No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

TYRONE ROBERTS – PETITIONER

vs.

UNITED STATES OF AMERICA – RESPONDENT

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-14598-C

TYRONE TERRANCE ROBERTS,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Julie Jones,
ATTORNEY GENERAL OF THE STATE OF FLORIDA,
Pam Bondi,

Respondents-Appellees.

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

ORDER:

In order to appeal the district court's denial of his *pro se* 28 U.S.C. § 2254 petition, Tyrone Roberts, a Florida prisoner, moves for a certificate of appealability ("COA"), and leave to proceed *in forma pauperis* ("IFP"). Roberts is serving a 30-year sentence for robbery with a deadly weapon. 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), by demonstrating "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," *see Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Reasonable jurists would not debate the district court's denial of his claim that counsel should have filed a motion to suppress his police interview because there was no meritorious

argument for counsel to raise, as Roberts's *Miranda v. Arizona*, 384 U.S. 436 (1966), waiver was knowing and voluntary, and his confession admissible. *See Slack*, 529 U.S. at 484; *Hart v. Att'y Gen. of the State of Fla.*, 323 F.3d 884, 891 (11th Cir. 2003). Specifically, the record indicates that Roberts was advised of his *Miranda* rights prior to being interviewed, and there is no ambiguity regarding his waiver of his *Miranda* rights. Additionally, the record contains no support for Roberts' claim that the detective strong-armed a confession by saying that, if he did not confess, then Thomas would be in jeopardy of being charged. *Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991).

Reasonable jurists would not debate the denial of his second claim, either, regarding suppressing evidence of an out-of-court identification of him, because Roberts's confession was introduced into evidence, so the jury had substantial other evidence on which to base its verdict, other than the bank teller's identification of him as the robber. *See Slack*, 529 U.S. at 484; *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Because Roberts has not satisfied the *Slack* test for his claims, his motion for a COA is DENIED. His motion for IFP status is DENIED AS MOOT.

/s/ Kevin C. Newsom
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case Number: 17-14074-CIV-MARTINEZ-WHITE

TYRONE TERRANCE ROBERTS,

Petitioner,

vs.

JULIE L. JONES,

Respondent.
_____/

ORDER ADOPTING MAGISTRATE JUDGE WHITE'S REPORT AND RECOMMENDATION

THIS MATTER was referred to the Honorable Patrick White, United States Magistrate Judge, for a Report and Recommendation on Petitioner's *pro se* petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254 [ECF No. 1]. Magistrate Judge White filed a Report and Recommendation [ECF No. 14], recommending that this petition for habeas corpus relief be denied on its merits; that no certificate of appealability issue; and, that the case be closed. Petitioner has filed objections [ECF No. 17]. This Court has reviewed the entire file and record and has made a *de novo* review of the issues that the objections to the Magistrate Judge's Report and Recommendation present. The Court finds the issues raised in Petitioner's objections are already addressed in Magistrate Judge White's well-reasoned Report and Recommendation. Florida law considers crime and flight a continuous criminal episode. Also, even if Petitioner's council's performance was deficient, which has not been shown, Petitioner cannot demonstrate prejudice because the evidence of Petitioner's guilt was overwhelming in this case. Finally, Petitioner has not challenged Magistrate Judge White's recommendation that a certificate of appealability be denied.

After careful consideration, it is hereby:

ADJUDGED that United States Magistrate Judge White's Report and Recommendation [ECF No. 14] is **AFFIRMED** and **ADOPTED**. Accordingly, it is:

ADJUDGED that this petition for habeas corpus relief is **DENIED** on the merits; no certificate of appealability shall issue; and, the case is **CLOSED**. Final Judgement will be issued by separate order.

DONE AND ORDERED in Chambers at Miami, Florida, this 12 day of July, 2018.

JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
Magistrate Judge White
All Counsel of Record
Tyrone Terrance Roberts, *pro se*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 17-14074-CV-MARTINEZ
MAGISTRATE JUDGE P.A. WHITE

TYRONE TERRANCE ROBERTS,

Petitioner,

v.

JULIE L. JONES,

Respondent.
_____/

REPORT OF
MAGISTRATE JUDGE

I. Introduction

Tyrone Terrance Roberts has filed a pro se petition for writ of habeas corpus, pursuant to 28 U.S.C. §2254, challenging the constitutionality of his convictions and sentences, entered following a jury verdict in the Nineteenth Judicial Circuit in and for Indian River County, Florida, case no. 312010CF001562A.

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

For its consideration of the petition (DE#1) and amended petition (DE# 8), the court has the response of the state (DE#9, 10, 11) to this court's order to show cause with supporting appendices, containing copies of relevant state court pleadings,[1]

[1]The appendix includes copies of the state court criminal and appellate dockets, which can also be found on-line. See Fed.R.Evid. 201; see also, United States v. Glover, 179 F.3d 1300, 1302 n.5 (11th Cir. 1999)(finding the district court may take judicial notice of the records of inferior courts). The court also takes judicial notice of its own records in habeas proceedings, McBride v. Sharpe, 25 F.3d 962, 969 (11th Cir. 1994), Allen v. Newsome, 7985 F.2d 934, 938 (11th Cir. 1986), together with the state records, which can be found on-line. See Fed.R.Evid. 201; see also, United States v. Glover, 179 F.3d 1300, 1302 n.5

as well as Petitioner's reply (DE# 13).

II. Claims

Because the petitioner is *pro se*, he has been afforded liberal construction under Haines v. Kerner, 404 U.S. 419 (1972). In this federal habeas petition, the petitioner raises the following grounds for relief:

Claim 1: The trial court erred in improperly imposing the minimum mandatory based on the use of a firearm. (DE#8:3-5).

Claim 2: Ineffective assistance of counsel for failing to properly consult with Petitioner. (DE#8:6-8).

Claim 3: Ineffective assistance of counsel for failing to request a Nelson[2] Hearing. (DE#8:8-9).

Claim 4: Ineffective assistance of counsel for failing to move to suppress Petitioner's statement to the police. (DE#8:9-10).

Claim 5: Ineffective assistance of counsel for failing to move to suppress the show-up identification. (DE#8:10-11).

Claim 6: Ineffective assistance of counsel for failing to move to request a principals jury instruction. (DE#8:11-14).

III. Procedural History

(11th Cir. 1999)(finding the district court may take judicial notice of the records of inferior courts).

[2]In brief, *Nelson* stands for the proposition that an inquiry by the trial court is appropriate when an indigent defendant attempts to discharge current, and obtain new, court-appointed counsel prior to trial due to ineffectiveness. Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973). See also Handpick v. State, 521 So.2d 1071 (Fla.), cert. denied, 488 U.S. 871 (1988).

The state charged Petitioner by information with robbery with a deadly weapon (count 1) and third degree grand theft (count 2). (DE# 10, Ex. 1). The state nolle prossed Count 2. (DE# 10, Ex. 2). Petitioner proceeded to a jury trial on count 1. (DE# 11, Trial Transcript).

At trial, Jacqueline Sartain testified to the following. She was working as a teller at a TD Bank in Vero Beach when a man came into the bank, pulled out a note, put it on her station, and slid it towards her. (T. 124-26). The note said "give me the money, I have a gun." (T. 126). The robber next whispered to her that he really had a gun. (T. 127). She feared that she would be shot if she did not comply with the demand in the note, as a result, she opened her drawer and stacked the cash she had on her station. (T. 127, 130). After she gave the robber the money, he fled the scene. (T. 127). The police responded to the bank and she spoke to Detective Kelly, who took her to a different site for a show-up identification. (T. 132). After arriving, she saw the suspect, who had removed a wig and bandana. (Id.). She "definitely recognized his face and . . . knew exactly at that moment that [it] was him." (Id.). She identified Petitioner as the robber, but admitted she did not see a gun during the robbery. (T. 133, 135, 219-22).

Indian River County Sheriff's Office Detective John Finnegan testified to the following facts. He was picking up his patrol car when he heard a call come on the radio that a helicopter was following a vehicle suspected of being involved in a robbery. (T. 186-89). He saw the vehicle stop and Petitioner run from the vehicle. (T. 189-94). He then chased Petitioner through a bay door at a citrus packing plant. (Id.). Petitioner's "foot got caught and he fell to the ground" at which point Finnegan saw a gun slide out from what appeared to be Petitioner's waistband and hit the ground.

(T. 189-194). Detective Finnegan eventually caught and arrested Petitioner and performed a search incident to arrest, during which he asked Petitioner whether he had any weapons, and Petitioner responded "you already saw one gun, what do you think I do, carry two." (T. 206).

Tommy Scott, an employee at Harbor Island Citrus, the packing plant through which officers chased Petitioner, testified that he also saw Petitioner drop a gun on the floor and he maintained a watch over the gun to ensure it was not moved. (T. 211-16).

Officer Nathan Lazinsky testified that he was called to the scene of an armed robbery, but was diverted because two other deputies had stopped a black Jeep Grand Cherokee. (T. 144-47). When Officer Lazinsky arrived on scene, he saw a blue shirt and stacks of money blowing around on the ground next to the vehicle. (T. 147-48). Officer Lazinsky assisted in collecting the money and in detaining the driver of the vehicle, a female. (T. 151). He transported her back to the station. (Id.).

Sergeant Milton Martin, the supervisor of the crime scene and evidence units of the Vero Beach Police Department, testified as follows. He recovered a blue dress shirt from beside the black Jeep and a stack of money with a GPS tracker inside. (T. 156-66). He found inside the vehicle, a red bandana and a dreadlock styled wig behind the passenger seat. (Id.). Underneath the bandana and wig, he found the note passed to the teller. (T. 171). Finally, Sergeant Martin recovered a Colt .380 automatic Pocketlite from the packing plant, but admitted that he could not identify Petitioner's prints on the gun. (T. 171, 179).

Mark Chapman, a firearms examiner with the Indian River Crime

Laboratory, testified that he test fired the gun recovered at the scene and it was in fact a functioning firearm. (T. 180-85).

Detective Kelly testified to the following facts. He interviewed Petitioner after his arrest. The Petitioner's statement was played for the jury. Petitioner admitted the following: He committed the robbery as a "last second decision" but did not pull the gun on Sartain and later said that he did not have a gun on him at all. (T. 223-24, 229, 236-38). Petitioner stated that he did not want to get caught with the gun and only had the gun on him when he got caught in order to get it out of the vehicle. (T. 238). Petitioner did not threaten Sartain with a gun at any point during the robbery, but later admitted he "might" have said he had a gun in the note. (T. 240-41). Petitioner stated the gun fell out when he got out of the vehicle. (T. 252).

Petitioner testified in his own defense and asserted an actual innocence claim. (T. 278-91). Petitioner testified to the following version of events. A friend of his called him on the day of the robbery to tell him she had car trouble, so he went to pick her up. (T. 278-79). His friend drove to Vero Beach to pick up a man named Trev Johnson. (T. 281, 283). They wound up in an area with which Petitioner was unfamiliar and they stopped. (T. 284). He went into "some building" but did not see Trev, but then heard a car horn and his name, so he returned to his car. (T. 285). When he returned, he saw an agitated Trev in the back seat. (T. 286). After Petitioner got into the car, they drove away. (Id.).

Petitioner eventually began to fight with Trev while they were driving but Petitioner's friend pulled the vehicle over, at which point Trev and Petitioner got out and fought more. (T. 286). Petitioner eventually got back into the car and told his friend to

drive off, leaving Trev behind. (T. 286). Once back in the car, Petitioner saw money on the ground and a shirt, but neither he nor his friend knew why they were in the car. (T. 287). Police pulled up behind them and, though there was no gun in the car, Petitioner panicked and ran into the packing plant. (T. 288-89). Petitioner gave a false confession to Officer Kelly because he felt bad for his friend and did not want to see her go to jail. (T. 289-90). He told Detective Kelly about Trev but that part of his statement was not taped. (T. 311-12).

The jury found Petitioner guilty as charged in the information and the jury specifically concluded that he "actually possessed a firearm in the course of committing the robbery." (DE# 10, Ex. 3). The trial court adjudicated him guilty and sentenced him to thirty years' imprisonment, with a ten-year mandatory minimum sentence. (DE# 10, Ex. 4-5).

Petitioner appealed in the Fourth District Court of Appeal ("Fourth DCA"). (DE# 10, Ex. 7). While the appeal was pending, Petitioner filed two motions to correct sentencing error pursuant to Fla.R.Crim.P. 3.800(b)(2), arguing that the ten-year mandatory minimum sentence was improper. (DE# 10, Ex. 8, 10). The trial court denied both motions. (DE# 10, Ex. 9, 11). On appeal, he argued that the trial court erred in imposing the ten-year mandatory minimum sentence because the jury did not find that Petitioner actually possessed a firearm "during the commission of" the robbery. (DE# 10, Ex. 12). Petitioner raises this same claim under claim 1 in the instant proceedings. On November 19, 2014, the Fourth DCA affirmed in a written opinion in Roberts v. State, 152 So.3d 669 (Fla. 4th DCA 2014). The Fourth DCA concluded that the "enhanced penalty [must] be predicated upon a 'clear jury finding' that the defendant possessed a firearm during the commission of the felony." Id. at 5.

It further concluded that because the "crime of robbery . . . continues during flight after attempt or commission of the robbery[,]" Petitioner was "involved in a single continuous criminal episode, so that even without strong circumstantial evidence that [Petitioner] possessed the firearm at the bank, evidence that he was in actual physical possession during his flight from the robbery was sufficient to support imposition of the mandatory minimum." Id. at 7. Mandate issued on **December 19, 2014**. (DE# 10, Ex. 16). He did not seek review in the Florida Supreme Court. (Ex. 27). Thus, petitioner's judgment of conviction became final on **March 19, 2015**, which is 90 days after Florida's Fourth DCA issued its decision affirming the state trial court and when time for seeking review with the U.S. Supreme Court expired.[3]

The federal limitations period next ran unchecked for **215 days**, from **March 19, 2015 until September 13, 2015**, when the petitioner filed a motion for postconviction relief pursuant to Rule 3.850 that alleged: (1) Ineffective assistance of counsel for failing to properly consult with Petitioner; (2) ineffective assistance of counsel for failing to request a Nelson Hearing; (3) ineffective assistance of counsel for failing to move to suppress

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[3]See Gonzalez v. Thaler, 132 S.Ct. 641, 655 (2012); Chavers v. Sec'y Dep't of Corr., 468 F.3d 1273 (11th Cir. 2006)(holding that AEDPA's one-year statute of limitations began to run 90 days after Florida appellate court affirmed habeas petitioner's conviction, not 90 days after mandate was issued by that court); Pugh, 485 F.3d at 1299-1300 ("In our decisions regarding the timeliness of habeas petitions filed by Florida prisoners, we have required the inclusion of the 90 days period for seeking direct review in the Supreme Court whenever the prisoner sought review in the highest court of Florida in which direct review could have been had for example...[where] the prisoner could have sought review in the Supreme Court...without first seeking review in the Supreme Court of Florida"); Clifton v. Sec'y Dep't of Corr., 2012 WL 3670264, *2 n.3 (M.D.Fla., August 27, 2012)(distinguishing Gonzalez "because in Florida, the Supreme Court of Florida does not have jurisdiction to review a district court's per curiam decision on direct appeal") (citing Jackson v. State, 926 So.2d 1262, 1265 (Fla.2006)); Gilding v. Sec'y Dep't of Corr., 2012 WL 1883745, *2 n.6 (M.D. Fla., May 22, 2012)(same); see also Sup.Ct.R. 13 (petition for certiorari must be filed within 90 days after entry of judgment); Sup.Ct.R. 30(1)(the day of the act is not counted and the last day, if not a weekend or federal holiday, is counted).

Petitioner's statement to the police; (4) ineffective assistance of counsel for failing to move to suppress the show-up identification; and (5) ineffective assistance of counsel for failing to move to request a principals jury instruction. (DE#10, Ex. 17). Petitioner raises these same claims under claim 2 through 6 in the instant proceedings.

On September 28, 2015, the trial court dismissed the motion without prejudice as legally insufficient. (DE# 10, Ex. 18). The trial court gave a certain period of time for Petitioner to amend the claims to make them legally sufficient. (Id.). Petitioner filed a motion for rehearing, which the trial court denied. (DE# 10, Ex. 19, 20).

Petitioner appealed in the Fourth DCA. (DE# 10, Ex. 21). The Fourth DCA recognized that the order appealed was non-final and non-appealable and relinquished jurisdiction and ordered that "[t]he trial court shall determine whether [Petitioner] timely filed the amended motion permitted by the" trial court's earlier order. (DE# 10, Ex. 22). Subsequently, the trial court concluded that no amended motion was filed and that because Petitioner failed to file an amended motion in the time permitted, the motion was denied. (DE# 10, Ex. 23). Petitioner appealed. On September 15, 2016, the Fourth DCA affirmed without written opinion. (DE# 10, Ex. 24). Mandate issued **October 14, 2016**. (DE# 10, Ex. 25).

From the time the final state court proceedings came to an end on **October 14, 2016**, the federal one-year limitations period ran untolled for **132 days** until the petitioner came to this court, filing the instant federal habeas corpus petition, in accordance

with the mailbox rule, on **February 24, 2017.**[4] (DE#1:15). He filed an amended complaint on April 3, 2017. (DE# 8).

III. Discussion-Timeliness

Since petitioner filed his federal habeas petition after April 24, 1996, the Antiterrorism and Effective Death Penalty Act ("AEDPA") governs this proceeding. See Wilcox v. Fla.Dep't of Corr., 158 F.3d 1209, 1210 (11th Cir. 1998)(*per curiam*). The AEDPA imposed for the first time a one-year statute of limitations on petitions for writ of habeas corpus filed by state prisoners. See 28 U.S.C. §2244(d)(1)("A 1-year period of limitation shall apply to an application for a writ of habeas corpus...."). Specifically, the AEDPA provides that the limitations period shall run from the latest of –

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on

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

collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

See 28 U.S.C. §2244(d)(1).

The limitations period is tolled, however, for "[t]he time during which a properly filed application for post-conviction or other collateral review with respect to the pertinent judgment or claim is pending...." 28 U.S.C. §2244(d)(2). Consequently, as noted above, this petition is time-barred, pursuant to 28 U.S.C. §2244(d)(1)(A), unless the appropriate limitations period was extended by properly filed applications for state post-conviction or other collateral review proceedings. See 28 U.S.C. §2244(d)(2); see also, Rich v. Sec'y for Dep't of Corr's, 512 Fed.Appx. 981, 982-83 (11th Cir. 2013); Nesbitt v. Danforth, 2014 WL 61236 at *1 (S.D. Ga. Jan. 7, 2014).

An application is properly filed "when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee." Artuz v. Bennett, 531 U.S. 4, 8, 121 S.Ct. 361, 148 L.Ed.2d 213 (2000)(footnote omitted); see also, Rich, 512 Fed.Appx. at 983; Everett v. Barrow, 861 F.Supp.2d 1373, 1375 (S.D. Ga. 2012). Consequently, if the petitioner sat on any claim or created any time gaps in the review process, the one-year clock would continue to tick. Kearse v. Sec'y, Fla. Dep't of Corr's, 736 F.3d 1359, 1362 (11th Cir. 2013); Nesbitt, 2014 WL 61236 at *1.

In that regard, "[a]n application that is untimely under state

law is not 'properly filed' for purposes of tolling AEDPAs limitations period." Garby v. McNeil, 530 F.3d 1363, 1367 (11th Cir. 2008)(citation omitted). A motion filed past the deadline for filing a federal habeas petition cannot toll the limitations period. See Hutchinson v. Florida, 677 F.3d 1097, 1098 (11th Cir. 2012)("In order for...§2244(d)(2) statutory tolling to apply, the petitioner must file his state collateral petition before the one-year period for filing his federal habeas petition has run."); Webster v. Moore, 199 F.3d 1256, 1259 (11th Cir. 2000); Nesbitt, 2014 WL 61236 at *1.

Statutory Tolling Under §2244(d)(1)(A) As noted previously in this Report, there were **347 days (215 + 132)** during which no state post-conviction motions were pending before he filed the instant §2254 petition, so as to statutorily toll the limitations period. In fact, the Undersigned has generously statutorily tolled the limitations period. As a result, the petition is timely.

The respondent argues that the petition was untimely filed. See (DE# 9:6-8). The respondent incorrectly asserts that Petitioner only had thirty days following the Fourth DCA affirmance on direct appeal before the limitations clock started running again. This court still affords Petitioners 90 days following the appellate court's ruling on direct appeal before the limitations period begins to run. Applying the 90-day period, the petition is timely. Nevertheless, the respondent addresses the merits.

IV. Standard of Review Re the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")

This federal habeas petition is governed by 28 U.S.C. §2254(d), as amended by the AEDPA. Pursuant to the AEDPA, federal

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

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

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

"Clearly established federal law" consists of the governing legal principles, rather than the dicta, set forth in the decisions of the United States Supreme Court at the time the state court issues its decision. White v. Woodall, 134 S.Ct. at 1702; Carey v. Musladin, 549 U.S. 70, 74, 127 S.Ct. 649, 166 L.Ed.2d 482 (2006)(citing Williams v. Taylor, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). A decision is "contrary to" clearly established federal law if the state court either: (1) applied a rule that contradicts the governing law set forth by Supreme Court

case law; or (2) reached a different result from the Supreme Court when faced with materially indistinguishable facts. Ward v. Hall, 592 F.3d 1144, 1155 (11th Cir. 2010); Mitchell v. Esparza, 540 U.S. 12, 16, 124 S.Ct. 7, 157 L.Ed.2d 263 (2003).

A state court decision involves an "unreasonable application" of the Supreme Court's precedents if the state court correctly identifies the governing legal principle, but applies it to the facts of the petitioner's case in an objectively unreasonable manner, Brown v. Payton, 544 U.S. 133, 134, 125 S.Ct. 1432, 161 L.Ed.2d 334 (2005); Bottoson v. Moore, 234 F.3d 526, 531 (11th Cir. 2000); or, "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Bottoson, 234 F.3d at 531 (quoting Williams, 529 U.S. at 406).

The unreasonable application inquiry "requires the state court decision to be more than incorrect or erroneous," rather, it must be "objectively unreasonable." Lockyer v. Andrade, 538 U.S. 63, 75-77, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003) (citation omitted); Mitchell, 540 U.S. at 17-18; Ward, 592 F.3d at 1155. The Petitioner bears the burden of rebutting the factual findings of the state court "by clear and convincing evidence." 28 U.S.C. §2254(e)(1). In other words, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." Woods v. Etherton, ___ U.S. ___, 136 S.Ct. 1149, 1151 (2016)(quoting Harrington v. Richter, 562 U.S. 86, 101, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011)). Thus, to warrant habeas relief, the decision of the state court "must be 'so lacking in justification that there was an error well understood and comprehended in

existing law beyond any possibility for fairminded disagreement.'" Id. (quoting White v. Woodall, ___ U.S. ____, 134 S.Ct. 1697, 1701 (2014)).

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

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

imposes a highly deferential standard for evaluating state-court rulings ... and demands that state-court decisions be given the benefit of the doubt.")(citations and internal quotation marks omitted).

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

Further, the Supreme Court has recognized that the AEDPA imposes a highly deferential standard for evaluating state-court rulings and requires that state-court decisions be given the benefit of the doubt. Burt v. Titlow, ____ U.S. ____, ___, 134 S.Ct. 10, 15 (2013)(stating, "AEDPA recognizes a foundational principle of our federal system: State courts are adequate forums for the vindication of federal rights."); Hardy v. Cross, 565 U.S. ___, ___, 132 S.Ct. 490, 491, 181 L.Ed.2d 468 (2011)(noting that the AEDPA "imposes a highly deferential standard for evaluating state-court rulings and demands that state-court

decisions be given the benefit of the doubt.") (quoting Felkner v. Jackson, 562 U.S. 594, 131 S.Ct. 1305, 1307, 179 L.Ed.2d 374 (2011)). Thus, "[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling ... was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, 562 U.S. 86, 101-102, 131 S.Ct. 770, 786-87, 178 L.Ed.2d 624 (2011). See also Greene v. Fisher, ____ U.S. ___, ___, 132 S.Ct. 38, 43, 181 L.Ed.2d 336 (2011) (The purpose of AEDPA is "to ensure that federal habeas relief functions as a guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction.") (internal quotation marks omitted).

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

Review under §2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. See Cullen v. Pinholster, 563 U.S. ___, 131 S.Ct. 1388, 1398-1400, 179 L.Ed.2d 557 (2011) (holding new evidence introduced in federal habeas court has no bearing on Section 2254(d)(1) review). And, a state court's factual determination is entitled to a presumption of correctness. 28 U.S.C. §2254(e)(1). Under 28 U.S.C. §2254(e)(1),

this Court must presume the state court's factual findings to be correct unless the petitioner rebuts that presumption by clear and convincing evidence. See id. §2254(e)(1). As recently noted by the Eleventh Circuit in Debruce, 758 F.3d at 1266, although the Supreme Court has "not defined the precise relationship between §2254(d)(2) and §2254(e)(1)," Burt v. Titlow, ___ U.S. ___, ___, 134 S.Ct. 10, 15, 187 L.Ed.2d 348 (2013), the Supreme Court has emphasized "that a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." Burt, Id. (*quoting* Wood v. Allen, 558 U.S. 290, 301, 130 S.Ct. 841, 849, 175 L.Ed.2d 738 (2010)).

B. Ineffective Assistance of Counsel Standard

Petitioner also claims that trial counsel provided constitutionally ineffective assistance. This Court's analysis begins with the familiar rule that the Sixth Amendment affords a criminal defendant the right to "the Assistance of Counsel for his defense." U.S. CONST. amend. VI. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In Strickland, the Supreme Court established a two-part test to determine whether a convicted person is entitled to habeas relief on the grounds that his or her counsel rendered ineffective assistance: (1) whether counsel's representation was deficient, i.e., "fell below an objective standard of reasonableness" "under prevailing professional norms," which requires a showing that

"counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"; and (2) whether the deficient performance prejudiced the defendant, i.e., there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, which "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 688; see also Bobby Van Hook, 558 U.S. 4, 8, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009); Cullen v. Pinholster, 563 U.S. ___, ___, 131 S.Ct. 1388, 1403, 179 L.Ed.2d 557 (2011).

"[T]he Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices." Bobby Van Hook, 558 U.S. at 9 (internal quotations and citations omitted). A court must adhere to a strong presumption that "counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. Strategic choices made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable. Id. at 690-91. To uphold a lawyer's strategy, the Court need not attempt to divine the lawyer's mental processes underlying the strategy. "There are countless ways to provide effective assistance in any given case." Strickland, 466 U.S. at 689. No lawyer can be expected to have considered all of the ways. Chandler v. United States, 218 F.3d 1305, 1316 (11th Cir. 2000)(*en banc*), cert. denied, 531 U.S. 1204 (2001). If the petitioner cannot meet one of Strickland's prongs, the court does not need to address the other prong. Strickland, 466 U.S. at 697. See also Butcher v. United States, 368 F.3d 1290, 1293 (11th Cir. 2004); Holladay v. Haley, 209 F.3d 1243, 1248 (11th Cir. 2000).

The Strickland test applies to claims involving ineffective

assistance of counsel during the punishment phase of a non-capital case. See Glover v. United States, 531 U.S. 198 (2001)(holding "that if an increased prison term did flow from an error [of counsel] the petitioner has established Strickland prejudice"). Prejudice is established if "there is a reasonable probability that but for trial counsel's errors the defendant's non-capital sentence would have been significantly less harsh." Spriggs v. Collins, 993 F.2d 85, 88 (5th Cir. 1993). The standard is also the same for ineffective assistance of appellate counsel claims, requiring petitioner to demonstrate deficient performance and prejudice. Philmore v. McNeil, 575 F.3d 1251, 1264 (11th Cir. 2009)(citing Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991)); Smith v. Robbins, 528 U.S. 259, 285-86, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000); Roe v. Flores-Ortega, 528 U.S. at 476-77.

If the Court finds there has been deficient performance, it must examine the merits of the claim omitted on appeal. If the omitted claim would have had a reasonable probability of success on appeal, then the deficient performance resulted in prejudice. Eagle, 279 F.3d at 943. See also Digsby v. McNeil, 627 F.3d 823, 831 (11th Cir. 2010)(holding that to determine whether the petitioner's appellate counsel rendered ineffective assistance, the court must assess the strength of the claim that the petitioner asserts his appellate counsel should have raised in his state direct appeal and only if failure to bring the claim both rendered counsel's performance deficient and resulted in prejudice to the petitioner was there ineffective assistance); Joiner v. United States, 103 F.3d 961, 963 (11th Cir. 1997). Non-meritorious claims which are not raised on direct appeal do not constitute ineffective assistance of counsel. Diaz v. Sec'y for the Dep't of Corr's, 402 F.3d 1136, 1144-45 (11th Cir. 2005).

Further, the Supreme Court has held that the Sixth Amendment does not require appellate attorneys to press every non-frivolous issue that the client requests to be raised on appeal, provided that counsel uses professional judgment in deciding not to raise those issues. Jones v. Barnes, 463 U.S. 745 (1983). In considering the reasonableness of an attorney's decision not to raise a particular issue, this Court must consider "all the circumstances, applying a heavy measure of deference to counsel's judgments." Eagle v. Linahan, 279 F.3d 926, 940 (11th Cir. 2001), quoting, Strickland, 466 U.S. at 691.

Keeping these principles in mind, the Court must now determine whether counsel's performance was both deficient and prejudicial under Strickland. As indicated, Courts must be highly deferential in reviewing counsel's performance, and must apply the strong presumption that counsel's performance was reasonable. "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689. See also Chandler v. United States, 218 F.3d at 1314. "Surmounting *Strickland's* high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284, 297 (2010). See also Osborne v. Terry, 466 F.3d 1298, 1305 (11th Cir. 2006)(*citing* Chandler v. United States, 218 F.3d at 1313).

A habeas court's review of a claim under the Strickland standard is "doubly deferential." Knowles v. Mirzayance, 556 U.S. 111, 123, 129 S.Ct. 1411, 1420, 173 L.Ed.2d 251 (2009), *citing*, Yarborough v. Gentry, 540 U.S. 1, 5-6, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003)(per curiam). The relevant question "is not whether a federal court believes the state court's determination under the Strickland standard was incorrect but whether that determination was

unreasonable-a substantially higher threshold." Knowles, 556 U.S. at 123, 129 S.Ct. at 1420. (citations omitted). Finally, "because the Strickland standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." Id.

Under AEDPA, a habeas petitioner must establish that the state court's application of Strickland was unreasonable under 28 U.S.C. §2254(d). "Where the highly deferential standards mandated by Strickland and AEDPA both apply, they combine to produce a doubly deferential form of review that asks only 'whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.'" Gissendaner v. Seaboldt, 735 F.3d 1311, 1323 (11th Cir. 2013)(quoting Harrington, 562 U.S. at 103, 131 S.Ct. at 788).

VI. Discussion

Under **claim 1**, Petitioner alleges that the trial court erred in improperly imposing the minimum mandatory based on the use of a firearm. (DE#8:3-5). Petitioner raised the same claim on direct appeal.

The Fourth DCA thoroughly addressed this claim in Roberts v. State, 152 So. 3d 669 (Fla. 4th DCA 2014) as follows:

> Appellant was charged in Count I of the Information with Robbery with a Deadly Weapon. The Information alleged that:
>
> > Tyron Terrance Roberts did take certain property, to-wit: U.S. Currency, from the person or custody of [the bank teller] or [the bank], with the intent to permanently or temporarily deprive the said person or owner of the property, and in the course of the taking there was the use of force, violence, assault, or putting in fear,

and during the course of the commission of the robbery, the defendant actually possessed a firearm, in violation of Florida Statutes 775.087 (10/20/Life), 812.13(1) and 812.13(2T)(a).

(Emphasis added).

. . .

The trial court instructed the jury:

> To prove the crime of robbery, the State must prove the following four elements beyond a reasonable doubt. One, Tyron Roberts took the money from the person or custody of [the bank teller] or [the bank]. Two, force, violence, assault or putting in fear was used in the course of the taking. Three, the property taken was of some value. Four, the taking was with the intent to permanently or temporarily deprive [the bank teller] or [the bank] of her right to the property or any benefit from it or appropriate the property of [the bank teller]or [the bank] to his own use or the use of any person not entitled to it.
>
> The phrase in the course of the taking means that the act occurred prior to, contemporaneous with or subsequent to the taking of the property, that the act and the taking of the property, that the act and the taking of the property constitute a continuous series of acts or events.
>
> ....
>
> An act is in the course of committing the robbery if it occurs in an attempt to commit the robbery or in flight after the attempt or commission.

The jury found appellant guilty of robbery and indicated on the verdict form their finding that the "defendant actually possessed a firearm in the course of committing the robbery." Appellant was sentenced to thirty years in prison, with a ten-year minimum mandatory sentence pursuant to section 775.087(2)(a), Florida Statutes (2010).

Id. at 670-71. The court went on the provide applicable state and federal law.

> In Alleyne v. United States, --- U.S. ----, 133 S.Ct. 2151, 2158, 186 L.Ed.2d 314 (2013), the United States Supreme Court held that, pursuant to Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), any fact that increases the mandatory minimum sentence for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt.
>
> > In Florida, a criminal defendant faces an enhanced mandatory minimum sentence when the defendant possesses a firearm during the commission of an enumerated offense:
> > Any person who is convicted of a felony or an attempt to commit a felony, regardless of whether the use of a weapon is an element of the felony, and the conviction was for:
> >
> > ....
> >
> > c. Robbery;
> >
> > ....
> >
> > and during the commission of the offense, such person actually possessed a "firearm" or "destructive device" as those terms are defined in s. 790.001, shall be sentenced to a minimum term of imprisonment of 10 years....
>
> §775.087(2)(a) 1., Fla. Stat. (2010) (emphasis added).
>
> The Florida Supreme Court clarified the jury findings necessary for imposing the mandatory minimum enhancement under section 775.087(2)(a), Florida Statutes, in State v. Iseley, 944 So.2d 227 (Fla.2006). After reviewing earlier cases where the court considered the sufficiency of a jury verdict to support penalty enhancements mandated by section 775.087(2)(a), the court reiterated its requirement that the enhanced penalty be predicated upon a 'clear jury finding' that the defendant possessed a firearm during the commission of the felony. Iseley,

944 So.2d at 230 (quoting State v. Hargrove, 694 So.2d 729, 731 (Fla.1997)). "This requisite 'clear jury finding' can be demonstrated either by (1) a specific question or special verdict form (which is the better practice), or (2) the inclusion of a reference to a firearm in identifying the specific crime for which the defendant is found guilty." Id. at 231 (citing Tucker v. State, 726 So.2d 768, 771-72 (Fla.1999) and State v. Overfelt, 457 So.2d 1385, 1387 (Fla.1984)).

Id. at 671-72.

Applying the law to the facts at hand, the Fourth DCA concluded as follows:

> [A]ppellant was involved in a single continuous criminal episode, so that even without strong circumstantial evidence that appellant possessed the firearm at the bank, evidence that he was is actual physical possession during his flight from the robbery was sufficient to support imposition of the mandatory minimum.
>
> Here, the jury's verdict constituted a "clear jury finding" that appellant possessed a firearm during the commission of the robbery, thus authorizing the trial court to impose the statutory minimum sentence. The information charged that appellant actually possessed a firearm during the course of the commission of the robbery, in violation of section 775.087(2)(a), and the verdict form contained an express reference to the use of a firearm in the commission of the robbery. See Iseley, 944 So.2d at 231; Grant, 138 So.3d at 1086 ("To 'enhance a defendant's sentence under section 775.087(2), the grounds for enhancement must be clearly charged in the information,' " and the jury must make a finding that the defendant actually possessed the gun). Accordingly, we affirm the mandatory minimum term imposed as part of appellant's sentence.

Id. at 67.

In the instant proceedings, Petitioner fails to point to any new argument which would render the Fourth DCA's reasoned analysis incorrect. No showing has been made either in the state forum or this habeas proceeding that the Fourth DCA erred in affirming

Petitioner's sentence enhancement. As a result, the rejection of this claim was neither contrary to nor an unreasonable application of controlling federal constitutional principles. It should not be disturbed here. Williams v. Taylor, supra.

Under **claim 2**, Petitioner alleges ineffective assistance of counsel for failing to properly consult with Petitioner. (DE#8:6-8). Petitioner raised this in his Rule 3.850 motion. (DE# 10, Ex. 17). The trial court denied the motion. (DE# 10, Ex. 18, 23). The Fourth DCA affirmed. (DE# 10, Ex. 24).

The Court has never required defense counsel to pursue every claim or defense regardless of its merit or chance of success. Knowles v. Mirzayance, 556 U.S. 111 (2009). General allegations of ineffective assistance of counsel are not sufficient to warrant relief. Hill v. Lockhart, 474 U.S. 52 (1985). Instead, a habeas petitioner is required to allege facts that establish both Strickland prongs - deficient performance and resultant prejudice. Id. "[A] petitioner cannot establish an ineffective assistance claims imply by pointing to additional evidence that could have been presented." Van Poyck v. Fla. Dep't of Corr., 290 F.3d 1318, 1324 (11th Cir. 2002). Therefore, vague or conclusory allegations that are speculative and unsupported do not entitle a petitioner to habeas relief for ineffective assistance of counsel. Tejada v. Dugger, 941 F.2d 1551, 1559 (11th Cir. 1991).

Even assuming counsel's pre-trial performance was deficient, Petitioner cannot demonstrate prejudice because the evidence of Petitioner's guilt was overwhelming in this case. Sartain testified that Petitioner slipped her a note that stated he had a gun and he then told her he had a gun. (T. 126-27). Detective Finnegan testified that he observed Petitioner run from the vehicle that was

suspected of being involved in the robbery and drop a gun. (T. 186-94). Detective Finnegan further testified that Petitioner admitted that he carried a gun when he was caught at the citrus packing plant. (T. 206). An employee at the plant testified that he observed Petitioner drop a gun. (T. 211-16). Sartain positively identified Petitioner at a show-up identification. (T. 132). Petitioner gave a statement to the police, which the prosecutor played for the jury, in which Petitioner admitted that he committed the robbery, but only had the gun once he was in the vehicle. (T. 223-24, 229, 236-38).

In light of the foregoing, no showing has been made either in the state forum or this habeas proceeding that the state courts erred in denying this claim in Petitioner's Rule 3.850 motion. As a result, the rejection of this claim was neither contrary to nor an unreasonable application of controlling federal constitutional principles. It should not be disturbed here. Williams v. Taylor, supra.

Under **claim 3**, Petitioner alleges ineffective assistance of counsel for failing to seek a Nelson hearing. (DE#8:8-9). He argues that he made a "reasonable attempt to inform counsel and the Court that he was displeased with counsel's representation." (Id.:8). He argues further that the trial court failed to conduct an adequate Nelson inquiry. (Id.). Petitioner raised this in his Rule 3.850 motion. (DE# 10, Ex. 17). The trial court denied the motion. (DE# 10, Ex. 18, 23). The Fourth DCA affirmed. (DE# 10, Ex. 24).

On the merits, Florida courts have consistently found a Nelson-hearing unwarranted where a defendant expresses dissatisfaction with his attorney and merely presents generalized complaints about defense counsel with no formal allegations of incompetence. See

Finfrock v. State, 84 So.3d 431, 433 (Fla. 2DCA 2012) (quoting Penn v. State, 51 So.3d 622, 623 (Fla. 2 DCA 2011)); Wilson v. State, 889 So.2d 114, 117 (Fla. 4 DCA 2004); Dunn v. State, 730 So. 2d 309, 311-12 (Fla. 4 DCA 1999); Davis v. State, 703 So. 2d 1055, 1058-59 (Fla. 1997); Gudinas v. State, 693 So. 2d 953, 962 n.12 (Fla. 1997). And, in Florida, a trial court has no obligation to inform a defendant of the right to represent himself where a defendant has not unequivocally requested that right. See Watts v. State, 593 So. 2d 198, 203 (Fla. 1992)("[B]ecause there was no unequivocal request for self-representation, Watts was not entitled to an inquiry on the subject of self-representation under Faretta.[5]").

The record does not support this claim. Petitioner told the trial court he was not ready for trial because he had seen his attorney four times and had four different attorneys, but Petitioner never requested to have his attorney removed from his case. (T. 6). Petitioner does not allege any specific facts to show that trial counsel was ineffective and should have been removed. Petitioner only points to generalized complaints about his attorneys' work ethic. These complaints fall short of requiring a Nelson hearing.

Petitioner's arguments regarding his counsel are nothing more that "general allegations of dissatisfaction" that were clearly not sufficient to require a Nelson hearing. The claim warrants no habeas corpus relief on the merits. See 28 U.S.C.§2254(d). See also Williams v. Taylor, supra.

Under **claim 4**, Petitioner alleges ineffective assistance of counsel for failing to move to suppress Petitioner's statement to the police on the grounds that it was involuntary or unreliable.

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[5]Faretta v. California, 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975).

(DE#8:9-10). Petitioner raised this in his Rule 3.850 motion. (DE# 10, Ex. 17). The trial court denied the motion. (DE# 10, Ex. 18, 23). The Fourth DCA affirmed. (DE# 10, Ex. 24).

Specifically, Petitioner alleges that counsel told him during trial that Petitioner's statement to police was "probably unreliable" but did not challenge the statement. (DE# 8:9). He argues that counsel should have argued that the police forced him to make the statement with a promise not to charge Dionne Thomas, that the interrogation was lengthy, and that "psychological factors . . . would have warranted suppression." (Id.). He further argues that counsel should have challenged the statement through cross-examination of Detective Kelly. (Id.:10).

A claim that counsel was ineffective for failing to file a motion to suppress fails where that motion would have been denied by the trial court. Green v. Nelson, 595 F.3d 1245, 1249 (11th Cir. 2010). To obtain relief based on an allegation that counsel was ineffective for failing to filing a motion to suppress, a petitioner must establish: (1) counsel's representation fell below an objective standard of reasonableness; (2) the Fourth Amendment claim is meritorious; and (3) there exists a reasonable probability that the verdict would have been different absent the excludable evidence. Kimmelman v. Morrison, 477 U.S. 365, 375 (1986). Thus, a meritorious Fourth Amendment claim alone is not sufficient to warrant relief. Huynh v. King, 95 F.3d 1052, 1058 (11th Cir. 1996) (quoting Kimmelman, 477 U.S. at 382).

In this case, there was no basis to challenge the Petitioner's statement. Detective Kelly testified that the interview was conducted about forty-five minutes after Petitioner's detention. (T. 224-25). As demonstrated by the video as transcribed at trial, upon

initially speaking to Petitioner, Detective Kelly read him his Miranda rights and Petitioner voluntarily waived those rights. (T. 229). There was no evidence of threats or coercion or any activity which would have caused the waiver to be questioned. (Id.).

As evidenced by the tape played at trial, Petitioner almost immediately told Detective Kelly that he made a last second decision to rob the bank:

> Q. With those rights in mind, can I talk to you about your arrest?
>
> A. Sure can.
>
> Q. What happened?
>
> A. Nothing, man.
>
> Q. Let me make it better than this. Did, is it Dionne? Did she have anything to do with this?
>
> A. No, she didn't, man. She ain't know what I was going to do, man.
>
> Q. When did you make up your mind that you were going to rob that bank?
>
> A. It was a last second decision. (Inaudible) just doing bad, man. Things just been going bad for me.

(T. 229).

Any allegation that Petitioner was threatened that Dionne Thomas would be charged if he did not confess is unsupported by the record. As far as his psychological comfort, Petitioner's handcuffs were placed in front and he was given water during the interview. (T. 232-35). Petitioner also admitted to writing the note. (T. 231).

Petitioner stated during the taped interview played for the

jury that he was having money troubles and "just needed some money." (T. 234-35). He stated he was alone and did not pull out a gun during the robbery. (T. 237). Petitioner also expressed his regret at robbing the bank and apologized for scaring the teller. (T. 240-41). He then theorized that he was caught because the money had a dye pack or "metal detector in it or something." (T. 241). With no one in the room and on multiple occasions, Petitioner stated that the "[d]amn GPS got me" and the "[d]ang GPS . . . got me caught." (T. 247, 255, 257).

According to the evidence at trial, Detective Kelly did not use any improper methods during the interview. Petitioner voluntarily waived his Miranda rights. Any motion to suppress asserting the contrary would have failed. Contrary to Petitioner's argument, during cross-examination, defense counsel used the detective's use of Dionne Thomas as a strategy, even bringing up the phrase "compliant confession," and questioned him about other strategies that might have had a psychological effect on a suspect. (T. 259-63, 266). Petitioner points to nothing specific about this statement that rendered it involuntary. Defense counsel cannot be ineffective for failing to file a frivolous motion. Schoenwetter v. State, 46 So. 3d 535 (Fla. 2010). Thus, the state courts' resolution of this claim is not "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1).

Under **claim 5**, Petitioner alleges ineffective assistance of counsel for failing to move to suppress the Ms. Sartain's show-up identification. (DE#8:10-11). Petitioner raised this in his Rule 3.850 motion. (DE# 10, Ex. 17). The trial court denied the motion. (DE# 10, Ex. 18, 23). The Fourth DCA affirmed. (DE# 10, Ex. 24).

Both Florida and federal courts employ the same standard to

determine if an out-of-court identification should be excluded: 1) did the police employ an unnecessarily suggestive procedure in obtaining it; and 2) if so, considering all the circumstances, was a likelihood of irreparable misidentification thereby created. Irwin v. McDonough, 243 Fed.Appx. 486, 492 (11th Cir. 2007) (citing Stovall v. Denno, 388 U.S. 293, 302, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); Manson v. Brathwaite, 432 U.S. 98, 104, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); Neil v. Biggers, 409 U.S. 188, 196, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)). "The fact that the identification procedure used was suggestive, alone, does not violate due process." Id. (citing Neil v. Biggers, 409 U.S. at 198-99); Chihora v. Dugger, 840 F.2d 893 (11th Cir. 1988): Grant v. State, 390 So.2d 341, 343 (Fla.), cert.denied, 451 U.S. 913 (1981). Factors to be considered in assessing the likelihood of misidentification include the witness' opportunity to view the defendant at the time of the crime, the witness' degree of attention, the level of certainty demonstrated by the witness, and the length of time between the crime and the confrontation. Grant, supra at 343; United States v. Diaz, 248 F.3d 1065, 1102 (11th Cir. 2001) (citing Neil v. Biggers, 409 U.S. at 199).

Although a show-up is an inherently suggestive process, it "is not invalid if it did not give rise to a substantial likelihood of irreparable misidentification under the totality of the circumstances."[6] Blanco v. State, 452 So.2d 520, 524 (Fla.), cert.

[6]An identification procedure which is unnecessarily suggestive and conducive to irreparable misidentification can constitutive a Fourteenth Amendment violation, Stovall v. Denno, 388 U.S. 293 (1967), and a conviction based on eyewitness identification following a pretrial identification is invalid if the procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Simmons v. United States, 390 U.S. 377 (1968). Both Florida and federal courts employ the same standard to determine if an out-of-court identification should be excluded: 1) did the police employ an unnecessarily suggestive procedure in obtaining it; and 2) if so, considering all the circumstances, was a likelihood of irreparable misidentification thereby created. Manson v. Braithwaite, 432 U.S. 98 (1977); Neil v. Biggers, 409 U.S. 188 (1972); Chihora v. Dugger, 840 F.2d 893 (11 Cir.

denied, 469 U.S. 1181 (1985). Further, in the process of reviewing the record to determine whether federal constitutional standards were violated in a habeas petitioner's underlying criminal case, the Court does not close its eyes to the reality of evidence of guilt fairly established in state court. Milton v. Wainwright, 407 U.S. 371, 377-78 (1971). See Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986).

The pretrial identification procedure was not unduly suggestive. At trial, Sartain identified two pictures of Petitioner taken from the bank's security system. (T. 128-29). She testified to the following: she was two to three feet away from Petitioner when he robbed the bank and she definitely remembered his face. (T. 132). She made eye contact with Petitioner out of habit, then looked down once he slipped her the note. (T. 134). She recalled seeing "gold on the top teeth." (T. 135). The same day as the robbery, she went with Detective Kelly in response to a call that they may have a suspect and wanted to determine whether Sartain could identify him as the robber. (Id.). She was told the person she was going to see at the show-up "may be" a suspect, not that he was the suspect. (T. 139). Petitioner was not in the same clothes and had removed his wig and bandana. (Id.). At the show-up identification, she "knew exactly at that moment that that was" Petitioner. (Id.). Petitioner was not handcuffed at the show-up identification and he was not surrounded by police, although "they were around but not by him." (T. 136). The show-up identification took place at the citrus packing plant "on the side of the street." (T. 137). She did not recall him being

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1988): Grant v. State, 390 So.2d 341, 343 (Fla.), cert.denied, 451 U.S. 913 (1981). Factors to be considered in assessing the likelihood of misidentification include the witness' opportunity to view the defendant at the time of the crime, the witness' degree of attention, the level of certainty demonstrated by the witness, and the length of time between the crime and the confrontation. Grant, supra, at 343.

detained in any way. (Id.).

Detective Kelly testified to the following facts regarding the show-up identification. He told Sartain that they had a "possible suspect" and that it did not "mean we have a person that did it in custody." (T. 221). He instructed Sartain to "take a look and see if she recognized anyone." (T. 222). "She immediately identified the detained person as the man who robbed her. And then when I asked her if she was sure, she said she was positive." (Id.). Petitioner "was standing in the parking lot with a plain clothes police officer away from the police cars, just with the officer." (Id.).

Based on the above trial testimony, the show-up identification was not impermissibly suggestive such that there was a chance it produced an irreparable misidentification. Counsel was not deficient in failing to file a motion to suppress the show-up identification because doing so would have been fruitless. Schoenwetter, 46 So. 3d at 535. Under Florida, as well as, federal law, the facts adduced at trial all support the conclusion that there was no substantial likelihood of misidentification in this case. Manson v. Braithwaite, supra; Grant v. State, supra.

Finally, Petitioner cannot establish Strickland prejudice from the failure of his attorney to make this motion. As set forth more extensively in ground four, Petitioner made a full confession to police where he told them he was the man that robbed the bank. (T. 229, 231, 234-35, 237, 247, 255, 257). Thus, the state courts' resolution of this claim is not "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. §2254(d)(1).

Under **claim 6**, Petitioner alleges ineffective assistance of

counsel for failing to move to request a principals jury instruction. (DE#8:11-14). Petitioner raised this in his Rule 3.850 motion. (DE# 10, Ex. 17). The trial court denied the motion. (DE# 10, Ex. 18, 23). The Fourth DCA affirmed. (DE# 10, Ex. 24).

Petitioner was not charged as a principal to the robbery. (DE# 10, Ex. 1). As a result, a principal instruction would not have been helpful as it would have provided another avenue for the State to establish Petitioner's guilt. See §777.011, Fla. Stat. (2010). It was the State which sought to include a principal instruction in anticipation of Petitioner's testimony. (T. 327). Furthermore, a defense request for a principal instruction in this case would have likely constituted ineffective assistance of counsel. Therefore, the state courts' resolution of this claim is not "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1).

Finally, this court has considered all of the petitioner's claims for relief, and arguments in support thereof. See Dupree v. Warden, 715 F.3d 1295 (11th Cir. 2013)(citing Clisby v. Jones, 960 F.2d 925 (11th Cir. 1992)). For all of his claims, petitioner has failed to demonstrate how the state courts' denial of his claims, to the extent they were considered on the merits in the state forum and were properly exhausted therein, were contrary to, or the product of an unreasonable application of, clearly established federal law. To the extent they were not considered in the state forum, and a *de novo* review of the claim conducted here, as discussed in this Report, none of the arguments raised herein warrant habeas relief. Thus, to the extent a precise argument was not specifically addressed herein or in the state forum, all arguments and claims were considered and found to be devoid of merit, even if not discussed in detail here.

VI. Evidentiary Hearing

To the extent Petitioner requests an evidentiary hearing, such request must be denied. To determine whether an evidentiary hearing is needed, the question is whether the alleged facts, when taken as true, is not refuted by the record and may entitled petitioner to relief. Schriro v. Landrigan, 550 U.S. 465, 474, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007)(citation omitted). "It follows that if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." Id. The pertinent facts of this case are fully developed in the record before the Court. Because this Court can "adequately assess [Petitioner's] claim[s] without further factual development," Turner v. Crosby, 339 F.3d 1247, 1275 (11th Cir. 2003), cert. den'd, 541 U.S. 1034 (2004), an evidentiary hearing is not warranted.

VII. Certificate of Appealability

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

After review of the record, petitioner is not entitled to a certificate of appealability. "A certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). To

merit a certificate of appealability, Petitioner must show that reasonable jurists would find debatable both (1) the merits of the underlying claims and (2) the procedural issues he seeks to raise. Slack v. McDaniel, 529 U.S. 473, 478, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). See also Eagle v. Linahan, 279 F.3d 926, 935 (11th Cir. 2001). Because the claims raised are clearly without merit, petitioner cannot satisfy the *Slack* test. Slack, 529 U.S. at 484.

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

VIII. Conclusion

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

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

SIGNED this 3rd day of April, 2018.

UNITED STATES MAGISTRATE JUDGE

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-14598-C

TYRONE TERRANCE ROBERTS,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Julie Jones,
ATTORNEY GENERAL OF THE STATE OF FLORIDA,
Pam Bondi,

Respondents-Appellees.

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

Before: WILLIAM PRYOR and NEWSOM, Circuit Judges.

BY THE COURT:

Tyrone Terrance Roberts has filed a motion for reconsideration, pursuant to 11th Cir. R. 27-2, of this Court's June 27, 2019, order denying his motion for a certificate of appealability to review the denial of his federal habeas corpus petition, 28 U.S.C. § 2254. Upon review, his motion for reconsideration is DENIED because he has offered no meritorious arguments to warrant relief.

argument for counsel to raise, as Roberts's *Miranda v. Arizona*, 384 U.S. 436 (1966), waiver was knowing and voluntary, and his confession admissible. *See Slack*, 529 U.S. at 484; *Hart v. Att'y Gen. of the State of Fla.*, 323 F.3d 884, 891 (11th Cir. 2003). Specifically, the record indicates that Roberts was advised of his *Miranda* rights prior to being interviewed, and there is no ambiguity regarding his waiver of his *Miranda* rights. Additionally, the record contains no support for Roberts' claim that the detective strong-armed a confession by saying that, if he did not confess, then Thomas would be in jeopardy of being charged. *Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991).

Reasonable jurists would not debate the denial of his second claim, either, regarding suppressing evidence of an out-of-court identification of him, because Roberts's confession was introduced into evidence, so the jury had substantial other evidence on which to base its verdict, other than the bank teller's identification of him as the robber. *See Slack*, 529 U.S. at 484; *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Because Roberts has not satisfied the *Slack* test for his claims, his motion for a COA is DENIED. His motion for IFP status is DENIED AS MOOT.

/s/ Kevin C. Newsom
UNITED STATES CIRCUIT JUDGE