IN THE SUPREME COURT UNITED STATES

PETER JOSEPH ROSATO JR.,
PETITIONER,

V.

SECRETARY, DEPARTMENT OF CORRECTIONS,
STATE OF FLORIDA
RESPONDENT(S)

APPENDIX

APPENDIX (A) Opinion of the Court of Appeals Eleventh Circuit

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Appendix A

Opinion of the Court of Appeals Eleventh Circuit

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-13983-D

PETER J. ROSATO,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

ORDER:

In order to appeal the district court's denial of his *pro se* 28 U.S.C. § 2254 petition for a writ of habeas corpus, Peter J. Rosato, Jr., a Florida prisoner, moves for a certificate of appealability ("COA"), and leave to proceed *in forma pauperis* ("IFP"). Mr. Rosato is serving a life sentence after a Florida jury found him guilty of burglary of a dwelling while wearing a hood or mask, during which he committed a battery ("Count 1"), and battery ("Count 2"). He was sentenced to a mandatory minimum sentence as a prison releasee reoffender ("PRR") on Count 1.

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), 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," *see Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Mr. Rosato only seeks a COA on five of his claims in the instant motion. As he makes no arguments in support of any of his other claims, the remainder of his claims have therefore been abandoned. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014); *Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008) ("[I]ssues not briefed on appeal by a *pro se* litigant are deemed abandoned."). Of his five remaining claims, reasonable jurists would not debate the district court's denial of any of the claims.

Where a state court has adjudicated a claim on the merits, 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); *see* 28 U.S.C. § 2254(d)(1), (2). "Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Harrington*, 562 U.S. at 98.

First, Mr. Rosato waived his right to be present during the victim's deposition by failing to appear at it, despite being in the building and aware of the deposition, and it was reasonable for the state court to deny that as a basis for challenging the admission of the victim's videotaped deposition at trial. *See* Fla. R. Crim. P. 3.190(j)(3) (2009). Second, although the burglary statute at the time that Mr. Rosato was charged—Fla. Stat. § 810.02(2)(a) (1997)—did not distinguish between occupied and unoccupied dwellings, and the PRR statute—Fla. Stat. § 775.082(8)(a)(1)(q) (1997)—required that the burglary be of an occupied dwelling, Florida law established that a court could look at the record to determine if the factual basis supported a conclusion that the dwelling was occupied to see if the PRR might apply. *See Caddo v. State*, 806 So. 2d 520, 521–22 (Fla. Dist. Ct. App. 2001). The Florida court's determination that Mr. Rosato

burgled an occupied dwelling, based on the factual basis, was reasonable. *See id.*; *Harrington*, 562 U.S. at 98, 103. Third, it was reasonable for the state court to find that his conviction for both burglary with battery and battery did not violate double jeopardy because they were based on two distinct criminal acts, even though they occurred in the course of the same burglary. *See United States v. Smith*, 532 F.3d 1125, 1128 (11th Cir. 2008); *State v. Paul*, 934 So. 2d 1167, 1172 & n.3 (Fla. 2006), *receded from on other grounds by Valdes v. State*, 3 So. 3d 1067, 1077 (Fla. 2009).

Fourth, a reasonable basis existed for the state court to deny Claim 4 consistent with federal law—*Strickland v. Washington*, 466 U.S. 668 (1984)—because the evidence of Mr. Rosato's flight when his trial was first scheduled could be admissible as relevant to his consciousness of guilty, such that any argument against this evidence on appeal would have been meritless. *See Murray v. State*, 838 So. 2d 1073, 1085 (Fla. 2003); *see also Bolender v. Singletary*, 16 F.3d 1547, 1573 (11th Cir. 1994) ("[I]t is axiomatic that the failure to raise nonmeritorious issues does not constitute ineffective assistance."). Finally, the jury's conviction on Count 1 as charged meant that, under Florida law, it could not have convicted him of a lesser-included offense, *see Sanders v. State*, 946 So. 2d 953, 957–60 (Fla. 2006), so the state court applied *Strickland* consistently to his claim that counsel should have requested a lesser-included offense jury instruction, *see Strickland*, 466 U.S. at 694.

Because Mr. Rosato has not satisfied the *Slack* test for any of his claims, his motion for a COA is DENIED. His motion for IFP status is DENIED AS MOOT.

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-13983-D

PETER J. ROSATO,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

Before: WILSON and JILL PRYOR, Circuit Judges.

BY THE COURT:

Peter J. Rosato has filed a motion for reconsideration, pursuant to 11th Cir. R. 27-2, of this Court's March 14, 2019, order denying his motion for a certificate of appealability and *in forma pauperis* status, to review the denial of his federal habeas petition, 28 U.S.C. § 2254. Upon review, his motion for reconsideration is DENIED because he has offered no meritorious arguments to warrant relief.

Appendix B

Opinion of the United States Middle District Court of Appeals

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

PETER JOSEPH ROSATO, JR.

Petitioner,

v. **Case No. 8:14-cv-3040-T-35AEP**

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

Respondents.
_____/

ORDER

This cause comes before the Court on Petitioner Peter Joseph Rosato, Jr.'s petition under 28 U.S.C. § 2254 for writ of habeas corpus (Doc. 1), the amended response (Doc. 31), the reply (Doc. 46), the construed supplement to the reply (Doc. 39; *see* Doc. 50, September 20, 2016 Order), the state court record supplied by Respondent Secretary, Department of Corrections (Doc. 14), the supplements thereto (Doc. 28 Ex. 1; Doc. 53), Rosato's Addendum to Ground Two (Doc. 60), Respondents' motion to strike Rosato's addendum (Doc. 61), and Rosato's response to motion to strike (Doc. 62). Upon review, and in accordance with the *Rules Governing Section 2254 Cases in the United States District Courts*, the motion to strike is granted and the petition is denied.

BACKGROUND

A November 16, 1998 amended information charged Rosato with burglary of a dwelling while wearing a hood or mask, during which he committed a battery (Count One)

and attempted sexual battery (Count Two). (Doc. 14 Ex. A1) The burglary, battery, and attempted battery were alleged to have occurred on June 24, 1998. (*Id.*) Rosato failed to appear for trial in January 1999; he was rearrested almost ten years later in August 2008. (Doc. 1 at 6)

On July 23, 2009, a jury found him guilty of Count One as charged and guilty of battery as to Count Two, a lesser-included charge of attempted sexual battery. (Doc. 14 Ex. A12) Regarding Count One, the state trial court sentenced Rosato to a mandatory minimum sentence of life in prison as a prison releasee reoffender pursuant to Section 775.082(9), Fla. Stat.; as to Count Two, the court sentenced Rosato to time served. (Doc. 14 Ex. A13)

Rosato appealed his conviction and sentence, raising three issues. (Doc. 14 Ex. B1). The state appellate court, Florida's Second District Court of Appeal, affirmed his convictions and sentences without a written opinion. (Doc. 14 Ex. B4); *Rosato v. State*, 48 So. 3d 849 (Fla. 2d DCA 2010) (table). During the pendency of his direct appeal, Rosato filed a motion to correct sentencing error pursuant to Rule 3.800(b)(2), Florida Rules of Criminal Procedure (Doc. 14 Ex. A14), which the state court denied. (Doc. 14 Exs. A15, 17)

Following the affirmance of his convictions and sentences on direct appeal, Rosato filed four more motions to correct illegal sentence (Doc. 14 Exs. C1, F1, I1, H1), which were denied. (Doc. 14 Exs. C2, F3, I2, H2) The state appellate court affirmed the denial of those motions. (Doc. 14 Exs. C4, C6, F3, F8, I6, I9, H6, H9); *Rosato v. State*, 90 So. 3d 289 (Fla. 2d DCA 2012) (table); *Rosato v. State*, 115 So. 3d 1010 (Fla. 2d DCA 2013) (table); *Rosato v. State*, 146 So. 3d 36 (Fla. 2d DCA 2013) (citing *Davis v. State*,

20 So. 3d 1024 (Fla. 4th DCA 2009); *Parrish v. State*, 816 So. 2d 146 (Fla. 1st DCA 2002)); *Rosato v. State*, No. 2D14-2156, 2014 WL 5097818 (Fla. 2d DCA Oct. 10, 2014) (citing *Galindez v. State*, 955 So. 2d 517 (Fla. 2007); *Knight v. State*, 6 So. 3d 733 (Fla. 2d DCA); *Bizzell v. State*, 912 So. 2d 386 (Fla. 2d DCA 2005); *Harris v. State*, 789 So. 2d 1114 (Fla. 1st DCA 2001)).

Rosato also filed a petition alleging ineffective assistance of appellate counsel pursuant to Rule 9.141(c)(4)(B), Fla. R. App. P. (Doc. 14 Ex. D1), which the state appellate court denied, (Doc. 14 Exs. D2, D3, D4, D5); *Rosato v. State*, 61 So. 3d 1126 (Fla. 2d DCA 2011) (table), and two motions for post-conviction relief pursuant to Rule 3.850, Fla. R. Crim. P. (Doc. 14 Exs. E1, G1), which were denied. (Doc. 14 Exs. E2, E4, G7) The denials of the motions for post-conviction relief were affirmed on appeal. (Doc. 14 Exs. E6, E7, G10, G11); *Rosato v. State*, 141 So. 3d 567 (Fla. 2d DCA 2013) (table); *Rosato v. State*, 119 So. 3d 1260 (Fla. 2d DCA 2013) (table).

Rosato filed the instant petition for writ of habeas corpus on November 25, 2014, raising 19 grounds for relief. (Doc. 1) The Court will address related grounds together. In addition, because the Court is able to resolve the entire petition on the basis of the record, an evidentiary hearing is not warranted. *See Schriro v. Landrigan*, 550 U.S. 465, 474 (2007).

STANDARD OF REVIEW

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs this proceeding. *Wilcox v. Florida Dep't of Corr.*, 158 F.3d 1209, 1210 (11th Cir. 1998), *cert. denied*, 531 U.S. 840 (2000). Section 2254(d), which creates a highly deferential standard for federal court review of a state court adjudication, states in pertinent part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The Supreme Court interpreted this deferential standard as "plac[ing] a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court." *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000). Specifically, the Supreme Court explained that,

> [u]nder [Section] 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied — the state-court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal Law, as determined by the Supreme Court of the United States" or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this 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 this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

"The focus . . . is on whether the state court's application of clearly established federal law is objectively unreasonable[,] an unreasonable application is different from an incorrect one." *Bell v. Cone*, 535 U.S. 685, 694 (2002). "[A]n 'unreasonable application of' those holdings must be objectively unreasonable, not merely wrong; even clear error will not suffice." *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015) (quoting *White v.*

Woodall, 134 S. Ct. 1697, 1702 (2014)). *Accord Brown v. Head*, 272 F.3d 1308, 1313 (11th Cir. 2001). 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*, 529 U.S. at 412. Ultimately, "[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). That burden is very difficult to meet. *See Burt v. Titlow*, 134 S. Ct. 10, 16 (2013) (quoting *Richter*, 562 U.S. at 102, 103) (" 'If this standard is difficult to meet' — and it is — 'that is because it was meant to be.' We will not lightly conclude that a State's criminal justice system has experienced the 'extreme malfunctio[n]' for which federal habeas relief is the remedy.").

The purpose of federal review is not to re-try the state case. "The [AEDPA] modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell*, 535 U.S. at 693. Federal courts must afford due deference to a state court's decision. "AEDPA prevents [the use of] federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts." *Renico v. Lett*, 559 U.S. 766, 779 (2010). *See also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

Review of a state court decision is limited to the record that was before the state court at the time the decision was made. *Pinholster*, 563 U.S. 170 at 181–82. The petitioner bears the burden of overcoming a state court factual determination by clear and

convincing evidence. 28 U.S.C. § 2254(e)(1). This presumption of correctness applies to findings of fact, but not to mixed determinations of law and fact. *Parker v. Head*, 244 F.3d 831, 836 (11th Cir.), *cert. denied*, 534 U.S. 1046 (2001). Further, although the state appellate court did not enter a written opinion on direct appeal, the state appellate court's affirmance still warrants deference under Section 2254(d)(1) because "the summary nature of a state court's decision does not lessen the deference that it is due." *Wright v. Moore*, 278 F.3d 1245, 1254 (11th Cir. 2002). See also *Richter*, 562 U.S. at 99 ("When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary."); *Bishop v. Warden*, 726 F. 3d 1243, 1255–56 (11th Cir. 2013).

ANALYSIS

A. Ground One

Ground One relates to the admission at trial of the victim's November 17, 1998 videotaped deposition to perpetuate testimony. (Doc. 14 Ex. A19) Rosato, although present in the building, was not in the room during the victim's deposition. (Doc. 14 Ex. A19 at 4) At the beginning of the deposition, his trial counsel at the time, Robert McClure, stated, "[i]t should probably be reflected that Mr. Rosato previously absented himself and has placed a statement to that effect already." (Doc.14 Ex. A19 at 4) Rosato subsequently failed to appear for trial in January 1999; he was rearrested almost ten years later in August 2008. (Doc. 1 at 6) After being apprehended, Rosato obtained Michael B. O'Haire as his new trial counsel.

On January 30, 2009, the State moved to use the videotaped deposition of the victim at trial. (Doc. 14 Ex. A3) Rosato opposed the motion, and the state trial court held an evidentiary hearing, at which both McClure (Doc. 14 Ex. A18 at 7–22) and Rosato (Doc. 14 Ex. A18 at 22–27) testified. Following the hearing, the state trial court granted the State's motion to use the deposition at trial. (Doc. 14 Ex. A10 at 427–29)

Rosato argues that the trial court abused its discretion by "allowing the State to introduce the videotaped deposition of [the victim] in violation of [his] Sixth and Fourteenth Amendment Rights[,] where the record does not support competent substantial evidence that [he] waived his constitutional right to confrontation during a critical stage of the proceeding." (Doc. 1 at 5) He contends that he desired to be present at the victim's deposition to perpetuate testimony, but that his counsel, Mr. McClure, "decided he should not be present." (Doc. 1 at 6) Rosato notes that the deposition record "contains no waivers or any statements" from him. He further argues that his counsel's advice — that Rosato should not attend the deposition to avoid the victim's identification of him — was illogical because the State had DNA evidence placing Rosato in the victim's home. (Doc. 1 at 6) Rosato raised this issue as issue one on direct appeal. (Doc. 14 Ex. B1 at ii, 18–27). The state appellate court affirmed without a written opinion. (Doc. 14 Ex. B4)

Although the state appellate court did not enter a written opinion on direct appeal, the trial court entered a written order explaining its decision to admit the victim's perpetuated testimony. The state appellate court's per curiam affirmance warrants deference under Section 2254(d)(1) because "the summary nature of a state court's decision does not lessen the deference that it is due." *Wright v. Moore*, 278 F.3d 1245, 1254 (11th Cir. 2002). *See also Richter*, 562 U.S. at 99 ("When a federal claim has been

presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary."); *Bishop v. Warden*, 726 F. 3d 1243, 1255–56 (11th Cir. 2013).

In deciding to admit the victim's deposition to perpetuate testimony following the evidentiary hearing, the state trial court explained (Doc. 14 Ex. A10 at 427–28):

> At the hearing, . . . McClure[ ] testified that[,] on the day of the deposition, he and the Defendant "reiterated" a previous conversation wherein Attorney McClure advised the Defendant he should not be present during the deposition, and that the Defendant agreed. Attorney McClure further testified that he advised the Defendant not to attend the deposition because identity was an issue in this case due to the victim's poor eyesight, and he believed it best to avoid a situation where the victim would have the opportunity to see and identify the Defendant in person. Attorney McClure testified that he believed the Defendant had an understanding of his right to be present during the deposition and that the Defendant waived that right.
>
> The Defendant, however, testified that Attorney McClure did not inform him of his right to be present at the deposition, or that the deposition might be the last opportunity the Defendant would have to cross-examine the victim. The Defendant also testified that he wanted to be present and never waived his right to be present at the deposition.
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> . . .
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> Florida Rule of Criminal Procedure 3.190(j)(3)[1] provides that a defendant who is not in custody and who has notice of a deposition to

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[1] At the time of Rosato's trial, Fla. R.Crim. P. 3.190(j)(3) stated:

> If the deposition is taken on the application of the state, the defendant and the defendant's attorney shall be given reasonable notice of the time and place set for the deposition. The officer having custody of the defendant shall be notified of the time and place and shall produce the defendant at the examination and keep the defendant in the presence of the witness during the examination. A defendant not in custody may be present at the examination, but the failure to appear after notice and tender of expenses shall constitute a waiver of the right to be present. The state shall pay to the defendant's attorney and to a defendant not in custody the expenses of travel and subsistence for attendance at the examination. The state shall make available to the defendant for examination and use at the deposition any statement of the witness being deposed that is in the possession of the state and that the state would be required to make available to the defendant if the witness were testifying at trial.

> perpetuate testimony waives his right to be present if he fails to appear. Here, the record indicates that the State complied with the requirements of [R]ule 3.190(j) and that the Defendant had notice of the deposition but did not attend.
>
> The Court is faced with conflicting testimony of Attorney McClure and the Defendant as to whether the Defendant waived his right to be present. When the court is called upon to make a factual determination and is presented with conflicting testimony, it is within its province to weigh the credibility of the witnesses to resolve the factual dispute. *See Alston v. State*, 894 So. 2d 46, 54 (Fla. 2004). After reviewing the testimony and weighing the credibility of the evidence, the Court finds that the Defendant waived his right to be present at the deposition to perpetuate testimony of Maartje Lewis.

When Rosato, through counsel, renewed his objection to the testimony at trial, the following colloquy occurred (Doc. 14 Ex. A20 at 35–36):

> MR. O'HAIRE: Judge, at this time I'm going to object to the introduction of the videotape as being violative of Mr. Rosato's Sixth Amendment rights to the U.S. Constitution because the statement is testimonial. Miss Lewis is unavailable. Mr. Rosato lacked a prior opportunity to cross-examine Miss Lewis. Mr. Rosato was never told this video deposition may be the only opportunity he'd have to confront and cross-examine Miss Lewis, and at no time did Mr. Rosato waive or on the record reflect a knowing, intelligent and voluntary waiver of his right to confront Miss Lewis.
>
> THE COURT: I've already heard a motion on this very subject, correct?
>
> MR. MARTIN: Yeah.
>
> THE COURT: And I made a ruling.
>
> MR. O'HAIRE: Yes.
>
> THE COURT: And the ruling will stand. The Court finding that there was a motion to perpetuate her testimony, it was taken by, I believe, Mr. McClure, his prior attorney, and based on the fact that your client absented himself from the jurisdiction for such a long period of time, I feel that this

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A subsequent amendment to the Florida Rules of Criminal Procedure, effective January 1, 2010, redesignated subsection (j) as subsection (i). *See In re Amendments to the Florida Rules of Criminal Procedure*, 26 So.3d 534, 539 (Fla. 2009).

> video deposition will be played in light of the fact that the victim is now deceased. Thank you.
>
> MR. O'HAIRE: I'm just putting it on the record, Judge.
>
> THE COURT: Noted.

Rosato contends that the state trial court unreasonably determined the facts based on the evidence presented. (Doc. 1 at 6) Rosato points out that McClure testified at the evidentiary hearing that he "believe[d]" he discussed the victim's eyesight with Rosato and "thought" that identification was an issue in the case. (Doc. 1 at 6; Doc. 14 Ex. A18 at 561) Rosato notes that McClure "thought" Rosato understood his rights and "th[ought Rosato] decided to follow [his] advice not to be present." (Doc. 1 at 6; Doc. 14 Ex. A18 at 566) McClure did not remember making the statement regarding Rosato's absence at the beginning of the deposition, and, when asked whether he thought Rosato waived his confrontation rights, responded, "I don't know that you can ever be sure what's on another person's mind, but he certainly had the information necessary to come to that conclusion. I believe he did waive." (Doc. 1 at 6; Doc. 14 Ex. A18 at 569–70) McClure further "assume[d]" that he explained to Rosato that he was required to be at the deposition unless he waived his right and "believe[d]" that he discussed with Rosato the nature of the deposition and that the deposition may be the only opportunity to confront to victim. (Doc. 1 at 6–7; Doc. Doc. 14 Ex. A18 at 571–72)

Rosato additionally contends that, contrary to Rosato's assertion that he met McClure the day of the deposition, McClure testified that he did not believe he met Rosato the day of the deposition, that "it would have been months before." (Doc. 46 at 9) Yet, Rosato states his attorney of record only weeks before was Mark Thellman. (Doc. 46 at

9) Finally, Rosato argues that the Court's ruling on the renewed motion to suppress at trial contradicted the original ruling. (Doc. 1 at 7–8)

In this case, the record supports the state trial court's determination. McClure testified that he reviewed the case discovery with Rosato, took the victim's discovery deposition on November 12, 1998, and subsequently discussed it with Rosato, and discussed with Rosato his right to be present at the victim's deposition to perpetuate testimony. (Doc. 14 Ex. A18 at 9–10, 12–13) Although he stated his recollection as to discussion with Rosato on the day of the deposition to perpetuate testimony was vague, he "th[ought he and Rosato] just briefly reiterated a previous discussion that it would be better if [Rosato] wasn't in the room, and he agreed." (Doc. 14 Ex. A18 at 14) As to his reason for stating that "[i]t should probably be reflected that Mr. Rosato previously absent[ed] himself and has placed his statement to that effect," McClure explained that, although he did not specifically remember making the statement, he "assume[ed] he put it on the record simply because it should be reflected that [Rosato] had an opportunity to be there and was waiving that right." (Doc. 14 Ex. A18 at 18, 19) Further, Rosato does not dispute that he knew about the deposition and was physically present in the building and able to attend. (Doc. 14 Ex. A18 at 23, 25)

The AEDPA provides that "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Rosato has failed to meet his burden. The statements challenged by Rosato were considered by the trial court and found to be credible. Rosato has provided no clear and convincing evidence that the trial court's findings were unreasonable.

Moreover, Rosato's argument that the trial court's rulings on the motion to suppress and renewed motion to suppress contradicted each other is not persuasive. Although the trial court did not reference in its written order Rosato's extended length of time as a fugitive, the State invoked the doctrine of laches[2] as one argument in opposition to the motion to suppress. The trial court did not retract or contradict its previous ruling that Rosato knowingly waived his right to confront the victim, but added another reason for denying suppression of the victim's testimony.

The state court's adjudication of this claim is not contrary to or an unreasonable application of federal law or based on an unreasonable determination of the facts. Accordingly, Ground One is denied.

B. Grounds Two and Five, Challenges to Sentencing as a Prison Releasee Reoffender

1. Grounds Two and Five

In Ground Two, Rosato alleges state court error where the jury did not, but "was required to[,] make a specific finding that the dwelling in question was occupied before an enhanced prison release reoffender ("PRR") sentence could be imposed." (Doc. 1 at 8) Citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000), he argues that, "[u]nder the Sixth Amendment[,] any fact that increases a sentence must be found by a jury[,] and Rosato is entitled to the same due process as likewise situated defendants governed under the laws at the time of the crime." (Doc. 1 at 9; see also Doc. 46 at 12) He notes that, although the burglary statute subsequently changed, the 1997 statute, which applied to

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[2] "Laches is sustainable in a criminal case where there has been a lack of due diligence on the part of the defendant in bringing forth the claim and prejudice to the State." *Wright v. State*, 711 So. 2d 66, 67 (Fla. 3d DCA 1998).

the June 1998 offense, differentiated between occupied and unoccupied dwellings,[3] and argues the verdict form should have accordingly differentiated between occupied and unoccupied as well. (Doc. 46 at 13) Rosato argues that he could not be sentenced as a prison release reoffender, because Florida's PRR statute in 1997, although later amended, applied only to burglary of occupied structures or dwellings at the time.[4]

In Ground Five, Rosato contends, citing *Gorham v. State*, 988 So. 2d 152 (Fla. 4th DCA 2008) and *Wilson v. State*, 76 So. 3d 332 (Fla. 2d DCA 2011), among others, that he could not properly be sentenced as a prison releasee reoffender, because "burglary with battery" is not an enumerated offense under Section 775.082, Fla. Stat., and does not fall under the catchall category provided by that statue. *See* Fla. Stat. § 775.082(8)(a)(1)(o). (1997) ("Any felony that involves the use or threat of

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[3] Rosato was charged with violation of Florida Statutes Section 810.02(2)(a) (1997), (Doc. 14 Ex. A1 at 179), which provided:

> (2) Burglary is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in s. 775.082, s. 775.083, or s. 775.084, if, in the course of committing the offense, the offender:
>
> (a) Makes an assault or battery upon and person[.]

Rosato cites subsections (3)(a) and (b) of Section 810.02, which provided:

> (3) Burglary is a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if, in the course of committing the offense, the offender does not make an assault or battery and is not and does not become armed with a dangerous weapon or explosive, and the offender enters or remains in a:
>
> (a) Dwelling, and there is another person in the dwelling at the time the offender enters or remains; [or]
>
> (b) Dwelling, and there is not another person in the dwelling at the time the offender enters or remains[.]

Rosato was not charged with violation of Section 810.02(3)(a),(b), Fla. Stat.

[4] At the time of the offense in June 1998, Florida's applicable prison releasee reoffender status provided, Fla. Stat. § 775.082 (8(a)(1)(q) (1997): " 'Prison releasee reoffender' means any defendant who commits, or attempts to commit: . . . q. Burglary of an occupied structure or dwelling[] . . . within 3 years of being released from a state correctional facility operated by the Department of Corrections or a private vendor."

physical force or violence against an individual"). (Doc. 1 at 14; Doc. 39 at 9–10; Doc 46 at 20–21) Those cases explain that burglary with battery does not qualify an offense for a PRR sentencing enhancement under the catchall provision, because a battery "does not necessarily involve the level of force or violence contemplated by the PRR statute's catch-all provision." *Wilson*, 76 So. 3d at 333–35 (quoting *Gorham*, 988 So. 2d at 154 and compiling cases). *See also State v. Hearns*, 961 So. 2d 211, 218–19 (Fla. 2007) (explaining that the statutory elements of simple battery require mere intentional touching, no matter how slight, of another person against that person's will, which is not sufficient for purposes of the PRR statute's catch-all provision).

Rosato raised these issues following trial in a motion to correct sentencing error. (Doc. 14 Ex. A14) The state court denied the motion, explaining (Doc. 14 Ex. A15 at 615):

> Defendant's PRR designation was not the result of retroactive application. It is true that prior to the 2001 amendment, PRR status could not be applied to a defendant convicted of burglary of an unoccupied dwelling. However, a court could impose a PRR sentence where there was a sufficient factual basis in support of the conclusion that the dwelling was occupied at the time of the burglary. *See Caddo v. State*, 806 So. 2d 520, 522 (Fla. 2d DCA 2001) (holding that the PRR sentence should stand if after reviewing the record, the trial court determined that a factual basis supported the conclusion that the dwelling house was occupied during the burglary.).
>
> The record herein supports the conclusion that the dwelling was occupied at the time of the burglary. The victim testified that she was sitting in her family room when Defendant entered the house. [See Doc. 14 Ex. A20 at 44]. Moreover, Defendant himself testified that the victim was in the house when he entered on the night of the offense. [See Doc. 14 Ex. A20 at 230-232]. Accordingly, Defendant's PRR sentence was proper under the applicable statute. This claim is denied.

Rosato next raised this contention as issue two on direct appeal. (Doc. 14 Ex. B1) The state appellate court affirmed Rosato's convictions and sentence without written

opinion. (Doc. 14 Ex. B4) He proceeded to file four more motions to correct sentence asserting the same issue. (Doc. 14 Exs. C1, F1, I1, H1). In denying the second motion to correct illegal sentence, the state trial court explained (Doc. 14 Ex. C2 at 2):

> [The Defendant] alleges that his PRR sentence was illegal because burglary of an unoccupied dwelling did not qualify for PRR sentencing under the 1997 version of the act, and the jury did not make a finding that the dwelling was occupied at the time of the burglary. . . .
>
> . . .
>
> . . . This claim is also without merit. The jury found the Defendant guilty of burglary to a dwelling with the intent to commit an offense therein. [See Doc 14 Ex. A12]. They also concluded that he wore a mask or hood and committed a battery in the course of the burglary. [See Doc 14 Ex. A12]. As evidenced by the jury instruction, this verdict required the jury to find that the defendant intentionally touched or struck a person while committing the burglary. [See Doc. 14 Ex. A20 at 268–88]. Thus, the fact that the dwelling was occupied is inherent in the jury's finding that a battery was committed.

Rosato appealed, and the state appellate court affirmed the state court's denial of his motion without written opinion. (Doc. 14 Exs. C3, C4, C6)

In denying Rosato's third motion to correct illegal sentence, the state court similarly determined that his conviction qualified for PRR enhancement because "it was inherent in the jury's findings that the dwelling burglarized by Defendant was occupied at the time he committed his offense." (Doc. 13 Ex. F3 at 2–3). Rosato appealed, and the state appellate court affirmed the state court's denial of his motion without written opinion. (Doc. 14 Exs. F6, F7, F8)

Rosato's fourth motion was denied for lack of jurisdiction due to his pending appeal on the third motion. (Doc. 14 Exs. I1, I2) Rosato appealed, and the state appellate court affirmed the state court's denial of his motion, citing *Davis v. State*, 20 So. 3d 1024 (Fla.

4th DCA 2009); *Parrish v. State*, 816 So. 2d 146 (Fla. 1st DCA 2002). (Doc. 14 Exs. I3, I6, I9)

Finally, Rosato's fifth motion was denied as successive. (Doc. 14 Exs. H1, H2) The state court also noted that "the Defendant's argument that his designation as a PRR is in violation of his Sixth Amendment rights has no merit. The Second District Court of Appeals has held that the application of PRR status is 'directly derivative of a prior conviction and therefore does not implicate Sixth Amendment protections.' " (Doc. 14 Ex. H2 at 3) He again appealed, and the state appellate court affirmed the state court's denial of his motion, citing *Galindez v. State*, 955 So. 2d 517 (Fla. 2007); *Knight v. State*, 6 So. 3d 733 (Fla. 2d DCA); *Bizzell v. State*, 912 So. 2d 386 (Fla. 2d DCA 2005); *Harris v. State*, 789 So. 2d 1114 (Fla. 1st DCA 2001). (Doc. 14 Exs. H2, H6, H9)

The Sixth Amendment to the United States Constitution provides that,

> [i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Supreme Court has held that the Sixth Amendment requires that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). In *Blakely v. Washington*, 542 U.S. 296, 303 (2004), the Supreme Court clarified that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*"

However, "[f]ailure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error," and is therefore subject to harmless error analysis. *Washington v. Recuenco*, 548 U.S. 212, 222 (2006). The Supreme Court framed the test as follows: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" *Neder v. United States*, 527 U.S. 1, 18 (1999); *Recuenco*, 548 U.S. at 221; *Galindez v. State*, 955 So. 2d 517, 522 (Fla. 2007) (adopting the harmless error test set out in *Neder*, 527 U.S. at 8, and *Recuenco*, 548 U.S. at 221).

The Court need not decide whether the trial court erred, because any error, in this case, was harmless. The Court determines that it is clear beyond a reasonable doubt that a rational jury would have found Rosato entered an occupied, rather than unoccupied, dwelling.

As the state court found regarding Rosato's first motion, "[t]he record . . . supports the conclusion that the dwelling was occupied at the time of the burglary" (Doc. 14 Ex. A15 at 615), as both the victim and Rosato testified that the victim was inside the home when Rosato entered. (Doc. 14 Ex. A20 at 44, 230–32) As to Rosato's second and third motions, the record supports the state court's determinations that "the fact that the dwelling was occupied is inherent in the jury's finding that a battery was committed." (Doc. 14 Ex. C2 at 2; Doc 14 Ex. F3 at 2–3) The court's instructions to the jury required that to find Rosato guilty of burglary during which a battery was committed, the jury was required to find that the defendant intentionally touched or struck a person while committing the burglary (Doc. 14 Ex. A20 at 288), and the jury, in fact, found that Rosato was guilty of burglary during which a battery was committed. (Doc. 14 Ex. A12 at 514)

Additionally, regarding Rosato's fifth motion to correct illegal sentence, the state appellate court's citation to *Galindez v. State*, 955 So. 2d 517 (Fla. 2007) — which adopted and applied the Supreme Court's holding in *Recuenco* — acknowledges that the error alleged, if any, was harmless.

The state courts' adjudications of this claim (including the trial court's determination to apply subsection q to enhance Rosato's sentence for conviction of burglary of an occupied dwelling, Fla. Stat. § 775.082(8)(a)(1)(q) (1997)), are not contrary to or an unreasonable application of federal law or based on an unreasonable determination of the facts. Accordingly, Grounds Two and Five are denied.

2. Respondents' Motion to Strike (Doc. 61)

On September 5, 2017, Rosato filed an "Addendum to Ground Two" of his petition. (Doc. 60) The addendum challenges not only the lack of a distinction between burglary of an "occupied" and "unoccupied" dwelling on the jury verdict form, but also a lack of the same distinction in the amended information. Rosato argues that he was not charged with burglary of an occupied dwelling, thus his sentence is illegal and cannot be harmless. Respondents move to strike the addendum (Doc. 61), challenging that it is untimely (filed nearly three years after the original petition) and raises an issue not raised in the state court.

Rosato states in the fourth sentence of Ground Two in his petition that "the information and verdict form should have been differentiated on the basis of occupancy." (Doc. 1 at 8) Thus, he focuses all of his arguments related to Ground Two in his petition, reply and construed supplement to the reply on the deficiency of the verdict form. (Doc.

1 at 8–9; Doc. 39 at 4–5; Doc. 46 at 12–15) Thus, the Court considers the addendum as an attempt to amend the petition to address the alleged deficiency of the information.

Rule 15(a), Fed. R. Civ. P., provides:

> **(1)** ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course within:
>
> (A) 21 days after serving it, or
> (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.
>
> **(2)** ***Other Amendments.*** In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

Rosato's petition was filed on December 15, 2014. (Doc. 1) Respondents' court-ordered amended responsive pleading was filed on August 5, 2015 (Doc. 27 at 5–6; Doc. 31), and the petition has been ripe for review since April 8, 2016 when Rosato filed his reply. (Doc. 46). He is not now entitled to amend his pleading as a matter of course, as any such amendment is clearly untimely. In addition, Rosato has not requested leave to amend his petition, and, even if the Court construes his addendum as a motion for leave to amend, Rosato fails to provide sufficient explanation justifying his extreme delay in raising this issue in this federal matter.[5]

Further, even were the Court to permit the amendment, Rosato has not exhausted his claim that the information was deficient. As in his present petition, on appeal, he stated that he "had not been charged with or convicted of an occupied burglary," (Doc. 14

[5] Rosato states only that he "overlook[ed] that identical to the cases cited, [he] also was not charged with burglary of an occupied dwelling, and likewise, the jury did not make this finding." (Doc. 60 at 1)

Ex. B1 at 28); but he focused his arguments on the allegedly deficient verdict form. (*Id.* at 28–33).

Accordingly, Respondents' Motion to Strike Petitioner's Addendum to Ground Two (Doc. 61) is granted.

C. Ground Three

In Ground Three, alleging trial court error, Rosato contends that he was improperly convicted for both misdemeanor battery and burglary with battery, arising from the same criminal episode. He argues that his convictions violate his constitutional right to be free from double jeopardy.

Rosato raised this as issue three on direct appeal and as issue seven in his first motion to correct illegal sentence pursuant to Rule 3.800, Fla. R. Crim. P. (Doc. 14 Ex. A15 at 603; Doc. 14 Ex. B1 at 15, 34-36) The state appellate court affirmed his convictions and sentences without a written opinion. (Doc. 14 Ex. B4)

Only two theories could have supported the state appellate court's decision to deny relief on this claim: (1) Rosato's convictions of misdemeanor battery and burglary with battery did not violate his double jeopardy rights; or (2) even if his double jeopardy rights were violated, the error was not fundamental. *See Pinkney v. Sec'y*, DOC, 876 F.3d 1290, 1298 (11th Cir. 2017) (quoting *Richter*, 562 U.S. at 102) (citing 28 U.S.C. § 2254(d)(1)) ("[The] task [of the habeas court] is to determine what arguments or theories 'could have supported' the state court's decision, and [the habeas court] must deny relief if it 'is possible fairminded jurists could' find that decision was not 'contrary to, or involved an unreasonable application of' the holding in an earlier Supreme Court decision.").

"[W]hen faced with a summary state court decision that is subject to more than one interpretation, [the Court] must choose the interpretation of the decision that is consistent with the state court knowing and correctly applying federal law[.]" *Pinkney*, 876 F.3d at 1298 (citing *Wilson v. Warden, Ga. Diagnostic Prison*, 834 F.3d 1227, 1240 (11th Cir. 2016)). Therefore, assuming without deciding that the second theory would be contrary to federal law, the Court gives the state appellate court the benefit of the doubt that it denied Rosato relief on the first theory — that the convictions did not violate his double jeopardy rights.

With regard to his Rule 3.800 motion, the state post-conviction court, in denying Rosato's claim, explained (Doc. 14 Ex. A17 at 606):

> In his motion, Defendant asserts that his sentence in count two was illegal. He alleges that his rights against double jeopardy were violated because battery is a necessarily lesser-included offense of burglary with battery.
>
> In its response, the State cites to *Avila v. State*, 9 So. 3d 778, 779 (Fla. 2d DCA 2009), and contends that the record conclusively shows that multiple batteries occurred, and therefore, there was no violation of double jeopardy. Specifically, the State alleges that the sentence in count two was imposed as punishment for the coerced masturbation of Defendant by the victim, whereas count one involved the non-consensual touching of the victim's breast and buttocks.
>
> In light of the State's response, Defendant has not demonstrated that his sentence in count two was the type of "sentencing error" recognized by Rule 3.800(b). Moreover, this claim more directly concerns merits of Defendant's underlying conviction for battery than it does his sentence. Accordingly, this claim is denied.

"The Double Jeopardy Clause of the Fifth Amendment provides that no person shall be 'subject for the same offence to be twice put in jeopardy of life or limb.' " *Jones v. Thomas*, 491 U.S. 376, 380 (1989) (quoting U.S. Const., amend. V). "In addition to protecting against multiple prosecutions for the same offense, the Clause also prohibits

'multiple punishments for the same offense imposed in a single proceeding.' " *Stoddard v. Sec'y, Dep't of Corr.*, 600 F.App'x 696, 703 (11th Cir. 2015) (per curiam) (quoting *Jones*, 491 U.S. at 381). "[I]n the multiple punishments context, [the purpose of double jeopardy] is "limited to ensuring that the total punishment did not exceed that authorized by the legislature." *Jones*, 491 U.S. at 381 (quoting *United States v. Halper*, 490 U.S. 435, 450 (1989)).

The Supreme Court, in *Blockburger v. United States*, 284 U.S. 299, 304 (1932), set forth the following test for determining whether two offenses are sufficiently distinguishable: "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." This test is codified in Florida law at Section 775.021(4)(a) (1997):

> Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.

See also State v. Drawdy, 136 So. 3d 1209, 1213 (Fla. 2014).

Because the purpose of double jeopardy is to ensure a defendant is not punished more than intended by the legislature, the Court's review of a state petitioner's challenge to a state sentencing procedure is limited. *Tarpley v. Dugger*, 841 F.2d 359, 364 (11th Cir. 1988).

> Where ... a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct ..., a court's task of statutory construction is at an end and the

> prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.

Id. (quoting *Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983)). Accordingly, "[i]n this context, [the Court is] bound to accept the Florida court's construction of that State's statutes." *Id.* The Florida Supreme Court has explained that, "if two convictions occurred based on two distinct criminal acts, double jeopardy is not a concern." *State v. Paul*, 934 So. 2d 1167, 1172 n.3 (2006), *receded from on other grounds by Valdes v. State*, 3 So.3d 1067, 1077 (Fla. 2009). *See also Drawdy*, 136 So. 3d at 1213.

The amended information charged Rosato with burglary with battery based on his unconsented touching of the victim's buttocks and breasts. (Doc. 14 Ex. A1 at 179) The verdict form gave the jury the option of finding burglary with battery; the lesser included offenses of burglary of a dwelling, burglary of a structure, trespass of an occupied structure, or trespass; or not guilty. (Doc. 14 Ex. A12 at 514) The verdict form did not give the jury the option of finding only battery as to Rosato's unconsented touching of the victim's buttocks and breasts. (*Id.*) The jury convicted Rosato of burglary with battery. (*Id.*)

The amended information also charged attempted sexual battery based on Rosato's attempted oral, anal, or vaginal penetration of the victim that resulted in the victim's coerced masturbation of Rosato. (Doc. 14 Ex. A1 at 179) The verdict form gave the jury the option of finding attempted sexual battery; the lesser included offenses of battery or assault; or not guilty. (Doc. 14 Ex. A12 at 515) The jury found Rosato guilty of battery. (*Id.*)

In light of the record, it is clear that Rosato was charged with separate criminal acts and that the jury found Rosato guilty of burglary with battery based on the

unconsented touching of the victim's buttocks and breasts, while the jury found him guilty of battery based on the coerced masturbation. This was not error under Florida law. *Compare Avila v. State*, 9 So. 3d 778, 779 (Fla. 2d DCA 2009) (explaining that conviction for both burglary with battery and battery as a lesser-included offense of sexual battery does not violate double jeopardy if the record shows multiple batteries occurred), *with Bradley v. State*, 540 So. 2d 185, 185–87 (Fla. 5th DCA 1989) (convictions for both burglary with battery and battery violated double jeopardy where the victim was struck only once).

The record therefore supports the state courts' decisions to affirm on direct appeal and to deny this issue in the first motion to correct illegal sentence. Based on the victim's testimony, the charging document, the jury instructions, and the verdict form, it is clear that the court did not err in permitting the jury to consider and find Rosato guilty of two separate criminal acts. The state courts' adjudications of this claim are not contrary to or an unreasonable application of federal law or based on an unreasonable determination of the facts. Ground Three is denied.

D. Ground Eight

In Ground Eight, Rosato contends that "the State prosecutor violated his due process rights by requiring him to stand trial based on false testimony resulting in *Giglio* violations by (a) use of false testimony, (b) allow[ing] false testimony, (c) committ[ing] fraud upon the court, [and] (d) misleading the jury by prosecutor misconduct." (Doc. 1 at 19–20) Specifically, he challenges the victim's testimony that it was dark and that she could not see in the dark. (*Id.* at 20) Rosato points to her testimony that she had seen Rosato at her fence on a night months before, around 9:00 p.m., when she was taking

out her garbage. (*Id.*) Yet, she testified that between 8:30 and 9:00 p.m. on the night at issue, it was getting dark and that she could not flee from Rosato because she could not see well and would fall. (*Id.*)

Rosato raised this claim as issue three in his first motion for post-conviction relief. (Doc. 14 Ex. E1 at 18–21). The state post-conviction court, affirmed by the state appellate court (Doc. 14 Exs. E6, E9), denied relief, explaining (Doc. 14 Ex. E2 at 46–47):

> The Defendant claims the State committed a *Giglio* violation by arguing at trial that the attempted battery occurred at night and the victim could not run from the Defendant because her eyesight prevented her from seeing in the dark. As proof of this alleged violation, he references a police statement given by the victim, wherein she states that it was getting "a bit dark" at the time of the offense.
>
> The Defendant's claim lacks merit because he fails to demonstrate how argument that the offense occurred at night is false. At trial (via videotaped deposition), the victim testified that, on the night of the incident, it was getting dark and she was sitting on her couch listening to audio books. ([Doc. 14 Ex. A20 at 44]). She further testified that, after the man left her house, she took off her dress, took a shower, and called a friend who then called police. ([Doc. 14 Ex. A20 at 56–59]). The responding police officer testified that she arrived at the victim's home at 10:52 p.m. ([Doc. 14 Ex. A20 at 28]). As there is nothing to indicate that the offense did not, in fact, occur at night or when it was beginning to get dark outside, there is no basis for the Defendant's *Giglio* claim. Accordingly, it is denied.

The Supreme Court has explained that "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.' " *Giglio*, 405 U.S. at 153 (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)).

Although Rosato claims that "reasonable fact-finders could agree that it was not []dark[] and [the victim] and the state prosecutor provided false testimony" (Doc. 1 at 20), as the post-conviction court noted, Rosato has presented no evidence to contradict the statement that it was dark or getting dark on the night of the offense.

Accordingly, the state court's adjudication of this claim is not contrary to or an unreasonable application of federal law or based on an unreasonable determination of the facts. Ground Eight is denied.

E. Ground Eighteen

In Ground Eighteen, Rosato argues that "Florida's burglary statute is vague and ambiguous as to legislative intent." (Doc. 1 at 27) Specifically, he argues that (Doc. 1 at 27):

> [t]he compound felony 'burglary -- battery' that reclassifies and enhances a burglary of a second degree [felony] up to 15 years to life . . . is not only being punished twice, but also enhanced twice. The legislature did not say when it enacted the burglary statute whether a battery 'misdemeanor' in its simplest form would have the same penalties as other felony batteries, i.e.[,] aggravated battery, sexual battery.
>
> Reasonable fact-finders could find that the statute interpretation is wrong and could interpret different meaning from the same language.

Rosato raised this claim as issue three in his second motion for post-conviction relief pursuant to Rule 3.850, Fla. R. Crim. P. (Doc. 14 Ex. G4 at 7–8) The state post-conviction court, affirmed per curiam by the state appellate court (Doc. 14 Exs. G10, G11), denied relief, explaining that the issue should have been raised on direct appeal, rather than in a motion for post-conviction relief. (Doc. 14 Ex. G7 at 3 (citing *McCrae v. State*, 437 So. 2d 1388, 1390 (Fla. 1983).)

"Federal courts are precluded from addressing claims that have been held to be procedurally defaulted under state law." *Tower v. Phillips*, 7 F.3d 206, 210 (11th Cir. 1993) (citing *Coleman v. Thompson*, 501 U.S. 722 (1991)). Therefore, a federal court must dismiss claims that either (1) have been explicitly ruled to be procedurally barred by the highest state court considering the claims, *Harris v. Reed*, 489 U.S. 255, 261 (1989),

or (2) are not exhausted but would clearly be barred if returned to state court. *Coleman*, 501 U.S. at 735 n.1.

Procedural default will be excused only in two narrow circumstances. First, a petitioner may obtain federal review of a procedurally defaulted claim if he can show both "cause" for the default and actual "prejudice" resulting from the default. "To establish 'cause' for procedural default, a petitioner must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in the state court." *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir.1999). "To establish 'prejudice,' a petitioner must show that there is at least a reasonable probability that the result of the proceeding would have been different." *Henderson* v. Campbell, 353 F.3d 880, 892 892 (11th Cir. 2003).

Here, the state post-conviction court explicitly ruled that the issue raised by Ground Eighteen is procedurally barred by Rosato's failure to raise it on direct appeal. Rosato argues that (counsel failed to preserve the issue for appeal?) the issue was not preserved for appeal. However, the Court notes that: (1) he has not asserted ineffective assistance of counsel in this petition as to any such failure to preserve and (2) he could have raised the issue as one of fundamental error on direct appeal, as, under Florida law, issues of fundamental error can be raised at any time. *Bedford v. State*, 970 So. 2d 935, 938 (Fla. 4th DCA 2008). Accordingly, Rosato has not established cause to override the procedural bar.

As the trial court determined that the issue raised by Ground Eighteen was procedurally barred because it should have been raised on direct appeal, and that

decision was affirmed, per curiam, by the state appellate court, Ground Eighteen is denied.

F. Ineffective Assistance of Counsel Claims

In the remaining fourteen Grounds, Rosato alleges that his counsel was constitutionally ineffective — a claim that is difficult to sustain. *See Waters v. Thomas*, 46 F.3d 1506, 1511 (11th Cir. 1995) (*en banc*) (*quoting Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994)) ("[T]he cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between."). In *Strickland v. Washington*, 466 U.S. 668 (1984),

> the Supreme Court set forth a two-part test for analyzing ineffective assistance of counsel claims. According to *Strickland*, first, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Sims v. Singletary, 155 F.3d 1297, 1305 (11th Cir. 1998) (citing *Strickland*, 466 U.S. at 687).

Strickland requires proof of both deficient performance and consequent prejudice. *Strickland*, 466 U.S. at 697; *Sims*, 155 F.3d at 1305. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690. "[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.* To establish deficient performance, *Strickland* requires a petitioner to demonstrate that, "in light of all the circumstances, the identified acts or omissions [of counsel] were

outside the wide range of professionally competent assistance." *Id.* To establish prejudice, the petitioner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

In the AEDPA context, sustaining a claim of ineffective assistance of counsel is even more difficult than in other types of cases because "[t]he standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Richter*, 562 U.S. 86, 105. *See also Pinholster*, 563 U.S. 170 at 190 ("Our review of the [state court's] decision is thus 'doubly deferential.' "); *Johnson v. Sec'y, Dep't of Corr.*, 643 F.3d 907, 911 (11th Cir. 2011) ("Double deference is doubly difficult for a petitioner to overcome, and it will be a rare case in which an ineffective assistance of counsel claim that was denied on the merits in state court is found to merit relief in a federal habeas proceeding.").

1. Ground Four

In Ground Four, Rosato asserts that his appellate counsel erred by failing to raise a properly preserved issue on appeal. (Doc. 1 at 10–13) Specifically, he notes that after the state court granted the State's motion to use evidence of other crimes and acts — Rosato's flight to avoid prosecution, continued absence, use of an alias, providing a false name to law enforcement, and attempting to avoid arrest or recapture (Doc. 14 Ex. A10) — his counsel renewed the objection to the evidence at trial. (Doc. 14 Ex. A20 at 35–36) The state trial court denied the objection, reiterating that the evidence was admissible as relevant to, among other things, consciousness of guilt. (Doc. 14 Ex. A20

at 36) The state court then refused to give a requested instruction on *Williams* rule evidence, over counsel's objection. (Doc. 14 Ex. A20 at 255–56) Rosato's appellate counsel did not raise these issues on appeal.

Rosato raised this claim to the state appellate court in a petition alleging in ineffective assistance of appellate counsel, pursuant to Rule 9.141(c)(4)(B), Fla. R. App. P. (Doc. 14 Ex. D1) The state appellate court denied the claim without a written opinion. (Doc. 14 Exs. D2, D3)

"In habeas corpus proceedings, federal courts generally do not review a state court's admission of evidence. . . . [F]ederal habeas corpus relief [will not be granted] based on an evidentiary ruling unless the ruling affects the fundamental fairness of the trial." *Sims v. Singletary*, 155 F.3d 1297, 1312 (11th Cir. 1998). Even if erroneous, a Petitioner must show that the evidentiary ruling "had [a] substantial and injurious effect or influence in determining the jury's verdict." *Id.* (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)).

As explained by the state trial court in granting the motion to admit the challenged evidence (Doc. 14 Ex. A10 at 426):

> Evidence of subsequent other acts or crimes may be admitted to show a defendant's consciousness of guilt when there exists a sufficient nexus between the act in question and the charged crime. *See Murray v. State*, 838 So. 2d 1073 (Fla. 2003). Evidence of flight to avoid prosecution may be admitted. *Id.*; *Merritt v. State*, 523 So. 2d 573 (Fla. 1988). Additionally, "[w]hen a suspected person in any manner attempts to escape or evade a threatened prosecution by flight, concealment, resistance to lawful arrest, or other indications after the fact of a desire to evade prosecution, such fact is admissible, being relevant to the consciousness of guilt which may be inferred from such circumstance." *Murray*, 838 So. 2d at 1085[] [(]citing *Straight v. State*, 397 So. 2d 908 (Fla. 1981)[)]. Furthermore, the passage of "significant" time between the offense and the other act in question does not preclude the admission of the other act. *Murray*, 838 So. 2d at 1085–86.

The state appellate court had multiple theories upon which it could deny Rosato's ineffective assistance of appellate counsel claim: (1) the evidentiary ruling was correct, therefore his appellate counsel did not err by not addressing it on appeal; (2) the evidentiary ruling was not correct, but it did not affect the fundamental fairness of the trial; therefore his appellate counsel did not err by not addressing it on appeal; or (3) similar to option two, the evidentiary ruling was not correct, and his counsel erred by failing to raise it on appeal, but Rosato did not suffer prejudice as a result of appellate counsel's error.

Fair-minded jurists could, and this Court does, find that the state appellate court's decision was not contrary to, and did not involve an unreasonable application of *Strickland.* As the state trial court explained, "[t]he evidence before [it was] that the Defendant failed to appear on the date of his trial and subsequently took steps to remain absent and avoid arrest. Accordingly, the . . . evidence of the Defendant's flight and his subsequent actions . . . [were] admissible to show consciousness of guilt." (Doc. 14 Ex. A 10 at 426) "[S]tate courts are the final arbiters of state law, and federal habeas courts should not second-guess them on [state-law] matters." *Agan v. Vaughn*, 119 F.3d 1538, 1549 (11th Cir. 1997). As the record supports the state court's determination, the Court cannot second guess the state court's challenged evidentiary decision. Accordingly, Ground Four is denied.[6]

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[6] To the extent that Rosato may also be attempting to raise a claim of trial court error for failure to provide a cautionary instruction as to *Williams* rule evidence (Doc 1 at 12), the Court finds, upon review, that Rosato did not raise this argument in his petition alleging ineffective assistance of counsel. (Doc. 14 Ex. D1) Accordingly the issue is not exhausted and is procedurally barred from habeas review.

2. Ground Six

In Ground Six, Rosato claims that his trial counsel was ineffective for "depriv[ing] him of his right to be present to confront the witness against him in violation of the Sixth and Fourteenth Amendments." (Doc. 1 at 15) As with Ground One, this claim stems from Rosato's absence at the victim's videotaped deposition to perpetuate testimony.

Rosato raised this claim as issue one in his first motion for post-conviction relief pursuant to Rule 3.850, Fla. R. Crim. P. (Doc. 14 Ex. E1 at 4–13) The post-conviction court, affirmed per curiam by the state appellate court (Doc. 14 Ex. E6), denied relief, explaining (Doc. 14 Ex. E2 at 45–46):

> The Defendant alleges his former trial counsel, Robert McClure, was ineffective by fabricating later testimony to the Court that he advised the Defendant not to be present at a deposition to perpetuate testimony of the victim due to an issue of identification. He further claims Mr. McClure was ineffective in failing to advise the Defendant of his right to be present at the deposition.
>
> First, the Court notes that the Defendant's claim is facially insufficient, as it does not allege that, absent the deficiency, the outcome of his trial would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Haliburton v. Singletary*, 691 So. 2d 466, 470 (Fla. 1997).
>
> More conclusively, however, the claim is without merit. The Defendant's allegations stem from a deposition to perpetuate testimony conducted on November 12, 1998. The deposition was taken due to the victim's advanced age. The victim died between the time this deposition was taken and the Defendant's trial in 2009, thus necessitating the State's use of the videotaped deposition at trial. When the Defendant was re-apprehended in August 2008 after absconding while on bond, a different attorney, Michael O'Haire, was appointed to represent him. Mr. O'Haire filed a motion to suppress the deposition testimony, claiming that the Defendant did not knowingly and voluntarily waive his presence at the deposition. Following a hearing on this motion, the Court granted the State's motion to use the deposition at trial, finding that the Defendant knowingly waived his presence at the deposition. In the order, the Court specifically noted that there was a discrepancy in the testimonies of the Defendant and Mr. McClure and [that] it had made a credibility

> determination in finding that the Defendant was advised of his right to be present at the deposition and voluntarily waived his presence. ([Doc. 14 Ex. A10 at 427–29]). Based on this Court's previous findings as to this issue, the Defendant's claim is denied.

Rosato has not demonstrated that state court's adjudication of this claim is contrary to or an unreasonable application of *Strickland* or based on an unreasonable determination of the facts. As with Ground One, the state trial court's factual determination to credit the testimony of Rosato's trial attorney that Rosato chose not to be at and waived his right to be present at the deposition binds this court where, as here, Rosato has provided no clear and convincing evidence that the trial court's factual findings were unreasonable. *See* 28 U.S.C. § 2254(e)(1). Ground Six is denied.

3. Ground Seven

In Ground Seven, Rosato alleges that both his first trial counsel, Mr. McClure, and his second trial counsel, Mr. O'Haire, failed to investigate and call a number of witnesses (Doc. 1 at 17):

> Ms. Shultz, Mr. Maita, and Mr. and Mrs. John Smith, who had placed statements that they observed the alleged victim Ms. Lewis outside her home at 4–5 a.m.; Mr. Gerobitz and Ms. Ballard[,] that [the victim] . . . call[ed] Rosato's place of employment; [and] Ms. Morris[] and Ms. Sutton[,] . . . who had told neighbors of [the victim's] physical conditions that contributed to her behavior and knowledge that [the victim] had made sexual advances toward other males.

Rosato contends that the witnesses' testimony that the victim was seen outside early in the morning in the dark would have rebutted the victim's testimony that she had trouble seeing in the dark. Testimony from Mr. Gerobitz and Ms. Ballard that the victim called Rosato's place of employment several times would have rebutted the victim's testimony that she called only once. Further, Ms. Sutton and Ms. Morris' testimony regarding the victim's physical condition, combined with the victim's testimony that she

had depression, would have warranted expert witness evaluation of the victim. (Doc. 1 at 18)

Rosato additionally contends that counsel should have obtained the victim's purported writings, based on her testimony that her reading glasses were "just for write — writing my sex (phonetic.)" (Doc. 14 Ex. A20 at 82)

Specifically as to Mr. O'Haire, Rosato contends that after Mr. O'Haire discovered that the original public defender's file had been lost, he "informed Rosato that he would hire an investigator or conduct a search himself, but abandoned the investigation." (Doc. 1 at 19) Rosato concedes that Mr. O'Haire arranged to travel and depose Ms. Morris and Ms. Sutton, but alleges that he called off the depositions prematurely after finding out the witnesses could not recall anything about the case. (Doc. 1 at 19)

Overall, Rosato argues that "[a]ny and all witnesses would have bolstered the defense. [He] stood trial for burglary and attempted sexual battery. The jury exonerated the attempted sexual battery. Thus, any witness favorable to defense would have made a difference when the case hinged on credibility and any exculpatory or contrary evidence would have had an impact on the verdict." (Doc. 1 at 19)

Rosato raised this claim as issues two and four (one issue each for Mr. McClure and Mr. O'Haire) in his first motion for post-conviction relief. (Doc. 14 Ex. E1 at 14–17, 22–25) The state post-conviction court, affirmed by the state appellate court (Doc. 14 Exs. E6, E9), denied relief, explaining (Doc. 14 Ex. E4 at 310–12):

> **Subclaim (A):** . . .
>
> . . .
>
> ***Mr. & Mrs. Smith, Mrs. Gail Schultz, and Mr. Salvatore Maita***

First, Defendant avers Mr. & Mrs. Smith, Mrs. Gail Schultz, and Mr. Salvatore Maita[] called the Office of the Public Defender prior to his first trial date. According to Defendant, these potential witnesses stated they had on occasion observed the victim dancing on her front lawn in her underwear early in the morning; flashing her breasts at motorists as they passed by.

However, Defendant's claim is not sufficient under *Nelson* [*v. State*, 875 So. 2d 579, 583–84 (Fla. 2004)]. As an initial matter, Defendant fails to indicate that any [of] these potential witnesses were actually available to testify at his jury trial. *See generally Garrett v. State*, 62 So. 3d 1274, 1275 (Fla. 2d DCA 2011). Additionally, Defendant has not shown how the omission of the alleged testimony in any way prejudiced the outcome of the trial. Assuming the witnesses had seen the victim dancing on her front lawn during the early morning hours on some unspecified date, this would have had no bearing on the issues before the jury; i.e., whether Defendant had committed the crimes charged in the felony information.[] *See Evans v. State*, 995 So. 2d 933, 945–46 (Fla. 2008); *Pietri v. State*, 885 So. 2d 245, 254 (Fla. 2004). Accordingly, Defendant's claim as it relates to these four potential witnesses is without merit.

Mr. Gerowitz & Ms. Ballard

Next, Defendant contends two of his co-workers, Mr. Gerowitz and Ms. Ballard, would have testified that the victim had called Defendant's place of employment. Again, Defendant has failed to allege Mr. Gerowitz and Ms. Ballard were available to testify. *Nelson*, 875 So 2d at 583–84. Furthermore, this testimony would likely not have been admissible as it was both irrelevant and cumulative. As with the alleged testimony of Defendant's first four potential witnesses, the fact [that] the victim subsequently attempted to contact the Defendant's employer is not relevant to Defendant's guilt or innocence on the charges he faced. *Evans*, 995 So. 2d at 945–46; *Pietri*, 885 So. 2d at 254. Additionally, during the victim's videotaped testimony she testified that she telephoned Defendant's work place in an attempt to learn whether Defendant was employed there. ([Doc. 14 Ex. A20 at 84]). As such, had trial counsel attempted to present the alleged testimony of Mr. Gerowitz and Ms. Ballard, it would have proven cumulative to the videotaped testimony presented by the victim. *Jones v. State*, 998 So. 2d 573, 586 (Fla. 2008) (holding "counsel is not ineffective for failing to present cumulative evidence.").

Ms. Barbara Morris & Ms. Mary Sue Sutton

Lastly, Defendant contends trial counsel failed to adequately investigate Ms. Morris and Ms. Sutton, who would have supposedly testified concerning the victim's "strange behavior," as well as alleged sexual

advances the victim made towards "other males in the neighborhood." However, as Defendant himself states in his instant motion, trial counsel contacted both Ms. Morris and Ms. Sutton, who informed him they could not remember anything. Consequently, trial counsel was not ineffective where the decision not to depose or call these witnesses was the result of his independent determination that they could not provide any substantive testimony for the defense. *Gorby v. State*, 819 So. 2d 664, 674–75 (Fla. 2002) ("An attorney's reasoned tactical decision not to present evidence of dubious mitigating value does not constitute ineffective assistance.") (citing *Porter v. State*, 478 So. 2d 33, 35 (Fla. 1985)).

Subclaim (B): Defendant also maintains trial counsel was ineffective for failing to adequately investigate the victim regarding the "sex-stories" she supposedly authored. According to Defendant, "there's a reasonable probability [the victim]'s version of what occurred was similar to one of her written stories." Defendant maintains any similarities "would have placed the case in different light."

The State contends, and the Court agrees, that Defendant appears to have taken some liberties with facts in this case. During the victim's perpetuated testimony, the following exchange took place between Defendant's previous trial counsel and the victim:

> Q. Now Ma'am, do you have eyeglasses?
> A. No.
> Q. Have you ever worn eyeglasses?
> A. Yeah. Sure.
> Q. And, in fact, you have a pair that are in your kitchen, correct?
> A. Don't — they don't help any more, eyeglasses.
> Q. Did you use those eyeglasses to look at the photo array?
> A. Pardon?
> Q. Did you look through those eyeglasses to help you look at the photo array?
> A. No. I didn't use glasses.
> Q. I noticed — I noticed in the photograph that the eyeglasses have a black patch —
> A. Oh, that's —
> Q. — on one of the lenses.
> A. *Oh, that was just for write — writing my sex. Very, close by, and I could write my sex with it.* But I've lost them already.
> Q. And you don't do that anymore?
> A. Beg your pardon?
> Q. You can't do that anymore.

A. Well, I've lost them. . . .

> (Exhibit I: Transcript of Victim Testimony at p. 46) (emphasis added.) Based on this testimony, Defendant argues the victim indicated she authored "sex stories." . . . However, the record before the Court paints a different picture. . . . [T]he context in which these statements were made suggests they were either a misstatement on the part of the victim or a misprint on the part of the court reporter who transcribed the victim's testimony. Regardless, the victim never indicated she penned "sex stories," and Defendant's claim to the contrary amounts to no more than mere speculation.[ ] As such, subclaim (B) is denied. *See Young*, 932 So. 2d at 1282–83 (stating "[the] enormous barrier to postconviction relief cannot be overcome by mere speculation.").

The state post-conviction court also explained, that "there was an abundance of testimonial and physical evidence presented at trial. Accordingly a tangential matter such as [the victim dancing on the front lawn] would not likely have had any effect on the outcome of Defendant's trial." (Doc. 14 Ex. E4 at 310 n.2 (citing *Gonzalez v. State*, 744 So. 2d 1102 (Fla. 3d DCA 1999)). Additionally, the court explained that "as with subclaim (A), Defendant fail[ed] to demonstrate how the victim's alleged 'sex stories' would have been relevant to the issue of Defendant's guilt, or how trial counsel's alleged failure to investigate the[ ] 'sex stories' resulted in prejudice so severe as to undermine confidence in the outcome at trial." (Doc. 14 Ex. E4 at 312 n.3 (citing *Evans*, 995 So. 2d at 945–46; *Jones*, 998 So. 2d at 584)).

Rosato first challenges the state post-conviction court's resolution of the two claims together as objectively unreasonable and contrary to *Strickland* because "each attorney['s] performance would have affected different outcomes in the state court proceeding." (Doc. 1 at 18) This argument is not persuasive. Rosato has not demonstrated prejudice as to either attorney's alleged deficiencies in representation.

Regarding alleged deficiencies by Mr. McClure, Rosato cannot demonstrate prejudice from his failure to investigate or call witnesses, because Rosato, himself, failed to appear for the January 1999 trial, and the trial, therefore, did not occur. Further, as Rosato concedes, in the years following Rosato's flight, the public defender's office lost his file. Thus, Rosato cannot demonstrate that any alleged deficiencies by Mr. McClure would have affected either his 1999 or 2009 trials.

Regarding Mr. O'Haire's representation, although Rosato contends that the witnesses called the public defender's office to "place statements" while Mr. McClure represented him, and the witnesses, therefore, were willing to testify at trial, Rosato does not allege that the witnesses were actually available when the trial finally took place approximately ten years later. Thus, the state post-conviction court was not unreasonable in determining that Rosato had not demonstrated the witnesses' availability.

Nor was the state post-conviction court unreasonable in its determination that Mr. O'Haire did not err by failing to depose or call Ms. Morris and Ms. Sutton as witnesses as, by that time, they could not recall anything about the case. Whether to call a witness is a strategic decision by counsel that the Court should "seldom, if ever, second guess." *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995); *Blanco v. Singletary*, 943 F.2d 1477, 1495 (11th Cir. 1991). Strategic decisions within the range of reasonable professional competence are not subject to collateral attack, unless a decision was so "patently unreasonable that no competent attorney would have chosen it." *Adams v. Wainwright*, 709 F.2d 1443, 1445 (11th Cir. 1983). "[C]omplaints of uncalled witnesses are not favored, because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have testified are largely

speculative." *Buckelew v. United States*, 575 F.2d 515, 521 (5th Cir. 1978) (citations omitted).

Here, the Court cannot find that it was patently unreasonable for Mr. O'Haire to decide not to depose or call Ms. Morris and Ms. Sutton to testify, based on their lack of recollection about the matter ten years later. Nor was Mr. O'Haire's failure to investigate the victim's alleged "sex stories" patently unreasonable. As the state post-conviction court explained, the victim did not say she wrote "sex stories" and the context of the statement demonstrates that there was either a misstatement or misprint involved.[7]

Finally, the Court is bound by the state post-conviction court's application of state law to the evidentiary issues underlying this claim — that much of the purported witness testimony would be either cumulative or irrelevant to determining Rosato's guilt. *See Pinkney v. Sec'y, DOC*, 876 F.3d 1290, 1295 (11th Cir. 2017) (quoting *Alvord v. Wainwright*, 725 F.2d 1282, 1291 (11th Cir. 1984) (superceded by statute on other grounds) ("[A]lthough 'the issue of ineffective assistance . . . is one of constitutional dimension,' [the Court] 'must defer to the state's construction of its own law' when the validity of the [underlying] claim . . . turns on state law.")).

The state court's adjudication of this claim is not contrary to or an unreasonable application of *Strickland*, or based on an unreasonable determination of the facts. Ground Seven is denied.

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[7] Rosato states that the state court concluded that the victim was actually stating that she used her glasses to write her "checks," rather than her "sex." (Doc. 46 at 29) While the Court does not find that conclusion in the state post-conviction court's order denying relief (Doc. 14 Ex. E4 at 311-12), the purported conclusion is not unreasonable given the context of the statement.

4. Ground Nine

In Ground Nine, Rosato contends that his trial counsel "failed to investigate and object to chain of custody and authenticity of a videotaped deposition to perpetuate testimony that had been transferred from VHS to DVD." (Doc. 1 at 20) He argues that this deficiency "relieved the State's burden to disclose or produce witnesses" and that a reasonable probability exists that if the State could not meet its burden to authenticate the recording, the videotape would have been dismissed. (*Id.* at 21)

Rosato raised this claim as issue five in his first motion for post-conviction relief pursuant to Rule 3.850, Fla. R. Crim. P. (Doc. 14 Ex. E1 at 26–29) The state post-conviction court denied relief, explaining (Doc. 14 Ex. E4 at 313–14):

> According to Defendant, the fact [that] the original stenographer passed away before trial and was therefore unavailable to swear to the authenticity of the video violated his "sixth amendment right to confrontation." Defendant also contends [that] the State failed to disclose the identities of, or produce for authentication purposes, the individual who videotaped the victim's perpetuated testimony and the individual who transferred the video from VHS to DVD. Lastly, Defendant appears to argue [that] his "right to confrontation" was also violated by the fact [that] Detective Jeffrey Good, the detective who originally provided a sworn affidavit in support of perpetuating the victim's testimony, was deceased at the time of Defendant's 2009 jury trial.
>
> Defendant's arguments are without merit. As the State correctly indicates in its response, depositions taken to perpetuate testimony are governed by Florida Rule of Criminal Procedure 3.190 . . . .
>
> . . .
>
> The record in the instant case reveals [that] the State fully complied with the requirements set out [in Rule 3.190(i)(1)-(3), (5), Fla. R. Crim. P.,] when it sought to perpetuate the victim's testimony. On September 16, 1998, the State filed a "Motion to Take Deposition to Perpetuate Testimony" identifying the victim, indicating her testimony was material and necessary to prevent a failure of justice, and listing the State's reasons for perpetuating her testimony. . . . Accompanying the State's motion was a supporting

> affidavit signed by Detective Jeffrey Good. . . . On September 28, 1998, the Court issued an [ ] order granting the State's request. . . .
>
> While Defendant apparently believes the State had an obligation to disclose the identities of any and all videographers and present authenticating testimony from the original stenographer, there are no such requirements listed in rule 3.190(i).[] Additionally, nowhere in rule 3.190(i) is support found for Defendant's contention that Detective Good's unavailability to testify should have precluded the State from introducing the victim's videotaped testimony at trial. Accordingly, Defendant has failed to establish any grounds on which trial counsel [could have] successfully objected to the introduction of the victim's perpetuated testimony.[] Therefore, ground five is hereby denied.

The state appellate court affirmed, per curiam. (Doc. 14 Exs. E6, E9)

Rosato's argument is without merit, as depositions to perpetuate testimony do not violate a defendant's confrontation clause rights. *See e.g.*, *Scott v. Tucker*, No. 1:11–cv–00240–MP–GRJ, 2015 WL 1179816, at *8 (N.D. Fla. Mar. 13, 2015). Additionally, to the extent that the state post-conviction court determined that nothing in Rule 3.190, Florida Rules of Criminal Procedure, requires authenticating testimony from the videographers or stenographer, the Court must defer to the state court's construction of its own law. *See Estelle v. McGuire*, 502 U.S. 62, 67 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions"). Therefore, Rosato's trial counsel was not ineffective for failing to object to its introduction at trial.

The state court's adjudication of this claim is not contrary to or an unreasonable application of *Strickland*, or based on an unreasonable determination of the facts. Ground Nine is denied.

5. Ground Ten

Similar to Ground Nine, in Ground Ten, Rosato contends that his trial counsel "failed to investigate or object to chain of custody of a 10 year old steno-tape that was

never transcribed or filed with the court." (Doc. 1 at 21) The stenotape contained the statement from Rosato's first trial attorney, Mr. McClure, that "[i]t should probably be reflected that Mr. Rosato previously absented himself and has placed a statement to that effect already." (Doc.14 Ex. A19 at 4) He argues he was prejudiced because Mr. O'Haire's "line of defense was predicated on the fact that Rosato did not waive his right" to be present at the victim's deposition to perpetuate testimony and, without proof of waiver, the State had no case against him. (Doc. 1 at 21, 22)

Rosato raised this claim as issue six in his first Rule 3.850 motion for post-conviction relief. (Doc. 14 Ex. E1 at 30–32) Although he contends that the state post-conviction court did not perform a *Strickland* analysis, it is evident that the court's decision rested on *Strickland*'s prejudice prong in denying relief. The state post-conviction court explained (Doc. 14 Ex. E4 at 314–15):

> Defendant's ground six argues trial counsel failed to properly investigate the chain of custody and authenticity of "a 10-year old steno disk allegedly containing a controvers[ial] statement made by the defendant's former attorney." Specifically, Defendant argues trial counsel should have contested the authenticity of the steno tape, which contained an admission by Defendant's previous attorney that Defendant had waived his right to be present during the victim's videotaped testimony. According to Defendant, the fact [that] "all other recordings or notes in the case [were] lost or destroyed . . . should [have] prompted a boatload of questions that further investigation was critical." Essentially, it appears as though Defendant believes [that,] had trial counsel contested the authenticity of the steno tape, the State would have been unable to show Defendant waived his right to be present for the victim's videotaped testimony; therefore permitting the defense to prevent the videotaped testimony from being admitted at trial.
>
> However, Defendant's argument is without merit. The record before the Court indicates the trial court heard testimony from Defendant's former attorney during a hearing on his motion to suppress the victim's videotaped testimony. ([Doc. 14 Ex. A18 at 558–73]). During this hearing, Defendant's former attorney testified that[,] following several discussions on the matter, Defendant acquiesced to his former attorney's recommendation that he not be present for the victim's perpetuated testimony. ([Doc. 14 Ex. A18 at 563–

> 67, 570–72]). As such, the testimony provided by Defendant's former attorney was independently sufficient to support the Court's determination that Defendant had indeed waived his right to be present during the victim's perpetuated testimony. Therefore, Defendant has failed to demonstrate how trial counsel's actions resulted in prejudice so severe as to "undermine confidence in the [trial's] outcome." *Jones*, 998 So. 2d at 584. As such, ground six is denied.

As explained with regard to Ground One, Rosato has provided no clear and convincing evidence that the trial court's decision (to credit the testimony of Mr. McClure that Rosato waived his confrontation right with regard to the victim's perpetuated testimony) was unreasonable. Therefore, regardless of any alleged error by his subsequent trial counsel in failing to investigate the steno-tape's chain of custody, Rosato cannot demonstrate prejudice, because, even absent the challenged statement at issue, the state court had sufficient basis to permit the videotaped deposition to perpetuate testimony to be used by the State at trial.

The state court's adjudication of this claim is not contrary to or an unreasonable application of *Strickland*, or based on an unreasonable determination of the facts. Accordingly, Ground Ten is denied.

6. Ground Eleven

In Ground Eleven, raised as issue seven in his first Rule 3.850 motion for post-conviction relief (Doc. 14 Ex. E1 at 33–35), Rosato contends that his trial counsel erred by failing to request a special jury instruction or verdict form. He explains that

> [Count One of] [t]he information charged burglary with battery while hooded or masked . . . . The verdict form did not provide the two aggravating circumstances separately . . . for the jury to select either one or the other. In Count Two the jury returned a verdict of Misdemeanor Battery. Based on the verdicts the jury may have decided a battery occurred in both Counts, but was not provided that option in Count One and convicted in the alternative[,] choosing option (a), which was the only option for battery.

"State court jury instructions ordinarily comprise issues of state law and are not subject to federal habeas corpus review absent fundamental unfairness." *Jones v. Kemp*, 794 F.2d 1536, 1540 (11th Cir. 1986). When, as here, a petitioner does not claim that an erroneous instruction was given, but instead challenges the failure to give an instruction further explaining an element of the offense, his burden is "especially heavy" because "[a]n omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977). A federal habeas court reviewing a challenged instruction must consider the instruction in the context of the instructions as a whole as well as the entire trial record. *Estelle v. McGuire*, 502 U.S. 62, 72 (1991).

Under Florida law, "[i]n order to be entitled to a special jury instruction, [the defendant] must prove: (1) the special instruction was supported by the evidence; (2) the standard instruction did not adequately cover the theory of defense; and (3) the special instruction was a correct statement of the law and not misleading or confusing." *Wheeler v. State*, 4 So. 3d 599, 605 (Fla. 2009) (quoting *Stephens v. State*, 787 So. 2d 747, 756 (Fla. 2001)).

The state post-conviction court denied Rosato's claim, explaining (Doc. 14 Ex. E2 at 47–48):

> The Defendant . . . claims that, based on the way the verdict instructions read, the jury could have convicted him either of committing a burglary involving a battery or a burglary while wearing a mask or hood, but not necessarily agreeing on which.
>
> This argument is without merit. The Defendant was charged in count one with committing a burglary of a structure and, during the course of the burglary, committing a battery on the victim. The offense additionally charges that, during the course of the burglary, the Defendant wore a hood or mask. ([Doc. 14 Ex. A1]). The instructions for this offense were the

> standard jury instructions and clearly outlined the elements for burglary with battery, including the element that, at the time he entered the structure, he intended to commit a battery within the structure. The instruction further outlined the elements for committing a battery and wearing a mask or hood. ([Doc. 14 Ex. A20 at 286–90]). On the verdict form for burglary to a dwelling with intent to commit a battery, the form requires an additional finding of "with a mask or hood during which time a battery was committed." ([Doc. 14 Ex. A12]). This language clearly requires both the wearing of a mask or hood *and* the commission of a battery. Therefore, the Defendant's argument that the jury could have believed that only one of these was required is without merit and this claim is denied.

The record supports the state post-conviction court's decision. The state trial court instructed the jury as follows regarding the burglary with battery charge (Doc. 14 Ex. A20 at 286–90):

> Peter Rosato, the defendant in this case, has been accused of the crimes of burglary and attempted sexual battery.
>
> Before you can find the defendant guilty of burglary, the State must prove the following three elements beyond a reasonable doubt:
>
> Element number one, Peter Rosato entered a structure owned by or in possession of Maarjte Lewis.
>
> Element two, Peter Rosato did not have the permission or consent of Maarjte Lewis or anyone authorized to act for her to enter the structure at the time.
>
> And, element three, at the time of the entering of the structure, Peter Rosato had a fully-formed conscious intent to commit the offense of battery in that structure.
>
> Proof of the entering of a structure stealthily and without the consent of the owner or occupant may justify a finding that the entering was with the intent to commit a crime if, from all the surrounding facts and circumstances, you're convinced beyond a reasonable doubt that the intent existed.
>
> Entry necessary need not be of the whole body of the defendant. It is sufficient if the defendant extends any part of the body far enough into the structure to commit battery.
>
> The intent with which an act is done is an operation of the mind and, therefore, is not always capable of direct and positive proof.

It may be established by circumstantial evidence like any other fact in the case.

Even though an unlawful entering of a structure is proved, if the evidence does not establish that it was done with the intent to commit battery, the defendant must be found not guilty.

. . .

Punishment provided by law for the crime of burglary is greater if the burglary was committed under certain aggravating circumstances. Therefore, if you find the defendant guilty of burglary, you must consider whether the defendant had -- whether the State has further proved those circumstances.

If you find that in the course of committing the burglary, the defendant made a battery upon any person, you should find him guilty of burglary during which a battery was committed.

A battery is an intentional touching or striking of a person against his or her will.

If you find -- if you find that the defendant made no battery and was unarmed as -- and was unarmed, the structure entered was a dwelling, you should find him guilty of burglary to a dwelling.

If you find that while the defendant made no battery, was unarmed and there was a human being in the structure at the time he entered the structure, you should find him guilty of burglary of a structure with a human being in the structure.

If you find the defendant committed the burglary without any aggravated circumstances, you can find him guilty only of battery.

. . .

Therefore, if you find the defendant guilty of burglary, it will be necessary for you to state in your verdict whether the defendant committed a battery inside the structure, whether the structure was a dwelling, whether there was a human being inside the structure.

If you find that Peter Rosato committed a burglary and you also find that Peter Rosato was wearing a hood, mask or other device that concealed his identity, you should find Peter Rosato guilty of burglary while wearing a device that concealed his identity.

> If you find only the defendant committed a burglary but did not wear a hood, mask or other device that concealed his identity, you should find him guilty only of burglary.
>
> In considering the evidence, you should consider the possibility that although the evidence may not convince you the defendant committed the main crime of which he is accused, there may be evidence that he committed other acts that would constitute a lesser included crime.
>
> Therefore, if you decide the main accusation has not been proved beyond a reasonable doubt, you will next need to decide if the defendant is guilty of any lesser included crime.
>
> The lesser crimes indicated in the definition of burglary/battery are: Burglary to a dwelling, burglary to an occupied structure, burglary, trespass of an occupied structure, and trespass.
>
> . . .

The state trial court therefore thoroughly instructed the jury on the requirements for entering a verdict in the case. The instructions given clearly required the jury to decide each aggravating circumstance separately. Moreover, the verdict form provided the jury with the following options (Doc. 14 Ex. A12 at 514):

> We, the Jury, find as follows, as to the defendant in this case: (check only one)
>
> ( ) A. The defendant is guilty of BURGLARY TO A DWELLING WITH INTENT TO COMMIT AN OFFENSE, as charged.
>
> with a mask or hood during which time a battery was committed
> __ yes __ no
>
> ( ) B. The defendant is guilty of BURGLARY TO A DWELLING, as included.
>
> with a mask or hood
> __ yes __ no
>
> ( ) C. The defendant is guilty of BURGLARY TO A STRUCTURE, as included

with a mask or hood
__ yes __ no

structure was occupied
__ yes __ no

( ) D. The defendant is guilty of TRESPASS OF AN OCCUPIED STRUCTURE, as included.

( ) E. The defendant is guilty of TRESPASS, as included.

( ) F. The defendant is not guilty.

The jury, therefore, had the option of choosing either burglary with or without a mask or hood (option B), or burglary with battery with or without a mask or hood (option A). Thus, Rosato's argument that the jury may not have agreed on either burglary with battery or burglary while wearing a mask or hood is without merit.

Considering the context of the trial and instructions as a whole, Rosato has not demonstrated that his counsel's performance was deficient with regard to the jury instructions or verdict form on the burglary with battery charge, or that any alleged deficiency prejudiced him. The state court's adjudication of this claim is not contrary to or an unreasonable application of Strickland, or based on an unreasonable determination of the facts. Ground Eleven is denied.

7. Ground Twelve

In Ground Twelve, Rosato contends that his counsel erred by failing to object to purportedly inconsistent verdicts by the jury on the two counts charged. He argues that, although he was found guilty on the main charge in Count One — burglary with battery — he was found guilty of only the lesser-included charge of misdemeanor battery in Count Two, rather than the originally charged offense of attempted sexual battery. He challenges that (Doc. 1 at 23):

> without . . . bring found guilty of the complete offense[,] the enhanced part of the burglary conviction could not stand since all the elements had to be proved in order to enhance the burglary from a second degree [felony,] punishable up to 15 years[,] to a first degree [felony,] punishable up to life imprisonment.

Rosato raised this as issue eight in his first motion for post-conviction relief. (Doc. 14 Ex. E1 at 36–37). The state post-conviction court, affirmed per curiam by the state appellate court (Doc. 14 Exs. E6, E9), denied relief, explaining (Doc. 14 Ex. E2 at 48):

> Count one charged that the Defendant entered the dwelling with the intent to commit a battery and, in the course of committing the burglary, did commit a battery. . . . Neither of these elements required that a sexual battery occur, so . . . the jury's finding of simple battery rather than sexual battery did not render the two verdicts inconsistent.

Rosato has not demonstrated that the state post-conviction court's determination was unreasonable. Moreover, as explained with regard to Ground Three, the amended information charged Rosato with burglary with battery based on his unconsented touching of the victim's buttocks and breasts. (Doc. 14 Ex. A1 at 179) The charge for attempted sexual battery was based on Rosato's attempted oral, anal, or vaginal penetration of the victim that resulted in the victim's coerced masturbation of Rosato. (Doc. 14 Ex. A1 at 179) Thus, the jury did not consider the same acts in determining guilt as to each offense.

The state court's determination that Rosato's trial counsel did not err by failing to object, because there was no inconsistent verdict to object to, is not contrary to or an unreasonable application of *Strickland*, or based on an unreasonable determination of the facts. Ground Twelve is denied.

8. Ground Thirteen

In Ground Thirteen, Rosato argues that his trial counsel was ineffective by failing to object, on grounds of double jeopardy, to his dual convictions and sentences for

burglary with battery and simple battery. Rosato raised this as issue nine in his first motion for post-conviction relief pursuant to Rule 3.850, Fla. R Crim. P. (Doc. 14 Ex. E1 at 38)

The state post-conviction court, affirmed per curiam by the state appellate court (Doc. 14 Ex. E6), denied Rosato's claim as an improper attempt to "couch a claim decided adversely to him on direct appeal in terms of ineffective assistance of counsel." (Doc. 14 Ex. E4 at 315 (quoting *Pietri v. State*, 885 So. 2d 245, 256 (Fla. 2004) and citing *State v. McBrid*e, 848 So. 2d 287, 290–92 (Fla. 2003)).

Rosato has not demonstrated that state court's adjudication of this claim is contrary to or an unreasonable application of federal law or based on an unreasonable determination of the facts. As explained with regard to Ground Three, there was no double jeopardy violation. Therefore counsel was not ineffective for failing to object. Ground Thirteen is denied.

9. Ground Fourteen

In Ground Fourteen, Rosato claims trial counsel error for failing to object to the admission of evidence that he purports was tampered with before trial. (Doc. 1 at 24) Specifically, he argues that the cap had been removed from evidence at some point and that, while the forensic photos show dime-sized hole, by trial it appeared that the hole had been torn larger. (*Id.*)

Rosato raised this claim as issue ten in his first motion for post-conviction relief. (Doc. 14 Ex. E1 at 39–40) The state post-conviction court denied relief, explaining (Doc. 14 Ex. E4 at 316–17):

> [T]he issue before the jury was not how big the holes in the black knit cap were, but whether the cap had been worn as a mask during the commission

> of the burglary. During her videotaped [deposition] testimony,[] the victim repeatedly indicated that the man who entered her home was wearing a black mask, which she described as "a knitted cap . . . that you roll over your head" with three "ragged holes" in it. ([Doc. 14 Ex. A20 at 46–48, 63–64].) The victim later identified the knitted cap offered into evidence by the State as the same knitted cap worn by Defendant. (*Id.* at p.64.) Moreover, Craig Giovo, a forensic scientist with the Pinellas County Sheriff's Office, testified [that] he discovered the "knitted black cap" while conducting a search of Defendant's vehicle. (*Id.* at pp. 156–57.) Mr. Giovo further testified that the cap introduced into evidence was the same cap he discovered during the aforementioned vehicle search, and went on to detail how the cap proceeded through the chain of custody. (*Id.* at pp. 158–60.) Also, Defendant himself testified that the cap found during the search of his car belonged to him. (*Id.* at 234–35.) Lastly, as part of its case-in-chief, the State tendered physical evidence consisting of the knit cap itself, as well as photographs depicting the cap as it was discovered in Defendant's vehicle. (*Id.* at 88–90, 156–180.)
>
> Given the plethora of testimonial and physical evidence presented by the State to demonstrate Defendant wore the cap as a mask while committing the burglary, had trial counsel filed a motion for mistrial based on the allegedly enlarged holes, such a motion most likely would have been denied as the size of the holes in the mask were of little to no consequence. Because trial counsel would have had no legitimate grounds upon which to base a motion for a mistrial, he cannot be deemed ineffective for failing [to] file one.[] *See McCree v. State*, 982 So. 2d 1278, 1280 (Fla. 2d DCA 2008) (holding trial counsel cannot be deemed ineffective for failing to file a meritless motion); *see also Ramos v. State*, 559 So. 2d 705 (Fla. 4th DCA 1990); *Evans v. State*, 975 So. 2d 1035 (Fla. 2007).

The state court additionally noted in a footnote that Rosato's "speculative allegations fail to establish a sufficient probability that evidence tampering occurred." (Doc. 14 Ex. E4 at 10 n.7)

Under Florida law, "[t]o bar the introduction of otherwise relevant evidence due to a gap in the chain of custody, a defendant must show there was a probability of tampering with the evidence." *Davis v. State*, 788 So.2d 308, 310 (Fla. 5th DCA 2001). "A mere possibility of tampering is insufficient." *Id.*

Here, Rosato bases his claim of evidence tampering on a statement by one of the detectives that the cap had been removed from evidence; he further contends, without support, that the holes were ripped larger. As the state post-conviction court notes, however, the jagged holes matched the victim's testimony describing the cap worn by Rosato and the forensic scientist testified that the cap was the same one found in Rosato's car and described the chain of custody at trial. (Doc. 14 Ex. A20 at 46, 48, 63–64, 156–57, 158-60)

On this record, Rosato has not shown that the state court's determination that his trial counsel's performance was not deficient was contrary to or an unreasonable application of *Strickland* or based on an unreasonable determination of the facts. Ground Fourteen is denied.

10. Grounds Fifteen & Sixteen

In Grounds Fifteen and Sixteen, respectively, Rosato contends that his trial counsel erred by failing to request trespass coupled with battery and misdemeanor battery as lesser-included offenses of the burglary with battery charge. (Doc. 1 at 24–26) He argues that, absent those lesser-included offenses, the jury was not able to exercise its inherent pardon power.

He raised these claims as issue eleven in his first motion for post-conviction relief (Doc. 14 Ex. E1 at 41–42) and issue one in his second motion for post-conviction relief (Doc. 14 Ex. G4 at 4–5). The state post-conviction court denied relief on each claim (Doc. 14 Exs. E4 at 10–11; G7 at 2), and the state appellate court affirmed the state post-conviction court's decisions. (Doc. 14 Exs. E6, E9, G10, G11)

As to both claims, the state post-conviction court explained, citing *Sanders v. State*, 946 So. 2d 953 (Fla. 2006), that an ineffective assistance of counsel claim for failure to request a jury instruction on a lesser-included offense is not cognizable in a post-conviction motion. (Doc. 14 Exs. E4 at 317–18; G7 at 2)[8]

In *Sanders*, the Florida Supreme Court applied *Strickland* to a claim by co-defendants that counsel was ineffective for failing to request an instruction on a lesser included offense. *Sanders*, 946 So. 2d at 957-59. As background, it explained that "[a] jury pardon is the jury's inherent power to pardon a defendant by convicting the defendant of a lesser offense," even though the evidence supports both the greater and lesser offense. *Id.* at 957.

> When a jury convicts a defendant of a criminal offense, it has decided that the evidence demonstrated beyond a reasonable doubt that the defendant committed the crime charged. To assume that, given the same choice, the jury would now *acquit* the defendant of the same crime of which it convicted him, and instead convict of a lesser offense, is to assume that the jury would disregard its oath and the trial court's instructions.

Id at 958 (citation omitted). Nevertheless, "despite their suspect pedigree, jury pardons have become a recognized part of the system; so much so that, in direct appeals, the failure to instruct on the next immediate lesser included offense . . . constitutes error that is per se reversible." *Id.* at 959 (quotation marks and citations omitted).

However, the Florida Supreme Court explained that "the test for prejudicial error in conjunction with a direct appeal is very different from the test for prejudice in conjunction with a collateral claim of ineffective assistance," making "relief granted in collateral proceedings for trial counsel's failure to request such an instruction illogical." *Id.* Even

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[8] The state post-conviction court also denied the claim raised in the second motion for post-conviction relief (now raised as Ground Sixteen) as successive.

assuming deficient performance by counsel, "any finding of prejudice resulting from defense counsel's failure to request an instruction on lesser-included offenses necessarily would be based on a faulty premise: that a reasonable probability exists that, if given the choice, a jury would violate its oath, disregard the law, and ignore the trial court's instructions." *Id.* Because "a defendant has no entitlement to an aberrant jury — 'the luck of a lawless decisionmaker[,]' [*Strickland*, 466 U.S. at 695,] . . . the defendants do not raise any issue that would undermine . . . confidence in their convictions. . . . The possibility of a jury pardon cannot form the basis for a finding of prejudice." *Id.*

The Eleventh Circuit has supported the Florida Supreme Court's reasoning, explaining that, under *Strickland*, the Court must presume the jury acted according to law, and that to assume, after finding a defendant guilty of the main accusation, the jury "would have used its power to pardon [the defendant] necessarily assumes that the jury would have disregarded the trial court's instructions." *See Torres v. Sec'y, Dep't of Corr.*, No. 16-17325-E, 2017 WL 5997387, at * 7 (11th Cir. June 2, 2017). *See also Santiago v. Sec'y, Fla. Dep't of Corr.*, 472 F App'x 888, 889 (11th Cir. 2012) (per curiam) (State court did not unreasonably apply *Strickland*, explaining: "The jury in [the defendant's] trial concluded that the evidence against him supported his conviction for the greater offenses on which it was instructed; therefore, even if the lesser-offense instructions had been given, the jury would not have been permitted to convict [the defendant] of the lesser included offenses because it had concluded that the evidence established that he was guilty of the greater offenses.").

Accordingly, because the jury found the evidence established that Rosato was guilty of burglary with battery, and because, under Florida law, the jury may consider a

lesser-included offense only if it "decide[s] that the main accusation has not been proven beyond a reasonable doubt," Fla. Std. Jury Instr. (Crim.) 3.4, *see also Sanders*, 946 So. 2d at 958, the jury would not have been permitted to find him guilty, instead, of the lesser-included offenses of trespass with battery or misdemeanor battery.

Therefore, the state court's adjudication of these claims was not contrary to or an unreasonable application of *Strickland*, or based on an unreasonable determination of the facts. Grounds Fifteen and Sixteen are denied.

11. Ground Seventeen

In Ground Seventeen, citing Florida Statutes Section 913.08, Rule 3.350 of the Florida Rules of Criminal Procedure, and Rule 24 of the Federal Rules of Criminal Procedure, Rosato contends that his trial counsel erred by failing to request ten peremptory challenges. He contends that, had his counsel had more peremptory challenges available, he "would have struck certain jurors selecting others, thus a reasonable probability exists [that] a different panel would have reached a different result substantially affecting the outcome of the proceeding." (Doc. 1 at 27)

Rosato raised this as issue two in his second motion for post-conviction relief. (Doc. 14 Exs. G4, G6) In denying the claim, the state post-conviction court found Rosato's claim "extremely speculative," noted that *Strickland* requires a showing of prejudice, and pointed out that he "fail[ed] to allege any facts upon which [it] might conclude that counsel's error affected the outcome of [the] trial." (Doc. 14 Ex. G7 at 2-3)

The state court's adjudication of this claim was not contrary to or an unreasonable application of *Strickland*, or based on an unreasonable determination of the facts. Review of Rosato's arguments regarding this claim reveals that he did not allege facts that would

permit a court to conclude that he was sufficiently prejudiced by his counsel's failure to request more peremptory challenges. Nor does he so allege in the instant petition. *See Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir.1991) (vague, conclusory, or unsupported allegations cannot support an ineffective assistance of counsel claim). Therefore, Ground Seventeen is denied.

12. Ground Nineteen

Finally, in Ground Nineteen, Rosato contends his counsel erred by "fail[ing] to investigate . . . the imposition of his prison releasee reoffender (PRR) sentence." (Doc. 1 at 28) He contends that his counsel did not investigate whether his sentence was legal, where the written judgment contained the PRR enhancement but "the sentencing judge did not orally pronounce a []PRR[] sentence." (*Id.*) Rosato raised this as issue four in his second motion for post-conviction relief. (Doc. 14 Ex. G4)

However, as explained by the post-conviction court in denying this claim, Rosato's argument is factually incorrect. (Doc. 14 Ex. G7 at 4) The state trial court specifically discussed the PRR sentence during the sentencing hearing (Doc. 14 Ex. A20 at 313–16):

> [THE COURT:] On Count 1, I know that you were given a notice that you were a, quote, prison releasee reoffender. Under this law, if an incident such as a burglary occurs within three years of your release from prison, the law prescribes a minimum mandatory penalty.
>
> State, do you have a sentencing packet?
>
> . . .
>
> THE COURT: First document with a gold seal simply tells me that you, Peter Rosato, have never been pardoned nor have you received executive clemency on any of your previous convictions.
>
> . . .

THE COURT: The next document is a business record from the department that basically indicates that the -- these records are kept in the normal course of business by the Department of Corrections.

The Department of Corrections said that you were last released from their custody on May 1st of 1997.

Do you in any way dispute that date?

MR. O'HAIRE: No, Judge.

. . .

THE COURT: This incident occurred June 24, 1998. That's certainly within three years, and that's how the prison Releasee Reoffender Act is triggered. If an incident occurs within three years of your release day, the legislature said you're looking at some mandatory time.

. . .

So the bottom line is that you were last released from prison within three years of this incident. And so the -- it doesn't matter how many prior felony convictions you had, just that you were released from prison and then this incident occurred. The jury has found you guilty of it.

First-degree felony, burglary, residential burglary with a battery, wearing a hood or mask, requires -- mandates by law the following sentence -- you know what it is -- life in prison. So with that, that's the sentence that I am imposing, a life sentence.

Further, to the extent Rosato attempts, once again, to argue that his sentence is illegal because it was not an offense enumerated in the PRR statute, that argument is meritless, as previously explained.

Rosato has not demonstrated that the state court's adjudication of this claim was contrary to or an unreasonable application of *Strickland*, or based on an unreasonable determination of the facts. Therefore, Ground Nineteen is denied.

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

Accordingly, Respondents' Motion to Strike Petitioner's Addendum to Ground Two (Doc. 61) is **GRANTED.** Rosato's petition for the writ of habeas corpus (Doc. 1) is **DENIED**. The **CLERK** is directed to enter a judgment against Rosato and to **CLOSE** this case.

DENIAL OF BOTH A CERTIFICATE OF APPEALABILITY AND LEAVE TO APPEAL *IN FORMA PAUPERIS*

IT IS FURTHER ORDERED that Rosato is not entitled to a certificate of appealability. A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253(c)(1). Rather, a district court must first issue a certificate of appealability ("COA"). Section 2253(c)(2) limits the issuing of a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." To merit a certificate of appealability, Rosato must show that reasonable jurists would find debatable both the merits of the underlying claims and the procedural issues. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000); *Eagle v. Linahan*, 279 F.3d 926, 935 (11th Cir. 2001). Because he fails to show that reasonable jurists would debate either the merits of the claims or the procedural issues, Rosato is not entitled to a certificate of appealability and is not entitled to appeal *in forma pauperis*.

Accordingly, a certificate of appealability is **DENIED**. Leave to appeal *in forma pauperis* is **DENIED**. Rosato must obtain permission from the circuit court to appeal *in forma pauperis*.

DONE AND ORDERED in Tampa, Florida, this 29th day of March, 2018.

MARY S. SCRIVEN
UNITED STATES DISTRICT JUDGE