IN THE
SUPREME COURT OF THE UNITED STATES

NO. _____

CHRISTOPHER STEPP
Petitioner

v.

STATE OF FLORIDA
Respondent

APPENDIX

A-1

The Eleventh Circuit's denial of Stepp's application for a certificate of appealability, dated December 26, 2019.

A-2

The Eleventh Circuit's denial of Stepp's motion for reconsideration, dated February 14, 2019.

A-3

The Southern District's denial of Stepp's § 2254 federal habeas petition, dated August 28, 2018.

A-4

Stepp's § 2254 federal habeas petition, filed December 6, 2016.

Appendix A-1

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-14101-D

CHRISTOPHER STEPP,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

ORDER:

Appellant's motion for a certificate of appealability ("COA") is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

/s/ William H. Pryor Jr.
UNITED STATES CIRCUIT JUDGE

Appendix A-2

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-14101-D

CHRISTOPHER STEPP,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

Before: WILLIAM PRYOR and NEWSOM, Circuit Judges.

BY THE COURT:

Christopher Stepp has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's order dated December 26, 2018, denying his motion for a certificate of appealability in the appeal of the denial of his 28 U.S.C. § 2254 habeas corpus petition. Because Stepp has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motion, this motion for reconsideration is DENIED.

Appendix A-3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-25170-CIV-ALTONAGA/White

CHRISTOPHER STEPP,

Petitioner,

v.

JULIE L. JONES,

Respondent.
_____/

ORDER

On December 13, 2016, Petitioner, Christopher Stepp, filed a *pro se* Petition Under 28 U.S.C. [Section] 2254 for Writ of Habeas Corpus by Person in State Custody [ECF No. 1]. The case was referred to Magistrate Judge Patrick A. White for a report and recommendation. (*See* Order of Reference [ECF No. 3]).

On December 16, 2016, Judge White entered an Order to Show Cause [ECF No. 6], requiring Respondent, Julie L. Jones, to respond to the Petition. (*See id.* 1). Respondent filed a Response [ECF No. 13] on February 24, 2017. On March 16, 2018, Judge White entered a Report of Magistrate Judge [ECF No. 17], recommending the Court deny the Petition. On April 5, 2018, Petitioner entered his Objections [ECF No. 18] to the Report, to which Respondent filed a Response [ECF No. 22] on April 20, 2018. The Court has carefully reviewed the parties' written submissions, the record, and applicable law. For the reasons that follow, the Report is affirmed and the Petition is denied.

I. BACKGROUND

In May 2010, Petitioner was charged by information with second-degree murder and attempted armed robbery, in violation of Florida Statutes. (*See* App. 1, Information

[ECF No. 14-1] 2–6[1]). Nearly a year later, Petitioner was charged through a superseding grand jury indictment with first-degree murder (count 1), and attempted armed robbery (count 2), in violation of Florida Statutes sections 782.04(1) and 812.13(2), respectively. (*See* App. 1, Indictment 8–10). A jury trial was held in October 2011. (*See* App. 1, Motions/Colloquy 15). The facts adduced at the trial are outlined below.

At trial, the jury heard the testimony of eye-witness, Cesar Luna, who on August 2, 2008, observed a man, later identified as the victim, walking on the sidewalk in front of Luna's house in Homestead, Florida. (*See* App. 2, Trial Transcript [ECF No. 14-2] 213:19–22). Luna saw a car pull up to the victim — Luna described the car as a brownish or grayish Chevrolet Impala. (*See id.* 215:7–8, 241:21–23). Luna heard a man from inside the passenger's side of the car ask the victim, "where is Krome?" (*Id.* 216:11–13). Luna then saw the man step out of the car. (*See id.* 220:1–3). The man repeatedly asked the victim "where is the money?" (*Id.* 223:8–9).

After the victim insisted he had no money, the man slammed him against the fence to check his pockets. (*See id.* 226:15–18). Then, the man, described as tall and white, drew a gun from his right side, pointed it at the victim's head, and shot him. (*See id.* 228:10–13, 229:8–15). Luna saw the victim fall down. (*See id.* 231:6–9). A woman, whom Luna described as a short Latin 18-24 year old, exited the car from the driver's side, screaming "you shot him!" (*Id.* 232:7–12). The man told her to "get inside the car," and the two drove away. (*Id.* 232:13). Luna then called 9-1-1. (*See id.* 239:10–12).

At trial and at a photo line-up before trial, Luna was unable to identify Petitioner as the man who shot the victim. (*See id.* 244:1–3, 249:2–5). Jennifer Acevedo, a detective from the Homestead Police Department, testified that she was dispatched to the scene of the shooting.

[1] The Court uses the pagination generated by the electronic CM/ECF database, which appears in the headers of all court filings, for all citations to the appendices, with the exception of citations to the trial transcript, which retain their original pagination.

(*See* App. 1, Trial Transcript 127:10–13). She arrived at the same time as the fire rescue team. (*See id.* 130:14–15). She then secured the scene and interviewed Luna. (*See id.* 130:2–4, 139:9–11).

Victor Chavez ("Officer Chavez"), an officer assigned to the Crime Scene Bureau of the Miami-Dade Police Department, testified that he went to a trauma center to process the victim after he died. (*See* App. 2, Trial Transcript 307:1–3). He photographed the victim, documented his injuries, and performed a gun-shot residue test on his hands. (*See id.* 307:11–16). Alan Klein, a criminalist supervisor at the Miami-Dade Police Crime Laboratory, testified that based on the gunshot residue test results the victim was in close proximity to the firing gun. (*See id.* 341:25–342:2, 346:6–10). Dr. Emma Lew, the Miami-Dade County Medical Examiner, testified the gunshot wound was to the victim's head, and that the manner of death was homicide. (*See id.* 437:25–438:1, 441:13).

Michael Scott ("Detective Scott"), from the Miami-Dade Police Department Homicide Bureau, testified that when he arrived at the scene, he spoke with Luna, who described the shooter as a white male, approximately six-feet tall, and thin in stature. (*See id.* 356:9–12). Luna described the female occupant of the car as Latin, approximately 5'2" to 5'4" in height, short, and skinny. (*See id.* 357:3–5). Luna also described the vehicle as a silver or brown Chevrolet Impala. (*See id.* 357:10–14).

Detective Scott testified that he located surveillance footage of the date of the incident from a nearby school, which showed a vehicle matching Luna's description of the assailant's vehicle. (*See id.* 372:5–11). Detective Scott testified that the police prepared a public information flier with the victim's picture, and the date and time of the incident; and the police canvassed the area for witnesses. (*See id.* 374:12–20). Soon after, Detective Scott located an

individual willing to cooperate, Jason Debari. (*See id.* 379:7–14).

Debari testified that he met Petitioner about six to nine months before the murder, when he first sold Petitioner marijuana. (*See* App. 1, Trial Transcript 146:20, 147:18–148:1). On the date of the incident, Debari received a call from Petitioner wanting to purchase marijuana. (*See id.* 149:9–17). They made plans to meet near Homestead Middle School to complete the transaction. (*See* App. 2, Trial Transcript 152:19–21). On his way to meet with Petitioner, Debari noticed a helicopter and police activity in the area, so he decided to turn his car around and leave. (*See id.* 154:18–25). He testified he turned his phoned off and went to pick up his wife from work. (*See id.* 155:15–25).

At some point that night, Debari turned his phone back on. (*See id.* 158:4–5). Soon after, Debari received another call from Petitioner, still asking for marijuana. (*See id.* 158:14–16, 159:13–14). Petitioner told Debari that earlier, he and his girlfriend, Elizabeth Moreno, became involved in an altercation with a man, and a gun had gone off, shooting the man in the head. (*See id.* 161:12–15).

The next morning, Petitioner called Debari, again asking for marijuana. (*See id.* 164:13–14). Debari delivered the marijuana to Petitioner in exchange for cash. (*See id.* 164:24, 165:11–12). During the transaction, Petitioner told Debari that "something got ugly last night." (*Id.* 165:12–20). Petitioner told Debari he had gotten into a scuffle with a man and his gun had gone off. (*See id.* 166:3–6). Petitioner also stated he was with Moreno all night. (*See id.* 171:22–23). At trial, Debari admitted he had previously been convicted of grand theft and fraudulent use of a credit card. (*See id.* 180:7–8).

Detective Scott learned Petitioner was a potential suspect from speaking with Debari. (*See id.* 384:16–385:2). After pulling up Petitioner's photo in a database, Detective Scott

determined Petitioner matched Luna's description of the shooter. (*See id.* 388:12–17). Detective Scott then located Moreno. (*See id.* 395:19–21). Despite many attempts, detectives could not locate Petitioner. (*See id.* 397:19–398:2). Detective Scott later learned an individual named Giovanni Castro had information about the case. (*See id.* 400:2). Castro told police he was Moreno's brother, and that Petitioner had admitted to committing the homicide. (*See id.* 400:17–24).

Castro testified that his sister, Moreno, had dated Petitioner. (*See id.* 251:9). He also testified that around the time of the murder, Petitioner told him he had killed a Latin man. (*See id.* 257:23, 258:4). Petitioner also stated to Castro that he tried to rob the victim, and as he tried to hit the victim in the head with the gun, it went off. (*See id.* 258:17–19). Petitioner showed Castro the gun he used. (*See id.* 260:22–23). Petitioner later told Castro he had sold the gun and buried the bullets. (*See id.* 263:17–264:5).

Castro also testified he first told law enforcement about the murder pursuant to a plea agreement for a burglary charge, in which he agreed to provide truthful testimony in Petitioner's case in exchange for a probation sentence. (*See id.* 284:8–21). When Castro was no longer bound by the plea agreement, he refused to cooperate. (*See id.* 285:22–23, 286:21–25). Nevertheless, after being arrested on a material witness bond, Castro testified in court consistent with his statement to the police. (*See id.* 287:11–287:18, 289:4–7).

Petitioner was found guilty of first-degree murder and attempted armed robbery by discharging a firearm causing death or great bodily harm. (*See* App. 3, Verdict [ECF No. 14-3] 136–38). In January 2012, Petitioner was sentenced to a term of life in prison without parole for first-degree murder, and to a minimum-mandatory term of 25 years' imprisonment for attempted robbery. (*See* App. 3, Sentence 142–46).

Petitioner appealed his convictions and sentences to the Third District Court of Appeal on January 19, 2012. (*See* App. 4, Notice of Appeal [ECF No. 14-4] 48). In his appeal, Petitioner contended the trial court erred by not allowing his trial counsel to argue in closing that Detective Scott had failed to subpoena phone records which would have impeached Debari's testimony. (*See* App. 4, Initial Brief 50–74). In March 2013, the Third District Court of Appeal affirmed the convictions and sentences in a written opinion, and issued its mandate. (*See* App. 4, Opinion 119–121, 123); *see also Stepp v. State*, 109 So. 3d 839 (Fla. 3d DCA 2013). Petitioner sought discretionary review in the Florida Supreme Court, which was denied in June 2013. (*See* App. 4, Brief of Petitioner on Jurisdiction 125–34; *see also* App. 4, Order Denying Petition for Review 151).

On January 8, 2014, Petitioner filed a Motion for Post-Conviction Relief under Florida Rule of Criminal Procedure 3.850. (*See* App. 6, Motion for Post-Conviction Relief [ECF No. 14-6] 68–79). In his Rule 3.850 Motion, Petitioner raised the same claims as in this Petition, with the exception of the first claim here. (*See generally id.*). In March 2016, the trial court denied Petitioner's Rule 3.850 Motion without a hearing. (*See* App. 7, Order Denying Defendant's Pro Se Motion for Post-Conviction Relief [ECF No. 14-7] 7–13). Again, Petitioner appealed. (*See* App. 7, Notice of Appeal 21). The appellate court *per curiam* affirmed the trial court's denial of Petitioner's Rule 3.850 Motion. (*See* App. 7, Opinion Per Curiam Affirmed 23). After Petitioner's motion for rehearing was denied (*see* App. 7, Order Denying Motion for Rehearing 69), the mandate issued on August 16, 2016 (*see* App. 7, Mandate 71).

Petitioner mailed the Petition on December 6, 2016. (*See* Pet. 1). The Petition was timely filed within the one-year period allowed under the Antiterrorism and Effective Death Penalty Act ("AEDPA"). (*See* Pet. 14; Report 7; Resp. 15).

II. LEGAL STANDARD

When a magistrate judge's "disposition" has been properly objected to, district courts must review the disposition *de novo*. Fed. R. Civ. P. 72(b)(3). Petitioner filed timely objections to the Report (*see generally* Objs.), and so the Court reviews the record *de novo*.

Federal review of state habeas petitions is governed by the AEDPA. *See, e.g.*, *Brumfield v. Cain*, 135 S. Ct. 2269, 2288 (2015). Section 2254 provides that federal habeas relief for a person in state custody is available only if the state court decision was "contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States" or if a petitioner's state court claim "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." *Id.* at 2288–89 (internal quotation marks omitted) (quoting 28 U.S.C. § 2254(d)(1)–(2)).

To prove a claim of ineffective assistance of counsel, a habeas petitioner must demonstrate (1) his counsel's performance was deficient; and (2) a reasonable probability exists the deficient performance prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). "There is no reason for a court deciding an ineffective-assistance-of-counsel claim to approach the inquiry in the same order, or even address both components of the inquiry, if the petitioner makes an insufficient showing on one." *Ojeda v. Sec'y for Dep't. of Corr.*, 279 F. App'x 953, 955 (11th Cir. 2008) (citing *Strickland*, 466 U.S. at 691).

III. ANALYSIS

Petitioner raises seven grounds for habeas relief: (1) the trial court violated his due-process rights by preventing his defense counsel from arguing during closing that law enforcement failed to obtain phone records (*see* Pet. 3–5); (2) his trial counsel was ineffective

under the Sixth Amendment for failing to subpoena Petitioner's phone records to impeach Debari's testimony (*see id.* 5–6); (3) trial counsel was ineffective under the Sixth Amendment for failing to properly explain that the nature of Petitioner's prior convictions would not be admitted if he testified (*see id.* 6–8); (4) trial counsel was ineffective under the Sixth Amendment for failing to subpoena his phone records to impeach Detective Scott (*see id.* 8–9); (5) trial counsel was ineffective under the Sixth Amendment in failing to call Moreno as an alibi witness (*see id.* 9–10); (6) trial counsel was ineffective under the Sixth Amendment for not advising Petitioner to accept the State's initial plea offer (*see id.* 10–12); and (7) the cumulative impact of trial counsel's multiple errors impaired Petitioner's access to a fair trial under the Sixth Amendment (*see id.* 12–14).

The Court addresses each claim on the merits, applying *de novo* review. *See* Fed. R. Civ. P. 72(b)(3).

A. Due-Process Right Violation During Closing Argument

Petitioner first asserts the trial court violated the Due Process Clause of the Fourteenth Amendment when it prevented his trial counsel from arguing during closing that law enforcement failed to obtain his phone records. (*See* Pet. 3–5). Petitioner contends this argument was designed to cast doubt on Debari's credibility, and thus on his testimony that Petitioner confessed to the murder. (*See id.* 3).

While "the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense," *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (internal quotation marks and citations omitted), a "presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing summations," *Herring v. New York*, 422 U.S. 853, 862 (1975). "Only the rare type of error — in general, one that infects the entire process and

necessarily renders it fundamentally unfair — requires automatic reversal . . . . None of our cases clearly requires placing improper restriction of closing argument in this narrow category." *Glebe v. Frost*, 135 S. Ct. 429, 430–31 (2014) (internal quotation marks and citation omitted; alterations removed).

The Report finds the trial court was within its discretion to preclude counsel from making arguments based on facts not admitted in evidence.[2] (*See* Report 24–27). The Report also finds that even assuming the trial court committed error, the error was harmless. (*See id.* 26–27).

Petitioner objects, contending his counsel never invited error by objecting to the State's questioning of Debari on the number of phones Petitioner had used to call Debari. (*See* Objs. 5). When questioned by the State, Debari testified:

> [State]: Okay. And why did you leave your phone off during that time period?
> [Debari]: I just didn't want to be bothered with any more calls.
> [State]: And who did you not want to be bothered by?
> [Debari]: With [Petitioner].
> [State]: Okay. Was he calling you quite often that night?
> [Debari]: Yes. He called me a few times.
> [State]: Did he always use the same number when he called?
> [Debari]: No.
> [Defense Counsel]: Objection, relevance.
> The Court: Sustained.
> [Debari]: No, he didn't.
> [Defense Counsel]: Judge I move to strike the answer.
> The Court: Granted. Strike that.

(App. 2, Trial Transcript 156:3–156:20 (alterations added)). Even assuming error was not invited when Petitioner's counsel objected during the colloquy, however, Petitioner's claim for habeas relief fails because the trial court had discretion to exclude any argument predicated on

[2] The Report concludes Petitioner's first claim should be rejected, both on exhaustion grounds and on the merits. (*See* Report 12–13, 25). As the Court agrees Petitioner's first ground fails on the merits, it does not address whether Petitioner failed to exhaust state court remedies before seeking habeas relief in federal court. *See Santiago-Lugo v. Warden*, 785 F.3d 467, 475 (11th Cir. 2015) ("[A] court may skip over the exhaustion issue if it is easier to deny . . . the petition on the merits without reaching the exhaustion question." (alterations added; citation omitted)).

facts not admitted in evidence. *See Stepp*, 109 So. 3d at 840–41 ("[B]ecause there was no evidence introduced through testimony or otherwise that the detective did not subpoena the phone records, defense counsel's argument regarding the detective's failure to subpoena the phone records would have been based on facts not in evidence, and clearly improper." (alteration added; citations omitted)). At the time of closing argument, the only evidence admitted at trial regarding Petitioner's phone records was 1) Debari did not "remember" whether the police asked him about his phone number; and (2) Detective Scott had the ability to obtain phone records in a homicide case. (*See* Report 26). This limited evidence was not a proper basis for Petitioner's counsel to draw the negative inference that law enforcement failed to obtain phone records. *See Taylor v. Sec'y, Fla. Dep't of Corr.*, 760 F.3d 1284, 1295 (11th Cir. 2014) ("[F]ederal courts will not generally review state trial courts' evidentiary determinations." (alteration added; citations omitted)).

Even if the trial court's decision was erroneous, the error did not render Petitioner's trial fundamentally unfair. *See id.* (holding error in a state court's evidentiary determination is harmless unless the error "so infused the trial with unfairness as to deny due process of law" (internal quotation marks and citations omitted)); *see also Cox v. Montgomery*, 718 F.2d 1036, 1038 (11th Cir. 1983) ("Even if the court's ruling was erroneous, it did not result in fundamental unfairness, as it was a narrow ruling limited to matters not in evidence."). As the Report notes, the State presented evidence from two witnesses, Debari and Castro, who testified Petitioner confessed to the murder, and some of those confessions took place in person. (*See* Report 26). In light of this other incriminating testimony, Petitioner fails to show a "reasonable probability" that the outcome at trial would have been different if his counsel had argued that law enforcement failed to subpoena Petitioner's phone records. *Strickland*, 466 U.S. at 694. The

Court thus rejects Petitioner's first claim for habeas relief.[3]

B. Ineffective Assistance of Counsel for Failing to Subpoena Phone Records

Petitioner's second and fourth claims for habeas relief involve Petitioner's counsel's purported failure to investigate by not subpoenaing Petitioner's phone records. (*See* Pet. 5–6, 8–9). In his second claim, Petitioner contends the phone records would have impeached Debari's testimony that he called Petitioner on the night of the incident. (*See id.* 5). In his fourth claim, Petitioner contends the records would have impeached Detective Scott's testimony that Petitioner failed to contact the police during the two years between the murder and the arrest. (*See id.* 8). As these two claims raise similar legal principles, the Court addresses them together.

A criminal defendant's counsel has a general duty "to reasonably investigate avenues of defense," *Blankenship v. Hall*, 542 F.3d 1253, 1273 (11th Cir. 2008), and "counsel's decision not to investigate must be reasonable under the circumstances," *Martinez v. Sec'y, Fla. Dep't of Corr.*, 684 F. App'x 915, 923 (11th Cir. 2017) (citation omitted). "Counsel's performance is deemed to be deficient only if the petitioner can show that 'no competent attorney' would have failed to pursue the defense, given the facts known to counsel at the time." *Id.* (quoting *Premo v. Moore*, 562 U.S. 115, 124 (2011)). "It should go without saying that the absence of evidence

[3] Petitioner states an objection, not previously raised in his Petition, that the trial court's limitation of his counsel's closing argument amounted to ineffective assistance of counsel. (*See* Objs. 5). Respondent argues the Court should not consider this new argument, and also that it would be frivolous to claim trial counsel could be ineffective for failing to make the argument he tried to make. (*See* Resp. 5). The Court agrees. The Court does not need to consider Petitioner's new argument because it was not presented to the Magistrate Judge. *See Williams v. McNeil*, 557 F.3d 1287, 1292 (11th Cir. 2009) ("[A] district court has discretion to decline to consider a party's argument when that argument was not first presented to the magistrate judge." (alteration added)). Even if the Court were to consider Petitioner's new argument, the Court would reject it. Because the trial court reasonably concluded Petitioner's counsel's attempted closing argument that law enforcement failed to subpoena phone records was based on facts not admitted in evidence, counsel could not have been ineffective for "failing to raise frivolous . . . defenses." *Vega v. United States*, No. 8:05 CV 711 T26TBM, 2006 WL 1805885, at *1 (M.D. Fla. June 29, 2006) (alteration added; citing *Chandler v. Moore*, 240 F.3d 907, 917–18 (11th Cir. 2001)). If failing to raise a non-meritorious defense is not deficient performance, then certainly neither is counsel's attempt at closing argument to raise a non-meritorious defense that the trial court does not allow.

cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.'" *Burt v. Titlow*, 571 U.S. 12, 17 (2013) (quoting *Strickland*, 466 U.S. at 689) (alteration in original).

The Report rejects Petitioner's second and fourth claims for habeas relief, concluding Petitioner's counsel's decision to forego subpoenaing the phone records was reasonable and that in any event, Petitioner was not prejudiced. (*See* Report 27–30, 37–40). The Report also states Petitioner's claim is speculative because he did not provide any objective evidence, such as the phone records themselves, to support it. (*See id.* 29). Petitioner objects, asserting he is not required to obtain and attach phone records to establish his claims for relief. (*See* Objs. 7, 17). Petitioner also contends his trial counsel never had the opportunity to advance a lack of evidence trial strategy given the trial court's exclusion of his counsel's closing argument about law enforcement's failure to subpoena the phone records. (*See id.* 10).

The Court agrees with the Magistrate Judge — the state court's rejection of Petitioner's second claim was not contrary to, and did not involve an unreasonable application of *Strickland*. First, Petitioner fails to show counsel's performance was deficient. Petitioner's counsel's decision not to subpoena Petitioner's phone records was a reasonable trial strategy predicated on the State's lack of evidence, and as such cannot support a collateral claim of ineffective assistance. *See Thomas v. McDonough*, No. 8:06-CV-00008, 2007 WL 656477, at *5 (M.D. Fla. Feb. 28, 2007) (rejecting petitioner's ineffective assistance of counsel claim because petitioner "has not demonstrated that counsel's decision not to . . . subpoena various records was anything other than trial strategy." (alteration added)). That the trial court precluded counsel from making one argument in closing does not negate the many other instances Petitioner's counsel advanced a lack of evidence strategy before the jury. (*See* Report 29).

Moreover, counsel's performance was not deficient because even if the records revealed Debari and Petitioner had not spoken on the phone, that showing would not have refuted Castro's and Debari's testimony that Petitioner confessed to the murder in person. *See, e.g., Estiven v. Sec'y, Dep't of Corr.*, No. 16-14056-D, 2017 WL 6606915, at *3 (11th Cir. Sept. 28, 2017) (holding habeas petitioner's trial counsel was not unreasonable for failing to investigate petitioner's phone records because "[a]dditional evidence . . . would not have refuted . . . testimony that [petitioner] admitted to committing the crimes . . . during two separate in-person conversations." (alterations added)).

Additionally, the Court is not persuaded by Plaintiff's objection he does not need to provide specific evidence, such as an affidavit or phone records, to substantiate his claims for habeas relief. Petitioner's speculation about what the phone records might reveal is insufficient to support a claim of ineffective assistance of counsel. *See Aldrich v. Wainwright*, 777 F.2d 630, 636 (11th Cir. 1985) ("Speculation is insufficient to carry the burden of a habeas corpus petitioner as to what evidence could have been revealed by further investigation."). Petitioner does not provide any objective evidence, such as the phone records, to substantiate his claim of ineffective assistance. *See Bing v. Sec'y, Fla. Dep't of Corr.*, No. 8:13-cv-1449, 2016 WL 5373480, at *11 (M.D. Fla. Sept. 26, 2016) ("[Petitioner] has not provided any phone records to support his claim. Nor has he alleged that he has seen and reviewed the records. Therefore, his contention that the phone records reveal that no phone call was made . . . is wholly speculative." (alterations added; citation omitted)).

Finally, Petitioner fails to show that any potential deficiency prejudiced him. In *Hill v. Secretary, Florida Department of Corrections*, the habeas petitioner argued that her trial counsel was deficient in failing to obtain her and her husband's phone records. 578 F. App'x 805, 809

(11th Cir. 2014). The Eleventh Circuit denied the petitioner's habeas claim. *See id.* The court reasoned the petitioner failed to "prove[] a reasonable probability that presenting the phone records would have changed the outcome of the proceeding" because the petitioner had "not shown what the phone records would have demonstrated." *Id.* (alteration added; citation omitted)). As in *Hill*, because Petitioner does not provide specific evidence as to what his phone records would have revealed, he fails to show he was prejudiced by his counsel's failure to subpoena the records. The Court thus denies Petitioner's second and fourth claims for habeas relief.

C. Ineffective Assistance of Counsel for Failing to Explain Non-Disclosure of Prior Convictions

In his third claim, Petitioner argues his trial counsel failed to properly explain to him that if he testified, the jury would hear only the number of his prior convictions, and not the nature of the convictions. (*See* Pet. 6–8). Petitioner asserts his counsel's failure to correct his erroneous belief, and thus failure to properly apprise him of his right to testify, constituted ineffective assistance. (*See id.*). "A claim of ineffective assistance of counsel is the proper framework to analyze defendant's allegation that his attorney has violated his right to testify." *Gallego v. United States*, 174 F.3d 1196, 1197 (11th Cir. 1999) (citation omitted).

According to Petitioner, when he told his counsel he was concerned about the jury learning of his convictions for burglary and grand theft, his counsel merely agreed, leading him to believe the nature of his convictions would be admitted if he testified. (*See* Pet. 6–7). Petitioner asserts had he known the nature of his convictions was inadmissible, he would have testified, which would have given him the "opportunity to personally refute the conflicting testimony of the state's central witnesses . . . ." (Objs. 14). Petitioner insists "[g]iven that [he] was facing life in prison, it was certainly worth what little risk their [sic] may have been to

divulge to the jury that he had a mere two prior convictions on his records if it meant he could declare his innocence and provide the jury with an alibi." (*Id.* 15 (alterations added)).

The Report recommends denial of Petitioner's claim, reasoning counsel never affirmatively misled Petitioner, and, in any event, Petitioner knowingly waived his right to testify. (*See* Report 32–37). Petitioner objects, reiterating the same arguments raised in the Petition. (*See* Objs. 11–15). Again, the Court agrees with the Magistrate Judge.

Deficient performance in this context may be established "[w]here counsel has refused to accept the defendant's decision to testify and refused to call him to the stand, or where defense counsel never informed the defendant of his right to testify and that the final decision belongs to the defendant alone." *Gallego*, 174 F.3d at 1197 (alteration added). Petitioner does not argue either situation applies. (*See generally* Objs.). Petitioner also does not claim this is a case of a defense counsel's "affirmative misrepresentation." *Guerra v. Sec'y, Dep't of Corr.*, 271 F. App'x 870, 871 (11th Cir. 2008) (internal quotation marks and citation omitted). Petitioner thus fails to show this habeas claim is predicated on "clearly established Federal law." 28 U.S.C. § 2254(d)(1).

Petitioner also fails to show his stated concern was so evident that only an unreasonable attorney would fail to correct it. In Florida, a criminal defendant can open the door by engaging in "spin control" that "characterize[es] the prior convictions in a way favorable to his case at trial." *Rogers v. State*, 964 So. 2d 221, 223 (Fla. 4th DCA 2007) (alteration added; internal quotation marks omitted). In that situation, "the state is entitled to inquire further regarding the convictions to attempt to dispel any misleading impression." *Id.* (citation omitted). In any event, it is not unreasonable to advise a defendant against testifying to keep prior convictions away from the jury. *See United States v. Teague*, 953 F.2d 1525, 1533 n.9 (11th Cir. 1992) ("There

are good tactical reasons why it may not be best for the defendant to testify in some circumstances. [For example] . . . the defendant might be prejudiced by revelation of prior convictions . . . ." (alterations added)).

Finally, the Court is not persuaded by Petitioner's objection that the state trial court failed to conduct a thorough inquiry to clarify Petitioner's misconception. (*See* Objs. 13). Before Petitioner's counsel rested his case, the trial court specifically asked Petitioner if he wanted to testify:

> The Court: Is Mr. Stepp going to testify?
> [Defense Counsel]: I don't believe Mr. Stepp is going to testify . . . .
> The Court: Mr. Stepp, is it your personal decision not to testify[?]
> [Petitioner]: Yes, sir.
> The Court: All right. Have you discussed that decision with your attorney [?]
> [Petitioner]: Yeah, based on my discussion with my attorney, I choose not to.
> The Court: All right . . . .

(App. 2, Trial Transcript 466:22–23, 467:16–22 (alterations added)). The trial court was not required to conduct a more thorough inquiry. *See Teague*, 953 F.2d at 1533 n.8 ("We believe that it would be inappropriate to require the trial court to discuss this choice [of whether to testify at trial] with the defendant." (alteration added)); *see also Lott v. State*, 931 So. 2d 807, 819 (Fla. 2006) (holding under Florida law, a similar colloquy with petitioner constituted "competent, substantial evidence," which supported finding that petitioner "voluntarily agreed with counsel's recommendation not to take the stand."). The Court thus denies Petitioner's third claim for habeas relief.

D. Ineffective Assistance of Counsel for Failing to Call Moreno as an Alibi Witness

In his fifth claim, Petitioner contends his counsel failed to call as a witness Moreno, who Petitioner claims would have testified as to his whereabouts on the night of the murder. (*See* Pet. 9–10). A habeas petitioner's counsel's failure to call alibi witnesses can give rise to a claim of

ineffective assistance of counsel. *See Rizo v. United States*, 446 F. App'x 264, 266 (11th Cir. 2011). However, "complaints about uncalled witnesses are not favored because the presentation of testimony involves trial strategy and 'allegations of what a witness would have testified are largely speculative' . . . . Deciding which witnesses to call 'is the epitome of a strategic decision, and it is one that [the Court] will seldom, if ever second guess.'" *Shaw v. United States*, 729 F. App'x 757, 759 (11th Cir. 2018) (alterations added; citations omitted).

The Report concludes Petitioner's fifth ground for habeas relief should be denied, agreeing with the state trial court that Petitioner has not presented a facially sufficient claim, and, in any event, the record conclusively refutes Petitioner's claim he wanted his attorney to call Moreno as a witness. (*See* Report 40–45). In his Objections, Petitioner objects, explaining that "when the trial court asked [him] whether he wished to call any defense witnesses, he was under the impression that his counsel was somehow going to get Moreno's testimony in through the state's case." (Objs. 20 (alteration added)). Additionally, Petitioner objects to the Report's finding that he fails to allege a facial claim of ineffective assistance of counsel. (*See id.* 21–22).

The Court agrees with the Magistrate Judge. First, Petitioner's counsel was not unreasonable for not calling Moreno as a witness. Moreno's proposed testimony may have strengthened the State's case as it would have placed Petitioner in the area of the murder, near the time of the murder, with a woman matching the description given by Luna. (*See* Report 44). As with the decision not to subpoena Petitioner's phone records, the decision not to call Moreno as a witness was consistent with counsel's reasonable trial strategy of advancing a theory of the State's lack of evidence.

Petitioner also fails to show he was prejudiced. The "prejudice burden is heavy where the petitioner alleges ineffective assistance in failing to call a witness because 'often allegations

of what a witness would have testified to are largely speculative.'" *Sullivan v. DeLoach*, 459 F.3d 1097, 1109 (11th Cir. 2006) (quoting *United States v. Guerra*, 628 F.2d 410, 413 (5th Cir. 1980) (footnote call number omitted)). Petitioner provides no evidence, such as an affidavit from Moreno, to substantiate her proposed testimony. (*See generally* Pet.). Petitioner's unsupported claim that his counsel should have called Moreno to testify is insufficient to warrant habeas relief. *See, e.g.*, *Estiven*, 2017 WL 6606915, at *4 (denying ineffective assistance of counsel claim involving a witness who would have "added a denial of any participation in the crime" because "such speculation cannot form the basis of a valid claim") (citations omitted); *see also Streeter v. United States*, 335 F. App'x 859, 864 (11th Cir. 2009) ("[M]ere speculation that missing witnesses would have been helpful is insufficient to meet the petitioner's burden of proof." (alteration added; citation omitted)). In claiming Moreno's proposed testimony is sufficient for a habeas claim (*see* Objs. 21), Petitioner does not acknowledge the extensive case-law demanding greater specificity in ineffective assistance of counsel claims.

Finally, even if Petitioner alleges a facial claim for ineffective assistance of counsel, the claim is conclusively refuted by the record, and Petitioner is thus not entitled to an evidentiary hearing. *See, e.g.*, *Marquez v. United States*, 684 F. App'x 843, 866 (11th Cir. 2017) ("Because the record conclusively refutes [petitioner's] allegation that counsel deprived him of his right to testify, he cannot establish *Strickland*'s first requirement that counsel's performance was deficient." (alteration added)). The trial court questioned Petitioner after the State rested its case, and he stated he did not want to call any witnesses:

> The Court: Is there any witness that you would like your attorney to call and you have told him and you are not going to call?
> [Petitioner]: I don't have any witness.
> The Court: Okay.
> The Court: And are you satisfied with the defense presented by your attorney?
> [Petitioner]: Yes.

(App. 2, Trial Transcript 468:17–24 (alterations added)).

The Court is not persuaded by Petitioner's objection he believed Moreno would testify as a witness for the State because, as illustrated by the colloquy above, Petitioner maintained he did not wish to call any witnesses even after the close of the State's case. The state court's conclusion was thus neither contrary to, nor an unreasonable application of *Strickland*. *See, e.g.*, *Saldo v. Crosby*, 162 F. App'x 915, 918 (11th Cir. 2006) (denying ineffective assistance of counsel claim for failure to investigate and call alibi witnesses where petitioner "was informed that he could call any witnesses that his attorney did not call, and he stated under oath that he did not wish to do so").

E. Ineffective Assistance of Counsel for Inaccurate Information Inducing Petitioner to Not Accept Plea Offer

Petitioner next argues that defense counsel improperly advised him not to accept the State's pre-indictment plea-offer of 10 years' imprisonment. (*See* Pet. 10–11). Specifically, Petitioner asserts his counsel told him the State's case was weak and acquittal was likely. (*See id.* 10). After Petitioner rejected the State's pre-indictment plea offer, the State then indicted him for first-degree murder, for which he was ultimately convicted and sentenced to life. (*See id.* 11).

"The Court has long recognized that *Strickland*'s two-part standard applies to 'ineffective assistance of counsel claims arising out of the plea process.'" *In re Perez*, 682 F.3d 930, 932 (11th Cir. 2012) (citations omitted). "To prevail on [t]his ineffectiveness claim, [a habeas petitioner] [must first] show that his counsel gave him constitutionally deficient advice with respect to plea offers . . . ." *Millan v. Sec'y, Fla. Dep't of Corr.*, 663 F. App'x 753, 754 (11th Cir. 2016) (alterations added). A habeas petitioner must also establish prejudice by showing "a reasonable probability that but for counsel's ineffectiveness: (1) 'the plea offer would have been

presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances)'; (2) 'the court would have accepted its terms'; and (3) 'the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.'" *Osley v. United States*, 751 F.3d 1214, 1222 (11th Cir. 2014) (quoting *Lafler v. Cooper*, 566 U.S. 156, 164 (2012)).

The Report finds Petitioner's final ineffective assistance of counsel claim fails, concluding counsel's performance was not deficient and Petitioner fails to provide any support to suggest he would have accepted the plea offer had it not been for his counsel's advice. (*See* Report 45–56).

Petitioner objects. First, Petitioner contends his counsel should have known Debari and Castro's testimonies were harmful and would result in a conviction, and his counsel should have advised him of that risk. (*See* Objs. 24). Second, Petitioner contends counsel represented he was going to investigate the case more thoroughly and explore witnesses and defenses, which he never did; and counsel's representations contributed to Petitioner's decision to reject the 10-year offer. (*See id.* 25). Third, Petitioner contends the mere fact he declared his innocence at trial does not refute his claim of ineffective assistance of counsel. (*See id.*). Finally, Petitioner notes the state trial court did not acknowledge the Supreme Court's recent decisions in *Lafler*, 566 U.S. 156, and *Missouri v. Frye*, 566 U.S. 134 (2012), nor apply the correct standard, as set forth in those cases, to Petitioner's claim. (*See id.* 26).

Again, the Court agrees with the Report. First, Petitioner fails to show his counsel's performance was deficient. At the time the plea-offer was made, Petitioner was faced with a second-degree murder charge and discovery had shown no physical evidence linking Petitioner

to the crime. (*See* Report 54; Objs. 24). Petitioner fails to show that a reasonable attorney would not advise a criminal defendant to reject such a plea offer, especially where the State's primary evidence came from Debari and Castro, both of whom had criminal histories and may have had credibility issues. (*See* Report 55; Objs. 24). Thus, Petitioner has not shown his counsel "made errors so serious that he was no longer functioning as the counsel guaranteed by the Sixth Amendment." *Frank v. United States*, 522 F. App'x 779, 781 (11th Cir. 2013) (citation omitted).

Second, Petitioner fails to provide any support, other than his own self-serving statement, to suggest he would have accepted the plea offer had it not been for counsel's advice. *Diaz v. United States*, 930 F.2d 832, 835 (11th Cir. 1991) ("Given [defendant's] awareness of the plea offer, his after the fact testimony concerning his desire to plead, without more, is insufficient to establish that but for counsel's alleged advice or inaction, he would have accepted the plea offer.") (alteration added; citation omitted)). Notably, Petitioner stated he did not wish to entertain any plea offers and that he genuinely believed in his innocence, as illustrated in the colloquy below:

> The Court: Would you like another opportunity to discuss with your attorney an offer that you would like to make and that maybe the State would consider? . . . But would you like to discuss it with your attorney to make an offer a plea that they might consider?
> [Petitioner]: No, Your Honor.
> The Court: You don't.
> [Petitioner]: No, sir.
> The Court: Do you understand clearly that if the jury finds you guilty, you will die in prison.
> [Petitioner]: I understand.
> The Court: Would you like to . . . talk it over with your mom?
> [Petitioner]: No, sir. It is not her decision.
> . . .
> The Court: I understand that. You don't want to even think about it.
> [Petitioner]: Your honor, I believe in my innocence and I believe that the facts of this case are going to reflect that . . . .

(App. 1, Trial Transcript 25:25–26:2, 26:4–16, 27:2–6 (alterations added)). While Petitioner is correct that maintaining his innocence at trial does not foreclose his ineffective assistance of counsel claim, it is certainly a "relevant consideration." *Osley*, 751 F.3d at 1224 (finding no prejudice to habeas petitioner's ineffective assistance of counsel claim where the petitioner's "claim that he would have pled guilty had he been properly informed is . . . undermined by his repeated claims of innocence" (alteration added)).

Third, the Court rejects Petitioner's objection his counsel represented he would investigate the case more thoroughly and explore witnesses and defenses, which contributed to Petitioner's decision to reject the 10-year offer. (*See* Objs. 25). Again, trial counsel advanced a reasonable strategy of attacking the State's lack of evidence, especially physical evidence, thus defeating Petitioner's claim of ineffective assistance of counsel. *See Rogers v. Zant*, 13 F.3d 384, 387 (11th Cir. 1994) ("By its nature, 'strategy' can include a decision not to investigate . . . . [A] lawyer can make a reasonable decision that no matter what an investigation might produce, he wants to steer clear of a certain course.") (quoting *Strickland*, 466 U.S. at 691; alterations added)). Moreover, Petitioner's claim he wished to pursue additional avenues for his defense, which purportedly induced him to reject the State's initial plea deal, is clearly refuted by the record. (*See* App. 2, Trial Transcript 468:17–24 (alterations added)). Thus, Petitioner fails to show his counsel's performance was deficient. *See Marquez*, 684 F. App'x at 866 ("Because the record conclusively refutes [petitioner's] allegation . . . he cannot establish *Strickland*'s first requirement that counsel's performance was deficient." (alterations added; footnote call number omitted)).

Finally, the Court is not persuaded by Petitioner's argument the Supreme Court's decisions in *Frye* and *Lafler* dictate a different result. In *Missouri v. Frye*, 566 U.S. 134 (2012),

defense counsel did not inform the defendant of the plea offer, and after the offer lapsed, the defendant still pled guilty, but on more severe terms. *See id.* at 148 (noting that its discussion involved an "application of *Strickland* to the instances of an uncommunicated, lapsed plea . . . ."). In *Lafler v. Cooper*, the government "conceded" there was deficient performance of counsel because petitioner's trial counsel had informed him of "an incorrect legal rule." 566 U.S. at 162, 166 (citation omitted). Here, Petitioner does not argue his counsel failed to inform him of the plea offer, nor does he assert he relied on an incorrect legal rule in deciding not to accept it. (*See generally* Pet.).

The Court, as did the state trial court and Magistrate Judge, applies *Strickland*'s prejudice test, consistent with *Frye* and *Lafler*. The Court thus rejects Petitioner's objection the state court applied the wrong standard by not referencing *Frye* or *Lafler*. *See, e.g., Fisher v. Secy., Fla. Dept. of Corr.*, 616 F. App'x 916, 921 (11th Cir. 2015) ("While the Florida court did not cite to . . . *Lafler*, it determined that Petitioner had to show prejudice in order to prevail on his claim, as required by *Strickland* . . . . Accordingly, the court correctly identified the governing legal principles, and thus, its decision was not contrary to federal law." (alterations added)). Petitioner's sixth habeas claim is denied.

F. Cumulative Impact of Counsel's Errors During Trial

Finally, Petitioner asserts the cumulative impact of counsel's errors deprived him of a fair trial. (*See* Pet. 12; Objs. 27). "Under the cumulative-error doctrine, a sufficient agglomeration of otherwise harmless or nonreversible errors can warrant reversal if their aggregate effect is to deprive the defendant of a fair trial." *Insignares v. Sec'y, Fla., Dep't of Corr.*, 755 F.3d 1273, 1284 (11th Cir. 2014) (citation omitted). This doctrine does not apply where there are no errors to accumulate. *Id.* ("[W]here '[t]here [is] no error in any of the [trial] court's rulings, the

argument that cumulative trial error requires that this Court reverse [the defendant's] convictions is without merit.'" (alterations in original) (quoting *United States v. Taylor*, 417 F.3d 1176, 1182 (11th Cir. 2005) (per curiam))).

As the Court finds, none of the alleged errors of counsel, considered alone, approach the threshold standard of ineffective assistance of counsel. Taken together, therefore, their cumulative effect also falls short of depriving Petitioner of effective assistance of counsel. *See Morris v. Sec'y, Dep't of Corr.*, 677 F.3d 1117, 1132 (11th Cir. 2012) ("Plainly, [the petitioner's] cumulative error claim must fail" because "none of [the petitioner's] individual claims of error or prejudice have any merit, and therefore we have nothing to accumulate." (alterations added)).[4] Petitioner's seventh claim for habeas relief is thus denied.

IV. CERTIFICATE OF APPEALABILITY

A certificate of appealability "may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (alteration added). The Supreme Court has described the limited circumstances when a certificate of appealability should properly issue after the district court denies a habeas petition:

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.

Slack v. McDaniel, 529 U.S. 473, 484 (2000). Petitioner does not satisfy his burden, and the Court will not issue a certificate of appealability.

[4] Because Petitioner's third and fifth claims fail individually, the cumulative error doctrine does not apply. The Court thus rejects Petitioner's request for the Court to read claims three and five "in harmony." (Objs. 14, 22).

V. CONCLUSION

The undersigned has reviewed the Report, Petitioner's Objections, the record, and applicable law *de novo*. In light of that review, the undersigned agrees with the Report's recommendations. Accordingly, it is

ORDERED AND ADJUDGED that the Report **[ECF No. 17]** is **ACCEPTED AND ADOPTED** as follows:

1. Petitioner, Christopher Stepp's Petition Under 28 U.S.C. [Section] 2254 for Writ of Habeas Corpus by Person in State Custody **[ECF No. 1]** is **DENIED**.
2. Petitioner is not entitled to an evidentiary hearing.
3. No certificate of appealability shall issue.
4. The Clerk of the Court is directed to **CLOSE** this case, and all pending motions are **DENIED as moot**.
5. Judgment will be entered by separate order.

DONE AND ORDERED in Miami, Florida, this 28th day of August, 2018.

Cecilia M. Altonaga

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge Patrick A. White;
Petitioner, Christopher Stepp, *pro se*
counsel of record