APPENDIX B

B-1 U.S. District Court Order/Opinion Denying Petition Under 28 U.S.C. § 2254 For Writ Of Habeas Corpus By A Person In State Custody, June 22, 2017.

B-2 U.S. District Court Order Denying Reconsideration Motion, August 9, 2017.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DENNIS WILLIAM ROBINSON,

Petitioner,

v. CASE NO. 6:14-cv-1666-Orl-40GJK

SECRETARY, DEPARTMENT OF CORRECTIONS, et al.,

Respondents.
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ORDER

This cause is before the Court on an Amended Petition for Writ of Habeas Corpus ("Amended Petition") filed pursuant to 28 U.S.C. § 2254 (Doc. 10). Thereafter, Respondents filed a Response to the Amended Petition (Doc. 20) in compliance with this Court's instructions. Petitioner filed a Reply to the Response (Doc. 38).

Petitioner alleges twenty-one claims for relief in the Amended Petition. For the following reasons, the Amended Petition denied.

I. PROCEDURAL HISTORY

Petitioner was charged by amended information with sexual battery upon a child less than twelve years old (Doc. 24-1 at 25). After a jury trial, Petitioner was convicted as charged (Doc. 24-16 at 6, 14). The trial court sentenced Petitioner to a term of life imprisonment with a twenty-five-year minimum mandatory term. *Id.* at 19, 27-29. Petitioner appealed, and the Fifth District Court of Appeal ("Fifth DCA") affirmed *per curiam* (Doc. 24-19 at 3).

APPENDIX B-1

Petitioner filed a motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure (Doc. Nos. 24-19 at 20-33; 24-20 at 1-29; 24-21 at 1-8). After filing an amended Rule 3.850 motion (Doc. 24-21 at 10-14), the trial court dismissed the motion in part and granted Petitioner leave to amend. *Id.* at 16-20. Petitioner filed two amended Rule 3.850 motions (Doc. 24-21 at 22-46; 24-22 at 1-12). The trial court summarily denied several of Petitioner's claims and directed the State to respond to the remaining claims (Doc. 24-22 at 14-41). The trial court later determined that an evidentiary hearing was necessary on several claims. *Id.* at 43-46. After holding an evidentiary hearing, the trial court denied Petitioner's remaining claims (Doc. Nos. 24-22 at 49-132; 24-23 at 1-40, 42-53). Petitioner appealed, and the Fifth DCA affirmed *per curiam* (Doc. 24-25 at 69).

Petitioner subsequently filed a petition for writ of habeas corpus alleging ineffective assistance of appellate counsel with the Fifth DCA (Doc. 24-26 at 10-31). The appellate court denied the petition without discussion. *Id.* at 44. Petitioner also filed a motion to correct illegal sentence pursuant to Rule 3.800(a) of the Florida Rules of Criminal Procedure. *Id.* at 53-55. The trial court denied the motion, and the Fifth DCA affirmed *per curiam* (Doc. 24-27 at 10-12, 39).

II. LEGAL STANDARDS

A. Standard of Review Under the Antiterrorism Effective Death Penalty Act ("AEDPA")

Pursuant to the AEDPA, federal habeas relief may not be granted with respect to a claim adjudicated on the merits in state court unless the adjudication of the claim:

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

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

"[S]ection 2254(d)(1) provides two separate bases for reviewing state court decisions; the 'contrary to' and 'unreasonable application' clauses articulate independent considerations a federal court must consider." *Maharaj v. Sec'y for Dep't of Corr.*, 432 F.3d 1292, 1308 (11th Cir. 2005). The meaning of the clauses was discussed by the Eleventh Circuit Court of Appeals in *Parker v. Head*, 244 F.3d 831, 835 (11th Cir. 2001):

> Under the "contrary to" clause, a federal court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the United States Supreme Court] on a question of law or if the state court decides a case differently than [the United States Supreme Court] has on a set of materially indistinguishable facts. Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the United States Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case.

Even if the federal court concludes that the state court applied federal law incorrectly, habeas relief is appropriate only if that application was "objectively unreasonable." *Id.* Whether a state court's decision was an unreasonable application of law must be assessed in light of the record before the state court. *Holland v. Jackson*, 542 U.S. 649, 652 (2004) (*per*

curiam).

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

B. Standard for Ineffective Assistance of Counsel

The United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), established a two-part test for determining whether a convicted person is entitled to relief on the ground that his counsel rendered ineffective assistance: (1) whether counsel's performance was deficient and "fell below an objective standard of reasonableness"; and (2) whether the deficient performance prejudiced the defense.[1] *Id.* at 687-88. A court must adhere to a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* at 689-90. "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690;

[1] In *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993), the United States Supreme Court clarified that the prejudice prong of the test does not focus solely on mere outcome determination; rather, to establish prejudice, a criminal defendant must show that counsel's deficient representation rendered the result of the trial fundamentally unfair or unreliable.

Gates v. Zant, 863 F.2d 1492, 1497 (11th Cir. 1989).

As observed by the Eleventh Circuit Court of Appeals, the test for ineffective assistance of counsel:

> has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial. Courts also should at the start presume effectiveness and should always avoid second guessing with the benefit of hindsight. *Strickland* encourages reviewing courts to allow lawyers broad discretion to represent their clients by pursuing their own strategy. We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.

White v. Singletary, 972 F.2d 1218, 1220-21 (11th Cir. 1992) (citation omitted). Under those rules and presumptions, "the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between." *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994).

III. ANALYSIS

A. Claim One

Petitioner alleges trial counsel was ineffective for failing to argue that the State of Florida violated the Interstate Agreement on Detainers Act ("IADA") (Doc. 10 at 5). Petitioner maintains that the State of Florida failed to accept temporary custody of him in order to try him while he was incarcerated in the United States Virgin Islands.[2] *Id.*

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[2] Contrary to Petitioner's assertion, the State of Florida requested Petitioner's extradition, however, the Virgin Islands declined to extradite him (Doc. 24-1 at 48-50, 119, 123).

Petitioner raised this claim in his Rule 3.850 motion, and the trial court determined that an evidentiary hearing was necessary on this claim (Doc. 24-22 at 45).

At the evidentiary hearing, attorney Ryan LaBar ("LaBar") testified that he did not recall filing any motions to dismiss the information based on a violation of the IADA. *Id.* at 69. Petitioner's other attorneys, Winston Hobson ("Hobson") and Timothy Caudill ("Caudill"), also testified that they did not file motions with regard to this matter. *Id.* at 78, 95. Petitioner testified that he was incarcerated in the Virgin Islands when the charging instruments were filed in Florida; however, he never made a demand for extradition during his incarceration or prior to being transported to Florida in September 2005. *Id.* at 121-22. The trial court denied the claim, concluding that because Petitioner never made a request to be transported, he could not demonstrate deficient performance or prejudice (Doc. 24-23 at 50-52). The Fifth DCA affirmed *per curiam* (Doc. 24-25 at 69).

The IADA establishes guidelines by which one jurisdiction may temporarily obtain custody of a prisoner held in another jurisdiction for the purpose of trying the prisoner. *See generally Reed v. Farley*, 512 U.S. 339, 341 (1994) (citations omitted); *Remeta v. Singletary*, 85 F.3d 513, 517 (11th Cir. 1996); *Seymore v. Alabama*, 846 F.2d 1355, 1357 (11th Cir. 1988). Article III of the IADA allows a prisoner against whom a detainer has been filed to demand a disposition of the charges within 180 days from the state's receipt of the prisoner's notice requesting final disposition of the charges. *Remeta*, 85 F.3d at 517; *Seymore*, 846 F.2d at 1357.

Petitioner did not file a demand for disposition of the Florida charges while he was

incarcerated in the Virgin Islands. Therefore, counsel's failure to move to dismiss the charges based on a violation of the IADA did not amount to deficient performance, nor did prejudice result. The state court's denial of this claim was not contrary to or an unreasonable application of clearly established federal law. Claim one is denied pursuant to § 2254(d).

B. Claim Two

Petitioner argues trial counsel was ineffective for failing to seek suppression of a letter admitted at trial (Doc. 1 at 7). In support of this claim, Petitioner maintains that the undated latter sent to Jimmy Mudica ("Mudica")[3] from Petitioner should have been suppressed because it did not reference any charged crime against the victim or any sexual act or abuse (Doc. 24-20 at 3). Petitioner raised this claim in his Rule 3.850 motion. *Id.* The trial court summarily denied the motion pursuant to *Strickland* (Doc. 24-22 at 28). The Fifth DCA affirmed *per curiam* (Doc. 24-25 at 69).

Petitioner's claim is refuted by the record. Prior to trial, defense counsel filed an amended motion to exclude *Williams*[4] Rule evidence related to similar crimes Petitioner had committed against Mudica (Doc. 24-1 at 31-42). The trial court held a hearing on the

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[3] Mudica, who is deceased, was a friend of the victim when they were children. The victim testified that he was present when Petitioner committed sexual acts upon Mudica (Doc. 24-10 at 91-92). In the letter to Mudica, Petitioner apologized for his actions (Doc. 24-11 at 12-13).

[4] *Williams v. State*, 110 So. 2d 654 (Fla. 1959) (holding that evidence of similar crimes is admissible and relevant if the evidence shows a common scheme or plan). The *Williams* Rule was codified at section 90.404(2), Florida Statutes.

motion, and the State noted that it was seeking to introduce the letter Petitioner wrote to Mudica (Doc. 24-3 at 15-17). The trial court determined that the State was permitted to offer *Williams* Rule evidence, including the letter to Mudica (Doc. 24-1 at 83-86). Defense counsel also objected to the introduction of the letter at trial, and the trial court overruled the objection (Doc. 24-11 at 11-13).

The record reflects that counsel attempted to prevent the introduction of this letter by filing a motion in limine and objections at trial. Therefore, Petitioner cannot demonstrate deficient performance on the part of counsel or that prejudice resulted. The state court's denial of this claim was neither contrary to, nor an unreasonable application of, *Strickland*. Claim two is denied pursuant to § 2254(d).

C. Claims Three and Twenty-One

Petitioner asserts in claim three that the trial court erred by improperly modifying the similar fact evidence jury instructions (Doc.1 at 8-9). In claim twenty-one, Petitioner argues the trial court erred by giving misleading and confusing jury instructions. *Id.* at 45-46. Petitioner raised these claims in his supplemental Rule 3.850 motion (Doc. 24-21 at 10-12). The trial court denied these claims, concluding they were not cognizable in a Rule 3.850 motion because they could have been raised on direct appeal (Doc. 24-22 at 39-40). The Fifth DCA affirmed *per curiam* (Doc. 24-25 at 69).

A *per curiam* affirmance of a trial court's finding of procedural default is a sufficiently clear and express statement of reliance on an independent and adequate state ground to bar consideration by the federal courts. *Harmon v. Barton*, 894 F.2d 1268, 1273

(11th Cir. 1990); *see also Ferguson v. Sec'y Dep't of Corr.*, 580 F.3d 1183, 1218 (11th Cir. 2009). "[T]he clear inference to be drawn from the appellate court's per curiam affirmance of the trial court's decision explicitly based on procedural default is that the court accepted not only the judgment but the reasoning of the trial court." *Harmon*, 894 F.2d at 1273. Therefore, this Court will apply the state procedural bar.

Procedural default will be excused only in two narrow circumstances: (1) when a petition can show cause for the default and prejudice resulting from the default or (2) if a "fundamental miscarriage of justice" has occurred, or where there is a reasonable probability resulted in the conviction of one who is actually innocent." *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999); *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

Petitioner has not shown cause or prejudice that would excuse any procedural default. *Wright*, 169 F.3d at 703. Likewise, he has not shown the applicability of the actual innocence exception. *Murray*, 477 U.S. at 49. A review of the record reveals that Petitioner is unable to satisfy either of the exceptions to the procedural default bar. Accordingly, the Court is barred from reviewing claims three and twenty-one.

D. Claim Four

Petitioner contends trial counsel was ineffective for failing to object to the jury instructions given on the *Williams* Rule evidence and for failing to request that the instruction be given at the close of the evidence (Doc. 1 at 11-12). Petitioner raised this claim in his Rule 3.850 motion and supplemental Rule 3.850 motion (Doc. Nos. 24-19 at 30; 24-21 at 13).

The state court held an evidentiary hearing on these claims (Doc. 24-22 at 45). Defense counsel Caudill testified that he reviewed the *Williams* Rule jury instruction prior to the reading of the instruction and stated he had the opportunity to object to the instruction. *Id.* at 90-91. The state court denied the claim, concluding that the jury was properly instructed on the similar fact evidence (Doc. 24-23 at 48). Additionally, the court stated that Petitioner failed to demonstrate prejudice. *Id.* The Fifth DCA affirmed *per curiam* (Doc. 24-25 at 69).

Petitioner was charged with sexual battery on a minor that occurred between 1992 and 1996 (Doc. 24-1 at 25). At that time, the laws of Florida allowed the introduction of similar fact evidence of other crimes or wrongs when relevant to prove a material act at issue, such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake. § 90.404(2), Fla. Stat. (1996).[5] The standard Florida jury instructions provide an instruction to be "given at the time the evidence is admitted:"

> The evidence you are about to receive concerning other crimes, wrongs, or acts allegedly committed by the defendant will be considered by you for the limited purpose of proving [motive] [opportunity] [intent] [preparation] [plan] [knowledge] [identity] [the absence of mistake or accident]] [(other relevant factor)] and you shall consider it only as it relates to [that] [those] issue[s].
>
> However, the defendant is not on trial for a crime, wrong, or act that is not include in the [information.]

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[5] This statute now contains a provision that specifically allows for the introduction of other crimes or wrongs or acts of child molestation for any matter to which the evidence is relevant. § 90.404(2)(b), Fla. Stat.

Fla. Std. (Crim) Jury Instr. 2.4. The trial court may also give a similar instruction at the close of evidence, if applicable. *See* Fla. Std. (Crim.) Jury Instr. 3.8.

The trial court gave the jury the following instruction at the time similar fact evidence was introduced:

> Ladies and gentleman of the jury, the evidence you are about to receive, concerning evidence of the touching and fondling of Charles Armstrong, by the Defendant, will be considered for the limited purpose of proving motive, opportunity, intent, preparation, plan, knowledge, the absence of mistake or accident on the part of the Defendant, and you shall consider it only as it relates to those issues.

(Doc. 24-10 at 53-55). The trial court also told the jury that Petitioner was not on trial for crimes that were not contained in the information. *Id.* at 55. The trial court read this similar fact instruction several additional times when similar fact evidence was introduced at trial. *Id.* at 75-76, 87, 90, and 147. Defense counsel renewed his objection to the introduction of the evidence. *Id.* The trial court did not re-read this instruction at the close of the evidence, and defense counsel did not object to the omission (Doc. 24-15 at 11-20).

The jury later submitted a question about the similar fact. *Id.* at 22. The jury recognized that they could only consider certain evidence to demonstrate motive, opportunity, intent, preparation, plan, knowledge, or accident. *Id.* The trial court instructed the jury that its limiting instruction applied to the uncharged sexual acts related to victim Charles Armstrong ("Armstrong") and Mudica (Doc. 24-16 at 5).

The jury instructions given were substantially the same as the standard jury

instructions on similar fact evidence. Thus, Petitioner cannot show that the trial court improperly instructed the jury. Additionally, counsel objected to the instruction, along with the admission of the similar fact evidence. There is no indication that any further objection would have been sustained.

Furthermore, although counsel could have requested the re-reading of the instruction at the close of the evidence, Petitioner cannot demonstrate that the failure to do so resulted in prejudice. Even though the jury submitted a question to the trial court regarding the similar fact evidence, the jury recognized that they could only consider the similar fact evidence to prove motive, opportunity, or plan. *Id.* Petitioner fails to show that but for counsel's actions, a reasonable probability exists that the outcome of trial would have been different. The state court's denial of this claim was not contrary to or an unreasonable application of clearly established federal law. Accordingly, claim four is denied pursuant to § 2254(d).

E. Claim Five

Petitioner contends that the trial court committed fundamental error when it denied his motion to dismiss the case due to the State's destruction of evidence (Doc. 1 at 14). Petitioner raised this claim in his Rule 3.850 motion (Doc. 24-20 at 19). The trial court concluded that this claim was not cognizable in Petitioner's Rule 3.850 motion because it should have been raised on direct appeal (Doc. 24-22 at 38). Thus, this claim appears to be procedurally defaulted. However, Respondents did not argue that this ground is procedurally defaulted. Therefore, the Court will not *sua sponte* invoke the procedural

bar. *See Esslinger v. Davis*, 44 F.3d 1515, 1524 (11th Cir. 1995) (a "district court may invoke the [exhaustion] bar *sua sponte* [only] where . . . requiring the petitioner to return to state court to exhaust his claims serves an important federal interest"). The Court will address the merits of this claim.

Petitioner filed a pretrial motion to dismiss the action due to the destruction of evidence (Doc. 24-1 at 77). Petitioner stated that the State had destroyed a videotaped interview of the victim. *Id.* The trial court held a hearing on the motion (Doc. 24-3 at 56). Deputy Chief Darryl Presley ("Deputy Chief Presley"), from City of Sanford Police Department testified that in 1996, the police department had a policy in effect whereby evidence was to be placed in an evidence bag and submitted to the evidence custodian. *Id.* at 58-59. Deputy Chief Presley stated that copies of videotaped interviews would not necessarily be placed into evidence if they part of an ongoing investigation; they would then be placed in the investigative file. *Id.* at 65. Deputy Chief Presley also testified that if videotapes were not submitted into evidence and were left in an investigative file, those files would be placed into a banker's box and be put in storage after a number of years. *Id.* at 66-68.

Sergeant Pat Smith ("Sergeant Smith") testified that he received a videotaped interview in this case from the Child Protection Team. *Id.* at 79. Sergeant Smith stated that he believed the Child Protection Team kept the original videotape and gave the police department a copy. *Id.* at 80. Sergeant Smith testified that he would have given the videotape to Investigator Daugherty because he was assigned to the case. *Id.* at 84.

Cleo Cohen ("Cohen"), the police department's support supervisor, testified that she has worked for the Sanford Police Department for more than twenty-one years and was responsible for maintaining the department's records. *Id.* at 89. Cohen testified that prior to 2001, a non-active file would be stored in a banker's box and maintained in the investigative division. *Id.* at 90. Cohen stated that eventually these boxes would be placed in the storage area with the investigator's name and/or year on the box. *Id.* at 90-91. Cohen testified that she searched several boxes looking for the victim's videotaped interview in this case, however, she could not find the videotape. *Id.* at 92.

Finally, Lieutenant Ron Daugherty ("Lieutenant Daugherty") testified that he was involved in the investigation for the instant case in 1996. *Id.* at 102. Lieutenant Daugherty testified that he believed he received a videotape from the Child Protection Team. *Id.* at 104. Typically, Lieutenant Daugherty kept his case files behind his desk area in a filing cabinet, including video and audio tapes. *Id.* at 104-06. Lieutenant Daugherty left his assignment as investigator in April 1998, and he left all files related to this case in the filing cabinet of his former office. *Id.* at 111. Lieutenant Daugherty stated that he did not intentionally destroy any videotape nor did he instruct anyone to do so. *Id.* at 118-19.

The trial court denied Petitioner's motion, finding that Lieutenant Daugherty's testimony was credible (Doc. 24-1 at 87-88). The trial court noted that the victim's videotaped interview would not exonerate Petitioner but instead would be useful in cross-examining the victim. *Id.* at 89. The trial court concluded that Petitioner failed to demonstrate bad faith on the part of the police department. *Id.* Additionally, the trial

court stated that to the extent Petitioner's preparation and presentation of his defense was affected by the loss of this video, it was due, in part, to Petitioner's choice to flee the jurisdiction, which resulted in a ten-year delay in prosecution. *Id.*

Pursuant to *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988), "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute the denial of due process of law." Additionally, Petitioner must demonstrate that the State was aware of the exculpatory value of the evidence and made a conscious effort to prevent the defense from securing the evidence. *See Guzman v. Sec'y, Dep't of Corr.*, 698 F.Supp.2d 1317, 1337 (M.D. Fla. 2010) ("A determination of bad faith by the police 'must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.' A due process violation is not established when the evidence is only 'potentially useful' and the actions of the police could 'at worst be described as negligent.'") (quoting *Youngblood*, 488 U.S. at 58) (internal citation omitted).

The trial court made a finding that Lieutenant Daugherty's testimony was credible. This Court must accept the state court's credibility determination. *See, e.g., Baldwin v. Johnson*, 152 F.3d 1304, 1316 (11th Cir. 1998) ("We must accept the state court's credibility determination and thus credit [counsels'] testimony over [petitioner's]."). Additionally, the state court's factual findings are presumed correct, and Petitioner has not rebutted those findings by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Parker v. Head*, 244 F.3d 831, 835-36 (11th Cir. 2001). Petitioner has not shown that State

acted in bad faith with regard to this matter. Therefore, this claim is denied.

F. Claim Six

Petitioner alleges the trial court erred by denying his motion to dismiss based on the violation of his right to a speedy trial (Doc. 10 at 15). Prior to trial, defense counsel filed a motion for discharge, arguing that Petitioner was entitled to dismissal of the charges because the State had violated his speedy trial rights (Doc. 24-1 at 23-24). The trial court held a hearing on the motion. *Id.* at 112-45. The trial court denied the motion, and in doing so, relied upon the four-factor balancing test set forth in *Barker v. Wingo*, 407 US. 514 (1972)[6]. *Id.* at 43-44. The trial court found the factors weighed in the State's favor, especially in light of the fact that Petitioner fled the jurisdiction and the delay was not attributable to the State. *Id.* at 44. Petitioner raised this claim on direct appeal (Doc. Nos. 24-16 at 36-42; 24-17 at 1-17). The Fifth DCA affirmed *per curiam* (Doc. 24-19 at 3).

A criminal defendant has a Sixth Amendment right to a speedy trial. *Barker v. Wingo*, 407 U.S. at 515. The record reflects that the initial information was filed in 1996, however, Petitioner fled the jurisdiction (Doc. 24-1 at 112). An amended information was filed in 2001, and the State attempted to extradite Petitioner at that time but the Virgin

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[6] *Barker* provides that in order to determine whether a defendant has been denied his right to a speedy trial, a court must weigh four factors: (1) the length of the delay, (2) the reason for the delay, (3) whether the defendant timely asserted his speedy trial right, and (4) any prejudice resulting from the delay. *Barker*, 407 U.S. at 530-33. An unreasonable delay can produce several harms, including oppressive pretrial incarceration and the possibility of impairing a defense by dimming memories and loss of evidence. *Id.* at 533. Prejudice need not be actual, but instead can be presumed depending on the length of and reasons for the delay. *Doggett v. United States*, 505 U.S. 647, 654 (1992).

Islands declined to extradite him. *Id.* at 2, 119. Petitioner was released from his incarceration in 2005, and arrested in this case on September 19, 2005. *Id.* at 120.

Federal courts have held that one's right to a speedy trial is not violated "where the defendant prevents a speedy trial from being held because he has fled, or refused to enter, the jurisdiction. . . ." *United States v. Richardson*, 780 F.3d 812, 817 (7th Cir. 2015). In the instant case, the reason for the delay in bringing Petitioner to trial was because first, he fled the jurisdiction, and second, he was incarcerated in the Virgin Islands. The delay was not caused by the State, and the State suffered the same prejudice as Petitioner from the delay, namely, the loss of witnesses. *See Barker*, 407 U.S. at 532 (noting that the showing of prejudice is designed to protect several interests of the defendant, including the limitation of the possibility that the defense will be impaired). Petitioner has failed to meet his burden of proving that the state court's ruling was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Accordingly, this claim is denied pursuant to § 2254(d).

G. Claim Seven

Petitioner asserts that the trial court erred by denying defense counsel's motion to withdraw based on a conflict of interest (Doc. 10 at 17). Respondents argue that this claim is unexhausted because it was not raised on direct appeal (Doc. 20 at 13). Contrary to Respondent's assertions, Petitioner arguably raised this claim in his *pro se* initial brief on direct appeal (Doc. 24-18 at 8). The Fifth DCA affirmed *per curiam* (Doc. 24-19 at 3).

"The Sixth Amendment guarantees criminal defendants the right to the effective

assistance of counsel." *Ferrell v. Hall*, 640 F.3d 1199, 1240 (11th Cir. 2011) (citing *Strickland*, 466 U.S. at 686 and *Hamilton v. Ford*, 969 F.2d 1006, 1011 (11th Cir. 1992) ("when counsel is burdened with a conflict of interest, she 'breaches the duty of loyalty, perhaps the most basic of counsel's duties' and has therefore failed to provide effective assistance of counsel.")). When there is a timely objection at trial because of a conflict of interest, and the trial court fails to appoint separate counsel or adequately inquire into the alleged conflict, the error is fundamental and reversal is automatic. *Holloway v. Arkansas*, 435 U.S. 475, 98 S. Ct. 1173 (1978); *Ferrell*, 640 F.3d at 1240 (citing *Hamilton*, 969 F.2d at 1012).

The trial court held a hearing on two separate motions filed by defense counsel. At the first hearing, defense counsel argued that the Office of the Public Defender had previously represented State witness Dawn Skeels ("Skeels") in an unrelated matter (Doc. 24-3 at 167-68). The trial court denied the motion, concluding that the mere fact that the Office of the Public Defender had previously represented a witness did not create a conflict of interest. *Id.* at 168-69; Doc. 24-1 at 81-82. At the second hearing, defense counsel noted that the Office of the Public Defender had represented the Armstrong in an unrelated criminal case (Doc. 24-3 at 178-81). The trial court also denied that motion. *Id.*

To state a violation of the right to conflict-free counsel, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance. *Cuyler v. Sullivan*, 446 U.S. 335 (1980). To demonstrate an actual conflict, a defendant must show that counsel actively represented conflicting interests and identify specific portions of the record that suggest that his interests were compromised. *Id.*

The record in this case does not establish that defense counsel had an actual conflict of interest. The Office of the Public Defender was not concurrently representing Petitioner and Skeels. At one point, the public defender did concurrently represent Petitioner and Armstrong. However, there is no indication that Petitioner's attorney was the same attorney who represented Skeels or Armstrong in the unrelated proceedings. Further, even if Petitioner had established an actual conflict of interest, Petitioner failed to demonstrate the conflict adversely affected his attorney's representation. Petitioner fails to demonstrate that his attorney was prevented from adequately representing him or from cross-examining Skeels or Armstrong. *See Hunter v. State*, 817 So. 2d 786, 793 (Fla. 2002) (holding that the Office of the Public Defender's prior representation of prosecution witness did not create an actual conflict of interest).

Consequently, Petitioner has not shown that his Sixth Amendment right to counsel was violated due to a conflict of interest. The state court's determination of this claim was not contrary to, nor did it result in an unreasonable application of, clearly established federal law. Claim seven is therefore denied pursuant to § 2254(d).

H. Claim Eight

Petitioner alleges that the trial court erred by denying his request to discharge defense counsel (Doc. 10 at 19). Prior to trial, counsel filed a motion to withdraw (Doc. 24-1 at 28). The trial court held a *Nelson*[7] hearing on January 30, 2006 (Doc. 24-2 at 1-36).

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[7] *Nelson v. State*, 274 So. 2d 256 (Fla. 4th DCA 1973) (holding that when a criminal defendant requests discharge of court-appointed counsel, the court should hold a hearing

Petitioner asserted that counsel was not prepared for hearings, had not filed requested motions, failed to meet with him, failed to advise him of the statute of limitations and the amended information, and had numerous other cases and could not devote enough time to this case. *Id.* at 1-5. The trial court heard from defense counsel and made a finding that there was "no reasonable cause to believe that Attorney Hobson was rendering ineffective representation." *Id.* at 32.

Petitioner filed a second motion to discharge counsel, and the trial court held another *Nelson* hearing on March 20, 2007 (Doc. Nos. 24-1 at 26; 24-3 at 27-37). The trial court noted that if Petitioner discharged the Office of the Public Defender, he would not appoint another public defender to represent him. *Id.* at 40. The trial court explained that Petitioner would be able to hire a private attorney if he decided to discharge his public defenders. *Id.* at 41. Petitioner stated that he felt the court was "trying to force [him] into a corner. . . ." *Id.* Petitioner was given an opportunity to talk to his attorneys, and after their discussion, Petitioner stated he did not wish to discharge counsel. *Id.* at 51-52. On appeal, the Fifth DCA affirmed *per curiam* (Doc. 24-19 at 3).

Florida courts have held that "a trial court abuses its discretion when it fails to provide the defendant with the opportunity to explain why he or she objects to counsel or fails to conduct the [required] inquiries." *Maderson v. State*, 29 So. 3d 1184, 1185 (Fla.

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to determine whether there is cause to believe that trial counsel is not rendering effective assistance).

1st DCA 2010) (quotation omitted). The issue of whether the trial court conducted an adequate *Nelson* inquiry is subject to harmless error analysis. *Torres v. State*, 42 So. 3d 910, 912 (Fla. 2d DCA 2010); *see also State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986) (holding that if it can be demonstrated that the error complained of did not contribute to the verdict, or that there is no reasonable probability that the error contributed to the conviction, then the error is harmless and no relief is warranted) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)).

The trial court gave Petitioner the opportunity to explain why he was dissatisfied with counsel. Although Petitioner states that the trial court failed to fully inquire into the matter, there is no indication that either *Nelson* hearing was inadequate. Furthermore, although Petitioner argues that the trial court "threatened him" with a trial, prejudged counsel's competency, and improperly testified as to counsel's experience and professional reputation (Doc. 10 at 19), the record refutes Petitioner's assertions. The trial court explained to Petitioner that unless he waived his right to speedy trial, his case would go to trial as scheduled (Doc. 24-2 at 28-31).

Furthermore, at the second hearing, the trial court explained that if Petitioner discharged his attorneys, he would have to proceed *pro se* unless he could hire private counsel. This statement was not a threat or an incorrect statement of the law. Florida law provides that a trial court should inquire into reasons for request to discharge an attorney, and the court should determine whether there is reason to believe that the attorney is "not rendering effective assistance to the defendant." *Nelson*, 274 So. 2d at 259. Petitioner

has not demonstrated that his attorneys were providing ineffective assistance. Petitioner's complaints were generalized expressions of dissatisfaction or were complaints about the trial strategy, which are not sufficient bases for the discharge of an attorney. *See Morrison v. State*, 818 So. 2d 432, 440 (Fla. 2002) (noting that a trial court need not conduct a *Nelson* inquiry where a defendant "presents general complaints about defense counsel's trial strategy and no formal allegations of incompetence have been made") (citations omitted).

Moreover, there is no indication that the trial court prejudged the matter or that he improperly interjected himself into the proceedings in any way (Doc. Nos. 24-2 at 1-33; 24-3 at 31-52). Even assuming the trial court's inquiries were inadequate, the error was harmless. Petitioner has not demonstrated that he was forced to proceed to trial with inadequate counsel, nor has he shown that some error on the part of counsel contributed to his conviction. The state court's denial of this claim was neither contrary to, nor an unreasonable application of, clearly established federal law. Accordingly, claim eight is denied pursuant to § 2254(d).

I. Claim Nine

Petitioner contends trial counsel was ineffective for failing to cross-examine Armstrong on his motive to testify and past occasions wherein he was untruthful (Doc. 10 at 21). In the trial court, Petitioner alleged that counsel was ineffective for failing to impeach Armstrong regarding a prior arrest while on probation (Doc. 24-23 at 44). The trial court denied the claim, stating that generally, evidence of a witness's arrest is not

admissible for impeachment purposes, and there was no evidence that (1) charges were pending against the victim at the time of his testimony or (2) that he received a deal in exchange for his testimony. *Id.* The Fifth DCA affirmed *per curiam* (Doc. 24-25 at 69).

Petitioner contends that the trial court "incorrectly interpreted" his claim and "the evidence presented" (Doc. 10 at 21). Petitioner states that his claim is that trial counsel failed to "conduct any investigation of [the] alleged victim's criminal history" and failed to cross-examine Armstrong about his motive to lie or "past untruthfulness." *Id.* Petitioner states counsel should have questioned Armstrong regarding his previous denials regarding the crime, whether he was on probation, or whether he violated his probation. *Id.*

Florida law allows for impeachment of a witness by introducing prior statements made by a witness which are inconsistent with his or her present testimony. *See* § 90.608(1), Fla. Stat. Defense counsel impeached Armstrong with his prior deposition testimony (Doc. 24-10 at 93-94). Petitioner has not provided the Court with a sufficient explanation of what other prior inconsistent statements were made by Armstrong. Petitioner merely makes the general contention that Armstrong had previously denied the sexual abuse. Petitioner has not made the requisite factual showing, and his self-serving speculation will not sustain this claim of ineffective assistance of counsel. *See Tejeda v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991) (stating vague, conclusory, speculative and unsupported claims cannot support relief for ineffective assistance of counsel).

Additionally, Florida law generally allows for the presentation of testimony regarding a witness's reputation for truthfulness. §§ 90.404(1)(b), 90.609, Fla. Stat. (2006). However, to the extent Petitioner suggests that counsel should have questioned Armstrong about his prior arrest, probationary status, his violation of probation, or his criminal history, "specific acts of misconduct which did not end in a criminal conviction" are not admissible for impeachment purposes. *Washington v. State*, 985 So. 2d 51, 52 (Fla. 4th DCA 2008) (quotation omitted) (stating a "witness may only be impeached by convictions of crimes involving dishonesty or false statements."). Thus, this evidence was inadmissible for impeachment purposes, and counsel was not deficient for failing to question Armstrong on these matters.

Although Armstrong could have been questioned about charges that were pending against him at the time of trial, *Torres-Arboledo v. State*, 524 So. 2d 403, 408 (Fla. 1988), Petitioner has not demonstrated that Armstrong had charges pending against him or that he had received a deal from the State in exchange for his testimony. Therefore, counsel's failure to question Armstrong regarding these issues does not amount to deficient performance. Additionally, Petitioner cannot demonstrate prejudice because he cannot show that but for counsel's actions, the result of the proceeding would have been different in light of the evidence presented at trial. The state court's denial of this claim was neither contrary to, nor an unreasonable application of, clearly established federal law. Claim nine is denied pursuant to § 2254(d).

J. Claim Ten

Petitioner claims trial counsel was ineffective for failing to object to the State's motion in limine (Doc. 10 at 23). The State filed a motion to preclude the defense from questioning Armstrong about his failure to disclose the charged acts during his deposition (Doc. 32-1 at 4). The State argued that defense counsel failed to question Armstrong about the charged acts and only questioned him regarding a *Williams* Rule incident. *Id.* Defense counsel had no objection to the motion (Doc. 24-3 at 20). Petitioner raised this claim in his Rule 3.850 motion, and the trial court denied relief, stating counsel had no basis to object because counsel only questioned the victim about the *Williams* Rule incident (Doc. 24-22 at 22).

Petitioner has not demonstrated that he is entitled to relief on this claim. As determined by the trial court, defense counsel had no basis to object to the State's motion in limine because counsel did not specifically question Armstrong during his deposition regarding the charged acts. Therefore, counsel had no basis to impeach Armstrong during with his failure to disclose these acts. The state court's denial of this claim was neither contrary to, nor an unreasonable application of, *Strickland*. Accordingly, this claim is denied pursuant to § 2254(d).

K. Claim Eleven

Petitioner asserts trial counsel was ineffective for failing to object to the improper comments made by the prosecutor during opening and closing argument (Doc. 10 at 25). Petitioner maintains that the prosecutor made impermissible comments about the

credibility of witnesses and expressed his personal opinion. *Id.* Petitioner raised this claim in his Rule 3.850 motion, and the trial court summarily denied the claim, concluding that the comments made during opening and closing argument were not improper, and therefore, counsel had no basis to object (Doc. 24-22 at 29-32). The Fifth DCA affirmed *per curiam* (Doc. 24-25 at 69).

The Court has reviewed the prosecutor's statements during opening and closing argument and finds that the comments were not improper. During the opening statement, the prosecutor merely stated what he believed the evidence would show (Doc. 24-10 at 28-40). Additionally, defense counsel made several objections to comments he believed to be improper, and the trial court overruled those objections. *Id.*

Further, the prosecutor's comments during closing argument were merely inferences that the jury could draw from all of the testimony given at trial (Doc. Nos. 24-12 at 16-26; 24-13 at 1-13). Similar to opening statements, defense counsel made several objections which were overruled. *Id.* Florida courts allow attorneys wide latitude during closing arguments. *Thomas v. State*, 748 So. 2d 970, 984 (Fla. 1999). Moreover, the Florida Supreme Court has stated that "[l]ogical inferences may be drawn, and counsel is allowed to advance all legitimate arguments." *Id.*

However, even if the comments were improper, they did not render the trial fundamentally unfair in light of the evidence presented. *Spencer v. Sec'y, Dep't of Corr.*, 609 F.3d 1170, 1182 (11th Cir. 2010). As such, the state court's denial of this claim was not contrary to, nor did it result in an unreasonable application of, clearly established federal

law. Accordingly, claim eleven is denied pursuant to § 2254(d).

L. Claim Twelve

Petitioner alleges trial counsel was ineffective for failing to impeach Lieutenant Daugherty's testimony that he had not interviewed Armstrong in 1996 (Doc. 10 at 27). Petitioner raised this claim in his Rule 3.850 motion, and the trial court denied the motion, concluding that defense counsel made a strategic decision during trial that he would not pursue this line of questioning with the officer because it could potentially open the door to the content of Lieutenant Daugherty's interview with Armstrong (Doc. 24-22 at 15). The Fifth DCA affirmed *per curiam* (Doc. 24-25 at 69).

Lieutenant Daugherty testified that he became involved in the investigation of this case on approximately March 26, 1996 (Doc. 24-11 at 121). The officer testified that he came into contact with Armstrong's mother, and she gave a statement. *Id.* at 123-24. Lieutenant Daugherty testified that he did not interview Armstrong, and instead, a member of the child protection team conducted the interview. *Id.* at 131. During cross-examination, the trial court conducted a sidebar with defense counsel and the prosecutor to determine whether the defense's impeachment of Lieutenant Daugherty on the fact that he did personally interview Armstrong would open the door to the contents of that interview. *Id.* at 133-38. The trial court indicated that if defense counsel pursued that line of questioning, the State would be permitted to question Lieutenant Daugherty about what Armstrong told him during the interview. *Id.* Defense counsel determined that he would not pursue that line of questioning. *Id.* at 138.

The Supreme Court of the United States has noted that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690–91. Moreover, "strategic choices made after less than complete investigation are reasonable . . . to the extent . . . professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.*

Counsel considered impeaching Lieutenant Daugherty regarding this matter, but made a strategic decision not to do so because the State would then be permitted to question the officer about the content of Armstrong's interview. The contents of Armstrong's interview with the officer only several days after the offenses, wherein he accused Petitioner of the crime, would have been harmful to the defense. Petitioner has not demonstrated that this strategy was unreasonable. Therefore, Petitioner cannot demonstrate deficient performance on the part of counsel or prejudice because a reasonable probability does not exist that but for counsel's actions, the result of the trial would have been different. Accordingly, claim twelve is denied pursuant to § 2254(d).

M. Claim Thirteen

Petitioner asserts that trial counsel was ineffective for failing to object to the general verdict form (Doc. 10 at 29). In support of this claim, Petitioner refers to his Rule 3.850 motion, wherein he alleged that Armstrong testified to three separate criminal events, one of which was an uncharged crime (Doc. 24-22 at 8). Petitioner contends that

due to the general verdict form, there is no way of knowing whether the guilty verdict was unanimous as to one specific incident. *Id.* at 9. The trial court denied the claim, stating that Florida law does not require a special or specific verdict form other than the one used at trial (Doc. 24-22 at 28). Additionally, the trial court noted that the jury was instructed on what incidents were to be considered only as proof of motive, opportunity, or intent as opposed to the incident for with which Petitioner was charged. *Id.* The Fifth DCA affirmed *per curiam* (Doc. 24-25 at 69).

Armstrong testified to several *Williams* Rule incidents (Doc. 24-10 at 76-77, 88, 91-92). However, Armstrong also testified that Petitioner placed his mouth on Armstrong's penis several times between 1992 and 1996, and Armstrong specifically testified about an incident that occurred in Petitioner's truck. *Id.* at 83-84, 88. During deliberations, the jury had a question regarding the *Williams* Rule evidence, and the trial court instructed the jury that it could only consider the *Williams* Rule incidents as evidence of Petitioner's motive, opportunity, or plan (Doc. 24-16 at 4).

Florida courts have held that a criminal conviction requires a unanimous verdict. *See Perely v. State*, 947 So. 2d 672, 675 (Fla. 4th DCA 2007). "Where a single count embraces two or more separates offenses, albeit in violation of the same statute, the jury cannot convict unless its verdict is unanimous as to at least one specific act." *Id.* (quotation omitted).

Armstrong gave testimony as to a specific incident in Petitioner's truck. The jurors were instructed that the other acts were only to be considered in determining Petitioner's

motive, opportunity, or plan. Thus, it is clear that the jury verdict was unanimous as to one specific act. Petitioner merely speculates that the verdict was not unanimous, however, speculation will not sustain a claim of ineffective assistance of counsel. *See Tejeda*, 941 F.2d at 1559.

Petitioner has not shown that counsel had a basis to object to the general jury verdict form. Furthermore, Petitioner fails to demonstrate that had counsel objected, the result of the proceeding would have been different. Accordingly, claim thirteen is denied pursuant to § 2254(d).

N. Claim Fourteen

Petitioner argues appellate counsel was ineffective for failing to "obtain a complete record prior to review" and for failing to "conduct [a] competent, diligent review for error" (Doc. 10 at 31). Petitioner asserts that appellate counsel was deficient for filing an *Anders*[8] brief and arguing that there were no appealable issues when he should have obtained the trial transcript on the motion to withdraw due to conflict. *Id.* Petitioner filed this claim in his state habeas petition (Doc. 24-26 at 12-28), and the Fifth DCA denied the petition without discussion (Doc. 24-25 at 69).

Appellate counsel need not raise issues that he reasonably concludes will not be considered on the merits by the appellate court. *Francois v. Wainwright*, 741 F.2d 1275, 1285 (11th Cir.1984). Appellate counsel must be allowed to exercise his reasonable

[8] *Anders v. California*, 386 U.S. 738 (1967).

professional judgment in selecting those issues most promising for review, and "[a] brief that raises every colorable issue runs the risk of burying good arguments . . . ." *Jones v. Barnes*, 463 U.S. 745, 753 (1983).

The filing of an *Anders* brief does not in itself constitute ineffective assistance of counsel." *Jorge v. United States*, 818 F. Supp. 55, 57 (S.D.N.Y. 1993). Petitioner simply has not shown that appellate counsel's filing of an *Anders* brief rendered his performance inadequate. Indeed, appellate counsel "had a duty to file an *Anders* brief if he believed that there were no meritorious issues to be argued on appeal." *Thompson v. Kelly*, No. 90 Civ. 3027 (JFK), 1992 WL 8181, at *2 (S.D.N.Y. Jan. 13, 1992). Hence, Petitioner has made no showing that appellate counsel's performance was in any manner deficient.

Moreover, Petitioner has not demonstrated that he was prejudiced. The Court addressed the conflict of interest issue above and concluded that Petitioner failed to demonstrate an actual conflict of interest. Accordingly, the state court's denial of this claim was not contrary to, or an unreasonable application of, clearly established federal law. Claim fourteen is denied pursuant to § 2254(d).

O. Claim Fifteen

Petitioner alleges trial counsel was ineffective for failing to call Charles Summers ("Summers"), Jessica Armstrong, Jacob Armstrong, Crystal Achevarria ("Achevarria"), and Charles Robinson ("Robinson") to testify at trial (Doc. 10 at 33). Petitioner raised this claim in his Rule 3.850 motion, and the trial court held an evidentiary hearing on this claim (Doc. 24-22 at 45).

Petitioner testified that he asked each of his attorneys to contact his brother, Robinson, Summers, and Jessica and Jacob Armstrong. *Id.* at 112-14. Caudill testified that he spoke with Petitioner about calling Robinson to testify (Doc. 24-23 at 4). Caudill stated that he told Petitioner generally, witnesses cannot be called to testify regarding "good character" and second, Robinson did not have knowledge regarding whether Petitioner confessed to Debra Skeels. *Id.* at 5-8. Caudill stated that he made a tactical decision not to call Robinson, and Petitioner agreed to that decision. *Id.* at 10, 16. Petitioner's attorneys were not questioned regarding the other potential witnesses.

The trial court denied this claim, first noting that Petitioner had not demonstrated that Summers, Jessica Armstrong, and Jacob Armstrong were available to testify at trial nor had he shown what their testimony would have consisted of if called as witnesses. *Id.* at 45. Additionally, the trial court denied the claim with respect to Robinson, concluding that Caudill's testimony was credible, and he made a strategic decision not to call Robinson as a witness. *Id.* at 46-47.

The trial court credited Caudill's testimony over Petitioner's testimony with respect to potential witness Robinson. This Court must accept the state court's credibility determination. *See, e.g., Baldwin v. Johnson*, 152 F.3d 1304, 1316 (11th Cir. 1998) ("We must accept the state court's credibility determination and thus credit [counsels'] testimony over [petitioner's]."). Additionally, the state court's factual findings are presumed correct, and Petitioner has not rebutted those findings by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Parker v. Head*, 244 F.3d 831, 835-36 (11th Cir. 2001).

Additionally, Petitioner is also not entitled to relief with regard to counsel's failure to call, Jessica Armstrong, Jacob Armstrong, and Achevarria as witnesses. "[E]vidence about the testimony of a putative witness must generally be presented in the form of actual testimony by the witness or an affidavit. A defendant cannot simply state that the testimony would have been favorable; self-serving speculation will not sustain an ineffective assistance claim." *United States v. Ashimi*, 932 F.2d 643, 650 (7th Cir. 1991) (footnotes omitted); *Dottin v. Sec'y Dep't of Corr.*, No. 8:07-cv-884-T-27MAP, 2010 WL 376639, at *6 (M.D. Fla. Sept. 16, 2010). Petitioner's claim is speculative because he has not presented an affidavit from these potential witnesses. Therefore, Petitioner has not made the requisite factual showing, and his self-serving speculation will not sustain this claim of ineffective assistance of counsel. Accordingly, claim fifteen is denied pursuant to § 2254(d).

P. Claim Sixteen

Petitioner contends that trial counsel was ineffective for failing to object when a juror was in possession of a laptop computer (Doc. 10 at 34). Petitioner raised this claim in his Rule 3.850 motion, and the trial court held an evidentiary hearing on the claim (Doc. 24-22 at 45).

At the hearing, defense counsel Darnell Toth Lawshe ("Lawshe") testified that she did not recall seeing a juror with a laptop during trial. *Id.* at 62. Lawshe stated that had she observed a juror with a laptop, she would have brought the matter to the trial court's attention and sought a mistrial. *Id.* at 62-63. Caudill also testified that he did not observe

any juror with a laptop computer. *Id.* at 94. Caudill stated that his normal practice would be to inform the trial court if a juror brought a computer into the courtroom. *Id.* Caudill also testified that Petitioner never raised this issue with him because if Petitioner had, he would have brought it to the attention of the trial judge. *Id.* at 95. Petitioner contradicted his attorneys' testimony and stated that he saw a juror with a laptop on the first day of trial after jury selection. *Id.* at 119. Petitioner testified that he told Caudill, and Caudill stated that he talked to the trial judge and the issue had been resolved. *Id.*

The trial court denied the claim, finding Toth and Caudill's testimony was more credible than Petitioner's testimony (Doc. 24-23 at 49-50). The trial court concluded that Petitioner failed to demonstrate juror misconduct during his trial, and thus his attorneys were not deficient nor was he prejudiced. *Id.* at 40. The Fifth DCA affirmed *per curiam* (Doc. 24-25 at 69).

The trial court credited counsels' testimony over Petitioner's testimony. This Court must accept the state court's credibility determination. *See, e.g., Baldwin,* 152 F.3d at 1316. Additionally, the state court's factual findings are presumed correct, and Petitioner has not rebutted those findings by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Parker,* 244 F.3d at 835-36. Petitioner has not shown that counsels' actions amounted to deficient performance or that a reasonable probability exists that but for counsels' actions, the result of the proceeding would have been different. Accordingly, claim sixteen is denied pursuant to § 2254(d).

Q. Claim Seventeen

Petitioner asserts trial counsel was ineffective with regard to the motion to dismiss due to a violation of speedy trial (Doc. 10 at 36). Specifically, Petitioner states that counsel rendered deficient performance by failing to consult with him prior to filing a motion to dismiss the charges, failing to investigate the facts and law regarding the issue, and failing to object or argue against the State's unsupported assertions at the hearing (Doc. 10 at 36). Petitioner raised this claim in his Rule 3.850 motion, and the trial court summarily denied the claim pursuant to *Strickland* (Doc. 24-22 at 35-36).

The trial court conducted a lengthy hearing on the speedy trial issue (Doc. 241 at 112-45), after which it issued a detailed order explaining why Petitioner's speedy trial rights were not violated. *Id.* at 43-44. This Court concluded, *supra*, that Petitioner's Sixth Amendment speedy trial rights were not violated because Petitioner fled the jurisdiction and was incarcerated in another jurisdiction which refused to transport him to face the charges in Florida. Petitioner fails to demonstrate that additional investigation, consultations, objections, or arguments would have resulted in a different outcome with regard to the motion to dismiss. Petitioner has not shown that counsel acted deficiently or that prejudice resulted. Accordingly, this claim is denied pursuant to § 2254(d).

R. Claim Eighteen

Petitioner alleges the trial court erred by allowing the State to introduce *Williams* Rule evidence at trial (Doc. 10 at 38-39). Respondents argue this claim is unexhausted because he did not raise the federal constitutional basis of the claim on direct appeal (Doc.

20 at 14).

Pursuant to the AEDPA, federal courts are precluded, absent exceptional circumstances, from granting habeas relief unless the petitioner has exhausted all means of available relief under state law. 28 U.S.C. § 2254(b); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842–44 (1999). In order to satisfy the exhaustion requirement a "petitioner must 'fairly present[ ]' every issue raised in his federal petition to the state's highest court, either on direct appeal or on collateral review." *Isaac v. Augusta SMP Warden*, 470 F. App'x 816, 818 (11th Cir. 2012) (quoting *Castille v. Peoples*, 489 U.S. 346, 351 (1989)). A petitioner must apprise the state court of the federal constitutional issue, not just the underlying facts of the claim or a similar state law claim. *Snowden v. Singletary*, 135 F.3d 732, 735 (11th Cir. 1998).

This claim was raised direct appeal, however, Petitioner did not cite to any federal constitutional issue or provision in his initial brief (Doc. Nos. 24-17 at 20-28, 24-18 at 1-13). In discussing this claim, Petitioner merely relied upon Florida law and statutes. *Id.* Therefore, this claim is unexhausted. *See Snowden*, 135 F.3d at 735. The Court is precluded from considering this claim because it would be procedurally defaulted if Petitioner returned to state court. *Id.* at 736. Petitioner could not return to the state court to raise this ground because he already filed a direct appeal. Thus, Petitioner's claim is procedurally defaulted.

Procedural default may be excused only in two narrow circumstances: if a petitioner can show (1) cause and prejudice or (2) actual innocence. *Murray v. Carrier*, 477

U.S. 478, 496 (1986); *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999). Petitioner states that appellate counsel's failure to raise this claim on direct appeal as cause for the procedural default. A claim of ineffective assistance of appellate counsel can be cause for procedural default if that claim also was exhausted in the state court. *See Brown v. United States*, 720 F.3d 1316, 1333 (11th Cir. 2013); *Dowling v. Sec'y for Dep't of Corr.*, 275 F. App'x 846, 847-48 (11th Cir. 2008) (*citing Edwards v. Carpenter*, 529 U.S. 446, 450-51 (2000)). However, Petitioner did not raise this specific claim in his state habeas petition (Doc. 24-26 at 12-28). Petitioner alleged appellate counsel was ineffective for failing to obtain a complete record and for failing to diligently review the record for trial court error. *Id.* Petitioner has failed to demonstrate cause or prejudice for the procedural default. Likewise, he cannot show the applicability of the actual innocence exception. Accordingly, this claim is procedurally barred.

Alternatively, Petitioner's claim fails on the merits. Generally, federal courts do not review a state court's admission of evidence in habeas proceedings. *Mills v. Singletary*, 161 F.3d 1273, 1289 (11th Cir. 1998) (citing *McCoy v. Newsome*, 953 F.2d 1252, 1265 (11th Cir. 1992)). A federal court "will not grant federal habeas corpus relief based on an evidentiary ruling unless the ruling affects the fundamental fairness of the trial." *Id.* (citation omitted). "A denial of fundamental fairness occurs whenever the improper evidence 'is material in the sense of a crucial, critical, highly significant factor.'" *Snowden v. Singletary*, 135 F.3d 732, 737 (11th Cir.1998) (quoting *Osborne v. Wainwright*, 720 F.2d 1237, 1238 (11th Cir.1983)).

Pursuant to § 90.404(2)(a), Florida Statutes, similar fact evidence is inadmissible when it is relevant "solely to prove bad character or propensity." However, similar fact evidence is admissible to prove motive, opportunity, intent, preparation, plan, knowledge, or identity. *Id.*

The similar fact evidence presented about other acts of child molestation and sexual battery that Petitioner committed on Armstrong and Mudica were inextricably intertwined with the charged offense because they occurred during the same time period (including the day after the charged offense) and occurred in a similar fashion. These other incidents were relevant to demonstrate Petitioner's motive, opportunity, or plan to commit the charged crime and not merely to demonstrate Petitioner's propensity. *See Padgett v. State*, 551 So. 2d 1259 (Fla. 5th DCA 1989) (noting that similar fact evidence of prior similar sexual acts against a victim are admissible to show the existence of a particular relationship, the fact that the charged crime was not an isolated event, to demonstrate a particular state of mind, or to establish a pattern of conduct). Additionally, there is no indication that this evidence became a feature of the trial. Therefore, Petitioner fails to show that the trial court's ruling with regard to this matter rendered his trial fundamentally unfair. Accordingly, this claim is denied.

S. Claim Nineteen

Petitioner asserts trial counsel was ineffective for failing to properly raise the destruction of evidence issue prior to trial (Doc. 10 at 41). Petitioner raised this claim in his Rule 3.850 motion, and the trial court summarily denied the claim pursuant to

Strickland (Doc. 24-22 at 33). The Fifth DCA affirmed *per curiam* (Doc. 24-25 at 69).

Petitioner admits that trial counsel filed a motion to dismiss the case due to the destruction of evidence (Doc. 10 at 41). However, Petitioner contends that counsel failed to argue the cumulative effect the destruction of evidence had on his case and the fact that without the destroyed evidence, he could not effectively impeach Armstrong, who had previously denied the charge. *Id.*

The Court addressed Petitioner's challenge to the destruction of evidence in claim five. The Court concluded that the trial court's ruling did amount to error, and Petitioner failed to demonstrate that the State willfully destroyed evidence in bad faith. Petitioner fails to demonstrate that the failure to conduct additional investigation with regard to this issue amounts to deficient performance or that prejudiced resulted. Accordingly, claim nineteen is denied pursuant to § 2254(d).

T. Claim Twenty

Petitioner asserts that trial counsel was ineffective for failing to object to the State's use of "consciousness of guilt evidence which was not supported by the record" (Doc. 10 at 43). In support of this claim, Petitioner contends that the prosecutor improperly told the jury that Petitioner had used a different name and fled the jurisdiction, and counsel should have objected, moved to suppress this evidence, or obtained evidence to rebut the State's claim. *Id.* Petitioner raised this claim in his Rule 3.850 motion, and the trial court summarily denied the claim pursuant to *Strickland* (Doc. 24-22 at 26-27). The Fifth DCA affirmed *per curiam* (Doc. 24-25 at 69).

Debra Skeels, who has been in a long-term relationship with Petitioner's brother Robinson, testified that Petitioner admitted to committing the crime (Doc. 24-11 at 8). Debra assisted Petitioner in leaving the State of Florida. *Id.* at 14-15. Debra did not have any contact with Petitioner until 2001, when she received a letter from Petitioner. *Id.* at 17. Debra testified that letter was mailed from the Virgin Islands and Petitioner used a different name. *Id.* Counsel objected to this testimony, and the objection was overruled. *Id.* at 18.

Petitioner's claim is refuted by the record because defense counsel did try to prevent the introduction of this evidence. Petitioner fails to demonstrate that additional argument or objections would have resulted in the suppression of this evidence. Evidence of flight or concealment after a crime is committed is admissible to show consciousness of guilt. *See Williams v. State*, 199 So. 3d at 424, 427 (Fla. 2d DCA 2016). Petitioner has not demonstrated deficient performance on the part of counsel or that there is a reasonable probability that but for counsel's actions, the result of the proceeding would have been different. Claim twenty is denied pursuant to § 2254(d).

Any of Petitioner's allegations not specifically addressed herein have been found to be without merit.

IV. CERTIFICATE OF APPEALABILITY

This Court should grant an application for certificate of appealability only if the Petitioner "makes a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). To make such a showing "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); *see also Lamarca v. Sec'y Dep't of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009). When a district court dismisses a federal habeas petition on procedural grounds without reaching the underlying constitutional claim, a certificate of appealability should issue only when a Petitioner shows "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.*; *Lamarca*, 568 F.3d at 934. However, a prisoner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

The Court concludes that Petitioner has not made the requisite showing in these circumstances. Petitioner is not entitled to a certificate of appealability.

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. The Amended Petition for Writ of Habeas Corpus filed by Dennis William Robinson (Doc. 10) is **DENIED**, and this case is **DISMISSED WITH PREJUDICE.**

2. Petitioner is **DENIED** a certificate of appealability.

3. The Clerk of the Court is directed to enter judgment and close the case.

DONE AND ORDERED in Orlando, Florida, this 22nd day of June, 2017.

PAUL G. BYRON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DENNIS WILLIAM ROBINSON,

Petitioner,

v. CASE NO. 6:14-cv-1666-Orl-40GJK

SECRETARY, DEPARTMENT OF CORRECTIONS, et al.,

Respondents.
_____/

ORDER

This case is before the Court on the following:

1. Petitioner Motion for Reconsideration (Doc. 47). Petitioner seeks reconsideration of the Court's June 22, 2017 Order denying the Amended Petition for Writ of Habeas Corpus and dismissing the case with prejudice (Doc. 45).

Federal Rule of Civil Procedure 60(b) allows the Court to grant relief from judgment if the movant can demonstrate mistake, excusable neglect, newly discovered evidence, fraud, a void judgment, or any other reason that justifies relief. The Court has considered Petitioner's allegations and concludes that he failed to satisfy the requirements of Rule 60(b). Petitioner merely reiterates arguments that the Court already considered and rejected or raises new arguments that could have been asserted prior to the entry of judgment. Accordingly, it is **ORDERED** that Petitioner's motion is **DENIED**.

APPENDIX B-2

Additionally, the Court should grant an application for certificate of appealability only if petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Petitioner failed to make a substantial showing of the denial of a constitutional right. Accordingly, Petitioner is **DENIED** a certificate of appealability.

2. Petitioner's Motion for Leave to Proceed in Forma Pauperis on Appeal (Doc. 49). An appeal would not be taken in good faith pursuant to Federal Rule of Appellate Procedure 24(a) and 28 U.S.C. § 1915(a)(3) because Petitioner has failed to demonstrate the deprivation of any federal constitutional right. Petitioner is not entitled to appeal as a pauper and shall pay the full appellate filing fee as required by 28 U.S.C. § 1915(a). Accordingly, it is **ORDERED** that Petitioner's motion is **DENIED.**

DONE AND ORDERED in Orlando, Florida this 9th day of August, 2017.

PAUL G. BYRON
UNITED STATES DISTRICT JUDGE

Copies to:
Dennis William Robinson
Counsel of Record

APPENDIX C

C-1 U.S. Circuit Court Orders/Opinions Denying Motion for C.O.A., December 26, 2018.

C-2 U.S. Circuit Court Order Denying Reconsideration Motion, March 1, 2019.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13418-G

DENNIS WILLIAM ROBINSON,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

ORDER:

Dennis William Robinson is a Florida prisoner serving a life sentence with a 25-year minimum mandatory term after a jury found him guilty of sexual battery on a child. He filed the instant amended *pro se* 28 U.S.C. § 2254 federal habeas petition, raising 21 grounds for relief. Following the state's response, and Robinson's reply, the district court denied the § 2254 petition. The district court also denied Robinson a certificate of appealability ("COA") and denied him leave to appeal *in forma pauperis* ("IFP"). Robinson has now moved this Court for a

COA and IFP status, specifically requesting a COA on 12 of his claims as discussed below.[2]

BACKGROUND:

By amended information filed in 2006, the state charged Robinson with one count of sexual battery upon a child less than 12 years old in connection with events that occurred between November 26, 1992, and March 24, 1996.

At trial, the victim, Charles Armstrong, testified to several instances of sexual contact with Robinson. Specifically, Armstrong testified as to three instances occurring between 1992 and 1996, when Robinson placed his mouth on Armstrong's penis. Debra Skeels, who had been in a relationship with Robinson's brother, testified that Robinson told her that he had given Armstrong blow jobs. After the police became involved, she helped Robinson leave Florida. She later learned that, in 2001, he had been incarcerated in the U.S. Virgin Islands under the name Timothy Morgan.

A jury found Robinson guilty as charged and the state trial court sentenced him to life imprisonment with a minimum of 25 years. Robinson appealed, and

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[2] Because Robinson does not seek a COA as to the remaining claims that he raised in his § 2254 petition, he has abandoned them. *See Jones v. Sec'y, Dep't of Corr.*, 607 F.3d 1346, 1353-54 (11th Cir. 2010) (providing that this Court "will not entertain the possibility of granting a certificate of appealability" on an issue as to which the § 2254 petitioner "does not provide facts, legal arguments, or citations of authority that explain why he is entitled to a certificate").

appellate counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), which pointed to several potential trial court errors. Robinson also filed a *pro se* appellate brief, and the Florida Fifth District Court of Appeal ("DCA") affirmed his conviction and sentence without a written opinion.

Robinson then filed a Fla. R. Crim. P. 3.850 motion for post-conviction relief and an amended and supplemental Rule 3.850 motion. The state trial court summarily denied the motions in part and held an evidentiary hearing on five claims. After the hearing, the state court denied Robinson's remaining claims, and the Fifth DCA affirmed *per curium.* Thereafter, Robinson timely filed the instant § 2254 petition.

DISCUSSION:

In order to obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted).

Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), if a state court has adjudicated a claim on the merits, a federal court may grant habeas relief only if the decision of the state court (1) "was contrary to,

or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d)(1), (2). "[A]n unreasonable application of federal law is different from an incorrect application of federal law." *Williams v. Taylor*, 529 U.S. 362, 410 (2000). A state court's decision is "contrary to" federal law if "the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than th[e] Court has on a set of materially indistinguishable facts." *Id.* at 412-13. Thus, a state prisoner seeking federal habeas relief "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).

A state court's factual findings are presumed correct absent clear and convincing evidence to the contrary. *See* 28 U.S.C. § 2254(e)(1). Further, a state court's credibility determination is a finding of fact that is entitled to a presumption of correctness on habeas review. *Brownlee v. Haley*, 306 F.3d 1043, 1061 (11th Cir. 2002).

"Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court." *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999); *see* 28 U.S.C. § 2254(b)(1). To exhaust state remedies, the petitioner must fairly present every issue raised in his federal petition through "one complete round of the State's established appellate review process," either on direct appeal or on collateral review. *See O'Sullivan*, 526 U.S. at 845. A federal claim is subject to procedural default where: (1) the state court applies an independent and adequate ground of state procedure to conclude that the petitioner's federal claim is barred; or (2) the petitioner never raised a claim in state court, and it is obvious that the unexhausted claim would now be procedurally barred under state procedural rules. *Bailey v. Nagle*, 172 F.3d 1299, 1302-03 (11th Cir. 1999).

Under the procedural default doctrine, a state court's rejection of a federal claim on state procedural grounds generally precludes subsequent federal habeas review of the claim, so long as the state court's judgment rests on independent and adequate state grounds. *Ward v. Hall*, 592 F.3d 1144, 1156 (11th Cir. 2010). A state court's ruling rests on independent and adequate state grounds if: (1) the last state court to decide the issue clearly and expressly stated that it relied on state procedural rules to resolve the federal claim without reaching the merits of the claim, (2) the decision rests entirely on state law grounds and is not intertwined

with an interpretation of federal law, and (3) the procedural rule is firmly established and regularly followed. *Id.* at 1156-57. A procedural default may be excused, however, if the movant establishes (1) cause and prejudice for failure to present the claim properly, or (2) a fundamental miscarriage of justice. *Id.* at 1306.

The Supreme Court decision applicable in an ineffective-assistance case is *Strickland v. Washington*, 466 U.S. 668 (1984). *See Premo v. Moore*, 562 U.S. 115, 121 (2011). To make a successful claim of ineffective assistance of counsel, a defendant must show both that (1) his counsel's performance was deficient; and (2) the deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 687. Deficient performance "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* To make such a showing, a defendant must demonstrate that "no competent counsel would have taken the action that his counsel did take." *United States v. Freixas*, 332 F.3d 1314, 1319-20 (11th Cir. 2003) (quotations omitted).

In determining whether counsel gave adequate assistance, "every effort must be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. There is a strong presumption that counsel "rendered adequate assistance and made all significant

decisions in the exercise of reasonable professional judgment." *Id.* at 690. Prejudice occurs when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Failure to establish either prong is fatal and makes it unnecessary to consider the other. *Id.* at 697.

When analyzing a claim of ineffective assistance under § 2254(d), this Court's review is "doubly" deferential to counsel's performance. *Harrington*, 562 U.S. at 105. Thus, under § 2254(d), "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." *Id.*

Claim 1: IADA Violation

In Claim 1, Robinson asserted that trial counsel was ineffective for failing to argue that the State of Florida violated the Interstate Agreement on Detainers Act ("IADA"), when it did not accept temporary custody of him in order to try him while he was incarcerated in the Virgin Islands. Robinson raised this claim in his Rule 3.850 motion, which the trial court denied after an evidentiary hearing. The court concluded that Robinson could not show deficient performance or prejudice in light of the fact that he never made a request to be transported. The Fifth DCA affirmed without a written opinion.

The IADA is an agreement entered into by 48 states, the District of Columbia, and the federal government whose purpose is to efficiently dispose of outstanding criminal charges brought against prisoners incarcerated in other jurisdictions. *Hunter v. Samples*, 15 F.3d 1011, 1012 (11th Cir. 1994). Under Article IV of the IADA, a signatory jurisdiction may file a detainer to receive temporary custody of a prisoner incarcerated in another jurisdiction, and then prosecute the prisoner for outstanding charges. *Id.* After a detainer has been lodged, a prisoner may also file a request for a final disposition to be made of the charges. *New York v. Hill*, 528 U.S. 110, 112 (2000).

Here, Robinson's argument that the state violated IADA is unavailing. First, the record shows that the Virgin Islands failed to honor Florida's request for Robinson's extradition, not that Florida refused to accept temporary custody of him. Moreover, Robinson never requested final disposition of the Florida charges while he was incarcerated in the Virgin Islands. Because there was no IADA violation, counsel cannot be deficient for failing to move to dismiss the charges on that basis. Accordingly, the state court's denial of this claim was not contrary to, or an unreasonable application of, *Strickland*, or an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d)(1), (2). No COA is warranted as to Claim 1.

Claim 2: Apology Letter

In Claim 2, Robinson contended that trial counsel was ineffective for failing to seek to exclude from trial an undated letter that Robinson wrote to Jimmy Mudica because the letter did not reference any charged crime or sexual abuse. Robinson raised this claim in his Rule 3.850 motion, which the state court summarily denied pursuant to *Strickland.* The Fifth DCA affirmed *per curium.*

By way of background, Mudica, who was deceased on the time of the trial, was Armstrong's childhood friend whom Robinson also allegedly sexually abused. Armstrong testified at trial that he was present when Robinson committed sexual acts upon Mudica. Robinson wrote a letter to Mudica in which he apologized for his actions. The state introduced this letter at trial.

Claim 2 is meritless because the record shows that trial counsel repeatedly sought to exclude this letter from trial, first in a pretrial motion, and then by repeatedly objecting at trial. Accordingly, Robinson has not shown that counsel was deficient in this regard, and the state court's rejection of this claim was not contrary to, nor an unreasonable application of, *Strickland.* No COA is therefore warranted.

Claims 3 and 4: *Williams* Rule Instruction

Next, in Claim 3, Robinson argued that the trial court improperly modified the *Williams* Rule jury instruction by eliminating the term "allegedly" from the

instruction. Relatedly, he argued in Claim 4 that trial counsel was ineffective for failing to object to the instruction on that basis and for failing to request that the instruction be given at the close of evidence.

As an initial matter, Claim 3 is procedurally defaulted. Robinson raised it for the first time in his Rule 3.850 motion, which the state court denied as procedurally barred because the argument should have been raised on direct appeal. Florida's rule that issues of trial court error must be raised on direct appeal is firmly established and regularly followed. *See Bruno v. State*, 807 So. 2d 55, 63 (Fla. 2001) (explaining that "[a] claim of trial court error generally can be raised on direct appeal but not in a [R]ule 3.850 motion"); Fla. R. Crim. P. 3.850(c) (providing that issues that could have, or should have, been raised on direct appeal are not cognizable in a state post conviction motion). Thus, the state court denied his claim on independent and adequate state grounds. *See Ward*, 592 F.3d at 1156-57 & n.5. In addition, Robinson cannot overcome this procedural bar because he has failed to demonstrate either cause and prejudice or a fundamental miscarriage of justice. No COA is thus warranted as to Claim 3.

As for the corresponding ineffective-assistance-of-counsel claim, in Claim 4, Robinson raised it in his Rule 3.850 motion and supplemental Rule 3.850 motion. After holding an evidentiary hearing, the state court denied the claim, determining

that the jury was properly instructed on the similar fact evidence and Robinson failed to show prejudice. The Fifth DCA *per curium* affirmed.

The state court's denial of this claim was not contrary to, or an unreasonable application of, *Strickland*, or an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d)(1), (2). In Florida, relevant evidence of collateral crimes is admissible at a jury trial when it does not go to prove the bad character or criminal propensity of the defendant, but is used to show motive, intent, knowledge, *modus operandi*, or lack of mistake. *Williams v. State*, 110 So. 2d 654 (Fla. 1959). Before the state introduced its *Williams* Rule evidence at trial, the court read a limiting instruction that identified the act and instructed the jury that the evidence of the specified act "will be considered for the limited purpose of proving motive, opportunity, intent, preparation, plan, knowledge, the absence of mistake or accident on the part of the Defendant or to corroborate the testimony of Charles Armstrong and you shall consider it only as it relates to those issues." The trial court also instructed the jury that Robinson was not on trial for a crime not included in the amended information and gave the jury a copy of the information at the start of trial. The limiting instruction, however, omitted the word "allegedly" used in the standard jury instruction for *Williams* Rule evidence. And while the trial court read this limiting instruction several additional times when similar fact

evidence was admitted during trial, the court did not read the instruction again at the close of evidence.

Nevertheless, assuming *arguendo* that trial counsel was deficient for failing to object to the instruction's language and for not asking the court to read the instruction at the close of evidence, Robinson cannot show any resultant prejudice. Indeed, during its deliberations, the jury submitted a question to the court, first recognizing that they could only consider certain evidence to demonstrate motive, opportunity, intent, preparation, plan, knowledge, or accident, but asking to which pieces of evidence the limiting instruction applied. The trial court instructed the jury that its *Williams* Rule limiting instruction applied to uncharged sexual acts related to Armstrong and Mudica. Because the jury recognized that they could only consider the similar fact evidence to prove motive, opportunity, or plan, Robinson failed to show that but for counsel actions, a reasonable probability exists that the outcome of the trial would have been different. Accordingly, no COA is warranted as to Claim 4 either.

Claims 5 and 19: Destroyed Evidence

Next, in Claim 5, Robinson contended that the trial court committed fundamental error when it denied his pretrial motion to dismiss the case due to the state's destruction of evidence. Specifically, he argued that the state destroyed the videotape recording of the Child Protection Team's interview of Armstrong,

conducted on March 26, 1996, during which Armstrong said that he initially denied having been abused by Robinson when he was questioned by his mother, and only said that he had after his mother forcibly interrogated him. Similarly, in Claim 19, Robinson argued that trial counsel was ineffective for failing to properly raise this destruction of evidence issue prior to trial.

By way of background, Robinson's trial counsel moved to dismiss the charges because the state destroyed the videotape of the 1996 interview of Armstrong. The state court held a hearing on the motion, at which several officers and Armstrong testified. The testimony showed that, in 1996, the police department would have received a copy the interview, and the videos were kept by the investigating officer, who, in this instance, was Lieutenant Ron Daugherty. Daugherty testified that he kept the videos in a filing cabinet in his office, and when he was promoted in 1998, he left everything in the cabinet and has not seen it since. Evidence showed that Daugherty's old case material was boxed up and placed in storage, but the police could not locate the 1996 video. Daugherty also testified that he did not intentionally destroy any videotape or instruct anyone to do so.

The state court denied the motion, finding that the missing videotape evidence was not destroyed or withheld in bad faith and Daugherty's testimony was credible. It also found that such evidence would have been potentially useful

only for cross-examination, rather than highly material evidence capable of exculpating Robinson. On direct appeal, Robinson pointed to the trial court's denial in this regard as a potential issue in counsel's *Anders* brief. The Fifth DCA affirmed without a written opinion. As to Robinson's corresponding ineffective-assistance-of-counsel claim, he raised it in his Rule 3.850 motion. The state court summarily denied the claim, and the Fifth DCA affirmed without a written opinion.

To show that the loss of evidence by the state constitutes a due process violation, the defendant must show that the evidence was likely to significantly contribute to his defense. *California v. Trombetta*, 467 U.S. 479, 488 (1984). "To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* at 489 (citation omitted). Pursuant to *Arizona v. Youngblood*, the failure to preserve this "potentially useful evidence" does not violate the due process clause "unless a criminal defendant can show bad faith on the part of the police." 488 U.S. 51, 58 (1988). The Supreme Court later rejected the argument "that *Youngblood* does not apply whenever the contested evidence provides a defendant's only hope for exoneration and is essential to and

determinative of the outcome of the case." *Illinois v. Fisher*, 540 U.S. 544, 548 (2004).

Here, the state court's rejection of Claim 5 was not contrary to, or an unreasonable application of, federal law, or an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d)(1), (2). First, the videotape of Armstrong's 1996 interview was only "potentially useful evidence." Robinson posited that, during the interview, Armstrong said that he initially denied to his mother that Robinson sexually abused him and only claimed that Robinson did so after she interrogated him. Even assuming that Armstrong at some point denied the abuse, he did eventually tell what happened and testified at trial to the sexual abuse. In addition, the jury heard the testimony of Skeels, who explained that Robinson admitted to her that he sexually abused Armstrong. Accordingly, although the videotaped interview might have contributed to Robinson's ability to cross-examine Armstrong, such information was not material exculpatory evidence in the context of the entire record. *See Youngblood*, 488 U.S. at 54-57 (concluding that samples from a rape-kit that "might have completely exonerated" the defendant of his child molestation and sexual assault charges were only potentially useful pieces of evidence).

Furthermore, the trial court found as fact that the missing videotape evidence was not destroyed or withheld in bad faith. Robinson has not rebutted that finding

by clear and convincing evidence, and, therefore, it is presumed correct. *See* 28 U.S.C. § 2254(e)(1). Because Robison did not show bad faith on the part of the police, he failed to establish a due process violation. *See Youngblood*, 488 U.S. at 58.

Similarly, Claim 19 is also meritless because trial counsel did move to dismiss the charges due to the destroyed evidence and argued to the trial court that, without the destroyed evidence, he could not effectively impeach Armstrong. Accordingly, Robinson has not shown that trial counsel was deficient in this regard, and the state court's rejection of this claim did not violate the AEDPA standards. No COA is, therefore, warranted as to Claims 5 and 19.

Claims 6 and 17: Speedy Trial Violation

In Claim 6, Robinson argued that the trial court erred by denying his motion to dismiss based on the state's violation of his right to a speedy trial. Relatedly, in Claim 17, he claimed that trial counsel was ineffective for failing to (1) consult with him before filing and arguing the speedy trial motion, (2) investigate the facts and law regarding the issue, and (3) object or argue against the state's unsupported assertions.

As background, before trial, in 2005, defense counsel moved to dismiss of the charges because the state violated Robinson's speedy trial rights. After holding a hearing, the trial court denied the motion, relying on the four-factor balancing

test set forth in *Barker v. Wingo*, 407 U.S. 514 (1972). The trial court concluded that the factors weighed in favor of the state because Robinson knew about the impending charges but fled the jurisdiction, and the delay was not attributed to the state. Robinson raised the claim on direct appeal and the Fifth DCA affirmed *per curium*.

The Sixth Amendment guarantees criminal defendants the right to a speedy and public trial. U.S. Const. amend. VI. In *Barker*, the Supreme Court established a four-factor test to determine whether a defendant's right to a speedy trial was violated: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) the prejudice to the defendant. 407 U.S. at 530. A state's inability to arrest or try a defendant because of the defendant's own evasive tactics constitutes a valid reason for delay. *United States v. Villarreal*, 613 F.3d 1344, 1351 (11th Cir. 2010). But the state's failure to pursue a defendant diligently will weigh against it, more or less heavily depending on if the state acted in good or bad faith. *Id.*

Here, the record shows that Robinson was charged in 1996, but he fled the jurisdiction, eventually ending up in the Virgin Islands where he went by the name Timothy Morgan. The state learned of Robinson's whereabouts in 2001—he was in prison in the Virgin Islands serving a five-year sentence for third degree assault with intent to commit sexual contact in the first degree. Meanwhile, the state of

Florida filed an amended information in 2001 and tried to extradite him at that time. However, the Virgin Islands declined to extradite him. On September 19, 2005, after the expiration of his Virgin Islands sentence, Robinson was extradited to Florida and arrested that same day.

Based on these facts, while there was a delay in bringing Robinson to trial, the reason for it was that: (1) Robinson fled the jurisdiction, and (2) he was incarcerated in the Virgin Islands, and not because of the state's actions. Moreover, even though Robinson knew that the police was aware of his sexual abuse of Armstrong in 1996, he fled to the Virgin Islands and changed his name, making no effort to assert his speedy trial rights until 2005. Accordingly, the state court's denial of Robinson's speedy-trial claim was not contrary to, or an unreasonable application of, *Barker* or its progeny, or based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d)(1), (2).

Likewise, the state court's rejection of Robinson's related claim of ineffective assistance of counsel, Claim 17, also did not violate the AEDPA standards. To begin, trial counsel did move to dismiss the charges based on a violation of speedy trial. The trial court conducted a lengthy hearing on the issue, after which it issued an order detailing why Robinson's speedy trial rights were not violated. Other than bald assertions, Robinson does not explain how additional investigations, consultations, or arguments would have resulted in a different

result. As such, he has not shown that counsel was deficient in this regard or that prejudice resulted. According, no COA is warranted as to Claims 6 and 17.

Claims 11 and 20: Improper Argument

In Claim 11, Robinson argued that trial counsel was ineffective for failing to object to the improper comments made by the prosecutor during opening and closing arguments. In particular, he argued that the prosecutor improperly (1) commented on the credibility of witnesses by stating that they had no motivation to lie, (2) commented on Robinson's relationship with the witnesses, and (3) testified as to facts not in evidence. Similarly, in Claim 20, he argued that trial counsel was ineffective for not objecting when the prosecutor improperly told the jury that, after Robinson went to a couple banks so he could have a large sum of money, he bought a train ticket under an assumed name, Robert Williams, and fled the jurisdiction. He argued that those facts were not in evidence, and counsel should have moved to suppress the evidence or obtained evidence to rebut the state's claim.

Robinson raised both Claims 11 and 20 and in his Rule 3.850 motion, and the state court summarily denied them. The Fifth DCA affirmed *per curium*.

The state court's denial of these claims was not contrary to, or an unreasonable application of, *Strickland*, or an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d)(1), (2). A review of the record shows that the

prosecutor's argument was proper. Moreover, even it was not, Robinson has not established that the remarks prejudiced his substantive rights. *See United States v. Foley*, 508 F.3d 627, 637 (11th Cir. 2007) (explaining that prosecutorial misconduct requires the additional showing that the comments "prejudiced the defendant's substantive rights"). The record shows that the trial court properly instructed the jury that, in reaching its decision, it was to consider only the evidence that it heard from the testimony of witnesses and in the form of the admitted exhibits. Therefore, any improper effect of counsel's statements was cured by the jury instructions. *See United States v. Lopez*, 590 F.3d 1238, 1256 (11th Cir. 2009) ("Because statements and arguments of counsel are not evidence, improper statements can be rectified by [an] instruction to the jury that only the evidence in the case be considered. . . . We presume that the jury followed the [court's] curative instructions."). Accordingly, no COA is warranted as to Claims 11 and 20.

Claim 13: General Verdict Form

Robinson asserted in Claim 13 that trial counsel was ineffective for failing to object to the general verdict form. He argued that Armstrong testified to three separate criminal events, one of which was an uncharged crime. According to Robinson, due to the general verdict form, there is no way of knowing whether the

guilty verdict was unanimous as to a specific incident of sexual abuse and counsel should have objected to ensure a unanimous verdict.

He raised this claim in his Rule 3.850 motion, which the trial court denied because Florida law does not require a special verdict form and the jury was instructed on what incidents were to be considered as proof of motive, opportunity, or intent, as opposed to the incidents for which Robinson was charged. In so ruling, the trial court cited *Perry v. State*, 10 So.3d 695, 697 (Fla. 1st DCA 2009), in which the First DCA rejected the defendant's argument that the trial court erred in denying his request for a special verdict form containing choices for the jury regarding which method of sexual battery he committed. The court noted that, in Florida, the prosecution for sexual battery upon a child is treated differently than other crimes in terms of charging documents, multiple dates and acts, and statutory definitions. *Id.* at 697-98.

Here, because there was no need for a special verdict form, defense counsel cannot be ineffective for failing to object to the verdict form on that basis. Moreover, Robinson fails to demonstrate that, had counsel objected, there was a reasonable probability that the result of the proceeding would have been different. Accordingly, Robinson has not shown that the state court's adjudication of this claim involved an unreasonable application of clearly established federal law or

that it based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d)(1)–(2). No COA is, therefore, warranted.

Claim 16: Juror Misconduct

Finally, in Claim 16, Robinson alleged that trial counsel was ineffective for failing to object when a juror possessed a laptop computer during a portion of the trial. According to Robinson, during a recess, he told trial counsel about the computer, and counsel approached the judge. The juror did not have the laptop after the recess.

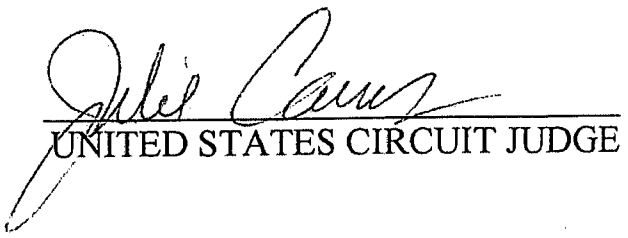
Robinson raised this claim in his Rule 3.850 motion, and the trial court held an evidentiary hearing on the claim. At the hearing, both defense counsel testified they did not recall seeing a juror with a laptop at trial, and, if they had, they would have brought it to the attention of the trial judge. Robinson testified that he saw a juror with a laptop and told counsel about it. The trial court denied the claim, finding counsel's testimony more credible than Robinson's and concluding that Robinson did not show juror misconduct. The Fifth DCA affirmed *per curium.*

The state court's denial of these claims was not contrary to, or an unreasonable application of, *Strickland*, or an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d)(1), (2). Indeed, Robinson has not rebutted, by clear and convincing evidence, the state court's finding that counsel credibly testified that they did not see any juror with a laptop during trial. It is, therefore, is

presumed correct. *See* 28 U.S.C. § 2254(e)(1). Robinson has, therefore, not shown that counsel was ineffective with regard to any juror misconduct, and no COA is warranted.

CONCLUSION:

Because Robinson did not show that reasonable jurists would find debatable the denial of his § 2254 petition, his motion for a COA is DENIED. His motion for IFP status on appeal is DENIED as moot.



UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13418-G

DENNIS WILLIAM ROBINSON,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

Before: TJOFLAT and JULIE CARNES, Circuit Judges.

BY THE COURT:

Dennis William Robinson has filed a motion for reconsideration of this Court's order dated December 26, 2018, denying his motions for a certificate of appealability and leave to proceed *in forma pauperis* in his appeal of the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition. Upon review, Robinson's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

APPENDIX C-2

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