IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-15522-H

ROSHARD WHITEHEAD,

Petitioner-Appellant,

versus

FLORIDA DEPARTMENT OF CORRECTIONS

Respondent-Appellee.

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

ORDER:

Roshard Whitehead is a Florida prisoner serving consecutive life sentences following his convictions for 2 counts of sexual battery on a person less than 12 and 2 counts of lewd or lascivious molestation. Whitehead filed his 28 U.S.C. § 2254 petition, arguing that the state trial court abused its discretion in admitting evidence of his flight and overruling his objection to the prosecutor's improper comment on his use of his right to silence. He also argued that the state's probable cause affidavit was null and void because the affidavit contained a forged notarized oath.

The district court denied Whitehead's § 2254 petition on the merits and denied a COA. Whitehead filed a notice of appeal. He now seeks a certificate of appealabiilty ("COA") in this Court.

In his first claim, Whitehead alleged that the trial court abused its discretion by allowing evidence of his flight to be introduced. He alleged that, had this evidence not been introduced at trial, he would have been found not guilty. Whitehead's disappearance, two days after being informed he was accused of molestation, suggests a nexus between the crime and his flight to Kentucky. *See United States v. Blakey*, 960 F.2d 996, 1000 (11th Cir. 1992); *Straight v. State*, 397 So.2d 903, 904 (Fla.1981); *Shellito v. State*, 701 So.2d 837, 840-41 (Fla.1997). Therefore, under both federal and state law and the particular facts of the case, a sufficient nexus was established between the crime and Whitehead's flight to justify admissibility of the flight evidence.

In his second claim, Whitehead alleged that the trial court abused its discretion when it overruled his objection to the prosecutor's statement about the lack of a confession. Whitehead contended that this comment was an improper admonition regarding the use of his right to remain silent. Here, it was fair for the state to counter the argument that no confession existed by pointing out that Whitehead fled, and thus was not around to give a confession, as Whitehead's counsel first brought this issue before the jury in his closing argument. Moreover, the comment was isolated to the prosecutor's closing argument, and therefore, there is no indication that the fundamental fairness of the movant's trial was not affected, especially given the evidence provided by the victims implicating Whitehead in the offenses. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 642-45 (1974); *Hall v. Wainwright*, 733 F.2d 766, 733 (11 Cir. 1984).

Finally, Whitehead argued that the probable cause affidavit used in his prosecution was null and void because the notary signature was forged. He argued that this mistake rendered his imprisonment and subsequent trial unconstitutional. Whitehead has procedurally defaulted his

probable cause affidavit claim, as this claim was available on direct appeal, but he failed to advance it.

Because Whitehead has not shown that reasonable jurists would find the denial of his § 2254 petition debatable, his motion for a COA is DENIED.

/s/ Adalberto Jordan
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-15522-H

ROSHARD WHITEHEAD,

Petitioner-Appellant,

versus

FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

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

Before: MARCUS and GRANT, Circuit Judges.

BY THE COURT:

Appellant has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's July 17, 2018, order denying his motion for a certificate of appealability in his appeal from the district court's denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. Upon review, appellant's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-81436-CIV-MARRA/WHITE

ROSHARD WHITEHEAD,

Petitoner,

vs.

JULIE JONES,

Respondent.
_____/

FINAL JUDGMENT

For the reasons stated in the Report of the Magistrate Judge and upon independent de novo review of the file, and over the objections having been filed, it is **ORDERED AND ADJUDGED** as follows:

1) The Court hereby adopts and affirms the Report and Recommendation of the Magistrate Judge. The petition to vacate pursuant to 28 U.S.C. § 2254 is denied.

2) Under Rule 11(a) of the Rules Governing Section 2254 Proceedings in the United States District Courts, this Court must issue or deny a certificate of appealability when entering a final order adverse to the applicant. Because the Court is adopting the Magistrate Judge's Recommendation denying the motion to vacate brought under 28 U.S.C. § 2254, the Court must consider whether to issue or deny the certificate of appealability at this time.

The Court concludes under *Slack v. McDaniel*, 529 U.S. 473 (2000), that Petitioner cannot shown that "jurists of reason would find it debatable whether the petition states a valid claim of 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.* at 478. Therefore, the Court **DENIES** a certificate of appealability. The Court notes that under Rule 22(b)(1) of the Federal Rules of Appellate Procedure, the Petitioner may seek a certificate of appealability from the U.S. Court of Appeals for the Eleventh Circuit.

3) All motions not otherwise ruled upon are dismissed as moot.

4) The case is closed.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida, this 30th day of October, 2017.

KENNETH A. MARRA
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-81436-Civ-MARRA
MAGISTRATE JUDGE P.A. WHITE

ROSHARD WHITEHEAD,

Petitioner,

v.

JULIE JONES,

Respondent.
_____/

REPORT OF MAGISTRATE JUDGE

I. Introduction

Roshard Whitehead has filed this *pro se* petition for writ of habeas corpus, pursuant to 28 U.S.C. §2254, challenging the constitutionality of his conviction and sentence, entered following a jury verdict in case 2009CF003886 in the Fifteenth Judicial Circuit Court, in and for West Palm Beach County.

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

For its consideration of the petition (DE#1), the court has the state's response to this court's order to show cause with supporting appendix (DE# 9), containing copies of relevant state court pleadings; and Petitioner's reply thereto (DE# 12, 13).

II. Claims

Because the petitioner is *pro se*, he has been afforded liberal

construction under Haines v. Kerner, 404 U.S. 419 (1972). As can best be discerned, the petitioner raises the following grounds for relief:

> **Claim 1:** The state trial court abused its discretion in admitting evidence of Petitioner's flight and giving a false name (DE#1:18).
>
> **Claim 2:** The state trial court abused its discretion in overruling an objection to a comment on silence during the state's closing argument. (DE#1:19).
>
> **Claim 3:** The probable cause affidavit was null and void because the affidavit contained a forged notarized oath (DE#1:21).

III. Procedural History

Petitioner was charged by second amended information with two counts of sexual battery on a person less than twelve and two counts of lewd or lascivious molestation (DE# 9, Exhibit 3). The victim was Petitioner's niece, M.B., and took place when she was between seven and eleven years old. (Id.).

Petitioner proceeded to trial where the following evidence was introduced. (DE# 9, Exhibit 5, Trial Transcripts, hereinafter "T."). M.B. testified petitioner touched her bottom and vagina with his hand and penis, penetrated her bottom and vagina with his penis, and would threaten to withhold food if she refused (T. 304-321). M.B. told her mother in January 2009 when her mother discussed inappropriate touching with her (T. 312-13). K.G.W., M.B.'s sister, testified petitioner rubbed her bottom and vagina with his hands and penis, but did not penetrate her. This started when she was four or five years old and petitioner would also threaten her with not eating. K.G.W. told her mother when M.B. told

her mother and her mother called the police (T. 336-52).

Petitioner's mother and the victim's grandmother, Ethyl Bailey, testified that she learned of the allegations on a Sunday, and petitioner stayed at her house that night. The next day, petitioner came by and denied anything happened. Petitioner was still there Tuesday morning but was gone when she arrived home that afternoon (T. 425-29). After Petitioner sent Bailey a text stating "Momma, what's going on?," Bailey did not see petitioner again for eight months (T. 432-37).

Officer Summers of the Rivera Beach Police Department responded to petitioner's address on Thursday, January 15, 2009 and spoke with petitioner's roommate, Freeman, who informed Summers that petitioner had gone missing. Summers then went to Bailey's address, but no one was home. Summers tried to conduct a controlled call with petitioner's sister, but the petitioner's number was disconnected (T. 390-93).

In August 2009, U.S. Marshall Gordon Hotchkiss received information that petitioner was in Kentucky and apprehended him. Petitioner initially gave his name as "Michael White" but Hotchkiss found a driver's license on petitioner with his true name (T. 471-75).

The jury convicted Petitioner as charged and he was sentenced to consecutive life sentences. (DE# 9, Exhibit 4).

Petitioner filed a timely notice of appeal of his conviction and sentence to the Fourth District Court of Appeal ("Fourth DCA"). (DE# 9, Exhibit 6). Petitioner filed an initial brief wherein he argued that (1) the trial court abused its discretion in admitting

evidence of Petitioner's flight and evidence of Petitioner's giving a false name and (2) the trial court abused its discretion in denying Petitioner's objections during closing argument. (DE# 9, Exhibit 7). The State filed an answer brief (DE# 9, Exhibit 8). On **February 27, 2013**, the Fourth DCA entered a *per curiam* affirmance without written opinion in Whitehead v. State, 144 So. 3d 552 (Fla. 4th DCA 2013).

Petitioner did not seek discretionary review with the Florida Supreme Court. The time for doing so expired thirty days after the appellate court's affirmance of petitioner's conviction, or no later than **March 29, 2013.**[1] Since he did not seek discretionary review to the Florida Supreme Court, he is not entitled to an additional ninety days to file a petition for a writ of certiorari in the United States Supreme Court. Gonzalez v. Thaler, ___ U.S. ___, 132 S.Ct. 641, 646 (2012).[2] Therefore, at the earliest, his

---

[1]Pursuant to Fla.R.App.P. 9.120(b), a motion to invoke discretionary review must be filed within 30 days of rendition of the order to be reviewed.

[2]In applying the Supreme Court's Gonzalez opinion to this case, the petitioner here is not entitled to the 90-day period for seeking certiorari review with the United States Supreme Court, because after his judgment was affirmed on direct appeal, petitioner did not attempt to obtain discretionary review by Florida's state court of last resort-the Florida Supreme Court, nor did he seek rehearing with the appellate court. See Gonzalez v. Thaler, ___ U.S. ___, 132 S.Ct. 641, 653-54, 181 L.Ed.2d 619 (2012)(holding that conviction becomes final upon expiration of time for seeking direct review); Jimenez v. Quarterman, 555 U.S. 113, 118-21, 129 S.Ct. 681, 685-86, 172 L.Ed.2d 475 (2009)(explaining the rules for calculating the one-year period under §2244(d)(1)(A)). See also Clay v. United States, 537 U.S. 522, 527, 123 S.Ct. 1072, 155 L.Ed.2d 88 (2003)(holding that "[f]inality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires."); Chavers v. Secretary, Florida Dept. of Corrections, 468 F.3d 1273 (11th Cir. 2006)(holding that one-year statute of limitations established by AEDPA began to run 90 days after Florida appellate court affirmed habeas petitioner's conviction, not 90 days after mandate was issued by that court). In other words, where a state prisoner, who pursues a direct appeal, but does not pursue discretionary review in the state's highest court after the intermediate appellate court affirms his conviction, the conviction becomes final when time for seeking such discretionary review in the state's highest court expires. Gonzalez, __ U.S. ___, 132 S.Ct. 641 (2012).

convictions are final on **March 29, 2013**. However, assuming, without deciding, that petitioner were entitled to seek review to the U.S. Supreme Court, then alternatively, his convictions would have become final at the latest on **May 28, 2013**, 90 days following the conclusion of his direct appeal, when time expired for doing so. For purposes of this Report, the undersigned has utilized this later date.

From the time his conviction became final on **May 28, 2013**, a total of **121 days** elapsed before Petitioner filed a **September 26, 2013** Petition for Writ of Habeas Corpus in the Fourth DCA. (DE# 9, Exhibit 11). He claimed appellate counsel rendered ineffective assistance by failing to argue that (1) the state lacked jurisdiction to prosecute because the probable cause affidavit was gained by forgery; and (2) the state continued the fraud by continuing to prosecute after a detective was charged with misconduct for forging signatures (Id.). On February 18, 2014, the court denied the petition. (DE# 9, Exhibit 13). Petitioner filed a motion for rehearing, which was denied on **April 25, 2014** (DE# 9, Exhibit 14, 15).

Another **53 days** elapsed before Petitioner filed a **June 17, 2014** motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850 (DE# 9, Exhibit 16). Petitioner argued ineffective assistance of counsel for various reasons including that the probable cause affidavit was null and void because the affidavit contained a forged notarized oath. (Id.). The state filed a response. (DE# 9, Exhibit 18) On August 20, 2015, the trial court issued a written order denying the post-conviction motion. (DE# 9, Exhibit 19).

Petitioner appealed. (DE# 9, Exhibit 21). Petitioner filed an initial brief. (DE# 9, Exhibit 22). The Fourth DCA *per curium* affirmed without opinion in Whitehead v. State, 192 So. 3d 486 (Fla. 4th DCA 2016). The mandate issued on **July 15, 2016.** (DE# 9, Exhibit 26).

Another **28 days** elapsed before Petitioner came to this court filing his federal habeas petition on **August 12, 2016,**[3] when petitioner signed and then handed the petition to prison authorities for mailing in accordance with the mailbox rule. (DE#1:15). In all, there were **202 days** (121 + 53 + 28) of untolled time during which no properly filed post-conviction motions were pending so as to toll the federal one-year limitations period.

IV. Threshold Issue: Timeliness

The respondent argues correctly that this federal petition is timely. (DE#9:3-4). See 28 U.S.C. §2244(d). With the exception of a 202 day-period of time described above, the Petitioner constantly had post-conviction proceedings pending in state court from the time his conviction became final until Petitioner filed the instant §2254.

V. Standard of Review

A. Antiterrorism and Effective Death Penalty Act of 1996

[3]"Under the prison mailbox rule, a *pro se* prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing." Williams v. McNeil, 557 F.3d 1287, 1290 n.2 (11th Cir. 2009); see Fed.R.App. 4(c)(1)("If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing."). Unless there is evidence to the contrary, like prison logs or other records, a prisoner's motion is deemed delivered to prison authorities on the day he signed it. See Washington v. United States, 243 F.3d 1299, 1301 (11th Cir. 2001); Adams v. United States, 173 F.3d 1339 (11th Cir. 1999) (prisoner's pleading is deemed filed when executed and delivered to prison authorities for mailing).

("AEDPA")

This federal habeas petition is governed by 28 U.S.C. §2254(d), as amended by the 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 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). This standard is both mandatory and difficult to meet. White v. Woodall, ___ U.S. ____, ___, 134 S.Ct. 1697, 1702, 188 L.Ed.2d 698 (2014); see also, Debruce v. Commissioner, Alabama Dept. of Corrections, 758 F.3d 1263, 1265-66 (11th Cir. 2014). The AEDPA imposes a highly deferential standard for reviewing the state court rulings on the merits of constitutional claims raised by a petitioner. A state court's summary rejection of a claim, even without explanation, qualifies as an adjudication on the merits which warrants deference. Ferguson v. Culliver, 527 F.3d 1144, 1146 (11th Cir. 2008).

"Clearly established federal law" consists of the governing legal principles, rather than the dicta, set forth in the decisions of the United States Supreme Court at the time the state court issues its decision. White v. Woodall, 134 S.Ct. at 1702; Carey v. Musladin, 549 U.S. 70, 74, 127 S.Ct. 649, 166 L.Ed.2d 482

(2006)(citing Williams v. Taylor, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). A decision is "contrary to" clearly established federal law if the state court either: (1) applied a rule that contradicts the governing law set forth by Supreme Court case law; or (2) reached a different result from the Supreme Court when faced with materially indistinguishable facts. Ward v. Hall, 592 F.3d 1144, 1155 (11th Cir. 2010); Mitchell v. Esparza, 540 U.S. 12, 16, 124 S.Ct. 7, 157 L.Ed.2d 263 (2003).

A state court decision involves an "unreasonable application" of the Supreme Court's precedents if the state court correctly identifies the governing legal principle, but applies it to the facts of the petitioner's case in an objectively unreasonable manner, Brown v. Payton, 544 U.S. 133, 134, 125 S.Ct. 1432, 161 L.Ed.2d 334 (2005); Bottoson v. Moore, 234 F.3d 526, 531 (11th Cir. 2000); or, "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Bottoson, 234 F.3d at 531 (quoting Williams, 529 U.S. at 406). The unreasonable application inquiry "requires the state court decision to be more than incorrect or erroneous," rather, it must be "objectively unreasonable." Lockyer v. Andrade, 538 U.S. 63, 75-77, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003) (citation omitted); Mitchell, 540 U.S. at 17-18; Ward, 592 F.3d at 1155. Petitioner must show that the state court's ruling was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." White, 134 S.Ct. at 1702 (quoting Harrington v. Richter, 562 U.S. 86, 131 S.Ct. 770, 786-787, 178 L.Ed.2d 624 (2011)).

It is also well settled that the state court is not required

to cite, or even have an awareness of, governing Supreme Court precedent, "so long as neither the reasoning nor the result of [its] decision contradicts them." Early v. Packer, 537 U.S. 3, 8, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002); *cf.* Harrington, 562 U.S. at 98, 131 S.Ct. at 785 (reconfirming that "§2254(d) does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits'" and entitled to deference); Mitchell v. Esparza, 540 U.S. 12, 16 (2003)("[A] state court's decision is not 'contrary to ... clearly established Federal law' simply because the court did not cite [Supreme Court] opinions.... [A] state court need not even be aware of [Supreme Court] precedents, 'so long as neither the reasoning nor the result of the state-court decision contradicts them.'") (*quoting* Early v. Packer, 537 U.S. at 7-8).

Thus, state court decisions are afforded a strong presumption of deference even when the state court adjudicates a petitioner's claim summarily—without an accompanying statement of reasons. Harrington, 562 U.S. at 91-99, 131 S.Ct. at 780-84 (concluding that the summary nature of a state court's decision does not lessen the deference that it is due); Gill v. Mecusker, 633 F.3d 1272, 1288 (11th Cir. 2011)(acknowledging the well-settled principle that summary affirmances are presumed adjudicated on the merits and warrant deference, citing Harrington, 562 U.S. at 98-99, 131 S.Ct. at 784-85 and Wright v. Sec'y for the Dep't of Corr., 278 F.3d 1245, 1254 (11th Cir. 2002)). See also Renico v. Lett, 559 U.S. 766, 773, 130 S.Ct. 1855, 1862, 176 L.Ed.2d 678 (2010)("AEDPA ... imposes a highly deferential standard for evaluating state-court rulings ... and demands that state-court decisions be given the benefit of the doubt.")(citations and internal quotation marks omitted).

The Supreme Court has also stated that "a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding[.]" Miller-El v. Cockrell, 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (*dictum*). When reviewing a claim under § 2254(d), a federal court must bear in mind that any "determination of a factual issue made by a State court shall be presumed to be correct[,]" and the petitioner bears "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. §2254(e)(1); see, e.g., Burt v. Titlow, ____ U.S. ___, ___, 134 S.Ct. 10, 1516, 187 L.Ed.2d 348 (2013); Miller-El, 537 U.S. at 340 (explaining that a federal court can disagree with a state court's factual finding and, when guided by AEDPA, "conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence").

Further, the Supreme Court has recognized that the AEDPA imposes a highly deferential standard for evaluating state-court rulings and requires that state-court decisions be given the benefit of the doubt. Burt v. Titlow, ____ U.S. ____, __, 134 S.Ct. 10, 15 (2013)(stating, "AEDPA recognizes a foundational principle of our federal system: State courts are adequate forums for the vindication of federal rights."); Hardy v. Cross, 565 U.S. ___, ___, 132 S.Ct. 490, 491, 181 L.Ed.2d 468 (2011)(noting that the AEDPA "imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt.")(quoting Felkner v. Jackson, 562 U.S. 594, 131 S.Ct. 1305, 1307, 179 L.Ed.2d 374 (2011)). Thus, "[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling ... 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, 101-102, 131 S.Ct. 770, 786-87, 178 L.Ed.2d 624 (2011). See also Greene v. Fisher, ____ U.S. ___, ___, 132 S.Ct. 38, 43, 181 L.Ed.2d 336 (2011)(The purpose of AEDPA is "to ensure that federal habeas relief functions as a guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction.")(internal quotation marks omitted).

As pointed out by the Eleventh Circuit, "the standard of §2254(d) is 'difficult to meet .... because it was meant to be.'" Downs v. Sec'y, Fla. Dep't of Corr's, 748 F.3d 240 (11th Cir. 2013)(*quoting*, Titlow, 134 S.Ct. at 16). This "highly deferential standard" demands that "[t]he petitioner carries the burden of proof," Id., quoting, Cullen v. Pinholster, 563 U.S. 170, 180, 131 S.Ct. 1388, 1398, 1403, 179 L.Ed.2d 557 (2011)(internal quotation marks omitted) and "'that state-court decisions be given the benefit of the doubt,' Woodford v. Visciotti, 537 U.S. 19, 24, 123 S.Ct. 357, 360, 154 L.Ed.2d 279 (2002).'" Id.

Review under §2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. See Cullen v. Pinholster, 563 U.S. 170, 180-90, 131 S.Ct. 1388, 1398-1400, 1403, 179 L.Ed.2d 557 (2011)(holding new evidence introduced in federal habeas court has no bearing on Section 2254(d)(1) review). And, a state court's factual determination is entitled to a presumption of correctness. 28 U.S.C. §2254(e)(1). Under 28 U.S.C. §2254(e)(1), this Court must presume the state court's factual findings to be correct unless the petitioner rebuts that presumption by clear and convincing evidence. See id. §2254(e)(1). As recently noted by the Eleventh Circuit in Debruce, 758 F.3d at 1266, although the Supreme Court has "not defined the

precise relationship between §2254(d)(2) and §2254(e)(1)," Burt v. Titlow, ____ U.S. ____, ____, 134 S.Ct. 10, 15, 187 L.Ed.2d 348 (2013), the Supreme Court has emphasized "that a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." Burt, Id. (*quoting* Wood v. Allen, 558 U.S. 290, 301, 130 S.Ct. 841, 849, 175 L.Ed.2d 738 (2010)).

VI. Discussion

In **claim 1**, Petitioner alleges the trial court abused its discretion in allowing the State to introduce the testimony of Marshall Hotchkiss, arguing evidence he fled to Kentucky and gave a false name when apprehended was impermissible collateral evidence of an uncharged crime. (DE# 1:18). Petitioner raised this claim in his initial brief on direct appeal. (DE# 9, Exhibit 7). The State filed an answer brief (DE# 9, Exhibit 8). On February 27, 2013, the Fourth DCA entered a *per curiam* affirmance without written opinion in Whitehead v. State, 144 So. 3d 552 (Fla. 4th DCA 2013).

In Florida, "[e]vidence of flight is admissible as being relevant to infer consciousness of guilt only where sufficient evidence exists to establish that the defendant fled to avoid prosecution of the charged offense." Adderly v. State, 44 So. 3d 167, 170 (Fla. 4th DCA 2010) (citing Escobar v. State, 699 So. 2d 988, 995 (Fla. 1997)). "The determination of whether the state has established a sufficient nexus to introduce evidence of flight is made on the particular facts of each case." Id. Federal law is similar. "Evidence of flight is admissible to demonstrate consciousness of guilt and thereby guilt." United States v. Blakey, 960 F.2d 996, 1000 (11th Cir. 1992). However, "[t]he probative

value of such evidence obviously is diminished if the defendant has committed several unrelated crimes or if there has been a significant time delay between the commission of the crime or the point at which the accused has become aware that he is the subject of a criminal investigation, to the time of flight." Id.

Here, evidence was introduced that the petitioner's mother told petitioner about the allegations on a Sunday, and he disappeared on Tuesday after texting his mother to ask what was going on. On Thursday, Officer Summers attempted to locate petitioner but could not, and further discovered that his phone had been connected. The fact that petitioner disappeared two days after being informed he was accused of molestation suggests a nexus between the crime and petitioner's flight to Kentucky. The fact that petitioner then gave a false name when apprehended raises an inference that he was trying to hide from law enforcement. At a minimum, the appellate court could reasonably conclude based on these facts that it was not an abuse of discretion for the trial court to find a sufficient nexus and admit the evidence of flight. Even if the giving of a false name was too attenuated due to the length of time between the report to police and petitioner's apprehension, the appellate court could reasonably conclude that any error was harmless in light of the direct testimony of petitioner's acts by the two child victims.

In light of the foregoing, no showing has been made either in the state forum or this habeas proceeding that the state court erred in denying this claim. As a result, the rejection of this claim was neither contrary to nor an unreasonable application of controlling federal constitutional principles. It should not be disturbed here. Williams v. Taylor, supra.

Under **claim 2**, Petitioner alleges the state trial court abused its discretion in overruling an objection to a comment on silence during closing argument. (DE#1:19). Petitioner raised this claim in his initial brief on direct appeal. (DE# 9, Exhibit 7). The State filed an answer brief (DE# 9, Exhibit 8). On February 27, 2013, the Fourth DCA entered a *per curiam* affirmance without written opinion in Whitehead v. State, 144 So. 3d 552 (Fla. 4th DCA 2013).

The prosecutor asserted in closing:

> **Prosecutor**: But why didn't they get ahold of him? Because his phone had already been disconnected. The officer told you that he went out to his . . . home, couldn't find him. Patrolled the area, couldn't find him. They couldn't find him. Why couldn't they find him? Because when he found out that now everybody knew what had been happening for the past four years, he fled. He went to a state where he has no ties because he didn't want to be found. And after eight months of looking for this defendant, when the U.S. Marshals finally found him again, he tried to avoid being prosecuted. He gave a fake name. Of course, he's not going to run out that door when you have helicopters and police officers surrounding the house. He wasn't going anywhere. But again he tried to get away by giving a false name. Why is that? Because he knew he was guilty. So when you ask yourself why is that? The fact that we don't have those things is not a reasonable doubt. The defendant didn't want you to have those things, not the State. We would have loved to have given you a confession.
>
> **Defense Counsel**: Objection.
>
> **Prosecutor**: But he wasn't around.
>
> **The Court**: Overruled.

(T. 552-53).

The Supreme Court has held that direct comments by the

prosecution on a defendant's silence violate the Fifth Amendment. Griffin v. California, 380 U.S. 609 (1965). When determining whether an impermissible comment on a defendant's right to remain silent has occurred, federal courts must consider the totality of the circumstances and evaluate whether the remark is "manifestly intended" by the prosecutor or "was of such a character" that it "would naturally and necessarily be understood by the jury" as a comment on the defendant's silence. Matire v. Wainwright, 811 F.2d 1430 (11 Cir. 1987), citing United States v. Vera, 701 F.2d 1349 (11 Cir. 1983), also citing United States v. Forrest, 620 F.2d 446, 455-56 (5 Cir. 1980); See also Baxter v. Thomas 45 F.3d 1501 (11 Cir. 1995); United States v. Beale, 921 F.2d 1412 (11 Cir. 1991).

If some other explanation for the remark is equally plausible, the Court cannot find that counsel 'manifestly intended' to comment on the defendant's failure to testify. United States v. Swindall, 971 F.2d 1531 (11th Cir.1992)(citing Samuels v. United States, 398 F.2d 964, 968 (5 Cir. 1968)(Court declined to reverse when finding it "very possible" that the prosecutor's statement was "merely inadvertent")); United States v. Ward, 552 F.2d 1080, 1083 (5 Cir. 1977)(approving a prosecutor's remarks when they were "more likely" intended to "properly refer to the defendants' failure to produce evidence of any kind to rebut the inference of knowledge that naturally follows from the possession of recently stolen property" than to comment on the defendants' failure to take the stand).

Here, the prosecutor's comments were invited when defense counsel stated:

> You know, it's really scary to think that when a girl makes an accusation and the police are still not called because everyone wants them to see the doctor, and the doctor finds nothing at all, that that's still enough.

> That's still enough. It's like [Petitioner is] fighting with his hands tied behind his back. There's nothing for him to do to say it didn't happen. Now if there's no physical findings, there's a reason why there's no physical findings. **We have no admissions. We have no confession.** But yet, it's still enough to prove to you beyond every reasonable doubt that it happened? No. That's just not enough.

(T. 547) (emphasis added). Comments that provoke a prosecutorial response are not error or are harmless as invited error. See United States v. Suggs, 755 F.2d 1538, 1540 (11th Cir. 1985). Here, it was fair for the state to counter the argument that no confession existed by pointing out that petitioner fled, and thus was not around to give a confession. Moreover, it is evident that the fundamental fairness of the movant's trial was not affected, given the evidence provided by the victims implicating the petitioner in the offenses. See Donnelly v. DeChristoforo, 416 U.S. 637, 642-45 (1974); Hall v. Wainwright, 733 F.2d 766, 733 (11 Cir. 1984); Hance v. Zant, 696 F.2d 940 (11 Cir.), cert. denied, 463 U.S. 1210 (1983); Williams v. Weldon, 826 F.2d 1018, 1023 (11 Cir.), cert. denied, 485 U.S. 964 (1988).

In light of the foregoing, no showing has been made either in the state forum or this habeas proceeding that the state courts erred in denying this claim. As a result, the rejection of this claim was neither contrary to nor an unreasonable application of controlling federal constitutional principles. It should not be disturbed here. Williams v. Taylor, supra.

Under **claim 3**, Petitioner alleges that the probable cause affidavit was null and void because the affidavit contained a forged notarized oath (DE#1:21). Petitioner raised this claim in his Rule 3.850 motion. (DE# 9, Exhibit 16). The state filed a

response. (DE# 9, Exhibit 18). On August 20, 2015, the trial court issued a written order denying the post-conviction motion. (DE# 9, Exhibit 19). Petitioner appealed. (DE# 9, Exhibit 21). Petitioner filed an initial brief. (DE# 9, Exhibit 22). The Fourth DCA *per curium* affirmed without opinion in Whitehead v. State, 192 So. 3d 486 (Fla. 4th DCA 2016). The mandate issued on July 15, 2016. (DE# 9, Exhibit 26).

The probable cause affidavit was signed on March 25, 2009 by Detective Schnieder and purportedly notarized by Sergeant Galligan (DE# 9, Exhibit 2). Detective Schnieder was charged with forging Galligan's signature on this affidavit in December 2009 (DE# 9, Exhibit 17). Petitioner was not sentenced until October 17, 2011. (DE# 9, Exhibit 4). Therefore, this information was available to petitioner and could have been raised on direct appeal, but was not See (DE# 9, Exhibit 7, Initial Brief on Direct Appeal). The trial court denied this claim as procedurally barred in a 3.850 motion because it should have been raised on direct appeal (DE# 9, Exhibit 15). The state appellate court could have reasonably affirmed the denial of petitioner's 3.850 motion on this basis, as longstanding Florida law holds that any matters which could have been presented on direct appeal cannot be raised in a 3.850 motion. See McCrae v. State, 437 So. 2d 1388, 1390 (Fla. 1983).

Even if addressed on the merits, petitioner is not entitled to relief. An arrest warrant is the legal process by which a Florida court obtains personal jurisdiction over a person, Campbell v. Dade County, 113 So. 2d 708, 711 (Fla. 3d DCA 1959), and challenges to that jurisdiction are waived after a formal information is filed. State v. Hickman, 189 So. 2d 254, 260 (Fla. 2d DCA 1966). "The manner by which a criminal defendant is brought before a court, even if improper, does not divest a court of subject matter

jurisdiction," Wardell v. State, 944 So. 2d 1089, 1091 (Fla. 5th DCA 2006). Even if petitioner was initially improperly brought before the trial court on a defective probable cause affidavit, that deficiency did not deprive the trial court of subject matter jurisdiction. Smith v. State, 82 So. 3d 823, 824 (Fla. 4th DCA 2011).

Further, as a matter of federal constitutional law, "immaterial falsehoods, even deliberate ones, in an affidavit that is presented to a judge or magistrate in support of a request for the issuance of an arrest or search warrant do not invalidate the warrant should it be issued." Haywood v. City of Chicago, 378 F.3d 714, 719 (7th Cir. 2004) (citing Franks v. Delaware, 438 U.S. 154 (1978)). Petitioner has not alleged that any statement within the probable cause affidavit itself was false and material to a finding of probable cause that would have entitled him to a Franks hearing, see United States v. Jackson, 103 F.3d 561, 574 (7th Cir. 1996), or that it was an unreasonable application of Franks to fail to hold a Franks hearing in this case.

In light of the foregoing, no showing has been made either in the state forum or this habeas proceeding that the state court erred in denying this claim. As a result, the rejection of this claim was neither contrary to nor an unreasonable application of controlling federal constitutional principles. It should not be disturbed here. Williams v. Taylor, supra.

Finally, this court has considered all of the petitioner's claims for relief, and arguments in support thereof. See Dupree v. Warden, 715 F.3d 1295 (11th Cir. 2013) (citing Clisby v. Jones, 960 F.2d 925 (11th Cir. 1992)). For all of his claims, petitioner has failed to demonstrate how the state courts' denial of his claims,

to the extent they were considered on the merits in the state forum, were contrary to, or the product of an unreasonable application of, clearly established federal law. To the extent they were not considered in the state forum, and a *de novo* review of the claim conducted here, as discussed in this Report, none of the claims individually, nor the claims cumulatively, warrant relief. Thus, to the extent a precise argument, subsumed within any of the foregoing grounds for relief, was not specifically addressed herein or in the state forum, all arguments and claims were considered and found to be devoid of merit, even if not discussed in detail herein.

VII. Evidentiary Hearing

Petitioner's request for an evidentiary hearing must be denied. To determine whether an evidentiary hearing is needed, `The pertinent facts of this case are fully developed in the record before the Court. Because this Court can "adequately assess [Petitioner's] claim[s] without further factual development," Turner v. Crosby, 339 F.3d 1247, 1275 (11th Cir. 2003), cert. den'd, 541 U.S. 1034 (2004), an evidentiary hearing is not warranted.

VIII. Certificate of Appealability

As amended effective December 1, 2009, §2254 Rule 11(a) provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. §2253(c)(2)." A timely notice of appeal must still be filed, even if the court issues a certificate of appealability. Rules Governing §2254 Proceedings, Rule 11(b), 28

U.S.C. foll. §2254.

After review of the record, petitioner is not entitled to a certificate of appealability. "A certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). To merit a certificate of appealability, Petitioner must show that reasonable jurists would find debatable both (1) the merits of the underlying claims and (2) the procedural issues he seeks to raise. Slack v. McDaniel, 529 U.S. 473, 478, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). See also Eagle v. Linahan, 279 F.3d 926, 935 (11th Cir. 2001). Because the claims raised are clearly without merit, petitioner cannot satisfy the *Slack* test. Slack, 529 U.S. at 484.

As now provided by Rules Governing §2254 Proceedings, Rule 11(a), 28 U.S.C. foll. §2254: "[B]efore entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." If there is an objection to this recommendation by either party, that party may bring this argument to the attention of the district judge in the objections permitted to this report and recommendation.

IX. Conclusion

Based upon the foregoing, it is recommended that the federal habeas petition be DENIED on the merits; that a certificate of appealability be DENIED; and, the case be closed.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report.

SIGNED this 14th day of June, 2017.

UNITED STATES MAGISTRATE JUDGE

cc: Roshard Whitehead, Pro Se
DC# B10144
Okeechobee Correctional Institution
Inmate Mail/Parcels
3420 NE 168th Street
Okeechobee, FL 34972

Luke Robert Napodano
Office of the Attorney General
1515 North Flagler Drive
Suite 900
West Palm Beach, FL 33401
561-837-5000 x179
Email: luke.napodano@myfloridalegal.com

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