IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10422-A

MAHOGANY TAQUILLA ALEXANDER,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

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

ORDER:

Mahogany Taquilla Alexander moves for a certificate of appealability in order to appeal the district court's denial of her *pro se* petition for a writ of habeas corpus under 28 U.S.C. § 2254. The motion is DENIED because she has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). Her motion for leave to proceed on appeal *in forma pauperis* is DENIED AS MOOT.

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

Appendix A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 2:16-CV-14316-ROSENBERG/WHITE

MAHOGANY TAQUILLA ALEXANDER,

Petitioner,

v.

JULIE JONES,

Respondent.
_____/

ORDER ADOPTING MAGISTRATE'S REPORT AND RECOMMENDATION

This matter is before the Court upon *pro se* Petitioner's Petition for Writ of Habeas Corpus, DE 1, which was previously referred to the Honorable Patrick A. White for a Report and Recommendation on any dispositive matters. DE 3. On November 29, 2017, Judge White issued a Report and Recommendation recommending that the Petition be denied. DE 12. Petitioner filed objections. DE 13. The Court has conducted a *de novo* review of Judge White's Report and Recommendation, Plaintiff's objections, and the record, and is otherwise fully advised in the premises.

Upon review, the Court finds Judge White's recommendations to be well reasoned and correct. The Court agrees with the analysis in Judge White's Report and Recommendation and concludes that the Petition should be denied for the reasons set forth therein.

For the foregoing reasons, it is **ORDERED AND ADJUDGED** as follows:

1. Magistrate Judge White's Report and Recommendation [DE 12] is hereby **ADOPTED**.

2. The Petition [DE 1] is **DENIED.**

3. A certificate of appealability shall not issue.

4. The Clerk of the Court is directed to **CLOSE THIS CASE**.

5. Final Judgment will be entered separately this same day.

DONE and ORDERED in Chambers, Fort Pierce, Florida, this 4th day of January, 2018.

ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Mahogany Taquilla Alexander, Pro Se

Appendix B 2 of 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-14316-Civ-ROSENBERG
MAGISTRATE JUDGE P.A. WHITE

MAHOGANY TAQUILLA ALEXANDER,

Petitioner,

v.

JULIE JONES,
Secretary, Florida
Department of Corrections,

Respondent.
_____/

REPORT OF
MAGISTRATE JUDGE

I. Introduction

Mahogany Alexander has filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. §2254, challenging the constitutionality of her conviction for robbery with a firearm, entered following a guilty plea in the Nineteenth Judicial Circuit Court, case no. **562009CF002036C.**

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

For its consideration of the instant petition (DE#1), this court has the response of the state (DE#10) to this court's order to show cause, with supporting appendix, containing copies of relevant state court pleadings.

II. Claims

Because the petitioner is *pro se*, she has been afforded liberal construction under Haines v. Kerner, 404 U.S. 419 (1972). In her federal habeas petition, the petitioner raises the following **eleven grounds** for relief:

> 1. The trial court abused its discretion by considering the *nolle prossed* charge of first degree murder in sentencing petitioner to the 20-year plea cap. (DE#1:4).
>
> 2. Her plea was not knowing and voluntary because it was premised on misadvice of counsel. (DE#1:7)
>
> 3. The trial court erred by including "armed robbery" on her scoresheet, rather than "robbery with a firearm," the crime for which she was convicted. (DE#1:9).
>
> 4. She was denied effective assistance of counsel at sentencing, where her lawyer failed to call an assistant state attorney on her behalf, regarding her cooperation against her co-defendants in exchange for a plea to accessory after the fact. (DE#1:11).
>
> 5. She was denied effective assistance of counsel, where her lawyer failed to ensure, given her cooperation in two trials, that the newly assigned prosecutor would honor the agreement reached with the previous prosecutor to grant petitioner a plea to accessory after the fact. (DE#1:13).
>
> 6. She was denied effective assistance of counsel, where her lawyer failed to advise her to withdraw her plea, and for failing to seek recusal of the judge, after he demonstrated bias towards petitioner. (DE#1:15).
>
> 7. She was denied effective assistance of counsel, where her lawyer allowed her to build

a case against herself without first securing a written plea deal with the prosecution to a charge of accessory after the fact, in exchange for petitioner's cooperation and testimony at her co-defendant's trials. (DE#1:17).

8. She was denied effective assistance of counsel at sentencing, where her lawyer failed to object to the judge's consideration of testimony from a witness at her co-defendant's trial, when determining the sentence to be imposed. (DE#1:19).

9. She was denied effective assistance of counsel at sentencing, where her lawyer failed to provide the trial court with sufficient mitigation, despite having had petitioner sign multiple medical release forms. (DE#1:21).

10. She was denied effective assistance of counsel at sentencing, where her lawyer failed to object to remarks made by the trial judge during sentencing. (DE#1:23).

11. She was denied effective assistance of counsel, where her lawyer failed to withdraw from representation due to her inexperience, and lack of qualification to handle a case of the petitioner's magnitude. (DE#1:25).

III. Procedural History[1]

Petitioner was charged by indictment with one count of principal first degree felony murder and one count of robbery with a firearm, in violation of Florida Statutes §812.13, §777.011, §775.087 and §782.04, **in case no. 562009CF002036C.** (DE#10-2:Ex.1:9). Petitioner pled guilty to the robbery with a firearm charge, and in exchange the state agreed to *nolle prosse* the count of first degree felony murder, which carried a mandatory life sentence. (DE#10-2:Ex.2:15). Petitioner was adjudicated guilty and sentenced to a total term of 20 years imprisonment in the Florida Department of Corrections. (DE#10-2:Ex.3:105).

Petitioner prosecuted a direct appeal, assigned Florida Fourth District Court of Appeal, **case no. 4D12-1352.** (DE#10-2:Ex.7). On **April 4, 2013,** the Fourth District Court of Appeal *per curiam* affirmed the judgment of conviction without a written opinion. Alexander v. State, 113 So.3d 12 (Fla. 4d DCA 2013);(DE#10-2:Ex.9). Petitioner's motion for rehearing was denied and the direct appeal concluded with the issuance of the mandate on June 21, 2013. (DE#10-2:Exs.10-12). Thus, petitioner's conviction became final on **July 3,**

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[1]The State of Florida and the Eleventh Circuit recognize that "[U]nder the prison mailbox rule, a *pro se* prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing." Williams v. McNeil, 557 F.3d 1287, 1290 n.2 (11th Cir. 2009); Griffin v. Sistuenck, 816 So.2d 600 (Fla. 2002)(date of service in prisoner's certificate of service was used as the filing date); see Fed.R.App. 4(c)(1)("If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing."). Unless there is evidence to the contrary, like prison logs or other records, a prisoner's motion is deemed delivered to prison authorities on the day he signed it. See Washington v. United States, 243 F.3d 1299, 1301 (11th Cir. 2001); Adams v. United States, 173 F.3d 1339 (11th Cir. 1999) (prisoner's pleading is deemed filed when executed and delivered to prison authorities for mailing). For purposes of this Report, unless otherwise specified, the date of filing of the petitioner's pleadings is the date file stamped by the prison authorities, and if that is unavailable, then it is the date petitioner signed the pleading. If neither is reflected, then the date of filing is the date file stamped as received by the Clerk of Court.

2013, 90 days after the Fourth District Court of Appeal affirmed petitioner's judgment of conviction, when the time for seeking a writ of certiorari in the U.S. Supreme Court expired.[2]

Arguably, the federal limitations period then ran untolled for **301 days**, from the time petitioner's conviction became final on **July 3, 2013** until **April 30, 2014**[3], when petitioner returned to the trial court filing her amended motion for post-conviction relief, pursuant to Fla.R.Crim.P 3.850, and in accordance with the mailbox rule. (DE#10-3:Ex.19), which was denied by the trial court on January 7, 2016. (DE#10-4:Ex.21). Petitioner appealed and on May 26, 2016, the Fourth District Court of Appeal *per curiam* affirmed the trial court's decision without a written opinion in **case no. 4D16-355.** (DE#10-6:Exs.22-23). Thus, petitioner's 3.850 proceedings were concluded, for purposes of re-starting the AEDPA's limitations

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[2]The Supreme Court has stated that a conviction is final when a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied. Griffith v. Kentucky, 479 U.S. 314, 321, n.6 (1986); accord, United States v, Kaufman, 282 F.3d 1336 (11th Cir. 2002); Wainwright v. Sec'y Dep't of Corr's, 537 F.3d 1282, 1283 (11th Cir. 2007)(conviction final under AEDPA the day U.S. Supreme Court denies certiorari, and thus limitations period begins running the next day). Once a judgment is entered by a United States court of appeals, a petition for writ of certiorari must be filed within 90 days of the date of entry. The 90 day time period runs from the date of entry of the judgment rather than the issuance of a mandate. Sup.Ct.R. 13; see also, Close v. United States, 336 F.3d 1283 (11th Cir. 2003).

[3]It should be noted that petitioner filed three motions in state court prior to the filing of her amended 3.850. On June 17, 2013, petitioner filed a motion to reduce sentence which the court denied for failure to comply with the state procedural rules. (DE#10-2:Exs.13-14). On September 6, 2013, petitioner filed a new motion to reduce sentence, which the court denied again on procedural grounds. (DE#10-2:Exs.15-16). And on January 27, 2014, petitioner filed a motion for postconviction relief pursuant to Fla.R.Crim.P 3.850 which the court denied on procedural grounds. (DE#10-2:Exs.17-18). Respondent argues that these motions do not serve to toll the statute of limitations as they are not properly filed state applications pursuant to 28 U.S.C. §2244. This court need not evaluate whether these motions are qualifying tolling motions under the AEDPA, as petitioner's motion appears to be timely even assuming that these motions do not toll the statute of limitations. Therefore, this timeliness calculation utilizes the amended 3.850 filing date as petitioner's first state application that began to toll the statute of limitations.

period, with the issuance of the mandate on June 24, 2016. (DE#10-6:Ex.24).

The federal limitations period was again untolled for **21 days**, from the issuance of the **June 24**, 2016-mandate until the petitioner came to this court, filing her habeas petition on **July 15, 2016**, after she signed and handed the petition to prison authorities for mailing in accordance with the mailbox rule. (DE#1). In total, **322 days** of the statute of limitations were untolled until the petitioner filed the instant petition in this court.

IV. Threshold Issues

A. Timeliness

In its response to this court's order to show cause, the respondent rightfully does not challenge the timeliness of the habeas petition filed herein. See 28 U.S.C. §2244(d)(1)-(2). (DE#15:17). The petition was filed after April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No. 104-132, 110 Stat. 1214 (1996). Consequently, post-AEDPA law governs this action. Abdul-Kabir v. Quarterman, 550 U.S. 233, 127 S.Ct. 1654, 1664, 167 L.Ed.2d 585 (2007); Penry v. Johnson, 532 U.S. 782, 792, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001); Davis v. Jones, 506 F.3d 1325, 1331, n.9 (11 Cir. 2007). As noted previously, less than one year of the federal limitations period ran during which, no state court proceedings were pending before petitioner came to this court, filing her §2254 proceeding on July 15, 2016. Thus, the instant federal petition (DE#1), filed within a year from the time the petitioner's conviction became final, is timely. See Artuz v. Bennett, 531 U.S. 4 (2000) (pendency of properly-filed state postconviction proceedings

tolls the AEDPA limitations period).

B. Exhaustion/Procedural Default

Next, the respondent argues that all of petitioner's claims are unexhausted and prospectively procedurally defaulted from federal habeas review. (DE#10:8-9).

It is axiomatic that issues raised in a federal habeas corpus petition must have been fairly presented to the state courts and thereby exhausted prior to their consideration on the merits. Anderson v. Harless, 459 U.S. 4 (1982); Hutchins v. Wainwright, 715 F.2d 512 (11th Cir. 1983). Exhaustion requires that a claim be pursued in the state courts through the appellate process. Leonard v. Wainwright, 601 F.2d 807 (5th Cir. 1979). Both the factual substance of a claim and the federal constitutional issue itself must have been expressly presented to the state courts to achieve exhaustion for purposes of federal habeas corpus review. Baldwin v. Reese, 541 U.S. 27 (2004); Gray v. Netherlands, 518 U.S. 152 (1996); Duncan v. Henry, 513 U.S. 364 (1995); Picard v. Connor, 404 U.S. 270 (1971). Exhaustion also requires review by the state appellate and post-conviction courts. See Mason v. Allen, 605 F.3d 1114 (11th Cir. 2010), Herring v. Sec'y Dep't of Corr's, 397 F.3d 1338 (11th Cir. 2005). In other words, in a Florida non-capital case, this means the applicant must have presented his claims in a district court of appeal. Upshaw v. Singletary, 70 F.3d 576, 579 (11th Cir. 1995). The claims must be presented in State court in a procedurally correct manner. Id.

"It is not sufficient merely that the federal habeas petitioner has been through the state courts ... nor is it sufficient that all the facts necessary to support the claim were before the state

courts or that a somewhat similar state-law claim was made." Kelley v. Sec'y, Dep't of Corr., 377 F.3d 1317 (11th Cir. 2004) (citing Picard v. Connor, 404 U.S. 270, 275-76 (1971); Anderson v. Harless, 459 U.S. 4, 6 (1982)). A petitioner is required to present his claims to the state courts such that the courts have the "opportunity to apply controlling legal principles to the facts bearing upon [his] constitutional claim." Picard v. Connor, 404 U.S. 270, 275-77 (1971). To satisfy this requirement, "[a] petitioner must alert state courts to any federal claims to allow the state courts an opportunity to review and correct the claimed violations of his federal rights." Jimenez v. Fla. Dep't of Corr., 481 F.3d 1337 (11th Cir. 2007) (citing Duncan v. Henry, 513 U.S. 364, 365 (1995)). "Thus, to exhaust state remedies fully the petitioner must make the state court aware that the claims asserted present federal constitutional issues." Snowden v. Singletary, 135 F.3d 732, 735 (11th Cir. 1998).

The requirement that a federal habeas corpus petitioner exhaust available state court remedy as a prerequisite to federal review is satisfied if the petitioner "fairly presents" his claim in each appropriate state court, alerting that court to the federal nature of the claim. 28 U.S.C. § 2254(b)(1); Picard v. Connor, 404 U.S. 270, 275-76, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971). A petitioner must "do more than scatter some makeshift needles in the haystack of the state court record"; a reasonable reader should be able to understand the factual and legal bases for the claim. McNair, 416 F.3d at 1302-03 (quotations and citations omitted). A petitioner may raise a federal claim in state court "by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such claim on federal grounds, or by simply labeling the claim 'federal.'" Baldwin v. Reese, 541 U.S. 27, 32, 124 S.Ct. 1347, 158 L.Ed.2d 64 (2004).

To circumvent the exhaustion requirement, Petitioner must establish that there is an "absence of available state corrective process" or that "circumstances exist that render such process ineffective to protect [his] rights." 28 U.S.C. §2254(b)(1)(B); see Duckworth v. Serrano, 454 U.S. 1, 3 (1981). Petitioner makes no such showing here. See Tribble v. Stacy, 2009 WL 2763030 (M.D. Fla. Aug. 27, 2009).

Failure to exhaust a claim can result in a procedural default bar in federal court if it is obvious that the unexhausted claim would now be procedurally barred in state court. Bailey v. Nagle, 172 F.3d 1299, 1302-03 (11th Cir. 1999). The federal court must determine whether any future attempt to exhaust state remedies would be futile under the state's procedural default doctrine. Id. at 1303. However, a petitioner can avoid the application of procedural default by establishing objective cause for failing to properly raise the claim in state court and actual prejudice from the alleged constitutional violation. Spencer v. Sec'y, Dep't of Corr., 609 F.3d 1170, 1179-80 (11th Cir. 2010).

To show cause, a petitioner "must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in state court." Wright v. Hopper, 169 F.3d 695, 703 (11th Cir. 1999); see also Murray v. Carrier, 477 U.S. 478 (1986). To show prejudice, a petitioner must demonstrate there is a reasonable probability the outcome of the proceeding would have been different. See Crawford v. Head, 311 F.3d 1288, 1327-28 (11th Cir. 2002).

However, there is a narrow non-constitutional equitable exception to excuse the procedural default of claims of ineffective assistance of trial counsel. "Where, under state law, claims of

ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing **a substantial claim** of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel **or counsel in that proceeding was ineffective.**" Martinez v. Ryan, 132 S.Ct. 1309, 1320 (2012) (emphasis added). Therefore, relief is available if (1) state procedures make it virtually impossible to actually raise ineffective assistance of trial counsel claims on direct appeal; and (2) the petitioner's state collateral counsel was ineffective for failing to raise ineffective assistance of trial counsel claims in the state proceedings. See Lambrix v. Sec'y, Fla. Dep't of Corr., 756 F.3d 1246, 1261 n.31 (11th Cir. 2014).

The claim of ineffective assistance must be a "substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." Martinez, 132 S.Ct. at 1318. The Eleventh Circuit held in Trevino v. Thaler, 133 S.Ct. 1911 (11th Cir. 2013), that the exception recognized in Martinez applies when a State's procedural framework makes it highly unlikely that a defendant in a typical case will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal.

Moreover, in Martinez, the Court restricted excusing the procedural default of an ineffective assistance of counsel claim to the initial review by the trial court, finding as follows:

> The rule in Coleman governs in all but the limited circumstances recognized here. The holding in this case does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary

> review in a State's appellate courts. It does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial, even though that initial-review collateral proceeding may be deficient for other reasons.

See Martinez, 132 S.Ct. at 1320 (internal citations omitted).

Further, actual innocence "serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar... or ... expiration of the statute of limitations." McQuiggen v. Perkins, 133 S.Ct. 1924, 1928 (2013); see Carrier, 477 U.S. at 496 ("in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."). This exception requires the petitioner to persuade the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt. Id.; Rozzelle v. Sec'y, Fla. Dep't of Corr's, 672 F.3d 1000, 1011 (11th Cir. 2012).

In making this assessment, the timing of the petition is a factor bearing on the reliability of the evidence purporting to show actual innocence. Schlup v. Delo, 513 U.S. 298, 327 (1995). To successfully plead actual innocence, a petitioner must show that his conviction resulted from a "constitutional violation." Id. at 327. "Actual innocence" means factual innocence, not mere legal insufficiency. Johnson v. Fla. Dep't of Corr's, 513 F.3d 1328, 1334 (11th Cir. 2008). This exception is exceedingly narrow in scope and requires proof of actual innocence, not just legal innocence.

Johnson v. Alabama, 256 F.3d 1156, 1171 (11th Cir. 2001); Spencer, 609 F.3d at 1180.

Claim 1

Petitioner initially raised this claim, in which she argues that the trial court abused its discretion, as her sole claim on direct appeal in Florida's Fourth District Court of Appeal. (DE#10-2:Ex.7). As delineated above, in order for a petitioner's claim to be properly exhausted and ripe for federal habeas review, the state court must first be alerted to the federal nature of the claim, so that it has an opportunity to correct any alleged violations of the petitioner's constitutional rights. Baldwin v. Reese, 541 U.S. 27 (2004); Gray v. Netherlands, 518 U.S. 152 (1996); Duncan v. Henry, 513 U.S. 364 (1995). Here, petitioner merely asserted trial court error and failed to notify the appellate court of the federal nature of her claim. (DE#10-2:Ex.7). Therefore, petitioner's claim has not been properly exhausted in state court and is thus procedurally defaulted from federal review as she cannot now raise the claim in state court. Bailey v. Nagle, 172 F.3d 1299, 1302-03 (11th Cir. 1999).

Moreover, petitioner fails to provide the court with any objective cause to excuse her failure to properly raise her claim in state court. Spencer v. Sec'y, Dep't of Corr., 609 F.3d 1170, 1179-80 (11th Cir. 2010). Similarly, if petitioner means to excuse the procedural default by claiming Martinez v. Ryan applies, petitioner's claim is without merit. Martinez pertains to claims of ineffective assistance of trial counsel and petitioner only asserts in claim 1 that the trial court abused its discretion at sentencing. See Gore v. Crews, 720 F.3d 811, 816-817 (11th Cir. 2013).

Furthermore, if petitioner intends to argue actual innocence as a means of overcoming the procedural bar with respect to **claim 1**, she fails to provide any support for this claim. See Schlup v. Delo, 513 U.S. 298, 327 (1995). Petitioner has not plead sufficient facts to prove that she is actually innocent nor has she demonstrated that her conviction resulted from a "constitutional violation." Id. at 327. Thus, petitioner's **claim 1** is defaulted from federal habeas review.

Claim 3

As stated previously, petitioner argues in **claim 3** that the trial court erred by improperly calculating her score sheet. Review of the record reveals petitioner did raise a similar claim in her amended motion for postconviction relief, where she argued that counsel was ineffective for failing to correct the score sheet error, however she failed to raise the current claim of trial court error on direct appeal. (DE#10-3:Ex.19).

Under Florida law, a claim is procedurally barred from being raised on collateral review if it could have been, but was not raised on direct appeal. See Philmore v. McNeil, 575 F.3d 1251, 1264 (11th Cir. 2009). Thus, petitioner's claim 3 has not been properly exhausted as it was a claim of trial court error that was not raised on direct appeal pursuant to the requirements under Florida law. As petitioner's claim is now procedurally barred in state court, it is procedurally defaulted from federal review, and this court cannot review claim 3 on the merits. Bailey v. Nagle, 172 F.3d 1299, 1302-03 (11th Cir. 1999).

Moreover, petitioner fails to provide any factual support for the proposition that had **claim 3** actually been raised on direct

appeal, there is a reasonable probability that the outcome would have been different. See Crawford v. Head, 311 F.3d 1288, 1327-28 (11th Cir. 2002). Thus, she has not shown objective cause to excuse the procedural default of claim 3. Id.

As in claim 1, if petitioner means to excuse the procedural default by claiming Martinez v. Ryan applies, petitioner's claim is without merit. Martinez pertains to claims of ineffective assistance of trial counsel and petitioner only asserts in claim 3 that the trial court erred in miscalculating her score sheet, not that trial counsel was ineffective. See Gore v. Crews, 720 F.3d 811, 816-817 (11th Cir. 2013).

Furthermore, if petitioner intends to argue actual innocence as a means of overcoming the procedural bar with respect to **claim 3**, she fails to provide any support for this claim. See Schlup v. Delo, 513 U.S. 298, 327 (1995). Petitioner has not alleged that she is actually innocent nor has she demonstrated that her conviction resulted from a "constitutional violation." Id. at 327. Thus, petitioner's **claim 3** is defaulted from federal habeas review.

Claims 2 and 4 through 11

First, respondent argues that because petitioner's remaining claims before this court are identical to the claims raised in her original motion for postconviction relief, which was dismissed as insufficient, her claims were not properly exhausted. (DE#10:9). As discussed above, the appropriate inquiry for exhaustion is whether petitioner's claims were fairly presented to the state court and pursued up through the state appellate process. Anderson v. Harless, 459 U.S. 4 (1982); Leonard v. Wainwright, 601 F.2d 807 (5th Cir. 1979). Further, as petitioner is *pro se*, her claims before this

court must be afforded liberal construction pursuant to Haines v. Kerner, 404 U.S. 419 (1972).

While it is true that petitioner's initial 3.850 motion for postconviction relief was dismissed by the court as legally insufficient, petitioner sufficiently raised the same claims in her amended 3.850 motion, which the trial court denied on the merits. (DE#10-3:Exs.19,21). Review of both the original and amended 3.850 motions reveals that the claims raised in both motions are identical, with petitioner merely stating more specific grounds for each claim in the amended motion, as requested by the trial court. (DE#10-3:Ex.18:12). Thus, as petitioner is entitled to liberal construction of her claims as a *pro se* filer, it is clear from the record that **her remaining claims** are exhausted, as they were raised during the Rule 3.850 proceedings and on appeal from the denial thereof by the state court. (DE#10-6:Ex.22); See also Leonard v. Wainwright, 601 F.2d 807 (5th Cir. 1979). Therefore, petitioner's remaining claims are ripe for federal habeas review.

Finally, where the merits of the claims may be reached and readily disposed of, judicial economy has dictated reaching the merits of the claim while acknowledging the procedural default and bar in the alternative.[4] The court need not belabor the exhaustion and procedural bar arguments raised as the claims raised in the instant petition warrant no federal habeas corpus relief.

V. Standard of Review

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

Because petitioner filed her federal petition after April 24, 1996, this case is governed by 28 U.S.C. §2254, as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). See Debruce v. Commissioner, Alabama Dept. of Corr's, 758 F.3d 1263, 1265-66 (11th Cir. 2014). The AEDPA imposes a highly deferential standard for reviewing the state court rulings on the merits of constitutional claims raised by a petitioner. "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, 131 S.Ct. 770, 786-87 (2011). See also Greene v. Fisher, 565 U.S. 34, 39, 132 S.Ct. 38, 43, 181 L.Ed.2d 336 (2011)(The purpose of AEDPA is "to ensure that federal habeas relief functions as a guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction.")(internal quotation marks omitted).

AEDPA allows federal courts to grant habeas relief only if the state court's resolution of those claims: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. §2254(d).

A state court's decision is "contrary to" clearly established Supreme Court precedent in either of two respects: (1) "if the state court applies a rule that contradicts the governing law set forth

in [Supreme Court] cases," or (2) "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [the Supreme Court's] precedent." Williams v. Taylor, 529 U.S. 362, 405-06, 120 S.Ct. 1495, 1519-20, 146 L.Ed.2d 389 (2000). To determine whether a state court decision is an "unreasonable application" of clearly established federal law, we are mindful that "an unreasonable application of federal law is different from an incorrect application of federal law." Id. at 410, 120 S.Ct. at 1522. As a result, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." Richter, id. at 786 (quotation marks omitted).

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

Thus, state court decisions are afforded a strong presumption of deference even when the state court adjudicates a petitioner's claim summarily—without an accompanying statement of reasons.

Harrington, 562 U.S. at 91-99, 131 S.Ct. at 780-84 (concluding that the summary nature of a state court's decision does not lessen the deference that it is due); Gill v. Mecusker, 633 F.3d 1272, 1288 (11th Cir. 2011)(acknowledging the well-settled principle that summary affirmances are presumed adjudicated on the merits and warrant deference, citing Harrington, 562 U.S. at 98-99, 131 S.Ct. at 784-85 and Wright v. Sec'y for the Dep't of Corr's, 278 F.3d 1245, 1254 (11th Cir. 2002)). See also Renico v. Lett, 559 U.S. 766, 773, 130 S.Ct. 1855, 1862, 176 L.Ed.2d 678 (2010)("AEDPA ... imposes a highly deferential standard for evaluating state-court rulings ... and demands that state-court decisions be given the benefit of the doubt.")(citations and internal quotation marks omitted).

Further, review under §2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. See Cullen v. Pinholster, 563 U.S. 170, 131 S.Ct. 1388, 1398-1400, 179 L.Ed.2d 557 (2011)(holding new evidence introduced in federal habeas court has no bearing on Section 2254(d)(1) review). And, a state court's factual determination is entitled to a presumption of correctness. 28 U.S.C. §2254(e)(1). Under 28 U.S.C. §2254(e)(1), this Court must presume the state court's factual findings to be correct unless the petitioner rebuts that presumption by clear and convincing evidence. See id. §2254(e)(1). As recently noted by the Eleventh Circuit in *Debruce*, 758 F.3d at 1266, although the Supreme Court has "not defined the precise relationship between § 2254(d)(2) and §2254(e)(1)," Burt v. Titlow, ___ U.S. ___, ___, 134 S.Ct. 10, 15, 187 L.Ed.2d 348 (2013), the Supreme Court has emphasized "that a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." Burt, Id. (quoting Wood v. Allen, 558 U.S. 290, 301, 130 S.Ct. 841, 849, 175 L.Ed.2d 738 (2010)).

VI. Applicable Legal Principles

A. Guilty Plea Principles

It is well settled that before a trial judge can accept a guilty plea, the defendant must be advised of the various constitutional rights that he is waiving by entering such a plea. Boykin v. Alabama, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). Since a guilty plea is a waiver of substantial constitutional rights, it must be a voluntary, knowing, and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences surrounding the plea. Brady v. United States, 397 U.S. 742, 748 (1970). See also United States v. Ruiz, 536 U.S. 622, 629, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002); Hill v. Lockhart, 474 U.S. 52, 56, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); Henderson v. Morgan, 426 U.S. 637, 645 n.13, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976). "A plea is voluntary in a constitutional sense if the defendant receives real notice of the charge against him and understands the nature of the constitutional protections he is waiving." United States v. Frye, 402 F.3d 1123, 1127 (11th Cir. 2005), *citing*, Brown, 117 F.3d at 476. To be voluntary and knowing, (1) the guilty plea must be free from coercion; (2) the defendant must understand the nature of the charges; and (3) the defendant must know and understand the consequences of his guilty plea. Frye, 402 F.3d at 1127, *quoting*, United States v. Mosely, 173 F.3d 1318, 1322 (11th Cir. 1999). The standard for determining the validity of a guilty plea is "whether the plea represents a voluntary intelligent choice among the alternative courses open to the defendant." North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970); Boykin, 395 U.S. at 242.

Moreover, a defendant's sworn answers during a plea colloquy

must mean something. Consequently, a defendant's sworn representations, as well as representation of defense counsel and the prosecutor, and any findings by the judge in accepting the plea, "constitute a formidable barrier in any subsequent collateral proceedings." Blackledge v. Allison, 431 U.S. 63, 73-74 (1977); United States v. Medlock, 12 F.3d 185, 187 (11th Cir.), cert. den'd, 513 U.S. 864 (1994); United States v. Niles, 565 Fed.Appx. 828 (11th Cir. May 12, 2014)(unpublished).

A criminal defendant is bound by his sworn assertions and cannot rely on representations of counsel which are contrary to the advice given by the judge. See Scheele v. State, 953 So.2d 782, 785 (Fla. 4 DCA 2007)("A plea conference is not a meaningless charade to be manipulated willy-nilly after the fact; it is a formal ceremony, under oath, memorializing a crossroads in the case. What is said and done at a plea conference carries consequences."); Iacono v. State, 930 So.2d 829 (Fla. 4 DCA 2006)(holding that defendant is bound by his sworn answers during the plea colloquy and may not later assert that he committed perjury during the colloquy because his attorney told him to lie); United States v. Rogers, 848 F.2d 166, 168 (11th Cir. 1988)("[W]hen a defendant makes statements under oath at a plea colloquy, he bears a heavy burden to show his statements were false.").

B. Ineffective Assistance of Trial Counsel

The Sixth Amendment affords a criminal defendant the right to "the Assistance of Counsel for his defence." U.S. CONST. amend. VI. To prevail on a claim of ineffective assistance of counsel, a habeas petitioner must demonstrate both (1) that his counsel's performance was deficient, and (2) a reasonable probability that the deficient performance prejudiced the defense. Strickland v. Washington, 466

U.S. 668, 687, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In assessing whether a particular counsel's performance was constitutionally deficient, courts indulge a strong presumption that counsel's conduct falls within the wide range of reasonable assistance. Id. at 689.

More specific to this case, a criminal defendant is entitled to the effective assistance of competent counsel before deciding whether to plead guilty. Padilla v. Kentucky, 559 U.S. 356, 364-65, 130 S.Ct. 1473, 1480-81, 176 L.Ed.2d 284 (2010). It is beyond dispute that an attorney has a duty to advise a defendant who is considering a guilty plea of the available options and possible consequences. See generally Brady v. United States, 397 U.S. 742, 756 (1970). See also Von Moltke v. Gillies, 332 U.S. 708, 721, 68 S.Ct. 316, 322, 92 L.Ed. 309 (1948)("Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered. Determining whether an accused is guilty or innocent of the charges in a complex legal indictment is seldom a simple and easy task for a layman ...."). The law requires counsel to research the relevant law and facts and to make informed decisions regarding the fruitfulness of various avenues. United States v. Grammas, 376 F.3d 433, 436 (5th Cir. 2004).

Thus, the *Strickland* two-part standard is applicable to ineffective-assistance-of-counsel claims arising out of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 57-59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). Generally, as indicated, a court first determines whether counsel's performance fell below an objective standard of reasonableness, and then determines whether there is a reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different. Padilla, 130 S.Ct. at 1482. In the context of a guilty plea, the first prong of *Strickland* requires petitioner to show his plea was not voluntary because he received advice from counsel that was not within the range of competence demanded of attorneys in criminal cases, while the second prong requires petitioner to show a reasonable probability that, but for counsel's errors, he would not have pled guilty but would have gone to trial. Hill, 474 U.S. at 56-59, 106 S.Ct. at 370-71. See generally Lafler v. Cooper, ___ U.S. ___, 132 S.Ct. 1376, 1385 (2012); Missouri v. Frye, ___ U.S. _____, 132 S.Ct. 1399 (2012).[5] A reasonable probability is "a probability sufficient to undermine confidence in the outcome." Strickland, 104 S.Ct. at 2052.

If the petitioner cannot meet one of *Strickland*'s prongs, the court does not need to address the other prong. Dingle v. Sec'y for Dep't of Corr., 480 F.3d 1092, 1100 (11th Cir. 2007); Holladay v. Haley, 209 F.3d 1243, 1248 (11th Cir. 2000). "Surmounting *Strickland*'s high bar is never an easy task." Richter, 131 S.Ct. at 788 (*quoting* Padilla, 559 U.S. at 371, 130 S.Ct. at 1485). A state court's adjudication of an ineffectiveness claim is accorded great deference. "The standards created by *Strickland* and §2254(d) are both 'highly deferential,' [*Strickland*], at 689, 104 S.Ct. 2052; Lindh v. Murphy, 521 U.S. 320, 333, n.7, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), and when the two apply in tandem, review is 'doubly' so, *Knowles*[6], 556 U.S., at ___, 129 S.Ct. at 1420." Richter, 131 S.Ct.

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[5]The Supreme Court in *Frye* and *Lafler* clarified that the Sixth Amendment right to effective assistance of counsel under the standard established in Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984) extends to the negotiation and consideration of plea offers that lapse or are rejected. See Frye, 132 S.Ct. at 1404-08; Lafler, 132 S.Ct. at 1384.

[6]Knowles v. Mirzayance, 556 U.S. 111 (2009).

at 788. The question "is not whether a federal court believes the state court's determination" under the *Strickland* standard "was incorrect but whether that determination was unreasonable—a substantially higher threshold." Schriro v. Landrigan, 550 U.S. 465, 474, 127 S.Ct. 1933 (2007).

Thus, a "doubly deferential" standard of judicial review therefore applies to a Strickland claim evaluated under §2254(d)(1). Id. at 1418 (noting that "because the Strickland standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard."); see also Rutherford v. Crosby, 385 F.3d 1300, 1309 (11th Cir. 2004)("In addition to the deference to counsel's performance mandated by Strickland, the AEDPA adds another layer of deference-this one to a state court's decision-when we are considering whether to grant federal habeas relief from a state court's decision.").

As will be demonstrated in more detail below, the petitioner is not entitled to vacatur on the claims presented. When viewing the evidence in this case in its entirety, the alleged errors raised in this collateral proceeding, neither individually nor cumulatively, infused the proceedings with unfairness as to deny the petitioner a fundamentally fair trial and due process of law. The petitioner therefore is not entitled to habeas corpus relief. See Fuller v. Roe, 182 F.3d 699, 704 (9th Cir. 1999)(holding in federal habeas corpus proceeding that where there is no single constitutional error existing, nothing can accumulate to the level of a constitutional violation), overruled on other grounds, Slack v. McDaniel, 529 U.S. 473, 482 (2000). See also United States v. Rivera, 900 F.2d 1462, 1470 (10th Cir. 1990)(stating that "a cumulative-error analysis aggregates only actual errors to determine their cumulative effect."). Contrary to the petitioner's apparent assertions, the

result of the proceedings were not fundamentally unfair or unreliable. See Lockhart v. Fretwell, 506 U.S. 364, 369-70 (1993).

VII. Discussion

A. Factual Basis for Plea

In the case at bar, neither the court nor the state explicitly recited the factual basis for movant's plea at the sentencing hearing. (DE#10-2:Ex.2). As petitioner does not seem to contest the specific facts of the crime for which she was convicted, the following summary of the facts provided in the probable cause affidavit is included below and intended to be an aid to this court in evaluating petitioner's claims in the appropriate context. (DE#10-3:43-45).

On September 4, 2009, officers were dispatched to the A&M Discount Beverage store, in reference to a possible armed robbery. (Id.). Upon their arrival, they observed that one person had been shot several times and needed rescue. (Id.). After speaking with those on scene, it appeared that "three unknown black male suspects wearing all black with masks and gloves" entered the store, robbed it, and shot the owner. (Id.). A witness told 911 that the men ran out of the store and got into a gray Chevrolet Impala that drove away. (Id.). When rescue arrived on scene, Parag Patel, the store owner, was pronounced dead. (Id.).

Surveillance video in the store showed that each of the three black males who entered the store was carrying a firearm. (Id.). The clerk "appeared to have been shot as soon as the males walked to the counter." (Id.). The vehicle, based on the witness's identification, was located. (Id.). The vehicle's owner, Stan Lee Griffin, advised

the officers that his sister, Mahogany Alexander, the petitioner, was using his car and came to his house to give him the keys that night. (Id.). Mr. Griffin stated that petitioner told him not to drive the car because she had dropped off some boys to rob a store near the bank. (Id.).

Soon after, officers were dispatched to Contessa Ellis's house. (Id.). She stated to officers that she had received a phone call from her sister, the petitioner, in which she stated "when they catch me I know I'm going away for a long time." (Id.). Petitioner further admitted to her sister that she went into the store first to purchase lottery tickets, and that she knew about the robbery plan, but did not know her co-defendants were going to kill the store owner. (Id.).

Later at the station, Ms. Ellis called petitioner and urged her to turn herself in. (Id.). Officers then overheard petitioner tell her sister to say that she knew nothing about the incident. (Id.). An officer then took the phone and urged petitioner to meet with him at the police station. (Id.). About an hour later, petitioner called Ms. Ellis and stated that she was going to kill herself and that the police could "get [her] at the grave." (Id.).

B. Lawfulness of Guilty Plea

On March 16, 2012, petitioner executed a Felony Plea Form, pleading no contest[7] to one count of robbery with a firearm. (DE#10-2:Ex.3). After the form was executed, the petitioner was sworn under oath and admitted that she read and understood the plea form that she had just signed. (DE#10-2:Ex.2:14). Petitioner represented that

[7]In Florida, a no contest plea is recognized as the equivalent of a guilty plea. See Fla.R.App.P. 9.140(b)(2).

she understood that because she cooperated and testified at her co-defendants' trials, the state was agreeing to *nolle prosse* the first degree murder charge. (Id.:15-16). Petitioner further acknowledged that by pleading guilty, the government was agreeing to a twenty year cap on a possible sentence of imprisonment in the department of corrections. (Id.). Petitioner also understood that if the court was to sentence her to a term of supervision, that she could be sentenced to life in prison if she were to violate the terms of supervision. (Id.:17-18). The court then found a factual basis for petitioner's plea given the fact that the court had listened to petitioner's testimony when it presided over her co-defendant's trials. (Id.:18). Petitioner acknowledged that she understood this fact, as well as all of the rights she was giving up by pleading guilty. (Id.).

Petitioner also understood that if the court were to accept her plea, that the court retained discretion with regard to her sentence. (Id.:19). She also understood that the court would consider all of the evidence before it as well as the parties' arguments in deciding an appropriate sentence. (Id.).

Petitioner then indicated that she was entering into a plea because she believed it to be in her best interest. (Id.). She acknowledged that she was entering the plea freely, knowingly, and voluntarily. (Id.). Petitioner further indicated that she was completed satisfied with the services of her attorney. (Id.:20). The court then accepted petitioner's plea and adjudicated her guilty of robbery with a firearm. (Id.:20). Pursuant to the plea agreement, the state announced a *nolle prosse* as to the count of first degree murder. (Id.:81).

Having accepted petitioner's plea, the court then heard

argument from both parties regarding petitioner's sentence. (Id.:20). The lowest permissible sentence was determined to be credit for time served, with the maximum sentence being twenty years, which petitioner indicated she understood. (Id.:23). Petitioner's counsel then called various witnesses on behalf of the petitioner, who asked the court for leniency given that she had young children and had made positive changes in her life since being incarcerated. (DE#10-2:Ex.2:25). Next, petitioner's counsel provided the court with a letter from petitioner regarding her medical issues, as well as letters from her children. (Id.:29). The petitioner then apologized to the victim's family, but expressed her dissatisfaction with the fact that the state had not agreed to a lower sentencing cap given her cooperation with the prosecution of her co-defendants' cases. (Id.:33-34).

On cross-examination by the state, petitioner stated that she cooperated because she was told by an investigating officer that she "wouldn't be facing nearly that much time and [she] was going to go back home to [her] kids." (Id.:38). She further testified that she was being truthful when she testified at one of her co-defendant's trials that she wasn't receiving anything for her testimony. (Id.:39). She stated that she decided to testify for her own reasons, including because she thought it was the right thing to do. (Id.:36).

Petitioner's counsel then clarified for the record that when petitioner initially spoke with police, she wasn't given "any type of deal", but that she was told that if she cooperated, the officers would make sure her cooperation would "[get] used in her favor at the end of the day." (Id.:43). Counsel also went on to state that when Mr. Isenhower, the assistant state attorney who was not involved in the case from the outset, became involved, the

environment for negotiation regarding petitioner's sentence became much more difficult. (Id.:36-37).

Next, counsel argued that without petitioner's participation, the state would not have had a case against her co-defendants. (Id.:73). Further, counsel explained how petitioner was incredibly remorseful for the death of Mr. Patel and that she had been a customer in his store many times. (Id.:76). Generally, counsel argued, petitioner should be sentenced in a way so as to incentivize individuals who do get involved in criminal acts to aid the state in obtaining evidence in exchange for more lenient sentences. (Id.:79-80). Counsel then asked the court to sentence petitioner to credit time served to be followed by probation. (Id.:81).

Next, in imposing a sentence, the court reasoned that while petitioner was a crucial witness in her co-defendant's cases, the prosecution had given her credit for her testimony by agreeing not to seek a life sentence. (Id.:84,86). The court stated that a human life was taken and that it did not matter that petitioner claimed she didn't know that the victim was going to be killed, as she was an active participant in the robbery. (Id.:87). The court went on to advise that if the prosecution had not agreed to the twenty year cap, that the court would have sentenced movant to a much higher sentence. (Id.:92). The trial court then sentenced petitioner to 20 years imprisonment in the Florida Department of Corrections. (Id.:93).

Before proceeding to address the specific ineffective assistance of trial counsel claims, the lawfulness of the subject plea must first be determined. Contrary to the petitioner's claims in the state forum and this habeas proceeding, as will be demonstrated in more detail below, it is readily apparent that the

petitioner's plea and admissions were entered freely, voluntarily, and knowingly with the advice received from competent counsel and not involuntarily and/or unknowingly entered, as now claimed by petitioner. The trial court took great pains to ensure that the plea was knowingly, voluntarily and freely entered. The trial court thoroughly questioned petitioner, and petitioner assured the court that she wanted to change her plea because it was in her best interest to do so.

B. Petitioner's Claims

Notwithstanding the default of claims 1 and 3, these claims are also not cognizable here, because "[a] state's interpretation of its own laws or rules provides no basis for federal habeas corpus relief, since no question of a constitutional nature is involved." McCullough v. Singletary, 967 F.2d 530, 535 (11th Cir. 1992). "Federal courts entertaining petitions for writs of habeas corpus must follow the state court's interpretation of a state law absent a constitutional violation." Hunt v. Tucker, 93 F.3d 735, 737 (11th Cir. 1996).

When a federal court considers whether habeas corpus is warranted, the decision is limited to whether a conviction violated the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2254; Rose v. Hodges, 423 U.S. 19, 21, 96 S.Ct. 175, 46 L.Ed.2d 162 (1975) (per curiam). Whether the trial court erred under Florida law, however, is a question of state law. The Eleventh Circuit has consistently held that federal courts cannot review a state's alleged failure to adhere to its own sentencing provisions. Branan v. Booth, 861 F.2d 1507 (11th Cir. 1988). A state court's error in applying its own sentencing provisions is thus not cognizable on federal habeas corpus review, even where it is

"couched in terms of equal protection and due process." Id. at 1508, *quoting* Willeford v. Estelle, 538 F.2d 1194, 1996-98 (5th Cir. 1976).

Therefore, even if Petitioner could establish that the state trial court erred in claims 1 and 3, her claims are not subject to review in this federal habeas corpus proceeding. See Id.; see also Souch v. Schaivo, 289 F.3d 616, 622-23 (9th Cir.2002)(state prisoner's challenge to trial court's exercise of discretion under state sentencing law fails to state federal habeas claim); Fielding v. LeFevre, 548 F.2d 1102, 1109 (2nd Cir. 1977)(finding petitioner raised no cognizable federal claim by seeking to prove that state judge abused his sentencing discretion by disregarding psychiatric reports)*(citing* Townsend v. Burke, 334 U.S. 736, 741 (1948)("The [petitioner's] sentence being within the limits set by the statute, its severity would not be grounds for relief here even on direct review of the conviction, much less on review of the state court's denial of habeas corpus.")). Thus, petitioner's claims 1 and 3 should be denied on this basis alone. Regardless, the claims are addressed below on the merits as the petitioner is not entitled to habeas corpus relief on any of the claims presented.

In **claim 1**, petitioner asserts that the trial court abused its discretion by considering the *nolle prossed* charge of first degree murder when it sentenced her to the 20 year plea cap. The respondent argues that the trial court's consideration of the *nolle prossed* charge was within the court's discretion. (DE#10:22). Petitioner raised this claim on direct appeal and the Fourth District subsequently *per curiam* affirmed petitioner's judgment of conviction without written opinion. (DE#10-2:Ex.12).

Under Florida law, the trial court's decision to impose a

sentence within the maximum limits set by the legislature is an exercise of discretion. See Peters v. State, 128 So.3d 832, 844 (Fla. 4 DCA 2013)(quoting Nusspickel v. State, 966 So.2d 441 (Fla. 2 DCA 2007). Further, it is well within the trial court's discretion to evaluate a defendant's prior record as well as the facts of the instant offense at sentencing, with the exception of offenses for which the defendant has been acquitted. Id. Moreover, a *nolle prosse* by the State is "merely a discretionary decision" and does not operate as an acquittal under Florida law. See Peters v. State, 128 So.3d 832, 844 (Fla. 4 DCA 2013)(quoting Al-Hakim v. Roberts, No. 8:08-CV-01370-T-17-EAJ, 2009 WL 2147062, at *4 (M.D.Fla. July 13, 2009)(internal quotations omitted).

In the case at bar, petitioner was not acquitted of first degree murder, but instead accepted responsibility for the charge of robbery with a firearm in exchange for the state agreeing to dismiss the murder charge. The state's decision to *nolle prosse* the murder charge was entirely due to petitioner's cooperation in the investigation and trial stages of her co-defendant's cases, and in no way because of a lack of evidence to support her guilt. In a case such as this, where a convenience store owner was murdered in the course of a robbery, the facts, including the murder itself, are relevant to a court's sentencing determination, and are permitted to be considered under state law. See Peters v. State, 128 So.3d 832, 844 (Fla. 4 DCA 2013). Thus, it is clear that there was no violation of Florida law as it was within the discretion of the trial court to consider the *nolle prossed* charge of first degree murder at petitioner's sentencing. Petitioner's claim warrants no habeas relief.

Furthermore, given this court's review of the applicable state law, it cannot be said that the finding of the state court was

contrary to or an unreasonable application of federal constitutional principles under Williams v. Taylor, supra, and its rejection of the claim should not be disturbed here.

In **claim 2**, petitioner asserts that she was denied effective assistance of counsel, where her lawyer misadvised her about the plea deal in her case. (DE#1:7). This claim is exhausted, and thus ripe for federal review, as it was raised on appeal from the denial of petitioner's amended 3.850 motion for postconviction relief. (DE#10-6:Exs.22-23).

As previously discussed, because a guilty plea is a waiver of substantial constitutional rights, it must be a voluntary, knowing, and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences. Brady v. United States, 397 U.S. 742, 748 (1970). A voluntary and intelligent plea of guilty made by an accused person who has been advised by competent counsel may not be collaterally attacked. Mabry v. Johnson, 467 U.S. 504, 508 (1984).

A guilty plea is, however, open to attack on the ground that counsel did not provide reasonably competent advice. Cuyler v. Sullivan, 446 U.S. 335, 344, 100 S.Ct. 1708, 1716 (1980)(citations omitted). A habeas petitioner can thus overcome the otherwise voluntary and intelligent character of his or her guilty plea only if he or she can establish that the advice she received from counsel was not "within the range of competence demanded of attorneys in criminal cases." McMann v. Richardson, 397 U.S. 759, 771 (1970).

Strickland's two-part test applies when a prisoner contends ineffective assistance led him or her to enter "an improvident guilty plea." Yordan v. Dugger, 909 F.2d 474,477 (11th Cir.1990)

(*citing* Hill v. Lockhart, 474 U.S. 52 (1985)). The first part of the Strickland test of course asks whether "counsel's assistance was reasonable considering all the circumstances." 466 U.S. at 688. An attorney has an obligation "to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." Stano v. Dugger, 921 F.2d 1125, 1149-50 (11th Cir. 1991). "Judicial scrutiny of counsel's performance must be highly deferential," however, and the courts should make certain "that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. Counsel's advice need not be errorless, and need not involve every conceivable defense; rather, it must simply be within the realm of competence demanded of attorneys representing criminal defendants. Scott v. Wainwright, 698 F.2d 427, 429 (11th Cir. 1983)(citations omitted).

In cases where a guilty plea has been entered, application of Strickland's second prong requires a showing that there is a reasonable probability that, but for counsel's alleged errors, the defendant would not have pleaded guilty and would have insisted on going to trial. Hill, 474 U.S. at 58. However, the defendant's "mere allegation that he would have insisted on trial. . ., although necessary, is ultimately insufficient to entitle him [or her] to relief." U.S. v. Clingman, 288 F.3d 1183, 1186 (10th Cir. 2002); see also Hutchings v. U.S., 618 F.3d 693 (7th Cir. 2010); U.S. v. Farley, 72 F.3d 158, 165 (D.C. Cir. 1995). Rather, the defendant must generally come forward with some objective evidence that he or she would not have pled guilty. Hutchings, 618 F.3d at 697. Indeed, there must be some showing that the decision to proceed to trial would have been rational under the circumstances. See Padilla v.

Kentucky, 559 U.S. 356, 372, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010). As such, the court must look to the totality of the objective factual circumstances surrounding the plea in order to determine whether there is a reasonable probability that the petitioner would in fact have insisted on trial. See, generally, Hill, 474 U.S. at 59; Hutchings, 618 F.3d at 697.

In many guilty plea cases, this inquiry will closely resemble the inquiry that the court would engage in to determine whether the result would have been different had the petitioner proceeded to trial, and will generally include assessment of matters such as the strength of the prosecution's case, any available defenses, the plea colloquy and negotiations, and the potential sentencing exposure. See Hill 474 U.S. at 59-60; Farley, 72 F.3d at 165. These issues are relevant precisely because they provide circumstantial evidence of the defendant's state of mind in making the plea. Miller v. Champion, 262 F.3d 1066, 1073 (10th Cir. 2001); see also Singleton v. Sec'y of Dept. Of Corr., 2009 WL 975783, *4 (M.D. Fla. 2009 ("The best way to evaluate whether there is a reasonable probability a petitioner would have insisted on going to trial is to determine whether petitioner had available a defense that would likely have borne fruit at trial."). A criminal defendant's subjective statements that he would have proceeded to trial can thus only support a finding of prejudice "if combined with probative, objective evidence" that the result would somehow have been different. Hutchings, 618 F.3d at 697. The weight of authority holds that a self-serving and conclusory statement by the defendant is insufficient in itself to show prejudice in the context of guilty pleas. See, e.g., United States v. Arvanitis, 902 F.2d 489, 494 (7th Cir. 1990); United States v. LaBonte, 70 F.3d 1396, 1413 (1st Cir. 1995), rev'd on other grounds, 520 U.S. 751, 117 S.Ct. 1673, 137 L.Ed.2d 1001 (1997); Parry v. Rosemeyer, 64 F.3d 110, 118 (3rd Cir.

1995); United States v. Gordon, 4 F.3d 1567, 1571 (10th Cir. 1993); United States v. Horne, 987 F.2d 833, 836 (D.C. Cir. 1993); Bonvillain v. Blackburn, 780 F.2d 1248, 1253 (5th Cir. 1986).

Moreover, it is well settled that even when an attorney erroneously estimates his client's potential sentence, the petitioner still must satisfy the prejudice requirement of Strickland by showing that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 59, 106 S.Ct. at 370; United States v. Stumpf, 827 F.2d 1027, 1030 (5th Cir. 1987); see also, United States v. Pease, 240 F.3d 938, 940-42 (11th Cir. 2001)(rejecting argument by defendant sentenced as a career offender that her plea was not knowing and voluntary because he had relied on counsel's prediction that her potential sentence under the plea agreement would be anywhere from five to ten years); Carranza v. United States, 508 Fed.Appx. 873 (11th Cir. 2013); United States v. Arvanitis, 902 F.2d 489, 494-95 (7th Cir. 1990)(no ineffective assistance where claim based only on inaccurate prediction of sentence). As the Fifth Circuit explained in Daniel v. Cockrell, 283 F.3d 697 (5th Cir. 2002):

> A guilty plea is not rendered involuntary by the defendant's mere subjective understanding that he would receive a lesser sentence. In other words, if the defendant's expectation of a lesser sentence did not result from a promise or guarantee by the court, the prosecutor or defense counsel, the guilty plea stands. Likewise, a guilty plea is not rendered involuntary because the defendant's misunderstanding was based on defense counsel's inaccurate prediction that a lesser sentence would be imposed.

Daniel, 283 F.3d at 703.

In the claim at bar, petitioner's assertion that her plea was

involuntary is belied by the record. Prior to entering her plea, petitioner understood that she was facing a possible sentence of life imprisonment for the crimes with which she was charged in the indictment. (DE#10-2:Ex.1). The record is clear that Petitioner understood that by pleading guilty, the government was agreeing to a twenty year cap on a possible prison sentence. (DE#10-2:Ex.2:15-16). Petitioner also understood that if the court were to accept her plea, that the court still retained discretion with regard to her sentence. (Id.:19). Petitioner then indicated that she was entering into a plea because she believed it to be in her best interest and that she was entering the plea freely, knowingly, and voluntarily. (Id.). Petitioner further indicated that she was completely satisfied with the services of her attorney. (Id.:20).

Petitioner's unequivocal testimony during the change of plea proceeding clearly refutes her unsubstantiated allegations made in claim 2. She cannot demonstrate prejudice arising from counsel's purported misadvice that she would be sentenced to credit for time served. The court informed petitioner of the statutory maximum penalty she faced and cautioned petitioner she would not be able to withdraw her plea as a result of the sentence imposed. Thus, any allegation by petitioner that it was in some way conveyed to her that she was to receive a particular lesser sentence as she suggests here, the petitioner's reliance on her attorney's erroneous prediction of a more lenient sentence is not sufficient to render a guilty plea involuntary.

Furthermore, it also cannot be overlooked that the entry of the guilty plea was clearly in the best interest of the petitioner. Because of the plea negotiated by defense counsel, petitioner did not receive a term of life imprisonment. Had she proceeded to trial and been found guilty, petitioner's exposure upon conviction may

have been significantly greater than the 20 year plea cap, exposing her to a term of life imprisonment, which could have been ordered to run consecutive to any other sentence imposed. On the record before this court, petitioner has not alleged, let alone demonstrated here, that but for counsel's errors, she would not have pled guilty but would have gone to trial. Hill, 474 U.S. at 56-59. Thus, petitioner's claim of ineffective assistance of counsel fails under both prongs of the Strickland inquiry.

Finally, it cannot be said that the state court applied Strickland in an unreasonable manner. The evidence in the record is clear that petitioner understood that pleading guilty was in her best interest and that the court retained discretion to sentence her to the twenty year cap. Therefore, the finding of the state court was neither contrary to nor an unreasonable application of federal constitutional principles under Williams v. Taylor, supra, and its rejection of the claim should not be disturbed here. Thus, petitioner's claim should be denied on the merits.

In **claim 3**, petitioner argues that the trial court erred by including "armed robbery" on her score sheet, rather than "robbery with a firearm", the crime for which she was convicted. (DE#1:9). The respondent argues that the trial court's error was harmless as the court still would have sentenced the petitioner to the maximum term of imprisonment. (DE#10:25).

Under Florida law, a score sheet is utilized to aid the court in calculating the lowest permissible prison sentence for a defendant. See Fla.R.Crim.P. 3.992. Points are given based on the type of offense for which the defendant is being sentenced, as well as, for the defendant's prior convictions. Id. Under Florida law, points are assessed based on the severity of the offense at issue, with felonies punishable by life having an offense level of 9. See

Fla. Stat. 921.0023.

First, petitioner fails to explain how the offense classification for robbery with a firearm is different from the offense classification for armed robbery under Florida law. She simply makes a blanket statement that the score sheet was incorrect with no factual support. Conclusory allegations are not sufficient. Because petitioner provides no support for this claim, it should be dismissed on this basis alone. See Machibroda v. United States, 368 U.S. 487 (1962).

Nevertheless, review of petitioner's score sheet reveals that the offense level was determined by the trial court to be a level 9 for armed robbery, as a felony punishable by life imprisonment, pursuant to Florida Statute §812.13. (DE#10-2:104). The indictment, in which petitioner was charged with robbery with a firearm, also cites section 812.13 of the Florida Statute. (DE#10-2:Ex.1). Specifically, §812.13 states that "if in the course of committing the robbery the offender carried a firearm...then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment." Fla. Stat. §812.13. Thus, review of the applicable law fails to demonstrate a distinction between armed robbery and robbery with a firearm under Florida law.

Furthermore, petitioner cannot show that even if the score sheet calculation had been incorrect, that the trial court would have sentenced her to a lesser term of imprisonment. At the sentencing hearing, the court repeatedly expressed the seriousness of the crime for which petitioner pled guilty and explained that it believed that the maximum sentence was the only appropriate outcome. (DE#10-2:Ex.2:91). Because score sheets, prepared pursuant to Fla.R.Crim.P 3.992, merely aid the court in calculating the

statutory *minimum* sentence for a defendant, it cannot be said that the court would have changed its decision to sentence petitioner to the maximum sentence, as the maximum sentence would not have changed. Thus, the finding of the state court was neither contrary to nor an unreasonable application of federal constitutional principles under Williams v. Taylor, supra, and its rejection of the claim should not be disturbed here. Petitioner's claim warrants no habeas relief.

In **claim 4**, petitioner asserts that she was denied effective assistance of counsel, where her lawyer failed to call an assistant state attorney on her behalf at sentencing. (DE#1:11). More specifically, petitioner alleges that Jeffrey Hendriks, the assistant state attorney initially involved in her case, would have testified that there was a plea agreement between the parties that the parties had agreed petitioner would plead guilty to the charge of accessory after the fact in exchange for her cooperation. (Id.). She further claims that her mother in law, Beverly Hines, would testify to the agreement as well. (Id.).

Petitioner raised this claim in her amended 3.850 postconviction motion in state court, which the trial court denied on the merits, finding that her argument that there was, in fact, an agreement between her attorney and the original prosecutor assigned to the case, was refuted by the record. (DE#10-4:25). Subsequently, the Fourth District Court of Appeal *per curiam* affirmed the trial court's ruling. (DE#10-6:Exs.22-23).

"Complaints of uncalled witnesses are not favored, because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have testified are largely speculative." Buckelew v. United States, 575 F.2d 515, 521

(5th Cir. 1978). Indeed, "[w]hich witnesses, if any, to call, and when to call them, is the epitome of a strategic decision and it is one that [the courts] will seldom, if ever, second guess." Waters v. Thomas, 46 F.3d 1506, 1512 (11th Cir. 1995).

Moreover, "evidence about the testimony of a putative witness must generally be presented in the form of actual testimony by the witness or on affidavit. A defendant cannot simply state that the testimony would have been favorable; self-serving speculation will not sustain an ineffective assistance claim." United States v. Ashimi, 932 F.2d 643, 650 (7th Cir. 1991) (footnotes omitted). In other words, to successfully assert that trial counsel should have called a witness, a petitioner must first make a sufficient factual showing substantiating the proposed witness testimony. United States v. Schaflander, 743 F.2d 714, 721 (9th Cir. 1984).

Review of the record reveals that counsel initially intended to call Jeffrey Hendriks at sentencing. (DE#10-2:Ex.2:41). Ultimately, however, he was not called to testify, the reasons for which this court does not have. As petitioner states, Mr. Hendriks was present in the courtroom during the sentencing hearing. (DE#10-2:Ex.2:12). Since his availability was not at issue, it is likely that counsel made a strategic decision not to call him as a witness as she did not believe that he would be advantageous to petitioner's case. Counsel's strategy not to call this witness should not be second-guessed by this court. Waters v. Thomas, 46 F.3d 1506, 1512 (11th Cir. 1995).

More importantly, petitioner fails to provide this court with any affidavit in support of Mr. Hendriks's proposed testimony. United States v. Ashimi, 932 F.2d 643, 650 (7th Cir. 1991). Petitioner's conclusory claim that Mr. Hendriks's testimony would

have been favorable is not enough, and without an affidavit to substantiate her claim, petitioner's assertion that her mother in law would testify to the agreement is insufficient and hearsay. Id. For these reasons alone, petitioner has failed to show that counsel's performance was deficient under the first prong of Strickland.

Moreover, petitioner's claim that there was, in fact, an agreement between the parties in which petitioner would plead guilty only to accessory after the fact is completely refuted by the record. Upon cross-examination by the state at sentencing, petitioner conceded that she had not been promised anything in exchange for her testimony. (DE#10-2:Ex.2:36). She further admitted that Mr. Hendriks never made her any promises but that she was told that she was "going to be tooken[sic] care of." (Id.). Upon questioning by the court, petitioner clarified that it was the detectives who initially spoke with her that told her that "she was going to get back home to [her] kids" if she cooperated, but that "it wasn't a deal." (Id.:38-39).

As petitioner's claim is refuted by her own testimony, counsel cannot be faulted for failing to raise this non-meritorious issue with the court. See, generally, Strickland, 466 U.S. at 690. It is not professionally unreasonable for a lawyer to fail to pursue issues which have little or no chance of success, and a criminal defendant is not prejudiced by counsel's failure to pursue non-meritorious claims or those on which they likely would not have prevailed. Id. ("counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment"); Knowles v. Mirzayance, 129 S.Ct. 1411, 1422 (2009)(the law does not require counsel to raise every available non-frivolous defense); Chandler

v. Moore, 240 F.3d 907, 917 (11th Cir. 2001)(counsel is not ineffective for failing to raise a non-meritorious objection); Bolender v.Singletary, 16 F.3d 1547, 1573 (11th Cir. 1994)("[I]t is axiomatic that the failure to raise non-meritorious issues does not constitute ineffective assistance" of counsel); United States v. Winfield, 960 F.2d 970, 974 (11th Cir. 1992)(failure to raise meritless issues cannot prejudice a client); Card v. Dugger, 911 F.2d 1494, 1520 (11th Cir. 1990)(counsel is not required to raise meritless issues). Thus, petitioner's claim of ineffective assistance of counsel fails under both prongs of Strickland.

Finally, it cannot be said that the trial court's decision 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) was "based on an unreasonable determination of the facts in light of the evidence presented" to the State court. 28 U.S.C. § 2254(d)(1), (2); see also Williams v. Taylor, 529 U.S. 362, 405-06 (2000); Fugate v. Head, 261 F.3d 1206, 1215-16 (11th Cir. 2001). The finding of the state court was neither contrary to nor an unreasonable application of federal constitutional principles under Williams v. Taylor, supra, and its rejection of the claim should not be disturbed here. Therefore, petitioner's claim should be denied on the merits.

In **claim 5**, petitioner asserts she was denied effective assistance of counsel, where her lawyer failed to advise her of a change in the plea agreement. (DE#1:13). Specifically, she alleges that counsel failed to advise her that the assistant state attorney had changed the terms of the oral agreement from credit for time served to the twenty year plea cap. Petitioner raised this claim in her amended postconviction motion in state court, which the trial court denied on the merits, finding the petitioner's claim was refuted by the record. (DE#10-4:Ex.21:28). The Fourth District Court

of Appeal then *per curiam* affirmed the trial court's decision on appeal. (DE#10-6:Exs.22-23).

As found correctly by the state court, petitioner's claim is belied by the record. As discussed above in claim 4, petitioner acknowledged that she had previously stated, under oath, that she had not received any inducements or promises for her testimony at her co-defendants' trials. (DE#10-2:Ex.2:36). Again, petitioner stated during cross examination at sentencing that she was told by detectives that she would be able to get back home to her kids if she cooperated with them, but that she wasn't "expecting anything for her testimony." (Id.:39). Thus, petitioner's claim that there was a plea agreement in place prior to the time of her testimony at trial is contradicted by her own sworn assertions at the sentencing hearing. Moreover, petitioner fails to provide any evidence that her sworn assertions at sentencing were untrue. See United States v. Rogers, 848 F.2d 166, 168 (11th Cir. 1988). As petitioner's claim is without merit, she is unable to show that counsel's performance was deficient under the first prong of Strickland.

Thus, the finding of the state court was neither contrary to nor an unreasonable application of federal constitutional principles under Williams v. Taylor, supra, and its rejection of the claim should not be disturbed here. Therefore, petitioner's claim should be denied on the merits.

In **claim 6**, petitioner claims she was denied effective assistance of counsel, where her lawyer failed to advise her to withdraw her plea and failed to file a motion to disqualify the judge in her case. (DE#1:15). These arguments were raised in the Rule 3.850, where the trial court denied relief, finding that the judge's statements were not grounds for disqualification. (DE#10-4:Ex.21:30). That denial was affirmed on appeal. (DE#10-6:Exs.22-

23).

Under Florida law, a defendant who pleads guilty may file a motion to withdraw the plea within thirty days "after rendition of the sentence." Fla.R.Crim.P 3.170(l). The grounds for the motion to withdraw must meet the requirements under Florida Rule of Appellate Procedure 9.140(b)(2)(A)(ii), which provides the limited circumstances in which a guilty plea can be vacated by the court upon motion by the defendant. Fla.R.App.P 9.140. These circumstances include a violation of the plea agreement, sentencing errors, the trial court's lack of jurisdiction, involuntary pleas, and any other grounds otherwise provided by law. Id.

With respect to the issue of disqualification, a judge's remarks or "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." Liteky v. United States, 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). Only personal bias, not judicial bias, is sufficient to justify recusal of a judge. Jaffree v. Wallace, 837 F.2d 1461, 1465 (11th Cir. 1988). Such bias must "'stem from personal, extrajudicial sources' unless 'pervasive bias and prejudice is shown by otherwise judicial conduct.'" First Alabama Bank of Montgomery, N.A. v. Parsons Steel, Inc., 825 F.2d 1475, 1487 (11th Cir. 1987) (citation omitted), cert. den'd, 484 U.S. 1060, 108 S.Ct. 1015, 98 L.Ed.2d 980 (1988). See also Liteky, 510 U.S. at 555 ("[J]udicial rulings alone almost never constitute [a] valid basis for a bias or partiality motion.").

The Due Process Clause may be violated when the judge is actually biased in a specific respect and even when, without a

showing of actual bias, objective circumstances show an unacceptable probability of bias. The Supreme Court has never held, though, that either an appearance of bias or a possibility of bias, without more, establishes a due-process violation. See Davis v. Jones, 506 F.3d 1325, 1333-37 (11th Cir. 2007) (rejecting a state habeas petitioner's appearance-of-bias claim for lack of supporting Supreme Court authority; citing circuit decisions suggesting that an appearance of bias is not a due-process violation).

Careful review of the record reveals that the court stated that it was going to judge petitioner in a "cold, logical fashion" only in response to petitioner apologizing to the Judge for causing him "any kind of turmoil." (DE#10-2:Ex.2:203). The trial judge further clarified that it was not a personal issue and that he was looking at the facts from a neutral perspective in determining petitioner's sentence. (Id.:204). Nothing in the judge's statements indicated that he had a personal bias towards the petitioner. Rather it was the opposite, that he was looking at the issue from an objective standpoint. See Jaffree v. Wallace, 837 F.2d 1461, 1465 (11th Cir. 1988). Further, simply because the judge gave petitioner the maximum sentence does not constitute a valid basis for a motion for recusal. See Liteky v. United States, 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). Thus, petitioner's claim that this is grounds for recusal of the judge is without merit.

Moreover, petitioner fails to provide any support for her bold claim that the judge's actual statement that he was going to judge petitioner "cold and harsh" was deliberately typed incorrectly on the transcript in order to cover up his actual statement. (DE#1:15). Petitioner's further claim that the judge "mocked" her by saying that he had considered giving her a probationary term to see if she would slip up is wholly unsupported by the record as well. (Id.). The court did state that it considered making part of the sentence

probation, but that after reviewing all of the circumstances at issue in the case, that prison time would be most appropriate. (DE#10-2:Ex.2:205). Nothing about the judge's statements indicated that he was biased against the petitioner so as to disqualify him from petitioner's case. See Jaffree v. Wallace, 837 F.2d 1461, 1465 (11th Cir. 1988).

Furthermore, petitioner fails to specify what grounds counsel even had to advise petitioner to move to withdraw her plea. If petitioner intends to argue that her plea should be vacated because the court sentenced her based on personal bias, that claim is without merit for the reasons cited above. Furthermore, the record shows that petitioner understood that the court retained discretion to sentence her even though she was pleading guilty. (DE#10-2:Ex.2:19). Thus, petitioner's fails to show counsel's performance was deficient under the first prong of Strickland.

Neither can it be said that had counsel advised petitioner to file a motion to withdraw plea, that the trial court would have granted such a motion. As previously discussed in claim 2, it is clear from the record that petitioner understood she was entering into a plea because she believed it to be in her best interest and that she was entering the plea freely, knowingly, and voluntarily.(DE#10-2:Ex.2:19). There is nothing in the record to indicate the petitioner's plea was anything other than voluntary. Because it cannot be said that any personal bias on the part of the judge influenced petitioner's sentence, there is little likelihood that the court would have granted a motion to withdraw petitioner's plea. Thus, petitioner's claim fails under the second prong of Strickland.

Because counsel cannot be faulted for failing to raise non-meritorious issues, petitioner can show neither deficient

performance nor prejudice resulting from trial counsel's failure to advise petitioner to withdraw her plea and for counsel's failure to move for disqualification. Strickland, 466 U.S. at 691-92. Thus, the rejection of this claim in the state habeas corpus proceeding should not be disturbed here. Williams v. Taylor, supra.

In **claim 7**, petitioner asserts she was denied effective assistance of counsel, where her lawyer allowed her to build a case against herself without first securing a plea deal. (DE#1:17). Specifically, petitioner argues that counsel failed to secure and/or otherwise memorialize in writing the terms of the plea agreement reached with the original assistant state attorney, Mr. Hendriks, that in exchange for her cooperation, petitioner would plead guilty to accessory after the fact. (Id.). This claim was raised in the Rule 3.850, where the trial court denied relief, finding that petitioner's claim was refuted by the record. (DE#10-4:Ex.21:30). That denial was affirmed on appeal. (DE#10-6:Exs.22-23).

Review of the record reveals petitioner's claim is contradicted by her own testimony. At sentencing, petitioner stated that she cooperated because she knew "it [was] the right thing to do." (DE#10-2:Ex.2:33). Moreover, petitioner's counsel stated that when she initially met with petitioner at the police station, "she had already made the decision to do the right thing and give a statement." (Id.:71). Counsel went on to state that she had seen previous defendants cooperate with the state to a certain extent, only to have it backfire on them later because they did not cooperate fully. (Id.). Once petitioner stated that she wanted to cooperate, counsel stated that she merely guided her in making the right decisions with respect to her testimony. (Id.).

Moreover, as discussed in claim 4, petitioner's claim that there was, in fact, an agreement that she would plead guilty only

to accessory after the fact is completely refuted by the record. Upon cross-examination by the state at sentencing, petitioner conceded that she had not been promised anything in exchange for her testimony. (DE#10-2:36). She further admitted that Mr. Hendriks never made her any promises but that she was told that she was "going to be tooken[sic] care of." (Id.). Upon questioning by the court, petitioner clarified that the detectives who initially spoke with her told her that "she was going to get back home to [her] kids" if she cooperated, but that "it wasn't a deal." (Id.:38-39).

Petitioner cannot show that counsel was deficient for failing to secure a plea deal which she herself admitted never existed. Furthermore, even if she could prove counsel's performance was deficient, she cannot show a reasonable probability that but for counsel's error, she would have proceeded to trial. See generally Lafler v. Cooper, ___ U.S. ___, 132 S.Ct. 1376, 1385 (2012). This is especially true given the evidence against petitioner, which included her brother's statement that she was using the car on the night in question, as well as her sister's statement that petitioner admitted her involvement in the robbery. (DE#10:13-14). Furthermore, petitioner was facing a life sentence, instead of the twenty year cap, if she had proceeded to trial. Given these facts, it is highly unlikely petitioner would have proceeded to trial. Thus, petitioner is unable to demonstrate either prong of the Strickland inquiry and the rejection of this claim in the state habeas corpus proceeding should not be disturbed here. Williams v. Taylor, supra.

In **claim 8**, petitioner argues that she received ineffective assistance of counsel where her lawyer failed to object to the court's consideration at sentencing of testimony adduced during her co-defendant's trial. (DE#1:20). Specifically, petitioner argues the court violated her right to confrontation because the witnesses were not present at the sentencing and could not be questioned by the

defense. (Id.). This claim was raised in the Rule 3.850, where the trial court denied relief, finding that petitioner's claim was bare and conclusory. (DE#10-4:30). That denial was affirmed on appeal. (DE#10-6:Exs.22-23).

In Crawford v. Washington, 541 U.S. 36, 68 (2004), the Supreme Court held that the Confrontation Clause does not allow the admission at trial of "testimonial" statements of a witness who does not appear at the trial unless the witness is unavailable and the defendant has had prior opportunity to cross-examine him. "[T]he right to confrontation is a trial right[.]" Pennsylvania v. Ritchie, 480 U.S. 39, 52 (1987). However, Crawford does not apply to a proceeding other than trial. Indeed, the Eleventh Circuit and other courts have declined to extend the holding of Crawford to other types of non-trial court proceedings. See United States v. Cantellano, 430 F.3d 1142, 1146 (11th Cir. 2005)(Crawford did not change prior law recognizing that right of confrontation does not apply to non-capital sentencing context and does not prohibit consideration of hearsay in sentencing proceedings), cert. denied, 547 U.S. 1034 (2006); see also United States v. Martinez, 413 F.3d 239, 242-43 (2d Cir. 2005) (same); United States v. Martin, 382 F.3d 840, 844 & n. 4 (8th Cir. 2004)(Crawford not applicable in supervised release revocation hearing).

First, it should be noted that petitioner fails to state the identity of the witness whose testimony was considered by the court at sentencing without defense objection. Moreover, she provides no factual support for her conclusory claim that the judge relied on "testimony that was used in co-defendant's trial by a witness for the state against defendant's co-defendant." (DE#1:20). Bare, conclusory allegations of ineffective assistance are insufficient to satisfy the Strickland test. See Boyd v. Comm'r, Ala. Dep't of Corr's, 697 F.3d 1320, 1333-34 (11th Cir. 2012). On this basis

alone, petitioner's claim does not warrant habeas relief.

Nevertheless, review of the record reveals that while the court believed that petitioner's testimony at her co-defendant's trials was truthful, petitioner's testimony also showed that she was attempting to minimize her involvement in the murder. (DE#10-2:Ex.2:85). At sentencing, the court stated that Kineshia Williams, a witness at petitioner's co-defendants' trials, testified that she saw the petitioner in the car "backing up with the doors open", demonstrating to the court that petitioner fully cooperated with the armed robbery plan. (Id.). Petitioner points to no authority, in the record or otherwise, to support the proposition that the judge was prohibited from taking this testimony into account when fashioning an appropriate sentence.

Further, as mentioned above, a defendant's rights to confrontation are not violated when hearsay testimony is relied upon at sentencing. Crawford v. Washington, 541 U.S. 36, 68 (2004). Thus, it cannot be said that the court impermissibly considered witness testimony from petitioner's co-defendants' trials. Counsel cannot be faulted for failing to raise an issue that has little chance of success with the court. See, generally, Strickland, 466 U.S. at 690. Under these circumstances, the petitioner cannot demonstrate either deficient performance or prejudice arising from counsel's failure to object to the judge's consideration of this trial testimony based on a violation of the petitioner's confrontation rights at sentencing. Thus, the state habeas court's rejection of this claim is in accordance with federal constitutional principles and should not be disturbed here. Williams v. Taylor, supra.

In **claim 9**, petitioner argues she was denied effective assistance of counsel, where her lawyer failed to provide the trial

court with proper mitigation. (DE#1:21). Petitioner claims that counsel had her sign medical release forms to present evidence of petitioner's illness as a mitigating factor for sentencing, but that counsel failed to actually present any evidence in support thereof. (Id.). Petitioner raised this claim in her amended motion for postconviction relief. (DE#10-3:Ex.19:25). Upon review, the trial court denied petitioner's claim on procedural grounds, but further found that petitioner had not suffered any prejudice because such mitigating evidence would not have changed its ruling. (DE#10-4:Ex.21:31). Subsequently, the Fourth District Court of Appeal *per curiam* affirmed the trial court's decision without written opinion. (DE#10-6:Exs.22-23).

Generally, counsel is not deficient in failing to present mitigation, where there is no reasonable probability that the outcome of sentencing would have been different if more mitigation had been presented. See Grayson v. Thompson, 257 F.3d 1194, 1219-20 (11th Cir. 2001)(in light of brutal nature of the crime, there was no reasonable probability that result of sentencing would have been different if more detailed information regarding defendant's history had been presented). This is especially true where circumstances of the crime for which the defendant is being sentenced are particularly aggravating. See Tafero v. Wainwright, 796 F.2d 1314, 1320 (11th Cir. 1986)(defendant failed to establish that result of sentencing would have been different had counsel presented available mitigating evidence or stronger closing argument, and thus failed to establish prejudice, in light of fact that mitigating evidence amounted to evidence merely as to defendant's general good nature and character and that there was overwhelming evidence of aggravating circumstances).

Review of the record reveals that counsel did request that the court downwardly depart from petitioner's prospective sentence on

the basis that petitioner had medical issues. (DE#10-2:Ex.2:81). Further, counsel did not wish to get into the details of petitioner's medical problems, as petitioner did not want her issues to be made part of the court's official record. (Id.). In fact, counsel presented a letter written by petitioner regarding her medical issues which she wished the judge to review himself, without making it a part of the official court record. (DE#10-2:Ex.2:28).

While this court is not privy to the reasons as to why petitioner did not want to address her medical issues on the record, it is nonetheless clear from independent review that it was petitioner's wish that the nature of her medical issues remain private. Petitioner cannot now claim that counsel should have addressed issues on the record which she wished to remain private. Thus, petitioner is unable to show that counsel's performance was deficient for failing to present more mitigation based on petitioner's medical issues under the first prong of Strickland.

Moreover, even if it can be said that counsel was deficient, petitioner is unable to show that the outcome at sentencing would have been different if the court had heard more mitigating evidence. The court was clear that it believed the maximum sentence was appropriate given the facts of the case, and that petitioner's medical issues did not serve to mitigate the particular aggravating facts of petitioner's case. (DE#10-2:Ex.2:89). Therefore, petitioner's claim should be denied on the merits as she can show neither deficient performance nor prejudice under the prongs of Strickland. Thus, the state habeas court's rejection of this claim is in accordance with federal constitutional principles and should not be disturbed here. Williams v. Taylor, supra.

In **claim 10**, petitioner asserts she was received ineffective assistance of counsel, where her lawyer failed to object to remarks

made by the trial judge at sentencing. (DE#1:23). This claim is essentially the same as claim 1, in which petitioner argued trial court error for considering the facts of the murder, rather than the charge for which petitioner was convicted: robbery with a firearm. (DE#1:4). The trial court denied petitioner's claims on the merits, citing in pertinent part, Howard v. State, 820 So.2d 337 (Fla. 4th DCA 2002), which states as follows:

> It is well established that a judge or other sentencing authority is to be well accorded very wide discretion in determining an appropriate sentence. The sentencing court or jury must be permitted to consider any and all information that reasonably might bear on the proper sentence for a particular defendant, given the crime committed. *Wasman v. United States*, 468 U.S. 559, 563, 104 S.Ct. 3217, 82 L.Ed.2d 424(1984). More recently, the Supreme Court recognized that it is permissible "for judges to exercise discretion-taking into consideration various factors relating both to offense and offender-in imposing a judgement within the range prescribed by statute." *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 2358, 147 L.Ed.2d 435 (2000).

Id. At 340. (DE#10-4:31). On appeal, the Fourth District Court of Appeal *per curiam* affirmed petitioner's judgement of conviction. (DE#10-6:Exs.22-23).

In the case at bar, review of the record reveals that the court did not impermissibly consider the first degree murder charge, which was dismissed by the state. As cited in claim 1, it is well within the trial court's discretion to evaluate a defendant's prior record, as well as, all relevant facts of the instant offense at sentencing, with the exception of offenses for which the defendant has been acquitted. See Peters v. State, 128 So.3d 832, 844 (Fla. 4 DCA 2013). Therefore, counsel cannot be faulted for failing to object to this non-meritorious issue. See, generally, Strickland, 466 U.S. at 690. Thus, petitioner is unable

to show deficient performance under the first prong of Strickland.

Moreover, even if it could be said that counsel's performance was deficient for failing to object to the judge's consideration of facts surrounding the first degree murder charge, it is clear from the record that the outcome at sentencing would not have been different had counsel objected. The court was steadfast in its position that petitioner deserved the maximum sentence possible. (DE#10-2:Ex.2:82-93). In fact, the court stated that had there not been the twenty year cap in place, it would have sentenced the petitioner to a much longer term of imprisonment. (DE#10-2:Ex.2:92). There is no reasonable probability that the court would have changed its position. Thus, petitioner's claim of ineffective assistance of counsel fails under both prongs of Strickland.

Therefore, it cannot be said that the trial court's decision 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) was "based on an unreasonable determination of the facts in light of the evidence presented" to the State court. 28 U.S.C. § 2254(d)(1), (2); see also Williams v. Taylor, 529 U.S. 362, 405-06 (2000); Fugate v. Head, 261 F.3d 1206, 1215-16 (11th Cir. 2001). Thus, the finding of the state court was neither contrary to nor an unreasonable application of federal constitutional principles under Williams v. Taylor, supra, and its rejection of the claim should not be disturbed here.

In **claim 11**, petitioner argues that she received ineffective assistance of counsel, where her lawyer was inexperienced and unqualified to handle a case of petitioner's magnitude. (DE#1:25). She further claims that counsel's explicitly asserted her inexperience when she stated on the record that she "had never been involved in a case" like the petitioner's since she began working

at the public defender's office. (Id.). She also claims that counsel was inexperienced because she "compared defendant's case to a drug trafficking case." (DE#1:26). This claim is exhausted, and thus ripe for federal review, as it was raised on appeal from the denial of petitioner's amended 3.850 motion for postconviction relief. (DE#10-6:Exs.22-23).

It is well established that an ineffective assistance claim cannot be based solely on counsel's inexperience. In United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), the Supreme Court rejected an ineffective assistance claim based on allegations that the appointed trial attorney was young, that his principal practice was in real estate, and that this was his first jury trial. Id. at 665, 104 S.Ct. 2039. The Cronic Court explained that "[e]very experienced criminal defense attorney once tried his first criminal case . . . The character of a particular lawyer's experience may shed light in an evaluation of his actual performance, but it does not justify a presumption of ineffectiveness in the absence of such an evaluation." Id.; see also LaGrand v. Stewart, 133 F.3d 1253, 1275 (9th Cir. 1998)("In considering a claim of ineffective assistance of counsel, it is not the experience of the attorney that is evaluated, but rather, his performance.").

Independent review of the record reveals that there is zero evidence to support petitioner's assertion that counsel was inexperienced. In her claim, petitioner wholly mischaracterizes counsel's actual statements to the court. At sentencing, counsel stated that her involvement in the case was "a lot different" than in a normal case because she was involved from the beginning of the case, starting with the initial interview at the police station. (DE#10-2:Ex.2:41). She also asked the court for a lenient sentence by explaining that, in her experience working on drug trafficking

cases, the system wants to incentivize cooperation of co-defendants and therefore gives cooperating defendants more lenient sentences. (Id.:80). Further, review of the sentencing transcript shows that counsel was a prepared, zealous advocate for her client. Petitioner cannot now claim that counsel was ineffective simply because she is upset with the court's sentencing decision. Therefore, petitioner has not shown that counsel's performance was deficient under the first prong of Strickland.

Moreover, it cannot be said that the trial court's decision 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) was "based on an unreasonable determination of the facts in light of the evidence presented" to the State court. 28 U.S.C. § 2254(d)(1), (2); see also Williams v. Taylor, 529 U.S. 362, 405-06 (2000); Fugate v. Head, 261 F.3d 1206, 1215-16 (11th Cir. 2001). Thus, the finding of the state court was neither contrary to nor an unreasonable application of federal constitutional principles under Williams v. Taylor, supra, and its rejection of the claim should not be disturbed here.

VIII. Evidentiary Hearing

Petitioner's request for an evidentiary hearing must be denied. To determine whether an evidentiary hearing is needed, the question is whether the alleged facts, when taken as true, is not refuted by the record and may entitled petitioner to relief. Schriro v. Landrigan, 550 U.S. 465, 474, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007)(citation omitted). "It follows that if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." Id. The pertinent facts of this case are fully developed in the record before the Court. Because this Court

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

IX. Certificate of Appealability

A prisoner seeking to appeal a district court's final order denying his petition for writ of habeas corpus had no absolute entitlement to appeal, but must obtain a certificate of appealability ("COA"). See 28 U.S.C. §2253 (c)(1); Harbison v. Bell, 556 U.S. 180, 129 S. Ct. 1481 (2009). This Court should issue a certificate of appealability only if the petitioner makes "a substantial showing of the denial of a constitutional right." See 28 U.S.C. §2253 (c)(2). Where a district court has rejected a petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). However, when the district court has rejected a claim on procedural grounds, the petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id. Upon consideration of the record as a whole, this Court should deny a certificate of appealability. Notwithstanding, if petitioner does not agree, he may bring this argument to the attention of the district judge in objections.

IX. Conclusion

Based upon the foregoing, it is recommended that the federal habeas petition be denied; that a certificate of appealability be

denied; that final judgment be entered; and, the case closed.

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

SIGNED this 29th day of November, 2017.

UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 2:16-CV-14316-ROSENBERG/WHITE

MAHOGANY TAQUILLA ALEXANDER,

Petitioner,

v.

JULIE JONES,

Respondent.
_____/

FINAL JUDGMENT

This matter is before the Court upon the Order Adopting Magistrate's Report and Recommendation. DE 14. Pursuant to Federal Rule of Procedure 58, and in accordance with the Court's denial of Petitioner's Petition for Writ of Habeas Corpus, final judgment is entered.

DONE and ORDERED in Chambers, Fort Pierce, Florida, this 4th day of January, 2018.

ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel of Record
Mahogany Taquilla Alexander

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10422-A

MAHOGANY TAQUILLA ALEXANDER,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

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

Before: WILSON and ROSENBAUM, Circuit Judges.

BY THE COURT:

Mahogany Taquilla Alexander has moved for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's order dated June 15, 2018, denying her a certificate of appealability and leave to proceed *in forma pauperis* in her appeal from the denial of her petition for a writ of habeas corpus under 28 U.S.C. § 2254. Upon review, the motion for reconsideration is DENIED because Alexander has offered no new evidence or arguments of merit to warrant relief.

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