No.

IN THE
Supreme Court of the United States

DONNIE BERRY,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, et al.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

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APPENDIX TO

PETITION FOR WRIT OF CERTIORARI

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APPENDIX

A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-10430-J

DONNIE BERRY,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

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

ORDER:

Donnie Berry is a Florida prisoner serving a total sentence of 25 years' imprisonment after a jury convicted him of 2 counts of robbery with a firearm and 1 count of resisting an officer without violence. He seeks a certificate of appealability ("COA") in order to appeal the denial of the following three claims in his counseled 28 U.S.C. § 2254 habeas corpus petition:

(1) His trial counsel was ineffective for failing to file a motion to suppress the victim Gregory Young's unnecessarily suggestive identification;

(2) His trial counsel was ineffective for failing to move to suppress his statements to law enforcement because he was given inadequate warnings under *Miranda v. Arizona*, 384 U.S. 436 (1966); and

(3) His trial counsel was ineffective for failing to investigate and present evidence of Officer David Reveille's disciplinary history during the trial.

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); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (stating

that, where a district court has rejected a constitutional claim on the merits, the petitioner must demonstrate 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").

Here, reasonable jurists would not debate the denial of Claim 1. Particularly in light of trial counsel's extensive experience in criminal trials, it was not unreasonable for trial counsel to determine that closing arguments was the best time to argue that Young had misidentified Berry due to law enforcement's use of unnecessarily suggestive procedures because (1) Young was intoxicated at the time of the incident; (2) Young only had a short amount of time to see the assailant; and (3) the other victim, Antonio Williams, could not identify Berry as the assailant. In any event, the state postconviction court confirmed that, based on the totality of the circumstances, a motion to suppress would not have been granted.

Reasonable jurists also would not debate the denial of Claim 2. The record reflects that law enforcement at least reasonably conveyed, if not explicitly advised, Berry of his right to have counsel present during questioning.

Finally, reasonable jurists would not debate the denial of Claim 3 because Berry failed to offer a legitimate basis for cross-examining Officer Reveille with his prior Internal Affairs investigations. *See Breedlove v. State*, 580 So. 2d 605, 608 (Fla. 1991) (stating that the ability to cross-examine state witnesses "merely under investigation" is "not absolute," and such "investigation must not be too remote in time and must be related to the case at hand to be relevant."). Even assuming Officer Reveille could have been impeached with his disciplinary history, three of the investigations for use of force and improper conduct were dismissed as unfounded, Berry presented no information of the unlawful conduct related to the investigation

resulting in Officer Reveille's later termination, and any other potential impeachment still would not have refuted Young's independent identification of Berry as the assailant.

Accordingly, Berry's motion for a COA is DENIED.

/s/ Adalberto Jordan
UNITED STATES CIRCUIT JUDGE

APPENDIX

B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA GAINESVILLE DIVISION

DONNIE BERRY,

Petitioner,

v. **Case No. 1:16cv234-MW/GRJ**

SECRETARY, DEPARTMENT OF CORRECTIONS,

Respondent.
_____/

ORDER ACCEPTING REPORT AND RECOMMENDATION

This Court has considered, without hearing, the Magistrate Judge's Report and Recommendation, ECF No. 40, and has also reviewed *de novo* Petitioner's objections to the report and recommendation, ECF No. 43. Accordingly,

IT IS ORDERED:

The report and recommendation is **accepted and adopted**, over Petitioner's objections, as this Court's opinion. The Clerk shall enter judgment stating, "The Amended Petition for Writ of Habeas Corpus, ECF No. 5, is **DENIED**. A Certificate of Appealability is **DENIED**." The Clerk shall close the file.

SO ORDERED on December 10, 2018.

s/ MARK E. WALKER
Chief United States District Judge

APPENDIX

C

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

DONNIE BERRY,

Petitioner,

v. CASE NO. 1:16-cv-234-WTH-GRJ

SECRETARY, DEP'T
OF CORRECTIONS,

Respondent.

_____/

REPORT AND RECOMMENDATION

This case is before the Court on Petitioner's Amended Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254, stemming from his conviction for armed robbery and resisting arrest without violence. (ECF No. 5.) Respondent has filed a response and appendix with relevant portions of the state-court record, arguing that the Amended Petition ("Petition") should be denied. (ECF No. 26.) Petitioner filed a reply, (ECF No. 39), and the Petition is therefore ripe for review. Upon due consideration of the Petition, the response, the state-court record, and the reply, the undersigned recommends that the Petition should be denied.[1]

[1] The Court has determined that an evidentiary hearing is not warranted because the Court may resolve the Petition on the basis of the record. *See* Rule 8, Rules

State-Court Proceedings

Petitioner and three co-defendants were charged by consolidated amended information in case number 2006-CF-5929 on March 12, 2008. (ECF No. 26-1 at 141–42.) Petitioner was specifically charged in counts one and two with robbery with a firearm, and count four with resisting an officer without violence. (*Id.*)[2]

The State filed several motions prior to trial, including a motion in limine to exclude notes written by co-defendant Jarell Whitehead and sent to Petitioner while they were in pretrial custody. (ECF No. 26-2 at 44–59.) In the notes Mr. Whitehead proclaimed that Petitioner did not know anything about the guns used in the robbery, that Petitioner was not present for the robbery, and that Petitioner was not with Mr. Whitehead on the night of the robbery. (ECF No. 26-3 at 33–36.) Following a motion hearing on April 11, 2008, the trial court ruled to exclude the handwritten

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Governing Habeas Corpus Petitions Under Section 2254.

[2] At the time of his arrest in case number 2006-CF-5929, Petitioner was on probation in case number 2006-CF-2351 for burglary of a structure/conveyance and dealing in stolen property, and also on pretrial release awaiting trial in case number 2006-CF-5251 for possession of a controlled substance and use or possession of drug paraphernalia. (ECF No. 26-1 at 50–52; 26-2 at 135–50.) The State later filed violation of probation affidavits in case number 2006-CF-2351 due to his arrests in case numbers 2006-CF-5251 and 2006-CF-5929. (ECF No. 26-2 at 151, 161–62.) On April 1, 2008, the trial court issued an order consolidating the violation of probation hearing in case number 2006-CF-2351 with the jury trial in case number 2006-CF-5929. (ECF No. 26-1 at 205.)

notes because the notes were hearsay without an exception. (*Id.* at 23–63.)

Petitioner proceeded to jury trial on September 19, 2008. (*Id.* at 65–268; ECF No. 26-4 at 1–84.) Defense counsel Stephen Bernstein, however, eventually moved for mistrial based on a statement Petitioner made while testifying. (ECF No. 26-4 at 68–80.) The trial court granted the motion and reset Petitioner's trial. (ECF No. 26-2 at 43.)

Following a second jury trial on October 21 and 22, 2008, the jury found Petitioner guilty as charged. (*Id.* at 62–63, 83, 117; ECF No. 26-4 at 86–304; ECF No. 26-5 at 1–252.) The trial court revoked Petitioner's probation in case number 2006-CF-2351 and sentenced him to five years imprisonment on both counts, to run concurrently with each other. (ECF No. 26-2 at 186–90.) The trial court then sentenced Petitioner in case number 2006-CF-5929 to twenty years imprisonment on counts one and two, to run concurrently with each other, and one year imprisonment on count four, to run concurrently with count one, all to run consecutive to the five year sentence imposed in case number 2006-CF-2351. (*Id.* at 83–89.)[3]

Petitioner thereafter appealed to the First District Court of Appeals

[3] The State entered a nolle prosequi in case 2006-CF-5251 on October 24, 2008. (ECF No. 26-1 at 98.)

("First DCA"). (ECF No. 26-1 at 99–100; ECF No. 26-5 at 254–297; ECF No. 26-6 at 1–8.) The First DCA per curiam affirmed without written opinion on January 20, 2010, and the mandate followed on March 8, 2010. (ECF No. 26-6 at 54, 61.)

On February 3, 2011, postconviction counsel filed, on behalf of Petitioner, a motion for postconviction relief raising eight ineffective assistance of trial counsel claims. (*Id.* at 63–112.) The circuit court denied the motion on June 28, 2013. (*Id.* at 365–373.) Petitioner appealed and on August 26, 2014, the First DCA per curiam affirmed in part and reversed and remanded in part for either an evidentiary hearing or attachment of portions of the record conclusively refuting Petitioner's claims in grounds two and five. (ECF No. 26-7 at 111, 133–92, 198, 242–44.)[4]

On remand the circuit court held an evidentiary hearing on January 5, 2015. (*Id.* at 249–89; ECF No. 26-8 at 1–122.) Then on January 22, 2015, the circuit court issued a final written order denying grounds two and five[5] of Petitioner's motion for postconviction relief. (ECF No. 26-8 at 125–36.)

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[4] Although the appeal was untimely, the First DCA granted Petitioner's petition for belated appeal. (ECF No. 26-7 at 113, 115–17, 131.)

[5] Although the circuit court referred to ground five in its order as ground three, it is clear based upon the First DCA's order and the substance of the claim itself that the circuit court's order pertains to ground five.

Petitioner appealed, but the First DCA per curiam affirmed without written opinion on April 7, 2016. (ECF No. 26-9 at 46–99, 157.) The mandate followed on April 25, 2016. (*Id.* at 159.)

Petitioner then filed his initial petition in this Court on June 22, 2016, followed by the instant Petition on July 27, 2016. (ECF Nos. 1, 5.)

Scope of Federal Habeas Review

Before bringing a habeas action in federal court, a petitioner must exhaust all state court remedies that are available for challenging his conviction, either on direct appeal or in a state postconviction motion. 28 U.S.C. §§ 2254(b)(1), (c). Exhaustion requires that prisoners give the state courts a "full and fair opportunity" to resolve all federal constitutional claims by "invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). To properly exhaust a federal claim, a petitioner must "fairly present" the claim in each appropriate state court, thereby affording the state courts a meaningful opportunity to "pass upon and correct alleged violations of its prisoners' federal rights." *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (quotation omitted).

When a petitioner fails to properly exhaust a federal claim in state court, and it is obvious that the unexhausted claim would now be

procedurally barred under state law, the claim is procedurally defaulted. *Bailey v. Nagle*, 172 F.3d 1299, 1303 (11th Cir. 1999). Federal habeas courts are precluded from reviewing the merits of procedurally defaulted claims unless the petitioner can show either (1) cause for the failure to properly present the claim and actual prejudice from the default, or (2) that a fundamental miscarriage of justice would result if the claim were not considered. *Id*. at 1302, 1306.

Under 28 U.S.C. § 2254(d)(2), a federal court may not grant a state prisoner's application for a writ of habeas corpus based on a claim already adjudicated on the merits in state court unless that adjudication "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." Under § 2254(e)(1), the petitioner must advance clear and convincing evidence that the state court's factual determination was "objectively unreasonable" to rebut the presumption that the determination was correct. *Gill v. Mecusker*, 633 F.3d 1272, 1287 (11th Cir. 2011); *see also* § 2254(e)(1).

As to legal findings, a petitioner is entitled to federal habeas relief only if the state court's adjudication of the merits of the federal claim "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." § 2254(d)(1). "[C]learly established Federal law, as determined by the Supreme Court of the United States," refers only to holdings (rather than *dicta*) of the Supreme Court, but decisions of lower federal courts may be considered to the extent that they demonstrate how those courts applied Supreme Court holdings. *Hawkins v. Alabama,* 318 F.3d 1302, 1309 (11th Cir. 2003) (citations omitted) ("The decisions of other federal circuit courts (and our decisions for that matter) are helpful to the AEDPA inquiry only to the extent that the decisions demonstrate that the Supreme Court's pre-existing, clearly established law compelled the circuit courts (and by implication would compel a state court) to decide in a definite way the case before them."). *See also Carey v. Musladin,* 549 U.S. 70, 74–77 (2006) (§ 2254 refers to holdings, rather than *dicta,* of the Supreme Court, collecting circuit cases "[r]eflecting the lack of guidance from this Court," on the issue).

The "contrary to" and "unreasonable application" clauses of § 2254(d)(1) have independent meanings. *Williams v. Taylor,* 529 U.S. 362, 404–06 (2000); *Bell v. Cone,* 535 U.S. 685, 694 (2002) (citing *Williams*, 529 U.S. at 362). "Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court

decides a case differently than this Court has on a set of materially indistinguishable facts. Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams,* 529 U.S. at 412–13. "Avoiding these pitfalls [described in *Williams v. Taylor*] does not require citation of our cases-indeed, it does not even require *awareness* of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer,* 537 U.S. 3, 8 (2002) (emphasis in original). Further, "whether a state court's decision was unreasonable must be assessed in light of the record the court had before it." *Holland v. Jackson,* 542 U.S. 649, 652 (2004).

In *Gill*, the Eleventh Circuit clarified how the federal habeas court should address the "unreasonable application of law" and the "unreasonable determination of facts" tests. The court acknowledged the well-settled principle that summary affirmances, such as the Florida First District Court of Appeal's in this case, are presumed adjudicated on the merits and warrant deference. 633 F.3d at 1288 (citing *Harrington v. Richter*, 526 U.S. 86 (2011), and *Wright v. Sec'y for the Dep't of Corr.*, 278 F.3d 1245, 1254 (11th Cir. 2002)). "A judicial decision and a judicial

opinion are not the same thing," and the Supreme Court has confirmed that determining whether the state court unreasonably applied the law or unreasonably determined the facts requires only a decision, not an opinion. *Id*. at 1291 (citing *Harrington*, 131 S. Ct. at 784). Yet, the Supreme Court has never squarely addressed whether under the "unreasonable application" test a federal habeas court "looks exclusively to the objective reasonableness of the state court's ultimate conclusion or must also consider the method by which the state court arrives at its conclusion." *Id.* at 1289 (quoting *Neal v. Puckett*, 286 F.3d 230, 244–45 (5th Cir. 2002) (summarizing the emerging circuit split)). The Eleventh Circuit concluded that district courts must apply the plain language of § 2254(d) and answer the "precise question" raised in a claim based on the state court's ultimate legal conclusion, and should not "evaluate or rely upon the correctness of the state court's process of reasoning." *Id.* at 1291. In short, the court stated, "the statutory language focuses on the result, not on the reasoning that led to the result." *Id.*

In light of *Gill,* the "unreasonable determination of facts" standard plays a limited role in habeas review because the district court considers the reasonableness of the trial court's fact finding only to the extent that the state court's ultimate conclusion relied on it. *Id*. at 1292. A federal habeas

court can consider the full record before it to answer "the only question that matters[:]" whether the state court's decision was objectively unreasonable. *Gill*, 133 F.3d at 1290.

To prevail on a constitutional claim of ineffective assistance of counsel, a defendant must demonstrate (1) that his counsel's performance was below an objective and reasonable professional norm, and (2) that he was prejudiced by this inadequacy. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The court may dispose of the claim if a defendant fails to carry his burden of proof on either the performance or the prejudice prong. *Id*. at 697.

To show counsel's performance was unreasonable, a defendant must establish that "no competent counsel would have taken the action that his counsel did take." *Grayson v. Thompson*, 257 F.3d 1194, 1216 (11th Cir. 2001) (emphasis omitted). "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000). There are no "absolute rules" for determining whether counsel's actions were indeed reasonable, as "[a]bsolute rules would interfere with counsel's independence—which is also constitutionally protected—and would restrict the wide latitude counsel have in making tactical decisions." *Putnam v. Head*, 268 F.3d 1223, 1244

(11th Cir. 2001). "To uphold a lawyer's strategy, [the Court] need not attempt to divine the lawyer's mental processes underlying the strategy." *Chandler v. United States*, 218 F.3d 1305, 1314 n.16 (11th Cir. 2000) (en banc). "No lawyer can be expected to have considered all of the ways [to provide effective assistance]." *Id*.

> If a defense lawyer pursued course A, it is immaterial that some other reasonable courses of defense (that the lawyer did not think of at all) existed and that the lawyer's pursuit of course A was not a deliberate choice between course A, course B, and so on. The lawyer's strategy was course A. And [the Court's] inquiry is limited to whether this strategy, that is, course A, might have been a reasonable one.

Id.

To show prejudice, a defendant must show more than simply that counsel's unreasonable conduct might have had "some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693. Instead, a defendant must show 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 defined as a probability sufficient to undermine confidence in the outcome." *Id*.

When the state courts have denied an ineffective assistance of counsel claim on the merits, the standard a petitioner must meet to obtain federal habeas relief is a difficult one. *Harrington*, 562 U.S. at 102. The

standard is not whether an error was committed, but whether the state court decision is contrary to or an unreasonable application of federal law that has been clearly established by decisions of the Supreme Court. 28 U.S.C. § 2254(d)(1). As the Supreme Court explained, error alone is not enough, because "[f]or purposes of § 2254(d)(1), an unreasonable application of federal law is different from an incorrect application of federal law." *Harrington*, 562 U.S. at 100 (quotation marks omitted). "[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id*. at 102.

When faced with an ineffective assistance of counsel claim that was denied on the merits by the state courts, a federal habeas court "must determine what arguments or theories supported or, [if none were stated], could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Id*. So long as fairminded jurists could disagree about whether the state court's denial of the claim was inconsistent with an earlier Supreme Court decision, federal habeas relief must be denied. *Id*. Stated the other way, only if "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's

precedents" may relief be granted. *Id*.

Even without the deference due under § 2254, the *Strickland* standard for judging the performance of counsel "is a most deferential one." *Id.* at 788. When combined with the extra layer of deference that § 2254 provides, the result is double deference and the question becomes whether "there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Id*. Double deference is doubly difficult for a petitioner to overcome, and it will be a rare case in which an ineffective assistance of counsel claim that was denied on the merits in state court is found to merit relief in a federal habeas proceeding.

Discussion

Ground One: Petitioner's claim that the state trial court erred by allowing improper hearsay evidence that identified Petitioner as the person who fled from the area of the robbery, is unexhausted and procedurally defaulted and in any event has no merit.

Petitioner argues in ground one that the trial court improperly allowed the State to elicit hearsay testimony from Officer Reveille, the officer who chased the suspect fleeing from the area that the suspects' vehicle had been stopped by police. Officer Reveille testified that as he was chasing the suspect a witness asked if he was looking for someone and then told Officer Reveille the person he was looking for "just ran through a doorway

that connects Gator Alley back out with University." (ECF No. 5 at 26.) Petitioner argues that the testimony was hearsay and allowed the jury to draw the impermissible inference that the person running through the doorway was the same person that had fled from the robbery, and thereby prove that Petitioner had committed the robbery. Petitioner claims that the admission of the hearsay testimony violated his right to confrontation under the Sixth Amendment. Respondent argues, however, that ground one is unexhausted and procedurally defaulted.

The Court agrees that this claim is unexhausted. Petitioner raised a similar hearsay claim in ground one of his direct appeal, but that claim only referenced state law and state evidentiary rules. (ECF No. 26-5 at 275–81.) Although Petitioner argued in the last paragraph of ground one on direct appeal that "[t]he admission of hearsay testimony implicating the Defendant not only prejudiced his defense, but violated the Defendant of his right to confrontation," his mere reference to his right to confrontation does not satisfy the exhaustion doctrine. That is so because:

> The exhaustion doctrine requires a habeas applicant to do more than scatter some makeshift needles in the haystack of the state court record. The ground relied upon must be presented face-up and squarely; the federal question must be plainly defined. Oblique references which hint that a theory may be lurking in the woodwork will not turn the trick.

Kelley v. Sec'y for Dep't of Corr., 377 F.3d 1317, 1345 (11th Cir. 2004) (quoting *Martens v. Shannon*, 836 F.2d 715, 717 (1st Cir. 1988)). "It is not . . . sufficient that all the facts necessary to support the claim were before the state courts or that a somewhat similar state-law claim was made . . . ." *Kelley*, 377 F.3d at 1343–44 (citing *Anderson v. Harless*, 459 U.S. 4, 6 (1982)). Instead, the petitioner must present his claim to the state court such that the state court has an "opportunity to apply controlling legal principles to the facts bearing upon [his] constitutional claim." *Picard v. Connor*, 404 U.S. 270, 277 (1971); *see Kelley*, 377 F.3d at 1345 (a reasonable reader must be able to understand "each claim's particular legal basis and specific factual foundation").

Merely referencing his right to confrontation in the last paragraph of his argument does not squarely present the issue as a federal one. *See Kelley*, 377 F.3d at 1345. Petitioner only cited two state cases in support of his assertion on direct appeal that the admission of the hearsay testimony violated his right to confrontation, neither of which pertain to federal constitutional law. (ECF No. 26-5 at 281) (citing *Zaluga v. State*, 915 So. 2d 1251, 1252 (Fla. 3d DCA 2005); *Diaz v. State*, 890 So. 2d 556, 558 (Fla. 5th DCA 2005)). Notably, Petitioner was represented by counsel on direct appeal. This is not a situation involving a *pro se* claim that should be

held to a more liberal reading.

Furthermore, the State's entire response to ground one also rested upon state law. (ECF No. 26-6 at 26–30.) Nothing suggests that the state court considered ground one of Petitioner's direct appeal as a constitutional claim rather than, or in addition to, whether the state court's evidentiary ruling resulted in reversible error. Accordingly, ground one of the instant Petition is unexhausted.

Ground one is also procedurally defaulted because Petitioner cannot file a second direct appeal, a second or successive motion for postconviction relief, or a state petition for writ of habeas corpus at this juncture.

A procedurally defaulted claim like Petitioner's can support federal habeas relief in only two narrow situations. First, the petitioner may demonstrate cause and prejudice for the default. *Mize v. Hall*, 532 F.3d 1184, 1190 (11th Cir. 2008). "'[C]ause' under the cause and prejudice test must be something external to the petitioner, something that cannot fairly be attributed to him . . . ." *Coleman v. Thompson*, 501 U.S. 722, 753 (1991). Attorney error that constitutes ineffective assistance of counsel violative of the Sixth Amendment can render "cause." *Murray v. Carrier*, 477 U.S. 478, 487 (1986). But, an ineffective assistance of counsel claim

must generally be presented to the state courts as an independent claim before it can be used to establish cause for a procedural default. *Edwards v. Carpenter*, 529 U.S. 446, 452 (2000) (citing *Murray*, 477 U.S. at 489). In such case, unless the prisoner can satisfy the cause and prejudice standard for the procedurally defaulted ineffective assistance of counsel claim, the ineffective assistance of counsel claim cannot serve as cause for another procedurally defaulted claim. *Id.* at 453. To show prejudice, the petitioner must show that there is at least a reasonable probability that the result of the proceeding would have been different had the constitutional violation not occurred. *Henderson v. Campbell*, 353 F.3d 880, 892 (11th Cir. 2003).

Second, the petitioner may show that enforcing the procedural default would result in a fundamental miscarriage of justice. *Mize*, 532 F.3d at 1190. To show a fundamental miscarriage of justice, the petitioner must show that in light of new evidence, no reasonable juror would have convicted him. *Id.* (citing *Schlup v. Delo*, 513 U.S. 298, 327 (1995)).

Petitioner has failed to demonstrate either cause and prejudice for the default or a fundamental miscarriage of justice. Petitioner provides no reason for his failure to properly exhaust this claim in state court. *See Ward v. Hall*, 592 F.3d 1144 (11th Cir. 2010) ("It is well established that if

the petitioner fails to show cause, we need not proceed to the issue of prejudice."). Although Petitioner contends that he raised this claim on direct appeal, as the Court previously discussed, Petitioner did not.

Petitioner also has not suggested that appellate counsel somehow rendered ineffective assistance of counsel by not squarely presenting the claim as a federal constitutional claim on direct appeal. Nor does this claim involve new evidence upon which no reasonable juror would have convicted him. Petitioner therefore cannot demonstrate a fundamental miscarriage of justice to excuse his procedural default. *See Mize*, 532 F.3d at 1190. Accordingly, Petitioner is not entitled to relief on ground one.

Moreover, even assuming ground one was properly exhausted in state court, it is nevertheless without merit. To the extent Petitioner is challenging the trial court's evidentiary ruling, a state trial court's evidentiary rulings do not provide a basis for federal habeas relief absent a showing that the ruling affected the fundamental fairness of the trial. *See Sims v. Singletary*, 155 F.3d 1297, 1312 (11th Cir. 1998). A petitioner must show that the ruling was more than merely erroneous; it must have had "'[a] substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)).

In this case there was substantial other evidence of guilt upon which

the jury could find Petitioner guilty. For example, one of the victims, Gregory Young, testified that he identified all four perpetrators of the robbery within hours after the offense, including Petitioner, who Mr. Young had no doubt was one of the perpetrators that robbed him. (ECF No. 26-3 at 102–03, 114–16, 120–21.)

Additionally, Officer Reveille testified that immediately after Officer Preston stopped the suspects' vehicle and two of the suspects jumped out and fled, he saw Petitioner and one of the co-defendants running from the area where the suspects' vehicle had been stopped. (*Id.* at 207–09.) Thus, even if Petitioner had properly exhausted ground one, it does not warrant federal habeas relief. Ground one should therefore be denied.

Ground Two: Petitioner's claim that the state trial court erred by excluding notes that were written by a co-defendant (Jarell Whitehead), was unexhausted and is procedurally defaulted and in any event has no merit.

In ground two Petitioner argues that the trial court erred in excluding the notes written by Mr. Whitehead and sent to Petitioner. Petitioner claims that the notes exculpated Petitioner and were corroborated by other testimony presented by the defense during trial, thus establishing that Petitioner was with Latonia Jackson at the time of the robbery. Petitioner contends that the state courts' rulings violated his right to due process and

right to present a defense.

Respondent argues, however, that ground two is unexhausted and procedurally defaulted. The Court agrees.

Petitioner presented a similar claim in ground two on direct appeal. (ECF No. 26-5 at 282–89.) Petitioner's entire argument on appeal, however, pertained to state law and state evidentiary rules. (*Id.*) Nothing in that claim referenced Petitioner's right to due process, his rights under the Sixth Amendment, or even his constitutional rights in general. (*Id.*) Thus, contrary to Petitioner's assertion, the claim raised on direct appeal does not "call[] to mind specific rights protected by the Constitution—i.e., constitutional due process rights and Sixth Amendment right to present a defense." (ECF No. 39 at 3.) Ground two is therefore unexhausted and also procedurally defaulted for the same reasons set forth in ground one. Accordingly, ground two should be denied.

Even assuming ground two was properly exhausted, which it was not, it is without merit. "It is not the province of a federal court to reexamine state-court determinations of state-law questions." *Estelle*, 502 U.S. at 68. The trial court's ruling on whether the notes were hearsay or fell within a hearsay exception is governed by Florida law. As previously discussed, however, a state trial court's evidentiary ruling does not provide a basis for

federal habeas relief absent a showing that the ruling affected the fundamental fairness of the trial. *Sims*, 155 F.3d at 1312.

Although the trial court did not permit introduction of the handwritten notes, other evidence was admitted at trial to support Petitioner's claim that he did not know anything about the guns used in the robbery, was not present for the robbery, and was not with Mr. Whitehead on the night of the robbery. Notably, Petitioner testified at trial, and provided this evidence for the jury to consider. (ECF No. 26-5 at 81–90.) Petitioner therefore cannot argue that he was denied a fair trial in accordance with the fundamental standards of due process. Accordingly, even if ground two was properly exhausted, it is without merit and should be denied.

Ground Three: Petitioner's claim that the state trial court erred by failing to exclude a juror who initiated contact with an employee from the State Attorney's Office after jury selection is unexhausted and procedurally defaulted and in any event is without merit.

Petitioner argues in ground three that the trial court erred in failing to strike a juror who, following jury selection, had *ex parte* communication with an employee in the State Attorney's office. Petitioner says that prior to the beginning of trial, the State advised the trial court that the employee received a phone call from one of the jurors the night before trial asking if she could bring her notepad to the courtroom to take notes. (ECF No. 5 at

31.) The State further advised that the employee told the juror he could not talk to her about anything. (*Id.*) The trial judge then questioned the juror, who admitted to calling the employee, explaining that the employee went to her church. The juror advised the trial court that the employee told her she probably could not bring her own notepad but that a notepad might be provided. (*Id.*) The juror stated that she did not tell the employee any details about the date of the trial on which she had been selected to serve as a juror or the name of the case. (*Id.*) Petitioner contends that the exact conversation could not be ascertained because the State's representation and the juror's representation of the conversation differed. Petitioner says that because the communication occurred in an *ex parte* setting, he was denied his right to a fair and impartial jury.

Respondent argues, however, that ground three is unexhausted and procedurally defaulted. The Court agrees.

Petitioner raised a similar claim in ground three on direct appeal. (ECF No. 26-5 at 290–96.) Like grounds one and two of the instant Petition, however, ground three on direct appeal does not reference federal law or Petitioner's constitutional rights, except for his assertion that "[t]he law treats errors in jury selection with utmost care because 'trial by jury in criminal cases is fundamental to the American scheme of justice.'" (*Id.* at

292) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)). This single reference to *Duncan* amidst Petitioner's six page argument, however, does not squarely present and plainly define his claim such that a reasonable reader would interpret his claim as a federal claim. *See Kelley*, 377 F.3d at 1345. Ground three is therefore unexhausted and also procedurally defaulted for the same reasons set forth in ground one. Accordingly, ground three does not warrant federal habeas relief.

Assuming, *arguendo*, that ground three was properly exhausted, it is nevertheless without merit. That is so because:

> A trial court possesses broad discretion in determining how to proceed when confronted with allegations of juror bias. *United States v. Yonn*, 702 F.2d 1341, 1344–45 (11th Cir. 1983). The discretion extends to the initial decision of whether or not to interrogate jurors regarding bias. *Id.* at 1345. The more speculative or unsubstantiated the allegation of juror misconduct, the lower the burden is for a trial court to investigate. *United States v. Caldwell*, 776 F.2d 989, 998 (11th Cir.1985). "In the absence of a colorable showing that the conduct complained of impugned in any way the integrity of the trial process, the district court is not required to make further inquiries or to conduct a hearing and its refusal to do so did not constitute an abuse of discretion." *United States v. Barshov*, 733 F.2d 842, 852 (11th Cir. 1984).

Miller v. United States, 562 F. App'x 838, 844–45 (11th Cir. 2014).

Although the State and the juror may not have provided a word for word match as to the conversation that occurred between the juror and the

state employee the night before trial, neither version suggests that the juror had any bias toward Petitioner or even that the specific case was discussed. Petitioner has not established that the juror was so tainted that the trial court's failure to strike her as a juror denied Petitioner of his right to a fair and impartial jury. Thus, even assuming ground three was exhausted—which it was not—it should be denied.

Ground Four: Petitioner's claim that the cumulative effect of the errors committed by the state trial court in obtaining the Petitioner's convictions constituted reversible cumulative error is without merit.

Petitioner raised this claim in ground four of his direct appeal (ECF No. 26-5 at 297; ECF No. 26-6 at 1–2.) Although it is questionable whether he fairly presented this claim to the state courts as a federal claim,[6] even assuming ground four was properly exhausted and not procedurally defaulted, it is without merit. The argument fails because:

> The cumulative error doctrine provides that an aggregation of non-reversible errors (i.e., plain errors failing to necessitate reversal and harmless errors) can yield a denial of the constitutional right to a fair trial, which calls for reversal." *United States v. Baker,* 432 F.3d 1189, 1223 (11th Cir. 2005) (internal quotation marks omitted). We address claims of cumulative error by first considering the validity of each claim individually,

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[6] Petitioner's sole reference to federal law in ground four on direct appeal was in citing *United States v. Baker*, 432 F.3d 1189, 1203 (11th Cir. 2005), to support his assertion that the court "should reverse if it finds the cumulative effect of the trial court's errors to be prejudicial, even if the prejudice caused by each individual error was harmless." (ECF No. 26-6 at 1.)

> and then examining any errors that we find in the aggregate and in light of the trial as a whole to determine whether the appellant was afforded a fundamentally fair trial. *See United States v. Calderon*, 127 F.3d 1314, 1333 (11th Cir. 1997).

Morris v. Sec'y, Dep't of Corr., 677 F.3d 1117, 1132 (11th Cir. 2012). Where there is no error, however, in any of the trial court's rulings, there can be no cumulative error to require reversal. *Id.* (citing *United States v. Taylor*, 417 F.3d 1176, 1182 (11th Cir. 2005); *United States v. Waldon*, 363 F.3d 1103, 1110 (11th Cir. 2004); *United States v. Barshov*, 733 F.2d 842, 852 (11th Cir. 1984)).

As previously discussed, grounds one through three have no merit. Accordingly, there can be no cumulative error to require reversal. Ground four should therefore be denied.

Ground Five: Petitioner's claim has no merit that defense counsel rendered ineffective assistance of counsel by failing to file a motion to suppress the Petitioner's out-of-court identification and in-court identification, which was unnecessarily suggestive in violation of the Petitioner's due process rights.

Petitioner claims defense counsel erred by not filing a motion to suppress Mr. Young's identification of Petitioner. The photo lineup that law enforcement showed to Mr. Young several hours after the robbery included four photographs, three of which were the three co-defendants already in custody and whom Mr. Young already had seen. Petitioner says that the

police told Mr. Young they had a picture of the man who was in custody and that they wanted Mr. Young to look at the photograph and tell them if the person in the photograph was the person that robbed him. Petitioner claims the police obtained Mr. Young's out-of-court pre-trial identification by means of an unnecessarily suggestive procedure. He argues that Mr. Young's in-court identification would not have been admissible had counsel filed a motion to suppress. Specifically, Petitioner contends there was very little evidence to convict him independent of Mr. Young's identification of Petitioner. Petitioner argues that because the theory of defense was misidentification, counsel's failure to file a motion to suppress undermined any confidence in the outcome.

Petitioner raised this claim in ground two of his motion for postconviction relief. Following an evidentiary hearing on remand from the First DCA, the circuit court denied the claim on the merits. (ECF No. 26-8 at 126–32.) The circuit court noted that although Mr. Bernstein could not specifically remember why he did not move to suppress Mr. Young's suggestive identification of Petitioner, Mr. Bernstein testified during the evidentiary hearing that based on his forty-two years as a criminal defense attorney he did not believe that the motion would have been successful. (*Id.* at 130.) Mr. Bernstein explained that by raising the issue in a motion to

suppress before trial, the trial judge likely would have limited Mr. Bernstein's argument regarding the suggestive identification to the jury, which was important because his trial strategy was to argue that Petitioner was misidentified based on the suggestive identification and a rush to judgment. (*Id.*) The circuit court noted that Mr. Bernstein emphasized the purported unreliability of Mr. Young's identification of Petitioner as the person who robbed him during closing argument. (*Id.* at 13–31.) The circuit court then explained:

> It can be presumed that defense counsel would have made the same argument had he filed a motion to suppress the identification. If counsel had filed a motion to suppress based on that argument, the motion would have been denied. First, according to Young, there was sufficient lighting at the location of the offense when it occurred. . . . . He had no difficulty seeing the persons robbing him. Second, Defendant was seen by Officer Reveille running away from the scene. . . . . Third, Defendant matched the description provided by Young. He was a young, light-skinned black male, less than 6 feet tall, with a low haircut. And, Young's identification of Defendant as the person who robbed him never faltered. Fourth, Defendant denied knowing any of his co-defendants, yet he was friends with co-defendant Woulard and his fingerprint was on Woulard's SUV, which was involved in the robbery. Fifth, he was seen by State witness Virgil Lee with co-defendant Woulard at a club that night. Finally, although Defendant was not wearing a striped shirt when he was caught, a striped shirt was found at the scene, next to the SUV, which is consistent with Defendant disposing of the shirt as he was fleeing from the SUV. . . . .
>
> Even if counsel did err by failing to file a motion to suppress the identification, Defendant still fails to show

> prejudice because counsel pointed out to the jury all of the aforementioned issues with the identification of Defendant as the perpetrator. . . . . And, there was evidence independent of Young's identification introduced at trial which placed Defendant with co-defendant Woulard that night, as well as evidence of his flight from the scene and denial of knowing the co-defendants. There is not a reasonable probability that the outcome of the trial would have been different even without Young's identification.
>
> For these reasons, Defendant fails to show either error by counsel or prejudice. Accordingly, the claim raised is without merit.

(*Id.* at 131–32.) The First DCA per curiam affirmed without written opinion. (ECF No. 26-9 at 157.)

To the extent Petitioner argues that the state court's decision was based on an unreasonable determination of the facts, the Court disagrees.

The improper use of photographs by police may reduce the trustworthiness of a subsequent lineup or courtroom identification. *Simmons v. United States*, 390 U.S. 377, 383–84 (1968). However, "[t]he danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error." *Id.* at 384. "[E]ach case must be considered on its own facts, and . . . convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if

the photograph identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Id.*; *see Simmons v. State*, 934 So. 2d 1100, 1118 (Fla. 2006) (the test for whether a suggestive identification procedure should be excluded has two prongs: (1) did the policy employ an unnecessarily suggestive procedure in obtaining an out-of-court identification; and (2) if so, considering all the circumstances, did the suggestive procedure give rise to a substantial likelihood of irreparable misidentification).

"Where suggestive pretrial confrontations may have created a substantial likelihood of irreparable misidentification at trial, the core question is whether under the totality of the circumstances, the in-court identification was reliable." *Jones v. Newsome*, 846 F.2d 62, 64 (11th Cir. 1988). In determining whether the in-court identification was reliable, the court should consider the following factors: (1) whether the witness had the opportunity to view the criminal at the time of the crime; (2) the degree of attention by the witness; (3) the accuracy of the witness's prior description; (4) the level of certainty displayed by the witness; and (5) the length of time between the crime and the identification. *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972); *see Simmons*, 934 So. 2d at 1118. "The state court's findings on each of the *Biggers* factors are entitled to a presumption of

correctness . . . .” *Hawkins v. Sec., Fla. Dep't of Corr.*, 219 F. App’x 904, 907 (11th Cir. 2007).

Even assuming the photographic array was impermissibly suggestive, the in-court identification was reliable under the totality of the circumstances. Mr. Young testified that there was sufficient lighting where the offense occurred and he had no difficulty seeing the person that robbed him. (ECF No. 26-3 at 101–02; ECF No. 26-4 at 147, 151–52) Petitioner matched the description that Mr. Young provided—a light skin black male, shorter and younger than Mr. Young, small build, and with a short haircut. (ECF No. 26-3 at 103; ECF No. 26-4 at 148) Mr. Young’s identification of Petitioner never faltered. (ECF No. 26-3 at 114–16; ECF No. 26-4 at 152, 161–62) Mr. Young also identified Petitioner as the person who robbed him only several hours after the offense. (ECF No. 26-3 at 120; ECF No. 26-4 at 161–62, 171.) Furthermore, Officer Reveille witnessed Petitioner running away from the area where the suspects’ vehicle had been stopped. (ECF No. 26-3 at 208–209, 212–13; ECF No. 26-4 at 254–56, 258–60.) Thus, as the state court concluded, Mr. Young’s in-court identification of Petitioner was reliable.

Petitioner has also failed to demonstrate that the state court’s decision was contrary to, or involved an unreasonable application of,

clearly established federal law.

As the state court noted, Mr. Bernstein testified that based on his forty-two years of experience he did not think the trial court would have granted a motion to suppress and would have instead limited his argument regarding the suggestive identification to the jury. (ECF No. 26-8 at 50–54.) Mr. Bernstein further stated that he "wanted to make this argument to the jury," and "thought that was our best place to make it." (*Id.* at 51.) Accordingly, Mr. Bernstein made a strategic choice not to file a motion to suppress and instead emphasized the unreliability of the out-of-court identification to the jury during closing arguments.

"In order to show that an attorney's strategic choice was unreasonable, a petitioner must establish that no competent counsel would have made such a choice." *Provenzano v. Singletary*, 148 F.3d 1327, 1332 (11th Cir. 1998). The more experienced an attorney is, the more likely it is that the decision to rely on experience and judgment is reasonable. *Id.*

For these reasons, Mr. Bernstein's decision not to file a motion to suppress was not unreasonable. And even assuming counsel should have filed a motion to suppress, Petitioner has not shown that the out-of-court identification would have been excluded. Notably, the state court confirmed that it would not have granted a motion to suppress. Thus, Petitioner

cannot demonstrate that the was prejudiced by counsel's decision not to file a motion to suppress. Ground five therefore fails on the merits.

Ground Six: Petitioner's argument that defense counsel rendered ineffective assistance of counsel by failing to object and move for a dismissal when the State withheld Brady evidence does not entitle him to habeas relief.

Petitioner claims the State withheld *Brady*[7] evidence because it failed to produce the blue and white striped shirt worn by the person who robbed Mr. Young. Specifically, Petitioner argues that the State improperly questioned Mr. Young at trial about the blue and white striped shirt and admitted photographs of the shirt into evidence, but failed to present the actual shirt to the jury. Petitioner claims that the shirt would have been exculpatory evidence because it could have been tested for DNA, which would have shown that Petitioner was not wearing the shirt on the night of the robbery. Petitioner argues in ground six that counsel was ineffective for failing to object and move for a dismissal based on the State's withholding of *Brady* evidence.

Petitioner presented this claim in ground five of his motion for postconviction relief. On remand from the First DCA, the state court acknowledged it is undisputed that law enforcement failed to preserve the

[7] *Brady v. Maryland*, 373 U.S. 83 (1963).

striped shirt seen in the crime scene photos. (ECF No. 26-8 at 133.) The state court pointed out, however, that although Mr. Bernstein testified at the evidentiary hearing that he did not file a *Brady* motion because he did not know, prior to trial, that the striped shirt had not been collected into evidence, Mr. Bernstein also testified that even if the shirt had been collected he would not have tested it for DNA due to the potential negative consequences the result could have on the theory of defense. (*Id.*) The state court then denied the claim on the merits. The state court found that:

> Based on the testimony presented at the evidentiary hearing, this Court finds that there is no competent, substantial evidence to support the claim that law enforcement intentionally destroyed or intentionally failed to collect the shirt. In particular, the striped shirt appears to have made if from outside the vehicle to inside the vehicle before the vehicle was impounded. In Defense Exhibit #1, the shirt is seen outside the vehicle. In State's Exhibit #5, the inside of the rear of the SUV is shown. There is no striped shirt in the photograph. In State's Exhibits #9 and 10, the shirt is seen in that same area of the vehicle, on top of other items. If the shirt in all three photographs is the same shirt, then that suggests the shirt was picked up off the ground and placed in the SUV prior to the SUV being impounded by the Gainesville Police Department. Thus, the shirt would not have been left lying on the side of the road. During the evidentiary hearing Property and Evidence Supervisor Howard Hughes testified that the SUV was impounded on December 17, 2006; and, was release to co-defendant Woulard's son two days later, on December 19, 2006. Presumably, since no striped shirt was taken into evidence by law enforcement, the striped shirt seen in the SUV in the crime scene photographs came into the possession of co-defendant Woulard's son at that time.

> During the portion of the evidentiary hearing on this issue, the State essentially conceded that law enforcement was negligent in failing to collect the shirt into evidence. So, the only question is whether the striped shirt was 'materially exculpatory' or only 'potentially useful.'[] Given the fact that the striped shirt was located near the SUV and matched the description of the shirt worn by one of the perpetrators, it would have been only potentially useful to the defense. It is speculative for Defendant to claim that the shirt would have exonerated him had it been DNA tested. It is equally possible that a DNA test of the shirt could have inculpated him. And, even if the DNA test determined that his DNA was not present, that fact would not have refuted the other evidence of his guilt: (1) Virgil Lee's testimony placing him with co-defendant Woulard that night; (2) co-defendant Woulard's SUV being used in the robbery; (3) his flight from law enforcement; (4) his denial of knowing any of the co-defendants; and, (5) his fingerprints on the SUV.
>
> For these reasons, had counsel filed a *Brady* claim, the motion would have been denied because the evidence was not intentionally destroyed; and if the shirt was in the SUV when it was returned to co-defendant Woulard's son, the shirt was obtainable by the defense with due diligence. Furthermore, there is not a reasonable probability that had the loss of the shirt been disclosed, it would have affected the outcome of the trial. The shirt was, at best, only potentially useful to the defense. Because Defendant has failed to show either error by counsel or prejudice, the claim raised is without merit.

(*Id.* at 134–36.) The First DCA per curiam affirmed the circuit court's decision without written opinion. (ECF No. 26-9 at 157.)

Petitioner has not shown that the state court's decision was contrary to, or involved an unreasonable application of clearly established federal law. As the state court found, counsel could not have been deficient for failing to file a *Brady* motion when (1) he did not know that the shirt had not

been collected into evidence, and (2) there is nevertheless no evidence of a *Brady* violation in this case.

To establish a *Brady* violation, a defendant must allege specific facts that, if accepted as true, demonstrate: (1) the evidence was favorable to the accused, "either because it is exculpatory, or because it is impeaching"; (2) the "evidence must have been suppressed by the state, either willfully or inadvertently;" and (3) "prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999); *see Wickham v. State*, 124 So. 3d 841, 851 (Fla. 2013). To establish that prejudice ensued from the suppression, the defendant must demonstrate "that there is a reasonable probability that the result of the trial would have been different if the suppressed [evidence] had been disclosed to the defense." *Strickler*, 527 U.S. at 289.

Petitioner cannot demonstrate the evidence was favorable to him because it is just as likely that had the shirt been tested for DNA, the results could have inculpated him. Moreover, there is no evidence that the State intentionally destroyed or failed to collect the shirt. Nor can Petitioner demonstrate that prejudice ensued because counsel testified that even if the shirt had been disclosed to the defense, he would not have tested the shirt for DNA. Counsel explained that he did he want to to use the

discrepancies regarding the striped shirt to support the theory of defense, because he had been involved in cases where forensics on a particular piece of evidence, such as DNA testing, actually generated more evidence against his client. (ECF No. 26-8 at 57–59–60.)

Even assuming there was a *Brady* violation, Petitioner cannot demonstrate that he was prejudiced by counsel's failure to file a *Brady* motion. As discussed, Petitioner's assertion that the striped shirt would have exculpated him is nothing more than speculative. Additionally, there was sufficient other evidence upon which the jury could have convicted Petitioner, including Mr. Young's identification of Petitioner as the person who robbed him, other testimony contradicting Petitioner's testimony that he did not know the co-defendants and was not with any of the co-defendants the night of the robbery, and Officer Reveille's testimony that Petitioner was one of the suspects who fled from the area where the suspects' vehicle had been stopped.

In short, the state court's decision was neither contrary to, nor did it involve an unreasonable application of clearly established federal law. Ground six therefore does not warrant habeas relief.

Ground Seven: Petitioner's claim that defense counsel rendered ineffective assistance of counsel by failing to move to suppress the Petitioner's statements to law enforcement has no merit.

Petitioner claims the *Miranda*[8] warnings he was given by law enforcement were insufficient because Detective Quirk did not inform Petitioner that he had a right to counsel during questioning. He argues that although Detective Quirk told him that he had a right to an attorney before he answered any questions and that an attorney could be appointed, Detective Quirk's warnings did not reasonably convey to him that he had a right to the presence of counsel during the actual questioning. Petitioner therefore contends that counsel should have filed a motion to suppress his statements to law enforcement.

Petitioner presented this claim in ground one of his motion for postconviction relief. The state court denied the claim on the merits, however, finding that the transcript of Petitioner's first trial demonstrates Detective Quirk advised Petitioner, prior to interviewing him, that he had a right to have counsel present during questioning. (ECF No. 26-6 at 367.) The state court determined that "[b]ecause [Petitioner] was advised of his right to have counsel present, he fail[ed] to show either error by counsel or

[8] *Miranda v. Arizona*, 384 U.S. 436 (1966).

prejudice in counsel's failing to file a motion to suppress based on the *Miranda* warning given." (*Id.*) The First DCA thereafter affirmed. (ECF No. 26-7 at 243.)

Petitioner has not demonstrated that the state court's decision was contrary to or an unreasonable application of clearly established federal law. Under *Miranda v. Arizona*, "an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation. 384 U.S. 436, 471 (1966). The "rigidity" of *Miranda* does not, however, "extend[] to the precise formulation of the warnings given a criminal defendant." *California v. Prysock*, 453 U.S. 355, 359 (1981). Instead, "[t]he inquiry is simply whether the warnings reasonably 'convey to a suspect his rights as required by *Miranda*.'" *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989) (quoting *Prysock*, 453 U.S. at 361)).

At Petitioner's first trial Detective Quirk testified that he advised Petitioner of his *Miranda* warnings prior to speaking with Petitioner, including advising Petitioner that he had the right to have an attorney *present* and that one would be appointed if he could not afford one. (ECF No. 26-4 at 1.) Detective Quirk testified that Petitioner "stated that he understood [all of the Miranda warnings] and was willing to speak with

[them]." (*Id.*) Detective Quirk further testified that before asking Petitioner any questions, to the best of his knowledge, Petitioner knowingly and voluntarily waived his rights and agreed to speak with him. (*Id.* at 1–2.)

At Petitioner's second trial Detective Quirk confirmed that Petitioner was advised of his *Miranda* rights prior to speaking with law enforcement. (ECF No. 26-5 at 4.) Detective Quirk testified that he told Petitioner he had a right to an attorney before he answered any questions and that one would be appointed if he could not afford one. (*Id.*) He also explained to Petitioner that he had the right at any time to stop answering questions if he wanted to. (*Id.*) Petitioner then stated he understood his rights and that he was willing to speak with law enforcement. (*Id.* at 4–5.) Petitioner further stated he understood everything that was explained to him and had no questions about his rights. (*Id.* at 5.) Detective Quirk also confirmed that to the best of his knowledge, Petitioner knowingly and voluntarily waived his rights and agreed to speak with law enforcement. (*Id.*)

Detective Quirk's testimony summarizing the warnings does not suggest he failed to convey that Petitioner had a right to have counsel present during questioning. Based on the record before this Court, there was no reason for counsel to file a motion to suppress Petitioner's statements to law enforcement after being informed of his *Miranda* rights.

Petitioner's reliance on *State v. Powell*, 998 So. 2d 531 (Fla. 2008), *rev'd*, *Florida v. Powell*, 559 U.S. 50 (2010), provides no assistance to Petitioner. The Florida Supreme Court found in *Powell* that it was constitutionally deficient to simply inform a suspect of the right to talk or consult with a lawyer *before questioning* and not to inform a suspect of his right to have a lawyer *with him during questioning.* 998 So. 2d at 542.

That is not what happened here. In this case Detective Quirk testified that he advised Petitioner of his right to have an attorney present. (ECF No. 26-4 at 1.) Thus, nothing suggests Petitioner was not properly informed prior to questioning of his right to have an attorney present during questioning. Consequently, there was no reason for trial counsel to file a motion to suppress Petitioner's statements and counsel could not have been deficient for failing to do so. Accordingly, ground seven should be denied.

Ground Eight: Defense counsel did not render ineffective assistance of counsel by failing to object to comments made by the State during closing arguments.

Petitioner contends the prosecutor improperly injected his personal opinion on the merits of witness' testimony and improperly attacked the defense's theory during closing arguments. Petitioner specifically points to the prosecutor's characterization of Petitioner's testimony as an

"unbelievable coincidence" and assertions by the prosecutor that Petitioner's testimony was "false" and "not true." Petitioner argues that counsel's failure to object to the prosecutor's statements denied him a fair trial because the evidence of his guilt was not overwhelming.

Petitioner presented this claim in ground three of his postconviction motion. The state court denied the claim on the merits, noting that under Florida law the State is allowed to submit to the jury a conclusion that could be drawn from the evidence, and finding the prosecutor "was merely arguing [to] the jury that [Petitioner's] testimony as to what happened the night of the offense was contradicted by the evidence in the case." (ECF No. 26-6 at 369.) The state court concluded that because the prosecutor's comments were not improper, counsel did not err by failing to object to them. (*Id.*) The First DCA affirmed. (ECF No. 26-7 at 243.)

Petitioner has failed to demonstrate that the state court's decision was contrary to, or involved an unreasonable application of, clearly established federal law.

The prosecutor's statements during closing arguments were made in reference to the evidence, particularly Petitioner's own testimony that was in direct conflict with both what he told law enforcement during questioning and evidence from other witnesses at trial. There was nothing improper

about the prosecutor arguing to the jury a conclusion that could be drawn from the evidence. *See Breedlove v. State*, 413 So. 2d 1, 8 (Fla. 1982) (wide latitude is given to the parties in closing arguments to fairly discuss and comment upon properly admitted testimony and other evidence, as well as to make logical inferences from that evidence); *Craig v. State*, 510 So. 2d 857, 865 (Fla. 1987) (finding no impropriety in prosecutor's references to the defendant's testimony as untruthful and assertions that the dependant was a "liar" because when "it is understood from the context that the charge is made with reference to testimony given by the person thus characterized, the prosecutor is merely submitting to the jury a conclusion that he is arguing can be drawn from the evidence"). Thus, there was no reason for counsel to object to the prosecutor's arguments and his failure to do so does not rise to the level of deficient performance. *See Wiggins v. McNeil*, No. 08-22473-CIV, 2011 WL 3878335, at *4 (S.D. Fla. Aug. 31, 2011) (counsel did not render ineffective assistance of counsel by failing to object to prosecutor's comments during closing arguments about petitioner being a liar because the comments were made in reference to the evidence). Ground eight should be denied.

Ground Nine: Defense counsel did not render ineffective assistance of counsel by failing to introduce into evidence the Petitioner's jail property record.

At trial the state argued that shortly before he fled from the vehicle after law enforcement stopped him Petitioner took off the blue and white striped collared shirt the victim identified the robber wore during the robbery. The blue and white striped collared shirt was found on the ground outside of the vehicle. Petitioner claimed, however, that he was wearing a blue sweatshirt that night, not a blue and white striped collared shirt.

Petitioner argues counsel should have introduced the actual Alachua County Jail property record into evidence at trial to prove that Petitioner was wearing a blue sweatshirt when he was arrested—i.e., on the night of the robbery—not a blue and white striped collared shirt as alleged by the victim and the State. Petitioner further argues that although counsel admitted the blue sweatshirt into evidence at trial, the property record would have refuted the State's theory that Petitioner was not wearing the blue sweatshirt when he was arrested and that his mother had actually put the blue sweatshirt in Petitioner's property at the jail when she visited him.

Petitioner presented this claim in ground four of his motion for postconviction relief. The circuit court denied this claim on the merits. The state court found that:

> The fact that Defendant may have been wearing a blue sweatshirt on the night of the offense is not mutually exclusive with the fact that Defendant may have been wearing the striped shirt that victim Gregory Young described and which was found next to the vehicle that Defendant's co-defendants were stopped in. Thus, even if counsel had introduced the jail property record into evidence at trial to support Defendant's testimony that he was wearing a blue sweatshirt at the time of his arrest, that document would not have refuted the State's evidence that Defendant was wearing the striped shirt at the time of the offense. Because there is not a reasonable probability that the jail property record would have affected the outcome of the trial, Defendant fails to show either error by counsel or prejudice. Accordingly, the claim raised in without merit.

(ECF No. 26-6 at 370.) The First DCA affirmed. (ECF No. 26-7 at 243.)

Petitioner has not demonstrated that the state court's decision was contrary to, or involved an unreasonable application of, clearly established federal law. Even assuming Petitioner was wearing a blue sweatshirt when he was arrested, counsel nevertheless admitted the actual blue sweatshirt into evidence at trial. Moreover, what Petitioner was wearing when he was arrested does not negate the State's theory that Petitioner removed the blue and white striped collared shirt to change his appearance before he fled from the vehicle in which his co-defendants were stopped. Thus, as the state court explained, even if counsel should have admitted the property record into evidence, he cannot demonstrate that he was

prejudiced by counsel's failure to do so. Ground nine should therefore be denied.

Ground Ten: Defense counsel did not render ineffective assistance of counsel by failing to elicit a description of the suspect's clothing from defense witness Benjamin Walker.

Petitioner claims defense witness Benjamin Walker testified during his deposition that he saw two men run from the suspects' vehicle upon being stopped by law enforcement. One was 6'3" to 6'4" wearing a long white T-shirt. The other was approximately 6'2" with dreadlocks. At trial, Mr. Walker testified that the two men were approximately 6'3" to 6'4" and that the man with dreadlocks was wearing a black shirt. But he did not testify, as he did at his deposition, that the other man was wearing a white T-shirt. (ECF No. 26-5 at 39.) Petitioner argues that defense counsel should have elicited testimony from Mr. Walker about the white T-shirt the other man was wearing. Petitioner contends such testimony would have shown he was not one of the robbery suspects because he was not wearing a black or white shirt.

The state court denied this claim on the merits because "[g]iven the fact that Mr. Walker did not identify Defendant as one of the fleeing suspects during his testimony, the jury was clearly aware that the purpose of Mr. Walker's testimony was to refute the State's contention that

Defendant was one of the fleeing suspects." (ECF No. 26-6 at 371–72.) The state court therefore concluded that there was not a reasonable probability that the outcome of the trial would have been different had Mr. Walker testified about the white T-shirt. (*Id.* at 372.) The First DCA affirmed the circuit court's decision. (ECF No. 26-7 at 243.)

Petitioner has not demonstrated that the state court's decision was contrary to or an unreasonable application of clearly established federal law. As the state court explained, it was clear, based on Mr. Walker's testimony about the height of the suspects,[9] as well as the fact that Mr. Walker did not identify Petitioner as one of the suspects, that the point of his testimony was to refute the State's contention that Petitioner was one of the fleeing suspects. Even if counsel should have elicited this testimony from Mr. Walker, it was not unreasonable for the state court to conclude that there was not a reasonable probability that the outcome of the trial would have been different had counsel elicited testimony from Mr. Walker about the white T-shirt. Petitioner therefore has failed to demonstrate prejudice and his claim should be denied.

[9] As defense counsel argued in closing arguments, Petitioner is only 5'6". (ECF No. 26-5 at 185.)

Ground Eleven: Defense counsel did not render ineffective assistance of counsel by failing to investigate and call material witnesses to testify, who were known to counsel prior to trial.

In ground eleven Petitioner claims defense counsel was ineffective by failing to investigate and call Chauncey Presley, Fred Williams, Yolanda Rochelle, and Shalandra Rochelle as witnesses at trial.

Petitioner claims Mr. Presley and Mr. Williams would have testified that they saw Petitioner leave the club that night prior to the robbery with Ms. Jackson and get into Ms. Jackson's silver Chrysler, not the black Mazda SUV in which the robbery suspects fled. Petitioner says this would have supported his assertion that he was with Ms. Jackson that night—contrary to her testimony at trial—and shown that he did not get into the black Mazda SUV with the robbery suspects.

Petitioner also claims that Yolanda and Shalandra Rochelle would have impeached the victims' testimony that Yolanda and Shalandra Rochelle were present during the robbery. According to Petitioner, Yolanda Rochelle testified at her deposition that she never saw anyone with a gun nor witness any robbery and had only heard that a robbery occurred. Similarly, Shalandra Rochelle testified at her deposition that although she was in the victim's car and saw a man in a black shirt tap on the driver's side window, she did not see a gun and just jumped out of the car when

she heard her sister screaming. Petitioner claims Yolanda and Shalandra Rochelle's testimony would have called into question the victims' accounts of the robbery and impeached the victims' credibility.

Petitioner says defense counsel knew about these four witnesses prior to trial and planned to call them because he referenced them in opening statements. He alleges that counsel's failure to call these four witnesses prejudiced his right to a fair trial.

The state court denied this claim on the merits because "[t]he record reflects that Defendant, under oath, agreed with counsel's decision not to call these witnesses. . . . . Because Defendant agreed with counsel's decision, and further indicated that he was satisfied with counsel's representation, Defendant fails to show either error by counsel or prejudice." (ECF No. 26-6 at 372.) The First DCA subsequently affirmed. (ECF No. 26-7 at 243.)

The state court's decision was neither contrary to, nor did it involve and unreasonable application of clearly established federal law. Petitioner stated, under oath, that counsel called all the witnesses he promised he would call. (ECF No. 26-5 at 76.) Petitioner further stated that he was satisfied with counsel's representation at trial. (*Id.*) Petitioner's statements under oath at trial demonstrate that he agreed with counsel's decision not

to call these four witnesses. Petitioner therefore cannot show that the state court's determination was objectively unreasonable. *See Levine v. Sec'y, Dep't of Corr.*, No. 8:14-cv-1195-T-36JSS, 2017 WL 3131450, at *8 (M.D. Fla. July 24, 2017) (denying ineffective assistance of counsel claim premised on counsel's alleged failure to call certain witnesses at trial where petitioner stated under oath at trial that he agreed with counsel's decision not to call any other witnesses). Accordingly, ground eleven should be denied.

Ground Twelve: Defense counsel did not render ineffective assistance of counsel by failing to investigate and present evidence of Officer Reveille's disciplinary history during the trial.

At trial Officer Reveille testified that he chased one of the suspects through a doorway a bystander had seen the suspect run through. He then apprehended Petitioner, who was the same person that Officer Reveille had been chasing. Officer Reveille further testified that as he brought Petitioner back to the patrol car, Petitioner attempted to flee by jumping into another car but fell when the car pulled away. Petitioner claims Officer Reveille actually slammed him to the ground, causing a head injury for which Petitioner was taken to the hospital. Petitioner says Officer Reveille was later terminated from his job with the Gainesville Police Department ("GPD") for twelve allegations of misconduct, including

inefficiency in job performance with respect to failure to report use of force, violation of statutory authority, intentional destruction of evidence, and improper arrest. Petitioner claims counsel should have investigated Officer Reveille's disciplinary history and presented the misconduct to the jury as impeachment evidence and to call into question Officer Reveille's credibility. Petitioner contends that such evidence would have likely changed the outcome of the trial.

The state court denied this claim on the merits, noting that according to Officer Reveille's disciplinary report, although the incident which ultimately let to Officer Reveille's termination occurred prior to Petitioner's trial on June 5, 2008, Officer Reveille was not terminated until November 12, 2008—after Petitioner's trial. (ECF No. 26-6 at 372.) Additionally, Officer Reveille testified at Petitioner's trial that he was still an active officer with the GPD. (*Id.*) The state court explained that Officer Reveille's disciplinary history did not refute Mr. Young's testimony identifying Petitioner as the person who robbed him. (*Id.* at 373.) The First DCA affirmed. (ECF No. 26-7 at 243.)

Petitioner has failed to demonstrate that the state court's decision was contrary to or involved an unreasonable application of clearly established federal law. Although the record is unclear as to the date

Officer Reveille was terminated from the GPD,[10] Officer Reveille testified at trial that he was still an active member of the GPD, thus confirming that he had not yet been terminated at the time of trial. (ECF No. 26-4 at 252–53.)

Moreover, even assuming counsel had investigated Officer Reveille's disciplinary history and was permitted to question Officer Reveille about his disciplinary history at trial, as the state court noted, Officer Reveille's disciplinary history does not refute Mr. Young's testimony that he had no doubt Petitioner was one of the people who robbed him. The state court's determination that Petitioner failed to show prejudice from counsel's failure to investigate Officer Reveille's disciplinary history was therefore not objectively unreasonable. Accordingly, ground twelve does not warrant federal habeas relief.

Ground Thirteen: Defense counsel did not render ineffective assistance of counsel by requesting a mistrial during the first trial.

In ground thirteen Petitioner claims there was no reason for counsel to move for a mistrial during the first trial. Petitioner argues there was nothing prejudicial that was said. Petitioner says that counsel nevertheless failed to discuss moving for mistrial with Petitioner before doing so. He argues "[t]here is a reasonable probability that had the first jury rendered a

[10] *See* ECF No. 26-6 at 361–62.

verdict, the verdict would have been a not guilty verdict." (ECF No. 5 at 86.)

Petitioner concedes that this claim is unexhausted. (*Id.*) Petitioner also cannot file a second or successive motion for postconviction relief. This claim is therefore also procedurally defaulted.

Petitioner contends, however, that he satisfies the exception set forth in *Martinez v. Ryan*, 556 U.S. 1 (2012), to excuse his procedural default. Under *Martinez*, inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance of counsel. *Id.* at 9. "To overcome the default, [however,] a prisoner must also demonstrate the the underlying ineffective-assistance-of-trial-counsel claim is a substantial, one, which is to say that the prisoner must demonstrate that the claim has some merit." *Id.* at 14.

Petitioner argues that postconviction counsel was ineffective for failing to properly raise this issue in Petitioner's motion for postconviction relief. He further contends that the underlying ineffective assistance of trial counsel claim "has some merit" to overcome the default.

Even assuming Petitioner's postconviction counsel should have raised this issue, Petitioner has failed to demonstrate that this claim is a substantial one. Nevertheless, even if Petitioner could overcome the

procedural default, his claim is meritless.

During direct examination Petitioner testified that he washed and detailed the vehicle in which his two co-defendants were stopped earlier that day. (ECF No. 26-4 at 67–68.) On cross-examination, the prosecutor, Mr. Colaw, asked Petitioner whether he remembered firearms in the vehicle. (*Id.* at 68.) The following exchange took place:

> A. No, I did not see no firearms. No, sir, I didn't. And you would know that best, because you came to the jail and tried to bribe me and give me 10 years if I didn't . . . testify against them.
>
> Q. Really.
>
> A. Really.
>
> Mr. Colaw: Mr. Berry – Your Honor, I'm going to move to strike. And I think we need to talk about this because that's – He's just made me a witness.
>
> The Court: All right.
>
> Mr. Colaw: And I'd be glad to testify.
>
> The Court: Mr. Berry, did you hear me tell you a little while ago to answer only the question that was asked?
>
> The Defendant: Well, I just went into detail.
>
> The Court: Would you take the jury back, please?
>
> The Bailiff: Yes, Your Honor.
>
> (The following proceedings took place outside the presence of the jury)
>
> The Court: Mr. Bernstein, I'm not going to decide it at this moment. I'm not going to take the time to deal with direct criminal contempt. But I want you to know that I am going to seriously consider direct criminal contempt for Mr. Berry.
>
> . . . .
>
> The Court: Just to put that on the record. I just do not have time to deal with it right now. I did not understand the significance of what he said. Perhaps you do.
>
> Mr. Colaw: Well, it's a flat-out lie. The significance is it's a

blatant lie. And – and now I don't know really – I don't really have any other way to address it or deal with it other than become a witness, take that stand, raise my hand, and tell the jurors he just blatantly flat-out lied. And –

. . . .

The Court: Was it clear to you, Mr. Bernstein? What Mr. Berry said?

Mr. Bernstein: Was it clear to me?

The Court: Yeah.

Mr. Bernstein: Yes.

The Court: Okay. As I'm reading it, he said Mr. Colaw came out to the jail and tried to bribe him and give him 10 years if he would testify against them, obviously referring to his co-defendants.

. . . .

The Court: The issue has nothing to do with what the negotiations were. The issue has to do solely with the accusation that he's made in the presence of the jury, and what affect that's going to have on this trial. That's our issue right now.

Mr. Colaw: Correct.

The Court: Do either of you have any suggestions on how we cure this, or if it even needs to be cured? Obviously it does. This is a very serious allegation.

Mr. Bernstein: Well, first, absent a motion for mistrial –

The Court: Yes.

Mr. Bernstein: – I think the Court can give a curative instruction that the jury should disregard any such statement as not being relevant to this proceeding. I'm not moving for a mistrial.

The Court: Let me ask this question though about that. I understand that. I can tell them to disregard it.

Mr. Bernstein: Yes.

The Court: But if they disregard it and still wonder if it's true –

Mr. Bernstein: Oh, I understand.

The Court: – do we have a problem? Disregarding it isn't the question so much in this case, as even if they separate it, they have an accusation by the Defendant that the prosecutor

came out to the jail and tried to bribe him to get him to testify against co-defendants. How do we unring that bell?

Mr. Bernstein: That – that – I don't have an answer for The Court. I would acknowledge on the record that if there was a mistrial, it would be because of what Mr. Berry said.

The Court: Yes.

Mr. Bernstein: So I don't think that jeopardy is attached to prevent any retrial.

The Court: You're absolutely right. I've had this issue come up before. And if – especially after being instructed, a Defendant does something that, in my judgment, makes it not possible for the State to get up here at trial, I can declare a mistrial and charge it to the Defense. . . . .

. . . .

Mr. Colaw: Right. I can tell The Court I'm not requesting a mistrial at this time. But I am requesting a – a very strong curative instruction and admonition – admonishment of that comment to the jury in the jury's presence. I mean, the problem is – the difficulty is it's – it has created quite the appearance that it was just me, not him with his lawyer, and that I went there unsolicited –

The Court: I tried a few minutes ago to identify a problem that I think is a real one. If I give a curative instruction with strong words, really go all out with it, what I'm asking them to do, I'm afraid, is not just disregard it, but to disbelieve it. Then the merits of that are laying right out here in the middle of this trial, and they haven't been resolved. Do you see what I'm saying?

Mr. Colaw: Oh, I totally – I completely understand, Your Honor.

The Court: But to reprimand him and this – and tell them to disregard that – The only inference you can draw from that is I'm telling the jury that this is not true. I'm – I just – I don't know on my own motion if I can declare a mistrial.

Mr. Bernstein: Well –

The Court: But I cannot think of a way to take something this serious out of the juror's minds.

Mr. Colaw: Judge, I actually – I believe you could. I mean, you could on your own motion – on The Court's own motion,

declare a mistrial.

Mr. Bernstein: Well, let me – Let me interject.

The Court: I don't think I would do it. I wouldn't do it without a motion.

Mr. Bernstein: I'll make it easier for The Court. At this time, I would move for a mistrial based on the statement that was made before the jury. I agree with The Court. I don't know how this is going to be taken out of their frame of reference in deciding what the facts are in this case. And that any verdict would be tainted with this information. And I don't know how we would separate it after the fact. I think it's impossible to separate.

The Court: I don't know how we can separate the taint from the State's fair trial and yours.

Mr. Bernstein: Right.

The Court: Anything I say to correct it is going to fall on Mr. Berry. And maybe he deserves it. But not in the context of whether this jury is finding him guilty or not guilty, based just on the evidence.

Mr. Bernstein: Given the seriousness of the consequences of a verdict of guilt, I would respectfully move for a mistrial.

The Court: I don't think we can have a fair trial beyond this point. And I'm not sure who the unfairness would fall on. I think it's more likely to fall on Mr. Berry than you, but this is very personal to you.

Mr. Colaw: Well, as I said, I – I understand.

Mr. Bernstein: I don't think we can make the decision based on who the – who's going to catch the downside, if we all agree –

The Court: No.

Mr. Bernstein: – that there's a taint on the process, I don't think it matters who gets hurt by it. That would be the basis for granting a mistrial.

The Court: I think the taint is so large that a curative instruction would not do it. And I think Mr. Colaw at least senses that when he says if we reprimand him, what we're doing then is making sure the taint falls on him. And I think the remedy for that is not that he gets an unfair – fair trial that he

> deserves. The remedy is a mistrial and some other consequence to him.
>
> All right. As much as investment as we've had in this, getting it here, and the investment we put into this entire day – but that's not good enough reason to continue with an unfair trial. If I knew of a better way to address it, I would, but I just don't.
>
> Mr. Bernstein: I don't either, Your Honor.
>
> The Court: I know you're opposed. I want to give you a chance to argue against it.
>
> Mr. Colaw: I – I don't have anything else to say, Judge.
>
> The Court: All right.

(*Id.* at 68–76.) The jurors then returned to the courtroom and the trial judge declared a mistrial. (*Id.* at 79.)

Even if trial counsel was deficient by moving for mistrial and/or failing to confer with Petitioner prior to doing so, Petitioner cannot demonstrate that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. Petitioner's assertion that "[t]here is a reasonable probability that had the first jury rendered a verdict, the verdict would have been a not guilty verdict," is nothing more than pure speculation. Speculative claims do not entitle a petitioner to federal habeas relief. *See Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991) (vague, conclusory, or unsupported allegations cannot support an ineffective assistance of counsel claim); *Argo v. Sec'y*, No. 8:05-cv-1964-T-33EAJ, 2010 WL 3222064, at *17 (M.D. Fla. Aug. 16, 2010) (ineffective assistance

of counsel claim failed because it rested "on the speculation that had the lesser-included offense [in the jury instructions] been armed robbery, a third-degree felony, that the jury would have found him guilty of this offense rather than attempted robbery with a deadly weapon").

Notably, Petitioner points to nothing in the record to support his claim that the verdict would have been a "not guilty" verdict. Instead, as the trial judge explained, had the trial continued with the trial judge reprimanding Petitioner and giving the jury a curative instruction, the taint likely would have fallen on Petitioner, not the State. Accordingly, ground thirteen should be denied.

Ground Fourteen: Petitioner's argument that the cumulative effect of defense counsel's errors deprived the Petitioner of a fair trial has no merit.

Finally, Petitioner claims that all of the errors committed by defense counsel, either considered individually or together, resulted in the denial of a fair trial.

As an initial matter, this claim appears to be unexhausted and procedurally defaulted. Petitioner did not present a standalone cumulative ineffective assistance of counsel claim in his motion for postconviction relief. Although he stated in a conclusory manner in the conclusion section of his motion for postconviction relief that "there is a reasonable probability

that, but for counsel's cumulative unprofessional errors, the result of the proceeding would have been different," (ECF No. 266 at 111), the state circuit court did not address this cumulative error assertion in ruling on Petitioner's motion for postconviction relief. (*Id.* at 365–73.) Petitioner also cannot return to state court at this juncture to present this claim and he has provided no reason to excuse his procedural default.

Nevertheless, Petitioner's cumulative ineffective assistance of counsel claim is without merit. Even assuming the cumulative error doctrine applies in the context of ineffective assistance of counsel claims,[11] ground fourteen fails because, as discussed, none of the alleged errors by counsel approach the threshold standard of ineffective assistance of counsel. Petitioner is therefore not entitled to federal habeas relief on ground fourteen.

Certificate of Appealability

Section 2254 Rule 11(a) provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. §

[11] The Eleventh Circuit has noted the absence of Supreme Court precedent applying the cumulative error doctrine to claims of ineffective assistance of counsel. *Forrest v. Fla. Dep't of Corr.*, 342 F. App'x 560, 564 (11th Cir. 2009).

2253(c)(2).” A timely notice of appeal must still be filed, even if the court issues a certificate of appealability. Rule 11(b), Rules Governing Section 2254 Cases.

The undersigned finds no substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000). Therefore, the undersigned recommends that the district court deny a certificate of appealability in its final order.

Rule 11(a) also provides: “Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue.” Thus, if there is an objection to this recommendation by either party, that party may bring this argument to the attention of the district judge in the objections permitted to this report and recommendation.

Conclusion

For the foregoing reasons it is respectfully **RECOMMENDED** that the Amended Petition for Writ of Habeas Corpus, ECF No. 5, should be **DENIED**, and that a certificate of appealability should be **DENIED**.

IN CHAMBERS this 13th day of June 2018.

s/Gary R. Jones
GARY R. JONES
United States Magistrate Judge

NOTICE TO THE PARTIES

Objections to these proposed findings and recommendations must be filed within fourteen (14) days after being served a copy thereof. Any different deadline that may appear on the electronic docket is for the court's internal use only, and does not control. A copy of objections shall be served upon all other parties. If a party fails to object to the magistrate judge's findings or recommendations as to any particular claim or issue contained in a report and recommendation, that party waives the right to challenge on appeal the district court's order based on the unobjected-to factual and legal conclusions. *See* 11th Cir. Rule 3-1; 28 U.S.C. § 636.