IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11473

MATTHEW A. CASTRO,

Petitioner-Appellant,

versus

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

Respondent-Appellee.

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

ORDER:

Matthew A. Castro, a Florida prisoner serving a life sentence for first-degree murder, seeks a certificate of appealability from the District Court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. He also seeks leave to proceed in forma pauperis. This order DENIES the certificate of appealability and DENIES AS MOOT his motion to proceed in forma pauperis.

I. FACTUAL BACKGROUND

Mr. Castro was part of a drug deal gone wrong. Later that same day, he took a gun and went to a hotel where he believed the other party to the deal was staying. He began knocking on doors. Lance Ulland opened one a few doors in. Mr. Castro asked Mr. Ulland if he had been in the parking lot earlier. Mr. Ulland said yes. Mr. Castro then put his gun to Mr. Ulland's head and shot him.

Three people, all staying in Mr. Ulland's hotel room, witnessed the shooting. Stevi Smith, Mr. Ulland's cousin, heard a knock on the door and saw Mr. Castro shoot her cousin when he opened it. Beau Smith, Stevi's sister and Mr. Ulland's other cousin, heard and saw the same things. Kayce Heinmiller, Mr. Smith's girlfriend, was asleep when Mr. Castro knocked. She awoke to the sound of the gunshot and saw Mr. Castro standing in the doorway. Another person staying in the room, Shawn Hall, was just outside when the shooting happened.

Officers arrived on scene and arrested Mr. Castro. One, Officer Dane, asked Mr. Castro where to find the gun. Mr. Castro initially balked but eventually revealed its location. In a post-arrest interview, Mr. Castro expressed remorse about the shooting before invoking his right to remain silent.

The State charged Mr. Castro with first-degree murder, which requires premeditation. Fla. Stat. § 782.04(1)(a)1. The case proceeded to trial. All three eyewitnesses testified, and all three identified Mr. Castro as the shooter. A

medical examiner testified Mr. Ulland had a contact gunshot wound to the head, consistent with someone putting a gun to Mr. Ulland's head.

The defense did not deny Mr. Castro shot Mr. Ulland. Instead, it advanced a theory that the shooting was accidental, the result of a muscle twitch in Mr. Castro's hand. It called a ballistics expert, Emanuel Kapelsohn, who testified to that effect. Mr. Castro took the stand in his own defense and testified that someone bumped him, causing his hand to twitch. The defense sought to elicit testimony about Mr. Castro's post-arrest statements expressing remorse, but the trial court excluded them as hearsay. The defense moved for a judgment of acquittal at the close of evidence. The court concluded there was enough evidence for a reasonable jury to find Mr. Castro premeditated the killing.

In closing argument, on top of summarizing the evidence, the prosecution used the gun and an autopsy photograph of Mr. Ulland's face to demonstrate how Mr. Castro would have shot Mr. Ulland. The defense objection was overruled.

The jury convicted Mr. Castro of first-degree murder. The trial judge imposed a life sentence. Fla. Stat. § 775.082(1)(a). On appeal, the Fifth District Court of Appeal affirmed without opinion. Castro v. State, 22 So. 3d 89 (Fla. 5th DCA 2009) (per curiam) (table).

II. PROCEDURAL BACKGROUND

Mr. Castro applied for postconviction relief in state court under Florida Rule of Criminal Procedure 3.850. He raised six claims:

- His counsel failed to provide Mr. Kapelsohn, the ballistics expert, with all relevant evidentiary materials;
- His counsel failed to object to the prosecution's acquisition of privileged information from Mr. Kapelsohn;
- His counsel failed to call four material witnesses at trial;
- His counsel failed to competently cross-examine the three eyewitnesses;
- His counsel failed to competently cross-examine the medical examiner;
- His counsel failed to object to the prosecution's improper questions and comments on his right to remain silent;

The trial court ordered an evidentiary hearing on the third claim and denied the others. After the evidentiary hearing, the trial court also denied the third claim. The Fifth District Court of Appeals affirmed the denial without opinion. Castro v. State, 138 So. 3d 465 (Fla. 5th DCA 2014) (table).

After exhausting the state postconviction process, Mr. Castro filed a petition for habeas corpus in federal District Court under 28 U.S.C. § 2254, raising the same six ineffective assistance of counsel claims. He also raised three claims he exhausted on direct appeal:

- The trial court erred by refusing to admit statements made in the post-arrest interview;
- The trial court erred by denying the motion for judgment of acquittal;
- The prosecution committed misconduct by demonstrating the way the shooting would have gone down in closing argument.

All told, he raised nine claims. As had the state courts, the District Court denied all of them. The District Court also denied a certificate of appealability. Mr. Castro now moves this Court for one. See 28 U.S.C. § 2253(c)(1).

III. STANDARD OF REVIEW

A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." Miller-El v. Cockrell, 537 U.S. 322, 327, 123 S. Ct. 1029, 1034 (2003); see 28 U.S.C. § 2253(c)(2). An applicant makes this showing "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El, 537 U.S. at 327, 123 S. Ct. at 1034.

On a § 2254 petition, a federal court may not grant habeas relief on any claim adjudicated on the merits in state court unless the state court's decision either "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 "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). Construing this standard, the Supreme Court has said a certificate of appealability should issue if "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 1603-04 (2000). If the most recent state-court decision does not explain its reasons for resolving the case the way it did, the federal court looks to "the last related state-court decision that does provide a relevant rationale" and "presume[s] the unexplained decision adopted the same reasoning." Wilson v. Sellers, __ U.S. __, 138 S. Ct. 1188, 1192 (2018).

IV. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Mr. Castro seeks a certificate of appealability from the District Court's ruling that the state postconviction court did not unreasonably apply federal law in rejecting Mr. Castro's six ineffective assistance of counsel claims. Under the familiar test from Strickland v. Washington, 466 U.S. 668, 694, 131 S. Ct. 733, 739 (1984), a defendant can prevail on an ineffective assistance claim by showing both that his "counsel's performance fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the

proceeding would have been different." Padilla v. Kentucky, 559 U.S. 356, 366, 130 S. Ct. 1473, 1482 (2010) (quotation marks omitted). Strickland creates a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," so "judicial scrutiny of counsel's performance must be highly deferential." Tanzi v. Sec'y, Fla. Dep't of Corrs., 772 F.3d 644, 652 (11th Cir. 2014) (quotation marks omitted).

a. Failure to Turn Over Discovery to Expert

First, Mr. Castro says his counsel was ineffective by failing to turn over all relevant discovery materials to the ballistics expert, Mr. Kapelsohn, who testified at trial that Mr. Castro likely experienced a muscle contraction that led to the shooting. The prosecution impeached Mr. Kapelsohn by showing he did not review one police investigative report, the statements of two witnesses who heard knocks on the door, the statements of the eyewitnesses, and the statement of one officer on the scene. Mr. Castro says his counsel should have given Mr. Kapelsohn this evidence.

Mr. Kapelsohn testified at trial that it did not matter which door Mr. Castro knocked on and that the officer's statement would not have made a difference to his opinion. So Mr. Castro was not prejudiced by his counsel's failure to hand over either of those. Nor was Mr. Kapelsohn prejudiced by the failure to give the eyewitness statements. The eyewitnesses said Mr. Castro was not bumped. So

having those statements would not have changed Mr. Kapelsohn's opinion. And Mr. Castro has not alleged that any of the discovery would have permitted Mr. Kapelsohn to reach a stronger conclusion as to the likelihood of an accidental shootings. The state postconviction court did not unreasonably apply clearly established federal law in ruling that the failure to turn over the discovery did not prejudice Mr. Castro.

b. Failure to Object to Prosecution Obtaining Expert's Notes

Second, Mr. Castro says his counsel was ineffective by failing to object to the prosecution getting Mr. Kapelsohn's notes. This was not ineffective, though, because the prosecution was legally entitled to those notes. Under Florida law, a defendant waives any privilege as to an expert when the defendant notifies the court of his intent to use the expert as a witness at trial. See Johnson v. State, 104 So. 3d 1010, 1024 (Fla. 2012); Northup v. Acken, 865 So. 2d 1267, 1270 (Fla. 2004).

c. Failure to Call Four Witnesses

Third, Mr. Castro says his counsel failed to call four material witnesses: John Fraley, Drew Hines, Jason Hakes, and Penny Dane. The state postconviction court held an evidentiary hearing on this issue.

Mr. Fraley testified he had known Mr. Castro since middle school and was with him the day of the killing. He said Mr. Castro seemed to be in a good mood.

He said Mr. Castro called twice after the killing to say he had done something stupid and that the shooting was an accident.

Mr. Hines and Mr. Hakes were staying in the same room at the hotel where the crime occurred. Mr. Hakes testified he did not hear anyone knocking on the doors. He said he heard a sound like a rock being thrown at the door that night and heard people screaming afterward. Mr. Hines corroborated Mr. Hakes' testimony.

Ms. Dane, a police officer, testified at a pretrial deposition that another officer told her Mr. Castro "wasn't telling him anything." The other officer testified at trial to statements Mr. Castro made before Ms. Dane arrived. Mr. Castro says Ms. Dane should have been called to impeach the other officer. At the evidentiary hearing, Ms. Dane testified that she meant to say the other officer told her Mr. Castro wasn't telling him anything about where the gun was. The state postconviction court credited this explanation.

Mr. Castro's counsel testified at the hearing that he knew of all four witnesses but decided not to call them. He did not call Mr. Fraley—after a discussion with Mr. Castro and his family—because Mr. Fraley would testify that he and Mr. Castro had been drinking that night, and this evidence would have undermined the muscle-contraction defense. He did not call Mr. Hines or Mr. Hakes because there was testimony about the knocking from other witnesses, and he wanted to downplay conflicting facts about knocking in favor of highlighting

the muscle-contraction defense. He did not call Ms. Dane because he spoke with her before trial and realized her testimony would not impeach the other officer. The state trial court did not unreasonably apply clearly established federal law in ruling that these strategic decisions were not objectively unreasonable.

d. Failure to Competently Cross-Examine Three Eyewitnesses

Fourth, Mr. Castro says his counsel failed to competently cross-examine Beau Smith, Kayce Heinmiller, and Stevi Smith, the three eyewitnesses to the shooting.

Mr. Castro says his counsel ought to have cross-examined Beau Smith about two inconsistencies. In a pre-trial deposition, Mr. Smith said Shawn Hall, another person staying in the hotel room, walked out of the room when Mr. Castro asked Mr. Ulland if he had been in the parking lot earlier. Mr. Smith testified at trial that Mr. Hall left after Mr. Ulland opened the door but before Mr. Castro spoke. Mr. Castro's counsel did in fact try to impeach Mr. Smith with this inconsistency. Next, Mr. Smith testified in his pre-trial deposition that Mr. Castro "didn't point the gun at me or anything" but that he "didn't let the gun go all the way down" after he shot Mr. Ulland. At trial, Mr. Smith testified that Mr. Castro "pointed the gun at—straight towards me. . . . [H]e pointed the gun towards the middle of the room, towards me." Mr. Castro says the failure to impeach Mr. Smith with this inconsistency left the prosecution's theory of premeditation went unrebutted. But

the prosecution's theory of premeditation rested mostly on Mr. Castro putting the gun to Mr. Ulland's eye, along with other circumstantial evidence. It was not an unreasonable application of clearly established federal law for the state postconviction court to conclude this omission did not prejudice Mr. Castro.

Mr. Castro further says his counsel should have examined Mr. Smith about a statement from his pre-trial deposition, where he said, "Sean [Mr. Hall] just left. He never saw it happen. I don't think Sean saw it happen. For a good twenty minutes Sean was gone." The state postconviction court held this statement was consistent with Mr. Smith's testimony on cross-examination that Mr. Hall already walked out of the room when Mr. Castro shot Mr. Ulland. That is so. It was not an unreasonable application of clearly stablished federal law to rule this omission did not prejudice Mr. Castro.

Mr. Castro says his counsel should have cross-examined Kayce Heinmiller about four inconsistencies. Ms. Heinmiller testified in a pre-trial deposition that she heard the knock on the hotel room door, but at trial she testified she did not hear the knock because she was asleep. She testified in her pre-trial deposition that the room door was never closed, but she testified at trial that Mr. Smith closed it at some point. Finally, she testified in her deposition that the room was small, so the door hit the bed when it opened. At trial, the state presented evidence that the door area was not so crowded. Mr. Castro says these inconsistencies would have poked

holes in the state's case. But the state postconviction court did not unreasonably apply clearly established federal law when it held that Mr. Castro was not prejudiced. The testimony established the most significant fact going to premeditation: that Mr. Castro put his gun to Mr. Ulland's eye. The state postconviction court did not unreasonably conclude impeachment about other matters was unlikely to have changed the trial outcome.

Mr. Castro also says Ms. Heinmiller testified during her deposition that she saw Mr. Hall inside the hotel room after the shooting. She did not testify to this at trial. Her deposition testimony on this point was inconsistent with Beau Smith's, Stevi Smith's, and Mr. Hall's trial testimony. Mr. Castro raised this in his state habeas petition, but the state postconviction court appears to have passed on it. The District Court did, and concluded it did not prejudice Mr. Castro. That is so. Mr. Castro's theory was that Mr. Hall bumped him and caused the shooting. Had Mr. Hall been inside the room the whole time, that would have undermined Mr. Castro's theory.

Mr. Castro says his counsel ought to have cross-examined Stevi Smith about a recorded statement she gave to the police. An officer asked her if she saw Mr. Castro's weapon, and she replied, "I didn't see anything, I was right behind it, all I could see is blonde hair." In fact, Mr. Castro's counsel did cross-examine Ms. Smith about this statement, and she testified she did not remember saying it. Mr.

Castro suggests Ms. Smith stated she didn't see anything and his counsel was ineffective for failing to introduce the recorded statement to impeach Ms. Smith. But Ms. Smith's statement was that she did not see Mr. Castro's weapon. In that same recorded statement, Ms. Smith said she saw Mr. Ulland open the hotel room door and saw Mr. Castro shoot her cousin. The state postconviction court did not unreasonably apply federal law when it concluded that the failure to introduce the recorded statement did not prejudice Mr. Castro.

Ms. Smith testified at trial that Mr. Castro put his arm down after shooting Mr. Ulland and then picked the gun back up and pointed it at her and Mr. Smith. She did not mention this in her recorded statement. Mr. Castro says his counsel ought to have impeached her about that. Impeaching her on this point would have undermined the state's case on premeditation, he says. The state postconviction court did not unreasonably apply clearly established federal law when it concluded this omission did not prejudice Mr. Castro. Ms. Smith positively identified Mr. Castro as the shooter, and the prosecution's premeditation case hinged mainly on other evidence.

e. Failure to Competently Cross-Examine the Medical Examiner

Fifth, Mr. Castro says his counsel failed to competently cross-examine the medical examiner, Dr. Marie Herrmann, who testified that Mr. Ulland had a "contact gunshot wound" to the head. Dr. Herrmann testified the wound was

consistent with a gun being pressed to Mr. Ulland's eye and then fired. On cross, Mr. Castro's counsel asked Dr. Herrmann, "[Y]ou are unable to tell us—and correct me if I'm wrong—the circumstances surrounding the shooting of Mr. Ulland; correct?" Dr. Herrmann replied, "That's correct." In closing, the prosecution used Dr. Herrmann's testimony that Mr. Ulland had a contact wound to argue Mr. Castro premeditated the killing.

Mr. Castro says his counsel ought to have asked Dr. Herrmann if the injury would also be consistent with a gun accidentally striking the defendant's eye and being fired. This question, Mr. Castro says, would have supported the defense theory that he was bumped and accidentally discharged the firearm. Even if Mr. Castro's counsel could have phrased the question more clearly, the state postconviction court did not unreasonably apply clearly established federal law in concluding the cross-examination did not prejudice Mr. Castro. Mr. Castro's counsel got the medical examiner to testify she could not say how Mr. Castro's gun made contact with the victim's eye. Nonetheless, the jury rejected Mr. Castro's accidental-shooting defense.

f. Failure to Object to Prosecutor's Allusions to Mr. Castro's Silence

Finally, Mr. Castro says his counsel failed to object to the prosecutor's allusions to his right to remain silent. Mr. Castro took the stand to testify he was bumped, which caused him to pull the trigger. On cross-examination, the

prosecutor asked, "[A]nd it's correct that you never told anybody, anybody until today, that somebody bumped into your left side, which caused you to lose—which caused the gun to go down, lose your balance, hit your right side on the door frame, and shoot Lance Ulland?" Mr. Castro responded, "I told that to my attorney." The prosecutor said, "Okay, I mean any police." Mr. Castro said, "No, ma'am, I did not." In closing argument, the prosecutor noted that Mr. Castro sat with police for over an hour on the scene and never said anything about it. Mr. Castro's counsel did not object to the question or to the closing. Mr. Castro says this failure was ineffective under the Florida and United States Constitutions.

The United States Supreme Court has clearly established that impeaching a defendant who has received Miranda warnings with the defendant's silence violates due process. Branch v. Sec'y, Fla. Dept. of Corrs., 638 F.3d 1353, 1354 (11th Cir. 2011) (citing Doyle v. Ohio, 426 U.S. 610, 617-18, 96 S. Ct. 2240, 2244-45 (1976)); see Fugate v. Head, 261 F.3d 1206, 1223 (11th Cir. 2001). But a defendant who voluntarily speaks after receiving Miranda warnings can be impeached with prior inconsistent statements. See United States v. Dodd, 111 F.3d 867, 869-70 (11th Cir. 1997) (citing Anderson v. Charles, 447 U.S. 404, 409, 100 S. Ct. 2180, 2182 (1980)). Defense counsel's failure to object to improper impeachment with a defendant's silence is ineffective. Fugate, 261 F.3d at 1223. The error is subject to prejudice analysis. See id.

There was no error here because the prosecutor was not commenting on Mr. Castro's silence. Mr. Castro was apprehended and was given a Miranda warning. He then voluntarily related the evening's events to the officer. During that time, he never mentioned being bumped. It was not illegal for the prosecutor to comment on the discrepancy between the post-arrest statement and trial testimony. It thus was not ineffective for his counsel to fail to object.

V.

Mr. Castro also seeks a certificate of appealability on the District Court's denial of his habeas petition with respect to three other issues: a trial court evidentiary ruling excluding some of Mr. Castro's out-of-court statements, the trial court's denial of Mr. Castro's motion for judgment of acquittal, and alleged prosecutorial misconduct in closing statements.

a. Exclusion of Post-Arrest Statements of Remorse

Mr. Castro made statements expressing remorse for the crime in a post-arrest interview. He sought to introduce these at trial, but the trial court excluded them as inadmissible hearsay. Federal courts generally do not review state evidentiary rulings raised in a habeas petition unless the ruling affected the fundamental fairness of the trial. See Snowden v. Singletary, 135 F.3d 732, 737 (11th Cir. 1998). It is fundamentally unfair to admit evidence that is "material in the sense of a crucial, critical, highly significant factor." Id. There was no fundamental

unfairness here. Under Florida evidence law, a defendant cannot admit his own prior self-serving statement for the truth of the matter asserted. See Barber v. State, 576 So. 2d 825, 830 (Fla. 1st DCA 1991) (citations omitted). Mr. Castro had to show his statements feel into a hearsay exception. He said they qualified as spontaneous statements or excited utterances, defined respectively in Florida law as "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter" and "a statement or excited utterance related to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Fla. Stat. § 90.803. Mr. Castro made his statements some two hours after the shooting, when, the trial court concluded, Mr. Castro was no longer under the stress of excitement. That ruling was not fundamentally unfair.

b. Denial of Motion for Judgment of Acquittal

Mr. Castro says the trial court erred in denying his motion for judgment of acquittal. He argued at trial the prosecution did not prove premeditation, meaning he could be convicted of manslaughter but not first-degree murder. Reviewing the sufficiency of the evidence, a federal court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Owen v. Sec'y, Dep't of Corrs., 586 F.3d 894, 918 (11th Cir. 2009). Premeditation

under Florida law means "more than a mere intent to kill; it is a fully formed conscious purpose to kill." Green v. State, 715 So. 2d 940, 943 (Fla. 1998). It may be proved by circumstantial evidence. Woods v. State, 733 So. 2d 980, 985 (1998). The trial court did not unreasonably apply clearly established federal law when it held a rational trier of fact could conclude Mr. Castro premeditated the killing. The evidence at trial showed Mr. Castro took a gun and went looking for the person who sold him bad drugs. He knocked on several doors before reaching Mr. Ulland's hotel room. He shot Mr. Ulland in the eye immediately after Mr. Ulland said he had been in the hotel parking lot earlier that night. This was sufficient evidence for a jury to conclude Mr. Castro had a purpose to kill.

c. Prosecutorial Misconduct During Closing Argument

Finally, Mr. Castro says the prosecutor made an improper demonstration during closing arguments. The prosecutor used the murder weapon and an autopsy photograph of Mr. Ulland to demonstrate how Mr. Castro would have put the gun to Mr. Ulland's eye. The trial court allowed the demonstration over a defense objection. A prosecutor's improper closing "violate[s] the Constitution only if [it] so infected the trial with unfairness as to make the resulting conviction a denial of due process." Parker v. Matthews, 567 U.S. 37, 45, 132 S. Ct. 2148, 2154 (2012). Improper argument rises to the level of a denial of due process "when there is reasonable probability that, but for the prosecutor's offending remarks, the

outcome of the proceeding would have been different." United States v. Eyster, 948 F.2d 1196, 1206 (11th Cir. 1991). To decide whether the outcome would have been different absent the misconduct, this Court considers "the degree to which the challenged remarks have a tendency to mislead the jury and prejudice the accused, whether they are isolated or extensive, whether they were deliberately or accidentally placed before the jury," and the strength of the evidence of conviction. Id. The trial court did not unreasonably apply clearly established federal law when it allowed the demonstration. The demonstration was consistent with evidence presented at trial and the prosecution's theory of the killing; the remark was isolated; and several eyewitnesses testified to what happened.

V. Constitutionality of Procedure for Obtaining a Certificate of Appealability

In addition to his merits claims, Mr. Castro argues in his application for a certificate of appealability that the process for obtaining such a certificate is unconstitutional. He says requiring district judges to grant or deny certificates of appealability before they file an appeal deprives applicants for writs of habeas corpus of access to the courts. Rule 11 of the Rules Governing § 2254 Cases requires a district court to "issue or deny a certificate of appealability when it enters a final order adverse to the applicant" for a writ of habeas corpus. This rule is consistent with 28 U.S.C. § 2253(c), which prohibits appeals from final orders in

habeas proceedings unless a judge issues a certificate of appealability. Even if the district judge denies a certificate, a circuit judge may issue one. And the circuit judge reviews whether jurists of reason could debate whether the petitioner's case should have been resolved differently. Miller-El, 537 U.S. at 336, 123 S. Ct. at 1039. Even assuming it would raise constitutional concerns if the District Court were solely responsible for granting or denying certificates of appealability, Mr. Castro had a full and fair opportunity to seek a certificate in this Court.

VI. Failure of Habeas Counsel to Develop Facts in Postconviction Proceedings

Mr. Castro asserts that his postconviction counsel rendered ineffective assistance by failing to develop facts in support of his claims. In support, he cites Buck v. Davis, 580 U.S. __, 137 S. Ct. 759 (2017), but that case concerned ineffective assistance during the penalty phase of a capital murder trial. In any event, his postconviction counsel did try to develop the factual record: she requested an evidentiary hearing on all claims raised in his state postconviction motion and his federal habeas petition. Indeed, the state postconviction court held an evidentiary on matters it felt warranted one. Mr. Castro's postconviction counsel was therefore not ineffective for failing to develop the record.

VII. State Court Rulings Unsupported by Factual Findings

Mr. Castro finally contends the state court decisions lacked factual support and that he is therefore entitled to a hearing under 28 U.S.C. § 2254(e). But the state court's decision did have factual support, and, where necessary, the state court developed the record. Mr. Castro is not entitled to an evidentiary hearing in federal court. See Daniel v. Comm'r, Ala. Dept. of Corrs., 822 F.3d 1248, 1280 (discussing the prerequisites for getting an evidentiary hearing on a habeas petition).

VIII. Conclusion

In the last analysis, jurists of reason would not debate whether the District Court properly resolved Mr. Castro's habeas petition. A certificate of appealability is therefore DENIED. Mr. Castro's motion to proceed in forma pauperis is DENIED AS MOOT.

Barrett B. Martin
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11473-C

MATTHEW A. CASTRO,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

Before: MARTIN and ROSENBAUM, Circuit Judges.

BY THE COURT:

Matthew A. Castro has filed a motion for reconsideration of this Court's order dated September 27, 2018, denying his motions for a certificate of appealability and leave to proceed *in forma pauperis* in his appeal of the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition. Upon review, Mr. Castro's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MATTHEW A. CASTRO,

Petitioner,

v. CASE NO. 6:14-cv-1844-Orl-18DCI

SECRETARY, DEPARTMENT OF CORRECTIONS, et al.,

Respondents.
_____/

ORDER

This case is before the Court on the following:

1. Petitioner's Motion for Certificate of Appealability (Doc. 16). This Court should grant an application for certificate of appealability only if the Petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Court denied Petitioner a certificate of appealability on March 13, 2018 (Doc. 13). Upon consideration of the instant motion, the Court concludes that Petitioner has failed to make a substantial showing of the denial of a constitutional right. Accordingly, it is **ORDERED** that Petitioner's motion is **DENIED.**

2. Petitioner's Motion for Leave to Proceed in Forma Pauperis on Appeal (Doc. 18). Any appeal would not be taken in good faith pursuant to Federal Rule of Appellate Procedure 24(a) and 28 U.S.C. § 1915(a)(3) because Petitioner has failed to demonstrate the deprivation of a federal constitutional right. Petitioner is not entitled to

appeal as a pauper and shall pay the full appellate filing fee as required by 28 U.S.C. § 1915(a). Accordingly, it is **ORDERED** that Petitioner's motion is **DENIED.**

DONE AND ORDERED in Orlando, Florida this 16 day of April, 2018.

G. KENDALL SHARP
SENIOR UNITED STATES DISTRICT JUDGE

Copies to:
OrlP-3 4/16
Matthew A. Castro
Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MATTHEW A. CASTRO,

Petitioner,

v. CASE NO. 6:14-cv-1844-Orl-18DAB

SECRETARY, DEPARTMENT OF CORRECTIONS, et al.,

Respondents.
_____/

ORDER

This cause is before the Court on a Petition for Writ of Habeas Corpus ("Petition," Doc. 1) filed pursuant to 28 U.S.C. § 2254. Respondents filed a Response to the Petition ("Response," Doc. 10) in compliance with this Court's instructions and with the *Rules Governing Section 2254 Cases for the United States District Courts*. Petitioner filed a Reply (Doc. 11). Petitioner alleges nine claims for relief in the Petition. For the following reasons, the petition for writ of habeas corpus is denied.

I. PROCEDURAL HISTORY

Petitioner was indicted on one count of first degree murder (Doc. 10-1 at 5). After a jury trial, Petitioner was convicted as charged (Doc. 10-2 at 49). The trial court sentenced Petitioner to a term of life imprisonment (Doc. 10-18 at 9). Petitioner appeal, and the Fifth District Court of Appeal ("Fifth DCA") affirmed *per curiam* (Doc. 10-19 at 36).

Petitioner filed a motion for post-conviction relief pursuant to Rule 3.850 of the

Florida Rules of Criminal Procedure. *Id.* at 48-100. After filing an amended motion, the trial court entered an interim order denying several of Petitioner's claims and concluding an evidentiary hearing was necessary on one claim. (Doc. 10-22 at 19-29, 79-90). After holding an evidentiary hearing, the trial court denied Petitioner's remaining claim (Doc. 10-23 at 63-145, 201-07. Petitioner appealed, and the Fifth DCA affirmed *per curiam* (Doc. 10-24 at 32).

II. LEGAL STANDARDS

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

Pursuant to the Antiterrorism Effective Death Penalty Act ("AEDPA"), a federal court may not grant federal habeas relief with respect to a claim adjudicated on the merits in state court unless the adjudication of the claim:

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

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

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

> Under the "contrary to" clause, a federal court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the United States Supreme Court] on a question of law or if the state court decides a case differently than [the United States Supreme Court] has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the United States Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case. *Id.* (quoting *Williams*, 529 U.S. at 412–13). Even if the federal court concludes that the state court applied federal law incorrectly, habeas relief is appropriate only if that application was "objectively unreasonable."1 *Id.* (quotation omitted).

Finally, under § 2254(d)(2), a federal court may grant a writ of habeas corpus if the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." However, the state court's "determination of a factual issue . . . shall be presumed correct," and the habeas petitioner

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[1] In considering the "unreasonable application inquiry," the Court must determine "whether the state court's application of clearly established federal law was objectively unreasonable." *Williams*, 529 U.S. at 409. Whether a state court's decision was an unreasonable application of law must be assessed in light of the record before the state court. *Holland v. Jackson*, 542 U.S. 649, 652 (2004) (per curiam); *see also Bell v. Cone*, 535 U.S. 685, 697 n.4 (2002) (declining to consider evidence not presented to state court in determining whether the state court's decision was contrary to federal law).

"shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see also Parker*, 244 F.3d at 835–36.

B. Standard for Ineffective Assistance of Counsel

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States 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: (1) whether counsel's performance was deficient and "fell below an objective standard of reasonableness"; and (2) whether the deficient performance prejudiced the defense. *Id.* at 687–88. A court must adhere to a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689–90. "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *see also Gates v. Zant*, 863 F.2d 1492, 1497 (11th Cir. 1989) ("*Strickland* teaches that courts must judge the reasonableness of the challenged conduct on the facts of the particular case, viewed as of the time of the conduct.").

III. ANALYSIS

A. Claim One

Petitioner alleges trial counsel was ineffective for failing to provide the defense expert with all of the relevant discovery (Doc. 1 at 5). Petitioner contends that trial counsel failed to provide the expert with the crime scene investigation report, interviews of witnesses, a witnesses' written statement, a deposition of a police officer, and the crime

scene video. *Id.* Petitioner argues that due to counsel's actions, the defense expert did not have sufficient evidence on which to base his opinion. *Id.* at 6. Petitioner also asserts that the expert was not adequately prepared for trial, and the State's cross-examination of the expert regarding his failure to review this information damaged his sole defense at trial. *Id.*

Petitioner raised this claim in his amended Rule 3.850 motion, and the trial court summarily denied the claim (Doc. 10-22 at 80). The trial court concluded that Petitioner had failed to demonstrate prejudice because there was no reasonable likelihood of a different outcome at trial had the defense expert received additional discovery. *Id.* at 81.

During trial, the defense expert testified that he reviewed the police records, witness statements, depositions, laboratory reports regarding the firearm, the autopsy report, ballistics reports, photographs, and spoke to Petitioner about the crime (Doc. 10-16 at 23-24). On cross-examination, the expert stated that he might not have reviewed the crime scene investigation report or some of the witnesses' depositions or taped interviews (Doc. 10-17 at 16-21). The expert admitted that he could not form an opinion regarding whether Petitioner fired the gun intentionally or unintentionally, but opined that the shooting was likely to have resulted from an involuntary muscular contraction. *Id.* at 42.

Petitioner has not shown that defense counsel acted in a deficient manner. Although the expert may not have reviewed every single witness interview or the crime scene investigation report, the expert did review the majority of the police reports, laboratory testing, and he visited the location of the crime scene. Based on his review of

the evidence and Petitioner's version of events, he thought it was likely Petitioner experienced an involuntary muscle contraction that led to the shooting. There is no indication that but for counsel's failure to give the expert additional information that the result of the proceeding would have been different.

Petitioner merely speculates that with the additional information, the State would not have been able to adequately cross-examine the expert, and thus the jury would have believed his defense. However, this speculation cannot support a claim for ineffective assistance of counsel. *See Tejeda v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991). The State presented ample evidence that conflicted with Petitioner's version of events and the expert's theory, therefore, Petitioner cannot demonstrate prejudice. The state court's denial of this claim was not contrary to or an unreasonable application of *Strickland*. Accordingly, claim one is denied pursuant to § 2254(d).

B. Claim Two

Petitioner claims that trial counsel was ineffective for failing to object to the State's acquisition of attorney-client privileged information from the defense expert (Doc. 1 at 8). Petitioner also contends that counsel should have objected to the disclosure of the defense expert's notes because they consisted of protected work production information. *Id.* at 9-10. Petitioner raised this claim in his amended Rule 3.850 motion, and the trial court summarily denied the claim, noting that an item that a party intends to use at trial is not privileged work-product and is therefore discoverable (Doc. 10-22 at 82). The Fifth DCA affirmed *per curiam* (Doc. 10-24 at 32).

Florida law provides that a defendant waives the attorney-client privilege when he notifies the State and trial court that he intends to use an expert as a witness at trial. *See Johnson v. State*, 104 So. 3d 1010, 1024 (Fla. 2012). Therefore, questions posed to the expert about alleged attorney-client privileged communications were not improper. Furthermore, Petitioner has not shown that the expert witness was required to disclose any opinion work product to the State. *See Smith v. State*, 873 So. 2d 585, 587 (Fla. 3d DCA 2004) (noting that opinion work product is almost always privileged whereas documents, research, records, and reports that do not contain theories, opinions, or conclusions are subject to discovery); Fla. R. Crim. P. 3.220(g)(1). The state court's denial of this claim was not contrary to or an unreasonable application of, clearly established federal law. Accordingly, claim two is denied pursuant to § 2254(d).

C. Claim Three

Petitioner alleges trial counsel was ineffective for failing to call material witnesses at trial (Doc. 1 at 12). Petitioner contends that counsel should have called John Fraley ("Fraley"), Drew Hines ("Hines"), Jason Hakes ("Hakes"), and Officer Dane to testify. *Id.* Petitioner raised this claim in his amended Rule 3.850 motion, and the trial court held an evidentiary hearing on the matter (Doc. Nos. 10-22 at 83; 10-23 at 66-144).

At the evidentiary hearing, Petitioner presented the testimony of Fraley, Hakes, Hines, and Officer Dane (Doc. 10-23 at 66-144). Hakes testified that he was present at the Economy Inn motel the night the crime occurred and he did not hear anyone knocking on the doors. *Id.* at 70. Hakes heard a sound like a rock being thrown at a door. *Id.* After

the sound, he heard people screaming. *Id.* at 71. Hakes never spoke to Petitioner's defense attorney about testifying at trial. *Id.* at 73. Hines testified that he was in the room with Hakes and corroborated Hakes' testimony. *Id.* at 78. Hines also was not contacted by defense counsel. *Id.* at 79.

Fraley testified that he has known Castro since middle school and was with him the day the crime was committed. *Id.* at 81-82. Fraley stated that prior to the crime, Petitioner appeared to be happy or in a good mood. *Id.* at 83-84. When they returned to the motel the evening of the crime, Petitioner went into the room a few minutes after him. *Id.* Petitioner mentioned that Justin Brock's car was being towed. *Id.* at 85. Petitioner called him after the shooting and told him that he had done something stupid. *Id.* at 86. Fraley testified that Petitioner appeared to be panicked. *Id.* at 87. Fraley was not available to testify at the time of trial because he was deployed, although he noted there was a possibility he could have testified via telephone. *Id.* at 88. Fraley was not served a subpoena in this case or contacted by defense counsel. *Id.* at 89.

Officer Dane testified that she spoke with Petitioner about finding the firearm that was used in the crime. *Id.* at 94. Officer Dane was impeached with her deposition testimony wherein she stated that Officer Kelly told her Petitioner refused to speak to him. *Id.* at 95. Officer Dane explained that this statement was intended to mean that Petitioner initially would not tell them where the gun was located and not that he refused to speak to law enforcement. *Id.* at 95-96.

Defense counsel James R. Valerino ("Valerino") testified that the theory of the

defense was that the shooting was accidental, possibly due to an involuntary muscular contraction. *Id.* at 103. Valerino was aware of Fraley, Hakes, Hines, and Officer Danes because they had been deposed. *Id.* at 104. Valerino decided not to call Fraley as a witness because Fraley had stated he and Petitioner were drinking the night the crime was committed, and counsel thought this testimony would be harmful to the muscular contraction defense. *Id* .at 105-06. According to the defense expert, intoxication would slow any involuntary muscle response and therefore, any testimony related to alcohol consumption would hurt the defense. *Id.* at 106-07. Valerino informed Petitioner of the issue and testified that Petitioner did not have an objection to the decision to forego calling Fraley. *Id.* at 107. Valerino could not recall whether he had Petitioner sign a waiver indicating that he agreed not to call Fraley as a witness. *Id.* at 112.

Additionally, Valerino had no recollection of any conversation regarding calling Hakes and Hines as witnesses. *Id.* at 113. Valerino did not subpoena either for trial because he was concerned regarding the testimony about knocking on the doors. *Id.* at 115. Valerino wished to downplay the issue of whether Petitioner knocked on multiple doors and focus on what happened at the victim's hotel room. *Id.* Valerino noted that Petitioner admitting to knocking on another door at least four or five times, therefore, he wanted to "stay away from the issue of how many doors were knocked on, whether it was one or two or three." *Id.* Valerino also stated that he thought calling Hakes and Hines regarding whether Petitioner was knocking on doors would cause confusion and was not relevant to the defense. *Id.* at 125. Finally, Valerino stated that he did not call Officer Dane

because he did not think he could use her testimony to impeach Officer Kelley. *Id.* at 122.

The trial court denied the claims, concluding that defense counsel made a strategic decision not to call these witnesses, and Petitioner failed to overcome the presumption that this strategy was sound. *Id.* at 206. The Fifth DCA affirmed *per curiam* (Doc. 10-24 at 32).

The record reflects that Valerino investigated and considered calling Fraley, Hines, Hakes, and Officer Danes; however, counsel made a strategic decision not to call these witnesses. *See Strickland,* 466 U.S. at 690 ("strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."). Petitioner has not demonstrated that this strategy was unreasonable. Further, Petitioner has not demonstrated that counsel's failure to call these witnesses resulted in prejudice because he has not met his burden of proving that the result of the proceeding would have been different in light of the evidence presented. Accordingly, claim three is denied pursuant to § 2254(d).

D. Claim Four

Petitioner alleges that trial counsel was ineffective for failing to competently cross-examine State witnesses Beau Smith, Kayce Heinmiller, and Stevi Smith (Doc. 1 at 18). In support of this claim, Petitioner contends that counsel failed to properly impeach these witnesses and elicit critical inconsistencies in their testimony. *Id.* Petitioner raised this claim in his amended Rule 3.850 motion, and the trial court summarily denied the claim pursuant to *Strickland,* concluding Petitioner failed to demonstrate prejudice (Doc. 10-22

at 84-87). The Fifth DCA affirmed *per curiam* (Doc. 10-24 at 32).

The Court has considered the testimony of these witnesses and concludes that defense counsel thoroughly cross-examined each witness and attempted to impeach them on any inconsistencies that may have occurred (Doc. Nos. 10-7 at 41-50; 10-10 at 59-62, 64, 67; 10-11 at 24-33). Additionally, the Court notes that Petitioner has not shown that but for counsel's actions, the result of the proceeding would have been different. Each witness identified Petitioner as the perpetrator of the crime and it is unlikely that additional questioning, such as whether they heard knocking on the motel doors, whether the motel door was opened or closed, when Shawn Hall left the hotel room and brushed past Petitioner, the size of the rooms, or placement of the firearm would have resulted in an acquittal in light of the evidence presented at trial. The state court's denial of this claim was not contrary to, or an unreasonable application of, clearly established federal law. Accordingly, claim four is denied pursuant to § 2254(d).

E. Claim Five

Petitioner contends that trial counsel was ineffective for failing to competently cross-examine the medical examiner (Doc. 1 at 24). Petitioner maintains that the medical examiner testified that the victim's wound was a contact gunshot wound. *Id.* Petitioner states that counsel should have asked the medical examiner whether the injury to the victim's eye could be consistent with "the gun striking the victim in the eye and being discharged, rather than the gun being pressed into the victim's eye." *Id.* at 25. Petitioner contends that such a question would have supported his defense that the firearm

accidentally discharged when Shawn Hall left the room and brushed passed him, causing him to fire the weapon unintentionally. *Id.* at 25-26. Petitioner also notes that the State used the medical examiner's testimony to demonstrate that the murder was premeditated. *Id.*

Petitioner raised this claim in his amended Rule 3.850 motion, and the trial court summarily denied the claim, concluding it was refuted by the record (Doc. 10-22 at 88). The court stated that counsel questioned the medical examiner regarding the circumstances of the shooting, and the medical examiner stated that she was unable to say how or why the firearm was discharged so closely to the victim. *Id.* The Fifth DCA affirmed *per curiam* (Doc. 10-24 at 32).

The medical examiner testified that the victim had a "contact penetrating gunshot wound to the head" or that the gun had contact with the victim's eye area (Doc. 10-13 at 31-33). Furthermore, the medical examiner testified that the wound could be consistent with someone raising a gun to the victim's eye and shooting. *Id.* at 38. However, on cross-examination, the medical examiner admitted that there no way of determining the circumstances surrounding the shooting. *Id.* at 39. Even assuming counsel's failure to question the medical examiner further amounts to deficient performance, Petitioner cannot demonstrate prejudice. The medical examiner could not say how the gun made contact with the victim's eye. Petitioner presented evidence that the shooting was accidental, and the State presented evidence that Petitioner intentionally raised his gun and shot the victim. The jury rejected Petitioner's defense. There is no indication that but

for counsel's actions, the result of the proceeding would have been different. Accordingly, this claim is denied pursuant to § 2254(d).

F. Claim Six

Petitioner contends that trial counsel was ineffective for failing to object to the prosecutor's improper questions and comments on his right to remain silent (Doc. 1 at 27). In support if this claim, Petitioner maintains that the prosecutor questioned him regarding whether he made statements to police that he was bumped by another person, which caused him to lose his balance and accidentally discharge the firearm. *Id.* Petitioner states that the prosecutor then argued to the jury during closing that Petitioner never told police about the bumping. *Id.* at 27-29.

Florida courts have held that all evidence that is "fairly susceptible of being interpreted by the jury as a comment on the right of silence" is inadmissible at trial. *Brookins v. State*, 228 So. 3d 31, 38-39 (Fla. 2017) (quotation omitted) (stating that a prosecutor may not comment upon a defendant's failure to offer an exculpatory statement prior to trial). However, the question that the prosecutor posed to Petitioner did not involve a time during or after arrest where Petitioner had invoked his right to remain silent (Doc. Nos. 10-9 at 37-40; 10-15 at 67). Petitioner was stopped by a law enforcement officer, and he voluntarily told police that the shooting was an accident (*Id.*). The prosecutor's cross-examination regarding whether Petitioner described to police how he accidentally discharged his firearm did not draw the jury's attention to his right to remain silent. *See Roundtree v. State*, 217 So. 3d 1051, 1052 (Fla. 4th DCA 2017).

Additionally, Petitioner's statements were properly used for impeachment purposes, even if his statements were imposed in violation of *Miranda*. *See id.* (citing *Harris v. New York*, 401 U.S. 222, 225-26 (1971) (noting that if a defendant voluntarily takes the stand, he is under an obligation to speak truthfully and a prosecutor may then utilize the "traditional truth-testing adversary process.")). Therefore, counsel's failure to object to the prosecutor's questions on cross-examination did not amount to deficient performance or prejudice.

Furthermore, defense counsel objected to the prosecutor's closing argument with regard to this matter, and the objections were overruled. (Doc. 10-1 at 50-51). Thus, Petitioner's claim is refuted by the record. Accordingly, this claim is denied pursuant to § 2254(d).

G. Claim Seven

Petitioner contends that the trial court erred by refusing to admit his non-hearsay statements made during his post-arrest interview (Doc. 1 at 31). Petitioner asserts that during his post-arrest interview, he expressed remorse for the crime and concern for the victim. *Id.* at 31. According to Petitioner, these statements did not amount to hearsay and were admissible as spontaneous statements or excited utterances. *Id.* Petitioner raised this claim on direct appeal, and the Fifth DCA affirmed *per curiam* (Doc. 10-19 at 36).

The Court notes that federal courts generally do not review a state court's admission of evidence in habeas corpus proceedings. *See McCoy v. Newsome*, 953 F.2d 1252, 1265 (11th Cir. 1992). A federal court will not grant federal habeas corpus relief

based upon an evidentiary ruling unless the ruling affects the fundamental fairness of the trial. *See Baxter v. Thomas*, 45 F.3d 1501, 1509 (11th Cir. 1995); *Snowden v. Singletary*, 135 F.3d 732, 737 (11th Cir.1998).

Petitioner has not demonstrated that the trial court's ruling with regard to this evidence was fundamentally unfair. Florida courts have held that "[w]hen a defendant seeks to introduce his own prior self-serving statement for the truth of the matter stated, it is hearsay and it is not admissible." *Barber v. State*, 576 So. 2d 825, 830 (Fla. 1st DCA 1991) (citations omitted); *see also Cotton v. State*, 763 So. 2d 437, 439 (Fla. 4th DCA 2000).

Therefore, to be admissible, Petitioner's statements to police had to fall into one of the exceptions to hearsay rule. Petitioner contends that his statements amount to an excited utterance or spontaneous statement. Section 90.803(2), Florida Statutes, defines an excited utterance as a statement made relating to a startling event or condition "made while the declarant was under the stress of excitement caused by the event or condition." Petitioner's statements at the police station two hours after the crime occurred would not qualify under this hearsay exception because they were not made while Petitioner was under the stress of the crime. Petitioner had ample time for reflective thought before making his statements to police. *See Charlot v. State*, 679 So. 2d 844, 845-46 (Fla. 4th DCA 1996) (holding statements are inadmissible as an excited utterance if a party fails to demonstrate that the declarant had no time for reflective thought); *State v. Jano*, 524 So. 2d 660, 663 (Fla. 1988) (holding that the length of time between the event and the statement is pertinent to determining admissibility).

Additionally, a spontaneous statement is defined a one "describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, except when such statement is made under circumstances that indicate its lack of trustworthiness." § 90.803(1), Fla. Stat. Petitioner's statements to police were not made during or immediately after the shooting occurred. *See Deparvine v. State*, 995 So. 2d 351, 371 (Fla. 2008) (holding that a spontaneous statement must be one describing or explaining current conditions as they are perceived). As noted above, Petitioner's statements were made approximately two hours later. Therefore, his statements also were not admissible under this hearsay exception.

The state court's denial of this claim was neither contrary to, nor an unreasonable application of, clearly established federal law. Accordingly, claim seven is denied pursuant to § 2254(d).

H. Claim Eight

Petitioner alleges that the trial court erred by denying his motion for judgment of acquittal (Doc. 1 at 32). Petitioner contends that the State only proved the charge of manslaughter and not first degree murder. *Id.*

The United States Supreme Court has held that when reviewing an insufficiency of the evidence claim in a habeas petition, a federal court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Owen v. Sec'y for Dept. of Corr.*, 568 F.3d 894,

918 (11th Cir. 2009). The court must assume that the jury resolved any evidentiary conflicts in favor of the prosecution, and the court must defer to that resolution. *Jackson*, 443 U.S. at 326; *Johnson v. Alabama*, 256 F.3d 1156, 1172 (11th Cir. 2001). Additionally, the Court must defer to the judgment of the jury in determining the credibility of witnesses and in weighing the evidence. *See Schlup v. Delo*, 513 U.S. 298, 330 (1995); *Johnson*, 256 F.3d at 1172.

To convict Petitioner of first degree murder, the State had to prove that (1) the victim was dead, and (2) the defendant had a premeditated design to effect the death of the person. § 782.04(1)(a)(1), Fla. Stat. Premeditation is defined as "more than a mere intent to kill; it is a fully formed conscious purpose to kill." *Green v. State*, 715 So. 2d 940, 943 (Fla. 1998). This purpose to kill must exist for such a time before the homicide "to permit reflection as to the nature of the act to be committed and the probable result of that act." *Id.* at 944. Premeditation can be shown by circumstantial evidence. *See Woods v. State*, 733 So. 2d 980, 985 (Fla. 1999).

Evidence was presented that Petitioner knocked on the victim's door that he shared with approximately four other people, and when the victim answered the door, Petitioner asked if he was the person who had been outside earlier (Doc. Nos. 10-7 at 27; 64-65; and 10-11 at 12). When the victim responded yes, Petitioner shot the victim (Doc. Nos. 10-7 at 27; 10-10 at 54; and 10-11 at 12-16). There was also evidence that Petitioner had purchased what he thought was cocaine, but when he learned that he had been duped, he took a firearm to confront the person that had taken his money (Doc. Nos. 10-

9 at 40; 10-14 at 58-62).

Although Petitioner testified that he accidentally shot the victim, and the police officers testified that Petitioner told them the shooting was an accident (Doc. Nos. 10-9 at 39-40; 10-14 at 68), there was sufficient circumstantial evidence for the jury to conclude that Petitioner had a purpose to kill when he left his hotel room with a firearm with the intent to confront the person who took his money. Thus, upon review of the record and after viewing the evidence in a light most favorable to the prosecution, the Court concludes that any rational trier of fact could have found Petitioner guilty of first degree murder. Accordingly, this claim is denied pursuant to § 2254(d).

I. Claim Nine

Petitioner asserts that the State committed prosecutorial misconduct during closing argument (Doc. 1 at 34). Petitioner contends that the prosecutor improperly used the firearm and made a demonstration during closing argument. *Id.* at 34-35.

The Court has reviewed the closing argument, and to the extent that the prosecutor used the firearm and photographs in evidence to demonstrate how the firearm could have left a mark on the victim's face (such as placing the firearm up to the photograph of the victim's face), the demonstration did not render the trial fundamentally unfair. *See Williams v. Kemp*, 846 F.2d 1276, 1283 (11th Cir. 1988) (stating a trial is rendered fundamentally unfair if "there is a reasonable probability that, but for the prosecutor's offending remarks, the outcome . . . would have been different . . ."). Petitioner has not provided any evidence that the prosecutor's actions inflamed the jury or improperly

evoked an emotional response. *See, e.g., Taylor v. State*, 640 So. 2d 1127, 1134-35 (Fla. 1st DCA 1994) (holding the prosecutor's act of striking the table with the murder weapon was harmful error); *Clark v. State*, 553 So. 2d 240, 242 (Fla. 3d DCA 1989) (holding that while pointing an unloaded murder weapon at the jury may not be proper as it is "theatrical and potentially dangerous," the error was harmless in light of the evidence of the defendants' guilt). Therefore, claim nine is denied pursuant to § 2254(d).

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

IV. CERTIFICATE OF APPEALABILITY

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

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

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

1. The Petition for Writ of Habeas Corpus filed by Matthew Castro (Doc. 1) is **DENIED**, and this case is **DISMISSED WITH PREJUDICE**.

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

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

DONE AND ORDERED in Orlando, Florida, this 9 day of March, 2018.

G. KENDALL SHARP
SENIOR UNITED STATES DISTRICT JUDGE

Copies to:
OrlP-3 2/28
Counsel of Record
Matthew Castro

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SUPREME COURT OF THE UNITED STATES
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C/O: HON. SCOTT S. HARRIS, CLERK
WASHINGTON, DC. 20543-0001

JUNE 20TH, 2019

RE: CASTRO V. JONES, SEC., FL. DOC. (#18-11473-C)
(#18A826)

DEAR HON. SCOTT S. HARRIS:

ENCLOSED, PLEASE FIND A COPY OF A LETTER DATED APRIL 30, 2019 FROM YOUR OFFICE BY DEPUTY CLERK, M. BLALOCK.

THE LETTER ACKNOWLEDGES AN APPLICATION FOR FURTHER EXTENSION OF TIME THAT WAS TIMELY AND SIMULTANEOUSLY SUBMITTED WITH AN INITIAL "PETITION FOR WRIT OF CERTIORARI". THE INTENT OF THE APPLICATION WAS TO SEEK PERMISSION TO AMEND THE ACCOMPANYING PETITION, BUT NOT TO FURTHER EXTEND THE TIME. IT APPEARS THAT THE LANGUAGE OF MY PRO SE REQUEST WAS NOT PRESENTED SUFFICIENTLY TO THE SATISFACTION OF THE COURT.

NEVERTHELESS, THE "PETITION FOR WRIT OF CERTIORARI" WAS NOT RETURNED TO ME. THUS, I PRESUME THAT THE COURT IS PROCESSING IT FOR REVIEW. HOWEVER, I HAVE NOT RECEIVED CONFIRMATION OF DOCKETING. ENCLOSED IS A SECOND COPY OF MY PETITION FOR YOUR CONVIENIANCE, AS WELL AS, A DOCUMENT BY THE FLORIDA DEP'T. OF CORRECTIONS (#250-2019-0377) TO SUBSTANTIATE THAT MY PETITION WAS PREPARED, COPIED, AND MAILED PRIOR TO THE DEADLINE OF APRIL 18, 2019. ACCORDINGLY, WOULD YOU KINDLY CONFIRM DOCKETING OF MY PETITION.

THANK YOU FOR YOUR TIME AND CONSIDERATION.

RESPECTFULLY,

ENCLOSURE:
(EXHIBITS) - CLERK'S LETTER (4/30/19)
- DC5-154 FORM (4/10/19)
- MOTION COVER-PAGE (4/15/19).
- ORIGINAL PROOF OF SERVICE (4/16/19)

MATTHEW A. CASTRO
NO.: C02140
HAMILTON CORRECTIONAL INSTITUTION
11419 S.W. COUNTY RD #249
JASPER, FL. 32052

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April 30, 2019

Matthew A. Castro
#C02140
Hamilton C.I.-Annex
11419 S.W. County Road #249
Jasper, FL 32052

RE: Castro v. Jones, Sec., FL DOC
(18A826)

Dear Mr. Castro:

The application for a further extension of time within which to file a petition for a writ of certiorari in the above-entitled case was postmarked April 15, 2019 and received April 23, 2019. The application is returned for the following reason(s):

You have previously been granted the maximum amount of time allowed by the Rules of this Court for an extension. No additional time can be given.

Sincerely,
Scott S. Harris, Clerk
By:

M. Blalock
(202) 479-3023

Enclosures

TRACKING #: 250 - 2019 - 037

INMATE NAME: Matthew Castro DC# C02140

INSTITUTION/UNIT: Hamilton C.I. Annex HOUSING LOCATION: A2108L

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REASON FOR DISAPPROVAL:

☒ CRIMINAL PROCEEDING. NO COST TO INMATE. (DC5-154 not sent to Inmate Trust)

☐ NON-CRIMINAL PROCEEDING. TOTAL COST (TOTAL COPIES X $0.15 EA): $ 0

DATE COMPLETED: 4-10-19 DATE ISSUED/MAILED TO INMATE: 4-10-19

DC5-154 (Revised 8/07) Incorporated by Reference in Rule 33-501.302, F.A.C.

IN THE SUPREME COURT OF THE UNITED STATES

MATTHEW A. CASTRO,
Petitioner,

v.

CASE NO: 18-11473-C

SEC'Y DEPT. OF CORR.,
ATTORNEY GENERAL,
STATE OF FLORIDA,
Respondent(s).
_____/

SECOND

MOTION FOR EXTENSION OF TIME
TO FILE WRIT OF CERTIORARI

UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

LAST RULING COURT

Matthew A. Castro DC # C02140
Hamilton C.I. – Annex
11419 S.W. County Road # 249
Jasper, Florida 32052