IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-11007-E

FRANK LE' DELL OWENS,

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:

Frank Le'Dell Owens is a Florida prisoner serving a 40-years sentence for attempted aggravated assault with a firearm, battery, and tampering with a witness. In 2014, Mr. Owens filed a 28 U.S.C. § 2254 habeas corpus petition raising 41 claims for relief. The District Court denied Mr. Owens's petition. Mr. Owens now moves in this Court for a certificate of appealability ("COA") and leave to proceed in forma pauperis ("IFP") on appeal. He has also filed a motion for an out-of-time appeal and a motion to compel this Court to rule on his pending motions.

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). If a state court has adjudicated a claim on the merits, a federal court may grant habeas relief only if the decision of the state court (1) "was contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. §§ 2254(d)(1), (2). The question is not whether a federal court believes that the state court's determination was incorrect but instead whether that determination was objectively unreasonable. Knowles v. Mirzayance, 556 U.S. 111, 123, 129 S. Ct. 1411, 1420 (2009).

I. Claims One, Five, Six, and Ten

Mr. Owens's first, fifth, sixth, and tenth claims of relief concern the trial court's jury instructions. At trial, Mr. Owens's counsel requested that the Florida trial court include attempted aggravated assault as a lesser included offense in the jury instructions. Although the trial court did so, it did not list the elements of attempted aggravated assault with a firearm. It also did not define the word "attempt" for the jury. Mr. Owens's trial counsel did not object to the instruction.

Mr. Owens argues in his first claim for relief that the trial court erred by not defining "attempt" or listing the elements of attempted aggravated assault for the jury. Mr. Owens raised the first claim on direct appeal, which the Fifth District

Court of Appeal ("Fifth DCA") summarily affirmed. Mr. Owens argues in his fifth and sixth claims that his appellate counsel was ineffective for failing to argue that his trial counsel provided ineffective assistance by not objecting to the lack of attempt instruction or to the modified instruction on attempted aggravated assault. He raised these claims for relief in his first state habeas petition, which the Fifth DCA denied. In his tenth claim for relief, Mr. Owens also asserts that trial counsel was ineffective for requesting an "impermissible" lesser included offense instruction on attempted aggravated assault. Mr. Owens argued that, had the attempt instruction not been given, he may have been convicted only of misdemeanor assault or acquitted. Mr. Owens raised his tenth claim in his pro se motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. The state habeas court denied the claim, which the Fifth DCA affirmed.

In reviewing a challenge to state law jury instructions, "federal courts on habeas review are constrained to determine only whether the challenged instruction, viewed in the context of both the entire charge and the trial record, so infected the entire trial that the resulting convictions violated due process." Jamerson v. Sec'y for the Dep't of Corr., 410 F.3d 682, 688 (11th Cir. 2005) (quotation marks omitted). Federal habeas relief is warranted only when the erroneous instruction "was so misleading as to make the trial unfair." Agan v. Vaughn, 119 F.3d 1538, 1545 (11th Cir. 1997).

The Fifth DCA's rejection of Mr. Owens's first claim was not contrary to or an unreasonable application of federal law. The trial court's failure to define the term "attempt" or list the elements of attempted aggravated assault with a firearm was not so misleading as to make the trial unfair. See Agan, 119 F.3d at 1545; see also United States v. Moran, 778 F.3d 942, 969–70 (11th Cir. 2015) (holding that failure to define "attempt" does not constitute plain error because "as a commonly used word, 'attempt' is unlikely to confuse the jury such that a miscarriage of justice would result"). The trial court instructed the jury twice on the elements of aggravated assault with a firearm. The jury could have inferred from the plain meaning of the word "attempt" that attempted aggravated assault with a firearm involved an incomplete effort by Mr. Owens to commit the charged crime. See Moran, 778 F.3d at 970. The jury instructions therefore did not "infect the entire trial that [Mr. Owens's] resulting conviction violat[ed] due process." See Jamerson, 410 F.3d at 690 (quotation marks omitted).

The Fifth DCA's rejection of Mr. Owens's fifth, sixth, and tenth claim of relief was also not contrary to or an unreasonable application of federal law. To succeed on an ineffective assistance of counsel claim, a petitioner must show that (1) his attorney's performance was deficient and (2) the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). Prejudice is a "reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S. Ct. at 2068. If the defendant makes an insufficient showing on either prong, the court need not address the other prong. See Holladay v. Haley, 209 F.3d 1243, 1248 (11th Cir. 2000).

Mr. Owens was not prejudiced by his appellate attorney's failure to raise his trial counsel's decision to not object to the trial court's jury instructions. As set out above, the trial court's jury instruction was not so misleading as to make the trial unfair. See Agan, 119 F.3d at 1545. As a result, appellate counsel's failure to raise this argument could not cause prejudice. See Strickland, 466 U.S. at 687, 694, 104 S. Ct. at 2064, 2068. Thus, the denial of Mr. Owens's fifth and sixth claims was not contrary to or an unreasonable application of federal law.

Neither was Mr. Owens prejudiced by his trial counsel's request of a lesser included offense instruction. In Florida, attempt is listed as a category two lesser included offense of aggravated assault, meaning that a trial court may instruct the jury on attempt if it determines that the elements of attempt may have been alleged and proven. See Fla. Std. Jury Instr. (Crim.) 8.2; State v. Montgomery, 39 So. 3d 252, 259 (Fla. 2010). Florida law also provides that a lesser included offense instruction is permissible when "the facts alleged in the accusatory pleadings are such that the lesser included offense cannot help but be perpetrated once the greater offense has been." Wong v. State, 212 So. 3d 351, 360 (Fla. 2017)

(quotations and alterations omitted). Here, the facts alleged in the information included all of the elements of attempted aggravated assault. See Fla. Stat. §§ 777.04(a), 784.011, 784.021. And the evidence presented at trial showed that, at a minimum, Mr. Owens threatened violence to two victims with a firearm. As a result, the lesser included offense jury instruction was permissible under Florida law and Mr. Owens's trial counsel's request therefore did not prejudice his defense. See Strickland, 466 U.S. at 687, 694, 104 S. Ct. at 2064, 2068. The denial of Mr. Owens's tenth claim for relief was not contrary to or an unreasonable application of federal law.

II. Claims Two, Eight, and Eleven

Mr. Owens's second, eighth, and eleventh claims for relief concern his recorded jail phone calls. In his second claim, Mr. Owens argues his appellate counsel was ineffective for failing to argue the trial court erred in admitting excerpts of his recorded jail phone calls. He contends the excerpts were irrelevant and misled the jury. He raised his second claim in his first state habeas petition, which the Fifth DCA denied. In his eighth claim for relief, Mr. Owens argues that two of the call excerpts in particular were misleading because they referred to an unrelated shooting for which he also faced charges. In his eleventh claim, Mr. Owens asserts trial counsel was ineffective for advising him to not review the recorded jail calls, not moving to suppress the calls, and failing to object to the

admission only of excerpts of the calls rather than the complete recordings. Mr. Owens raised his eighth and eleventh claims in his Rule 3.850 motion, which was summarily denied by the state habeas court and affirmed by the Fifth DCA.

In a habeas action brought by a state prisoner, federal courts will generally not review state court evidentiary rulings except to determine whether the alleged error "so infused the trial with unfairness as to deny due process of law." See Taylor v. Sec'y, Fla. Dep't of Corr., 760 F.3d 1284, 1295 (11th Cir. 2014) (quotation marks omitted). "The admission of prejudicial evidence justifies habeas corpus relief only if the evidence is material in the sense of a crucial, critical, highly significant factor." Osborne v. Wainwright, 720 F.2d 1237, 1238 (11th Cir. 1983) (quotation marks omitted).

The state courts' denial of Mr. Owens's claims regarding his recorded jail calls was not contrary to or an unreasonable application of federal law. Florida courts have held there is no reasonable expectation of privacy in telephone calls made from jail and, as a result, recordings of jail calls are admissible evidence. See Jackson v. State, 18 So. 3d 1016, 1030 (Fla. 2009); Cox v. State, 26 So. 3d 666, 676 (Fla. 4th DCA 2010). Mr. Owens has not shown that the trial court erred in admitting his recorded calls and therefore cannot show his trial or appellate counsel were deficient for failing to challenge their admission. See Strickland, 466 U.S. at 687, 694, 104 S. Ct. at 2064, 2068.

Although unrelated, Mr. Owens also asserts in his eighth claim that his pretrial counsel was deficient for failing to convey two plea offers to him. Mr. Owens says he would have accepted those offers had he been aware of them. The state habeas court rejected Mr. Owens's claim regarding the plea offers, concluding he had not shown a reasonable probability that he would have accepted a plea. The Fifth DCA affirmed the state habeas court's ruling.

To show prejudice from counsel's failure to communicate a plea offer, a defendant must demonstrate a reasonable probability that he would have accepted the plea offer. See Missouri v. Frye, 566 U.S. 133, 147–48, 132 S. Ct. 1399, 1409–10 (2012). In response to a bar complaint filed against his trial counsel by Mr. Owens, trial counsel explained that before she was retained as his counsel, Mr. Owens received and repeatedly rejected a 10-year plea offer as to all of his open cases at the time, including this case. She further stated Mr. Owens retained her to represent him specifically because he wanted to proceed to trial. Mr. Owens also insisted at trial that he was innocent of the charged offenses. It was therefore reasonable for the state habeas court to conclude that Mr. Owens had not shown he would have accepted the plea offers.

III. Claim Three

In his third claim for relief, Mr. Owens argues his appellate counsel was ineffective for failing to argue his due process and equal protection rights were

violated by the two 20-year sentences imposed by the jury. Mr. Owens asserts the 20-year sentences are unlawful because the jury exercised its "pardon powers" to convict him of a lesser included offense of attempted aggravated assault with a firearm. He maintains that, having been convicted of the lesser offense, he should also have received a lower sentence.[1]

At the time of Mr. Owens's offense, Florida law provided that any person convicted of aggravated assault or attempted aggravated assault who discharged a firearm during the commission of the offense shall be sentenced to a minimum term of imprisonment of 20 years. See Fla. Stat. § 775.087(2)(a)(1)(f), (2)(a)(2) (2005). For both Counts 1 and 2, the jury convicted Mr. Owens of attempted aggravated assault and specifically found that he possessed and discharged a firearm during the commission of the offense. Mr. Owens has not explained why a sentencing statute that provides the same penalties for a substantive offense and an attempt to commit the same offense violates due process and equal protection. As a result, he cannot show deficient performance by his appellate counsel that prejudiced his defense. Neither can he show that appellate counsel was ineffective

[1] The District Court concluded Mr. Owens's third claim of relief was unexhausted and procedurally defaulted. However, a review of the record shows that Mr. Owens made substantially the same argument in his second claim of relief in his first state habeas petition. As a result, it appears that the District Court erred in this regard. Nevertheless, as set out below, no relief is warranted on this claim.

for failing to raise this argument on direct appeal. See Strickland, 466 U.S. at 687, 104 S. Ct. at 2064 (1984).

IV. Claim Four and Seven

In his fourth claim for relief, Mr. Owens argues appellate counsel was ineffective for failing to argue that the trial court erred in denying his motions for arrest of judgment and to object to a sentence enhancement. His basis for this argument is that attempted aggravated assault is a misdemeanor not subject to an enhancement under Fla. Stat. § 775.087. Mr. Owens raised his fourth claim in his first state habeas petition, which the Fifth DCA denied. Similarly, in his seventh claim of relief, Mr. Owens argues his 20-year sentences were unlawful because attempted aggravated assault is a misdemeanor not subject to enhancement. Mr. Owens raised his seventh claim of relief in his pro se motion to correct an illegal sentence under Florida Rule of Criminal Procedure 3.800. The state court denied Mr. Owens's seventh claim of relief, which the Fifth DCA affirmed. In denying his claims for relief, the state court explained that an attempt to commit a third-degree felony reduces to a misdemeanor only if the felony is ranked at level one or two. But aggravated assault is ranked at level six and, as a result, attempted aggravated assault is a third-degree felony subject to an enhancement under Fla. Stat. § 775.087.

The denial of Mr. Owens's fourth and seventh claims for relief was not contrary to or an unreasonable application of federal law. Florida law explicitly provided at the time of his offense that a conviction for attempted aggravated assault required a longer sentencing for discharging a firearm during the commission of the offense. See Fla. Stat. § 775.087(2)(a)(2). His appellate counsel's failure to raise these arguments therefore did not prejudice his defense, and the state court and Fifth DCA did not act contrary to or unreasonably apply federal law when they denied Mr. Owens's fourth and seventh claims for relief. See 28 U.S.C. §§ 2254(d)(1), (2); Strickland, 466 U.S. at 687, 104 S. Ct. at 2064.

V. Claim Nine

In his ninth claim for relief, Mr. Owens argues trial counsel was ineffective for failing to call Ernest Miles as a witness. Mr. Owens asserts Ernest Miles was present on the night of the alleged assault and would have testified that Mr. Owens did not have a gun. Mr. Owens raised this claim in his Rule 3.850 motion and provided an affidavit from Ernest Miles in support of his claim. The state habeas court denied the claim, concluding that the testimony presented at trial was sufficient to establish that Mr. Owens did have a gun, and there was no reasonable probability Ernest Miles's testimony would have changed the outcome of the trial. The Fifth DCA affirmed.

The state court and Fifth DCA's denial of Mr. Owens's ninth claim of relief was not contrary to or an unreasonable application of federal law. At trial, the multiple victims testified that Mr. Owens discharged a firearm during the attempted aggravated assaults. Mr. Owens testified that he did not have a gun during the crime. Although Ernest Miles's testimony would have been consistent with Mr. Owens's account, it is by no means clear that the jury would have credited that testimony. This is especially true because the jail recordings presented at trial revealed Mr. Owens offered to pay potential witnesses to testify on his behalf. There is not a reasonable probability that had trial counsel called Ernest Miles as a witness, the proceeding would have been different. See Strickland, 466 U.S. at 687, 694, 104 S. Ct. at 2064, 2068.

VI. Claim Thirteen

In his thirteenth claim for relief, Mr. Owens argues trial counsel was ineffective for failing to request a continuance before trial. He asserts he advised counsel to request a continuance so that she could further investigate his case, interview witnesses, file a motion to suppress, and prepare a defense. Mr. Owens raised this claim in his Rule 3.850 motion. The state habeas court denied the claim, noting trial counsel stated in response to Mr. Owens's bar complaint that, when she assumed his representation, Mr. Owens did not want any additional continuances for any reason. The Fifth DCA affirmed.

Mr. Owens disputes trial counsel's statement in response to his bar complaint. But even if Mr. Owens's account is true, he cannot show that trial counsel's failure to request a continuance prejudiced his defense. Mr. Owens has not demonstrated that any additional investigation or effort, including motion filings or preparation, by his trial counsel would have changed his defense. As a result, he was not prejudiced by his trial counsel's failure to request a continuance. See Strickland, 466 U.S. at 687, 694, 104 S. Ct. at 2064, 2068.

VII. Claim Twelve

In his twelfth claim for relief, Mr. Owens raises a claim of cumulative error, arguing that the cumulative effect of trial counsel's errors resulted in a fundamental error requiring reversal. Mr. Owens raised this claim in his Rule 3.850 motion. The state habeas court denied Mr. Owens's cumulative error claim because all of the other claims raised in Mr. Owens' Rule 3.850 motion lacked merit. The Fifth DCA affirmed.

Under the cumulative error doctrine, an aggregation of nonreversible errors can warrant reversal if their aggregate effect deprived the defendant of a fair trial. Insignares v. Sec'y, Fla. Dep't of Corr., 755 F.3d 1273, 1284 (11th Cir. 2014). In reviewing a claim of cumulative error, we examine any errors it finds in the aggregate and in light of the trial as a whole to determine whether the petitioner

received a fundamentally fair trial. Morris v. Sec'y, Dep't of Corrs., 677 F.3d 1117, 1132 (11th Cir. 2012).

The denial of Ms. Owens's twelfth claim for relief was not contrary to or an unreasonable application of federal law. As set out above, trial counsel's representation of Mr. Owens was not ineffective as it pertains to the jury instructions, jail recordings, witness presentation, or continuance requests. Because Mr. Owens has not shown individual error on any of these issues, there can be no cumulative error as a result. See id. The denial of his twelfth claim for relief was therefore not contrary to or an unreasonable application of federal law.

VIII. Claims Fourteen through Forty-One

In his remaining claims for relief, Mr. Owens alleged his state post-conviction counsel provided ineffective assistance by failing to request oral argument; failing to raise and preserve for federal review all of Mr. Owens's claims regarding trial counsel's ineffectiveness; failing to adequately investigate his case; failing to file a reply brief; and failing to move for rehearing en banc. The District Court concluded these claims were not cognizable on federal habeas review because there is no constitutional right to post-conviction counsel.[2]

[2] The district court mistakenly concluded Mr. Owens's fourteenth claim, which alleged ineffective assistance based on counsel's failure to request oral argument, referred to Owens's direct appeal. However, a review of the exhibits referenced by Mr. Owens in his fourteenth claim, however, clarifies that he was referring to post-conviction appellate counsel's failure to request oral argument on appeal from his Rule 3.850 motion. Nonetheless, for the reasons explained below, his fourteenth claim for relief is not cognizable on federal habeas review.

There is no constitutional right to counsel in state post-conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566 (1991). As a result, a state habeas petitioner cannot assert a claim of relief in a habeas proceeding based on ineffective assistance of post-conviction counsel. Id.; see also Chavez v. Sec'y, Fla. Dep't of Corr., 742 F.3d 940, 944 (11th Cir. 2014). However, a claim of ineffective assistance of post-conviction counsel excuses a petitioner's procedural default of a substantial claim of ineffective assistance of trial counsel if: (1) state law requires that ineffective-assistance claims be raised in an initial-review collateral proceeding; and (2) the petitioner had no counsel in his initial-review collateral proceeding, or his counsel was ineffective. Martinez v. Ryan, 566 U.S. 1, 17, 132 S. Ct. 1309, 1320 (2012). This rule, however, "does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial," including attorney errors in appeals from initial-review collateral proceedings. Id. at 16, 132 S. Ct. at 1320.

Here, the District Court did not err in denying relief as to claims fourteen through forty-one, all of which alleged ineffective assistance of post-conviction appellate counsel. First, because Mr. Owens had no constitutional right to post-conviction counsel, claims fourteen through forty-one are not cognizable as freestanding claims for relief in a § 2254 proceeding. Coleman, 501 U.S. at 752,

111 S. Ct. 2566; Chavez, 742 F.3d at 944. And to the extent Mr. Owens seeks to raise these claims in reference to his procedural default of his appeal of the denial of his Rule 3.850 motion, his argument fails because Martinez does not apply to attorney errors in appeals from initial-review collateral proceedings. 566 U.S. at 16, 132 S. Ct. at 1320.

IX. Conclusion

For the reasons set out above, Mr. Owens has failed to make a substantial showing of the denial of a constitutional right and, as a result, his motion for a COA is **DENIED**. Because no COA is warranted, his motion for leave to proceed IFP on appeal is **DENIED AS MOOT**. Mr. Owens's request for an out-of-time appeal is **DENIED AS UNNECESSARY**, and his motion to compel is **DENIED AS MOOT**.

Barry B. Martin
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-11007-E

FRANK LE'DELL OWENS,

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: MARTIN and ROSENBAUM, Circuit Judges.

BY THE COURT:

Frank Le'Dell Owens has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's order dated March 14, 2019, denying his motion for a certificate of appealability, denying as unnecessary his request for an out-of-time appeal, and denying as moot his motions for leave to proceed *in forma pauperis* and motion to compel, in the appeal of the denial of his habeas corpus petition, 28 U.S.C. § 2254. Because Owens has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motion, his motion for reconsideration is DENIED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

FRANK LE'DELL OWENS,

Petitioner,

v. CASE NO. 6:14-cv-309-Orl-18GJK

SECRETARY, DEPARTMENT OF CORRECTIONS, et al.,

Respondents.
_____/

ORDER

This cause is before the Court on an Amended Petition for Writ of Habeas Corpus ("Amended Petition") filed pursuant to 28 U.S.C. § 2254 (Doc. 15). Thereafter, Respondents filed a Response to the Amended Petition (Doc. 28). Petitioner filed a Reply to the Response (Doc. 30) and an Amended Reply (Doc. 32).

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

I. PROCEDURAL HISTORY

Petitioner was charged by amended information with three counts of aggravated assault with a firearm (counts one, two, and five), one count of battery (count three), and one count of tampering with a witness with a firearm (count four) (Doc. 29-1 at 24-28). After a jury trial, Petitioner was convicted of the lesser included offense of attempted aggravated assault with a firearm as to counts one and two, to count three as charged, and to the lesser included offense of tampering with a witness as to count four *Id.* at 61-67. The

State entered a nolle prosequi with regard to count five. *Id* .at 68. The trial court sentenced Petitioner to consecutive twenty-year minimum mandatory terms of imprisonment for counts one and two, to a consecutive one-year term of imprisonment for count three, and to a consecutive five-year term of imprisonment for four (Doc. 29-2 at 18-21). Petitioner appealed, and the Fifth District Court of Appeal ("Fifth DCA") affirmed *per curiam* (Doc. 29-6 at 87).

Petitioner filed a petition for writ of habeas corpus alleging ineffective assistance of appellate counsel with the Fifth DCA. *Id.* at 91-124. The Fifth DCA denied the petition without discussion (Doc. 29-8 at 57). Petitioner then filed a motion to correct illegal sentence pursuant to Rule 3.800(a) of the Florida Rules of Criminal Procedure. *Id.* at 66-69. After filing an amended motion, the trial court denied the motion (Doc. 29-9 at 19-21). Petitioner appealed, and the Fifth DCA affirmed *per curiam*. *Id.* at 55.

Petitioner subsequently filed a motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure (Doc. Nos. 29-10 at 37-57; 29-11 at 1-68; 29-12 at 1-71; 29-13 at 1-2). After filing two amended motions, the trial court dismissed the motions without prejudice (Doc. Nos. 29-20 at 57; 29-21 at 1-2). Petitioner filed a second amended motion (Doc. Nos. 29-21 at 15-40; 29-22 at 1-9). The trial court summarily denied the motion (Doc. 29-27 at 2-20). Petitioner appealed, and the Fifth DCA affirmed *per curiam* (Doc. 29-28 at 10).

II. LEGAL STANDARDS

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

("AEDPA")

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

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

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

"[S]ection 2254(d)(1) provides two separate bases for reviewing state court decisions; the 'contrary to' and 'unreasonable application' clauses articulate independent considerations a federal court must consider." *Maharaj v. Sec'y for Dep't of Corr.*, 432 F.3d 1292, 1308 (11th Cir. 2005). Even if the federal court concludes that the state court applied federal law incorrectly, habeas relief is appropriate only if that application was "objectively unreasonable." *Id.*

Finally, under § 2254(d)(2), a federal court may grant a writ of habeas corpus if the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." A determination of a factual issue made by a state court, however, shall be presumed correct, and the habeas petitioner shall have the burden of rebutting the presumption of correctness by clear and convincing

evidence. *See Parker*, 244 F.3d at 835-36; 28 U.S.C. § 2254(e)(1).

B. Standard for Ineffective Assistance of Counsel

The United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), established a two-part test for determining whether a convicted person is entitled to relief on the ground that his counsel rendered ineffective assistance: (1) whether counsel's performance was deficient and "fell below an objective standard of reasonableness"; and (2) whether the deficient performance prejudiced the defense.[1] *Id.* at 687-88. A court must adhere to a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* at 689-90. "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *Gates v. Zant*, 863 F.2d 1492, 1497 (11th Cir. 1989).

The same standard utilized by courts to analyze claims of ineffective assistance of trial counsel under *Strickland* also applies to appellate counsel. *Eagle v. Linahan*, 279 F.3d 926, 938 (11th Cir. 2001) (citing *Matire v. Wainwright*, 811 F.2d 1430, 1435 (11th Cir. 1987)). When evaluating the prejudice prong of *Strickland* in relation to ineffective assistance of appellate counsel, the Court "must decide whether the arguments [Petitioner] alleges his

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

counsel failed to raise were significant enough to have affected the outcome of Petitioner's appeal." *See United States v. Nyhuis*, 211 F.3d 1340, 1344 (11th Cir. 2000) (citing *Miller v. Dugger*, 858 F.2d 1536, 1538 (11th Cir.1988)) "If [the Court] conclude[s] that the omitted claim would have had a reasonable probability of success, then counsel's performance was necessarily prejudicial because it affected the outcome of the appeal." *Eagle*, 279 F.3d at 943 (citing *Cross v. United States*, 893 F.2d 1287, 1290 (11th Cir. 1990)).

III. ANALYSIS

A. Claim One

Petitioner alleges that the trial court erred when it failed to instruct the jury on the elements of attempted aggravated assault (Doc. 15 at 6). Petitioner raised this claim on direct appeal (Doc. 29-6 at 60-63). The Fifth DCA affirmed *per curiam*. *Id.* at 87.

The jury charge instructed the jury to consider several lesser included offenses of aggravated assault with a firearm, including attempted aggravated assault with a firearm (Doc. 29-4 at 39-40). However, the trial judge did not define attempt. *Id.* Defense counsel did not object. *Id.* Therefore, the issue was not preserved for direct appeal. *See Harrell v. State*, 894 So. 2d 935, 939-40 (Fla. 2005) (in order to preserve an error for appellate review a party must make a timely, contemporaneous objection, state the legal ground for the objection, and obtain a ruling on that objection). The sole exception to the "contemporaneous objection" requirement is fundamental error, or in other words, the error had to "reach down into the validity of the trial itself to the extent that the verdict of guilty could not have been obtained without the assistance of the alleged error." *Id.* at

941 (quotation omitted).

Because defense counsel did not object to the jury instructions, the error in failing to define attempt was not preserved for appeal. Furthermore, Petitioner cannot demonstrate that the error was fundamental. A federal court's role on habeas review is to determine whether any error or omission in a jury charge was so prejudicial as to amount to a violation of due process or result in rendering the trial fundamentally unfair. *See Agan v. Vaughn*, 119 F.3d 1538, 1545 (11th Cir. 1997). Petitioner cannot demonstrate that the trial court's error in failing to instruct on the definition of "attempt" resulted in an unfair trial. Federal courts have noted that "attempt" is "not an overly technical or ambiguous term, nor is it beyond the common understanding of the jury." *United States v. Moran*, 778 F.3d 942, 969-70 (11th Cir. 2015) (quotation omitted). There was sufficient evidence to convict Petitioner of the completed action, therefore, the error does not amount to a violation of due process (Doc. Nos. 29-2 at 195-99; 29-5 at 99-116; Doc. 29-6 at 8-34) (victims testifying that Petitioner and Tressy Miles got into an argument, Petitioner pushed Tressy, Tressy's brother and Petitioner argued, Petitioner left, and Petitioner returned five minutes later, pointed a gun at them, and fired his gun at them two to three times). The state court's denial of this claim was not contrary to, nor does it result in an unreasonable application of, clearly established federal law. Accordingly, claim one is denied pursuant to § 2254(d).

B. Claim Two

Petitioner argues appellate counsel was ineffective for failing to argue that the

introduction of a several recorded jailhouse telephone calls at trial violated his Fifth Amendment rights and resulted in an unfair trial (Doc. 15 at 7-8). Petitioner raised this claim in his state habeas petition (Doc. 29-6 at 99-102). The Fifth DCA denied the petition (Doc. 29-8 at 57).

The State introduced portions of Petitioner's recorded telephone conversations that were made while he was in jail (Doc. Nos. 29-2 at 118; Doc. 29-3 at 10-32). Defense counsel noted that she had no good faith legal basis to object to the introduction of these conversations (Doc. 29-2 at 118-19). Therefore, this claim was not preserve for appeal, and Petitioner may only obtain relief by demonstrating that the error was fundamental. *See Harrell*, 894 So. 2d at 939-40.

Florida courts have held that "'inmates do not have a reasonable expectation of privacy in jail,' and '[t]herefore, most conversations and confessions . . . are admissible as evidence.'" *Cuomo v. State*, 98 So. 3d 1275, (Fla. 1st DCA 2012) (quoting *Cox v. State*, 26 So. 3d 666, 676 (Fla. 4th DCA 2010)). Petitioner has not shown that the introduction of his jailhouse telephone conversations was in error. Additionally, Petitioner has not shown that the introduction of excerpts of the telephone calls, rather than playing all twenty or more hours of audiotape resulted in a fundamentally unfair trial. Appellate counsel's failure to raise this claim on direct appeal did not result in prejudice. The state court's denial of this claim was neither contrary to nor an unreasonable application of *Strickland*. Thus, claim two is denied pursuant to § 2254(d).

C. Claim Three

Petitioner asserts appellate counsel was ineffective for failing to argue that his rights to equal protection and due process were violated when he received a twenty-year sentence for his convictions for attempted assaulted with a firearm (Doc. 15 at 9). Respondents argue that this claim is unexhausted (Doc. 28 at 13).

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

Contrary to Petitioner's assertions, he did not raise this claim in his state habeas petition (Doc. 29-6 at 91-129). Therefore, this claim remains unexhausted. *See Snowden*, 135 F.3d at 735. The Court is precluded from considering this claim because it would be procedurally defaulted if Petitioner returned to state court. *See id.* at 736. Petitioner could not return to the state court to raise this ground because he already filed a state habeas petition. Thus, Petitioner's claim is procedurally defaulted.

Procedural default may be excused only in two narrow circumstances: if a

petitioner can show (1) cause and prejudice or (2) actual innocence. *Murray v. Carrier*, 477 U.S. 478, 496 (1986); *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999). Petitioner asserts that pursuant to *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), he can establish cause for the procedural default (Doc. 32 at 5). However, Petitioner's argument is misplaced. *Martinez* excuses the procedural default of a substantial ineffective assistance of trial counsel claim asserted in a first initial-review collateral proceeding. *Id.* at 1309. The procedural default asserted here involves a claim of ineffective assistance of appellate counsel, and therefore, *Martinez* is not applicable. *See Smith v. Jones*, No. 8:12-cv-833-T-36TBM, 2015 WL 7444825, at *27 (N.D. Fla. Oct. 6, 2015). Petitioner has failed to demonstrate cause or prejudice for the procedural default. Likewise, he cannot show the applicability of the actual innocence exception. Accordingly, this claim is procedurally barred.

D. Claim Four

Petitioner alleges that appellate counsel was ineffective for failing to argue that the trial court erred when it denied defense counsel's motion for arrest of judgment and motion to prohibit sentence enhancement (Doc. 15 at 10). Petitioner raised this claim in his state habeas petition (Doc. 29-6 at 107-09), and the Fifth DCA denied the claim (Doc. 29-8 at 57).

After trial, Petitioner filed a motion for arrest of judgment and a motion to prohibit sentence enhancement, in which he argued that attempted aggravated assault is a first degree misdemeanor and therefore, is not subject to the enhancement provisions of § 775.087(2), Florida Statutes (Doc. 29-1 at 89-94). The trial court denied the motions. *Id.* at

71-75.

In 2005, section 775.087(2), Florida Statutes, provides that any person who is "convicted of a felony *or an attempt to commit* a felony, regardless of whether the use of a firearm is an element of the felony, and the conviction was for . . ." aggravated assault, and was found to have discharged a firearm during the commission of the felony "shall be sentenced to a minimum term of imprisonment of twenty years." (emphasis added). Therefore, Petitioner's conviction for attempted aggravated assault was subject to an enhancement. Petitioner cannot demonstrate that appellate counsel's failure to raise this claim on direct appeal resulted in prejudice because there is not a reasonable probability that the claim would have been successful on appeal. Accordingly, this claim is denied pursuant to § 2254(d).

E. Claims Five and Six

Petitioner argues that appellate counsel was ineffective for failing to raise counsel's deficient performance on appeal when such errors were apparent on the face of the record (Doc. 15 at 11). In support of this claim, Petitioner maintains that appellate counsel should have asserted that trial counsel rendered deficient performance for failing to object to the missing attempt jury instruction and modification of the jury instruction. *Id.* Petitioner raise these claims in his state habeas petition (Doc. 29-7 at 77), and the Fifth DCA denied the petition (Doc. 29-8 at 57).

Ineffective assistance of counsel claims are not typically raised on direct appeal, and may only be considered where (1) the deficient performance was apparent on the

face of the record, and (2) it would be a waste of judicial resources to require the trial court to address the issue. *Robards v. State*, 112 So. 3d 1256, 1266 (Fla. 2013). Assuming that this claim could have been raised on direct appeal because the deficient performance was apparent on the face of the record, Petitioner cannot demonstrate that he would have been successful on appeal. The Court stated with regard to claim one, *supra*, that the trial court's failure to give the definition of attempt did not amount to fundamental error. Therefore, appellate counsel's failure to raise this claim did not result in prejudice. The state court's denial of this claim was not contrary to or an unreasonable application of *Strickland*. Accordingly, claims five and six are denied pursuant to § 2254(d).

F. Claim Seven

Petitioner contends that his sentence is illegal because it exceeds the five-year maximum penalty (Doc. 15 at 12). In support of this claim, Petitioner argues that the application of the 10-20-Life statute to enhance his sentence violates due process and equal protection. *Id.* Petitioner raised this claim in his amended Rule 3.800(a) motion (Doc. 29-8 at 83-87). The trial court denied the motion (Doc. 29-9 at 19-21), and the Fifth DCA affirmed *per curiam*. *Id.* at 55.

As the Court discussed with regard to claim four, the 10-20-Life statute, as written in 2005, applied to convictions for attempted aggravated assault. Therefore, Petitioner has not demonstrated that his sentence is illegal or that he is entitled to relief on his claim. Accordingly, claim seven is denied pursuant to § 2254(d).

G. Claim Eight

Petitioner alleges that trial counsel was ineffective for failing to object to the introduction of the audiotaped telephone calls (Doc. 15 at 13). Petitioner complains that the audiotapes were not "completely played," and instead, the trial court allowed the State to play excerpts instead of the full twenty hours of recorded telephone calls. *Id.* Petitioner states that several of the recordings played were irrelevant. *Id.* Petitioner also contends that trial counsel was ineffective for failing to convey a three or four-year plea offer. *Id.*

Petitioner raised these claims in his Second Amended Rule 3.850 motion (Doc. 29-21 at 19, 34, and 40). The trial court summarily denied the claims, stating with regard to the first part of Petitioner's claim, stating that it was not improper to play only portions of the recorded telephone calls (Doc. 29-27 at 9). With regard to the failure to convey the plea, the trial court concluded that Petitioner could not demonstrate that he would have entered a plea instead of going to trial. *Id.* at 4. The Fifth DCA affirmed *per curiam* (Doc. 29-28 at 10).

With regard to the first portion of Petitioner's claim, the Court concludes that counsel did not act deficiently for failing to object to the introduction of the audiotaped telephone calls. The telephone calls were relevant and admissible, and this Court has not found any precedent preventing the State or the trial court from playing excerpts of the audiotape. Therefore, counsel's failure to object did not result in prejudice.

Additionally, the Court notes that Petitioner's attorney discussed the issue of the

plea in a letter responding to Petitioner's complaint to the Florida Bar (Doc. 29-22 at 31). Defense counsel noted that Petitioner had been extended a ten-year plea before she had been retained, and Petitioner refused the offer and hired her to take his case to trial. *Id.* Counsel also noted that Petitioner insisted she proceed to trial only after representing him for three weeks. *Id.* Even assuming a three or four-year plea had been conveyed to Petitioner, there is no indication that he would have entered such a plea because Petitioner insisted on proceeding to trial. *See Lafler v. Cooper*, 132 S. Ct. 1376 (2012).

The state court's denial of this claim was not contrary to or an unreasonable application of *Strickland*. Accordingly, claim eight is denied pursuant to § 2254(d).

H. Claim Nine

Petitioner claims trial counsel was ineffective for failing to call Ernest Miles, Jr. to testify on his behalf (Doc. 15 at 15). Petitioner raised this claim in his Second Amended Rule 3.850 motion (Doc. 29-21 at 22). The trial court summarily denied the motion (Doc. 29-27 at 2-21). The Fifth DCA affirmed *per curiam* (Doc. 29-28 at 10).

Petitioner provided the affidavit of Earnest Miles, Jr., who attests that he was present on the night the crimes were committed and he did not see Petitioner with a firearm (Doc. 29-22 at 39). Even if the jury had heard this testimony, there is no indication that the outcome of trial would have been different in light of the three witnesses who stated that Petitioner shot at them and Petitioner's own audiotaped statements. Petitioner cannot demonstrate that counsel's failure to call this witness resulted in prejudice. Accordingly, claim nine is denied pursuant to § 2254(d).

I. Claim Ten

Petitioner claims that trial counsel was ineffective for requesting a jury instruction on the "impermissible" lesser included offense of attempted aggravated assault (Doc. 15 at 16). Petitioner states that an instruction and conviction on attempted aggravated assault was improper based on the facts presented at trial (Doc. 29-21 at 23). Petitioner raised this claim in his Second Amended Rule 3.850 motion. *Id.* The trial court summarily denied the claim, stating that the evidence presented supported the convictions for attempted aggravated assault (Doc. 29-27 at 6). The Fifth DCA affirmed *per curiam* (Doc. 29-28 at 10).

Attempted aggravated assault is a category two, or permissible, lesser included offense of aggravated assault. *See* Fla. Std. Jury Instr. (Crim) 8.2. In Florida, there are two categories of lesser included offenses, category one, necessarily included lesser offenses and category two, permissive lesser included offenses. *See McKiver v. State*, 55 So. 3d 646, 648 (Fla. 1st DCA 2011) (citation omitted). A trial court is not required to give a jury instruction on a category two lesser included offense, but may do so upon request if "(1) the indictment or information [alleges] all the statutory elements of the permissive lesser included offense; and (2) there must be some evidence adduced at trial establishing all of these elements." *Id.* (quotation omitted).

Counsel's request for the attempt instruction was not improper because the information contained the elements of attempted aggravated assault and there was

evidence presented at trial that Petitioner attempted to threaten violence against the victims. However, even assuming counsel's request for the attempt instruction was improper, Petitioner cannot demonstrate prejudice. Petitioner received the benefit of this instruction when he was convicted of the lesser included offense for counts one and two. Petitioner merely speculates that had the jury not been instructed on the attempt, he would have been acquitted of counts one and two. However, speculation cannot support a claim for ineffective assistance of counsel. *See Tejeda v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991). Accordingly, claim ten is denied pursuant to § 2254(d).

J. Claim Eleven

Petitioner asserts that trial counsel was ineffective for failing to listen to all "25 hours of alleged incriminating jail phone call recordings." (Doc. Nos. 15 at 17-18; Doc. 29-21 at 28). In support of this claim, Petitioner states that had counsel investigated the audio recordings of these calls, she would have filed a pretrial motion to suppress the statements (Doc. 29-21 at 28). Petitioner also contends that trial counsel was ineffective for failing to object to the introduction of the audiotaped statements at trial. *Id.* at 33. Petitioner raised these claims in his Second Amended Rule 3.850 motion. *Id.* at 28, 33. The trial court summarily denied the claims, concluding there was no reasonable probability that a motion to suppress or objection would have been granted (Doc. 29-28 at 8, 11). The Fifth DCA affirmed *per curiam* (Doc. 29-28 at 10).

The Court noted *supra* with regard to claim two that the audiotaped phone calls were admissible at trial. Therefore, counsel had no legal basis to file a motion to suppress

or to object at trial. Accordingly, Petitioner cannot demonstrate deficient performance or prejudice. The state court's denial of this claim was neither contrary to, nor an unreasonable application of, *Strickland*. Claim eleven is denied pursuant to § 2254(d).

K. Claim Thirteen[2]

Petitioner contends that trial counsel was ineffective for failing to file a pretrial motion for continuance in order to investigate and prepare a defense (Doc. Nos. 15 at 20; 28-22 at 4). In support of this claim, Petitioner contends that counsel needed more time to become familiar with the case, interview and call witnesses, file a motion to suppress, and investigate the victim (Doc. 28-22 at 4). Petitioner raised this claim in his Second Amended Rule 3.850 motion. *Id.* The trial court summarily denied the claim, noting that counsel stated in her response to the Florida Bar regarding Petitioner's complaint that Petitioner did not want any continuances of the trial (Doc. 28-27 at 18). The Fifth DCA affirmed *per curiam* (Doc. 28-28 at 10).

At the conclusion of trial, Petitioner told the trial court that he was satisfied with his attorney's services. He did not tell the trial court that he had wished to continue the case or that counsel had failed to adequately investigate, call witnesses, or file pretrial motions. In counsel's letter to the Florida Bar, she stated the following:

> I assumed representation of Mr. Owens on June 21, 207. Mr. Owens made it clear that he did not want any additional continuances on his case for any reason. I went to trial, at his demand, twenty[-]one days after assuming representation because Mr. Owens demanded to have his case taken to trial.

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[2] Claim twelve raises a claim of cumulative error, therefore, the Court will discuss this claim at the conclusion of the Order.

. . . .

> Mr. Owens did not want a continuance. He [stated] repeatedly that the witnesses were not coming to court to testify against [him]. On the day of trial before the jury was selected and Mr. Owens had an opportunity to not to [sic] proceed to trial, Mr. Owens still wanted to proceed to trial. My exact words to him were, "look over there, there are the witnesses, what are you going to do?" I told him about the tapes, he was not concerned.

(Doc. 29-22 at 30).

Petitioner cannot demonstrate that any alleged deficient performance on the part of counsel resulted in prejudice. Petitioner has not shown that but for counsel's failure to perform additional investigation, call additional witnesses, or file a motion to suppress for which there was no legal basis, the result of the trial would have been different. The state court's denial of this claim was neither contrary to, nor an unreasonable application of, *Strickland*. Accordingly, claim thirteen is denied pursuant to § 2254(d).

L. Claim Fourteen

Petitioner claims that appellate counsel was ineffective for failing to request oral argument on direct appeal (Doc. 15 at 22). Respondents argue that this claim is unexhausted (Doc. 28 at 16-17). The Court has reviewed the record and concludes that Petitioner did not raise this claim in his state habeas petition (Doc. Doc. 29-6 at 91-129). Therefore, this claim is unexhausted, and the Court is precluded from considering it because it would be procedurally defaulted if Petitioner returned to state court. *See Snowden*, 135 F.3d at 735. Additionally, Petitioner has not demonstrated the applicability of *Martinez*, nor has he shown cause or prejudice for the default or that he is actually

innocent. Accordingly, this claim is procedurally barred.

M. Claims Fifteen through Forty-One

Petitioner raises twenty-seven claims of ineffective assistance of appellate post-conviction counsel (Doc. 15 at 23-58). Petitioner is not entitled to relief on these claims because a claim that state post-conviction counsel was ineffective is not cognizable on habeas review. *See Mendoza v. Sec'y, Florida Dep't of Corr.*, 659 F. App'x 974, 982 (11th Cir. 2016) (noting there is no constitutional right to post-conviction counsel). Accordingly, Petitioner's claims are denied.

N. Claim Twelve

Petitioner asserts a claim of cumulative error (Doc. 15 at 19; 29-22 at 6). Petitioner raised this claim in his Second Amended Rule 3.850 motion (Doc. 29-22 at 6). The trial court denied the claim (Doc. 29-27 at 19). The Fifth DCA affirmed *per curiam* (Doc. 29-28 at 10).

Although the cumulative effect of several errors that are harmless by themselves could result in prejudice, *United States v. Preciado-Cordoba*, 981 F.2d 1206, 1215 n.8 (11th Cir. 1993), in addressing a claim of cumulative error, the trial as a whole must be examined to determine whether Petitioner's trial was fundamentally unfair. *Conklin v. Schofield*, 366 F.3d 1191, 1210 (11th Cir. 2004). The Court has considered the cumulative effect of Petitioner's ineffective assistance of counsel claims and concludes that he cannot demonstrate cumulative error sufficient to entitle him to habeas relief. Therefore, this claim is denied.

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

IV. CERTIFICATE OF APPEALABILITY

This Court should grant an application for certificate of appealability only if the Petitioner "makes a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). To make such a showing "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Lamarca v. Sec'y Dep't of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009). When a district court dismisses a federal habeas petition on procedural grounds without reaching the underlying constitutional claim, a certificate of appealability should issue only when a Petitioner shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*; *Lamarca*, 568 F.3d at 934. However, a prisoner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

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

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

1. The Amended Petition for Writ of Habeas Corpus filed by Frank Le'Dell Owens (Doc. 15) is **DENIED**, and this case is **DISMISSED WITH PREJUDICE**.

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

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

DONE AND ORDERED in Orlando, Florida, this 10 day of February, 2017.

G. KENDALL SHARP
SENIOR UNITED STATES DISTRICT JUDGE

Copies to:
OrlP-3 2/10
Counsel of Record
Frank Le'Dell Owens