IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-12339-C

CHARLENE TERRY-ANN WALKER ROSA,

Petitioner-Appellant,

versus

STATE OF FLORIDA,
ATTORNEY GENERAL OF THE STATE OF FLORIDA,

Respondents-Appellees.

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

ORDER:

Charlene Terry-Ann Walker Rosa moves for a certificate of appealability ("COA") in order to appeal the dismissal of her 28 U.S.C. § 2254 petition for writ of habeas and denial of her Fed. R. Civ. P. 59(e) motion to alter or amend the judgment. To merit a COA, Rosa must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Because Rosa failed to make a substantial showing of the denial of a constitutional right, her motion for a COA is DENIED.

Rosa's motion for appointment of counsel is also DENIED AS MOOT.

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 16-cv-62332-BLOOM

CHARLENE TERRY-ANN WALKER ROSA,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.
_____/

ORDER

THIS CAUSE is before the Court on Petitioner Charlene Terry-Ann Walker Rosa's Motion for Certificate of Appealability, ECF No. [89]. Under 28 U.S.C. § 2253(c)(1)(A), an appeal may not be taken from a final order in a habeas corpus proceeding unless a Certificate of Appealability has issued. The Certificate must contain a finding that the applicant has made a substantial showing of the denial of a constitutional right and must indicate which specific issue or issues satisfy the required showing. Applying these standards, the Court finds that there is no substantial showing of a denial of a constitutional right. Accordingly, it is

ORDERED AND ADJUDGED that the Petitioner Charlene Terry-Ann Walker Rosa's Motion for Certificate of Appealability, ECF No. [89], is **DENIED**.

DONE AND ORDERED in Miami, Florida, this 26th day of September, 2018.

BETH BLOOM
UNITED STATES DISTRICT JUDGE

cc: counsel of record

Charlene Terry-Ann Walker Rosa
Homestead Correctional Institution
19000 S.W. 377th Street, Suite 200
Florida City, FL 33034

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-cv-62332-BLOOM/WHITE

CHARLENE TERRY-ANN WALKER ROSA,

Petitioner,

v.

JULIE L. JONES,
SEC'Y, FLA. DEP'T OF CORR'S,

Respondent.
_____/

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

THIS CAUSE is before the Court upon *pro se* Petitioner's Petition for Writ of Habeas Corpus, ECF No. [7], filed pursuant to 28 U.S.C. § 2254 (the "Petition"), which was previously referred to the Honorable Patrick A. White for a Report and Recommendation on any dispositive matters. *See* ECF No. [3]. On April 2, 2018 Judge White issued a Report and Recommendation (the "Report"), recommending that the Petition be denied on the merits as to claims 1, 2, and 4 and procedurally barred as to claim 3. *See* ECF No. [53]. The Report also recommended that a certificate of appealability be denied and that the case be closed. In the Report, Petitioner was advised that "[o]bjections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report." *Id.* at 38. She then timely filed Objections and separately filed an Application for Certificate of Appealability. *See* ECF Nos. [54] and [59]. The Court has since conducted a *de novo* review of Magistrate Judge White's Report and Recommendation, Petitioner's Objections, the record, and is otherwise fully advised. *See Williams v. McNeil*, 557 F.3d 1287, 1291 (11th Cir. 2009) (citing 28 U.S.C. § 636(b)(1)).

I. BACKGROUND

Petitioner was charged with first-degree murder of Lola Salzman by bludgeoning and/or stabbing with a knife in violation of Florida Statute § 782.04(1). *See* ECF No. [30-1] at 13-14. On July 5, 2007, the jury found Petitioner guilty of first-degree murder and she was sentenced to a term of life in prison without the possibility of parole. *Id.* at 16-22. After a lengthy history of proceedings in state court, Petitioner timely filed her Petition for habeas relief in this tribunal. *See* ECF No. [1]. The Report summarized Petitioner's four claims as follows:

> 1. Ineffective assistance of counsel where counsel's opening statements prejudiced her from receiving a fair trial. Petitioner's conviction was obtained by an involuntary concession of guilt without understanding the nature of the charge and the consequences of a plea since Counsel did not have Petitioner's affirmative, explicit consent to concede her guilt. Counsel's opening and closing statements, and cross examination of witnesses were a demonstration of evidence conceding Petitioner's guilt.
>
> 2. Ineffective assistance of counsel where:
>
> (A) Counsel was ineffective for conceding to the authenticity of the telephone conversations;
>
> (B) Counsel elicited testimony that Petitioner's blood was found on a picture on a wall at the crime scene
>
> (C) Counsel admitted to or failed to challenge evidence presented that Petitioner extorted a friend to collect payment from the victim.
>
> (D) Counsel knowingly presented false testimony that Petitioner had a scar on her hand and that she showed it to police at the time of the arrest as evidence that the scar was a result of the "alleged murder" of the victim;
>
> (E) Counsel informed the jury that Petitioner left the country because of her consciousness of guilt;
>
> (F) Counsel conceded to facts in the prosecution's case without Petitioner's consent, which denied meaningful adversary testing; and
>
> (G) Counsel refused to "strategize" with Petitioner.

3. Ineffective assistance of counsel where Petitioner was shackled throughout the entire trial in front of the jury, which prejudiced the Petitioner in violation of her right to a fair trial.

4. Ineffective assistance of counsel where counsel failed to:

(A) Call Dr. Edward Greenburg to testify as an expert witness who would have stated that the victim died of natural causes. Counsel improperly conceded that the victim died as a result of 43 stab wounds; and

(B) Assert an alibi defense with the testimony of Thomas Fairbough.

ECF No. [53] at 2-4. Ultimately, the Report concluded that, as to claims 1, 2, and 4, the Petition failed on the merits and, as to claim 3, it was procedurally barred for failure to exhaust the remedy in state court.

II. OBJECTIONS

Petitioner's lengthy Objections raise multiple arguments, which the Court summarizes as follows: (1) the Report did not contain a verbatim recitation of her four claims for relief; (2) Petitioner did not receive the assistance of counsel to prepare her Petition and did not know she could file additional grounds for habeas relief; (3) the Report should have not relied upon the recitation of facts contained within the opinion issued by Florida's Fourth District of Appeals in her direct appeal; (4) claim 3 is not procedurally barred because she has uncovered new evidence of her actual innocence; (5) the Report erred in finding that claim 1 did not constitute ineffective assistance of counsel; and (6) the Report misconstrued her position as to claim 2(a) regarding the authenticity of telephone conversations. *See* ECF No. [54]. In addition, Petitioner separately filed an Application for Certificate of Appealability. The Court addresses each issue in turn.

a. Objection Number 1

Petitioner did not object to the recommendation that claims 2(B) through 2(G) and 4 be denied on the merits, other than to argue that the report failed to verbatim recite all claims and

supporting facts from her Petition. She claims that this failure rendered the Report inadequate and deprived her of a fair and impartial review of her constitutional claims. *See* ECF No. [54] at 6-9. However, Judge White explicitly states in the Report that he reviewed the Petition at ECF No. [7], and he accurately summarized each of Petitioner's claims. *See* ECF No. [53]. The Report need not include a word-for-word recitation of all claims and facts. The Report reflects that Judge White meticulously analyzed each of the four claims in the Petition along with all subparts and the underlying record. *Id.* Therefore, Petitioner's objection is without merit and is overruled. And, because Petitioner did not raise any substantive objections to the recommendation that claims 2(B) through 2(G) and claim 4 be denied on the merits, she has foregone the right to otherwise object to the legal analysis and factual findings made by Judge White as to these specific claims.

b. Objection Number 2

Petitioner next contends that conflict-free counsel should have been appointed to assist her with the preparation of her Petition. It should be noted that prior to the instant objection, Petitioner filed no less than four motions requesting the appointment of counsel and on four occasions, Petitioner's request was denied. *See* ECF Nos. [10], [11], [32], [39], [49], [50], [57], [58]. In support of her objection, Petitioner argues that she is financially indigent and cannot afford counsel and lacks the intellectual ability to properly articulate legal arguments in support of her request for habeas relief. *See* ECF No. [54]. More specifically, Petitioner states she has an intellectual quotient of 72 and is, therefore, intellectually disabled, referring to a report prepared by the Department of Corrections.

A petitioner does not have a constitutional right to counsel during post-conviction collateral attack proceedings. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) ("Our cases

establish that the right to appointed counsel extends to the first appeal of right, and no further. . . . We think that since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori,* he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process."). The decision whether to appoint counsel on a petition for habeas relief is subject to the discretion of the trial court and "will not be overturned absent a showing of fundamental unfairness which impinges on the due process rights of the petitioner." *Vandenades v. United States*, 523 F.2d 1220, 1225–26 (5th Cir. 1975).

Petitioner's claim of intellectual disability is belied by the record. While she attached an Intake Psychological Screening report dated July 10, 2007 to support her fourth Motion for Appointment of Conflict-Free Counsel, ECF No. [57], indicating that her IQ is 72, the report also concluded she has no mental retardation and does not suffer from any mildly impaired adaptive functions. *Id.* at 21. Further, a review of the record reveals that Petitioner has filed lengthy, eloquent, and detail-oriented filings throughout the proceedings in which she has cited to relevant standards, case law, and the state-court record. Contrary to her claim, her filings reveal she is able to articulate legal arguments in support of her request for relief. Because the record does not reveal a need for an evidentiary hearing, the appointment of counsel is not mandatory, and there has been no showing that the interest of justice requires an appointment of counsel, Petitioner's objection on this basis is overruled. *See* Rules Governing Section 2254 Cases Rule 8(c); see *McGriff v. Dept. of Corr's*, 338 F.3d 1231 (11th Cir. 2003); *Thomas v. Scott*, 47 F.3d 713, 715 (5th Cir. 1995).

Also intertwined with this objection is Petitioner's claim that this Court only allowed her to pursue four of her thirty claims for habeas relief. *See* ECF No. [54] at 2. Petitioner states that

the Court ordered her to file an amended motion and only allowed her to use the space provided in the form, preventing her from adding extra pages. *Id.* Again, Petitioner's claim is belied by the record. Although the Court required that she use the form petition, she was repeatedly informed that her motion and its incorporated memorandum of law could be up to twenty pages excluding the title page, signature pages, certificates of good faith, and certificate of service. *See* ECF No. [4]. In addition, Petitioner was informed that she could file an amended petition within the twenty-page limit and could *exceed* such a limitation with prior leave of court and upon a showing of good cause. *Id.* The Order did not limit Petitioner to the space provided within the form and did not prevent her from adding pages. *Id.* Despite this, Petitioner opted to file a sixteen-page application, raising only four claims, and never requested leave of Court to file a petition exceeding twenty pages so that she could raise all thirty claims for relief. The Court, therefore, finds this objection to be without merit.

c. Objection Number 3

Next, Petitioner objects to the Report's reliance upon and recitation of facts contained within the Fourth District of Appeals' opinion issued in her direct appeal. *See* ECF No. [54] at 9-12. She argues that, because she did not receive effective assistance of counsel during the trial, the facts as explained in the appellate court should not be considered as she "denie[s] all the allegations in the direct appeal." *Id.* at 11. The Court finds no error in the Report's reliance upon and recitation of facts from the Fourth District Court of Appeals' decision when discussing the underlying facts of the offense and procedural history. The appellate court's opinion provides a recitation of the evidence presented at trial, regardless of whether Petitioner disagrees with the veracity of such evidence and how her case was presented to the jury. As further

explained below, this Court finds that Petitioner failed to prove her claims of ineffective assistance of counsel, rendering her objection on this point moot.

d. Objection Number 4

As to her next objection, Petitioner argues that claim 3 is not procedurally barred. She does not dispute Judge White's conclusion that she failed to exhaust claim 3 in state court by waiting to raise the claim until her third amended motion for post-conviction relief filed on January 2, 2015. Instead, she argues that the Court should consider an exception to the procedural time bar to prevent a miscarriage of justice. *See* ECF No. [54] at 13. Specifically, she asserts a claim of actual innocence, which allows consideration of a time-barred or procedurally-barred claim. *See McQuiggin v. Perkins*, 569 U.S. 383 (2013). While Petitioner is correct that "actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar," the Supreme Court has explained that "tenable actual-innocence gateway pleas are rare." *McQuiggin*, 569 U.S. at 386. A prisoner may present a constitutional claim, such as ineffective assistance of counsel, on the merits despite a procedural bar only upon a "credible showing of actual innocence." *Id.* at 392–93. "To be credible, such a claim requires petitioner to support his allegations of constitutional error with **new reliable evidence**—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995) (emphasis added). "[A] petitioner does not meet the threshold requirement unless he persuades 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." *McQuiggin*, 569 U.S. at 386 (citing *Schlup,* 513 U.S. at 329 and *House v. Bell,* 547 U.S. 518, 538 (2006) (emphasis added)). "The gateway should open only when a petition presents '**evidence** of

innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error." *Id.* at 401 (emphasis added). It should also be noted that "[u]nexplained delay in presenting new evidence bears on the determination whether the petitioner has made the requisite showing." *McQuiggin*, 569 U.S. at 399. Such unexplained delay "should seriously undermine the credibility of the actual-innocence claim." *Id.* at 400.

In support of her objection, Petitioner argues that on June 29, 2017, she discovered "new evidence" when the prison law librarian, Ms. Green, informed her that the computer revealed an amended indictment or information[1] filed on August 23, 2007 – one month after she was convicted. *Id.* at 14. This amended document charged Petitioner with two counts: first-degree murder (Count I) and "'Solicit to Commit Robbery" (Count II). *Id.* According to Petitioner, this newly discovered evidence was filed of record on August 23, 2007 by the Hallandale Police Department in Case No. 062005CF01014414A88810 and established that the State conceded defense counsel's theory of solicitation in which Petitioner solicited Ivan McKenzie a/k/a Dutch to extort payment from the victim and that it was Dutch – not Petitioner – who killed the victim. *Id.* Had the State presented the amended charging document to defense counsel prior to trial, Petitioner argues that her counsel would not have pursued a strategy in which he admitted to third-degree murder. *Id.* at 16.

Despite these arguments, Petitioner has not presented the Court with any evidence of her actual innocence. She simply provides allegations that the prison law librarian, Ms. Green, informed her of the August 23, 2007 amended indictment or information. Petitioner did not

[1] It is unclear whether Petitioner claims the State filed an amended indictment or amended information as she uses the two words interchangeably in her Objections. *See* ECF No. [54] at 14-16.

supply the Court with a copy of the alleged amended indictment or information that forms the basis of her claim of actual innocence or an affidavit from Ms. Green attesting to the discovery. Instead, Petitioner simply provides an unsubstantiated allegation, which falls far short of satisfying the demanding standard articulated in *Schlup*. Given the lack of evidence, the Court cannot evaluate the claim to determine whether it supports Petitioner's actual innocence argument.

The Court also finds no merit in the argument that an amended information or indictment filed in August of 2007 in the public docket of the Seventeenth Judicial Circuit in and for Broward County, Florida constitutes *newly discovered* evidence. Had Petitioner exercised any degree of diligence, she could have discovered such readily available information. Even if she truly "discovered" this public filing on June 29, 2017, Petitioner still waited until after the issuance of the Report (more than nine months) to raise her actual innocence argument and did so without any supporting evidence. Petitioner's failure to supply any reliable evidence and her unexplained delay in raising this argument fail to satisfy the exacting standard under *Schlup*. *See Jemison v. Nagle*, 158 F. App'x 251, 256 (11th Cir. 2005) (holding that the district court did not abuse its direction in failing to conduct an evidentiary hearing when the petitioner did not produce any reliable evidence to support the claim of actual innocence, such as the allegedly exculpatory DNA report or its results). For these reasons, Petitioner cannot avail herself of this exception to resurrect her procedurally barred claim of ineffective assistance of counsel - claim 3. Petitioner's objection is, therefore, overruled.

e. Objection Number 5

Next, Petitioner argues that defense counsel lacked the authority to waive her right against self-incrimination and her right to confront her witnesses when her counsel informed the

jury that the essential facts and elements of the prosecution's case were not in dispute and made a concession of guilt as to lesser-included offenses. *See* ECF No. [54] at 20-26. This objection relates to Judge White's recommendation that claim 1 be denied on the merits because Petitioner failed to demonstrate that her counsel's performance was deficient and prejudicial. *Id.*

Section 2254(d) only allows federal courts to grant habeas relief 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). Applying this standard, a state court's decision will be deemed "contrary to" clearly established Supreme Court precedent if either (1) "the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases," or (2) "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 (2000).

In a § 2254 petition for habeas relief based on a claim of ineffective assistance of counsel, "[t]he pivotal question is whether the state court's application of the *Strickland* standard was unreasonable." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). This is *not* the same as asking whether defense counsel's performance fell below *Strickland*'s standard. *Id.* Under *Strickland*, a habeas petitioner was must satisfy a two-prong inquiry: (1) defense counsel's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard

itself." *Id.* "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." *Id.* (quoting *Yarborough v. Alvarado,* 541 U.S. 652, 664 (2004)). "[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by th[e Supreme] Court." *Id.* (quoting *Knowles v. Mirzayance,* 556 U.S. 111, 122 (2009)). This standard under § 2254 was intended to be a difficult one to satisfy. *Id.* at 102 ("If this standard is difficult to meet, that is because it was meant to be.").

The Court must now apply these principles to Petitioner's claim that her counsel's performance was ineffective when he allegedly waived her right against self-incrimination as well as her right to confront her witnesses by conceding her guilt to lesser-included offenses. When the state trial court ruled on this claim and denied the habeas relief, it adopted the State's arguments contained within its response brief. *See* ECF No. [30-1] at 658. The State, in turn, argued that defense counsel never conceded Petitioner's guilt to the crime charged – first degree murder – and instead made arguments in closing argument that she was a principal to a third-degree murder only after the State presented its evidence and that this tactic was a matter of trial strategy to admit only a lesser-included offense. *Id.* at 633-634. Under *Strickland*, Petitioner bears the burden of proving that her counsel's concession "was objectively unreasonable and that, but for the concession, a reasonable probability exists that the outcome of his trial would have been different." *Harvey v. Warden, Union Corr. Inst.*, 629 F.3d 1228, 1249–53 (11th Cir. 2011). The Court now considers whether Petitioner's objection to the Report has merit.

The Eleventh Circuit Court of Appeals has considered similar claims of ineffective assistance of counsel. *See e.g. McNeal v. Wainwright*, 722 F.2d 674, 676–77 (11th Cir. 1984).

In *McNeal*, the defendant was also charged with first-degree murder and received a life sentence. *Id.* Much like in this case, McNeal's counsel never stated that he was guilty of murder and instead argued that the government had, at most, proven manslaughter as there was no evidence of premeditation. *Id.* Finding that "[a]n attorney's strategy may bind his client even when made without consultation" and that there was an overwhelming amount of evidence against McNeal, the Eleventh Circuit held that it "cannot be said that the defense strategy of suggesting manslaughter instead of first degree murder was so beyond reason as to suggest defendant was deprived of constitutionally effective counsel." *Id.* (citing *Thomas v. Zant,* 697 F.2d 977, 987 (11th Cir. 1983)). More recently, the Eleventh Circuit denied habeas relief for a similar ineffective assistance of counsel claim, finding no error in the Florida Supreme Court's determination that the petition failed to prove a deficient performance or prejudice under *Strickland. See Atwater v. Crosby*, 451 F.3d 799, 809 (11th Cir. 2006) (finding that Florida Supreme Court did not unreasonably apply or reach a decision contrary to clearly established federal law when, in light of the overwhelming evidence of guilt presented by the state and in an effort to save the defendant's life, defense counsel argued in closing that there was no evidence of premeditation but that the evidence may support second-degree murder). In a thorough analysis of the *Strickland* prejudice prong, the Eleventh Circuit more recently denied habeas relief when the Florida Supreme court reasoned that a concession to first-degree murder during opening statement "merely restated facts that the jury would soon hear when the State introduced [the defendant's] confession into evidence." *Harvey,* 629 F.3d at 1252. Although defense counsel in *Harvey* conceded first-degree murder in opening without first consulting the defendant, the Eleventh Circuit determined that the Florida Supreme Court's finding of no prejudice was not "an unreasonable determination of the facts." *Id.* (quoting 28 U.S.C. §

2254(d)(2)). This is because the State's evidence against the defendant was overwhelming and included his confession, making it "very difficult to see how the outcome of the trial would have been different had Watson not conceded Harvey's guilt, as charged in the indictment." *Id.*

Petitioner argues the Report unreasonably concluded that the concession of guilt was a trial strategy as such a concession was a departure from constitutional principles established by the United States Supreme Court. *See* ECF No. [54] at 24. She further contends that due process does not allow an attorney to admit facts that amount to a guilty plea without the client's consent and that her entry of a not guilty plea required the State to prove the charged offense and any lesser-included offenses beyond a reasonable doubt. *Id.* at 24-25. According to Petitioner, defense counsel's presentation to the jury was "the functional equivalent of a guilty plea," demonstrating that she satisfied both prongs of *Strickland*. *Id.* at 25.

Upon review of the record, the Court concludes that the state court's resolution of this ineffective assistance of counsel claim did not result 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" and did not result "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). During opening statement, defense counsel did *not* concede that Petitioner was guilty of the crime charged, first-degree murder. To the contrary, defense counsel repeatedly stated in opening that "Ms. Rosa did not kill Lola Salzman." *See* ECF No. [31-1] at 367-368. Instead, defense counsel provided a preview of the State's evidence consisting of telephone calls in which Petitioner admitted she enlisted Dutch's assistance to collect money owed by the victim and that the encounter with the victim went awry when she

took a knife and swung it at Petitioner. *Id.* at 364, 366. Defense counsel then argued that Dutch killed the victim. *Id.*

During trial, the State presented evidence that the victim's neighbor saw Petitioner walk into the victim's apartment on the date of her death, July 4, 2002, and later leave hurriedly from the apartment. *See Rosa v. State*, 27 So. 3d 718 (Fla. 4th DCA 2010). Three of Petitioner's fingerprints were found at the scene. *Id.* Cell phone records also confirmed that Petitioner made numerous calls from the victim's apartment on the date of her death. *Id.* Also on this date, Petitioner changed her upcoming departure flight to Jamaica from July 11, 2002 to July 5, 2002 and then again from July 5, 2002 to the evening of July 4, 2002 – the day the victim was killed. *Id.* She then travelled to Jamaica using a passport in the name of "Alicia Lueyen." *Id.* Tape recordings of Petitioner's conversations revealed that she admitted to sending Dutch to collect money from the victim and then stated that Dutch hit the victim with a phone when she threatened to call the police. *Id.* In other taped conversations, she provided conflicting information, stating that she went to a lady's house to collect money on one call, that she did not know what happed to the lady but she probably died in another call, and that she did not know anything about the victim in yet another call. *Id.* And, after her arrest, she voluntarily stated that she worked as an aide for the victim, confronted her about the money owed with her friend Frost, and when doing so, the victim attempted to stab her with a knife. *Id.* Frost then struck the victim in the face followed by them leaving the victim on the floor and driving away in the same vehicle the neighbor described. *Id.*

At the close of the State's case, the Court, the State and defense counsel discussed the inclusion of several lesser-included offenses on the verdict form and in the jury instructions, such as first-degree murder, second-degree murder, third-degree murder, and manslaughter. *See* ECF

No. [31-1] at 1233-1234. The inclusion of these lesser offenses formed part of defense counsel's trial strategy. *Id.* at 1344 ("[T]hat's our theory, Dutch killed her. She set this course of action in motion by asking Dutch to get her money."). At the commencement of the charge conference, the Court turned to the Petitioner and said: "Ms. Rosa, you need to participate in this process." *Id.* at 1234. Petitioner did not voice any objection to the inclusion of the lesser-included offenses in the jury instructions at any point during the charge conference. *See* ECF No. [31-1] at 1233-1252. Thereafter, in closing argument, Petitioner's counsel argued as follows:

> I have never, since this trial started, asserted to you that my client was innocent or was not involved, I would lose all credibility with you if I did, but what I have come before you to say is that my client is not guilty, not guilty of first degree murder; rather, my client committed a much lesser crime, and you're going to get an instruction on that, and that crime is that she committed the crime of third degree murder. That's why we're here today.

See ECF No. [31-1] at 1338.

Given the overwhelming evidence presented by the State against Petitioner, it cannot be said that the defense strategy of conceding third-degree murder instead of first-degree murder "was so beyond reason as to suggest defendant was deprived of constitutionally effective counsel." *McNeal v. Wainwright*, 722 F.2d 674, 676–77 (11th Cir. 1984). In fact, as pointed out in closing, defense counsel believed the defense would have lost credibility had he argued that Petitioner was innocent or not involved at all. *See* ECF No. [31-1] at 1338. "In this light, counsel cannot be deemed ineffective for attempting to impress the jury with his candor and his unwillingness to engage in 'a useless charade.'" *Fla. v. Nixon*, 543 U.S. 175, 192 (2004); *see also Atwater v. Crosby*, 451 F.3d 799, 809 (11th Cir. 2006). Petitioner likewise failed to present any evidence of prejudice by the comments made during opening as defense counsel simply

restated the facts that the State would introduce at trial. *Harvey,* 629 F.3d at 1252. And, in light of the vast amount of evidence presented by the State, Petitioner failed to demonstrate that the outcome of the trial would have been any different had defense counsel not conceded a lesser-included offense. *Id.* Based on the foregoing, the Court cannot conclude that the state trial court unreasonably applied or reached a decision contrary to clearly established federal law or unreasonably determined the facts in light of the evidence presented in the state court proceeding. Thus, Petitioner's claim number 1 is denied on the merits and her objection to the Report is overruled.

f. Objection Number 6

Petitioner's final objection relates to claim 2(a). She argues that the Report misconstrued her position regarding the authenticity of telephone conversations. *See* ECF No. [54] at 27. According to the Objections, her position is not that her counsel was ineffective by failing to object to the presentation of the recorded telephone conversations. *Id.* Instead, she states she "wants the State to present its alleged telephone conversations and all it [sic] evidence to the jury. What she is saying is that she object [sic] to the authenticity of the alleged tapes and all the state evidence for the jury to decide the credibility of the witnesses and the state entire evidence, she is entitle [sic] to that absent that right the jury verdict is unreliable." *Id.* On the one hand, she does not fault her defense counsel for failing to object to the admission of the recorded conversations because she wants the State to present the evidence to the jury and, on the other hand, she objects to the authenticity of the tapes and wants the jury to decide the credibility of the witnesses. Petitioner's objection is irreconcilably inconsistent and unintelligible. To the extent Petitioner claims her attorney was ineffective for not objecting to the authenticity of the

tapes, the Court adopts Judge White's well-reasoned analysis on this point. Therefore, this objection is also overruled.

g. Certificate of Appealability

Finally, Petitioner filed a separate Application for Certificate of Appealability. *See* ECF No. [59]. The Court first finds that Petitioner's Application for Certificate of Appealability is untimely as it is, in reality, a belated objection to Judge White's recommendation that no Certificate of Appealability be issued. *See* ECF No. [59]. Petitioner was cautioned in the Report that she had fourteen days upon her receipt to file her objections with the district court. *See* ECF No. [53] at 38. Although her objections, addressed above, were timely filed, her Application for Certificate of Appealability, which is an additional objection, was not. Petitioner admittedly received the Report on April 6, 2018. *See* ECF No. [54] at 1. She was, therefore, required to provide *all* of her objections to prison officials for mailing no later than April 20, 2018 under the prisoner mailbox rule. *See Newnam v. McDonough*, 2008 WL 539065 (N.D. Fla. Feb. 22, 2008) (citing *Washington v. United States*, 243 F.3d 1299, 1301 (11th Cir. 2001)) (noting that pursuant to the prisoner mailbox rule, "a pleading is considered filed by an inmate on the date it was delivered to prison authorities for mailing, which (absent contrary evidence) the court assumes is the date he signed it"); *see also Garvey v. Vaughn*, 993 F.2d 776, 783 (11th Cir. 1993) (stating that "the date of filing shall be that of delivery to prison officials of a complaint or other papers destined for district court for the purpose of ascertaining timeliness"). Although Petitioner did not date the Certificate of Service, prison officials at Homestead Correctional Institutional stamped the legal mail as received by them on April 25, 2018. *See* ECF No. [59] at 1, 14. Thus, Petitioner failed to timely file this specific objection to the Report as it was filed five days after the deadline.

Despite the untimeliness of the objection, the Court will consider the merits of the request. As explained in Judge White's Report, a certificate of appealability should only be issued if the Petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). If the district court rejects the Petitioner's constitutional claims on the merits, the Petitioner must establish that reasonable jurists would find such an assessment of the constitutional claims to be debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). If the district court rejects a claim for procedural reasons, then 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.* Petitioner has made no such showing as to the Report's denial of claims 1, 2 and 4 on the merits or the denial of claim 3 on procedural grounds. Indeed, the arguments she raises are simply a recitation of the same arguments raised in her Objections, which the Court rejected above and are not subject to debate by reasonable jurists. Thus, Petitioner's objection to Judge White's recommendation that a Certificate of Appealability be denied is also overruled.

In sum, the Court finds Judge White's Report to be well reasoned and correct. The Court agrees with the analysis in Judge White's Report, finds no merit in Petitioner's Objections, and concludes that the Petition must be denied on the merits as to claims 1, 2, and 4 and dismissed as procedurally barred as to claim 3 for the reasons set forth in the Report.

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

1. Magistrate Judge White's Report and Recommendation, **ECF No. [53]**, is **ADOPTED**;

2. Petitioner's Petition, **ECF No. [7]**, is **DENIED** on the merits as to claims 1, 2, and 4 and **DISMISSED** as procedurally barred as to claim 3;

3. Petitioner's Objections, **ECF No. [54]**, are **OVERRULED**;

4. Petitioner's Application for Certificate of Appealability, **ECF No. [59]**, is **DENIED.** No Certificate of Appealability shall issue;

5. All pending motions are **DENIED AS MOOT**; and

6. The Clerk shall **CLOSE** this case.

DONE and ORDERED in Miami, Florida, this 31st day of May, 2018.

BETH BLOOM
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Charlene Terry-Ann Walker Rosa
L06814
Homestead Correctional Institution
Inmate Mail/Parcels
19000 SW 377th Street
Florida City, FL 33034
PRO SE

The Honorable Patrick A. White

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 16-cv-62332-BLOOM

CHARLENE TERRY-ANN WALKER ROSA,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.
_____/

ORDER

THIS CAUSE is before the Court on Petitioner Charlene Terry-Ann Walker Rosa's Motion for Certificate of Appealability, ECF No. [89]. Under 28 U.S.C. § 2253(c)(1)(A), an appeal may not be taken from a final order in a habeas corpus proceeding unless a Certificate of Appealability has issued. The Certificate must contain a finding that the applicant has made a substantial showing of the denial of a constitutional right and must indicate which specific issue or issues satisfy the required showing. Applying these standards, the Court finds that there is no substantial showing of a denial of a constitutional right. Accordingly, it is

ORDERED AND ADJUDGED that the Petitioner Charlene Terry-Ann Walker Rosa's Motion for Certificate of Appealability, ECF No. [89], is **DENIED**.

DONE AND ORDERED in Miami, Florida, this 26th day of September, 2018.

BETH BLOOM
UNITED STATES DISTRICT JUDGE

cc: counsel of record

Charlene Terry-Ann Walker Rosa
Homestead Correctional Institution
19000 S.W. 377th Street, Suite 200
Florida City, FL 33034

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-CIV-62332-BLOOM
MAGISTRATE JUDGE P.A. WHITE

CHARLENE TERRY-ANN WALKER ROSA,

Petitioner,

vs.

JULIE L. JONES,
SEC'Y, FLA. DEP'T OF CORR'S,

Respondent.
_____/

REPORT OF MAGISTRATE JUDGE

I. Introduction

The pro se petitioner, **Charlene Terry-Ann Walker Rosa**, a convicted state prisoner presently confined at the Homestead Correctional Institution, has filed this petition for writ of habeas corpus, pursuant to 28 U.S.C. §2254, attacking the constitutionality of her state conviction and sentence in the Circuit Court of the 17th Judicial Circuit in and for Broward County **case number 04-10827CF10A.**

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

The Court has reviewed the operating petition (DE#7) together

with the online state court criminal docket[1] (hereinafter referred to as "Online Trial Docket"), the relevant appellate history in the Fourth District Court of Appeals (Fourth DCA) and the Florida Supreme Court, the State's response to this Court's order to show cause (DE#29) and its exhibits thereto; and Petitioner's traverse (DE#41).

II. Claims

Construing the arguments liberally as afforded *pro se* litigants pursuant to Haines v. Kerner, 404 U.S. 419 (1972), Petitioner raises the following grounds for relief:

1. Ineffective assistance of counsel where counsel's opening statements prejudiced her from receiving a fair trial. Petitioner's conviction was obtained by an involuntary concession of guilt without understanding the nature of the charge and the consequences of a plea since Counsel did not have Petitioner's affirmative, explicit consent to concede her guilt. Counsel's opening and closing statements, and cross examination of witnesses were a demonstration of evidence conceding Petitioner's guilt. (DE#7:6).

2. Ineffective assistance of counsel where:

   (A) Counsel was ineffective for conceding to the authenticity of the telephone conversations;

   (B) Counsel elicited testimony that Petitioner's blood was found on a picture on a wall at the crime scene;

[1]The online state court criminal docket is located at the following web address: https://www.browardclerk.org.

© Counsel admitted to or failed to challenge evidence presented that Petitioner extorted a friend to collect payment from the victim.

(D) Counsel knowingly presented false testimony that Petitioner had a scar on her hand and that she showed it to police at the time of the arrest as evidence that the scar was a result of the "alleged murder" of the victim;

(E) Counsel informed the jury that Petitioner left the country because of her consciousness of guilt;

(F) Counsel conceded to facts in the prosecution's case without Petitioner's consent, which denied meaningful adversary testing; and

(G) Counsel refused to "strategize" with Petitioner. (DE#7:8).

3. Ineffective assistance of counsel where Petitioner was shackled throughout the entire trial in front of the jury, which prejudiced the Petitioner in violation of her right to a fair trial. (DE#7:9).

4. Ineffective assistance of counsel where counsel failed to:

(A) call Dr. Edward Greenburg to testify as an expert witness who would have stated that the victim died of natural causes. Counsel improperly conceded that the victim died as a result of 43 stab wounds; and

(B) assert an alibi defense with

the testimony of Thomas Fairbough.[2]

Petitioner seeks a reversal of her conviction and sentence, an evidentiary hearing, or a new trial. (DE#1:15).

III. Facts of the Offense and Procedural History

A. Facts of the Offense

The Fourth DCA provides a summary of the facts of the underlying criminal offense. Rosa v. State, 27 So.3d 718 (Fla. 4th DCA, 2010).

Petitioner worked as a caretaker for the victim, a woman in her 70s.[3] Id. at 719. Frequently, the victim required her caretakers to come back to collect their money days after it was due. Id. at 720. The victim was last seen alive on July 3, 2002, by her neighbor. Id. Although the date of death is uncertain, phone records and the autopsy report indicated that the victim died on July 4, 2002. Id.

One of Petitioner's friend's testified at trial that Petitioner was originally scheduled to travel to Jamaica on July 11, 2002, and asked her to care for the victim during her absence. Id. Then, on July 4, 2002, Petitioner called her friend from the victim's phone and told her that the victim was not paying her money that was due. Id. Petitioner changed her flight to Jamaica

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[2]According to Petitioner's amended motion for post-conviction relief as filed in the state court on April 29, 2011, Mr. "Farabaugh" was the Petitioner's landlord. (Exh. 14, DE#30-1:196).

[3]The medical examiner, Dr. Price, testified the victim was 71 years old. (Tr. T. 609; DE#31-1:621).

for the next day, July 5th, rather than the 11th, and then, once again, changed her flight to leave the same evening (July 4th). Id. She explained to her friend that she needed to leave because her child was sick. Id. The investigation took approximately two to three years before the Jamaican authorities finally arrested Petitioner. Id. at 720. A member of the Jamaican Fugitive Apprehension Team testified at trial that Petitioner used an assumed name, not her own, on her passport. Id.

Police discovered the victim's body on July 17, 2002; she had been stabbed 43 times. Id. The only signs of criminal activity were in the bedroom and a small amount of blood transfer in the hallway. Id. Three fingerprints at the scene belonged to Petitioner. Id. Police asked Petitioner's friend to record her conversations with Petitioner; and these recordings were entered into evidence, without objection, and played for the jury. Id. In one such call, Petitioner explained that she sent a person known as "Dutch" to collect her money, that "Dutch" told her the victim screamed at him and threatened to call police, and that "Dutch" told her he may have hit the victim with the phone. Id. Another friend of Petitioner's also made controlled calls. Id. On one occasion, Petitioner claimed she went the victim's home to collect money. Id. On another call, Petitioner stated she didn't know what happened to the lady but that she probably died. Id. On yet another call, Petitioner continued denying that she knew anything about the victim. Id.

After her arrest, Petitioner voluntarily told an authority that she worked as an aide for a woman, confronted her with a friend named "Frost" about the money owed, claimed the woman stabbed her with a knife, and showed the resulting scar on her hand. Id. According to Petitioner's statement, the altercation led

to "Frost" striking the woman in the face; they took the knife leaving the woman on the floor bleeding; and drove away in a vehicle identified by the neighbor. Id.

Overall, according to the Fourth DCA, "there were multiple witnesses and substantial evidence inculpating Petitioner," in particular:

> A friend of the defendant confirmed a conversation in which the defendant complained about not being paid for services. Other cell phone records confirmed numerous calls from the victim's location. The defendant left the country abruptly. Recorded conversations suggested the defendant's involvement leading to the death of the victim. Id. at 723.

Petitioner's conviction was affirmed.

B. Procedural History

On June 30, 2004, Petitioner was charged in a one-count Indictment with the first-degree murder of Lola Salzman by bludgeoning and/or stabbing with a knife, in violation of F.S. 782.04(1). (Exh. 2). Petitioner asserted her right to a jury trial; and, on July 5, 2007, the jury found her guilty of first-degree, premeditated murder despite their options to find her guilty of lesser-included offenses. (Exh. 3). Accordingly, on **July 5, 2007,** the court adjudicated Petitioner guilty and sentenced her to a term of life in prison without the possibility of parole, the mandatory minimum sentence for a capital offense, pursuant to F.S. 775.082(1). (Exh. 4).

Petitioner filed an appeal with the Fourth DCA acknowledged as case no. **4D07-2778** and raised the following issues: (1) the trial

court reversibly erred when it denied repeated motions for mistrial related to Evan McKenzie's testimony that he took a polygraph exam administered by the State; (2) the trial court reversibly erred in denying the motion for judgment of acquittal as to premeditation; (3) the trial court reversibly erred in allowing the State to introduce improper collateral crimes evidence; and (4)the trial court reversibly erred in admitting extremely prejudicial photographs of little probative value. (Exh. 6). On **January 27, 2010**, the Fourth DCA affirmed Petitioner's conviction for first-degree, premeditated murder. Rosa v. State, 27 So.3d 718 (Fla. 4th DCA, 2010). Specifically, the Fourth DCA found that claims 2, 3, and 4 were without merit. Id. at 724. As to the matter of Mr. McKenzie's testimony, the appellate court determined that the comment was elicited as a result of defense counsel's cross-examination and there was no stipulation that results of the polygraph examination were admissible. Id. at 722. Thus, the trial court properly denied the defense request to cross-examine the witness about the polygraph examination. Id. The mere mention of the fact that the witness went to the state attorney's office to take a polygraph is not the same as indicating that he had, in fact, taken the exam or the results of the exam. Id. at 723.

On **March 12, 2010**, the Fourth DCA denied Petitioner's motion for rehearing and issued the mandate on April 23, 2010. Rosa v. State of Florida, 2010 Fla. App. LEXIS 3318. (See also State's Exhs. 10, 11, and 12 and Appellate Docket 4D07-2778). Petitioner appealed to the Supreme Court of Florida; however, that was dismissed on December 27, 2011. Rosa v. State of Florida, 77 So.3d 1255 (Fla., 2011). Accordingly, Petitioner's sentence became final on, **June 10, 2010**, which was 90 days from the time the Fourth DCA

denied Petitioner's motion for rehearing.[4]

Next, **on April 22, 2011**, pursuant to Rule 3.850, Petitioner filed a motion for post-conviction relief and claimed therein: (1) ineffective assistance of counsel for failure to preserve trial judge's potential conflict of interest and (2) ineffective assistance of trial counsel for failure to engage in pretrial investigation, failure to present witnesses at trial, and declining to depose an alibi witness. (Exh. 13). Petitioner then filed a 116-page amended motion for post-conviction relief asserting 27 claims in total, mostly relating to ineffective assistance of counsel. (Exh. 14). Of these claims, Petitioner raised the following in the instant habeas petition are as follows: (Ground II) counsel failed to present an alibi defense with the testimony of Thomas Fairbough (Id. at 196-197, see also Ground XXII at 279, 294-295); (Ground IV) counsel's concession of guilt without Petitioner's consent (Id. at 202-207, 297); (Ground VI) failure to authenticate the voice recordings as belonging to Petitioner during the conversations with Omar Nunez and Maxine Hylton (Id. at 213-219, 296-297); (Ground XIV) failure to call victim's primary health care physician, Dr.

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[4]See Gonzalez v. Thaler, 565 U.S. 134, 152 (2012); Chavers v. Sec'y Dep't of Corr., 468 F.3d 1273 (11th Cir. 2006)(holding that AEDPA's one-year statute of limitations began to run 90 days after Florida appellate court affirmed habeas petitioner's conviction, not 90 days after the mandate was issued by the court); see Pugh v. Smith, 465 F.3d 1295, 1299-1300 (2006) ("In our decisions regarding the timeliness of habeas petitions filed by Florida prisoners, we have required the inclusion of the 90-day period for seeking direct review in the Supreme Court whenever the prisoner sought review in the highest court of Florida in which direct review could have been had...for example, we held that a Florida prisoner's conviction became final 90 days after the Florida district court of appeal affirmed his conviction, because the prisoner could have sought review in the Supreme Court of the United States without first seeking review in the Supreme Court of Florida." referencing Nix v. Sec'y for the Dep't of Corr., 393 F.3d 1235, 1237 (2004); Clifton v. Sec'y Dep't of Corr., 2012 U.S. Dist. LEXIS 121056, 2012 WL 3670264, *2 n. 3 (M.D.Fla., August 27, 2012)(distinguishing Gonzalez "because in Florida, the Supreme Court of Florida does not have jurisdiction to review a district court's *per curiam* decision on direct appeal")(citing Jackson v. State, 926 So.2d 1262, 1265 (Fla.2006)); Gilding v. Sec'y Dep't of Corr., 2012 U.S. Dist. LEXIS 70975, 2012 WL 1883745, *2 n.6. (M.D.Fla., May 22, 2012)(same); see also Sup.Ct.R. 13 (petition for certiorari must be filed within 90 days after entry of judgment); Sup.Ct.R. 30(1)(the day of the act is not counted and the last day, if not a weekend or federal holiday, is counted).

Edward Green,[5] to testify that victim died of natural causes and not 43 stab wounds (Id. at 244-247, 295); (Ground XVI) failure to properly cross-examine witnesses (Id. at 249-251); and (Ground XXII) counsel suggested the Petitioner's blood was at the crime scene. (Id. at 272-275). On **August 31, 2011**, the court denied Petitioner's motion for post conviction relief adopting the State's response that Petitioner's claims were legally insufficient and refuted by the record and failed to support claims of ineffective assistance of counsel. (Exh. 16, 17). However, neither the State nor the court addressed the added claims presented in the amended complaint.

Therefore, Petitioner appealed to the Fourth DCA, which determined that she had properly filed an amended petition and remanded the matter to the trial court to address the other claims raised therein. Rosa v. State, 78 So. 3d 674 (Fla. 4th DCA, Jan. 25, 2012) (See also Exh. 22). Petitioner submitted several more amended motions and supplements to the state court; including allegations in the third amended motion that counsel failed to object to Petitioner being shackled at trial in the presence of the jury.[6] (See Exhs. 27, 28, 30, 31, and 33). On **April 12, 2016**, the court, taking into account all of the amended motions, supplements, and the responses from the State, denied Petitioner relief by incorporating the reasoning set forth in the State's response. (Exh. 35). Given the plethora of claims raised, the denial of post-

[5]Petitioner refers to this physician as Dr. Greenburg in her instant habeas petition. "Dr. Greenburg" is referenced again in Exh. 34, in the State's response to Defendant's Motions for Post Conviction Relief. (DE#30-1:642).

[6]On January 2, 2015, Petitioner raised the claim (within her third amended motion for post-conviction relief) that counsel failed to protect her fundamental right to go before a jury without shackles. (Exh. 30; DE#30-1:477). Petitioner raises this same claim in the instant federal habeas petition. Petitioner filed four amended motions for post-conviction relief and two supplemental motions following her second- and third amended motions in this state proceeding alone. (See Exhs. 27, 28, 30, 31, and 33).

conviction relief rested on a multitude of reasons. Such claims were without merit, refuted by the record, calculated trial strategy, failure to establish grounds for relief, legally insufficient to support a claim, speculative allegations refuted by the record, not cognizable, failure to raise claims on appeal, time barred, and in excess of the page limitations. (Id.; DE#30-629-656).

Undeterred, on **April 28, 2016**, Petitioner filed a notice of appeal to the Fourth DCA. (Exh. 36). That case remained pending while, on **September 26, 2016**, Petitioner filed her habeas petition in this Court, pursuant to 28 U.S.C. §2254. (DE#1). Petitioner was permitted one amended complaint, serving as the sole operating complaint, which she submitted on **October 17, 2016**. (DE#7). On **March 2, 2017**, the appellate court affirmed the denial of post-conviction relief, *per curiam* and without opinion. Rosa v. State of Florida, 224 So.3d 237 (Fla. 4th DCA, 2017) (See Exh. 42, DE#30-1:775). After the granting of motions for extension of time, on **March 16, 2017**, the State submitted its response to this Court's order to show cause and its exhibits in support thereof. (DEs#29, 30, 31).

On April 11, 2017, Petitioner's motion for rehearing was denied by the Fourth DCA; subsequently, on **April 28, 2017**, the appellate court issued its mandate. (See Appellate Docket 4D16-1943). Then, on the same day, **April 28, 2017**, Petitioner filed -- in this Court -- an "amended" "supplement," which is allowed to operate *only* to the extent it is a reply (traverse) to the State's response but not to the extent it may contain additional claims.

(DE#41).[7] (See this Court's Order DE#51 putting Petitioner on notice of the restrictions since she did not seek leave to amend following the State's responsive pleading).

IV. Threshold Issues
Timeliness, Exhaustion and Procedural Bar

A. Timeliness

Parties agree that Petitioner's habeas petition is timely filed with the exception of **claim 3**, which the State asserts is time barred. Petitioner's claims are timely filed.

The Antiterrorism and Effective Death Penalty Act ("AEDPA") created a limitation for a motion to vacate. Pursuant to 28 U.S.C. 2255(f), as amended on April 24, 1996, a one-year period of limitations applies to a motion under the section. The one-year period runs from the latest of:

> (1) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (2) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the movant is prevented from filing by such governmental action;
>
> (3) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by

[7]Petitioner's attempt to supplement her habeas petition was submitted more than six months after the filing of her amended petition. The Court forewarned Petitioner that "only the claims listed in [the amended petition] will be considered by the Court, subject to all timeliness and procedural requirements, pursuant to Davenport v. United States, 217 F.3d 1341 (11th Cir. 2000). (DE#4). In addition, Local Rule 15.1 does not permit the incorporation of other pleadings or arguments by reference.

> the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims could have been discovered through the exercise of due diligence.

See 28 U.S.C. §2255(f); see also, Pruitt v. United States, 274 F.3d 1315, 1317 (11th Cir. 2001); see also Bousley v. United States, 523 U.S. 614 (1998) (new substantive not constitutional rule apples retroactively on collateral review, finding that the issue there was the product of statutory interpretation and not constitutional determinations that place particular conduct covered by a statute beyond the State's power to punish). The burden of demonstrating that the AEDPA's one-year limitation period was sufficiently tolled, whether statutorily or equitably, rests with the movant. See e.g., Pace v. Diguglielmo, 544 U.S. 408, 418 (2005); Gaston v. Palmer, 417 F.3d 1030, 1034 (9th Cir. 2005); Smith v. Duncan, 297 F.3d 809, 814 (9th Cir. 2002); Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir. 2002).

As discussed above, Petitioner's conviction became final on **June 10, 2010,** which is 90 days from the time the Fourth DCA denied rehearing. Petitioner had one year from the time her conviction became final within which to timely file this initial collateral proceeding absent any tolling motions. Petitioner first filed a motion for post-conviction relief in state court on **April 22, 2011,** at which point **three hundred sixteen (316) days** had elapsed. She continued to properly appeal and submit further motions for post-conviction relief, without incurring additional delays. This period was tolled until **April 28, 2017,** when the mandate was issued by the Fourth DCA affirming the denial of post-conviction relief. At this point, the instant petition, along with the State's response, was already present before this Court.

Because Petitioner properly tolled AEDPA with her appeal, motions for post-conviction relief, and appeals of the state court's denial of post-conviction relief, her claims are timely filed.

B. Exhaustion & Procedural Bar

A thorough analysis of the exhaustion issues at bar follows below and is applied to the discussion of Petitioner's claims, in particular, **claim 3.**

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); Hutchings 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. Wainright, 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. In Florida, exhaustion is ordinarily accomplished on direct appeal. If not, it may be accomplished by the filing of a Rule 3.850 motion and an appeal from its denial, Leonard, 601 F.2d at 808, or, in the case of a challenge to a sentence, by the filing of a Rule 3.800 motion and an appeal from its denial. See Caraballo v. State, 805 So.2d 882 (Fla. 2d DCA 2001).

Claims of ineffective assistance of trial counsel are generally not reviewable on direct appeal but are properly raised in a motion for post-conviction relief. See Kelley v. State, 486 So.2d 578, 585 (1986 Fla.), cert. den'd, 479 U.S. 871 (1986). Further, in Florida, claims concerning representation received by appellate counsel are properly brought by way of a petition for habeas corpus relief to the appropriate district court of appeal. State v. District Court of Appeal, First District, 569 So.2d 439 (Fla. 1990). Exhaustion also requires that an ineffective assistance of trial counsel claim not only be raised in a Rule 3.850 motion but the denial of the claim be presented on appeal. See Leonard, 601 F.2d at 808.

"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. at 275-276; Anderson v. Harless, 459 U.S. at 6). 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. at 275-277. 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. at 365). "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). 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).

Lastly, 28 U.S.C. § 2254(b)(2) provides "[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."

As to **claim 3**, Petitioner claims that counsel's failure to object to Petitioner being shackled throughout the entire trial in front of the jury prejudiced her from being afforded a fair trial (DE#7:9). The State asserts that the claim is (1) untimely because Petitioner did not raise the issue within two years of her final conviction, therefore, the state court denied relief and (2) it is time barred under the AEDPA because she did not raise the issue within one year of her final conviction. (DE#29:35). Petitioner claims in her traverse that her claims are timely filed because of her various tolling motions. (DE#41:20). Petitioner's claim fails.

Petitioner did not properly raise the issue before the state court. As narrated above, despite Petitioner's magnitude of claims raised in numerous post-conviction filings, Petitioner raised this claim for the first time as part of her third (out of four) amended

complaint in the second state proceeding for post-conviction relief.[8] (Exh. 30, DE#30-1:477). Consequently, the state court denied this claim as time barred. (Exh. 34, DE#30-1:654; Exh. 35, DE#30-1:658). This decision was upheld by the Fourth DCA, *per curiam* and without opinion. Rosa v. State of Florida, 224 So.2d 237 (Fla. 4th DCA, 2017).

This claim, although not time barred by AEDPA, is rather procedurally barred because Petitioner could have, but did not, present on direct appeal the matter of her being shackled at trial in front of the jury (the factual substance of her claim) nor did she timely assert a claim in state court as to counsel's ineffectiveness on the matter (the federal constitutional issue) in post-conviction motions, which resulted in the denial of relief. See 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). Accordingly, here, the claim, which is procedurally barred, warrants no relief and should be DENIED.

Claims 1, 2, and 4, are properly exhausted and are addressed on the merits in the Discussion herein.

V. Standard of Review in §2254 Cases

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

[8]Despite Petitioner filing a 116-page amended motion for post-conviction relief on April 29, 2011, she raised 27 claims but did not raise the issue of being shackled during trial or counsel's ineffectiveness in not properly objecting to the shackling. (Exh. 14 DE#30-1:187-303). As narrated in the procedural history, the second state proceeding was the result of a remand by the Fourth DCA since the State and the court failed to address the 116-page amended motion for post-conviction relief. Petitioner submitted four amended complaints and two supplements in the second proceeding.

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 (2011). See also Greene v. Fisher, 565 U.S. 34, 39, (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 (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). 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 (2002); cf. Harrington, 562 U.S. at 98 (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); see also Mitchell v. Esparza, 540 U.S. 12, 16 (2003).

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 (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 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 (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).

Furthermore, 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 (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 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, (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 (2010)).

VI. Applicable Principles of Law

A. Assistance of Counsel Principles

The Sixth Amendment affords a criminal defendant the right to "the Assistance of Counsel for his defense." 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 (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).

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's, 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." Harrington, 562 U.S. at 105 (quoting Padilla, 559 U.S. at 371). 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, 466 U.S. at 689; Lindh v. Murphy, 521 U.S. 320, 333, n.7 (1997), and when the two apply in tandem, review is 'doubly' so, Knowles[9], 556 U.S. at 123." Harrington, 562 U.S. at 105. 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 (2007).

"[W]hen the state courts have denied an ineffective assistance of counsel claim on the merits, the standard a petitioner must meet to obtain federal habeas relief was intended to be, and is, a difficult one." Johnson v. Sec'y, Dep't of Corr., 643 F.3d 907, 910 (11th Cir. 2011) (citing Harrington, 562 U.S. at 101 (2011)). "The standard is not whether an error was committed, but whether the state court decision is contrary to or an unreasonable application of federal law that has been clearly established by decisions of the Supreme Court." (Id.); see also 28 U.S.C. § 2254(d)(1). "[O]nly if there is no possibility fairminded jurists could disagree that the state court's decision conflicts with the Supreme Court's precedents may relief be granted." Johnson, 643 F.3d at 910 (quotation marks and alteration omitted). The double deference

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

required by §2254 and Strickland means a petitioner must show that the state courts applied Strickland in an objectively unreasonable manner. Johnson, 643 F.3d at 910-11; see also Rutherford v. Crosby, 385 F.3d 1300, 1309 (11th Cir. 2004). "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." Harrington, 562 U.S. at 104-105. See also Jones v. Sec'y, 487 Fed.Appx. 563, 565 (11th Cir. 2012).

Bare and conclusory allegations of ineffective assistance of counsel which contradict the existing record and are unsupported by affidavits or other indicia of reliability are insufficient to require a hearing or further consideration. See United States v. Robinson, 64 F.3d 403, 405 (8th Cir. 1995); United States v. Ammirato, 670 F.2d 552, 555 n.1 (5th Cir. 1982).

B. Manifest Injustice/Fundamental Miscarriage of Justice

It is well-settled that "the writ of habeas corpus does not perform the office of a writ of error or an appeal." Ex parte Terry, 128 U.S. 289 (1888). Federal habeas courts do not sit to correct errors of fact but serve to ensure that persons are not imprisoned in violation of the their rights guaranteed by the Constitution. Herrera v. Collins, 506 U.S. 390 (1993). Claims of actual innocence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding. (Id. at 400).

The law is clear that a petitioner may obtain federal habeas review of a procedurally defaulted claim, without a showing of cause or prejudice, if such review is necessary to correct a

fundamental miscarriage of justice. See Edwards v. Carpenter, 529 U.S. 446, 451 (2000); Henderson v. Campbell, 353 F.3d 880, 892 (11th Cir. 2003). This exception is only available "in an extraordinary case, where a constitutional violation has resulted in the conviction of someone who is actually innocent." Henderson, 353 F.2d at 892. "What we have to deal with [on habeas review] is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved." Herrera v. Collins, 506 U.S. at 400 citing Moore v. Dempsey, 261 U.S. 86, 87-88 (1923).

"To establish actual innocence, [a habeas petitioner] must demonstrate that ... 'it is more likely than not that no reasonable [trier of fact] would have convicted him.' Schlup v. Delo, 513 U.S. 298, 327-328, 115 S.Ct. 851, 867-868, 130 L.Ed.2d 808 (1995)." Bousley v. United States, 523 U.S. 614, 623 (1998). "[T]he Schlup standard is demanding and permits review only in the "'extraordinary' case." House v. Bell, 547 U.S. 518, 538 (2006).

Courts have emphasized that actual innocence means factual innocence, not mere legal insufficiency. Id.; see also High v. Head, 209 F.3d 1257 (11th Cir. 2000); Lee v. Kemna, 213 F.3d 1037, 1039(8th Cir. 2000); Lucidore v. New York State Div. of Parole, 209 F.3d 107 (2nd Cir. 2000)(citing Schlup v. Delo, 513 U.S. 298, 299, (1995); Jones v. United States, 153 F.3d 1305 (11th Cir. 1998)(holding that appellant must establish that in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him). See also Bousley, 523 U.S. at 623-624; Doe v. Menefee, 391 F.3d 147, 162 (2nd Cir. 2004)("As Schlup makes clear, the issue before [a federal district] court is not legal innocence but factual innocence.").

To be credible, a claim of actual innocence requires the

petitioner to "support his allegations of constitutional error with new reliable evidence--whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence--that was not presented at trial." Schlup v. Delo, 513 U.S. at 324. All things considered, the evidence must undermine the Court's confidence in the outcome of the trial. Id. at 316. No such showing has been made here. "Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears"; thus, in the context of the instant proceeding, "petitioner does not come before the Court as one who is 'innocent,' but, on the contrary, as one who has been convicted by due process of law." (Id. at 399-400).

Petitioner provides no facts to this Court that would support a claim of actual innocence, manifest injustice, or miscarriage of justice; and the record refutes such a consideration.

VII. Discussion

In **claim 1**, Petitioner claims that counsel was ineffective during opening statements and the cross-examination of witnesses where he conceded to Petitioner's guilt without her explicit consent. She further claims that she did not understand the nature of the charge and the consequences of a plea. (DE#7:6). The State asserts that counsel's actions were not concessions of guilt but rather strategic decisions to argue that Petitioner, at the most, was guilty as a principal to third-degree murder and not first-degree, premeditated murder; and, therefore, counsel was not deficient since the strategy was not unreasonable under Florida v. Nixon, 543 U.S. 175 (2004). (DE#29:24-29). Moreover, the State argues that this Court should defer to the jury's judgment as to the weight and credibility of the evidence and to the state court's

decision, which denied relief on this claim on the merits, and was subsequently affirmed on appeal by the Fourth DCA. (Id.). In her traverse, Petitioner concurs with the State that counsel created a circumstantial alternative theory of guilt, however, such a strategy is presumptively prejudicial. (DE#41:8).

Counsel will not be deemed unconstitutionally deficient because of tactical decisions. Adams v. Wainwright, 709 F.2d 1443, 1445 (11th Cir. 1983); Ford v. Strickland, 696 F.2d 804, 820 (11th Cir. 1983) (en banc); see United States v. Costa, 691 F.2d 1358, 1364 (11th Cir. 1982). Even if in retrospect the strategy appears to have been wrong, the decision will be held ineffective only if it was so patently unreasonable that no competent attorney would have chosen it. Adams v. Balkcom, 688 F.2d 734, 738 (11th Cir. 1982) citing Washington v. Strickland, 693 F.2d at 1254; also citing Ford v. Strickland, 696 F.2d 804, 820 (11th Cir. 1983) (en banc); Baldwin v. Blackburn, 653 F.2d 942, 946 (5th Cir. 1981), cert. den'd, 456 U.S. 950 (1982); Beckham v. Wainwright, 639 F.2d 262, 265 (5th Cir. 1981). The burden of proof to establish ineffectiveness and prejudice is on the petitioner. Washington v. Strickland, 693 F.2d at 1258, 1262.

Here, in view of the overwhelming evidence against Petitioner, as described in the appellate opinion affirming her conviction, the strategy of trial counsel was proper and would not amount to a constitutional violation. Despite Petitioner's assertions that counsel did not have her consent to proceed with such a strategy, "an attorney's strategy may bind his client even when made without consultation." McNeal v. Wainwright, 722 F.2d 674, 677 (11th Cir. 1984) citing Thomas v. Zant, 697 F.2d 977, 987 (11th Cir. 1983). Therefore, it cannot be said that the defense strategy of alternative theory of third-degree murder instead of first-degree murder was so beyond reason as to suggest Petitioner was deprived

of constitutionally effective counsel. (Tr. T. 1241). See McNeal v. Wainwright, 722 F.2d at 677. The court conferred with the defense, including Petitioner, that the jury verdict form would include lesser included offenses as options (murder two manslaughter, manslaughter murder three, and murder three) and asked if that was agreeable and encouraged Petitioner to participate but she made no comment nor did she even attempt to say that she disagreed with the strategy. (Id. at 1232-1252). Counsel informed the jury that Petitioner was not guilty of first-degree murder but a much lesser crime and told the jury they would get an instruction on that option. (Id. at 1320).

State court decisions are afforded a strong presumption of deference, per Harrington, and doubly so when the matter of ineffective counsel has been adjudicated on the merits by the state appellate courts as it has here. The state court's factual determination is entitled to a presumption of correctness, Section 2254(e)(1). The state court's decision was not contrary to or an unreasonable application of clearly-established federal law as determined by the Supreme Court of the United States nor was it an unreasonable determination of the facts in light of the evidence presented. More importantly, because Petitioner cannot demonstrate that her counsel's performance was deficient, nor can she demonstrate any prejudice, her claim fails on the merits and warrants no relief. As such, this claim should be DENIED.

With regard to Petitioner's additional claim that she did not understand the nature of the charges or the plea. Her claim is controverted by the record. Petitioner asserted her right to a trial by jury and did not enter a guilty plea. Hence, such a claim is without merit and should be DENIED.

In **claim 2**, Petitioner compiles numerous claims (herein

identified as 2A-2G), each of which are addressed in turn.

2A. Counsel was ineffective for conceding to the authenticity of the telephone conversations.

Plaintiff claims counsel was ineffective for conceding to the authenticity of the telephone conversations submitted as evidence. The State asserts that counsel was not ineffective because voice identification is admissible in Florida, particularly, because the persons who identified the Petitioner's voice on the recordings were individuals that had long-lasting, personal relationships with the Petitioner; therefore, a challenge by counsel would be baseless. (DE#29:30-31).

It is well-settled in Florida, that voice identification is admissible and that testimony attesting to the "identity of the accused even by one who has heard his voice" is "direct and positive proof of a fact." Martin v. State, 100 Fla. 16, 24 (Fla. 1930); see England v. State, 940 So. 2d 389, 401 (Fla. 2006) cert. den'd by England v. Florida, 549 U.S. 1325 (2007); Cason v. State, 211 So. 2d 604, 604 (Fla. 2d DCA 1968). The probative value of this evidence, along with the credibility, is a question for the jury. Martin v. State, 100 Fla. at 24; see also Worley v. State, 263 So. 2d 613, 613 (Fla. 4th DCA 1972).

Here, counsel did not object to the authenticity of the taped conversations between Petitioner and Maxine Hylton[10] and Petitioner and Omar Nunez.[11] Hylton testified that she met Petitioner years ago, babysat for Petitioner's children, and asserted that they were

[10]The testimony of Maxine Hylton is located at Tr. T. 723-844, 877-899; DE#31-1:736-857, 891-913.

[11]The testimony of Omar Nunez is located at Tr. T. 900-938, 946-950, 980-1095; DE#31-1:914-952, 960-964, 995-1110.

close friends. (Tr. T. 723-725). Hylton also testified that Petitioner asked Hylton to substitute for her in caring for an older woman because Petitioner had plans to go to Jamaica; and, on another occasion, Petitioner explained her frustration in not getting paid by the woman. (Id. 726-734). Just before the State presented the taped conversation[12] in court before the jury, Hylton explained that she cooperated with law enforcement and agreed to participate in taped conversations with Petitioner. (Id. at 743-749). At the end of the presentation of the first taped conversation, the prosecutor resumed direct examination of Hylton to discuss the conversation before presenting the second taped conversation between the two. (Id. at 787, 791). Counsel conducted a thorough cross-examination.[13] (Id. at 877-890).

Omar Nunez testified that he met Petitioner in the 1990s, they dated briefly and remained friends for a while thereafter, and that he cosigned a loan for a burgundy, Ford F-150 truck[14], registered the truck in his name, and paid the car insurance for Petitioner. (Tr. T. 901, 903-904). Just before the State presented the taped conversation[15] in court before the jury, Nunez testified that he

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[12]The transcript of the telephone conversation between Hylton and Petitioner is located at Tr. T. 756-786. Therein, Petitioner stated she sent someone named "Dutch" to collect money from the woman, that the woman screamed at "Dutch," and that "Dutch" might have hit the woman with the phone. Id. at 759-761. Petitioner also told Hylton during this same conversation, "I think about you close to me, I think about you like a sister, like a part of me...the only person I could always call upon is you." Id. at 782.

[13]Counsel established that Petitioner had a fear of "Dutch," which gave credibility to the defense of a lesser included charge. Id. at 881-890.

[14]A truck meeting this description was the suspect vehicle at the victim's home on or about the day of the murder. Police questioned Nunez about the vehicle during the investigation. Id. at 908.

[15]The transcript of the telephone conversation between Nunez and Petitioner is located at Tr. T. 911-938, 946-950. Therein, the two discussed the truck and that Petitioner had someone named "Dutch" willing to purchase the truck. Id. 919-923, 929-930, 946-948. Petitioner also told Nunez during this same conversation, "I wish I marry you, Man, I wouldn't have all these problems in my life now...life would not be like this" and then asked Nunez for money. Id. at 948-

agreed to cooperate with law enforcement and to participate in taped conversations with Petitioner. (Id. at 908). At the end of the presentation of the first taped conversation, the prosecutor resumed direct examination of Nunez to discuss the conversation. Id. at 951. Counsel conducted a proper cross-examination. (Id. at 1081-1095).

The question here is not whether counsel's decision to not object to the voice identification is reasonable but whether there is any reasonable argument counsel satisfied Strickland's deferential standard, as per Harrington. The state post-conviction court's conclusion that counsel was not deficient for failing to make a meritless objection was consistent with Strickland and not objectively unreasonable. Double deference is due. Moreover, Petitioner's claim fails because she cannot demonstrate a reasonable probability that the jury would have found her not guilty had the trial court excluded the testimony identifying her voice.

The state court's decision was not contrary to or an unreasonable application of clearly-established federal law as determined by the Supreme Court of the United States nor was it an unreasonable determination of the facts in light of the evidence presented. More importantly, because Petitioner cannot demonstrate that her counsel's performance was deficient, nor can she demonstrate any prejudice, her claim fails on the merits and warrants no relief. As such, this claim should be DENIED.

2B. Counsel elicited testimony that Petitioner's blood was found on a picture on a wall at the crime scene.

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949). Petitioner ended the conversation with "I love you." Id. at 950. A second phone call was entered into evidence where the two had further discussions about truck and the police interest in the vehicle. Id. at 988-1079.

Petitioner claims counsel was ineffective for eliciting testimony that her blood was on a picture at the crime scene. The State asserts that the record refutes Petitioner's claim. (DE29:32-33). Petitioner's claim fails.

Donna Marchese, the DNA specialist from The Broward County Sheriff's Office Crime Laboratory testified under direct examination that both the victim's DNA and Petitioner's DNA were on the picture frame in the hall.[16] (Tr. T. 561). Counsel did not elicit this testimony. During cross-examination, counsel did, however, challenge the veracity of the reports and certain inconsistencies therein. (Tr. T. 568-569, 574-577).

The state post-conviction court's conclusion that counsel was not deficient because the claim was refuted by the record was consistent with Strickland and not objectively unreasonable in light of the evidence presented. Because Petitioner's claim is refuted by the record, she cannot demonstrate that her counsel's performance was deficient. Her claim fails on the merits and warrants no relief. As such, this claim should be DENIED.

2C. Counsel admitted to or failed to challenge evidence presented that Petitioner extorted a friend to collect payment from the victim.

Petitioner claims counsel was ineffective as to the admission of evidence that Petitioner extorted a friend to collect payment from the victim. The State asserts the same as it did in 2A that the evidence was admissible as part of recorded conversations with Hylton. Petitioner's claim fails as it is essentially a claim that counsel failed to properly cross-examine Hylton.

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[16]The testimony of Donna Marchese is located at Tr. T. 541-581; DE#31-1:551-592.

The issue of whether counsel properly cross-examined a witness is a matter of trial strategy. Mere allegations of inadequate performance during cross-examination are conclusory and do not permit the Court to examine whether counsel's failure prejudiced her. See United States v. Irby, 103 F.3d 126 (5th Cir. 1996) (unpublished) (denying ineffective assistance claim based on counsel's failure "to adequately cross-examine a number of government witnesses" because petitioner "fail[ed] to set forth … the possible impact of any additional cross-examination"); Lincecum v. Collins, 958 F.2d 1271, 1279 (5th Cir. 1992) (denying habeas relief where petitioner "offered nothing more than the conclusory allegations in his pleadings" to support claim that counsel was ineffective for failing to investigate and present evidence). See also Day v. Quarterman, 566 F.3d 527 (5th Cir. 2009).

Here, Petitioner employs a broad brush to allege failure by counsel and offers no concrete explanation of the testimony that a proper cross-examination would have elicited.[17] Moreover, review of the testimony by Hylton and counsel's cross examination of the witness, refute Petitioner's claims. The evidence that Petitioner enlisted a friend to collect payment from the victim was used by counsel, in her favor, as a trial strategy to establish support for lesser included offenses.

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[17]Movant is cautioned that arguments not raised by Movant before the magistrate judge cannot be raised for the first time in objections to the undersigned's Report. See Starks v. United States, 2010 WL 4192875 at *3 (S.D. Fla. 2010); United States v. Cadieux, 324 F.Supp. 2d 168 (D.Me. 2004). "Parties must take before the magistrate, 'not only their best shot but all of the shots.'" Borden v. Sec'y of Health & Human Servs., 836 F.2d 4, 6 (1st Cir. 1987) (quoting Singh v. Superintending Sch. Comm., 593 F.Supp. 1315, 1318 (D.Me. 1984)). Thus, "[W]here a party raises an argument for the first time in an objection to a report and recommendation, the district court may exercise its discretion and decline to consider the argument." Daniel v. Chase Bank USA, N.A., 650 F.Supp.2d 1275, 1278 (N.D. Ga. 2009) (citing Williams v. McNeil, 557 F.3d 1287 (11th Cir. 2009). Here, if Movant attempts to raise a new claim or argument in support of this §2255 motion, the court should exercise its discretion and decline to address the newly-raised arguments.

The state post-conviction court's conclusion that counsel was not deficient because the claim was refuted by the record was consistent with Strickland and not objectively unreasonable in light of the evidence presented. Therefore, Petitioner's claim warrants no relief and should be DENIED.

2D. Counsel knowingly presented false testimony that Petitioner had a scar on her hand and showed it to police at the time of her arrest as evidence of "the alleged murder" of the victim.

Petitioner claims that her counsel presented false testimony that she had a scar on her hand and showed to police at the time of her arrest as evidence of "alleged murder." The State responded to this claim as "2E" and asserts the claim is, generally, refuted by the record.[18] (DE#29:33).

As a threshold matter, there is no "alleged murder," as Petitioner purports. Indeed, there is no delicate manner in which to acknowledge that, as proven at trial (and affirmed on appeal), the victim was murdered as a result of 43 stab wounds. Petitioner's claim is completely refuted by the record. Counsel never presented such false testimony. A state witness, Melanie Parnell, with the Fugitive Apprehension Team of the Jamaican Constabulary Force, testified on direct examination that at the time of Petitioner's arrest, Petitioner told Parnell that she had a confrontation with the victim, that the victim stabbed her, and pointed out a scar on her hand as proof that the victim attacked her.[19] (Tr. T. 687-688; DE#31-1:699-700).

The state post-conviction court's conclusion that counsel was

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[18]The State erroneously addressed a witness identification issue as "2D." (DE#29:33).

[19]The testimony of Melanie Parnell is located at Tr. T. 673-694; DE#31-1:685-706.

not deficient because the claim was refuted by the record was consistent with Strickland and not objectively unreasonable in light of the evidence presented. Therefore, Petitioner's perjurious claim must be DENIED.

2E. Counsel informed the jury that Petitioner left the country because of her consciousness of guilt

Petitioner claims that counsel told the jury that she left the country because of her consciousness of guilt. The State asserts that a defendant's behavior is circumstantial evidence of consciousness of guilty when there is evidence the suspect fled or took other action to avoid arrest and prosecution. (DE#29:34).

In Florida, it is well settled that where a suspect "in any manner endeavors to escape or evade a threatened prosecution, by flight, concealment, resistance to lawful arrest, or other ex post facto indications of a desire to evade prosecution, is admissible against the accused, the relevance of such evidence being based on the consciousness of guilt inferred from such actions." Mackiewicz v. State, 114 So. 2d 684 (Fla. 1959) cert. den'd 362 U.S. 965 (1960).

Here, *nowhere* in opening or closing argument to the jury does counsel assert that Petitioner leaving the country was evidence of her guilt. (Tr. T. 355-364, 1319-1346; DE#31-1:359-368, 1337-1364). The State, appropriately, makes that implication during their own opening[20] and closing arguments.[21] To the extent Petitioner would

[20]See Tr. T. 327; DE#31-1:331. See entire opening statement by State at Tr. T. 329-355; DE#31-1:325-359.

[21]See Tr. T. 1279, 1281; DE#31-1:1297.

assert that her counsel made those comments, Petitioner's claim is patently false, as refuted by the record. Therefore, her claim is meritless; and she is entitled to no relief.

2F and 2G. Counsel conceded to facts in the prosecution's case without Petitioner's consent, which denied meaningful adversary testing; and counsel refused to "strategize" with Petitioner.

To the extent that Petitioner may intend to include these allegations as additional claims, she provides no factual support. Bare and conclusory allegations of ineffective assistance of counsel unsupported by specifics are insufficient to raise a constitutional issue and do not justify an evidentiary hearing. Lynn v. United States, 365 F.3d 1225, 1239 (11th Cir. 2004) (quoting Blackledge v. Allison, 431 U.S. 63, 74 (1977). Here, Petitioner fails both to cite to any portion of the record or to the transcript (or to any circumstances even outside the record). "It is not the job of [the] court to go on a fishing expedition through the record to find facts favoring or disfavoring [a petitioner's] arguments. Rather, it is the job of a party before this court to supply in its brief relevant record cites in order that this court may properly review [her] arguments." Green v. Johnson, 160 F.3d 1029, 1036 n. 2 (5th Cir. 1998).

Accordingly, Petitioner is not entitled to relief on these claims.

In **claim 4**, Petitioner claims counsel was ineffective for his failure to (A) call Dr. Edward Greenburg testify as an expert witness who would have stated that the victim died of natural causes rather than the result of 43 stab wounds and (B) counsel's failure to assert an alibi defense with the testimony of Thomas Fairbough. The State asserts that counsel was not deficient and that Dr. Eroston Price, the forensic pathologist, assigned to the

investigation, clearly demonstrated that the cause of death was multiple stab wounds. (DE#29:35).

It is well-settled that which witnesses to call, if any, is a strategy decision that should seldom be second guessed. Conklin v. Schofield, 366 F.3d 1191, 1204 (11th Cir. 2004), cert. den'd, 544 U.S. 952 (2005). See also Dorsey v. Chapman, 262 F.3d 1181, 1186 (11th Cir. 2001)(holding that petitioner did not establish ineffective assistance based on defense counsel's failure to call expert witness for the defense in that counsel's decision to not call the expert witness was not so patently unreasonable a strategic decision that no competent attorney would have chosen the strategy); United States v. Costa, 691 F.2d 1358, 1364 (11th Cir. 1982). Tactical decisions within the range of reasonable professional competence are not subject to collateral attack unless a decision was so "patently unreasonable that no competent attorney would have chosen it." Adams v. Wainwright, 709 F.2d 1443, 1445 (11th Cir. 1983). See also Waters v. Thomas, 46 F.3d 1506, 1512 (11th Cir. 1995)("Which 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."); Chandler v. United States, 218 F.3d 1305, 1314 (11th Cir. 2000)(en banc), cert. den'd, 531 U.S. 1204 (2001)(holding that counsel cannot be deemed incompetent for performing in a particular way in a case as long as the approach taken "might be considered sound trial strategy")(quoting Darden v. Wainwright, 477 U.S. 168 (1986).

Complaints of uncalled witnesses are not favored in federal habeas corpus review because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have stated are largely speculative. See Bray v. Quarterman, 265 F. App'x 296, 298 (5th Cir. 2008). "Thus, to prevail on an ineffective assistance claim based on counsel's

failure to call a witness, the petitioner must name the witness, demonstrate that the witness was available to testify and would have done so, set out the content of the witness's proposed testimony, and show that the testimony would have been favorable to a particular defense. Day v. Quarterman, 566 F.3d 527, 538 (5th Cir. 2009) referencing Bray v. Quarterman, 265 F. App'x at 298, and Alexander v. McCotter, 775 F.2d 595, 602 (5th Cir. 1985)). See, e.g., Evans v. Cockrell, 285 F.3d 370, 377-78 (5th Cir. 2002) (rejecting uncalled expert witness claim where petitioner failed to present evidence of what a scientific expert would have stated); United States v. Doublin, 54 F. App'x 410 (5th Cir. 2002).

With regard to calling Dr. Greenburg to testify, Petitioner claims in her traverse that Dr. Greenburg would have explained the victim's medical history. Petitioner asserts that since Dr. Price, the medical examiner in this case, was not familiar with the victim's medical history, he was not an appropriate trial witness. (DE#41:18). Petitioner fails to demonstrate that Dr. Greenburg *was available* to testify and *would have testified* that the victim was not stabbed 43 times. The assertion by Petitioner is, simply, more speculation from her without any additional support. Moreover, Dr. Greenburg, even according to Petitioner, is the victim's personal physician who did not examine the victim's body to determine the cause of death and is not a forensic pathologist.[22] Counsel's decision to not call this witness forward is not unreasonable nor deficient.

With regard to asserting an alibi defense with the assistance

[22]Dr. Price was the medical examiner who conducted the autopsy on the victim and determined that the cause of death was multiple stab wounds and the manner of death was homicide. (Tr. T. 614; DE#31-1:626). More than half a dozen stab wounds were to the victim's face alone, with at least one being 4 ½ inches deep. Tr. T. 616-623; DE#31-1:628-635. A stab wound to the neck cutting into the jugular vein was a fatal wound. Tr. T. 630; DE#31-1:642. His entire testimony is located at Tr. T. 605-655; DE#31-1:617-666.

of Fairbough, Petitioner claims in her traverse, that Fairbough would have testified that he assisted her and Hylton to secure a job with the victim, that Hylton worked for the victim, and Hylton introduced Fairbough to "Dutch." (DE#41:18). Petitioner's speculations, even if true, do not support an alibi defense. No where does Petitioner claim that Fairbough would have said that she was elsewhere at the time of the murder. Defense counsel is not deficient for failing to present a witness that does not support the defense theory, which is sound trial strategy.

Moreover, the state post-conviction court's conclusion that these claims of ineffective assistance of counsel were denied on the merits is consistent with Strickland and deserves double deference. The state court's conclusion, affirmed on appeal, is not objectively unreasonable in light of the evidence presented. Accordingly, Petitioner's claims fail.

VIII. Evidentiary Hearing

Based upon the foregoing, any request by Petitioner for an evidentiary hearing on the merits of any or all of her claims should be denied since the habeas petition can be resolved by reference to the state court record. 28 U.S.C. §2254(e)(2); Schriro v. Landrigan, 550 U.S. at 474 (holding that if the record refutes the factual allegations in the petition or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing). See also Atwater v. Crosby, 451 F.3d 799, 812 (11th Cir. 2006) (addressing the petitioner's claim that his requests for an evidentiary hearing on the issue of trial counsel's effectiveness during the penalty phase of his trial in both the state and federal courts were improperly denied, the court held that an evidentiary hearing should be denied "if such a hearing would not assist in the resolution of his claim."). Petitioner has

failed to satisfy the statutory requirements in that she has not demonstrated the existence of any factual disputes that warrant a federal evidentiary hearing.

IX. Certificate of Appealability

A prisoner seeking to appeal a district court's final order denying his petition for writ of habeas corpus has no absolute entitlement to appeal, but must obtain a certificate of appealability ("COA") to do so. 28 U.S.C. §2253(c)(1); Harbison v. Bell, 556 U.S. 180 (2009).

This Court should issue a COA only if Petitioner makes "a substantial showing of the denial of a constitutional right." 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). Alternatively, 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.

After review of the record, Petitioner is not entitled to a certificate of appealability. Nevertheless, as now provided by the Rules Governing §2254 Proceedings, Rule 11(a), 28 U.S.C. §2254: "Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." If there is an objection to this recommendation by either party, that party may bring this argument to the attention of the district

judge in the objections permitted to this report and recommendation.

X. Recommendations

Based upon the foregoing, it is recommended that this petition for habeas corpus relief be DENIED on the merits as to **claims 1, 2, and 4** and procedurally barred as to **claim 3**; that no certificate of appealability issue; and, that the case be 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 2nd day of APRIL, 2018.

UNITED STATES MAGISTRATE JUDGE

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