effect on the valid inventory (and consent) search which had already occurred.
>
> Regardless of the inventory search and the fact of inevitable discovery, the claim was also denied in part because sufficient evidence was found prior to the revocation of consent. The trial court attached sworn testimony from the officer who conducted the consent/inventory search which resulted in the discovery of used fraudulent prescriptions, receipts, and other documentation found in the passenger area.
>
> Addressing the cell phone, it is important to note that Ware was accused of printing fraudulent narcotic prescriptions which listed his own cell phone number. The pharmacies would then call Ware's phone to confirm the legitimacy of the narcotic prescription. Ware's cell phone was clearly evidence because its number matched that which was found on the prescriptions. The evidence reflects that several phones were found in Ware's possession, but only the one found on his person was entered into evidence.
>
> The trial court denied this portion of the claim in part because a court order was entered which mandated release of the telephone data on Ware's phone. Said order is also attached to the trial court's summary denial. Therefore, because of the nature of the case and because the court entered an order requiring release of phone data, Ware cannot show deficient performance or prejudice.
>
> Courts have "consistently held that trial counsel cannot be held ineffective for failing to anticipate changes in the law." Cherry v. State, 781 So. 2d 1040, 1053 (Fla. 2000); Johnston v. State, 63 So. 3d 730, 740 (Fla. 2011) (holding that counsel cannot be deemed ineffective for failing to file a meritless motion). Here, Ware relies on a 2013 opinion (Smallwood v.

> State, 113 So. 3d 724 (Fla. 2013)) in support of his argument that counsel should have moved to suppress cell phone evidence seized in 2009. This fact, coupled with the search of the person incident to arrest and the initial consent, in addition to the subsequent court order, renders this claim moot.
>
> Furthermore, testimony reflects that at the time consent to search was revoked, officers had already found incriminating evidence and were also in the process of conducting an inventory search. Thus, the remaining evidence would have inevitably been discovered in the course of the legitimate investigation, where the initial consent to search resulted in probable cause to search the remainder of the vehicle. See Nix v. Williams. 467 U.S. 431, 447 (1984); Rolling v. State, 695 So. 2d 278, 294 (Fla. 1997).

(R. 3715-3717). The Fifth DCA *per curiam* affirmed the trial court's decision. (R. 3720).

The state court's findings and conclusions regarding this claim were reasonable, in accord with, and not contrary to, the principles of Strickland v. Washington, 466 U. S. 668 (1984), which the state court cited as the controlling authority regarding ineffective assistance of counsel claims; and were also reasonable, not unreasonable, in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d)(1)-(2).

Claim Five. Ware claims that he received ineffective assistance of counsel because his defense lawyer failed "to file a sufficient motion for judgment of acquittal." (Doc. 1 at 14-16). Ware presented this same argument to the state court as "Omission Three" of his postconviction motion under Florida's Rule 3.850. (R. 3381-3383). The state court found:

> In Issue Three, Defendant argues trial counsel was ineffective for failing to properly argue his motion for judgment of acquittal. Defendant contends trial counsel did not properly set for [sic] the grounds. Specifically, Defendant claims the State failed to prove elements of the crimes and trial counsel did not sufficiently argue for the judgment of acquittal. Defendant is mistaken. After the rest of the State's case, trial counsel motioned for a

> judgment of acquittal. Trial counsel outlined the lack of evidence and argued the State has failed to prove the crimes beyond a reasonable doubt. After his argument this Court denied his motion. Therefore, Defendant's Issue Three is conclusively refuted by the record.

(R. 3582-3583) (internal citations omitted). Ware appealed this ground to the Fifth DCA as Issue Two. (R. 3652-3654). The Fifth DCA *per curiam* affirmed the trial court's decision. (R. 3720).

The state court's findings and conclusions regarding this claim were reasonable, in accord with, and not contrary to, the principles of Strickland v. Washington, 466 U. S. 668 (1984), which the state court cited as the controlling authority regarding ineffective assistance of counsel claims; and were also reasonable, not unreasonable, in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d)(1)-(2).

Claim Six. Ware claims that he received ineffective assistance of counsel because his defense lawyer "failed to challenge the Williams Rule evidence." (Doc. 1 at 16-17). Ware presented this same argument to the state court as "Omission Four" of his postconviction motion under Florida's Rule 3.850. (R. 3384-3388). The state court found:

> In his Issue Four the Defendant alleges that his trial counsel failed to challenge the Williams Rule evidence. Defendant contends trial counsel was ineffective for failing to present evidence to challenge the State's claims. Defendant is mistaken. This Court held a hearing on the State's Williams Rule Notice filed February 2, 2010. The State argued evidence of Defendant's addiction to cocaine and oxycodone should be admissible at trial to support its contention that Defendant was involved in drug trafficking. At the hearing trial counsel made numerous arguments that the State's evidence regarding drug addiction is unsupported and objected to allowing admission. The Court then granted the State's motion. Therefore, Defendant's claim is conclusively refuted by the record.

(R. 3583) (internal citations omitted). Ware appealed this ground to the Fifth DCA as Issue Three. (R. 3654-3657). The Fifth DCA *per curiam* affirmed the trial court's decision. (R. 3720).

The state court's findings and conclusions regarding this claim were reasonable, in accord with, and not contrary to, the principles of Strickland v. Washington, 466 U. S. 668 (1984), which the state court cited as the controlling authority regarding ineffective assistance of counsel claims; and were also reasonable, not unreasonable, in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d)(1)-(2).

Conclusion

Having determined that none of the Claims of the motion or petition under 28 U.S.C. § 2254 have any merit, judgment will be entered DISMISSING the petition with prejudice.

The Clerk is Directed to do so, to terminate any pending motions and close the file.

IT IS SO ORDERED.

DONE and ORDERED at Ocala, Florida, this 19th day of June, 2017.

UNITED STATES DISTRICT JUDGE

Copies to: *Pro Se* Petitioner; Counsel of Record

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