IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-15560-E

DIEGO RODRIGO PEREA,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

ORDER:

Diego Rodrigo Perea is a Florida prisoner serving a life sentence after a jury convicted him of sexual battery on a person less than 12 years of age, lewd or lascivious exhibition, lewd or lascivious molestation, showing obscene material to a minor, and lewd or lascivious conduct. He seeks a certificate of appealability ("COA"), as construed from his notice of appeal, as well as leave to proceed *in forma pauperis* ("IFP"), in order to appeal the denial of his habeas corpus petition, 28 U.S.C. § 2254, in which he raised seven claims for relief, and the denial of his Fed. R. Civ. P. 59(e) motion for reconsideration.

In order to obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the district court denied a habeas petition on procedural grounds, the petitioner must show that jurists of reason would find debatable

(1) whether the petition states a valid claim of the denial of a constitutional right, and (2) whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Reasonable jurists would not debate the district court's determination that Claims 1, 2, and 6 were procedurally defaulted, as Perea failed to raise them either on direct appeal or in his state postconviction proceedings. Moreover, Perea failed to establish: (1) cause and prejudice; (2) a fundamental miscarriage of justice; or (3) a substantial claim of ineffective assistance of postconviction counsel, under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), with respect to any of these claims. Accordingly, the denial of these claims does not warrant a COA.

In Claim 3, Perea alleged that he was denied his Sixth Amendment right to counsel because the trial court failed to provide him with "instantaneous electronic communication" with counsel during the victim's testimony over closed-circuit television. In Claim 4, he alleged that his trial counsel was ineffective for failing to object to the trial court's failure to provide him with instantaneous electronic communication with counsel. Reasonable jurists would not debate the denial of Claims 3 and 4, as Perea failed to show that the inability to instantaneously communicate with counsel while counsel was questioning the child-victim violated his constitutional rights. Furthermore, counsel's failure to object to this method of communication did not amount to deficient performance. Moreover, the state court found that counsel had the opportunity to consult with Perea prior to finishing his cross-examination of the victim, thereby providing Perea a meaningful opportunity to raise any issues or questions he believed that counsel may have overlooked. Accordingly, no COA is warranted on either claim.

In Claim 5, Perea alleged that his trial counsel was ineffective for failing to properly inform him of the penalties he faced, the strength of the state's case, and the "potential likelihood

that he would be convicted at trial." He stated that, had counsel properly advised him of these matters, he would have accepted the state's plea offer. Reasonable jurists would not debate the denial of this claim, as the record reflected that Perea acknowledged to the court that he was aware of the penalties he faced if convicted at trial. In spite of this, Perea rejected the plea offer. Accordingly, Perea failed to establish that, but for counsel's advice, he would have entered a plea instead of going to trial. The denial of this claim does not warrant a COA.

In Claim 7, Perea argued that his trial counsel was ineffective for failing to notify him about an evidentiary hearing on the motion to allow the victim to testify via closed-circuit television. Furthermore, he stated that he did not consent to counsel's waiver of his right to be present at the evidentiary hearing. Reasonable jurists would not debate the denial of this claim. Even assuming that the evidentiary hearing was a critical stage in the proceeding, counsel's failure to compel Perea's presence did not affect the outcome, as the parties discussed only legal issues at the hearing, and, therefore, his presence was unnecessary. Moreover, Perea did not point to any specific information or arguments that he would have presented at the hearing that counsel did not present that would have changed the outcome. Accordingly, no COA is warranted on this claim.

Finally, the district court did not abuse its discretion by denying Perea's Rule 59(e) motion, as it rehashed the same arguments he had made in his § 2255 motion. For the reasons discussed above, those claims already had been properly disposed of by the district court. Accordingly, the denial of this motion does not merit a COA.

Reasonable jurists would not debate the denial of any of Perea's claims. Therefore, his motion for a COA is DENIED and his motion for IFP status is DENIED AS MOOT.

/s/ Adalberto Jordan
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-15560-E

10/31/18

DIEGO RODRIGO PEREA,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

Before: JORDAN and NEWSOM, Circuit Judges.

BY THE COURT:

Diego Rodrigo Perea has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's order dated September 5, 2018, denying his motion for a certificate of appealability and denying as moot his motion for leave to proceed *in forma pauperis* in the appeal of the denial of his 28 U.S.C. § 2254 habeas corpus petition. Because Perea has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motion, his motion for reconsideration is DENIED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DIEGO RODRIGO PEREA,

Petitioner,

v.

Case No: 6:15-cv-812-Orl-41GJK

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

Respondents.
_____/

ORDER

THIS CAUSE is before the Court on a Petition for Writ of Habeas Corpus ("Petition," Doc. 1) filed pursuant to 28 U.S.C. § 2254. Respondents filed their Response to Petition ("Response," Doc. 6) in compliance with this Court's instructions. Petitioner filed a Reply to Respondents' Response ("Reply," Doc. 11).

Petitioner asserts seven claims for relief in the Petition. For the following reasons, the Petition will be denied.

I. PROCEDURAL HISTORY

The State Attorney's Office for the Ninth Judicial Circuit in and for Orange County, Florida filed an information charging Petitioner with sexual battery on a person less than twelve years of age (Count One), lewd or lascivious exhibition (Count Two), lewd or lascivious molestation (Count Three), showing obscene material to a minor (Count Four), and lewd or lascivious conduct (Count Five). (Doc. 7-1 at 35-39). A jury found Petitioner guilty as charged. (*Id.* at 103-10). The trial court sentenced Petitioner to a term of life in prison as to Count One, a concurrent mandatory minimum twenty-five-year term of imprisonment as to Count Three, concurrent terms of fifteen

years in prison as to Counts Two and Five, and to a five-year term of imprisonment as to Count Four. (*Id.* at 137-42). Petitioner appealed, and Florida's Fifth District Court of Appeal ("Fifth DCA") affirmed in part and reversed in part, remanding the case for resentencing as to Count Three (Doc.7-3 at 99-102). Upon remand, the trial court sentenced Petitioner to twenty-five years in prison as to Count Three without a minimum mandatory term (Doc. 7-5 at 219).

Petitioner filed a motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. (Doc. 7-3 at 166-84). After Petitioner filed two supplemental Rule 3.850 motions, the trial court summarily denied Petitioner's motions (Doc. 7-4 at 1-8, 22-24, 57-63). On appeal, the Fifth DCA *per curiam* affirmed. (Doc. 7-5 at 215).

II. LEGAL STANDARDS

A. Standard of Review Under the Antiterrorism Effective Death Penalty Act

Pursuant to the Antiterrorism Effective Death Penalty Act ("AEDPA"), a federal court may not grant federal habeas relief with respect to a claim adjudicated on the merits in state court unless the adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The phrase "clearly established Federal law," encompasses only the holdings of the United States Supreme Court "as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

"[S]ection 2254(d)(1) provides two separate bases for reviewing state court decisions; the 'contrary to' and 'unreasonable application' clauses articulate independent considerations a federal court must consider." *Maharaj v. Sec'y for Dep't of Corr.*, 432 F.3d 1292, 1308 (11th Cir. 2005).

The meaning of the clauses was discussed by the Eleventh Circuit Court of Appeals in *Parker v. Head,* 244 F.3d 831, 835 (11th Cir. 2001):

> Under the "contrary to" clause, a federal court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the United States Supreme Court] on a question of law or if the state court decides a case differently than [the United States Supreme Court] has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the United States Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case. *Id.* (quoting *Williams*, 529 U.S. at 412–13). Even if the federal court concludes that the state court applied federal law incorrectly, habeas relief is appropriate only if that application was "objectively unreasonable."[1] *Id.* (quotation omitted).

Finally, under § 2254(d)(2), a federal court may grant a writ of habeas corpus if the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." However, the state court's "determination of a factual issue . . . shall be presumed correct," and the habeas petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see also Parker*, 244 F.3d at 835–36.

B. Standard for Ineffective Assistance of Counsel

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court established a two-part test for determining whether a convicted person is entitled to relief on the ground that his counsel rendered ineffective assistance: (1) whether counsel's performance was

[1] In considering the "unreasonable application inquiry," the Court must determine "whether the state court's application of clearly established federal law was objectively unreasonable." *Williams*, 529 U.S. at 409. Whether a state court's decision was an unreasonable application of law must be assessed in light of the record before the state court. *Holland v. Jackson*, 542 U.S. 649, 652 (2004) (per curiam); *see also Bell v. Cone*, 535 U.S. 685, 697 n.4 (2002) (declining to consider evidence not presented to state court in determining whether the state court's decision was contrary to federal law).

deficient and "fell below an objective standard of reasonableness"; and (2) whether the deficient performance prejudiced the defense. *Id.* at 687–88. A court must adhere to a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689–90. "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *see also Gates v. Zant*, 863 F.2d 1492, 1497 (11th Cir. 1989) ("*Strickland* teaches that courts must judge the reasonableness of the challenged conduct on the facts of the particular case, viewed as of the time of the conduct.").

III. ANALYSIS

A. Claim One

Petitioner asserts that his Sixth Amendment rights under the Confrontation Clause were violated when the trial court allowed Dr. Jacobs-Alvarez, a psychiatrist, to testify at a pre-trial hearing via telephone.[2] (Doc. 1 at 6). In support of this claim, Petitioner contends Dr. Jacobs-Alvarez was improperly sworn over the telephone instead of requiring a notary public to be physically present with the witness. (*Id.*). Respondents assert that this claim is unexhausted. (Doc. 6 at 9-10).

Pursuant to the AEDPA, federal courts are precluded, absent exceptional circumstances, from granting habeas relief unless the petitioner has exhausted all means of available relief under state law. 28 U.S.C. § 2254(b); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842–44 (1999). In order to satisfy the exhaustion requirement a "petitioner must 'fairly present[ ]' every issue raised in his

[2] Dr. Jacobs-Alvarez testified regarding the victim's mental state in support of the State's motion to allow the victim to testify via a closed-circuit camera. (Doc. Nos. 7-1 at 80-81; 7-2 at 31-52). The trial court granted the motion, and the victim was allowed to testify outside the physical presence of Petitioner. (Doc. 7-2 at 59-60). Petitioner, the trial judge, and the jury were able to view the victim's testimony by watching a video screen in the courtroom. (*Id.* at 82-83).

federal petition to the state's highest court, either on direct appeal or on collateral review." *Isaac v. Augusta SMP Warden*, 470 F. App'x 816, 818 (11th Cir. 2012) (quoting *Castille v. Peoples*, 489 U.S. 346, 351 (1989)); *see also Duncan v. Henry*, 513 U.S. 364, 365 (1995) ("[E]xhaustion of state remedies requires that petitioners fairly present federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." (quotation omitted)). A petitioner must apprise the state court of the federal constitutional issue, not just the underlying facts of the claim or a similar state law claim. *Snowden v. Singletary*, 135 F.3d 732, 735 (11th Cir. 1998).

A review of the record reveals that this claim was not raised on direct appeal or in Petitioner's Rule 3.850 motion or the supplements to the motion. (Doc. Nos. 7-3 at 53-97, 166-84; 7-4 at 1-38). Although Petitioner made reference to the violation of his Sixth Amendment right to confront witnesses in a supplement to his Rule 3.850 motion, this was with regard to his claim that the trial court erred by failing to make specific findings of fact with regard to the order granting a motion for testimony by closed circuit television. (Doc. 7-4 at 12-13). This claim contained a different factual basis than the one currently raised, and Petitioner did not apprise the state court of the underlying facts of the claim he now raises. Therefore, this claim is unexhausted. *See Snowden*, 135 F.3d at 735.

Moreover, the Court is precluded from considering this claim because it would be procedurally defaulted if Petitioner returned to state court. "[W]hen it is obvious that the unexhausted claims would be procedurally barred in state court due to a state-law procedural default, we can forego the needless 'judicial ping-pong' and just treat those claims now barred by state law as no basis for federal habeas relief." *Snowden*, 135 F.3d at 736. Petitioner could not

return to the state court to raise this ground because he already filed a direct appeal. Thus, Petitioner's claim is procedurally defaulted.

Procedural default may be excused only in two narrow circumstances: if a petitioner can show (1) cause and prejudice or (2) actual innocence. *Murray v. Carrier*, 477 U.S. 478, 496 (1986); *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999). Petitioner asserts that appellate counsel was ineffective for failing to raise this claim on direct appeal. (Doc. Nos. 1 at 7; 11 at 10).

A claim of ineffective assistance of appellate counsel can be cause for procedural default if that claim also was exhausted in the state court. *See Brown v. United States*, 720 F.3d 1316, 1333 (11th Cir. 2013); *Dowling v. Sec'y for Dep't of Corr.*, 275 F. App'x 846, 847-48 (11th Cir. 2008) (citing *Edwards v. Carpenter*, 529 U.S. 446, 450-51 (2000)). Petitioner did not raise a claim of ineffective assistance of appellate counsel in the state court. Therefore, Petitioner's ineffective assistance of appellate counsel claim is procedurally defaulted and cannot be considered as cause for the default of his trial court error claim. *Dowling*, 275 F. App'x at 248.

To the extent Petitioner argues that he can establish cause for the procedural default pursuant to *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), his contention is misplaced. In *Martinez*, the Supreme Court held a prisoner may establish cause for the procedural default of an ineffective assistance counsel claim that was not raised in an initial or first post-conviction motion if: (1) the state court did not appoint counsel in the initial-review collateral proceeding or (2) if counsel was appointed in the initial-review proceeding but failed to raise the claim. *Id.* at 1318-19. The holding of *Martinez* is solely applicable to collateral proceedings and has not been interpreted to apply to claims of trial court error that were not raised on direct appeal. *See Duffey v. Fla. Att'y Gen.*, No. 2:15-cv-149-FTM-29MRM, 2016 WL 4193870, at *14 (M.D. Fla. Aug. 9, 2016).

Petitioner also claims that he is actually innocent and a miscarriage of justice would result if the Court declines to address this claim. (Doc.11 at 7). However, Petitioner has not shown that he is actually innocent. His argument relates to the legal sufficiency of his conviction and does not demonstrate that he is factually innocent of the crimes. *See Bousley v. United States*, 523 U.S. 614, 623 (1998) ("actual innocence means factual innocence, not mere legal insufficiency"). Consequently, Claim One is procedurally barred and will be denied.[3]

B. Claim Two

Petitioner contends that trial counsel was ineffective for failing to object to Dr. Jacobs-Alvarez's testimony because the testimony was obtained in violation of his rights to due process and equal protection. (Doc. 1 at 9). Petitioner argues that trial counsel should have objected to Dr. Jacobs-Alvarez's telephonic testimony because she was not properly sworn. (*Id.*).

Petitioner did not raise this claim in his Rule 3.850 motion or any supplements to that motion (Doc. Nos. 7-3 at 166-84; 7-4 at 1-38). Thus, the Court is precluded from considering this claim because it would be procedurally defaulted if Petitioner returned to state court. *See Snowden*, 135 F.3d at 736. Petitioner could not return to the state court to raise this ground because he already filed a Rule 3.850 motion in the state court. "[F]ailure to raise the constitutional issues surrounding the errors in [a petitioner's] first post-conviction petition in the Florida courts bars [the petitioner]

[3] Alternatively, Petitioner's claim is without merit because any error on the part of the trial court was harmless. *See United States v. Travis*, 311 F. App'x 305, 311 (11th Cir. 2009) (noting that Confrontation Clause errors are subject to harmless error analysis). Petitioner asserts that his Sixth Amendment rights were violated by Dr. Jacobs-Alvarez's testimony at the pre-trial hearing. Even if Dr. Jacobs-Alvarez was not properly sworn before giving testimony at the pre-trial hearing, Petitioner cannot demonstrate that the error had a "substantial and injurious effect or influence in determining the jury's verdict" because Dr. Jacobs-Alvarez did not testify at trial. *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Accordingly, Claim One will be denied pursuant to § 2254(d).

from raising these new issues in a successive petition." *Id.* at 736 n.4. Thus, Petitioner's claim is procedurally defaulted.

Petitioner asserts that pursuant to *Martinez*, he can establish cause for the procedural default. However, Petitioner must also show that the defaulted claim is substantial, or in other words, that the claim has some merit. 132 S. Ct. at 1319.

Pursuant to Florida law, "'[a]n unsworn witness is not competent to testify.'" *Willis v. Romano*, 972 So. 2d 294, 294 (Fla. 5th DCA 2008) (citing *Houck v. State,* 421 So. 2d 1113, 1115 (Fla. 1st DCA 1982)). Section 90.605, Florida Statutes provides:

> Before testifying, each witness shall declare that he or she will testify truthfully, by taking an oath or affirmation in substantially the following form: "Do you swear or affirm that the evidence you are about to give will be the truth, the whole truth, and nothing but the truth?" The witness's answer shall be noted in the record.

Fla. Stat. § 90.605(1) (2012). Generally, "[t]estimony may be taken through communication equipment only if a notary public or other person authorized to administer oaths in the witness's jurisdiction is present with the witness and administers the oath consistent with the laws of the jurisdiction." Fla. R. Jud. Admin. 2.530(d)(3). However, "[i]f the testimony to be presented utilizes video conferencing or comparable two-way visual capabilities, the court in its discretion may modify the procedures set forth in this rule to accommodate the technology utilized." Fla. R. Jud. Admin. 2.530(d)(5).

Dr. Jacobs-Alvarez testified via telephone, therefore, two-way visual capabilities were not present in this case. Dr. Jacobs-Alvarez was sworn in prior to her testimony. (Doc. 7-2 at 31). However, there is no indication whether a notary public was present with Dr. Jacobs-Alvarez. (*Id.*). It appears that the trial court merely relied on the clerk to swear in the witness over the telephone. (*Id.*). Despite this error, Petitioner cannot demonstrate that counsel's failure to object resulted in prejudice. Dr. Jacobs-Alvarez's telephonic testimony was the only evidence presented by the State

at the hearing in support of the motion seeking to allow the victim to testify via closed circuit television. *See Rivero v. State*, 121 So. 3d 1175 (Fla. 3d DCA 2013) (noting that a violation of Rule 2.530(d) of the Florida Rules of Judicial Administration would result in exclusion of improper telephonic testimony).

However, the victim would have nonetheless been able to testify against Petitioner at trial contrary to Petitioner's allegations. Petitioner attempts to disqualify the victim's testimony at trial by arguing that the error in allowing Dr. Jacobs-Alvarez's testimony invalidates the victim's testimony. (Doc. 11 at 8). This assertion is too speculative to sustain a claim of ineffective assistance of counsel. *See Tejeda v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991) (stating vague, conclusory, speculative and unsupported claims cannot support relief for ineffective assistance of counsel). Petitioner cannot show that but-for counsel's actions, there is a reasonable probability that the outcome of trial would have been different.

Petitioner has not met his burden of demonstrating that this claim is substantial. Therefore, it is procedurally barred. Accordingly, the Court will deny Claim Two.

C. Claims Three and Four

Petitioner alleges in Claim Three he was denied his Sixth Amendment right to counsel because the trial court failed to provide him with "instantaneous electronic communication" with counsel during the victim's testimony. (Doc. 1 at 10). In Claim Four, Petitioner contends that trial counsel was ineffective for failing to object to the trial court's failure to "provide immediate and direct electronic communication between counsel and defendant." (*Id.* at 12). Petitioner raised these claims in his Rule 3.850 motion. (Doc. 7-3 at 179-80). The trial court summarily denied the claims, concluding counsel had no basis to object to the trial court's procedures during the closed circuit testimony because the Supreme Court of the United States has held that such procedures do

not deny the right to confront one's accuser when necessary to prevent trauma to a child witness. (Doc. 7-4 at 59-61). The Fifth DCA *per curiam* affirmed. (Doc. 7-5 at 215).

The Sixth Amendment affords a criminal defendant the right "to Assistance of Counsel for his defence [sic]." U.S. Const. amend. VI. "It has long been recognized that the right to counsel is the right to effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970). The right to the effective assistance of counsel enables a criminal defendant to subject his case to "meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656-57 (1984). If a defendant is subject to the complete denial of counsel, it is presumed that the adversarial process was unfair or unreliable. *Id.* at 659.

The Sixth Amendment also provides "[i]n all criminal cases, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The Confrontation Clause "reflects a preference for face-to-face confrontation at trial, a preference that must occasionally give way to consideration of public policy and the necessities of the case." *Maryland v. Craig*, 497 U.S. 836, 849 (1990) (citations omitted). Specifically, a "defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation . . . only where denial of such confrontation is necessary to further an important public policy and where the reliability of the testimony is otherwise assured." *Id.* at 850. To ensure that a violation of a defendant's right to accuse witnesses is not violated by employing a procedure such as testifying by closed circuit television, the trial court should (1) hold an evidentiary hearing and (2) make findings regarding whether the denial of a face-to-face confrontation furthers an important public policy and whether the reliability of the subject testimony is otherwise assured. *Id.* at 850, 855; *see also United States v. Yates*, 438 F.3d 1307, 1312 (11th Cir. 2006).

In the instant case the trial court held an evidentiary hearing regarding whether to employ closed circuit television for the victim's testimony at trial. (Doc. 7-2 at 29-61). After hearing expert testimony regarding the matter, the trial court determined that a departure from a face-to-face confrontation was warranted because the child victim had extreme physical anxiety, loss of focus, sleeping and eating difficulties, and an inability to perform in school. (*Id.* at 60). The trial court concluded that if the victim were required to testify face-to-face, she would suffer "such effects that it would make it difficult for her to talk." (*Id.*). The trial court later determined that defense counsel could be physically present during the victim's testimony. (*Id.* at 181-83). The trial court also gave defense counsel an opportunity to confer with Petitioner regarding any other questions he had for the victim. (*Id.* at 183).

The trial court followed the proper procedure for allowing the victim to testify via closed circuit television. Additionally, there is no indication that the communication procedure employed, *i.e.*, allowing defense counsel to communicate with Petitioner at the conclusion of the victim's testimony, was improper. Petitioner has presented no case law suggesting that the trial court was required to allow "instantaneous electronic communication." Petitioner retained his full opportunity to cross-examine the victim, and the trial judge and jury were able to view the demeanor of the victim as she testified. *See Craig*, 497 U.S. at 851-52 (noting that the Confrontation Clause is satisfied if the witness testifies under oath, the defendant retains the ability to cross-examine the witness, and the trial judge and jury retain the ability to view the demeanor of the witness).

Petitioner has not shown that the inability to instantaneously communicate with counsel amounts to the complete denial of counsel. Furthermore, counsel's failure to object to this method of communication does not amount to deficient performance, nor can Petitioner demonstrate that

he sustained prejudice as a result. Therefore, the state court's denial of these claims was neither contrary to, nor an unreasonable application of, clearly established federal law. Accordingly, Claims Three and Four will be denied pursuant to § 2254(d).

E. Claim Five

Petitioner alleges trial counsel was ineffective for failing to properly inform him of the penalties he faced, the strength of the State's case, and the "potential likelihood that he would be convicted at trial." (Doc. 1 at 14). Petitioner states that had counsel properly advised him of these matters and the fact that he could be convicted solely on the victim's testimony, he would have accepted the State's plea offer of fifteen years in prison followed by ten years of sex offender probation. (*Id.* at 14-15).

Petitioner raised this claim in his Second Supplemental Rule 3.850 motion. (Doc. 7-4 at 22-24). The trial court denied this claim as untimely. (*Id.* at 62). Although this claim is procedurally defaulted, Respondents address the claim on the merits. Thus, it appears that Respondents have waived the procedural bar. To the extent the Court may *sua sponte* invoke the procedural bar, it declines to do so. *See Esslinger v. Davis*, 44 F.3d 1515, 1524 (11th Cir. 1995) (a "district court may invoke the bar *sua sponte* [only] where . . . requiring the petitioner to return to state court to exhaust his claims serves an important federal interest").

In Lafler v. Cooper, 132 S. Ct. 1376 (2012), and *Missouri v. Frye*, 132 S. Ct. 1399 (2012), the Supreme Court of the United States held that the Sixth Amendment right to effective assistance of counsel extends to plea negotiations, and defense counsel has a duty to communicate a formal plea offer to the accused. To show prejudice, a defendant must demonstrate a reasonable probability that he would have accepted the plea offer but for counsel's actions, the plea would

have been entered, and the plea would have resulted in a lesser charge or lower sentence. *Lafler*, 132 S. Ct. at 1383-85; *Frye*, 132 S. Ct. at 1408-09.

The record reflects that the State offered Petitioner a negotiated plea whereby he would agree to plead guilty to Counts Two, Four, and Five, in exchange for a fifteen-year term of incarceration followed by a ten-year term of sex offender probation. (Doc. 7-1 at 19). Petitioner told the trial court that counsel had conveyed the plea offer. (*Id.* at 20). Petitioner was advised of the maximum penalties he faced if he were convicted at trial, including that he faced a potential life sentence and also could receive a twenty-five-year minimum mandatory term for Count Three. (*Id.*). The trial court discussed whether Petitioner intended to call witnesses at trial and Petitioner responded by stating that he intended to call only one witness at trial. (*Id* at 22).). Petitioner indicated that he wished to proceed to trial. (*Id.* at 20).

Petitioner was fully aware of the penalties he faced if convicted at trial. Despite knowledge of a potential life sentence, the possibility of a twenty-five-year mandatory minimum term, and the real possibility that the victim could testify at trial, Petitioner rejected the plea offer. Petitioner's representations to the trial court are presumed true, and he has not shown that the Court should overlook his statements. *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) (stating "the representations of the defendant . . . [at a plea proceeding] constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity."). Petitioner cannot demonstrate that but for counsel's advice, he would have entered a plea instead of going to trial. *Lafler*, 132 S. Ct. at 1383-85; *Frye*, 132 S. Ct. at 1408-09. The state court's denial of this claim was neither contrary to, nor an unreasonable application of, clearly established federal law. Therefore, the Court will deny Claim Five.

F. Claim Six

Petitioner contends counsel was ineffective for failing to file a motion for mistrial. (Doc. 1 at 16). In support of this claim, Petitioner maintains that counsel should have moved for a mistrial after the prosecutor improperly commented on his failure to testify. (*Id.*). Petitioner admits that Claim Six is unexhausted. (*Id.* at 16-17). Petitioner asserts that pursuant to *Martinez*, he can establish cause for the procedural default. (Doc. 1 at 16). However, Petitioner must also show that the defaulted claim is substantial, or in other words, that the claim has some merit. 132 S. Ct. at 1319.

Petitioner takes issue with the following statement of the prosecutor:

> [Defense counsel] has given you lots of things speculate about on how perhaps [the victim] came up with these stories, as she calls them. Well, if she was coming up with stories, first of all, why was she coming up with stories? There has been no evidence presented about any reasons why [the victim] made this up, none. There is no indications [sic] about family problems. This was the husband –

(Doc. 7-3 at 19). Defense counsel objected to this statement and argued that the State was improperly attempting to shift the burden to the defense. (*Id.* at 19-20). The trial court held a bench conference, and the prosecutor stated that the comment was in response to the defense counsel's assertion that the victim was making up the accusations. (*Id.* at 20). The trial court overruled the objection, and defense counsel decided to forego moving for a mistrial. (*Id* at 21.).

Claims based on statements of a prosecutor are assessed using a two-pronged analysis: first, a court must determine whether the comments at issue were improper, and, second, whether any comment found to be improper was so prejudicial as to render the entire trial fundamentally unfair. *Spencer v. Sec'y, Dep't of Corr.*, 609 F.3d 1170, 1182 (11th Cir. 2010); *see also Cargill v. Turpin*, 120 F.3d 1366, 1379 (11th Cir.1997). A trial is rendered fundamentally unfair only where there is a reasonable probability that the outcome of the trial would have been different or a

probability sufficient to undermine confidence in the outcome. *Spencer*, 609 F.3d at 1182; *Williams v. Kemp*, 846 F.2d 1276, 1283 (11th Cir. 1988).

The prosecutor's comments were not improper nor did they render the trial fundamentally unfair. First, the statement cannot be read as an improper comment on Petitioner's right to remain silent. The prosecutor did not reference Petitioner's failure to testify or give a statement. Additionally, the comment did not amount to an improper shift of the burden of proof. Federal courts have held that prosecutors must "refrain from making burden-shifting arguments which suggest that the defendant has an obligation to produce any evidence or to prove innocence." *See United States v. Sosa*, 208 F. App'x 752, 756 (11th Cir. 2006) (quotation omitted); *Cook v. Schriro*, 538 F.3d 1000, 1020 (9th Cir. 2008) ("Prosecutors may comment on the failure of the defense to produce evidence to support an affirmative defense so long as it does not directly comment on the defendant's failure to testify."); *Duncan v. Stynchombe*, 704 F.2d 1213, 1215-16 (11th Cir. 1983) (comments made by a prosecutor in an attempt to point out to the jury the lack of evidence and failure of the defense, as opposed to the failure of the defendant, is not burden shifting). The State did not suggest that Petitioner was required to produce evidence or prove his innocence.

However, even if the statement was improper, the trial court instructed the jury on the burden of proof, noting that Petitioner was not required to present evidence and the State was required to prove Petitioner's guilt beyond a reasonable doubt. (Doc. 7-3 at 32-33). It is generally presumed that jurors follow their instructions. *See Ruiz v. Sec'y, Dep't of Corr.*, 439 F. App'x 831, 834 (11th Cir. 2011); *Puiatti v. McNeil*, 626 F.3d 1283, 1314-15 (11th Cir. 2010). Thus, there is no indication that the comment impermissibly shifted the burden of proof to the defense. Further, Petitioner cannot show that but for counsel's failure to file a motion for mistrial, a reasonable

probability exists that the outcome of the trial would have been different. Petitioner has not met his burden of demonstrating that this claim is substantial, therefore it is procedurally barred. Accordingly, the Court will deny Claim Six.

G. Claim Seven

Petitioner asserts that trial counsel was ineffective for failing to notify him about the evidentiary hearing on the motion to allow the victim to testify via closed circuit television. (Doc. 1 at 17). Petitioner states he did not consent to counsel's waiver of his right to be present at the evidentiary hearing. (*Id.* at 18). Petitioner raised this claim in his Rule 3.850 motion. (Doc. 7-3 at 177). The trial court denied the claim on the merits, concluding that Petitioner's right to be present at the crucial stages of trial does not extend to every conference at which the case is discussed. (Doc. 7-4 at 58-59). The Fifth DCA *per curiam* affirmed. (Doc. 7-5 at 215).

A criminal defendant has a constitutional right to be present at any critical stage of the trial proceedings. *See Kentucky v. Stincer*, 482 U.S. 730, 745 (1987). The Supreme Court has stated that a defendant has a due process right to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge. . . . [T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence. . . ." *Stagg v. Sec'y, Dep't of Corr.*, 2013 WL 6184058, at *16 (N.D. Fla. Nov. 26, 2013) (citing *Snyder v. Massachusetts*, 291 U.S. 97 (1934)). However, the right to be present at a critical stage of the proceedings is subject to a harmless error analysis. *See United States v. Diamond*, 482 F. App'x 380, 383 (11th Cir. 2012) (citing *Rushen v. Spain*, 464 U.S. 114, 117 n. 2 (1983)).

Petitioner contends that he did not waive his right to be present at the evidentiary hearing to determine whether the victim would be allowed to testify by closed circuit television. Even

assuming the pretrial evidentiary hearing was a critical stage in the proceeding, counsel's failure to compel Petitioner's presence did not affect the outcome of the matter. The parties discussed only legal issues, and therefore, Petitioner's presence was not necessary. *See Escobar v. McDonough*, No. 1:06-cv-207-MP-AK, 2008 WL 2635565, at *9 (N.D. Fla. July 2, 2008) (denying the petitioner's claim that he was improperly excluded from a conference on a motion for judgment of acquittal because the motion hearing discussed only legal issues and the petitioner's presence was not needed); *Seibert v. State*, 64 So. 3d 67, 85-86 (Fla. 2010) (noting that the defendant's exclusion from hearings during which legal matters were discussed was not erroneous because the defendant "could have provided no useful input."). Petitioner has not demonstrated that counsel's alleged failure to notify him regarding the hearing and her waiver of his presence resulted in prejudice. Consequently, the state court's rejection of this claim was neither contrary to, nor an unreasonable application of, clearly established federal law. Therefore, the Court will deny Claim Seven pursuant to § 2254(d).

Allegations not specifically addressed herein are without merit.

IV. CERTIFICATE OF APPEALABILITY

This Court should grant an application for a certificate of appealability only if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Lamarca v. Sec'y, Dep't of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009). However, the petitioner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

Petitioner fails to demonstrate that reasonable jurists would find the Court's assessment of

the constitutional claims debatable or wrong. Moreover, Petitioner cannot show that jurists of reason would find this Court's procedural rulings debatable. Petitioner fails to make a substantial showing of the denial of a constitutional right. Thus, the Court will deny Petitioner a certificate of appealability.

V. CONCLUSION

Therefore, it is **ORDERED** and **ADJUDGED** as follows:

1. The Petition for Writ of Habeas Corpus (Doc. 1) is **DENIED**.
2. This case is **DISMISSED with prejudice**.
3. Petitioner is **DENIED** a certificate of appealability.
4. The Clerk of Court is directed to enter judgment in favor of Respondents and to close this case.

DONE and **ORDERED** in Orlando, Florida on February 17, 2017.

CARLOS E. MENDOZA
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party