APPENDIX B

MEMORANDUM AND ORDER OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

TIMOTHY L. JOE,

Petitioner,

v. **Case No: 6:16-cv-1369-Orl-41GJK**

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

Respondents.
_____/

ORDER

THIS CAUSE is before the Court on a Petition for Writ of Habeas Corpus ("Petition," Doc. 1) filed under 28 U.S.C. § 2254 on July 29, 2016. In compliance with this Court's Order (Doc. 13), Respondents filed a Response to the Petition. ("Response," Doc. 22). Petitioner filed a Reply to the Response ("Reply," Doc. 28), and it is ripe for review. For the reasons set forth below, each of Petitioner's claims will be denied.

I. PROCEDURAL HISTORY

On September 8, 2010, the State of Florida charged Petitioner by amended information with one count of burglary of an occupied dwelling, in violation of Florida Statute §§ 810.02(3)(a) and 810.02(1) (count one) and one count of grand theft of items valued at $20,000 or more, in violation of Florida Statute § 812.014(2)(b) (count two). (Doc. 24-1 at 5). A jury found Petitioner guilty as charged. (*Id.* at 951-52). The trial court sentenced Petitioner as a violent career criminal to forty years in prison on count one and to a concurrent term of thirty years in prison on count two. (*Id.* at 959-65). Florida's Fifth District Court of Appeal ("Fifth DCA") *per curiam* affirmed

Petitioner's convictions and sentences without a written opinion. (Doc. 24-2 at 66); *Joe v. State*, 77 So. 3d 197 (Fla. 5th DCA 2011).

Between April 16, 2012 and March 23, 2013, Petitioner filed several motions for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure (collectively, "Rule 3.850 Motion"). (Doc. 24-2 at 70, 125, 203, 247). The post-conviction court summarily denied five claims in the Rule 3.850 Motion and set an evidentiary hearing on the remaining five claims. (*Id.* at 278). After holding an evidentiary hearing, the post-conviction court denied the remaining claims. (*Id.* at 496). On November 24, 2015, Florida's Fifth DCA *per curiam* affirmed without a written opinion. (*Id.* at 558); *Joe v. State*, 179 So. 3d 336 (Fla. 5th DCA 2015).

On April 26, 2012, Petitioner filed a state petition for writ of habeas corpus in which he raised two claims of ineffective assistance of appellate counsel. (Doc. 24-2 at 562). On October 5, 2012, Florida's Fifth DCA denied the petition. (Doc. 24-3 at 55).

II. LEGAL STANDARDS

A. 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). This standard is both mandatory and difficult to meet. *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014). Notably, a state court's violation of state law is not sufficient to show that a petitioner is in custody in violation of the "Constitution or laws or treaties of the United States." 28 U.S.C. § 2254; *Wilson v. Corcoran*, 562 U.S. 1, 16 (2010).

"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 issued its decision. *White*, 134 S. Ct. at 1702; *Carey v. Musladin*, 549 U.S. 70, 74 (2006) (citing *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). That said, the Supreme Court has also explained that "the lack of a Supreme Court decision on nearly identical facts does not by itself mean that there is no clearly established federal law, since 'a general standard' from [the Supreme Court's] cases can supply such law." *Marshall v. Rodgers*, 133 S. Ct. 1446, 1449 (2013) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). State courts "must reasonably apply the rules 'squarely established' by [the Supreme] Court's holdings to the facts of each case." *White*, 134 S. Ct. at 1706 (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009)).

Even if there is clearly established federal law on point, habeas relief is only appropriate if the state court decision was "contrary to, or an unreasonable application of," that federal law. 29 U.S.C. § 2254(d)(1). 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 (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 (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 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 fair-minded disagreement." *White*, 134 S. Ct. at 1702 (quoting *Harrington v. Richter*, 562 U.S. 86 (2011)).

Notably, even when the opinion of a lower state post-conviction court contains flawed reasoning, the federal court must give the last state court to adjudicate the prisoner's claim on the merits "the benefit of the doubt." *Wilson v. Warden, Ga. Diagnostic Prison*, 834 F.3d 1227, 1235 (11th Cir. 2016), *cert granted Wilson v. Sellers*, No. 16-6855, 137S. Ct. 1203 (2017). 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). Therefore, to determine which theories could have supported the state appellate court's decision, the federal habeas court may look to a state post-conviction court's previous opinion as one example of a reasonable application of law or determination of fact; however, the federal court is not limited to assessing the reasoning of the lower court. *Wilson*, 834 F.3d at 1239.

Finally, when reviewing a claim under § 2254(d), 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); *Burt v. Titlow*, 134 S. Ct. 10, 15 (2013) ("[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.") (quoting *Wood v. Allen*, 558 U.S. 290, 293 (2010)).

B. Ineffective Assistance of Counsel

In *Strickland v. Washington*, the Supreme Court established a two-part test for determining whether a convicted person is entitled to relief on the ground that his counsel rendered ineffective assistance. 466 U.S. 668, 687-88 (1984). A petitioner must establish that counsel's performance was deficient and fell below an objective standard of reasonableness and that the deficient

performance prejudiced the defense. *Id.* This is a "doubly deferential" standard of review that gives both the state court and the petitioner's attorney the benefit of the doubt. *Burt*, 134 S. Ct. at 13 (citing *Cullen v. Pinholster*, 131 S. Ct. 1388, 1403 (2011)).

The focus of inquiry under *Strickland*'s performance prong is "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688-89. In reviewing counsel's performance, a court must adhere to a strong presumption that "counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. The petitioner must "prove, by a preponderance of the evidence, that counsel's performance was unreasonable[.]" *Jones v. Campbell*, 436 F.3d 1285, 1293 (11th Cir. 2006). A court must "judge the reasonableness of counsel's conduct on the facts of the particular case, viewed as of the time of counsel's conduct," applying a "highly deferential" level of judicial scrutiny. *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000) (quoting *Strickland*, 466 U.S. at 690).

Petitioner's burden to demonstrate *Strickland* prejudice is also high. *Wellington v. Moore*, 314 F.3d 1256, 1260 (11th Cir. 2002). Prejudice "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. That is, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

III. ANALYSIS

Petitioner raises nine grounds in the Petition. He asserts that trial counsel Saul Baran ("Counsel") was constitutionally ineffective for failing to: (1) challenge Petitioner's illegal interrogation, detention, and arrest; (2) ensure that Raymond Jones testified at trial; (3) argue that the state had not proven the value of the stolen items; (4) present exculpatory shoeprint evidence;

(5) have Petitioner evaluated to ensure his competency to stand trial; (6) file a written motion to disqualify the trial judge; and (7) proffer crucial impeachment evidence of the state's key witness. (Doc. 1 at 4-19). He also alleges that the trial court erred when it denied Counsel's request for the inclusion of a jury instruction on trespass. (*Id.* at 10). Finally, he asserts that appellate counsel was ineffective for failing to argue on direct appeal that Petitioner was denied his constitutional right to effectively cross-examine the state's key witness. (*Id.* at 15).

Petitioner's claims alleging ineffective assistance of trial counsel were raised in his Rule 3.850 Motion, denied by the post-conviction court, and affirmed by Florida's Fifth DCA without a written opinion. (Doc. 24-2 at 558). Petitioner's claim of trial court error was raised on direct appeal and affirmed by Florida's Fifth DCA without a written opinion. (*Id.* at 66). The claim of ineffective assistance of appellate counsel was raised in Petitioner's state habeas petition and denied by Florida's Fifth DCA without a written opinion. (Doc. 24-3 at 55). Accordingly, each ground is exhausted. The appellate court's silent affirmances and rejection of Petitioner's habeas petition are entitled to deference, and this Court must determine whether any arguments or theories could have supported the appellate court's decisions. *Wilson*, 834 F.3d at 1235.

Each ground will be addressed below.

A. Ground One

Petitioner asserts that Counsel was ineffective for failing file a motion to suppress the physical evidence used to convict him. (Doc. 1 at 5). Petitioner urges that the evidence found in a storage shed located behind the residence in which he was staying with his sister, brother-in-law, and nephew was "fruit of the poisonous tree" because he was illegally arrested by the police. (Doc. 10 at 1-10). Petitioner raised this claim in his Rule 3.850 Motion, and it was summarily denied by the post-conviction court because the police had obtained independent permission from the owner

of the house to search the premises. (Doc. 24-2 at 279). Florida's Fifth DCA affirmed without a written opinion. (*Id.* at 558). Ground One is without merit.

Prior to trial, Counsel filed two motions to suppress. In the first motion, Counsel urged that Petitioner's statements to the police must be suppressed because they were obtained without an intelligent waiver of his right to counsel. (Doc. 24-1 at 6). In the second motion, Counsel sought to suppress the physical evidence recovered from a backyard and a shed belonging to Petitioner's sister on the grounds that Petitioner had an expectation of privacy in the shed, had not given police permission to search it, and police did not have a search warrant. (*Id.* at 9). After conducting an evidentiary hearing on the motions, the trial court concluded that the home's actual owner and the owner's son had both given the police permission to search the home and the shed where most of the items at issue were found. (*Id.* at 434-35). Accordingly, the trial court denied Petitioner's motion to suppress the physical evidence. (*Id.* at 435-36). The court further determined that Petitioner's motion to suppress his statements to the police was moot because the "state has placed on the record they do not intend to use any of those statements in its case in chief." (*Id.* at 438-39).

Reasonable competent counsel could have decided against challenging the legality of Petitioner's arrest because doing so would not have resulted in the exclusion of the evidence seized from the storage shed. The mere fact that evidence is discovered after illegal conduct by a police officer is, standing alone, an insufficient basis for suppression of that evidence. Instead the evidence "in some sense [must be] the product of illegal government activity." *Nix v. Williams*, 467 U.S. 431, 443 (1984). Evidence is admissible if the state can show that it was obtained by "means wholly independent of any constitutional violation." *Id.* In the instant case, the police received permission from the home's actual owner and her son to search the house. (Doc. 24-1 at 204, 206, 242, and 243). There is no evidence to suggest that the home's owner would have refused consent to the search if Petitioner had not been arrested or that the police used Petitioner's arrest

to obtain her consent.[1] Thus, even if Petitioner's arrest was illegal, the owner's consent removed the taint of the arrest, making the items taken from the backyard admissible at trial. *See Jackson v. State*, 1 So. 3d 273, 279 (Fla. 1st DCA 2009) (noting, on facts similar to those alleged here, that evidence is admissible if it is discovered independently of any unlawful police activity); *Teart v. State*, 26 So. 3d 644 (Fla. 1st DCA 2010) ("[T]he illegality of the initial detention is not sufficient for a successful motion to suppress because the taint of evidence seized incident to an illegal detention may be purged based upon intervening circumstances[.]"). Under these circumstances, Counsel was not deficient for failing to seek suppression of the evidence based on Petitioner's arrest. The state courts' rejection of Ground One was neither contrary to *Strickland* nor based upon an unreasonable determination of the facts. Ground One is denied. 28 U.S.C. § 2254(d).

B. Ground Two

Petitioner asserts that Counsel was ineffective for failing to call Raymond Jones to testify that he and a friend had witnessed someone other than Petitioner with the victims' stolen property. (Doc. 1 at 7).[2] Petitioner raised this claim in his Rule 3.850 Motion, and after holding an evidentiary hearing, the post-conviction court determined:

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[1] To the contrary, after the police searched the house, the owner performed her own search, found additional stolen items, and turned them over to the police. (Doc. 24-1 at 243-44). Moreover, Petitioner received a "full and fair" hearing on the issue of whether the police had valid consent to search his sister's property. He raised the issue in a pre-trial motion, a hearing was held, the motion was denied by the trial court, Petitioner appealed, and the denial was affirmed by Florida's Fifth DCA. (Doc. 24-1 at 6, 11, 434; Doc. 24-2 at 30, 66). Fourth Amendment claims are generally barred from collateral review by the federal courts if they were fully and fairly litigated in the state courts. *Stone v. Powell*, 428 U.S. 465 (1976). Accordingly, the issue of the voluntariness of the consent "may not be reexamined" by this Court because the state courts gave the claim a "full, fair hearing and consideration to [the] question." *Hedden v. Wainwright*, 558 F.2d 784, 786 (5th Cir. 1977).

[2] Petitioner does not explain this claim in the instant habeas petition. However, at the evidentiary hearing on Petitioner's Rule 3.850 Motion, Petitioner testified that Counsel had not called Jones to testify even though the police had discovered Jones in possession of the victim's stolen cell phone and Jones told the police that he had purchased the phone from a person named

> Evaluating the evidence under the totality of circumstances suggests that there was an informed conscious decision by trial counsel not to call Mr. Jones to the stand as the potential detriment to Defendant's case was greater than the benefit that would have been achieved. Trial counsel testified that he felt that the most important part of Mr. Jones' testimony was elicited through his cross examination of Detective Carter. Detective Carter testified that Mr. Jones did not obtain the victim's property from the Defendant, implying someone else possessed the victim's property and it is possible that this unknown person actually committed the burglary. The Court finds that this is a classic case of strategic decision and the cross examination testimony by Detective Carter was "good enough." No evidence was presented that would call into question trial counsel's decision.

(Doc. 24-2 at 497). Florida's Fifth DCA affirmed without a written opinion. (*Id.* at 558). A review of the record supports the state courts' rejection of Ground Two.

First, although Petitioner now argues that Raymond Jones' testimony would have been helpful to his case, he has not provided evidence to support this assertion. Specifically, he has not produced a sworn statement of Jones' putative testimony. Consequently, the claim is too speculative to warrant relief. *See Johnson v. Alabama*, 256 F.3d 1156, 1187 (11th Cir. 2001) ("Johnson offers only speculation that the missing witnesses would have been helpful. This kind of speculation is 'insufficient to carry the burden of a habeas corpus petitioner.'") (quoting *Aldrich v. Wainwright*, 777 F.2d 630, 636 (11th Cir. 1985)); *see also United States v. Ashimi*, 932 F.2d 643, 650 (7th Cir. 1991) ("[E]vidence about the testimony of a putative witness must generally be presented in the form of actual testimony by the witness or on affidavit. A defendant cannot simply state that the testimony would have been favorable; self-serving speculation will not sustain an ineffective assistance claim.").

"Banjo" who also possessed some jewelry. (Doc. 24-2 at 18). Presumably, this is the issue raised in Ground Two. To the extent Petitioner attempts to raise a new claim, it is dismissed as unexhausted.

Next, reasonable strategic decisions by trial counsel do not constitute ineffective assistance. *Strickland*, 466 U. S. at 673. "Which witnesses, if any, to call . . . is the epitome of a strategic decision, and it is one that [a reviewing court] will seldom, if ever, second guess." *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995). As noted by the post-conviction court, Counsel testified at the evidentiary hearing that he was able to get any helpful information to which Jones would have testified before the jury through the testimony of other witnesses. (Doc. 24-2 at 432). Counsel said that it was clear from video evidence that Jones was not the burglar, but he did not want Jones to testify "[s]o the jury could not see what he looked like to know that it wasn't him on the video." (*Id.* at 433). In other words, Counsel did not want "the jury to see [Jones] [and] rule him out as a potential suspect for the burglary." (*Id.* at 481). Counsel's decision to present Jones' testimony through other witnesses was within the realm of reasonable competent representation. The state courts' rejection of Ground Two was neither contrary to *Strickland* nor based upon an unreasonable determination of the facts. Ground Two is denied.

C. Ground Three

Petitioner was charged with stealing property valued at $20,000 or more. (Doc. 24-1 at 6). Petitioner asserts that Counsel was ineffective for failing to argue that the state did not prove that the value of the stolen items exceeded $20,000. (Doc. 1 at 8). In denying this claim, the post-conviction court determined that "[e]vidence was presented that the victim valued one piece of the multiple pieces of property stolen between $24,000 and $28,000. . . . [T]he Court finds that the victim's testimony is sufficient to support [the] charge of grand theft and conviction." (Doc. 24-2 at 497) (citing *C.G. v. State*, 123 So. 3d 680 (Fla. 5th DCA 2013)). Florida's Fifth DCA affirmed. (Doc. 24-2 at 558). A review of the record supports the state courts' rejection of Ground Three.

When asked at trial about the value of her stolen jewelry, the victim testified that the most expensive item stolen was a "pair of Heart and Fire diamond earrings . . . valued at between 24

and $28,000." (Doc. 24-1 at 532). The victim also testified as to the value of a stolen computer, a Rolex watch, her Coach purse, cash, and several other items of jewelry. (*Id.*). Because it is well established under Florida law that "[t]he owner of stolen property is competent to testify as to the fair market value of the property," Counsel was not ineffective for failing to argue that the state had not proven the value element of the grand-theft charge. *C.G.*, 123 So. 3d at 682; *see also Taylor v. State*, 425 So. 2d 1191, 1193 (Fla. 1st DCA 1983) ("[A]n owner is generally presumed as competent to testify to the value of his stolen property."). The state courts' conclusion that Counsel's performance was not constitutionally deficient was neither contrary to *Strickland* nor based upon an unreasonable determination of the facts. Ground Three is denied.

D. Ground Four

Petitioner asserts that the trial court erred when it denied his request to include a jury instruction for the lesser-included offense of trespassing. (Doc. 1 at 10). Petitioner argues that the instruction was required under Florida law because the information alleged the elements of trespassing, and evidence was adduced at trial establishing those elements. (*Id.*). Petitioner raised this claim on direct appeal, and it was rejected by Florida's Fifth DCA. (Doc. 24-2 at 34, 66).

Petitioner does not explain how the state court's rejection of this claim was contrary to clearly established federal law, as determined by the United States Supreme Court. Rather, he merely urges that "[t]he trial court violated the Due Process Clause by failing to follow state law procedure." (Doc. 28 at 9). The Supreme Court has not held that constitutional due-process entitles defendants in non-capital cases to lesser-included offense instructions. To the contrary, in *Beck v. Alabama*, the Court concluded that "we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process." 447 U.S. 625, 637 (1980).

Thus, even assuming that the evidence warranted a lesser-included-offense instruction, the trial judge's decision to deny Petitioner's request for such was not "contrary to, and [did not

involve] an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d); *see also Sabillo v. Sec'y, Dep't of Corr.*, 355 F. App'x 346, 349 (11th Cir. 2009) (noting that, because the Supreme Court has never determined that due process requires the reading of lesser-included jury instructions in non-capital cases, the petitioner is not entitled to federal habeas relief). Ground Four is denied.

E. Ground Five

Petitioner asserts that Counsel was ineffective for failing to present evidence that a size eleven shoe print was found in the victim's home and that Petitioner wears a size twelve shoe. (Doc. 1 at 11). Petitioner raised this claim in his Rule 3.850 motion, and after listening to testimony from Petitioner and Counsel at the evidentiary hearing, the post-conviction court orally denied the claim because Petitioner had not met his burden of showing that shoe print evidence ever existed. (Doc. 24-2 at 487). In its written order, the post-conviction court determined that there was no evidence of a shoe print left by the burglar. (*Id.* at 496-97). The denial was affirmed by Florida's Fifth DCA. (*Id.* at 558).

It is unclear why Petitioner believes in the existence of an exculpatory shoe print.[3] Petitioner admitted at the evidentiary hearing that he had never actually seen the shoe print at issue, but noted that the detectives had seized a pair of his shoes—presumably, according to Petitioner, to compare the shoes to the alleged print. (Doc. 24-2 at 418-19). In contrast, Counsel testified that "[t]here was no shoe print – shoe print evidence in this case at all." (Doc. 24-2 at 429, 440, 446). Counsel also said that he asked the lead detective in the case about a shoe print, and the detective said that there was no shoe print. (*Id.* at 442). Finally, the state prosecutor stated at the hearing that

[3] The victim may have told the police that a surveillance video showed a black man with a size eleven shoe. (Doc. 24-2 at 388). However, it appears that the victim was just guessing about the shoe size as nothing in the record suggests that an actual shoe print was ever found.

conduct and the evidence raises a "bona fide doubt" regarding the defendant's competence to stand trial.). In order to properly allege ineffective assistance for a defense attorney's failure to raise a competency issue, Petitioner "must allege specific facts showing that a reasonably competent attorney would have questioned [his] competence to proceed." *Thompson v. State*, 88 So. 3d 312, 319 (Fla. 4th DCA 2012)

At the evidentiary hearing, Petitioner testified that he has suffered mental health issues since 1995 and that Counsel knew about the issues because he had represented Petitioner "at least three times before -- previously on other cases." (Doc. 24-2 at 405). Petitioner claimed that he could not understand anything that happened during his trial. (*Id.* at 403). In contrast, Counsel testified that he represented Petitioner only once before and that the prior case had resulted in a plea. (*Id.* at 437). Although Counsel could not remember whether he had ordered a mental examination in the prior case, he insisted that if he "had done a mental exam and it came back that [Petitioner] was incompetent, [he] would not have allowed him to plea." (*Id.*). Counsel testified that Petitioner understood the charges against him, was able to keep the facts of each of his six separate burglary cases straight, and there was nothing making him believe there was reason to move the trial court for a pretrial competency evaluation. (*Id.*). Counsel also said that he had spoken with Petitioner's sister and "she never indicated he was incompetent." (*Id.* at 453). He asserted that he asked both Petitioner's sister and his prior attorney about Petitioner's background, and that he would have asked for a mental exam if anything suggested incompetency. (*Id.* at 455). Petitioner admitted that he never told the trial court that he believed he was incompetent. (*Id.* at 416). By rejecting Ground Six, the post-conviction court implicitly found Counsel's testimony to be more credible than Petitioner's testimony. [4]

[4] The credibility determination is a finding of fact entitled to deference by this Court. *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983) (a habeas court has "no license to redetermine

Nothing in the record approaches the threshold of raising a bona fide doubt about Petitioner's competency. Accordingly, Counsel's performance was not constitutionally deficient. Moreover, under *Strickland*, a showing of prejudice requires evidence that Petitioner was actually incompetent during the relevant time period. *Futch v. Dugger*, 874 F.2d 1483, 1487 (11th Cir. 1989) ("In order to demonstrate prejudice from counsel's failure to investigate his competency, [a] petitioner has to show that there exists 'at least a reasonable probability that a psychological evaluation would have revealed that he was incompetent to stand trial.'") (quoting *Alexander v. Dugger*, 841 F.2d 371, 375 (11th Cir. 1988)). Other than his own self-serving statements, Petitioner presents no evidence showing that, even had Counsel requested a competency hearing, one would have been granted or that he would have been found incompetent to proceed. Petitioner cannot satisfy the second prong of *Strickland* with mere speculation and conjecture. *Bradford v. Whitley*, 953 F.2d 1008, 1012 (5th Cir. 1992). This claim fails to satisfy either *Strickland* prong and is denied pursuant to 28 U.S.C. § 2254(d).

G. Ground Seven

Petitioner asserts that Counsel was ineffective for failing to file a written motion to have the trial judge disqualified. (Doc. 1 at 14). Petitioner claims that the trial judge may have represented one of the victims in a land deal, and that Counsel orally objected to the judge presiding over his trial. (*Id.*). However, the judge refused to recuse himself. (*Id.*). Petitioner urges that Counsel was constitutionally ineffective for failing to make a written motion for recusal. (*Id.*). Petitioner raised this claim in his Rule 3.850 Motion, and the post-conviction court rejected it on the ground that Petitioner could not demonstrate prejudice since any motion to disqualify based on

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credibility of witnesses whose demeanor has been observed by the state trial court, but not by them.").

the alleged bias would not have been successful. (Doc. 24-2 at 282). Florida's Fifth DCA affirmed. (Doc. 24-2 at 558). A review of the record supports the rejection of Ground Seven.

At issue is the following exchange between the state prosecutor, Counsel, and the trial judge:

STATE: Judge Johnson, was our understanding, was going to be the original judge handling this case. He had a conflict. It's my understanding the victims in the case knew Judge Johnson –

COURT: Yeah.

STATE: And they know a few of the other judges in town.

So we just wanted to make sure that you are aware of who the victims were and that –

COURT: Yes.

Well, over my – over my 40 years in practicing law and as a judge, I may have run into him. I don't think he would know me if I walked down the street. I know the name. I believe maybe when I was in practice 20 years ago, I might have a real estate closing where he was involved.

But I don't think he knows me, and I have never had any social dealings or any really business dealings with him.

STATE: Okay. I just wanted to make sure all up front before we started picking a jury and everything.

COUNSEL: So you've had a real estate transaction with him?

COURT: Forty years ago, I think. I'm not even positive about that.

COUNSEL: Mr. Joe wants to object on that basis.

COURT: I'm sorry?

COUNSEL: Mr. Joe wants to object on that basis then, Your Honor.

COURT: Well . . .

STATE: Judge, I certainly don't think that any real estate dealing you may have had 40 years ago, it doesn't sound like you necessarily know the –

COUT: I'm not sure if I even spoke with him. I think it involved one of his hotels, and I'm not even – I may have had a brief conversation with him by phone, but I believe he was represented by an attorney.

So, I'm not – and I'm not sure I would even know him if he walked down the street, so I'm not going to take myself off the case for that.

. . .

COURT: Can I make something real clear on the last thing.

I didn't represent him, Mr. Staed, in any way.

COUNSEL: You were representing the other party?

COURT: I was representing – as my memory goes, I was representing another party and it had to do with maybe a parking lot my – my client may have bought, he may have been one of the principals and I just remember that name.

STATE: Thank you.

(Doc. 24-2 at 370-72). Notably, the judge did not represent the victim as Petitioner now alleges, and Counsel *did* object to the trial judge's failure to recuse. Reasonable competent counsel could have decided that filing a separate written motion on the same ground would have been futile since the judge had already denied the oral motion.

In addition, Petitioner is not entitled to habeas relief because he has not demonstrated facts showing "an unconstitutional probability of bias." *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 887 (2009).[5] Rather, the only facts offered by Petitioner regarding the judge's potential bias is that the judge "may" have represented someone, four decades earlier, who had a business

[5] Nor has Petitioner even alleged that the trial court was actually biased against him or that this bias affected the outcome of his trial.

deal with the husband of one of Petitioner's victims. This attenuated link is insufficient to show an objectively reasonable fear of bias that would "would place a reasonably prudent person in fear of not receiving a fair and impartial trial." *Arbelaez v. State*, 898 So. 2d 25, 41 (Fla. 2005). "A mere 'subjective fear[ ]' of bias will not be legally sufficient; rather, the fear must be objectively reasonable." *Arbelaez*, 898 So.2d at 41 (quoting *Fischer v. Knuck*, 497 So.2d 240, 242 (Fla. 1986)). Petitioner has satisfied neither *Strickland* prong, and Ground Seven is denied.

H. Ground Eight

Petitioner asserts that appellate counsel was ineffective for failing to argue on direct appeal that the trial court erred when it did not allow him to cross examine a key witness about the witness' arrest for using and possessing illegal prescription narcotics. (Doc. 1 at 15). Petitioner notes that Detective Robert Carter, who investigated his case, was terminated from the Daytona Beach Police Department after the investigation, but before Petitioner's trial. (*Id.*). Prior to trial, the state filed a motion in limine seeking to preclude the defense from impeaching Carter with questions regarding his "current employment status or why he is no longer employed with the Daytona Beach Police Department[.]" (Doc. 24-2 at 606). The state noted that that "[t]here are no criminal charges pending against Mr. Carter at this time and he has not been convicted of any crime." (*Id.*). After hearing argument from both sides at a pre-trial hearing, the trial court granted the state's motion in limine. (*Id.* at 610). Appellate counsel did not appeal the trial court's order, and Petitioner urges that her failure to do so was constitutionally ineffective. Petitioner raised this claim in his state habeas petition, and it was summarily denied by Florida's Fifth DCA. (Doc. 24-2 at 558). A review of the record supports the state courts' rejection of Ground Eight.

In *State v. Bullard*, 858 So. 2d 1189 (Fla. 2d DCA 2003), Bullard urged that the state's primary witness against him had been suspended by the Pinellas County Sheriff's Office after an Internal Affairs investigation determined that he had lied to the public. Bullard argued that Internal

Affairs investigations are relevant and admissible impeachment evidence. Florida's Second DCA disagreed that the evidence was admissible, noting:

> Bullard argues that the evidence would have been admissible to impeach Deputy Broome by demonstrating bias or that he had a motive to testify as he did. While a defendant in a criminal case has a right to cross-examine a prosecution witness to show bias or motive to be untruthful, that right has limits. Courts have allowed cross-examination on Internal Affairs investigations where the investigation arose from the same incident as the defendant's criminal charges or, if a defendant claims an officer used excessive force, investigations involving prior incidents of excessive force, but they have refused to allow such evidence when the investigation is completely unrelated to the defendant's case. The investigation that resulted in Deputy Broome's suspension did not arise from the same incident as Bullard's criminal charges and it did not involve the use of excessive force. Because it was completely unrelated to Bullard's case, it would not have been admissible.

Id. at 1191-92 (internal citation omitted). As in *Bullard*, the Internal Affairs investigation against Detective Carter was completely unrelated to Petitioner's case. Accordingly, reasonable competent appellate counsel could have determined that appealing the trial court's decision on this issue was futile. *See Breedlove v. State*, 580 So. 2d 605, 609 (Fla. 1991) (recognizing that the investigation of a prosecution witness is not relevant "when the conduct and investigations are totally unrelated to the case at bar."); *State v. Pettis*, 520 So. 2d 250, 253 (Fla. 1988) (finding that the trial judge erred when it permitted the police officer to be questioned concerning unrelated reprimands). Ground Eight fails to satisfy *Strickland*'s performance prong, and the claim is denied.

I. Ground Nine

Petitioner asserts that trial counsel was ineffective for failing to proffer evidence that Detective Carter was actually using illegal prescription narcotics "before, during, and after the investigation of the case." (Doc. 1 at 16). Ground Nine is directed towards the trial court's decision not to allow Counsel to question Detective Carter about the reasons he was terminated from the Daytona Beach Police Department. *See* discussion *supra* Ground Eight. As noted in the discussion

on Ground Eight, the state filed a pre-trial motion in limine seeking to prevent Counsel from questioning Detective Carter about the reasons he was terminated. At the hearing on the pre-trial motion in limine, Counsel argued that he should be allowed to impeach Detective Carter's testimony with the reasons for the detective's termination:

> As you know, a police officer testifying usually has more credibility than a lay witness simply because they're a police officer. I think the Jury needs to know he's no longer a police officer, why he's no longer a police officer.
>
> He was fired because he was committing felonies while he was a police officer in violation of Department police. And any witness who testifies is going to always be shown to have a bias for one party or the other. Clearly the State can prosecute Mr. Carter now, we have a three-year Statute of Limitations. Just because there is no prosecution now does not mean he can't be prosecuted. He has bias for the State to curry favor for them. Defense should be given great latitude in the cross-examination of the witness regarding that.

(Doc. 24-1 at 485-86). The prosecutor disagreed with Counsel's argument, noting that the appellate courts "have refused to allow such evidence when the investigation is completely unrelated to the Defendant's case." (*Id.* at 486) (citing *Bullard*). The trial court granted the state's pre-trial motion in limine and prohibited Counsel from questioning Detective Carter about why he was terminated from his employment with the Daytona Beach Police Department. (*Id.*).

Thereafter, Petitioner urged in his Rule 3.850 Motion that Counsel was ineffective for failing to proffer the evidence of Detective Carter's drug use. Presumably, Petitioner believes that, had Counsel proffered the evidence, the trial court would have reversed its ruling and allowed Counsel to attack Carter's credibility with evidence that he was fired from the police department because of his drug use. The post-conviction court rejected the claim because the motion in limine specifically addressed this issue, and "[t]he trial court prohibited [Counsel] from introducing [the] impeachment evidence" that Petitioner now urges. The post-conviction court determined that it

would have been improper for Counsel "to elicit such evidence in light of the trial court's prohibition[.]" (Doc. 24-2 at 498). Florida's Fifth DCA affirmed. (Doc. 24-2 at 558).

When denying this claim, the post-conviction court specifically held that any attempt by Counsel to proffer evidence of Detective Carter's drug use would have been improper. (Doc. 24-2 at 498). For this Court to now determine that Petitioner can demonstrate deficient performance under *Strickland*, it would have to first conclude that the post-conviction court misinterpreted or misapplied state law when it rejected this claim. State courts, not federal courts on habeas review, are the final arbiters of state law. *See Agan v. Vaughn*, 119 F.3d 1538, 1549 (11th Cir. 1997) ("state courts are the final arbiters of state law, and federal habeas courts should not second-guess them on such matters."); *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) ("We have repeatedly held that a state court's interpretation of state law . . . binds a federal court sitting in habeas corpus."). Moreover, given that Petitioner was identified as the robber by two separate witnesses—one of whom was his sister—there is no reasonable probability that the jury would have acquitted Petitioner of the robbery, even had it known of Detective Carter's alleged drug use. Ground Nine fails to satisfy either *Strickland* prong, and Petitioner is not entitled to federal habeas relief.

Any of Petitioner's allegations not specifically addressed herein have been found to be without merit. Because the petition is resolved on the record, an evidentiary hearing is not warranted. *See Schriro v. Landrigan*, 550 U.S. 465, 474 (2007).

IV. CERTIFICATE OF APPEALABILITY

A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253(c)(1). Rather, a district court must first issue a certificate of appealability ("COA"). "A [COA] 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 make such a showing, Petitioner must demonstrate that "reasonable jurists would find the district court's

assessment of the constitutional claims debatable or wrong," *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)), or that "the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller–El v. Cockrell*, 537 U.S. 322, 335–36 (2003). Petitioner has not made the requisite showing in these circumstances.

Because Petitioner is not entitled to a certificate of appealability, he is not entitled to appeal *in forma pauperis*.

Accordingly, it is hereby **ORDERED** and **ADJUDGED** as follows:

1. The 28 U.S.C. § 2254 petition for habeas corpus relief filed by Timothy L. Joe is **DENIED**, and this case is dismissed with prejudice.
2. Petitioner is **DENIED** a certificate of appealability.
3. The Clerk of Court is directed to terminate any pending motions, enter judgment accordingly, and close this case.

DONE and **ORDERED** in Orlando, Florida on April 10, 2018.

CARLOS E. MENDOZA
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party
SA: OrlP-4

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U.S. District Court
Middle District of Florida

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Docket Text:
ORDER dismissing case with prejudice and denying [1] Petition for writ of habeas corpus. Petitioner is DENIED a certificate of appealability. The Clerk of Court is directed to terminate any pending motions, enter judgment accordingly, and close this case. Signed by Judge Carlos E. Mendoza on 4/10/2018. (DJD)

6:16-cv-01369-CEM-GJK Notice has been electronically mailed to:
Linda Charlene Matthews Linda.Matthews@myfloridalegal.com, CrimAppDAB@MyFloridaLegal.com, martina.wolfe@myfloridalegal.com

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Timothy L. Joe
#593575
Martin Correctional Institution
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APPENDIX C

ORDER DENYING CERTIFICATE OF APPEALIBILITY

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-12322-C

TIMOTHY L. JOE,

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:

Timothy L. Joe, a Florida prisoner serving a 40-year total sentence for burglary of an occupied dwelling and grand theft over $20,000, appeals the district court's denial of his *pro se* 28 U.S.C. § 2254 habeas corpus petition, in which he raised nine claims for relief. Joe moves this Court for a certificate of appealability ("COA") and leave to proceed *in forma pauperis* ("IFP") on appeal. Specifically, Joe seeks a COA on four issues:

1. whether his trial counsel was ineffective for failing to move to suppress evidence seized from a storage shed based on his illegal detention, interrogation, and arrest;

2. whether his trial counsel was ineffective for failing to file a written motion to have the trial judge disqualified for bias;

3. whether his appellate counsel was ineffective for failing to raise on direct appeal that the trial court violated the Confrontation Clause by limiting his ability to impeach Detective Robert Carter on cross-examination; and

4. whether his trial counsel was ineffective for failing to proffer impeachment evidence related to Detective Carter's drug use and dismissal from the Daytona Beach Police Department

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

As to Joe's first claim, reasonable jurists would not debate the state court's denial of this claim. Joes's sister, who owned the property in question, gave actual consent for the police to search the shed in her backyard. As a result, Joe cannot show prejudice from his counsel's failure to challenge whether Joe was unlawfully "arrested" when he agreed to accompany police to the station prior to the search. *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986) (holding that, where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence).

Similarly, reasonable jurists would not debate the state court's denial of Joe's second claim. Counsel's decision not to file a duplicative written motion after the trial court denied his oral motion to disqualify the trial judge was not unreasonable. *See United States v. Freixas*, 332 F.3d 1314, 1319–20 (11th Cir. 2003) (holding that, to show deficient performance, a defendant must demonstrate that no competent counsel would have taken the action that counsel did take).

Finally, reasonable jurists would not debate the state court's denials of Claims 3 and 4. It was within the trial judge's authority to limit cross-examination that was only marginally relevant. *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) ("[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on . . . cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant."); *see also Francis v. Dugger*, 908 F.2d 696, 701-02 (11th Cir.1990) (holding on habeas review that a trial court did not violate the Confrontation Clause by prohibiting a defendant from asking a state witness about a pending unrelated murder charge because it was only "marginally relevant" to the case at bar). Additionally, Joe's counsel was not ineffective for failing to proffer evidence impeachment evidence that was inadmissible under Florida law because Detective Carter's firing for illegal drug use was unrelated to Joe's case. *See Breedlove v. State*, 580 So. 2d 605, 608 (Fla. 1991) (stating that, in order to impeach a state witness with evidence that the witness is under criminal investigation, the investigation must be related to the case at hand to be relevant).

Accordingly, Joe's motion for a COA is DENIED. Joe's motion for leave to proceed IFP on appeal is DENIED AS MOOT.

UNITED STATES CIRCUIT JUDGE

APPENDIX D

ORDER DENYING REHEARING

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-12322-C

TIMOTHY L. JOE,

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: TJOFLAT and BRANCH, Circuit Judges.

BY THE COURT:

Timothy L. Joe has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's order dated January 24, 2019, denying his motions for a certificate of appealability and leave to proceed *in forma pauperis* in order to appeal the district court's denial of his *pro se* 28 U.S.C. § 2254 habeas corpus petition. Because Joe 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.