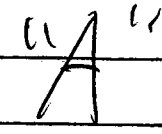
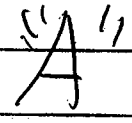
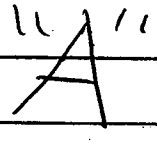
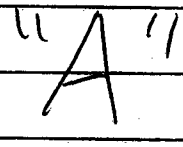
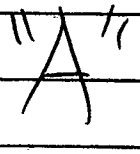
Appendix

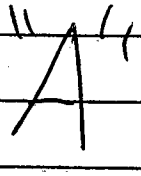


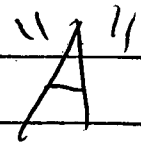












[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-12054
Non-Argument Calendar

D.C. Docket No. 1:15-cv-23896-MGC

JAVIER SOLIS,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,
DEPARTMENT OF LEGAL AFFAIRS FOR THE STATE OF FLORIDA,

Respondents-Appellees.

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

(March 1, 2018)

Before WILLIAM PRYOR, JILL PRYOR and FAY, Circuit Judges.

PER CURIAM:

Javier Solis, a Florida prisoner, appeals *pro se* the denial of his petition for a writ of habeas corpus. 28 U.S.C. § 2254. Solis argues that the state trial and postconviction courts violated his right to due process and that both his trial and his appellate counsel were ineffective. Because the decisions of the Florida courts rejecting Solis's arguments reasonably applied clearly established federal law, we affirm.

Solis raised nine issues to invalidate his convictions and sentence for burglary with assault and for sexual battery. Solis contested the denial of his motion for a mistrial based on the state allegedly shifting the burden to him to present an alibi defense. Solis also alleged that trial counsel was ineffective for failing to object to Detective Castaneda's authentication of photographs; for failing to object to the detective's testimony about a warning to be on the lookout and about his arrival at the crime scene; for conceding that Solis was guilty of assault; and for failing to object to Solis's sentence as being based on his arrests for two similar offenses. Solis also alleged that the postconviction court had an *ex parte* communication with the state. Finally, Solis alleged that his appellate counsel was ineffective for failing to challenge Solis's sentence and to challenge a hearsay statement made by Castaneda. The Florida court summarily rejected all of Solis's postconviction arguments.

We review *de novo* the denial of a petition for a writ of habeas corpus. *Borden v. Allen*, 646 F.3d 785, 808 (11th Cir. 2011). The Antiterrorism and Effective Death Penalty Act of 1996 prohibits granting "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court . . . with respect to any claim that was adjudicated on the merits in State court unless the adjudication of the claim . . . was contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). "By its terms, Section 2254(d) bars relitigation of any claim 'adjudicated on the merits,'" even if the "state court's decision is unaccompanied by an explanation," *Harrington v. Richter*, 562 U.S. 86, 98 (2011), unless the petitioner can "show that the state court's ruling on the claim . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement," *id.* at 103. And because the factual findings of the state court are "presumed to be correct," the petitioner bears "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). The relevant state decision for federal review is the last adjudication on the merits. *Wilson v. Warden, Ga. Diagnostic Prison*, 834 F.3d 1227, 1235 (11th Cir. 2016) (en banc).

The state court did not unreasonably apply clearly established federal law when it rejected Solis's argument that he was denied a fair trial because the state

shifted the burden to him to prove his innocence with alibi evidence when it inquired whether he had given a statement about being with his brother and submitted rebuttal testimony about his statement. *See United States v. Simon*, 964 F.2d 1082, 1086 (11th Cir. 1992). Solis testified that he was unsure of his whereabouts at the time of the crimes and that he could have been with the victim if she were one of 20 prostitutes he had paid for sex. The prosecutor asked Solis about giving a statement "that he remembered the day because [he] [was] with [his] brother," Solis responded, "I told [Castaneda] it's possible." Later, the detective testified that Solis said he had worked on a bathroom in his brother's house when the crimes occurred. Because Solis's trial testimony conflicted with his prior statement to the detective, the prosecutor could use Solis's statement for impeachment on rebuttal. The trial court commented that the prosecutor never alluded to the absence of Solis's brother during the trial, which might have suggested to the jury that Solis should have called his brother as a witness. *See Simon*, 964 F.2d at 1086. The state court could have reasonably concluded that Solis's statement was used for the permissible purpose of testing his credibility.

The state postconviction court could have also reasonably concluded that Solis's trial counsel was not ineffective. The state court could have reasonably concluded that trial counsel had no reason to object to Castaneda's testimony or to Solis's sentence. *See Freeman v. Att'y Gen.*, 536 F.3d 1225, 1233 (11th Cir. 2008).

Castaneda could authenticate photographs of the crime scene that he witnessed the photographer take. *See* Fed. R. Evid. 901. Castaneda's testimony about receiving a warning to be on the lookout "with a description of the person [they were] looking for" and about the purpose of a lookout warning was unobjectionable and was devoid of any incriminating hearsay information that might have been in the actual warning. *See* Fed. R. Evid. 801(c); *United States v. Cain*, 587 F.2d 678, 680 (5th Cir. 1979). It would have been futile to challenge Castaneda's testimony about being at the crime scene based solely on Solis's conjecture that the testimony was false. *See Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991). The state court also could have reasonably determined that trial counsel, faced with the victim's positive identification and biological evidence connecting Solis to the crimes, made a strategic decision to concede that Solis was guilty of assault and to focus on the failure of the state to produce direct evidence that he had burgled her vehicle. *See Strickland v. Washington*, 466 U.S. 668, 690 (1984). And after trial counsel objected at sentencing to evidence of Solis's arrests, the trial court stated that it was "not considering the facts" of nor would Solis "be punished" for other bad acts.

Solis was entitled to no relief on his claim about an *ex parte* communication between the postconviction court and the state. A district court may summarily dismiss a petition that fails "to state facts that point to a 'real possibility of

constitutional error,'" Advisory Committee Notes to Rule 4 Governing Section 2254 Cases, and Solis offered no evidence beyond his speculation that an *ex parte* communication occurred before the trial court ruled on his postconviction motion.

The state postconviction court also could have reasonably concluded that appellate counsel was not ineffective. The state court could have reasonably determined that appellate counsel had no reason to pursue the meritless claim that Solis's sentence was based on his arrests. *See Chandler v. Moore*, 240 F.3d 907, 917 (11th Cir. 2001). And the state court could have ruled that appellate counsel could not argue for the first time on appeal that the trial court violated the Confrontation Clause or that Solis was punished for maintaining that he was innocent and proceeding to trial. *See Diaz v. Sec'y for the Dep't of Corr.*, 402 F.3d 1136, 1142 (11th Cir. 2005) ("Under Florida law, an error that passed without objection cannot be raised on appeal; appellate counsel, therefore, is not ineffective for failure to raise a meritless argument."). And, even if Solis's claims had been preserved for appeal, the state court could have reasonably determined that the claims lacked merit. Solis contended that Castaneda testified about a statement that Solis's brother made to Detective Espana, but Solis failed to explain where Castaneda made the alleged hearsay statement or to respond to the argument of the state that Espana was not mentioned during Solis's trial. *See Chavez v. Sec'y Fla. Dep't of Corr.*, 647 F.3d 1057, 1061 (11th Cir. 2011). Solis argues he was

punished for maintaining his innocence, as evidenced by the trial judge's remark that he had "a serious problem with Mr. Solis' testimony." But the state court could have reasonably concluded that the trial judge's remark referred to Solis's lack of credibility and lack of remorse. *See Duke v. Allen*, 641 F.3d 1289, 1294–95 (11th Cir. 2011).

We **AFFIRM** the denial of Solis's petition for a writ of habeas corpus.

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 17-12054

District Court Docket No.
1:15-cv-23896-MGC

JAVIER SOLIS,

Petitioner - Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,
DEPARTMENT OF LEGAL AFFAIRS FOR THE STATE OF FLORIDA,

Respondents - Appellees.

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

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: March 01, 2018
For the Court: DAVID J. SMITH, Clerk of Court
By: Jeff R. Patch

ISSUED AS MANDATE 05/30/2018

A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-12054-FF

JAVIER SOLIS,

Petitioner - Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,
DEPARTMENT OF LEGAL AFFAIRS FOR THE STATE OF FLORIDA,

Respondents - Appellees.

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

Before WILLIAM PRYOR, JILL PRYOR and FAY, Circuit Judges.

PER CURIAM:

The petition(s) for panel rehearing filed by Appellant Javier Solis is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-41

A

"B"

"B"

Appendix "B"

"B"

"B"

"B"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-CIV-23896-COOKE
MAGISTRATE JUDGE P.A. WHITE

JAVIER SOLIS,

Petitioner,

v.

JULIE JONES,

Respondent.

REPORT OF MAGISTRATE JUDGE

Introduction

Javier Solis, who is presently confined at South Bay Correctional Institution in South Bay, Florida, has filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, attacking his conviction and sentence in case number 10-35072, entered in the Eleventh Judicial Circuit Court of Miami-Dade County.

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.

The court has before it the amended petition for writ of habeas corpus [DE#7],[1] Respondent's response to an order to show cause [DE#12] and appendix of exhibits [DE#13], Respondent's notice of filing the trial transcripts [DE#14], and Petitioner's reply [DE#15].

Claims

Ground One: The trial judge erred in denying Petitioner's motion for mistrial when the

[1]As the record reflects, Petitioner was ordered to file an amended petition due to the rambling and disjointed nature of his original filing. [DE#6].

State was allowed to shift the burden of proof to the Petitioner by giving the jury the impression Petitioner should have called an alibi witness despite the fact that Petitioner never asserted any alibi defense.

Ground Two: Petitioner was denied his Sixth Amendment right to effective assistance of counsel by virtue of his failure to object to the inadmissible inferential hearsay testimony of Detective Casteneda.

Ground Three: Petitioner was denied his Sixth Amendment right to effective assistance of counsel by virtue of his failure to object to Detective Castenda testifying falsely during direct examination.

Ground Four: Trial counsel was ineffective for conceding Petitioner's guilt on assault, in violation of the Sixth and Fourteenth Amendment of the United States Constitution.

Ground Five: Trial counsel was ineffective for failure to object to a Williams' Rule violation, in violation of the trial court order granting the motion *in limine* precluding any mentioning of collateral crimes, in in violation of the Sixth and Fourteenth Amendment of the United States Constitution.

Ground Six: Trial court's successor judge had *ex parte* communications with the state attorney that denied Petitioner due process under the Sixth and Fourteenth Amendments.

Ground Seven: Petitioner was denied his Sixth Amendment right to effective appellate counsel for his failure to raise a Williams' Rule violation, a violation of the trial court granting the motion in limine precluding any mentioning of collateral crimes.

Ground Eight: The State introducing the brother's statement through Detective Castenda in violation of Petitioner's confrontation rights where the statement was made to Detective Espana, the inescapable inference from the testimony is that a non-testifying witness has furnished the police with evidence of Petitioner's guilt; the testimony is hearsay.

Ground Nine: Appellate counsel was ineffective by virtue of his failure to argue that the trial court committed fundamental error by considering impermissible sentencing factor such as the Petitioner's continuing and maintaining his innocence, taking responsibility, and failure to express remorse.

Procedural History[2]

Petitioner was convicted after a jury trial of one count of burglary with assault or battery and one count of sexual battery with no serious injury, and sentenced to concurrent terms of 25 and 15 years, respectively. Petitioner appealed his conviction and sentence, and Florida's Third District Court of Appeal affirmed in a *per curiam* decision without written opinion. State v. Solis, 130 So.3d 1288 (Fla. 3rd DCA 2014). Petitioner then unsuccessfully pursued post-conviction relief pursuant to state law. Then on October 12, 2015, Petitioner initiated the instant federal proceeding for writ of habeas corpus. Respondent concedes that the petition is timely, and that the claims raised therein are properly exhausted.

[2]The relevant procedural history of Petitioner's underlying criminal case is not in dispute. A detailed recitation thereof, with citations to the record, can be found in Respondent's response. The court thus sets forth here only those portions of the procedural history that are necessary and relevant to an understanding and resolution of the claims raised in the instant petition. Unless otherwise noted, any citations to exhibits are to the exhibits to Respondent's response.

Evidence Adduced at Trial

The victim in this case, Lasawanda Render, was the principal witness against Petitioner at trial. Ms. Render testified that on the date of the incident, she was getting into her car when she noticed a male open her car door. (T.324). Ms. Render testified that she tried to exit the car and the man hit her in the face three times and then removed her boxer shorts and panties. (T.331). Ms. Render further testified that the assailant then proceeded to have forced intercourse with her, and that when he was done he rode away on a bike. (T.339). Ms. Render identified Petitioner in a photo lineup as the perpetrator (T.202), and a DNA analyst concluded Petitioner's DNA was present on Ms. Render's nightgown and on a vaginal swab. (T.295).

Standard of Review

A prisoner in state custody may not be granted a writ of habeas corpus for any claim that was adjudicated on the merits in state court unless the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "based on an unreasonable determination of the facts in light of the evidence presented" to the State court. 28 U.S.C. § 2254(d)(1), (2); see also Williams v. Taylor, 529 U.S. 362, 405-06 (2000); Fugate v. Head, 261 F.3d 1206, 1215-16 (11th Cir. 2001). A state court decision is "contrary to" or an "unreasonable application of" the Supreme Court's clearly established precedent within the meaning of § 2254(d)(1) only if the state court applies a rule that contradicts the governing law as set forth in Supreme Court case law, or if the state court confronts a set of facts that are materially indistinguishable from those in a decision of the Supreme Court and nevertheless arrives at a result different from Supreme Court precedent. Brown v.

Payton, 544 U.S. 133, 141 (2005); Williams, 529 U.S. at 405-06. A federal court must presume the correctness of the state court's factual findings, unless the petitioner overcomes them by clear and convincing evidence. See, 28 U.S.C. § 2254(e)(1); Putman v. Head, 268 F.3d 1223, 1241 (11th Cir. 2001). So long as neither the reasoning nor the result of the state court decision contradicts Supreme Court decisions, the state court's decision will not be disturbed. See Early v. Packer, 537 U.S. 3, 8 (2002). To obtain habeas relief on a claim of ineffective assistance of counsel, the petitioner must show that the state court applied Strickland an objectively unreasonable manner." Bell v. Cone, 535 U.S. 685, 699 (2002).[3]

In addition, it is well-settled that a habeas petitioner must allege facts that, if proved, would entitle him to relief. See Blackledge v. Allison, 431 U.S. 63, 75 n. 7, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977) (noting that notice pleading is not sufficient for habeas petition) (citing Advisory Committee Note to Rule 4, Rules Governing Section 2254 Cases); Rule 2, Rules Governing § 2254 Cases (requiring petitioner to state "facts supporting each ground" and "relief requested"); see also Schriro v. Landrigan, 550 U.S. 465, 474-75, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007) (holding that if the record refutes the factual allegations in the petition or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing). The pleading requirements for a

[3]To prevail on a claim of ineffective assistance of counsel, the defendant must demonstrate both (1) that his counsel's performance was deficient, and (2) that he suffered prejudice as a result of that deficient performance. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). "To establish deficient performance, a defendant must show that his counsel's representation fell below an objective standard of reasonableness in light of prevailing professional norms at the time the representation took place." Cummings v. Sec'y for Dep't of Corr., 588 F.3d 1331, 1356 (11th Cir.2009). To demonstrate prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

petition for writ of habeas corpus under §2254 apply equally with regard to claims of ineffective assistance of counsel. Conclusory allegations of ineffective assistance of counsel are insufficient to state a claim. See Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)(conclusory allegations of ineffective assistance of counsel are insufficient to raise a constitutional issue). A petitioner's claims of ineffective assistance of counsel are thus subject to summary dismissal when they "are merely 'conclusory allegations unsupported by specifics' or 'contentions that in the face of the record are wholly incredible.'" Tejada v. Dugger, 941 F.2d 1551, 1559 (11th Cir. 1991)(citations omitted). A habeas petitioner's claim of ineffective assistance of counsel will thus fail unless he affirmatively demonstrates both attorney error and resulting prejudice by alleging facts or specific details to identify precisely how his attorney failed to fulfill his obligations. See Spillers v. Lockhart, 802 F.2d 1007, 1010 (8th Cir. 1986).

Discussion

In Ground One, Petitioner claims that the trial judge erred in denying Petitioner's motion for mistrial when the State was allowed to shift the burden of proof to the Petitioner by giving the jury the impression Petitioner should have called an alibi witness despite the fact that Petitioner never asserted any alibi defense. In support of this claim, Petitioner alleges that, because he did not raise an alibi defense at trial, it was error for the court to allow the State to introduce a statement by Petitioner made prior to trial wherein he claimed that he was with his brother at the time of the incident. Petitioner argues that by allowing the State to introduce this allegedly irrelevant testimony, the trial judge allowed the State to shift the burden to Petitioner, since once the jury heard the evidence of what Petitioner allegedly said about

Moreover, comment by the court or counsel on the failure of the accused to explain or deny by his own testimony, any evidence or facts in case against him do not violate due process clause of Fourteenth Amendment and do not shift burden of proof or duty to go forward with evidence. Adamson v. People of State of California, 332 U.S. 46, 87-58, 67 S. Ct. 1672, 1678, 91 L. Ed. 1903 (1947). As the Supreme Court explained in Adamson:

> Indeed, this is a dilemma with which any defendant may be faced. If facts, adverse to the defendant, are proven by the prosecution, there may be no way to explain them favorably to the accused except by a witness who may be vulnerable to impeachment on cross-examination. The defendant must then decide whether or not to use such a witness. The fact that the witness may also be the defendant makes the choice more difficult but a denial of due process does not emerge from the circumstances.

Id.

Here, Petitioner testified that he had been with approximately twenty prostitutes in a period of one year prior to trial and was unable to conclude that the victim was not one of the prostitutes he had sex with. (T.375-78). When in cross-examination the State asked, "You also told him (Detective Castaneda) you were with your brother - that you remembered the day because you were with your brother," the petitioner testified that "I told him it's possible." (T.384). Then, Detective Castaneda testified in rebuttal that Petitioner told him that he was working on a bathroom at his brother's house on the night of the crimes against the victim. (T.413). The defense first made an objection on the basis of improper impeachment, which was denied, and then made a general objection and moved for a sidebar, which was also denied. (T.384). The State did not argue to the jury in closing argument that Petitioner's brother was not called to testify that Petitioner was with him on the night in question. (T.420-427).

being with his brother they would expect Petitioner to produce this witness at trial.

The State violates a defendant's right to due process when it shifts the burden of proof to the defendant to establish his innocence. See Patterson v. New York, 432 U.S. 197, 215, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977) ("[A] State must prove every ingredient of an offense beyond a reasonable doubt and ... may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense."). Such "burden-shifting" occurs, for example, when a prosecutor makes an argument suggesting that the defendant has an obligation to produce evidence or prove his innocence. United States v. Simon, 964 F.2d 1082, 1086 (11th Cir.1992).

However, when a defendant, while testifying in his own behalf, first mentions the identity of a missing witness as part of an alibi, and the witness was particularly within the power of the defendant to call, the prosecution may comment on the fact that defendant failed to call that witness. United States v. Lehmann, 613 F.2d 130, 135-36 (5th Cir.1980). "The failure of a party to produce as a witness one peculiarly within the power of such party creates an inference that such testimony would be unfavorable, and may be the subject of comment to the jury by the other party." Id. at 136. "[T]he question of equal availability of a witness not called is largely a question of fact, and various courts have regarded all manner of circumstances as bearing upon the matter." McClanahan v. United States, 230 F.2d 919, 925-26 (5th Cir.1956), cert. denied, 352 U.S. 824, 77 S.Ct. 33, 1 L.Ed.2d 47 (1956) (citation omitted). Therefore, in the case of an uncalled witness who was particularly more available to the defendant than the government, the prosecution may comment on a defendant's failure to present that witness without committing unconstitutional burden-shifting.

Later, counsel moved for a mistrial on this same basis. In denying the motion, the state trial court stated:

> It makes no sense to give the defense the ability to take the witness stand, say whatever they want to say. . .and then when the state has information that's contrary to what [the defense] just presented, that the state cannot present it in rebuttal just to challenge the theory that what he's saying is possibly not true . . . But, the problem that I had instinctually with what you were trying to do is that you were trying to put forward a defense, and then you wanted everybody to forget the fact that your client made a statement that may be construed as inconsistent or unsupportive with the defense- - and you argue it's under the guise of being an alibi; and since you didn't raise it, they can't raise it.

(T.406, 470). Similarly, in denying Petitioner's motion for a new trial, the trial court stated that the State did not comment in closing "Where is the brother?" (Exh.N, pp.80-81). Rather, the trial court denied the motion for a new trial because the court believed that the State's cross-examination of Petitioner was proper. (Id.).

In sum, here, Petitioner was the one who, while testifying on his own behalf, first mentioned that he had been with approximately twenty prostitutes in the year prior to trial, and that he was unable to conclude that the victim was not of the prostitutes he had sex with. Petitioner further testified that it was *possible* that he told Detective Casteneda that he was with his brother at the time of the assault. This was inconsistent with his prior statement to Detective Casteneda that he was in fact working on a bathroom at his brother's house at the time in question. Under these circumstances, Detective Casteneda's testimony was proper impeachment and, as such, did not amount to improper burden shifting. Adamson, 332 U.S. 87-58 (proper impeachment and cross-examination do not violate due process clause of Fourteenth Amendment and do not shift burden of proof or duty to go forward with evidence). Moreover, as the trial court noted, the State

never implied during the testimony nor argued in closing that Petitioner failed to produce his brother, or any other evidence for that matter. As such, no burden shifting occurred. Simon, 964 F.2d at 1086 ("burden-shifting" generally occurs when a prosecutor makes a comment or argument suggesting that the defendant has an obligation to produce evidence or prove his innocence).

Based on the foregoing, the state court's disposition of this claim is not in conflict with clearly established federal law or based on an unreasonable determination of the facts. Consequently, petitioner is not entitled to federal habeas corpus relief on this claim. 28 U.S.C. § 2254(d); Williams, 529 U.S. at 405-06.

In Ground Two, Petitioner claims he was denied his Sixth Amendment right to effective assistance of counsel by virtue of his failure to object to the inadmissible inferential hearsay testimony of Detective Casteneda. In support of this claim, Petitioner alleges that Detective Castenda's testimony at trial revealed that he never went to the scene of the crime to collect evidence, but that the State through his inferential hearsay testimony introduced and admitted evidence he did not collect, such as various photographs. Petitioner further alleges that the State improperly presented inferential hearsay information contained within the "be-on-the-lookout" (BOLO) report of the suspect through Detective Casteneda.

Contrary to Petitioner's assertions, the transcript of Detective Castaneda's testimony clearly shows that he went to the scene and was present when all the photographs were taken and many of the exhibits collected. (T.162-214). Moreover, in Florida, photographs are admissible if relevant to prove a material fact and are not otherwise excluded as unduly prejudicial under § 90.403. King v. State, 545 So. 2d 375, 378 (Fla. 4th DCA 1989); see §§ 90.401, 90.402, 90.403, Fla. Stat. (2010). Specifically, photographs are admissible if they tend to illustrate or explain

the testimony of a witness or may be of assistance to the jury in understanding the testimony. Garmise v. State, 311 So. 2d 747, 749 (Fla. 3d DCA 1975). In order to lay the foundation for a photograph, it is necessary to establish only that the photograph is a fair and accurate representation of the scene that it depicts. Bryant v. State, 810 So. 2d 532, 535 (Fla. 5th DCA 2002). Any witness with knowledge that it is a fair and accurate representation may testify to the foundational facts. Id. at 536 (stating that the witness "need not have been the photographer").

With regard to Petitioner's assertions regarding the information contained in the BOLO, the record establishes that Detective Castenda merely testified that the Homestead officers issued a BOLO with the description of the person that they were looking for. (T.166-167). Detective Castendea explained to the jury that a BOLO is a "Be on the Lookout" and that it is a general description of what law enforcement were looking for. (T.167). Here, the testimony was merely that the BOLO gave a general description. Although the contents of a BOLO are generally inadmissible, see Tillman v. State, 964 So.2d 785, 788 (Fla. 4th 2007), in the instant case the contents of the BOLO were not admitted.

In sum, because admission of the photographs was proper and the contents of the BOLO were not disclosed, counsel had no basis to object to either. As such, counsel cannot be deemed ineffective for failing to have done so. There is no duty to pursue issues which have little or no chance of success, and a lawyer's failure to raise a meritless issue cannot prejudice a client. See, generally, Chandler v. Moore, 240 F.3d 907, 917 (11 Cir. 2001)(counsel is not ineffective for failing to raise a non-meritorious objection); Bolender v. Singletary, 16 F.3d 1547, 1573 (11th Cir. 1994)("[I]t is axiomatic that the failure to raise non-meritorious issues does not constitute ineffective assistance" of

counsel); United States v. Winfield, 960 F.2d 970, 974 (11th Cir. 1992) (failure to raise meritless issues cannot prejudice a client); Card v. Dagger, 911 F.2d 1494, 1520 (11 Cir. 1990) (counsel is not required to raise meritless issues).

Based on the foregoing, the state court's disposition of this claim did not result in the application of Strickland to the facts of this case in an objectively unreasonable manner. Consequently, Petitioner's claim similarly fails in this forum. See Bell, 535 U.S. at 699 (to obtain habeas relief, Petitioner must show state court applied Strickland in an objectively unreasonable manner); see also 28 U.S.C. § 2254(d); Williams, 529 U.S. 362, 405-06.

In Ground Three, Petitioner claims he was denied his Sixth Amendment right to effective assistance of counsel by virtue of his failure to object to Detective Castenda testifying falsely during direct examination. In support of this claim, Petitioner alleges that the State allowed Detective Casteneda to testify that he was present at the scene when the photographs were taken, but that the State knew that this testimony was false and misleading because Detective Castenda was never at the crime scene when the photographs were taken. According to Petitioner, the State thus committed a Giglio violation.[4]

To prevail on a claim of prosecutorial misconduct in a federal habeas corpus proceeding, a petitioner must demonstrate that the prosecutor's conduct violated a specific constitutional right or infected the trial with such unfairness as to make the resulting conviction a denial of due process. Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). The prosecution denies a criminal defendant due process when it knowingly uses perjured testimony at trial, or allows untrue testimony to go uncorrected. See Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); Napue v.

[4]Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); Faulder v. Johnson, 81 F.3d 515, 519 (5th Cir.1996). To demonstrate prosecutorial misconduct on the basis of perjured testimony, a habeas petitioner must show that: (1) the testimony was actually false, (2) the prosecutor knew it was false, and (3) the testimony was material. Kirkpatrick v. Whitley, 992 F.2d 491, 497 (5th Cir.1993); see also United States v. Hawkins, 969 F.2d 169, 175 (6th Cir.1992); United States v. Mack, 695 F.2d 820, 822-23 (5th Cir. 1983). Evidence is "false" if, inter alia, it is "specific misleading evidence important to the prosecution's case in chief." See Donnelly, 416 U.S. 637, 647 (1974). False evidence is "material" only "if there is any reasonable likelihood that [it] could have affected the jury's verdict." Westley v. Johnson, 83 F.3d 714, 726 (5th Cir. 1996), cert. denied, 519 U.S. 1094 (1997).

Here, Petitioner fails to allege any facts whatsoever in support of his claim that Detective Casteneda's testimony was false or misleading, much less that the State knew that it was. Rather, his allegation is wholly conclusory. This is insufficient to state a claim for habeas relief, or of ineffective assistance of counsel. See Blackledge, 431 U.S. 63, 75 n. 7 (notice pleading is not sufficient for a habeas petition); Hill, 474 U.S. 52(conclusory allegations of ineffective assistance of counsel are insufficient to raise a constitutional issue); see also Tejada v. Dugger, 941 F.2d at 1559 (claims of ineffective assistance of counsel are subject to summary dismissal when they are merely conclusory allegations unsupported by specifics or contentions that are wholly incredible in the face of the record)(§ 2255 context).

Based on the foregoing, the state court's disposition of this claim did not result in the application of Strickland to the facts of this case in an objectively unreasonable manner. Consequently, Petitioner's claim similarly fails in this forum. See Bell, 535 U.S. at 699 (to obtain habeas relief, Petitioner must show state

court applied Strickland in an objectively unreasonable manner); see also 28 U.S.C. § 2254(d); Williams, 529 U.S. 362, 405-06.

In Ground Four, Petitioner claims trial counsel was ineffective for conceding Petitioner' guilt on assault, in violation of the Sixth and Fourteenth Amendment of the United States Constitution. In support of this claim, Petitioner alleges that, during argument on Petitioner's motion for judgment of acquittal, counsel conceded there was sufficient evidence to allow the assault charge to go to the jury, without Petitioner's consent.

As previously noted, to prevail on a claim of ineffective assistance of counsel, the defendant must demonstrate both (1) that his counsel's performance was deficient, and (2) that he suffered prejudice as a result of that deficient performance. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). "To establish deficient performance, a defendant must show that his counsel's representation fell below an objective standard of reasonableness in light of prevailing professional norms at the time the representation took place." Cummings v. Sec'y for Dep't of Corr., 588 F.3d 1331, 1356 (11th Cir. 2009). Reasonableness is assessed objectively, measured under prevailing professional norms, and includes a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time. Strickland, 466 U.S. at 689. The standard to be applied is that of a reasonable attorney, not a "paragon of the bar." Hannon v. Sec'y, Dep't of Corr., 562 F.3d 1146, 1151 (11th Cir. 2009). "A lawyer can almost always do something more in every case. But the Constitution requires a good deal less than maximum performance." Atkins v. Singletary, 965 F.2d 952, 960 (11th Cir. 1992).

With regard to Strickland's second prong, the defendant must do more than simply show that counsel's conduct might have had "some conceivable effect on the outcome of the proceeding." Strickland, 466 U.S. at 693. Rather, to demonstrate prejudice, the

defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. Prejudice is thus established only with a showing that the result of the proceeding was fundamentally unfair or unreliable. Lockhart v. Fretwell, 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

Here, review of the transcript reveals that counsel's entire argument at issue was as follows:

> Your Honor, I just wanted to renew all the prior motions and objections. And now we enter our first -- looking for our first judgement of acquittal. The State has failed. In view of the light -- as in the light most favorable to the State, in this case put on a prima facie case, and we agree with assault.
>
> There is no evidence other than this lady's testimony that this man entered into this car. On Count 1, burglary with assault, counsel, the element of the crime means entering into this car.
>
> There is no physical evidence that this man ever entered the car. His prints weren't on it. He was not wearing gloves according to this lady.
>
> There was no semen found. There was no DNA found. Nothing at all inside this car. All the biological evidence was found on the lady.
>
> And thus we're moving for judgement for the -- on all counts particularly as to Count 1, the burglary with a battery.

(T.369-70).

Review of the record thus reveals that counsel made a strategic decision to argue the lack of any evidence that Petitioner ever entered the victim's car, which would have defeated the burglary charge, regardless of whether or not any assault was committed therein. Moreover, the reveals that counsel never

conceded that there was sufficient evidence to convict Petitioner on either count. And regardless, review of the record reveals that there was more than ample evidence to allow both charges to go to the jury, and also to sustain guilty verdicts as to both counts. Therefore, counsel's performance in uttering the words "we agree with the assault," when viewed in context, cannot be deemed deficient, and Petitioner cannot establish that he was prejudiced thereby. See Hannon, 562 F.3d 1151 (the standard to be applied in assessing counsel's performance is that of a reasonable attorney, not a "paragon of the bar"); Strickland, 466 U.S. at 693 (to establish prejudice, the defendant must do more than simply show that counsel's conduct might have had "some conceivable effect on the outcome of the proceeding").

Based on the foregoing, the state court's disposition of this claim did not result in the application of Strickland to the facts of this case in an objectively unreasonable manner. Consequently, Petitioner's claim similarly fails in this forum. See Bell, 535 U.S. at 699 (to obtain habeas relief, Petitioner must show state court applied Strickland in an objectively unreasonable manner); see also 28 U.S.C. § 2254(d); Williams, 529 U.S. 362, 405-06.

In Ground Five, Petitioner claims trial counsel was ineffective for failure to object to a Williams' Rule violation,[5] in violation of the trial court order granting the motion *in limine* precluding any mentioning of collateral crimes, in violation of the Sixth and Fourteenth Amendment of the United States Constitution. In support of this claim, Plaintiff alleges that at sentencing the

[5]The Williams' Rule, codified in Fla. Stat. § 90.404, is substantially similar to Federal Rule of Evidence 404. Under Fla. Stat. § 90.404(2), evidence of other crimes, wrongs, or acts is admissible when relevant as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but is inadmissible when the evidence is relevant solely to prove bad character or propensity. See Williams v. State, 110 So.2d 654, 662 (Fla.), cert. denied, 361 U.S. 874 (1959) (holding that evidence of other crimes is admissible and relevant if it tends to show a common scheme or plan).

trial court relied on purported facts not proven, or even at issue at trial and not established otherwise. According to Petitioner, this resulted in a due process violation.

Relevant evidence of collateral crimes is admissible at jury trial when it does not go to prove the "bad character" or "criminal propensity" of the defendant but is used to show motive, intent, knowledge, modus operandi, or lack of mistake. Williams v. State of Florida, 110 So.2d 654 (Fla.1959). Rather, evidence of another crime can only be introduced when some relevancy to the trial at hand is shown by evidence. Akers v. State, 352 So.2d 97 (Fla. 4th DCA 1977).

Here, Petitioner fails to make any specific factual allegations regarding how or why any Williams' Rule violation occurred at his sentencing, and thereby fails to provide the necessary factual allegations for any claim of ineffective assistance of counsel predicated upon same. His claim thus fails on this basis alone. See Blackledge, 431 U.S. 63, 75 n. 7 (notice pleading is not sufficient for a habeas petition); Hill, 474 U.S. 52 (conclusory allegations of ineffective assistance of counsel are insufficient to raise a constitutional issue); see also Tejada v. Dugger, 941 F.2d at 1559 (claims of ineffective assistance of counsel are subject to summary dismissal when they are merely conclusory allegations unsupported by specifics or contentions that are wholly incredible in the face of the record) (§ 2255 context).

Regardless, Petitioner's conclusory allegations of ineffectiveness are belied by the record. Specifically, review of the sentencing transcript reveals that, at sentencing, the State did raise facts of a case involving the petitioner in a case of attempted sexual battery of a waitress and another case of attempted sexual battery of a junior college student after she was dropped off by a bus. (Ex.N:67-69). Defense counsel, contrary to what Petitioner alleges, did object to both cases being raised.

(Ex.N, pp.67, 68, 71). Moreover, the trial court twice stated at the sentencing hearing that the facts of the cases concerning the waitress and junior college student would not be considered in its sentencing order. Specifically, when the defense objected to the facts of the waitress case being raised by the state, the trial court stated, "If I can't consider it, I won't consider it. He's not going to be punished by the fact that - - I do have the ability to kind of not consider things that I don't believe I should consider." (Id. at 67). Again, the defense argued that the two cases were irrelevant and the trial court responded that "And I'm not considering the facts." (Id. at 71). As such, Petitioner's assertions that counsel was ineffective in failing to object to the alleged Williams' Rule violation is wholly without merit.

Based on the foregoing, the state court's disposition of this claim did not result in the application of Strickland to the facts of this case in an objectively unreasonable manner. Consequently, Petitioner's claim similarly fails in this forum. See Bell, 535 U.S. at 699 (to obtain habeas relief, Petitioner must show state court applied Strickland in an objectively unreasonable manner); see also 28 U.S.C. § 2254(d); Williams, 529 U.S. 362, 405-06.

In Ground Six, Petitioner claims the trial court's successor judge had *ex parte* communications with the state attorney that denied Petitioner due process under the Sixth and Fourteenth Amendments. In support of this claim, Petitioner alleges that the trial court set his 3.850 motion for an evidentiary hearing but that, instead of conducting the hearing, a successor judge cancelled it. Petitioner further alleges that the successor judge engaged in *ex parte* communications with the prosecutor without preparing the order that denied Petitioner' motion, and thereby denied Petitioner his right to due process.

Ex parte communications between judge and prosecutor are presumptively improper, Glynn v. Donnelly, 485 F.2d 692, 694 (1st

Cir. 1973), and in appropriate cases can implicate due process concerns. Yohn v. Love, 76 F.3d 508 (3d Cir. 1996). As with habeas claims in general, however, claims of *ex parte* communications require more than bare and conclusory allegations. See Salem Hosp. Corp. v. N.L.R.B., 808 F.3d 59, 70 (D.C. Cir. 2015) (failure to transfer was reasonable where movant "did not make specific allegations of *ex parte* communications"). Here, Petitioner's allegations of *ex parte* communications between the successor judge and the prosecutor are not only wholly conclusory, they appear purely speculative. This cannot form the basis for habeas relief. See Blackledge, 431 U.S. 63, 75 n. 7 (notice pleading is not sufficient for a habeas petition).

Based on the foregoing, the state court's disposition of this claim is not in conflict with clearly established federal law or based on an unreasonable determination of the facts. Consequently, petitioner is not entitled to federal habeas corpus relief on this claim. 28 U.S.C. § 2254(d); Williams, 529 U.S. at 405-06.

In Ground Seven, Petitioner claims he was denied his Sixth Amendment right to effective appellate counsel for his failure to raise a Williams' Rule violation, a violation of the trial court granting the motion *in limine* precluding any mentioning of collateral crimes. In support of this claim, Petitioner alleges again as he did in Ground Five that, during his sentencing hearing, the trial judge impermissibly relied on collateral crimes evidence.

The Sixth Amendment does not require attorneys to press every non-frivolous issue that might be raised on appeal, provided that counsel uses professional judgment in deciding not to raise those issues. Jones v. Barnes, 463 U.S. 745, 753-54 (1983). The Supreme Court has recognized that "a brief that raises every colorable issue runs the risk of burying good arguments - those that . . . 'go for the jugular.'" Id. at 753. To be effective, therefore, appellate counsel may select among competing non-frivolous

arguments in order to maximize the likelihood of success on appeal." Smith v. Robbins, 528 U.S. 259, 288, 120 S.Ct. 746, 765, 145 L.Ed.2d 756, 781-82 (2000). Indeed, the practice of "winnowing out" weaker arguments on appeal, so to focus on those that are more likely to prevail, is the "hallmark of effective appellate advocacy." Smith v. Murray, 477 U.S. 527, 536, 106 S.Ct. 2661, 2667, 91 L.Ed.2d 434, 445 (1986). In considering the reasonableness of an appellate attorney's decision not to raise a particular claim, therefore, 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. In the context of an ineffective assistance of appellate counsel claim, "prejudice" refers to the reasonable probability that the outcome of the appeal would have been different. Eagle v. Linahan, 279 F.3d 926, 943 (11th Cir. 2001); Cross v. United States, 893 F.2d 1287, 1290 (11th Cir. 1990); see also Robbins, 528 U.S. at 285-86 (claim for ineffective assistance of appellate counsel requires showing that appellate counsel's performance was deficient and that, but for counsel's deficient performance, the defendant would have prevailed on appeal); Shere v. Sec'y Fla. Dep't of Corr., 537 F.3d 1304, 1310 (11th Cir. 2008)(same). Thus, in determining whether the failure to raise a claim on appeal resulted in prejudice, the courts must review the merits of the omitted claim and, only if it is concluded that it would have had a reasonable probability of success, then can counsel's performance be deemed necessarily prejudicial because it affected the outcome of the appeal. Eagle, 279 F.3d at 943; see, also, Card v. Dugger, 911 F.2d 1494, 1520 (11 Cir. 1990)(holding that appellate counsel is not required to raise meritless issues).

Here, Petitioner's claim of a Willaims' Rule violation is without merit for the reasons set forth in the discussion of Ground

Five, above. As such, Petitioner cannot establish that appellate counsel was ineffective in failing to raise this issue on direct appeal. See Jones, 463 U.S. 745, 753-54 (appellate counsel need not raise every non-frivolous issue); Robbins, 528 U.S. at 288 (appellate counsel may select arguments in order to maximize the likelihood of success); Murray, 477 U.S. at 536 (the practice of "winnowing out" weaker arguments is the "hallmark of effective appellate advocacy"); see also Card, 911 F.2d at 1520 (appellate counsel is not required to raise meritless issues); Eagle, 279 F.3d at 943 ("prejudice" for ineffective assistance of appellate counsel refers to a reasonable probability that the outcome of the appeal would have been different); Cross, 893 F.2d at 1290 (same); Smith, 528 U.S. at 285-86 (claim for ineffective assistance of appellate counsel requires showing that appellate counsel's performance was deficient and that, but for counsel's deficient performance, the defendant would have prevailed on appeal); Shere, 537 F.3d at 1310 (same).

Based on the foregoing, the state court's disposition of this claim did not result in the application of Strickland to the facts of this case in an objectively unreasonable manner. Consequently, Petitioner's claim similarly fails in this forum. See Bell, 535 U.S. at 699 (to obtain habeas relief, Petitioner must show state court applied Strickland in an objectively unreasonable manner); see also 28 U.S.C. § 2254(d); Williams, 529 U.S. 362, 405-06.

In Ground Eight, Petitioner claims the State introducing the brother's statement through Detective Castenda in violation of Petitioner's confrontation rights where the statement was made to Detective Espana, the inescapable inference from the testimony is that a non-testifying witness has furnished the police with evidence of Petitioner's guilt; the testimony is hearsay. In support of this claim, Petitioner alleges that appellate counsel was ineffective in failing to argue on appeal that the state trial

court committed reversible error by overruling the defense's objection when Detective Casteneda testified that Detective Espana spoke to Petitioner's brother, who allegedly denied that Petitioner worked on his bathroom on the night in question. Petitioner cites to those portions that contain his own testimony, and to pages 213-14 of the trial transcript.

In its response, the government notes that the trial transcript is devoid of any reference to any Detective Espana. In his reply, Petitioner merely re-iterates what he alleges in his petition, and cites to the same pages of the transcript that he cited in the petition. Those pages do not contain any reference to any Detective Esapna, and Petitioner has otherwise failed to rebut Respondent's assertion that there is no such reference.

A court may not act as a petitioner's lawyer and construct his case. See Fils v. City of Aventura, 647 F.3d 1272, 1284 (11th Cir. 2011). In this regard, the Eleventh Circuit has instructed:

> [A]ll of these principles of law would mean nothing if district courts were required to mine the record, prospecting for facts that the habeas petitioner overlooked and could have, but did not, bring to the surface of his petition. Making district courts dig through volumes of documents and transcripts would shift the burden of sifting from petitioners to the courts. With a typically heavy caseload and always limited resources, a district court cannot be expected to do a petitioner's work for him. Cf. Adler v. Duval County School Board, 112 F.3d 1474, 1481 n.12 (11th Cir. 1997) (noting in a civil case that, absent plain error, "it is not our place as an appellate court to second guess the litigants before us and grant them relief...based on facts they did not relate."); Johnson v. City of Fort Lauderdale, 126 F.3d 1372, 1373 (11th Cir. 1997) ("[W]e are not obligated to cull the record ourselves in search of facts not included in the statements of fact."). The Seventh Circuit memorably said that appellate judges "are not like pigs, hunting for truffles buried in briefs." United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991). Likewise, district court judges are not required to ferret out delectable facts buried in a massive record, like the one in this case,

which was more than 25,000 pages of documents and transcripts.

Chavez v. Sec'y Fla. Dep't of Corr's, 647 F.3d 1057, 1059-60 (11th Cir. 2011).

The court has nevertheless reviewed Detective Casteneda's rebuttal testimony, since that it the only logical place that the alleged reference might appear and because it is not voluminous. (T.410-419). And those pages do not contain any reference to any Detective Casteneda. As such, appellate counsel cannot be deemed ineffective for failing to have raised something that never occurred. Jones, 463 U.S. 745, 753-54 (appellate counsel need not raise every non-frivolous issue); Robbins, 528 U.S. at 288 (appellate counsel may select arguments in order to maximize the likelihood of success); Murray, 477 U.S. at 536 (the practice of "winnowing out" weaker arguments is the "hallmark of effective appellate advocacy"); see also Card, 911 F.2d at 1520 (appellate counsel is not required to raise meritless issues); Eagle, 279 F.3d at 943 ("prejudice" for ineffective assistance of appellate counsel refers to a reasonable probability that the outcome of the appeal would have been different); Cross, 893 F.2d at 1290 (same); Smith, 528 U.S. at 285-86 (claim for ineffective assistance of appellate counsel requires showing that appellate counsel's performance was deficient and that, but for counsel's deficient performance, the defendant would have prevailed on appeal); Shere, 537 F.3d at 1310 (same).

Based on the foregoing, the state court's disposition of this claim is not in conflict with clearly established federal law or based on an unreasonable determination of the facts. Consequently, petitioner is not entitled to federal habeas corpus relief on this claim. 28 U.S.C. § 2254(d); Williams, 529 U.S. at 405-06.

In Ground Nine, Petitioner claims appellate counsel was ineffective by virtue of his failure to argue that the trial court

committed fundamental error by considering impermissible sentencing factor such as the Petitioner's continuing and maintaining his innocence, taking responsibility, and failure to express remorse. In support of this claim, Petitioner alleges that, at sentencing, the trial court considered Petitioner's lack of candor and failure to take responsibility, and basically said that it did not believe him and punished him for exercising his right to trial.

It is well-settled that a defendant may not be subjected to more severe punishment for exercising his constitutional right to stand trial. See Wasman v. United States, 468 U.S. 559, 568 (1984). A finding of judicial bias may not be made, however, "unless it affirmatively appears in the record that the court based its sentence on improper information." See Farrow v. United States, 580 F.2d 1339, 1359 (9th Cir. 1978)(en banc).

Here, the trial court stated at sentencing that " . . . I will tell you that I have a serious problem with Mr. Solis' testimony in this case." (Exh.N., p.81). As such, the trial court did not expressly state that he was considering Petitioner's maintenance of his innocence, failure to take responsibility and failure to express remorse, as Petitioner claims. The trial court could very easily have been referring to Petitioner's claim that the victim could have been one of twenty prostitutes he had visited in the last year or his testimony that he had an arrangement with his wife that if she did not want sex anymore, he would visit prostitutes. (T.376-78). Appellate counsel could thus never have established judicial bias because it did not "affirmatively appear[] in the record that the court based its sentence on improper information." Farrow, 580 F.2d at 1359. As such, appellate counsel cannot be deemed ineffective in having failed to raise this claim. Jones, 463 U.S. 745, 753-54 (appellate counsel need not raise every non-frivolous issue); Robbins, 528 U.S. at 288 (appellate counsel may select arguments in order to maximize the likelihood of success);

Murray, 477 U.S. at 536 (the practice of "winnowing out" weaker arguments is the "hallmark of effective appellate advocacy"); see also Card, 911 F.2d at 1520 (appellate counsel is not required to raise meritless issues); Eagle, 279 F.3d at 943 ("prejudice" for ineffective assistance of appellate counsel refers to a reasonable probability that the outcome of the appeal would have been different); Cross, 893 F.2d at 1290 (same); Smith, 528 U.S. at 285-86 (claim for ineffective assistance of appellate counsel requires showing that appellate counsel's performance was deficient and that, but for counsel's deficient performance, the defendant would have prevailed on appeal); Shere, 537 F.3d at 1310 (same).

Based on the foregoing, the state court's disposition of this claim did not result in the application of Strickland to the facts of this case in an objectively unreasonable manner. Consequently, Petitioner's claim similarly fails in this forum. See Bell, 535 U.S. at 699 (to obtain habeas relief, Petitioner must show state court applied Strickland in an objectively unreasonable manner); see also 28 U.S.C. § 2254(d); Williams, 529 U.S. 362, 405-06.

Certificate of Appealability

Rule 11(a) of the Rules Governing Section 2254 Cases provides that "the district court must issue or deny a certificate of appealability when it enters a final order adverse to the 2applicant," and that 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)." Rule 11(a), Rules Governing Section 2254 Cases in the United States District Courts. Rule 11(a) further provides that "[b]efore entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." Id. Regardless, a timely notice of appeal must still be filed, even if the court issues a certificate of appealability. Rule 11(b), Habeas Rules.

A certificate of appealability may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where a habeas petitioner's constitutional claims have been adjudicated and denied on the merits by the district court, the petitioner must demonstrate reasonable jurists could debate whether the issue should have been decided differently or show the issue is adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). Where a petitioner's constitutional claims are dismissed on procedural grounds, a certificate of appealability will not issue unless the petitioner can demonstrate both "(1) 'that jurists of reason would find it debatable whether the petition [or motion] states a valid claim of denial of a constitutional right' and (2) 'that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" Rose v. Lee, 252 F.3d 676, 684 (4th Cir.2001)(quoting Slack, 529 U.S. at 484). "Each component of the §2253(c) showing is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments." Slack, 529 U.S. at 484-85.

Having determined that Petitioner is not entitled to relief on the merits, the court considers whether Petitioner is nonetheless entitled to a certificate of appealability with respect to one or more of the issues presented in the instant petition. After reviewing the claims presented in light of the applicable standard, the court finds reasonable jurists would not find the court's treatment of any of petitioner's claims debatable or wrong and none of the issue are adequate to deserve encouragement to proceed further. Accordingly, a certificate of appealability is not

warranted. See Miller-El, 537 U.S. at 336-38; Slack, 529 U.S. at 483-84.

Conclusion

Based upon the foregoing, it is recommended that this petition for writ of habeas corpus be DENIED, and that no certificate of appealbility be issued.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report, including any objections to the recommendation that no certificate of appealability be issued.

SIGNED this 21st day of December, 2016.

UNITED STATES MAGISTRATE JUDGE

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