IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13699-C

TROY SIERRA,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

ORDER:

Troy Sierra, a Florida prisoner, moves this Court for a certificate of appealability ("COA") and leave to proceed *in forma pauperis* ("IFP") to appeal the denial of his *pro se* 28 U.S.C. § 2254 petition for a writ of habeas corpus and the denial of his request for production of a "Technical Service Report." He also moves this Court for voluntary dismissal of one of his claims and to "Rule and Exhaust." Mr. Sierra is serving a life sentence after a jury convicted him on one count of first-degree murder of his ex-girlfriend, Kelly Burgess.

As background, the evidence at trial showed the following. Ms. Burgess left the apartment of Steven Bellman, her new boyfriend, in Clearwater, Florida, on December 28, 2007, to go to the apartment she formerly shared with Mr. Sierra ("the Carillon apartment") in St. Petersburg, Florida, to retrieve some items while Mr. Bellman stayed home and made job

calls with Ms. Burgess's phone. Records from Ms. Burgess's cell phone company confirmed that Ms. Burgess's phone was used in the same location and within the same 1.5 to 2 mile radius in Clearwater throughout the day on December 28. Anthony Bodtmann was house sitting for his sister-in-law, who lived in the apartment below the Carillon apartment. At approximately 11:13 a.m. on December 28, Mr. Bodtmann heard three gunshots in the apartment above his sister-in-law's. Mr. Bodtmann then saw a man leaving the apartment shortly thereafter. Mr. Bodtmann later identified the man he saw leaving the building as Mr. Sierra. Early in the morning on December 29, 2007, Mr. Sierra was arrested in Orlando, Florida, for having an open container of alcohol. Mr. Sierra told the arresting officer, Deputy Brian Figueroa, that he came to Orlando by bus to "get away."

In the evening on December 29, the police responded to a call about a suspicious vehicle at the Carillon apartment building. Police identified the car as belonging to Ms. Burgess. Ms. Burgess's body, along with her keys, was discovered in the Carillon apartment, which had been locked from the outside. The medical examiner confirmed that Ms. Burgess died as a result of gunshot wounds to her head. Detectives Joseph Deluca and Gary Gibson went to the Orange County jail, where Mr. Sierra was then incarcerated, on December 30, 2007, and January 3, 2008, to interview Mr. Sierra, and Mr. Sierra waived his *Miranda*[1] rights and spoke with the detectives. Mr. Sierra told the detectives that he met a woman named Rhonda on December 27, 2007, in Clearwater and that he and Rhonda drove around Clearwater and to Orlando. Mr. Sierra told the police that he was in Orlando from late December 27 through the early morning of December 29, when he was arrested. Mr. Sierra began tearing up when the detectives asked him

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

about Ms. Burgess, and he could not explain how Ms. Burgess was found in the locked Carillon apartment with her key when only he and Ms. Burgess had keys to the apartment.

Records from Mr. Sierra's cell phone company showed that a call was made from Mr. Sierra's phone to his voicemail at 10:15 a.m. on December 28, and that the call used a cell phone tower located within 1.5 miles of the Carillon apartment in St. Petersburg. Mr. Sierra had his cell phone with him when he was arrested on December 29.

Mr. Bellman testified that Ms. Burgess and Mr. Sierra had a bad relationship and that he asked Ms. Burgess to move in with him because she was "done with Sierra." Christopher Petty, one of Mr. Sierra's co-workers, also testified that Mr. Sierra and Ms. Burgess had a bad relationship and that Mr. Sierra was trying to move out of the Carillon apartment.

Finally, Scot McCombs testified that he had been housed at the Orange County jail at the same time as Mr. Sierra and that Mr. Sierra told him that he had killed his ex-girlfriend two days before he was arrested in their apartment and had disposed of the murder weapon. Mr. McCombs testified that he wrote the Sherriff's Office a letter detailing what Mr. Sierra had told him. He said he wrote the letter because he was a father, and if one of his children had been murdered, he would want someone to do the same for him. Mr. McCombs testified that he had completed his sentence by the time of Mr. Sierra's trial and had not received any benefits from testifying at Mr. Sierra's trial.

The jury convicted Mr. Sierra as charged, and the state trial court sentenced Mr. Sierra to life imprisonment without the possibility of parole. Mr. Sierra, through new counsel, filed a direct appeal raising only one issue for appellate review. Florida's Second District Court of Appeals ("2nd DCA") *per curiam* affirmed Mr. Sierra's conviction and sentence.

Mr. Sierra later filed a *pro se* Fla. R. Crim. P. 3.850 motion for post-conviction relief, raising 15 claims of trial court error and ineffective assistance of trial counsel. The state trial court denied Mr. Sierra's Rule 3.850 motion, and the 2nd DCA *per curiam* affirmed the denial of his motion on appeal.

MOTION FOR A COA:

In his motion for a COA, he argues that the district court erred in denying his request for production of the "Technical Service Report" and repeats his arguments stated in support of his § 2254 petition. However, Sierra also raises a number of new allegations for the first time on appeal—that his trial counsel, the prosecutor, and the state trial court judge were biased against him and trial counsel attempted to force him to accept a 30 year plea agreement because trial counsel worked for the state. Sierra has also filed a supplemental motion for a COA, asserting four new claims for relief from his conviction and sentence he did not raise in his § 2254 petition. This Court will not consider Mr. Sierra's new arguments and claims raised for the first time before this Court because Mr. Sierra failed to present them to the district court. *Walker v. Jones*, 10 F.3d 1569, 1572 (11th Cir. 1994) (stating that an argument not raised in the district court and raised for the first time in an appeal will not be considered by this court).

In order to obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the district court denied a habeas petition on procedural grounds, the movant must show that reasonable jurists would debate (1) whether the motion states a valid claim of the denial of a constitutional right, and (2) whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). If a state court has adjudicated a claim on the merits, a federal court may grant habeas relief only if the decision of the state court (1) "was contrary to, or involved an unreasonable application of,

clearly established [f]ederal law, as determined by the Supreme Court," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d)(1), (2).

Unexhausted and procedurally defaulted claims: Claims 1(b), 3(b), and 5(a)

In Claim 1(b), Mr. Sierra asserted that the police violated his rights to counsel and due process by photographing him and his clothing while he was in pre-trial detention at the Orange County jail. In Claim 3(b), he alleged that the state trial court committed fundamental error by failing to give an alibi instruction. He further alleged in Claim 5(a) that trial counsel was ineffective for failing to investigate his alibi defense. The district court denied Claim 1(b) as unexhausted. The district court denied Claims 3(b) and 5(a) as procedurally defaulted on federal habeas review because the state trial court had denied those claims as procedurally barred in Mr. Sierra's state habeas proceedings.

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court may not grant habeas relief until the petitioner exhausts state court relief. 28 U.S.C. § 2254(b)(1)(A). Additionally, a claim is procedurally defaulted for purposes of federal habeas review if the petitioner failed to exhaust the claim in state court and the claim would now be procedurally barred under the state's procedural rules. *Snowden v. Singletary*, 135 F.3d 732, 736 (11th Cir. 1998). A federal claim is also subject to procedural default where the state court applies an independent and adequate ground of state procedure to reject the petitioner's federal claim. *Bailey v. Nagle*, 172 F.3d 1299, 1302–03 (11th Cir. 1999).

Exhaustion or procedural default may be excused if the petitioner establishes (1) cause for not raising the claim of error on direct appeal and actual prejudice from the alleged error, or

(2) a fundamental miscarriage of justice, meaning actual innocence. *McKay v. United States*, 657 F.3d 1190, 1196 (11th Cir. 2011).

Reasonable jurists would not debate the district court's denial of Claim 1(b) as unexhausted or Claim 3(b) as procedurally defaulted. Mr. Sierra failed to raise Claim 1(b) before the state court, either on direct appeal or in his Rule 3.850 motion. Because this claim could have, or should have, been raised during trial and on direct appeal, the claim is both unexhausted and procedurally defaulted. 28 U.S.C. § 2254(b)(1)(A); *Snowden*, 135 F.3d at 736; *see also* Fla. R. Crim. P. 3.850(c) (providing that a Rule 3.850 does not authorize relief based on grounds that could have or should have been raised at trial and on direct appeal). Furthermore, the state trial court expressly denied Claim 3(b) based on a firmly established state procedural rule—*i.e.* failure to raise the claim on direct appeal—that was not intertwined with any interpretation of federal law. Accordingly, Sierra was also procedurally barred from raising Claim 3(b) on federal habeas review. *Bailey*, 172 F.3d at 1302–03. Mr. Sierra has not shown, nor has he even alleged, cause and prejudice, such that he can overcome the procedural default on Claims 1(b) and 3(b). *McKay*, 657 F.3d at 1196.

However, reasonable jurists would debate the district court's denial of Claim 5(a) as procedurally defaulted. The state trial court noted that Mr. Sierra had raised the issue asserted in Claim 5(a) in a pre-trial request to discharge trial counsel, so the state trial court determined that Mr. Sierra was barred from relitigating that issue. Such a finding of procedural bar by the state court did not prevent Mr. Sierra from raising this sub-claim on federal habeas review. *Cone v. Bell*, 556 U.S. 449, 467 (2009) (explaining that when a state court does not readjudicate a claim on the ground that it has been previously determined, the court's decision does not indicate that the claim has been procedurally defaulted, but shows that the claim has already been exhausted).

Nevertheless, Mr. Sierra is not entitled to federal habeas relief on Claim 5(a). To make a successful claim of ineffective assistance of counsel, a defendant must show both that (1) his counsel's performance was deficient; and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). On the morning of trial, Mr. Sierra requested to discharge trial counsel, claiming that he had requested trial counsel to investigate and call to testify witnesses from the liquor store where he was arrested on December 29 to act as alibi witnesses. Trial counsel responded that the witnesses Mr. Sierra wished to call would not establish an alibi because they could only confirm that Mr. Sierra was at the liquor store when he was arrested, which was already in the record. Based on trial counsel's response, it appears that trial counsel considered Mr. Sierra's alibi defense, but determined that it was not the best theory of defense for trial. Trial counsel's decision not to pursue an alibi defense at trial was arguably a reasonable strategic decision for which counsel cannot be deemed ineffective. *See Conklin v. Schofield*, 366 F.3d 1191, 1204 (11th Cir. 2004) (holding that which witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, that will seldom, if ever, serve as grounds to find counsel constitutionally ineffective).

Claims denied on the merits

The state trial court denied all of Mr. Sierra's remaining claims on the merits. As shown below, Mr. Sierra has failed to show that the state trial court's denial of his claims constituted an unreasonable determination of the facts in light of the evidence presented in the state court or constituted an unreasonable application of federal law. 28 U.S.C. § 2254(d)(1), (2). Thus, reasonable jurists would not debate the denial of Mr. Sierra's remaining claims.

A. Claim 1(a)

In Claim 1(a), Mr. Sierra alleged that the state trial court erred in denying his pre-trial motion to suppress Mr. Bodtmann's out-of-court and in-court identifications. The state trial court denied the motion to suppress Mr. Bodtmann's identifications after holding a hearing on the motion, concluding that, although police used an impermissibly suggestive photographic identification procedure, there was not a substantial likelihood that Mr. Bodtmann had misidentified Mr. Sierra because (1) Mr. Bodtmann had a good opportunity to view Mr. Sierra leaving the Carillon apartment after the shooting, (2) he had a high degree of attention at the time, (3) his description of the man he saw leaving matched Mr. Sierra, and (4) he was very certain of his identification. Mr. Sierra has not presented any clear and convincing evidence to overcome the state court's factual finding that there was not a substantial risk that Mr. Bodtmann misidentified him, which was supported by the record. *Miller-El v. Cockrell*, 537 U.S. 322, 324 (2003) (holding that factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, and a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state court proceeding).

B. Claim 2(a)(i)

Mr. Sierra asserted in Claim 2(a)(i) that trial counsel was ineffective for failing to present the medical examiner's report, which stated that Ms. Burgess died at 5:48 p.m. on December 29, and failing to cross-examine the medical examiner about Ms. Burgess's time of death. The state trial court denied this claim, concluding that the medical examiner's report did not establish that Mr. Sierra did not shoot Ms. Burgess and trial counsel was not ineffective for failing to present the report or Mr. Burgess's time of death during trial. The state trial court noted that the issue in

dispute was whether Mr. Sierra shot Ms. Burgess at 11:15 a.m. on December 28, not Mr. Sierra's whereabouts at 5:48 p.m. on December 29. As the state trial court concluded, even if Mr. Sierra was in custody at the time of Ms. Burgess's death, as stated in the medical examiner's report, such a fact would not have shown that he could not have shot Ms. Burgess the previous day. Consequently, trial counsel was not ineffective for failing to raise this non-meritorious issue at trial. *Bolender v. Singletary*, 16 F.3d 1547, 1573 (11th Cir. 1994) (holding that failure to raise nonmeritorious issues does not constitute ineffective assistance).

C. Claim 2(a)(ii)

In Claim 2(a)(ii), Mr. Sierra alleged that trial counsel was ineffective for failing to object to the state's representations to the trial court about the medical examiner's report and Ms. Burgess's time of death. The record shows that, during its deliberations, the jury sent the state trial court a written note, requesting that the state trial court "provide a copy of the medical examiner's report" and Burgess's time of death. The state trial court stated that "given the evidence there couldn't have been determined to be an exact time of death, right?" The state responded that the court was correct. The court then asked whether there was any indication that Burgess's time of death would have been stated in the medical examiner's report, to which the state responded that there was not. The trial court and the parties agreed to instruct the jury that it could only consider the evidence presented during trial. In denying this claim as raised in Mr. Sierra's Rule 3.850 motion, the state trial court determined that, even if trial counsel had objected, such an objection would have been fruitless because (1) the trial court did not repeat the state's alleged inaccuracy to the jury and (2) the trial court could not have given a different response to the jury, as Burgess's time of death was never adduced at trial.

Here, the state trial court correctly determined that neither the medical examiner's report nor Ms. Burgess's time of death were presented by trial counsel or the state during trial. Whether the jury could have been provided a copy of the medical examiner's report or been told Ms. Burgess's time of death when such information was not adduced during trial is a determination of state law, and this Court defers to the state court's determinations of state law. *See Herring v. Sec'y, Dep't of Corr.*, 397 F.3d 1338, 1355 (11th Cir. 2005) (holding that it is a fundamental principle that state courts are the final arbiters of state law, and federal habeas courts should not second-guess them on state law). Because, as the state trial court concluded, the medical examiner's report and Ms. Burgess's time of death could not have been provided to the jury, there is no indication that the trial court would have responded differently to the jury's question. Thus, trial counsel did not perform deficiently by failing to raise a meritless objection to the state's misstatements, nor did trial counsel's performance prejudice Mr. Sierra, as there is not a reasonable probability that the outcome of his trial would have been different had trial counsel objected. *Bolender*, 16 F.3d at 1573; *Strickland*, 466 U.S. at 687.

D. Claim 2(b)

Mr. Sierra alleged in Claim 2(b) that the state committed a *Brady*[2] violation by deliberately withholding the medical examiner's report from the trial court and the jury. The state trial concluded that the state had not committed a *Brady* violation because, among other things, the medical examiner's report was neither exculpatory nor material. For the same reasons stated above, the medical examiner's report was not exculpatory or material. Even if Ms. Burgess died at 5:48 p.m. on December 29, such a fact would not mean that Mr. Sierra did not shoot her at 11:15 a.m. the day before. Consequently, there was not a reasonable probability

[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

that, had Ms. Burgess's time of death as stated in the report been presented to the jury, the outcome of Mr. Sierra's trial would have been different. *See Tanzi v. Sec'y, Fla. Dep't of Corr.*, 72 F.3d 644, 661 (11th Cir. 2014) (holding that, in order to establish that a *Brady* violation occurred, the petitioner must show that evidence withheld from the defense was material, and that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different).

E. Claim 3(a)

Mr. Sierra asserted in Claim 3(a) that trial counsel was ineffective for failing to request an alibi instruction because trial counsel had argued an alibi defense at trial. The state trial court denied this claim, determining that trial counsel did not argue an alibi defense and, as a result, a request for an alibi instruction would have been denied. Mr. Sierra's assertion that trial counsel raised an alibi defense during trial is belied by the record, as trial counsel did not file a notice that he would argue and alibi defense, and, in fact, stated during the discussion of Sierra's request to have him discharged that he would not call any alibi witnesses. As noted above, trial counsel made a reasonable strategic decision not to pursue an alibi defense. *See Bertolotti v. State*, 534 So. 2d 386, 387 (Fla. 1988) (holding that trial counsel is not deficient for failing to raise a defense that was unreasonable under the circumstances).

F. Claim 4(a)

In Claim 4(a), Mr. Sierra alleged that trial counsel was ineffective for failing to move to suppress his statements made during the December 30 and January 3 interviews with Detectives Deluca and Gibson because those statements were obtained in violation of his right to counsel. He claimed that, because his right to counsel had attached by the time he was interviewed, any waiver of his rights was invalid. The state trial court concluded that Mr. Sierra had freely and

voluntarily waived his right to counsel prior to both interviews. The state trial court's factual findings regarding the voluntariness of Mr. Sierra's statements, which are supported by the record, are afforded a presumption of correctness, and Sierra has presented no clear and convincing evidence to overcome this presumption. *See Harris v. Dugger*, 874 F.2d 756, 762 (11th Cir. 1989) (explaining that, in § 2254 proceedings challenging the admission of an allegedly coercive statement, state court findings of fact are afforded a presumption of correctness). Even assuming that Mr. Sierra's right to counsel had attached prior to interviews, his assertion that his waivers during the interviews were invalid was incorrect. *See Michigan v. Harvey*, 494 U.S. 344, 352–353 (1990) (holding that nothing in the Sixth Amendment prevents a suspect charged with a crime and represented by counsel from voluntarily choosing to speak with police in the absence of an attorney).

G. Claim 4(b)

In Claim 4(b), Mr. Sierra alleged that trial counsel was ineffective for failing to move to suppress Mr. McCombs's testimony because he had never met Mr. McCombs, so the state must have "fed" Mr. McCombs information about his case. The state trial court denied this claim, concluding that Mr. McCombs's testimony was not subject to suppression because he did not act in concert with law enforcement when he spoke to Mr. Sierra. Mr. Sierra has not shown by clear and convincing evidence that the state trial court's determination that Mr. McCombs was not acting a police informant during their conversations was unreasonable. *Miller-El*, 537 U.S. at 324. Mr. Sierra's allegations that the state must have fed Mr. McCombs information about his case are conclusory and speculative, as he provided no support for his assertions beyond his self-serving allegations. *Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991). Thus, there was

no valid basis upon which trial counsel could have sought to suppress Mr. McCombs's testimony.

H. Claims 5(b) and (c)

In Claim 5(b) Mr. Sierra alleged that trial counsel was ineffective for failing to cross-examine: (1) Mr. Bellman about his prior felony convictions and his testimony that he was the last person to see Ms. Burgess alive; (2) Mr. McCombs on his prior convictions, being an government informant, or his history of being a "jailhouse snitch"; (3) the medical examiner about Ms. Burgess's time of death; (4) the crime scene detective about bloody footprints allegedly found at the crime scene; and (5) Detectives Deluca and Gibson about their failure to pursue Mr. Bellman as a suspect, why they interviewed him in violation of his right to counsel, or why they did not investigate his alibi. In Claim 5(c), Mr. Sierra alleged that trial counsel was ineffective for failing to present Mr. Bellman as an alternate suspect.

With regard to Mr. Sierra's assertion that trial counsel failed to cross-examine the medical examiner, the state trial court noted that Mr. Sierra raised this same assertion in Claim 2(a)(i), and denied this claim for the same reason it denied Claim 2(a)(i). Consequently, Mr. Sierra's assertion that trial counsel should have cross-examined the medical examiner fails for the same reasons stated in Claim 2(a)(i).

1. Failure to cross-examine Mr. Bellman

As an initial matter, the state trial court did not separately review Claim 5(c), but construed that claim as part of Mr. Sierra's assertion that trial counsel failed to cross-examine Mr. Bellman. Thus, Claim 5(c) is reviewed in conjunction with Mr. Sierra's assertion that trial counsel failed to cross-examine Mr. Bellman.

Even assuming Mr. Bellman had prior convictions that were admissible at trial, Mr. Sierra cannot show that he was prejudiced by trial counsel's failure to raise those convictions because Mr. Bellman's testimony was corroborated by other witnesses and evidence presented by the state during trial, including the detectives and Mr. Petty. Thus, even if trial counsel had questioned Mr. Bellman about his prior convictions to impugn his credibility as a witness, there was no reasonable probability that the outcome of his trial would have been different. *Strickland*, 466 U.S. at 687. The record also belies Mr. Sierra's assertion that Mr. Bellman testified that he was the last person to see Burgess alive. Rather, the record shows that Mr. Bellman testified that, on the day Ms. Burgess was shot, she left his apartment at 10:30 a.m. to go to the Carillon apartment, but never returned. Additionally, Mr. Bellman testified on direct examination that he stayed home after Ms. Burgess left for the Carillon apartment and made job calls using her cell phone. Thus, Mr. Bellman testified about his alibi on direct examination, and there was no need for trial counsel to further pursue that subject on cross-examination. As such, trial counsel did not perform deficiently in failing to cross-examine Mr. Bellman. *Strickland*, 466 U.S. at 687. Furthermore, the state presented Ms. Burgess's cell phone records, which corroborated Mr. Bellman's alibi. Thus, the state's evidence would have refuted any claim that Mr. Bellman was the one who shot Ms. Burgess in the Carillon apartment on December 28. As such, trial counsel was not ineffective for failing to raise a non-meritorious argument that Mr. Bellman was the actual killer. *Bolender*, 16 F.3d at 1573.

2. Failure to cross-examine Mr. McCombs

Mr. McCombs testified about his prior convictions on direct examination, stating that he had been in and out of jail a number of times and that he had multiple felony convictions. Consequently, trial counsel did not perform deficiently by failing to rehash this information on

cross-examination. *Strickland*, 466 U.S. at 687. Furthermore, Mr. Sierra has provided no evidence beyond his self-serving assertions that Mr. McCombs was a government informant or that he has a history of testifying on the state's behalf against criminal defendants, and such speculative and conclusory allegations are insufficient to warrant federal habeas relief. *Tejada*, 941 F.2d at 1559.

3. Failure to cross-examine the detectives

Mr. Sierra's assertion that trial counsel should have cross-examined Detectives Deluca and Gibson about why they denied him his right to counsel during the December 30 and January 3 interviews does not warrant relief for the same reasons stated in Claim 4(a) above. Furthermore, in denying this claim, the state trial court determined that Mr. Sierra's suggested lines of questioning for the detectives would have been beyond the scope of direct examination, and Mr. Sierra has not shown by clear and convincing evidence, or even alleged, that the state trial court's determination was unreasonable in light of the record. *Miller-El*, 537 U.S. at 324. The state trial court's determination that trial counsel would not have been permitted to ask questions beyond the scope of direct examination constitutes a determination of state law to which this Court defers. *Herring*, 397 F.3d at 1355.

I. Claim 6

In Claim 6, Mr. Sierra alleged that trial counsel was ineffective for failing to object to Mr. Bellman's testimony that Ms. Burgess was "done with [him]" and that Ms. Burgess was "scared of [him]" on the basis that these statements were hearsay. The state trial court denied this claim, concluding that Mr. Bellman's statement that Ms. Burgess was "done with Sierra" was a comment on his understanding of their relationship, and so, was not based on hearsay. The state trial court also noted that trial counsel did object to Mr. Bellman's testimony that

Ms. Burgess was "scared of Sierra." Mr. Sierra has not shown by clear and convincing evidence that the state trial court's determination, that Mr. Bellman was testifying to his understanding of Ms. Burgess's relationship with Mr. Sierra, and was not repeating a statement Ms. Burgess had made, was unreasonable in light of the evidence presented. *Miller-El*, 537 U.S. at 324. Additionally, the record shows that trial counsel did object to Mr. Bellman's testimony that Ms. Burgess was scared of Mr. Sierra, arguing that the statement was based on hearsay, and the state trial court sustained the objection.

J. Claim 7

Mr. Sierra alleged in Claim 7 that trial counsel was ineffective for failing to object to and impeach Deputy Figueroa's testimony that Mr. Sierra said that he came to Orlando on a bus because Deputy Figueroa's testimony was inconsistent with his deposition testimony. In denying this claim, the state trial court stated that Deputy Figueroa testified during his deposition that, although he could not remember whether Mr. Sierra explicitly said he took a bus to Orlando, Mr. Sierra indicated that he took a bus from Clearwater to Orlando, and that Mr. Sierra never mentioned a woman named Rhonda. Thus, the court determined that Deputy Figueroa's testimony at trial that Mr. Sierra took a bus to Orlando was not inconsistent with his deposition testimony. Mr. Sierra has not shown by clear and convincing evidence that the state trial court's determination, which is supported by the record, was incorrect. *Miller-El*, 537 U.S. at 324. Trial counsel, therefore, was not ineffective for failing to raise a non-meritorious argument that Deputy Figueroa's statements were inconsistent. *Bolender*, 16 F.3d at 1573.

K. Claim 8

Mr. Sierra alleged in Claim 8 that trial counsel was ineffective for failing to cross-examine and impeach Mr. McCombs on whether (1) he was a government informant and

received special favors from the state in exchange for his testimony, (2) his history of testifying on behalf of the state, and (3) his criminal history. He also asserted that trial counsel should have pressed Mr. McCombs to give exact dates for their conversations at the Orange County jail and investigated Orange County jail records to confirm whether he and Mr. McCombs were actually housed in the same unit. The state trial court denied this claim, determining that Mr. Sierra could not show prejudice. First, Mr. Sierra's assertions that trial counsel should have cross-examined Mr. McCombs about being a government informant, receiving benefits from the state in exchange for his testimony, his history of testifying on behalf of the state, and his criminal history do not warrant federal habeas relief for the reasons stated above in Claims 2(a)(ii) and 5(b). Second, even assuming trial counsel performed deficiently by failing to investigate Orange County jail records and to ask Mr. McCombs for exact dates and times of their conversations, Mr. Sierra cannot show he was prejudiced by trial counsel's performance. The state presented overwhelming evidence of Mr. Sierra's guilt even absent Mr. McCombs's testimony. Additionally, the jury was entitled to disbelieve Mr. Sierra's testimony that he had never met Mr. McCombs and never confessed to killing Ms. Burgess, and instead, concluded that he did confess to Mr. McCombs that he shot Ms. Burgess. *See United States v. Sharif*, 893 F.2d 1212, 1214 (11th Cir. 1990) (providing that, when a defendant chooses to testify, he runs the risk that the jury will disbelieve him and concluded that the opposite of his testimony is the truth). Thus, there was not a reasonable probability that outcome of Mr. Sierra's trial would have been different if trial counsel had questioned him about their jailhouse conversations. *Strickland*, 466 U.S. at 687.

L. Claim 9

In Claim 9, Mr. Sierra alleged that trial counsel was ineffective for conceding his guilt to second-degree murder without his prior consent. The state trial court concluded that trial counsel did not concede Mr. Sierra's guilt during trial. Mr. Sierra's assertion that trial counsel conceded his guilt is belied by the record. After the state rested its case-in-chief, trial counsel moved for a judgment of acquittal, arguing that, taking the evidence in the light most favorable to the state, the state had, at most, presented a *prima facie* case for second-degree murder. Thus, trial counsel merely made an argument based on the standard for obtaining a judgment of acquittal, and did not concede Mr. Sierra's guilt. *See Fitzpatrick v. State*, 900 So. 2d 495, 507 (Fla. 2005) (explaining that, under Florida law, a motion for a judgment of acquittal should be denied "[i]f, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt). Consequently, trial counsel did not perform deficiently. *Strickland*, 466 U.S. at 687.

M. Claim 10

In Claim 10, Mr. Sierra alleged that he was entitled to relief based on the trial counsel's cumulative errors. The state trial court denied this claim, noting that all of Mr. Sierra's claims of ineffective assistance of trial counsel had been denied. This Court has emphasized that, where there is no error or only a single error, there can be no cumulative error. *United States v. Gamory*, 635 F.3d 480, 497 (11th Cir. 2011). Here, the state trial court found that no error resulted from any of trial counsel's alleged deficiencies, and, therefore, there can be no cumulative error.

N. Request for production:

Mr. Sierra filed a letter in the district court requesting that the court order Detective Deluca to produce a copy of a "Technical Service Report." He stated that the report contained information about bloody footprints found at the murder scene that did not match the size of his feet. He claimed that all of his attempts to obtain the report had been unsuccessful. Mr. Sierra attached (1) a document he claimed to be the "top page" of the report in question, and (2) two letters he sent to the Sheriff's Office in 2013 requesting the report. The district court denied Mr. Sierra's request for production because it was not part of the state court record and Mr. Sierra failed to show that the report was newly discovered evidence under § 2254(e)(2).

The district court did not abuse its discretion in denying Mr. Sierra's request for production of the "Technical Service Report" because Mr. Sierra failed to show that he acted with diligence in attempting to obtain and present a copy of the report during his state court proceedings. *Chavez v. Sec'y, Fla. Dep't of Corr.*, 647 F.3d 1057, 1060 (11th Cir. 2011) (holding that this Court reviews the denial of an evidentiary hearing for an abuse of discretion); *Williams v. Taylor*, 529 U.S. 420, 435, 437 (2000) (holding that, to submit newly discovered evidence for a claim on federal habeas review, the petitioner must show that he acted with diligence by making reasonable attempts to investigate and pursue the claim at each stage of his state proceedings). Although Mr. Sierra alleged that he had attempted to obtain the report multiple times, he only submitted two letters sent to the Sheriff's Office in 2013 in support of that assertion. Thus, the district court was not permitted to consider the report in reviewing Mr. Sierra's claims. *Williams*, 529 U.S. at 435, 437; *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (holding that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits).

O. Evidentiary hearing:

An evidentiary hearing is not required where the record conclusively demonstrates that the habeas claims have no merit. *Tejada*, 941 F.2d at 1559. As noted above, the record clearly showed that Mr. Sierra's claims were meritless. *Id.* Thus, the district court did not abuse its discretion in denying Mr. Sierra's § 2254 petition without an evidentiary hearing. *Chavez*, 647 F.3d at 1060.

In light of the foregoing, Mr. Sierra's motion for a COA is DENIED. *See* 28 U.S.C. § 2253(c)(2); *Slack*, 529 U.S. at 484. His motion for IFP is DENIED AS MOOT.

MOTION FOR VOLUNTARY DISMISSAL:

Mr. Sierra has filed a motion for voluntary dismissal in this Court, arguing that the district court incorrectly determined that Claim 1(b) was unexhausted. He requests that this Court either deem that claim exhausted, or allow him to voluntarily dismiss that claim so that he may exhaust it. However, as noted above, Claim 1(b) is unexhausted and procedurally defaulted. Mr. Sierra also cannot return to state court to exhaust this claim because a Rule 3.850 motion raising this claim would be barred as untimely, as Mr. Sierra's criminal judgment became final well over two years ago. *See* Fla. R. Crim. P. 3.850(b)(1) (providing that motions seeking post-conviction relief on grounds other than that the sentence exceeds the limits provided by law may not be filed more than two years after the criminal judgment and sentence becomes final). Consequently, his motion for voluntary dismissal is DENIED.

MOTION TO "RULE AND EXHAUST"

Mr. Sierra has also filed a motion to "Rule and Exhaust" in this Court, claiming that the district court failed to rule on his ineffective assistance of appellate counsel claims raised in a Fla. R. App. P 9.141(c) petition he filed in the 2nd DCA. The district court did not err in failing

to address those claims. *See Clisby v. Jones*, 960 F.2d 925, 936 (11th Cir. 1992) (holding that district courts must resolve all claims for relief that were raised in a habeas proceeding). Although Mr. Sierra attached a copy of the Rule 9.141(c) petition to his § 2254 petition, he did not list any claims of ineffective assistance of appellate counsel in his § 2254 petition, or otherwise mention his Rule 9.141(c) petition. Consequently, Mr. Sierra did not evince an intent to raise his claims of ineffective assistance of appellate counsel on federal habeas review. As such, this Court will not review Mr. Sierra's claims of ineffective assistance of appellate counsel because he failed to properly raise them before the district court. *Walker*, 10 F.3d at 1572. Thus, Mr. Sierra's motion to "Rule and Exhaust" is DENIED.

UNITED STATES CIRCUIT JUDGE

Case: 8:14-cv-00897-MSS-TGW

Troy Sierra 131770
Wakulla CI Annex
110 Melaleuca Drive
Crawfordville, FL 32327

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

TROY SIERRA,

Petitioner,

v. **Case No. 8:14-cv-897-T-35TGW**

SECRETARY, DEPARTMENT OF CORRECTIONS, *et al.*,

Respondent.
_____/

ORDER

This cause comes before the Court on Troy Sierra's *pro se* petition for the writ of habeas corpus under 28 U.S.C. § 2254. He challenges his conviction for first degree murder. After the Respondent filed a response and Sierra filed a reply, Sierra filed a motion to appoint counsel, and after the motion was denied, he filed a notice of interlocutory appeal. (Docs. 14–16) The order was unappealable, and on May 25, 2017, Sierra's appeal was dismissed for lack of jurisdiction. (Doc. 22) The records were returned to this Court. Accordingly, the stay entered by this Court pending resolution of the interlocutory appeal is lifted, and the Clerk is directed to reopen this case. (Doc. 21)

The Respondent admits the petition's timeliness. Upon consideration of the petition, the response, and Sierra's reply (Docs. 1, 9, and 12), and in accordance with the Rules Governing Section 2254 Cases in the United States District Courts, it is ORDERED that the petition must be **DENIED**:

I. FACTS[1]

Sierra was indicted for the first degree murder of Kelly Burgess, which occurred at a St. Petersburg apartment ("Carillon apartment"). Burgess had terminated her relationship with Sierra and moved in with Steve Bellman, with whom she had a relationship for about three weeks before the murder. On Friday, December 28, 2007, around 10:30 a.m., Burgess left Bellman's Clearwater Beach apartment to retrieve some belongings from the Carillon apartment.

Anthony Bodtman was a witness to events surrounding the murder. He was at his sister-in-law's apartment, which was situated below the apartment where Burgess was murdered. At around 11 a.m. Bodtman heard the first of three gunshots upstairs in the Carillon apartment. After the first shot, Bodtman heard moaning and mumbling. After the second shot, Bodtman heard a sound of something hitting the floor "very heavily." Bodtman also heard heavy footsteps he recognized as coming from the apartment above his sister-in-law's apartment. After a third shot that sounded as if it struck the floor, Bodtman called 911 and went to the screened balcony of his sister's apartment. Bodtman observed a short, stocky male, approximately 5'6" to 5'8", leave the apartment and walk toward the parking lot. The man was wearing blue athletic pants, a wrinkled T-shirt, and a black ball cap. He was carrying another cap and had a backpack across his right shoulder. From his vantage point, Bodtman was able to observe a profile view of the man, and Bodtman could see that he had facial hair and a goatee.

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[1] This summary of the facts derives from Sierra's initial brief on direct appeal and the trial transcript. (Doc. 10, Resp. Exs. A10, B1)

Although police arrived on the scene in response to the 911 call, they did not make entry to the locked Carillon apartment that day. As Bodtman left the complex, he noticed a vehicle parked in front of the breezeway of the building but not in a designated parking spot. The next day, the vehicle was reported as suspicious. After interviewing Bodtman and a coworker of Sierra who were present at the scene, the responding officer knocked on the Carillon apartment. There was no response, and a decision was made to open the unlocked vehicle. Inside the vehicle was Burgess's purse with a list of phone numbers. Police contacted Bellman, with whom Burgess had left her cellular phone for his use. Securing the assistance of the apartment manager, police entered the Carillon apartment, discovering Burgess's body with gunshot wounds to her head.[1] There were no signs of forced entry, theft, or a struggle. Burgess's keys to her car and the Carillon apartment were on a counter.

Sierra's coworker advised police that Sierra had not shown up for work on that Saturday (December 29th). Earlier that Saturday around 1:30 a.m., Deputy Brian Figueroa with the Orange County Sheriff's Office was dispatched to a Chevron station in response to a call of a drunken person. Sierra was sleeping on the ground with an open beer can next to him. Sierra was arrested for an open container violation. His keys to the Carillon apartment and his clothing were placed in property. Sierra's unlocked vehicle was discovered two or three blocks from a Greyhound bus station in Clearwater.

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[1] The medical examiner's testimony established that an entry wound to Burgess's right eyelid, the angles, and the exit wound were consistent with the shooter firing from approximately two feet to two inches of Burgess. The other wound to the back of her head, the angles, and the exit wound were consistent with the shooter firing while Burgess was lying on the floor.

Bodtman was shown a photo pack containing a booking photograph of Sierra taken at the Orange County jail. The photo pack did not include profile photographs, and Bodtman was unable to make an identification. When shown a single photograph of Sierra, Bodtman indicated that he wanted to see a profile view. Subsequently, photos of Sierra's profile and his clothing on arrest were taken. Bodtman identified Sierra and his pants, which matched Bodtman's description of the pants worn by the man whom Bodtman had observed.

In the first of two interviews, Sierra said that he had a good relationship with Burgess, but he said it was coming to an end. He stated that he had last seen her around December 14th or 15th. He stated that on Thursday, December 27th, he met up with a woman named Rhonda, they drove around Clearwater, and they drove to Orlando. Sierra said that in the past, he and the victim lived together, but she did not cheat because she knew that he could throw her out. However, she was on the lease [to the Carillon apartment] and she was cheating because she knew that he could not throw her out. He said that only he and Burgess had a key to the apartment. The second time Sierra spoke with detectives, he described his relationship with Burgess in greater detail. He described an intermittent relationship with Burgess. He maintained that he went to Orlando the day before the shooting.

On January 24, 2008, Sierra was indicted for first degree murder. At his jury trial, held July 14–16, 2009, the prosecution offered evidence of the identification of Sierra by Bodtman as well as other evidence that showed that Sierra had been not been in Orlando on December 28, 2007, as he claimed. Specifically, an analysis of Sierra's computer found at the Carillon apartment showed that he had accessed it at 4:51 a.m. on Friday,

December 28th. A call from Sierra's cell phone to his voicemail at 10:15 a.m. on December 28th utilized a cellular tower close to the Carillon apartment.

In addition, Scott McCombs, Sr., — who identified Sierra at trial as the individual with whom McCombs had been housed in the Orange County jail — testified to incriminating statements that Sierra made about Burgess's murder. Sierra told McCombs that: Sierra was in jail for killing his girlfriend; such occurred at his house; his girlfriend was trying to leave him; they got into an argument; he killed her two days before his arrest; and he partied with a woman and went to Orlando where he was arrested. Sierra also indicated that he got rid of the weapon.

At trial, Sierra denied meeting McCombs at the jail. Sierra approximated that Burgess left their apartment the week after Thanksgiving, 2007. He testified that he worked the morning shift on Thursday, December 27th; that after doing laundry, he went to purchase beer and drove by his place of employment; that he drove to the Clearwater Mall and went over to a RaceTrac gas station where he met "Rhonda". He stated that they drove around Clearwater area and they ended up in Orlando. He said he was still in Orlando on Friday, December 28th, he purchased more beer, and he recalled being arrested for an open container violation. Sierra denied killing Burgess. He was found guilty of first degree murder and sentenced to life in prison.

II. STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) governs a state prisoner's federal petition for habeas corpus. *See* 28 U.S.C. § 2254; *Ledford v. Warden, Ga. Diagnostic & Classification Prison*, 818 F.3d 600, 642 (11th Cir. 2016).

Section 2254(d), which creates a highly deferential standard for federal court review of a state court adjudication, states in pertinent part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

In *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000), the Supreme Court interpreted this deferential standard:

> In sum, § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied — the state-court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal Law, as determined by the Supreme Court of the United States" or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

"The focus . . . is on whether the state court's application of clearly established federal law is objectively unreasonable, and . . . an unreasonable application is different from an incorrect one." *Bell v. Cone*, 535 U.S. 685, 694 (2002). "As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

The purpose of federal review is not to re-try the state case. AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. at 693. "AEDPA prevents defendants — and federal courts — from using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts." *Renico v. Lett*, 559 U.S. 766, 779 (2010). *See also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) ("This is a 'difficult to meet,' . . . and 'highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt' . . . .") (citations omitted). Review under Section 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. *Pinholster*, 563 U.S. at 181.

Before applying AEDPA deference, the federal habeas court must first identify the last state court decision that evaluated the claim on the merits. *Wilson v. Warden, Ga. Diagnostic Prison*, 834 F.3d 1227, 1235 (11th Cir. 2016) (*en banc*), *cert. granted sub nom. Wilson v. Sellers*, 137 S. Ct. 1203 (2017). The state appellate court's silent decisions on direct appeal and post-conviction review are entitled to deference under Section 2254(d) where those decisions constitute adjudications of Sierra's claims on the merits.

The summary nature of a state court's decision does not lessen the deference that it is due. *Wright v. Moore*, 278 F.3d 1245, 1254 (11th Cir.), *reh'g and reh'g en banc denied*, 278 F.3d 1245 (2002), *cert. denied sub nom Wright v. Crosby*, 538 U.S. 906 (2003). *See also Richter*, 562 U.S. at 99 ("When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court

adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.").

The Court must presume the state court's factual determinations are correct, unless the petitioner rebuts that presumption with "clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *Jones v. Sec'y, Fla. Dep't of Corr.*, 834 F.3d 1299, 1311 (11th Cir. 2016). "When considering a determination of a mixed question of law and fact, such as a claim of ineffective assistance of counsel, the statutory presumption of correctness applies to only the underlying factual determinations." *Daniel v. Comm'r, Ala. Dep't of Corr.*, 822 F.3d 1248, 1259 (11th Cir. 2016) (quoting *Tanzi v. Sec'y, Fla. Dep't of Corr.*, 772 F.3d 644, 651 (11th Cir. 2014)).

III. DISCUSSION

Ground One

Sierra alleges that the state trial court erred in denying his motion to suppress evidence pertaining to an impermissibly suggestive identification obtained without counsel after being formally charged, in violation of his rights under the Fifth, Sixth, and Fourteenth Amendments. (Doc. 1-3 at 16) Sierra alleges that on December 29, 2007, he was charged with murder. He claims that the next day, he was granted bond or pretrial release on separate charges in Orlando but he was detained for the murder. (Doc. 1-3 at 16, 20) Sierra claims that his right to counsel under the Florida constitution, and Rules 3.111(a) and 3.130(a) of the Florida Rules of Criminal Procedure, attached when on December 29, 2007, Detective Deluca charged him with murder. Sierra also cites his rights to counsel under the Sixth and Fourteenth Amendments. (Doc. 1-3 at 17, 20)

Sierra asserts that after he was formally arrested, Bodtman was shown a group of photos and could not pick out Sierra. (Doc. 1-3 at 18) Sierra further alleges that after Bodtman could not identify him from the photo lineup, Bodtman was shown a single photograph. Sierra contends that Bodtman testified at the suppression hearing that it was his belief that the single photograph Detective Deluca had in his hand was the photo of the person they caught. Sierra contends, therefore, that "[h]aving Deluca tell the witness that the suspect was in custody" was unduly suggestive. (Doc. 1-3 at 19, 21) Sierra also contends that photographs of him were taken on January 3, 2008, after he was formally charged, and admission of the photo lineup shown Bodtman violated Sierra's right to counsel and was not harmless error. (Doc. 1–3 at 17, 18, 20, 21)

In addition, Sierra raises state and federal due process claims. Sierra contends that the detective took "illegal" photographs of Sierra and his pants on January 3, 2008, and showed them to Bodtman. According to Sierra, Detective Deluca's "forcing" Sierra to "submit to a photo lineup" after formally charging him violated his due process rights. Sierra cites *State v. Smith*, 547 So. 2d 131 (Fla. 1989) (holding that *ex parte* order compelling defendant in custody to participate in a live lineup violated the state's due process clause). Sierra also asserts that photographs were taken of him and illegally used at trial in violation of the Fifth Amendment, as well as the Sixth and Fourteenth Amendments. (Doc. 1–3 at 21)

To the extent Sierra is alleging that his rights to counsel and due process under state law were violated, such claims are not cognizable on federal habeas review. Habeas relief can only be granted if a petitioner is in custody "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). *See also*

Branan v. Booth, 861 F.2d 1507, 1508 (11th Cir.1988) ("This limitation on federal habeas review is of equal force when a petition, which actually involves state law issues, is 'couched in terms of equal protection and due process.'") (citation omitted).

To the extent Sierra is alleging in this ground that the identification procedures of showing Bodtman photographs of Sierra and Sierra's pants violated federal due process because such were unduly suggestive, rendering the in-court identification evidence inadmissible, the claim is exhausted. Sierra alleged in his motion to suppress evidence and on direct appeal that: (1) Bodtman's out-of-court identification of Sierra from a single employment photo was the result of an impermissibly suggestive identification procedure; and (2) any in-court identification evidence would be tainted and unreliable because out-of-court identification procedures were unduly suggestive. (Doc. 19, Resp. Ex. A11; Doc. 10, Resp. Ex. B1 at p. 27) Sierra did not allege in his suppression motion that the procedure of showing the witness photographs of Sierra's profile and front views and Sierra's pants was unduly suggestive. However, these out-of-court procedures were addressed at the suppression hearing in testimony and in trial counsel's argument as to Bodtman's impressions when Detective Deluca showed photographs of Sierra and Sierra's pants to Bodtman. (Doc. 19, Resp. Ex. A12, R 442–43) Further, on direct appeal, Sierra's appellate counsel argued that: (1) there was a "second photo show-up"; (2) there was a "photo show-up of the suspect's pants" that may have occurred prior to Bodtman's identification of Sierra from photographs taken in profile; and (3) use of such procedures only after Bodtman failed to identify Sierra from a photopack aggravated the "suggestiveness of the multiple show-up confrontations". (Doc. 10, Resp. Ex. B1 at p. 26) The state court's silent affirmance on direct appeal is entitled to deference as an

adjudication of the claims before the state appellate court on the merits. (Doc. 10, Resp. Ex. B3) Each constitutional component of this ground is addressed in turn below.

The suppression hearing

Testimony at the suppression hearing showed that officer Vanderbilt was dispatched to the Carillon apartments on December 29, 2007, at approximately 6:02 p.m. She spoke with Bodtman, who described the man leaving the building the day before as a white male, approximately 5'6" to 5'7", possibly in his 30s, approximately 160 pounds, stocky build, scruffy or unshaven face, dark hair with a baseball cap. The officer testified that Bodtman stated that the man was carrying another cap, possibly yellow, he had a single-strap dark gray or black backpack, and he was wearing a T-shirt, blue sporty jogging pants with white stripes down the side and some type of glasses or frames. (Doc. 19, Resp. Ex. A12, R 375-76)

Lieutenant Kovacsev was a sergeant in charge of the homicide unit on December 30, 2007, when he showed Bodtman a photo pack that included a booking photograph of Sierra taken at the Orange County jail. Lt. Kovacsev testified that the booking photograph was a "terrible" picture, as Sierra appeared to have been on a "crack binge". Nevertheless, the officer used the booking photograph because Sierra's driver's license did not depict facial hair. (Doc. 19, Resp. Ex. A12, R 386-87) When Bodtman was unable to make an identification, the officer questioned Bodtman about the description of the person Bodtman had seen. His description was similar to the original one, with the addition that he was able to recall that the man's shirt was possibly dark in color. (Doc. 19, Resp. Ex. A12, R 382–83) When shown a photo of Sierra on an identification card, Bodtman told the officer, "I'm a hundred percent this is the individual but I could be more

than a hundred percent if you show me a side picture as well." (Doc. 19, Resp. Ex. A12, R 384-85) Lieutenant Kovacsev denied that prior to displaying the photograph he told Bodtman the photograph was of an individual involved. He also did not indicate to Bodtman that the photograph was of an individual who was in custody. (Doc. 19, Resp. Ex. A12, R 384-85)

Detective Deluca testified that on January 3, 2008, he showed Bodtman photographs of Sierra's profile, and Bodtman stated without hesitation, "that's the guy." The detective also testified that he showed Bodtman a front-view photograph of Sierra, and Bodtman had no hesitation in identifying Sierra. In addition, the detective testified that when Bodtman was shown a photograph of Sierra's pants, Bodtman identified the pants as those worn by the man Bodtman had seen. (Doc. 19, Resp. Ex. A12, R 399-401, 406-407, 431)

Bodtman testified to what he heard in the Carillon apartment and to his observations of the man who left the building. Bodtman saw the man turn to the left as he walked across the parking lot, and Bodtman observed that the man had some facial hair. Making a mental note of what the person was wearing, Bodtman drew a sketch of the man for police. (Doc. 19, Resp. Ex. A12, R 415-16)

Bodtman recalled seeing two individuals in the initial photo pack but was not comfortable with making an identification. He testified that the single photograph shown by Lt. Kovacsev to Bodtman appeared to be that of Sierra. To be certain, Bodtman requested to see a profile view of person in the photo. Bodtman testified that when Detective Deluca presented photographs of Sierra, Bodtman had no doubt that the profile photos were of the person Bodtman had seen in the parking lot on the day he heard the

gunshots. While Bodtman felt that the detective was showing him photographs of the suspect, the detective had not stated that they might be of the suspect. Bodtman also testified that he had no doubt that the pants depicted in a photograph shown to him were the pants that the man was wearing. (Doc. 19, Resp. Ex. A12, R 419, 431-32)

The photo pack, Bodtman's sketch, and the photographs of Sierra and his pants that Bodtman identified were admitted in evidence at the suppression hearing. (Doc. 19, Resp. Ex. A13) The State acknowledged that showing the witness the single photograph might be suggestive did not concede that such was impermissibly suggestive. (Doc. 19, Resp. Ex. A12, R 436)

The state trial court's findings and conclusions

The state trial court found:

> I think Mr. Bodtmann is a smart, concerned, observant, articulate, and on top of that a citizen who has some artistic ability it appears on top of all of that. I do think that they used the suggestive technique. I think that the first prong is met. The question is whether there's a substantial likelihood of misidentification.
>
> I don't think because the guy's intelligent and figures things out that disqualifies him from giving a valid identification. Because the guy's bright enough to know what the cops are doing and figure it out doesn't mean that he -- that his ID can't be separate and apart from what he understands the cops are asking him to do. And that's precisely what he testified to.
>
> His opportunity to view the criminal at the time: He had a period of time to view him from a distance, said he had a good enough view, especially from the side, and was able to draw a sketch that looks consistent with everything that he's testified to, as far as that's concerned.
>
> His degree of attention: There's nobody that was more attempting to observe at that point than somebody that just heard three shots in the apartment above him and then thinks that right after that he's seeing the person walk away; nobody could have more of a heightened degree of observation at that point.

a two-week period about a month before the murder. (Doc. 10, Resp. Ex. A10, T 184, 187) In particular, Bodtman testified that the heavy footstep he heard was "very familiar" and that it was "very clear" to him that they were of the person "who had lived in that apartment." (Doc. 10, Resp. Ex. A10, T 187-88) Bodtman's testimony that he heard a similar walking pattern on previous occasions and that he heard them after the heavy sound of something hitting the floor constituted compelling evidence that Bodtman had heard Sierra's footsteps. (Doc. 10, Resp. Ex. A10, T 187) Further corroborating that Sierra was at the scene were Bodtman's observations of Sierra after the shooting. Sierra had facial hair as Bodtman described, and Sierra's pants worn at the time of arrest were accurately described by Bodtman.

Other evidence placed Sierra on December 28th inside and/or in the vicinity of the apartment where the victim was found, showing that at 4:51 a.m., he had accessed his computer which was in the apartment, and at 10:15 a.m. he made a phone call from his cell phone which utilized a cell phone tower close to the Carillon apartment. (Doc. 10, Resp. Ex. A10, T 373, 376-77, 409-11) The victim was dead inside the locked apartment. Her key to the deadbolt on the front door was inside the locked apartment. Sierra's key was in his possession on arrest, and there was no indication that anyone else had a key other than the property manager. (Doc. 10, Resp. Ex. A10, T 240, 242-44, 313, 317, 329-30, 334-35) In addition, Sierra told McCombs that Sierra confessed that he killed his girlfriend after she was trying to leave him and they got in an argument. (Doc. 10, Resp. Ex. A10, T 440-41) In view of the overwhelming evidence of Sierra's guilt, admission of the identification evidence, if error, did not have a substantial and injurious effect or influence in determining the jury's verdict. The state decision constitutes a reasonable

application of federal law as clearly established by the Supreme Court, and the state decision is based on a reasonable determination of the facts in light of the evidence.

Sierra's claims not presented to the state trial court and the state appellate court on direct appeal

To the extent that Sierra is claiming that he was illegally subjected to a photo lineup and/or that his clothing was photographed in violation of his rights to due process or to counsel, rendering the in-court identification evidence inadmissible, such claims are not properly exhausted. Sierra did not raise these claims in his suppression motion and on direct appeal. The Respondent does not raise a procedural bar argument to this aspect of Sierra's ground. Nonetheless, Sierra states that he raised his ground on direct appeal (Doc. 1-3 at 6), and this Court's review of the state court's decision on direct appeal must be based on the allegations and record before the state appellate court. Accordingly, Sierra's additional claims in this ground are not properly considered in assessing whether Sierra has met his burden of showing that the state appellate court unreasonably applied clearly established federal law or unreasonably determined the facts.

Even if Sierra's additional claims — that he was forced to submit to a photo lineup in violation of his rights to due process and to counsel and that other photographic evidence was obtained and used in violation of his right to counsel — are reached, Sierra is not entitled to relief. Sierra was not subjected to a lineup, and Sierra had no right to have counsel present when his booking photo was shown to the witness in a photo pack or when pre-indictment photographs were taken of Sierra and his clothing and shown to the witness. "[T]he Sixth Amendment does not grant the right to counsel at photographic displays conducted by the Government for the purpose of allowing a witness to attempt

an identification of the offender." *United States v. Ash*, 413 U.S. 300, 321 (1973). These unexhausted claims embedded in Ground One warrant no relief.

Grounds Two Through Ten

The remaining grounds raise claims of ineffective assistance of Sierra's trial counsel. The Respondent concedes that Sierra exhausted his state court remedies and relies on the state post-conviction court's rulings. (Doc. 9 at 46, 48-49)

The Sixth Amendment right to counsel "is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970)). In *Strickland*, the Supreme Court established a two-part test for analyzing ineffective assistance of counsel claims. "A defendant who claims to have been denied effective assistance must show both that counsel performed deficiently and that counsel's deficient performance caused him prejudice." *Buck v. Davis*, 137 S. Ct. 759, 775 (2017) (citing *Strickland*, 466 U.S. at 687). [C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690. "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." 466 U.S. at 690.

> *Strickland*'s first prong sets a high bar. A defense lawyer navigating a criminal proceeding faces any number of choices about how best to make a client's case. The lawyer has discharged his constitutional responsibility so long as his decisions fall within the "wide range of professionally competent assistance." *Id.*, at 690, 104 S.Ct. 2052. It is only when the lawyer's errors were "so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment" that *Strickland*'s first prong is satisfied. *Id.*, at 687, 104 S.Ct. 2052.

Buck, 137 S. Ct. at 775.

"To satisfy *Strickland*, a litigant must also demonstrate prejudice — 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Buck*, 137 S. Ct. at 776 (quoting *Strickland*, 466 U.S. at 694). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. "There is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one." 466 U.S. at 697.

Sustaining a claim of ineffective assistance of counsel is very difficult because "[t]he standards created by *Strickland* and Section 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Richter*, 562 U.S. at 105. *See also Pinholster*, 563 U.S. at 202 (a petitioner must overcome the "'doubly deferential' standard of *Strickland* and AEDPA."). "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Richter*, 562 U.S. at 105.

Ground Two

Sierra alleges that his trial counsel failed to investigate and present the medical examiner's report, which he characterizes as exculpatory evidence. This ground has three components with a core assertion: Sierra was in Orlando on the date and at the time listed in the report as the date and time of the victim's death.

Subclaim One

Sierra claims that his counsel failed to investigate and adduce evidence of the victim's time of death by cross-examining the medical examiner and presenting the

medical report at trial. (Doc. 1-3 at 23, 25). Sierra provides a copy of a report that he represents was the medical examiner's report that was furnished in his state post-conviction proceeding. (Doc. 1-3 at 25) The cover page of the report states, without elaboration, that the date of victim's death was December 29, 2007, and the report contains a sketch of the victim's body with the date and time of death listed as "12/29/07" at 17:48 hours. (Doc. 1-7 at 12, 16) Claiming that he was in Orlando at that time, Sierra contends that there was a "reasonable possibility" that revelation of the victim's exact date and time of death contained in the medical examiner's report would have affected the jury's verdict. Sierra further asserts that his counsel's failure to investigate and obtain a copy of the "exculpatory" medical report and to offer it at trial violated Sierra's constitutional rights to due process and effective counsel. (Doc. 1-3 at 26)

Sierra raised his ground in his Rule 3.850 motion. Assuming that the report tendered by Sierra was accurate, the state post-conviction court found:

> The Defendant is not entitled to relief because he cannot show that counsel was deficient for failing to present evidence of the time of the death. During closing arguments, counsel argued that "the State was right. It really boils down to one element in the crime of murder which is in dispute. . . . The issue in dispute, of course is whether or not the State has proved beyond a reasonable doubt that my client was the shooter."

(Doc. 10, Resp. Ex. C2 at p. 2) (State court's record citation omitted)

After summarizing the evidence adduced at trial, the state court held:

> It is clear from the record that the issue at trial was whether the Defendant shot the victim at roughly 11:15 a.m. on Friday, December 28, 2007, not the Defendant's whereabouts at 5:48 p.m. Saturday, December 29, the time of death listed on the medical report. Consequently, counsel cannot be deficient for failing to admit into evidence the time of death when that fact had no bearing on whether the Defendant shot the victim a day earlier. By the same reasoning, the Defendant cannot show prejudice. Even if counsel had established the time of death at trial, the fact that the Defendant was in custody at that time does not affect the determination of whether he was in

> St. Petersburg to commit the murder a day earlier. Moreover, the Defendant's conjecture that the jury would have acquitted him had it been provided the time of death during deliberations is pure speculation. Speculation cannot be the basis for postconviction relief. See Griffin v. State, 866 So. 2d 1 (Fla. 2003); Maharaj v. State, 778 So. 2d 944, 951 (Fla. 2000); see also State v. Young, 932 So. 2d 1278, 1282-83 (Fla. 2d DCA 2006) (explaining that mere speculation cannot establish prejudice). Having failed under each prong of Strickland, the Defendant's claim must fail.

(Doc. 10, Resp. Ex. C2 at p. 3) The state court's ruling provides a reasonable basis for the state appellate court to deny relief on *Strickland*'s performance prong.

Sierra maintains he was in Orlando on December 28, 2007, with a woman named Rhonda. (Doc. 12 at 6) Bodtman's testimony, however, established that the murder occurred on that date, that he recognized the resident's footsteps between shots, and that Sierra left the building after the shooting. In view of his testimony, it is reasonable to conclude that counsel's performance in not cross-examining the medical examiner about the date and time of death stated in the report satisfied *Strickland*'s deferential standard.

The state court also reasonably applied *Strickland* in determining that Sierra was not prejudiced by the alleged omission of counsel. Moreover, Sierra failed to show any due process deprivation resulted from counsel's not presenting the medical examiner's report. Subclaim One is denied.

Subclaim Two

Sierra contends that during deliberations, the jury requested a copy of the medical examiner's report, stating that they would like to know what was determined to be the time of death. Sierra contends that his counsel did not object when the prosecutor misrepresented the facts by responding affirmatively when the trial judge stated that from the evidence, the exact time of death could not be determined. (Doc. 1-3 at 24) Sierra states that with his counsel's agreement, the jury was instructed to rely only on their

recollection of the evidence. Sierra asserts that his counsel was ineffective for not securing a copy of the report and objecting to the prosecutor's statements because the medical examiner determined that the victim's death was Saturday, December 29, 2007, at 5:48 p.m. Utilizing this date and time, Sierra claims that he was in custody when the murder occurred. (Doc. 1–3 at 23)

Sierra raised his claim in his Rule 3.850 motion. The state post-conviction court held:

> The Defendant is not entitled to relief because he has not shown that he is entitled to relief under Strickland. The trial transcript reflects that, during jury deliberations, the jury presented a question to the trial court, asking to be provided with a copy of the medical report because they wanted to know the victim's time of death. When the trial court asked for input from the parties about responding to the jury, the court asked whether it is correct that there was no indication that the time of death "would have been provided in a medical examiner's report . . ." and the State responded, "correct." Ultimately, the trial court informed the jury that all the evidence they could consider had been presented at trial, and they had to rely on their memory of the evidence. [*See Exhibit E: pp. 615-18*].
>
> When considered in the terms suggested by the Defendant's motion, it is possible that the State may have misspoken, because there did exist a medical report that contained a time of death. However, it appears that the trial court and parties were referring to whether there was any indication, based upon the evidence provided at trial, that this information had been established. But even if the State's agreement that there was no indication the time of death would be in any report was erroneous, any such inaccuracy was harmless. First, as described in this Court's analysis of subclaim one, the time of death on the medical report did not necessarily correlate to the time the victim was shot. Evidence at trial indicates that the shooting occurred at approximately 11:15 a.m. on Friday, December 28, 2007. Furthermore, the evidence reflected that the victim died as a result of gunshot wounds; that gunshots were heard in the apartment she had shared with the Defendant and were reported to the police at approximately 11:15 a.m. on the morning of Friday, December 28, 2007; and that the victim left her new residence at 10:30 a.m. on Friday, December 28, 2007[,] to go to the Carillon apartment, which was slightly more than 30 minutes away, to retrieve some items, but that she never returned.

> As noted in this Court's analysis of subclaim one, the medical report and the time of death were not admitted into evidence. Therefore, the State was not incorrect in indicating to the trial court that the time of death had not been established during the trial, and that the jury would have to rely upon their memory of the evidence that was presented. Even if counsel had objected to the State's apparent misstatement at this point, his objection would have been of no consequence because (1) the trial court did not repeat this inaccuracy to the jury and (2) there would have been nothing that the [trial] court could have done differently – the court could not give the jury something that was never introduced into evidence. All the trial court could tell the jury was that they had to rely on their memory. Objecting during this portion of the proceedings would not have affected what the jury was told in response to their question about the medical report.
>
> Had counsel objected the jury still would not have heard about the report or its listed time of death. Thus, the Defendant cannot show that counsel was ineffective, or that he was prejudiced by counsel's acts.

(Doc. 10, Resp. Ex. C2, at pgs. 3–5) The state post-conviction court reasonably applied *Strickland,* and the state appellate court could deny relief for the same reasons. Even if the prosecutor's statements to the trial court were incorrect, Sierra's counsel would not have been able to offer the medical examiner's report once deliberations had commenced. Accordingly, Sierra cannot show that his counsel's performance in not objecting to the prosecutor's statements made outside the presence of the jury about the medical report resulted in actual prejudice to Sierra. Subclaim Two is denied.

Subclaim Three

Sierra claims that the State knew the medical examiner's report cleared him of the crime and deliberately withheld the report from the judge and jury and misrepresented its exculpatory contends. (Doc. 1-3 at 26) He raised this claim in his Rule 3.850 motion. Construing his claim as brought pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), the state post-conviction court determined that Sierra was not entitled to relief, stating:

> First, the time of death was not necessarily favorable to the Defendant because it was not exculpatory in nature. Even if the victim actually died on Saturday, December 29, 2007, this does not change the critical fact that the

> evidence in this case indicated the victim was shot the morning of Friday, December 28, 2007. That she might not have died immediately would not absolve the Defendant of guilt for the act of shooting her – which did ultimately cause her death.
>
> Additionally, it is not apparent that this information was suppressed by the State. The only thing apparent from the State's input into the conversation surrounding the jury's question is that the State was mistaken in its contention that the time of death was not contained in any report, which had not been addressed during the course of trial. But it is purely speculative to suggest that the State intentionally misrepresented this information to the trial court.
>
> Finally, the Defendant cannot show that he was prejudiced by the omission of this information. As explained in subclaim one, the fact that the Defendant was in custody at the time of death does not affect the determination of whether he was in St. Petersburg to commit the murder a day earlier. Therefore, the medical report was not material, and the Defendant cannot show prejudice.

(Doc. 10, Resp. Ex. C2 at pgs. 5–6)

The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment. *Brady*, 373 U.S. at 87. However, "the Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense." *Kyles v. Whitley*, 514 U.S. 419, 436–37 (1995). To prevail on a *Brady* claim, the defendant must establish: (1) the evidence at issue is favorable to the accused, either because it is exculpatory or because it is impeaching; (2) the evidence was suppressed by the State, either willfully or inadvertently; and (3) the defendant incurred prejudice. *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). "[E]vidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Strickler*, 527 U.S. at 280 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). Stated differently, "the materiality standard

for *Brady* claims is met when 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Banks v. Dretke*, 540 U.S. 668, 698 (2004) (quoting *Kyles*, 514 U.S. at 435 (1995)).

It was not unreasonable for the state court to determine that the medical examiner's report was not favorable to Sierra if and to the extent that the medical examiner had used the date and time that law enforcement was notified of the vehicle that was determined to be Burgess's car as the date and time of the victim's death. However, even assuming the medical examiner's report was favorable to him, Sierra failed to show that the State willfully or inadvertently suppressed the medical examiner's report. When the jury requested a copy, Sierra's counsel did not complain that he was not furnished the report or did not know of its existence, and it is reasonable to conclude that Sierra's counsel either knew of or had equal access to the report. Indeed, Sierra's claim that his counsel failed to obtain the report implicitly accepts that counsel had access to it. "A defendant cannot meet the second prong when, 'prior to trial, [he] had within [his] knowledge the information by which [he] could have ascertained the alleged *Brady* material.'" *See Wright v. Sec'y, Fla. Dep't of Corr.*, 761 F.3d 1256, 1278 (11th Cir. 2014) (quoting *Maharaj v. Sec'y, Dep't of Corr.*, 432 F.3d 1292, 1315 (11th Cir. 2005)). In such cases, "[w]hen the defendant has equal access to the evidence[,] disclosure is not required" and "there is no suppression by the government." *Wright* at 1278 (quoting *Maharaj* at 1315 & n. 4).

Even if Sierra satisfied the first two prongs of *Brady*, he failed to meet the materiality prong. "While *Brady*'s materiality requirement 'is not a sufficiency of the evidence test,' — i.e., courts do not simply look to whether there is still enough evidence

to support the result — a defendant must show 'that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *See Hittson v. GDCP Warden*, 759 F.3d 1210, 1257 (11th Cir. 2014) (quoting *Kyles*, 514 U.S. at 434–35), *cert. denied sub nom*, *Hittson v. Chatman*, 135 S. Ct. 2126 (2015). Even if the medical examiner's report had been offered, the medical examiner did not explain in her report the references to the date and time of the victim's death. Nor did the medical examiner in the report expressly rule out that Burgess was fatally shot on December 28, 2007. The State's evidence amply showed that Burgess was shot in the head by Sierra on that date at the apartment she had shared with him, and Sierra fails to show that the medical examiner's report could reasonably be taken to put the whole case in a different light as to undermine confidence in the verdict

The state court decision constitutes a reasonable application of federal law as clearly established by the Supreme Court and involved a reasonable determination of the facts. Subclaim Three is denied.

Ground Three

Sierra contends that it was ineffective assistance for counsel not to request an alibi instruction, and he faults the trial court for not giving an alibi instruction. The claims were raised in his Rule 3.850 motion.

Subclaim One

Sierra claims that his trial counsel was ineffective for failing to request an alibi instruction and that counsel's alleged failure to do so violated Sierra's constitutional rights to due process and effective counsel. (Doc. 1-3 at 30) The state post-conviction court held:

> The Defendant is not entitled to relief because, contrary to the Defendant's claim, counsel did not argue an alibi defense and thus was not deficient for failing to request the instruction. In a July 14, 2009, pre-trial hearing on the Defendant's motion to dismiss counsel, the trial court held a Nelson [v. State, 274 So. 2d 256 (Fla. 1973] hearing, and counsel stated on [the] record that he disagreed with the Defendant's strategy of calling alibi witnesses from the Orlando liquor store; he did not see any relevance to those witnesses because the Defendant's story was not an alibi. Moreover, counsel did not argue an alibi defense during trial or in closing arguments; he argued the defense of mistaken identity. Had counsel requested the alibi jury instruction, the request would have been denied. Counsel cannot be deficient for failing to raise a meritless issue. Ferrell v. State, 29 So. 3d 959, 976 (Fla. 2010). Furthermore, the Defendant admits in his motion that he was present during the jury charge conference and that no one mentioned the alibi instruction. This is supported by the transcript of the jury charge conference. Thus, the Defendant admitted to being present but did not speak up to ask for the alibi instruction. He cannot now allege that counsel was deficient. Having found that Defendant has failed to make a showing as to the first prong of Strickland, this Court need not determine whether he has made a showing as to the second.

(Doc.10, Resp. Ex. C2 at p. 6) (state court's record citations and footnote omitted)

The state post-conviction court reasonably applied *Strickland*'s performance prong. Sierra asserts that his counsel filed a notice of alibi and questioned Sierra at trial in order to raise a valid defense. Sierra testified that after working a morning shift on Thursday, December 27th, he did some laundry, finishing it between 7 and 8 pm, and left the Carillon apartment open. He stated that after purchasing beer and driving by his place of work, Sierra left his vehicle at the Clearwater Mall and walked to a gas station where a woman named "Rhonda" asked him to show her where a church was located. According to Sierra, they drove around and eventually ended up in Orlando. He said that: "Rhonda" dropped him off at a store; at 7 or 8 a.m., he started drinking again; he had lunch; he fell asleep on the side of a building, and he started drinking again. (Doc. 10, A10, T 462–477) While Sierra said he was still in Orlando on Friday, December 28th, Sierra did not

specifically testify that he was in Orlando when Bodtman heard the gunshots on December 28th around 11 a.m.

Moreover, notwithstanding that Sierra was attempting through his testimony to establish an alibi or that he views his testimony as warranting an alibi instruction, the state post-conviction court, and the appellate court by its affirmance, have answered the question of what would have happened under state law had counsel sought an alibi instruction. Deference must be afforded to the state court's determination that a request for an alibi instruction would have been denied. *See, e.g., Herring v. Sec'y, Dep't of Corr.*, 397 F.3d 1338, 1354–55 (11th Cir. 2005) ("The Florida Supreme Court already has told us how the issues would have been resolved under Florida state law had [petitioner's counsel] done what [petitioner] argues he should have done. . . . It is a 'fundamental principle that state courts are the final arbiters of state law, and federal habeas courts should not second-guess them on such matters.'") (quoting *Agan v. Vaughn*, 119 F.3d 1538, 1549 (11th Cir. 1997)).

Sierra contends that his counsel "argued Sierra's alibi defense heavily" during closing argument. (Doc. 1-3 at 31) The record shows, however, that the focus of counsel's argument was on the State's burden of proof. Reminding the jury that although Sierra had testified, the State had the burden of proof, counsel submitted the issue in dispute was whether the State had proven beyond a reasonable doubt that Sierra was the shooter. (Doc. 10, Resp Ex. A10, T 572-73) After addressing the State's evidence, counsel did attend to Sierra's testimony but did not state that Sierra was not the shooter

because he was Orlando.[3] Nonetheless, even accepting that counsel was advancing Sierra's testimony as evidence in support of an alibi, the instructions as a whole were sufficient. The jury was instructed that the State had the burden of proving Sierra was the person who committed the crime and if the jury did not have an abiding conviction of guilt, the jury must find Sierra not guilty. The jury was also given on factors in considering witness testimony. (Doc. 10, Resp. Ex. A10, T 603-05) In view of these instructions, there was no reasonable probability of a different outcome had Sierra's jury been instructed on alibi. *See e.g.*, *Thomas v. Sec'y, Dep't of Corr.*, No. 2:14-CV-338-FTM-29CM, 2017 WL 1345577, at *10 (M.D. Fla. Apr. 12, 2017) (unpublished) (holding that while the jury was not specifically instructed on the theory of alibi because counsel never requested a separate alibi instruction, the state court's charge when viewed as a whole correctly stated the issues and law and was adequate) (citing *United States v. Russell*, 717 F.2d 518, 521 (11th Cir. 1983)). Subclaim One is denied.

Subclaim Two

Sierra contends that counsel's failure to request an alibi instruction violated his constitutional right to due process and that it was fundamental error for the trial court not to instruct the jury on the defense of alibi. (Doc. 1-3 at 30) The state court found that the claim of trial court error was procedurally barred because such could have been raised on direct appeal. (Doc. 10, Resp. Ex. C2 at pgs. 6-7) Other than relying the state court's rulings in denying post-conviction relief, the Respondent does not specifically raise a

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[3] Acknowledging that there were gaps in Sierra's testimony, Sierra's trial counsel submitted that such were reasonable given that Sierra had been on a drinking binge. Counsel also argued that there was evidence to support Sierra's testimony by asking the jury, "I mean what did he get arrested for?" and by submitting to the jury, "It fits together." (Doc. 10, Resp. Ex. A10, T 577)

procedural bar argument to these claims. Notwithstanding, even if reached, these claims do not warrant relief. Sierra relies on *United States v. Hicks*, 748 F.2d 854, 857 (4th Cir. 1984), which held that once it appeared that there was sufficient alibi evidence, the defendant had a Sixth Amendment and due process right to have the issue submitted to the jury. Unlike *Hicks*, in which the federal prisoner argued that the district court erred in refusing to give an alibi instruction, the state trial court did not refuse to give an alibi instruction in Sierra's case. Moreover, Sierra does not show that he was deprived of due process when his counsel did not request an alibi instruction or when the trial court did not given such an instruction. The jury instructions made clear that the State had the burden of showing that Sierra killed the victim; therefore, there was no constitutional due process deprivation resulting from lack of an alibi instruction. *See e.g.*, *Echols v. Ricci*, 492 Fed. App'x. 301, 313 (3d Cir. 2012) ("Because there is no constitutional requirement for an alibi instruction and because the instructions given by the trial court in this case made it clear that the government had to prove beyond a reasonable doubt that Echols was in the apartment complex when the shooting occurred, the Supreme Court of New Jersey did not unreasonably apply *Strickland* in determining that appellate counsel was not ineffective for choosing to focus on other issues on direct appeal."). Subclaim Two is denied.

Ground Four

In two subclaims within Claim Four, Sierra alleges his counsel rendered ineffective assistance by failing to file a motion to suppress evidence. These claims were raised in Sierra's Rule 3.850 motion and on summary appeal.

Subclaim One

Sierra asserts that his trial counsel failed to move to suppress police interviews with him on December 30, 2007, and January 3, 2008, which he asserts were conducted in Orlando after his right to counsel had attached, in violation of Rule 3.111 of the Florida Rules of Criminal Procedure and Section 27.51(1)(A), Florida Statutes. (Doc. 1-3 at 33)

The December 30, 2007, interview

Detective Deluca testified at trial that on December 30, 2007, he reviewed with Sierra the advisement form containing his *Miranda*[4] rights, and Sierra signed the form. (Doc. 10, Resp. Exs. A5; A10, T 221-29) Detective Gibson testified that Sierra was cooperative but vague. (Doc. 10, Resp. Ex. A10, T 411-14) In its order denying Sierra's Rule 3.850 motion, the state post-conviction court recapped this testimony. The state court also found that Sierra testified that: Sierra agreed to talk to the detectives on two occasions; Sierra freely and voluntarily gave a statement because the detectives asked him for help; the detectives did not threaten him; and Sierra answered their questions to help them. (Doc. 10, Resp. Ex. C2 at pgs. 7–8) The state post-conviction court concluded:

> Thus, the Defendant knew his rights and waived them by deciding to speak with detectives. Had counsel moved to suppress the statements for absence of counsel, the motion would have been denied. Counsel cannot be deficient for failing to raise a meritless argument. Ferrell at 976. Having found that the Defendant has failed to a make a showing as to the first prong of Strickland, this Court need not determine whether he has made a showing as to the second.

(Doc. 10, Resp. Ex. C2 at p. 8)

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[4] *Miranda v. Arizona*, 384 U.S. 436 (1966).

The January 3, 2008, interview

Sierra spoke with the detectives again on January 3, 2008. The state court made the following findings as to that interview:

> . . . Detective Deluca testified in a proffer that, prior to the interview, he went through the same procedure with the Defendant as he did prior to the December interview but, this time, the Defendant answered "no" to the question asking whether he wanted to speak with the detectives. As a result, he and Detective Gibson started packing up to leave when the Defendant said he had something to get off his chest and, without interrogation or questioning, spontaneously made statements to them without asking to speak to an attorney. The Defendant's trial testimony (that he freely and voluntarily gave a statement because they asked him for help, that the detectives were not threatening him, that they asked if he could help then, and that he answered their questions to help them) corroborates Detective Deluca's testimony. By spontaneously speaking with detectives, despite both the absence of counsel and his initial answer of "no" to the question of whether he wanted to speak to detectives, the Defendant again waived his right to counsel. See Hayward v. State, 24 So. 3d 17, 36 (Fla. 2009) (finding that Haywood's statements were admissible because they were clearly spontaneous and voluntary and not the product of interrogation). Further, counsel advised the trial court and the State that he would not argue that the statements were involuntary because there was no evidence to support such an argument.

(Doc. 10, Resp. Ex. C2 at p. 8) (state court's record citations omitted)

The post-conviction court concluded:

> Counsel cannot be deficient for failing to raise a meritless argument. Ferrell. Having found that the Defendant has failed to make a showing as to the first prong of Strickland, this Court need not determine whether he has made a showing as to the second.

(Doc. 10, Resp. Ex. C2 at p. 8)

It is reasonable to deny relief on this claim on *Strickland*'s performance prong. Sierra's statements in the initial interview were made after he waived his *Miranda* rights, and Sierra made spontaneous or volunteered statements the second time he spoke with the detectives.

Citing Rule 3.111(a) of the Florida Rules of Criminal Procedure, Sierra asserts that his right to counsel had attached on December 29, 2007, "when he was "formally charged in open court" with the murder of Burgess and also on December 30, 2007, at 11:16 a.m., when he alleges that authorities at the Orange County jail were told to hold Sierra on the murder charge. (Doc. 1-3 at 35) To the extent Sierra claims that counsel should have sought to suppress Sierra's statements based on a violation of his right to counsel under state law, the state decision answers the question of what would have happened under state law had counsel moved to suppress Sierra's statements on the basis that his right to counsel under state law was violated when Sierra was interviewed on both dates.

To the extent Sierra is claiming that his trial counsel should have raised a violation of Sierra's constitutional right to counsel in a motion to suppress Sierra's statements to detectives, he shows no deficiency in counsel's performance in foregoing such a claim. The Sixth Amendment right to counsel attaches when the adversarial judicial process is initiated, "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)). Although Sierra claims he was formally charged in open court on December 29, 2007, and the warrant indicates that Detective Deluca provided an oath on that date, the complaint and warrant are dated December 31, 2007. (Doc. 10, Resp. Ex. A2) Notwithstanding, it need not be determined for purposes of this claim of ineffective assistance of counsel whether Sierra's Sixth Amendment right to counsel had attached by the time he was interviewed because in those interviews Sierra waived his right to counsel and/or made spontaneous statements to the detectives. Sierra relies on *Michigan v. Jackson*, 475 U.S. 625 (1986), which forbade the police from initiating an

interrogation of a criminal defendant once he has invoked his Sixth Amendment right to counsel at an arraignment or similar proceeding. However, in *Montejo v. Louisiana*, 556 U.S. 778, 797 (2009), the Supreme Court overruled *Jackson*. The Court stated:

> Our precedents also place beyond doubt that the Sixth Amendment right to counsel may be waived by a defendant, so long as relinquishment of the right is voluntary, knowing, and intelligent. *Patterson v. Illinois*, 487 U.S. 285, 292, n. 4, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988); *Brewer v. Williams*, 430 U.S. 387, 404, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977); *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). The defendant may waive the right whether or not he is already represented by counsel; the decision to waive need not itself be counseled. *Michigan v. Harvey*, 494 U.S. 344, 352–353, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990). And when a defendant is read his *Miranda* rights (which include the right to have counsel present during interrogation) and agrees to waive those rights, that typically does the trick, even though the *Miranda* rights purportedly have their source in the Fifth Amendment. . . .

Montejo, 556 U.S. at 786. *See also United States v. Rojas*, 553 F. App'x. 891, 893 (11th Cir. 2014) ("A defendant may waive his Sixth Amendment right to counsel, 'so long as relinquishment of the right is voluntary, knowing, and intelligent.' *Montejo*, 556 U.S. at 786, 129 S.Ct. at 2085. 'The defendant may waive the right whether or not he is already represented by counsel; the decision to waive need not itself be counseled.' *Id.*").

Sierra asserts that he was indicted for first degree murder on January 24, 2008, while held in the Orlando jail and that he was not furnished counsel until March 11, 2008. (Doc. 1–3 at 33) In any event, no matter when his right to counsel attached, Sierra was advised of his rights and he signed a written waiver of his right to counsel, and he subsequently made spontaneous or volunteered statements. As such, it is reasonable to conclude there was no deficiency in counsel's performance in not moving to suppress Sierra's statements to the detectives on the basis that the statements were obtained in violation of his right to counsel.

Sierra fails to show *Strickland* prejudice. In light of the other evidence establishing Sierra's guilt as charged, there was no reasonable probability of a different outcome had counsel filed a motion to suppress Sierra's statements to the detectives.

Finally, to the extent Sierra raises a substantive claim of a denial of his constitutional right to counsel when he was interviewed, such claim was not preserved and raised on direct appeal. Notwithstanding, such claim does not warrant relief, as Sierra waived his right to counsel when interviewed and later made spontaneous or volunteered statements to the detectives. Subclaim One is denied.

Subclaim Two

Sierra contends that his trial counsel was ineffective for failing to file a motion to suppress the statements and testimony of McCombs, a detainee at the jail where Sierra was held. (Doc. 1-3 at 33, 37) Sierra claims that counsel had not been appointed to represent him during an inordinate 73-day when he was allegedly approached by McCombs at the Orange County Jail. (Doc. 1-3 at 37) The state post-conviction court found there was no evidence, nor did Sierra allege, that law enforcement acted in concert with McCombs in a manner that infringed on Sierra's Sixth Amendment right to counsel. Finding that McCombs was not acting as a police informant and that Sierra was not entitled to the presence of counsel during his discussions with McCombs, the state post-conviction court concluded there was no legal basis for suppressing Sierra's statements to McCombs and that had a motion to suppress the statements been filed, it would have been denied. (Doc. 10, Resp. Ex. C2 at pgs. 9–10)

The state court reasonably applied *Strickland* in concluding that Sierra did not satisfy the first prong *of Strickland*. The Supreme Court held in *Kuhlmann v. Wilson*, 477

U.S. 436, 459 (1986), that a defendant does not demonstrate a violation of the Sixth Amendment "simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." 477 U.S. at 459. McCombs's conversations with Sierra were not initiated by an agent for the government. Sierra's statements to McCombs were not obtained in violation of his Sixth Amendment right to counsel, and a motion claiming otherwise would have been meritless. Sierra has not shown that the state court's rejection of his claim of ineffective assistance of counsel was unreasonable or that the decision was based on an unreasonable determination of the facts.

Sierra claims he was further prejudiced because he was subjected to false claims of a "jailhouse snitch". (Doc. 1-3 at 37) The post-conviction court held that claims challenging the admissibility, validity, or sufficiency of the evidence are not cognizable in a Rule 3.850 motion and denied Sierra's claim to the extent he was alleging that McCombs's testimony was false. (Doc. 10, C2 at p. 10) Notwithstanding, it appears Sierra is alleging as *Strickland* prejudice that McCombs's testimony was false. Sierra fails to show any deficiency in counsel's performance to Sierra's prejudice in counsel's not moving to suppress McCombs's testimony on such basis. Subclaim Two is denied.

Ground Five

Sierra alleges that his trial counsel was ineffective for failing to (1) investigate Sierra's "valid" alibi defense, (2) subject the State's case to adversarial testing by cross-

examination of key witnesses, and (3) develop an alternate suspect for the jury's consideration. (Doc. 1-3 at 42)

Subclaim One

Sierra alleges that he "consistently" advised his counsel to go Orlando to interview the owner and the store clerk who worked at the ABC Liquor Store where Sierra was seen buying beer and alcohol throughout Friday, December 28, 2007, until his arrest on Saturday morning at 1:33 a.m. (Doc. 1-3 at 42) According to Sierra, his counsel refused to conduct this investigation.

Before his trial commenced, Sierra informed the trial court that he wanted his attorney to bring some alibi witnesses who were at the liquor store when Sierra said he purchased liquor. His attorney commented that he did not see the relevancy, as everyone knew Sierra was arrested next to the store and the murder was committed the previous day. Sierra advised that he had been at the store earlier that day and returned later in the evening and that the person to whom he had spoken had seen him when she started her shift and again when she ended the shift. At the conclusion of the hearing, the state trial court determined that Sierra's counsel would not be removed. (Doc. 10, Resp. Ex. A9 at pgs. 16–18)

When Sierra raised this ground in his Rule 3.850 motion, the post-conviction court held that this ground was procedurally barred under the state's collateral estoppel doctrine because the claim was addressed at the hearing on Sierra's request to dismiss his counsel.[5] (Doc. 10, Resp. Ex. C2 at p. 10) The state appellate court affirmed the

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[5]The state post-conviction court cited *State v. McBride*, 848 So. 2d 287, 291 (Fla. 2003) (stating that "[a]lthough collateral estoppel generally precludes relitigation of an issue in a subsequent but separate

post-conviction court's application of the state procedural bar by its *per curiam* affirmance. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991) (where "the last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits."). Therefore, the claim is procedurally defaulted.

Notwithstanding the default, however, the claim is without merit.

The failure-to investigate-component

Under the Sixth Amendment, counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. No absolute duty exists to investigate particular facts or a certain line of defense. *Chandler v. United States*, 218 F.3d 1305, 1317 (11th Cir. 2000). The decision not to investigate must be assessed for reasonableness based on the circumstances, "applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691.

Sierra alleged in his Rule 3.850 motion that he asked his counsel to interview the store owner and clerk at the ABC Liquor Store where Sierra was seen buying beer and alcohol "throughout" Friday, December 28, 2007, up to his arrest on Saturday morning at 1:33 a.m. (Doc. 10, Resp. Ex. C1 at p. 23) While Sierra alleged that his counsel refused to conduct this investigation, Sierra did not allege that he was in the store the entire day of December 28, 2007. Nor did Sierra assert that he told counsel that the store owner and clerk observed Sierra in the store at or around 11:00 in the morning on December

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cause of action, its intent, which is to prevent parties from rearguing the same issues that have been decided between them, applies in the postconviction context.") (citation omitted)).

28, 2007, when Bodtman heard the first gunshot in the Carillon apartment. Further, Sierra offers nothing more than nonspecific, conclusory allegations about what the store clerk's testimony would have been if she had been asked whether Sierra was at the store at the time Bodtman testified the fatal shots were fired. Accordingly, Sierra has not met his burden of demonstrating that his counsel's performance in not pursuing the information of the store owner and clerk was deficient to Sierra's prejudice.

Failure-to call-witnesses component

Sierra alleged in his Rule 3.850 motion that he needed just one witness to place him in Orlando during the morning, afternoon, and evening hours of December 28, 2007, to secure an acquittal at trial. (Doc. 10, Resp. Ex. C1 at p. 23) Again, Sierra did not, allege that the store owner or clerk was available at the time of trial and would have testified that Sierra was in the liquor store or nearby when Bodtman heard the first gunshot in the Carillon apartment. Nor did Sierra assert that the owner or clerk would have testified that Sierra was at the Orlando store at a time that would have foreclosed the possibility that Sierra had sufficient time to travel to Orlando after murdering the victim. Without specifics as to the witnesses' testimony, Sierra failed to show constitutional deficiency in counsel's performance in not calling the owner or clerk at trial.

Where a petitioner raises an ineffective assistance claim based on counsel's failure to call a witness, the petitioner carries a heavy burden to show prejudice "because often allegations of what a witness would have testified to are largely speculative." *Finch v. Sec'y, Dep't of Corr.*, 643 F. App'x. 848, 852 (11th Cir.) (quoting *Sullivan v. DeLoach*, 459 F.3d 1097, 1108–09 (11th Cir. 2006)), *cert. denied sub nom. Finch v. Jones*, 137 S. Ct. 519 (2016). Sierra's Rule 3.850 motion lacked specifics as to when the owner or clerk

observed Sierra at the store and lacked any statements from the putative witnesses of what they would have said if called to testify. As such, Sierra's claim was speculative and failed to establish that there was any reasonable probability of a different outcome had his counsel called the owner or clerk as alibi witnesses. Subclaim One is denied.

Subclaim Two

Sierra claims that his counsel failed to cross-examine nine of 14 witnesses called by the State. (Doc. 1–3 at 43) He raises specific allegations as to Bellman, McCombs, and the detectives. Sierra raised this ground in his Rule 3.850 motion and on summary appeal.

Steve Bellman

Characterizing Bellman as "Sierra's alternative suspect," Sierra contends that Bellman admitted being the last person to see the victim alive and that Bellman had no alibi other than he was home alone. Sierra also states that Bellman did not contact police when the victim did not return home that day and that Bellman had several prior felony convictions. (Doc. 1-3 at 43)

The state post-conviction court denied Sierra's claim that counsel failed to cross-examine Bellman about his alibi as follows:

> The Defendant is not entitled to relief because the answers to his suggested line of questioning were already brought out on direct examination. First, contrary to the Defendant's allegation, Mr. Bellman did not admit to being the last person to see the victim alive. Rather, Mr. Bellman testified on direct-examination that the victim left his apartment in Clearwater Beach at 10:30 a.m. on December 28, 2007, and began the cross-county drive to the Carillon apartment. He also testified that he stayed home after the victim left and used her cellular phone to make appointments for job interviews and to later call the contacts within the phone to search for the victim after she failed to return, although he did not call the police. Id. [FN] Thus, the facts upon which the Defendant's theory is based were brought out on direct examination.

> It is quite possible that the jury may have found that Mr. Bellman's testimony created a reasonable doubt that the Defendant was guilty. The State apparently realized this possibility because it called two other witnesses to corroborate Mr. Bellman's alibi. Larry Smith, custodian of records for the victim's cellular phone company, testified that the victim's cell phone was being used in the same location and within the same 1.5 to 2-mile radius in Clearwater throughout the day of the shooting. The State also called Dan Jensen, the records custodian for the Defendant's cell phone carrier, who testified that cell phone usage records indicate that the Defendant's phone received a text message from the victim's cell phone on the day of the shooting. Consequently, the facts that the Defendant claims should have been elicited by counsel through cross-examination were already elicited on direct examination. To the extent that the Defendant claims that counsel was ineffective for failing to cross-examine Mr. Bellman about being the last person to see the victim alive and about his alibi, this Court finds that counsel was not deficient. Having found that the Defendant has failed to make a showing as to the first prong of Strickland, this Court need not determine whether he has made a showing as to the second.
>
> > [FN] Although he testified that the cross-county trip would take nearly an hour by car, Detectives Deluca and Co[]eyman both testified that they timed the trip as taking 33 minutes. The disparity between Mr. Bellman's estimate of the duration of the time and the detectives' measurement of time is reasonable given Mr. Bellman's infrequent use of private motor vehicle transportation; he testified at trial that he does not have a driver's license, does not drive, does not own a car, and gets around by walking or taking the bus or riding his bicycle.

(Doc. 10, Resp. Ex. C2 at pgs. 11–12) (state court's record citations omitted)

This ruling furnishes a reasonable basis on which to deny relief on *Strickland*'s performance prong. Even if counsel had cross-examined Bellman, Sierra has not shown that his counsel would have been able to elicit testimony showing that Bellman was not at his Clearwater Beach apartment when the shots were fired in the Carillon apartment.

The post-conviction court found that while counsel could have impeached Bellman on his prior convictions, Sierra cannot show there was a reasonable probability that he would have been acquitted had counsel elicited Bellman's prior convictions. After setting out Sierra's testimony, the state court found that the evidence refuting Sierra's testimony

was overwhelming, supporting this finding with a detailed summary of the testimony adduced by the State. The state post-conviction court concluded:

> The State established a very strong circumstantial case that implicated the Defendant as the shooter. In light of the overwhelming, inculpatory evidence, there is no reasonable probability that the jury would have acquitted the Defendant had counsel tried to impeach Mr. Bellman over his prior convictions. This is especially true since his alibi was corroborated by both Larry Smith and Dan Jenson. Therefore, the Defendant cannot show prejudice. Having found that the Defendant has failed to make a showing as to the second prong of Strickland, this Court need not determine whether he has made a showing as to the first.

(Doc. 10, Resp. Ex. C2 at p. 19)

The state court reasonably applied *Strickland*'s prejudice prong. In view of the evidence that showed that Sierra was present at the Carillon apartment on December 28, 2007, before, during, and after the shooting, there was no reasonable probability of a different outcome had counsel questioned Bellman about his prior convictions.

Scott McCombs

The post-conviction court denied Sierra's claim that counsel failed to cross-examine McCombs on his prior convictions as follows:

> . . . the Defendant alleges that counsel was ineffective for failing to impeach Mr. McCombs regarding his alleged 27 convictions. The Defendant is not entitled to relief because Mr. McCombs' prior convictions were brought out on direct examination. In support of his claim, the Defendant submits a printout of Mr. McCombs' Orange County case history, which lists 27 records. The printout, by itself, does not convey enough information to determine the dispositions of these records. Nonetheless, even if all 27 records were convictions, this Court notes that only seven of them qualify under section 90.610, Florida Statutes (2009), for impeachment purposes. The jury knew about at least some of these prior convictions because Mr. McCombs testified on direct examination that he had some prior felonies. Consequently, the facts that the Defendant claims should have been elicited through cross-examination were already elicited on direct examination. Counsel cannot be deficient for failing to cross-examine and impeach Mr. McCombs for his prior convictions. Having found that the Defendant has

> failed to make a showing as to the first prong of Strickland, this Court need not determine whether he has made a showing as to the second.

(Doc. 10, Resp. Ex. C2 at p. 20) (state court's record citations omitted)

The state court reasonably denied relief on *Strickland*'s performance prong. McCombs's acknowledgment that he had prior convictions provides a reasonable basis on which to find counsel's performance in not questioning McCombs further on his prior record satisfied *Strickland*'s deferential standard.

At trial, McCombs testified that he wrote a letter to the Pinellas County Sheriff's Office, furnishing his information on Sierra. He stated that he did not do so to gain a benefit. McCombs explained that he brought the information forward because he was a father and thought that he should provide the information. (Doc. 10, Resp. Ex. A10, T 444) Sierra contends that his counsel did not obtain any confidential informant agreement between the State and McCombs and did not secure McCombs's letter to "the State". (Doc. 1-3 at 44) As to McCombs's letter to law enforcement, the state post-conviction court found that McCombs's letter was inadmissible hearsay. Accordingly, the post-conviction court denied relief on *Strickland*'s performance prong. As to Sierra's claim that counsel failed to obtain a confidential informant agreement, the post-conviction court stated that McCombs testified that he had completed his sentence and did not benefit from his testimony. Finding that the evidence showed that McCombs acted on his own volition and out of his duty as a parent, the post-conviction court held that Sierra provided no support for his conjecture that McCombs was a confidential informant. Accordingly, the post-conviction court concluded that Sierra failed to show *Strickland* prejudice. (Doc. 10, Resp. Ex. C2 at pgs. 20-21)

The state court reasonably applied *Strickland* in denying relief on Sierra's claims. Sierra did not show that there was any deficiency in counsel's performance or that there was any reasonable probability of a different outcome had counsel secured McCombs's letter, foraged for an agreement, or questioned McCombs on such matters. McCombs's letter was inadmissible — a state law determination due deference, and McCombs's testimony established that he had no agreement with police. Sierra's speculation of an agreement does not meet his burden of establishing prejudice. *See Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991) (vague, conclusory, or unsupported allegations cannot support an ineffective assistance of counsel claim).

The Detectives

Sierra asserts that his counsel never cross-examined the crime scene detectives about bloody footprints at the scene, which he indicates were size 12 or 13 and did not match Sierra's shoe size. Claiming that he told his attorney about this "exculpatory" evidence, Sierra asserts that a Technical Services Report shows that footprints were at the scene. Sierra also faults his counsel for not cross-examining the detectives about why they did not pursue Bellman as a suspect, why they did not pursue witnesses at the Orlando ABC Liquor Store to prove or disprove Sierra's alibi; and why they denied Sierra counsel when under custodial restraint. (Doc. 1-3 at 44) Addressing the testimony of Detectives Deluca and Coeyman, the state post-conviction court held that it would have been impermissible to cross-examine the detectives on such matters, which were beyond the scope of direct examination. As to Sierra's claim that his trial counsel should have cross-examined detectives as to why detectives placed him under custodial restraint but denied him counsel, the state court found that Sierra waived his right to counsel. The

post-conviction court concluded that because Sierra failed to meet the first prong of *Strickland*, it need not determine whether he had made a showing on the second prong. (Doc. 10, Resp. Ex. C2 at p. 22)

The state court reasonably denied relief on *Strickland*'s performance prong. The post-conviction court, and the appellate court by its affirmance, have answered the question of what would have happened under Florida law had counsel attempted to cross-examine the detectives on matters beyond direct examination. Sierra did not demonstrate that he was denied counsel during a custodial interrogation; therefore, Sierra cannot show there was a reasonable probability of a different outcome had counsel undertaken the lines of questioning that Sierra has proposed.

Sierra adds that his counsel never cross-examined the medical examiner about the "exculpatory" date and time of death and did not enter in evidence the autopsy report. (Doc. 1–3 at 44) This claim has been addressed. Sierra failed to show deficient performance to his prejudice in counsel's performance in not cross-examining the medical examiner about, or seeking admission of, the medical examiner's report. Subclaim Two is denied.

Subclaim Three

Sierra claims that he has "always suspected" that "Burgess's new boyfriend" is the real killer and that he requested counsel to explore this theory of a viable alternate suspect. Sierra alleges that it is a reasonable hypothesis that Bellman killed Burgess in a jealous rage after seeing her, or some other reminder of her and Sierra, at the Carillon apartment. According to Sierra, an investigation of Bellman as a suspect would have been helpful to show there was a reasonable doubt that Sierra was the killer. Sierra adds

that his prior counsel, attorney Dwight Wolfe, asked to withdraw because he represented Bellman on a number of occasions in prior cases. According to Sierra, this proves that Bellman had a past and possibly violent criminal history. (Doc. 1-3 at 45) Sierra does not explain, nor did he allege in his Rule 3.850 motion, how counsel could have developed Bellman as a suspect.

The state post-conviction court addressed Sierra's claim as asserting that counsel was ineffective for failing to cross-examine Bellman.[6] The state court held that the facts upon which Sierra's theory was based were adduced on Bellman's direct examination. (Doc. 10, Resp. Ex. C2 at p. 12) Because Sierra did not specify any investigative steps his counsel could have taken before trial, the state post-conviction court reasonably construed his claim as faulting counsel for not developing Bellman as an alternate suspect through cross-examination.

Not only did Sierra fail to show that his counsel could have elicited further testimony from Bellman to support Sierra's hypothesis, Sierra also failed to allege facts that, if developed, would have supported his hypothesis that Bellman killed Burgess in a jealous rage. Accordingly, Sierra has not shown that his counsel's performance in not developing an alternate suspect was deficient to Sierra's prejudice. Subclaim Three is denied.

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[6] While the post-conviction court did not analyze the claim as a separate subclaim, the state court recited Sierra's allegations that Sierra "has always" suspected that Bellman is the real killer, that "it is a reasonable hypothesis" that Bellman killed the victim, and that he asked counsel to explore this theory. (Doc. 10, Resp. Ex. C2 at p. 11) The state court also stated that Sierra alleged that had counsel cross-examined Bellman, such would have created a reasonable doubt in the jurors' minds that Sierra committed the murder. The appellate court's affirmance is due deference as an adjudication of Sierra's claim on the merits. *See Pinholster*, 563 U.S. at 187 ("Section 2254(d) applies even where there has been a summary denial.").

Ground Six

Sierra alleges that his trial counsel was ineffective for failing to object to Bellman's testimony that the victim stated she "was done" with Sierra and that she was scared of Sierra. (Doc. 1-3 at 49) He contends that the testimony was inadmissible hearsay. The post-conviction court held:

> The Defendant is not entitled to relief because the statement that the victim "was done with him" was not hearsay and because counsel did object to later hearsay statements. Initially, this Court notes that Mr. Bellman did not testify as the Defendant asserts. Rather, Mr. Bellman testified on direct examination as follows:
>
> THE STATE: Okay. Had you ever met Troy?
>
> MR. BELLMAN: No, never.
>
> THE STATE: Okay, But you were aware they were living together when you guys began talking?
>
> MR. BELLMAN: Yes. Yes, I knew.
>
> THE STATE: And was it your understanding that that relationship was over?
>
> MR. BELLMAN: Yes, She was done with him, and that's why we had the commitment, and that's why it happened pretty quickly. She wanted to get out of there, so I allowed her — I gave her the opening if she wanted to move in with me. —
>
> . . . .
>
> THE STATE: Do you know why she wanted to do it while he was gone?
>
> MR. BELLMAN: Well, she was scared of him.
>
> DEFENSE COUNSEL: Your Honor, I object. He's getting into hearsay stuff here.
>
> The record is clear that Mr. Bellman was testifying to his understanding of the victim's relationship with the Defendant, not to a statement she made. Therefore his testimony about [the] status of the relationship did not involve a hearsay statement. Moreover, counsel did in fact object later to a statement that was hearsay. The Defendant has thus failed to show any deficiency by

> counsel. Having found that the Defendant has failed to make a showing as to the first prong of Strickland, this Court need not determine whether he has made a showing as to the second.

(Doc. 10, Resp. Ex. C2 at pgs. 23–24) (state court's record citation omitted)

The state appellate court by its affirmance of this ruling has determined what would have happened had counsel objected to Bellman's testimony as inadmissible hearsay. *See Callahan v. Campbell,* 427 F.3d 897, 932 (11th Cir. 2005) ("[T]he Alabama Court of Criminal Appeals has already answered the question of what would have happened had [petitioner's counsel] objected to the introduction of [petitioner's] statements based on [state law] — the objection would have been overruled. . . . Therefore, [petitioner's counsel] was not ineffective for failing to make that objection."). Giving deference to the state court's determination that Bellman's testimony did not constitute hearsay, Sierra cannot show that counsel's performance in not objecting on hearsay grounds was constitutionally deficient.

Sierra also claims that counsel's "failing" to object to "inadmissible hearsay" deprived him of his rights to due process and confrontation. (Doc. 1-3 at 49) Sierra did not raise these claims in his Rule 3.850 motion as substantive constitutional claims of trial court error. He raised his claims in the context of his claim of ineffective counsel. Although the post-conviction court did not discuss the due process and confrontation aspects of his ground, the state appellate court's affirmance is due deference as an adjudication on the merits. Sierra failed to show as prejudice under *Strickland* that he was deprived of his constitutional rights to due process and confrontation when his trial counsel did not object to Bellman's testimony.

The Sixth Amendment provides that, "[i]n all criminal cases, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. Amend. VI. This provision is applicable to the states under the Fourteenth Amendment's Due Process Clause. *See Rodriguez v. Sec'y, Fla. Dep't of Corr.*, 756 F.3d 1277, 1299, n. 39 (11th Cir. 2014) (quoting *Pointer v. Texas*, 380 U.S. 400, 406 (1965)). The Confrontation Clause does not apply to non-testimonial statements. *Davis v. Washington*, 547 U.S. 813, 823 (2006). Moreover, the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford v. Washington*, 541 U.S. 36, 59, n.9 (2004).

Sierra has not shown that testimonial statements of Burgess were elicited when Bellman testified that Burgess was "done with" Sierra and that she was scared of Sierra. There was no federal due process or confrontation violation resulting from trial counsel's alleged failure to object to Bellman's testimony as "inadmissible hearsay" as Sierra has claimed. Where counsel objected, he discharged his duty as counsel. Where he did not object, the state court has determined under state rules that the assertions made by the witness were not hearsay.

The state decision constitutes a reasonable application of federal law as clearly established by the Supreme Court and involves a reasonable determination of the facts. Ground Six is denied.

Ground Seven

Sierra alleges that his counsel was ineffective for failing to object to and impeach the testimony of Officer Figueroa that Sierra went to Orlando from Clearwater by bus. Sierra claims that this testimony led the jury to doubt Sierra's alibi that he came to Orlando

was from, that Sierra had said that he came from Clearwater, and that Sierra came over on a bus from Clearwater. Accordingly, Sierra has not shown any deficiency in his counsel's performance in not objecting to the officer's trial testimony as inconsistent or perjurious. Nor has Sierra demonstrated any deficiency in counsel's performance in not impeaching the officer at trial with the deposition. Ground Seven is denied.

Ground Eight

Sierra claims that his trial counsel was ineffective for failing to cross-examine and impeach the testimony of McCombs at trial. He asserts that counsel did not obtain a copy of any letter sent to the State or any confidential agreement between the State and McCombs. Sierra asserts that the "letters and agreement may have indeed shown that McCombs was asking for, and consequently did receive, special favors in his criminal case in exchange for his testimony at trial." (Doc. 1-3 at 56) The post-conviction court pointed out, without further discussion, that Sierra raised many of the same grounds in subclaim two of ground four of his Rule 3.850 motion. Sierra has not shown that the state decision on his ground is an unreasonable application of *Strickland* or involves an unreasonable determination of the facts. As pointed out *supra*, McCombs's letter to law enforcement was determined to be inadmissible and Sierra merely speculated that there was a confidential informant agreement.

Sierra also alleges his counsel should have: (1) aggressively pressed McCombs for exact dates and times of the alleged confessions of Sierra; (2) inquired of McCombs why he did not tell personnel at the Orlando jail about the discussion; and (3) asked McCombs if Pinellas County detectives "fed" McCombs details of Sierra's case and "fed" McCombs the testimony that McCombs gave at trial. Sierra further claims that his counsel

should have investigated McCombs's jail records to determine if McCombs was housed in the same unit as Sierra. (Doc. 1-3 at 57) The post-conviction court denied relief on his claims as follows:

> The Defendant is not entitled to relief because he cannot show prejudice. The evidence at trial was overwhelming, as outlined in this Court's prejudice analysis in claim four, subclaim two. In light of that inculpatory evidence, this Court finds that the Defendant cannot show a reasonable probability that, had counsel elicited on cross-examination the exact dates and times of the Defendant's confessions, the jury would have acquitted him. Nor is there a reasonable probability that, had counsel elicited Mr. McCombs' reasoning for not immediately advising the Orange County Police about the confessions, the result of the trial would have been different. Moreover, even if counsel had obtained Orange County Jail records and these records completely refuted Mr. McCombs' testimony, the Defendant cannot show a reasonable probability that the jury would have acquitted him. Having found that the Defendant has failed to make a showing as to the second prong of Strickland, this Court need not determine whether he has made a showing as to the first.

(Doc. 10, Resp. Ex. C2 at pgs. 25-26)

The state court reasonably denied relief on *Strickland*'s prejudice prong. Sierra did not set forth facts that would show that McCombs's testimony was based on any information other than his conversations with Sierra. Nor did Sierra show from jail records that McCombs could not have had contact with Sierra while in jail. Moreover, the State's case did not rest on McCombs's testimony, and, in view of the other evidence of Sierra's guilt, there was no reasonable probability of a different outcome had counsel investigated McCombs's housing while in custody or cross-examined McCombs as Sierra has alleged.

Sierra has not shown that the state court unreasonably applied *Strickland* or unreasonably determined the facts. Ground Eight is denied.

Ground Nine

Sierra alleges that his counsel was ineffective for conceding Sierra's guilt of second degree murder to the state trial judge without Sierra's express consent. Sierra contends that instead of moving for a judgment of acquittal, his counsel decided to argue the charge should be reduced to second degree murder without Sierra's consent. (Doc. 1–3 at 57) He states that his counsel argued that Sierra shot the victim "something akin to a crime of passion," and that there was no premeditation required to convict him of first degree murder. (Doc. 1-3 at 58) (citing the trial transcript (Doc. 10, Resp. Ex. A10, T 449-50)) Counsel at trial argued that taking the evidence in the light most favorable to the state, the evidence did not present a prima facie case of first degree murder but would support second degree murder going to the jury. (Doc. 10, Resp. Ex. A10, T 449) The state court post-conviction held:

> The Defendant is not entitled to relief because counsel did not concede the Defendant's guilt. First, counsel did in fact move for a judgment of acquittal. Second, counsel argued in favor of the motion by positioning the evidence in the light most favorable to the State and contending that the State did not make a prima facie case of first-degree murder and that the evidence (viewed in a light most favorable to the State) would support second-degree murder. Counsel then detailed the evidence in support of his motion. After hearing the State's response, the Court denied the motion. Contrary to the Defendant's claim, counsel did indeed move for [a] judgment of acquittal and never conceded the Defendant's guilt. The Defendant has failed to show that counsel was deficient. Having found that the Defendant has failed to make a showing as to the first prong of Strickland, this Court need not determine whether he has made a showing as to the second.

(Doc. 10, Resp. Ex. C2 at p. 26) (state court's record citations omitted)

The state court reasonably denied relief on *Strickland*'s performance prong. Counsel's arguments were made in support of a judgment of acquittal and were not made to Sierra's jury. In context, counsel's arguments were advanced to the court in an effort

to reduce the charge that the jury would consider if the court concluded that the State had offered sufficient evidence that Sierra shot the victim. Accordingly, Sierra has not shown that his counsel performed deficiently when making arguments to the trial court. Ground Nine is denied.

Ground Ten

In his last ground, Sierra claims that the cumulative effect of the alleged omissions and errors of trial counsel deprived him of his Sixth Amendment right to effective counsel. (Doc. 1-3 at 61) His ground was raised in his Rule 3.850 motion and on summary appeal.

The post-conviction court denied relief on his claim of cumulative error based on its reasoning in denying his claims of ineffective assistance. (Doc. 10, Resp. Ex. C2, p. 26) Assuming that a claim of cumulative error is cognizable in federal habeas proceedings, Sierra's claim of cumulative error would necessarily fail because none of his individual claims have merit. *See Morris v. Sec'y, Dep't of Corr.*, 677 F.3d 1117, 1132 (11th Cir. 2012) (concluding that none of Morris's individual claims of error or prejudice had any merit, and therefore the Court had nothing to accumulate).

Accordingly, Sierra cannot show that the state court unreasonably applied federal law or unreasonably determined the facts in denying Sierra's claim. Ground Ten does not warrant habeas relief.

IV. Sierra's Request for Order to Produce Report

In a *pro se* letter furnished with his petition, Sierra seeks an order directing Detective Deluca to turn over an entire "Technical Service Report" ("service report") to this Court. (Doc. 1-7 at 42–43) Sierra indicates that he has a cover page of the service report. (Doc. 1–7 at 41) Sierra claims that his appointed counsel informed him that the

service report included a complete narration of photographs and description of bloody footprints found at the scene, but his attorney would not release any documents to Sierra. Sierra asserts that after he made several requests to the police department for documents and his family paid $25, the police department did not send the complete service report. He states that in 2014, he did obtain a diagram made by a homicide detective. Asserting his innocence, Sierra contends that four years and over $200 of his family's resources have been spent in search of bloody footprints that "were said not to match the size or shoe" of Sierra. (Doc. 1-7 at 43)

Pinholster prohibits this Court from considering evidence outside the state-court record in reviewing the merits of any claims for relief that were adjudicated by the state courts. *See id.*, 563 U.S. at 182 (Section 2254(d)(1) review is limited to the state-court record). Sierra has not cleared the Section 2254(d) hurdle; nor has he met Section 2254(e)(2) on any claim not adjudicated in state court on the merits. His request for an order for the detective to furnish the entire service report is **DENIED**.

Finally, any claim in the instant petition not specifically discussed in this Order is denied.

V. CONCLUSION

The stay is lifted (Doc. 21), and the **CLERK** is directed to **REOPEN** this case. Sierra's petition for the writ of habeas corpus is **DENIED**. Sierra's request for an evidentiary hearing is **DENIED,** and his request for appointment of counsel for an evidentiary hearing is **DENIED** as moot. (Doc. 1-3 at 15) The **CLERK** is directed to enter a judgment against Sierra and to **CLOSE** this case.

DENIAL OF BOTH A CERTIFICATE OF APPEALABILITY AND LEAVE TO APPEAL *IN FORMA PAUPERIS*

IT IS FURTHER ORDERED that Sierra is not entitled to a certificate of appealability. A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253(c)(1). Rather, a district court must first issue a certificate of appealability ("COA"). Section 2253(c)(2) limits the issuing of a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." To merit a certificate of appealability, Sierra must show that reasonable jurists would find debatable both the merits of the underlying claims and the procedural issues. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000); *Eagle v. Linahan*, 279 F.3d 926, 935 (11th Cir 2001). Because he fails to show that reasonable jurists would debate either the merits of the claims or the procedural issues, Sierra is not entitled to a certificate of appealability, and he is not entitled to appeal *in forma pauperis*.

Accordingly, a certificate of appealability is **DENIED**. Leave to appeal *in forma pauperis* is **DENIED**. Sierra must obtain permission from the circuit court to appeal *in forma pauperis*.

DONE AND ORDERED in Tampa, Florida, this 28th day of July, 2017.

MARY S. SCRIVEN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

TROY SIERRA,

Petitioner,

v.

Case No: 8:14-cv-897-T-35TGW

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

Respondents.

JUDGMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED that judgment is entered against Troy Sierra.

ELIZABETH M. WARREN,
CLERK

s/B. Sohn, Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13699-C

TROY SIERRA,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

Before: MARTIN and JILL PRYOR, Circuit Judges.

BY THE COURT:

Troy Sierra has filed a motion for reconsideration of this Court's order dated July 5, 2018, denying his motions for a certificate of appealability, leave to proceed *in forma pauperis*, voluntary dismissal, and to "Rule and Exhaust," in his appeal of the district court's denial of his 28 U.S.C. § 2254 petition for writ of habeas corpus. Upon review, Sierra's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

APPENDIX C

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

TROY SIERRA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D13-3111

Opinion filed January 31, 2014.

Appeal pursuant to Fla. R. App. P. 9.141(b)(2) from the Circuit Court for Pinellas County; Keith Meyer, Judge.

Troy Sierra, pro se.

PER CURIAM.

Affirmed.

CASANUEVA, WALLACE, and KHOUZAM, JJ., Concur.

APPENDIX D