IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-10225-B

JUAN JORGE,

Petitioner-Appellant,

versus

STATE OF FLORIDA,
SECRETARY, DEPARTMENT OF CORRECTIONS,

Respondents-Appellees.

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

ORDER:

Juan Jorge moves for a certificate of appealability ("COA"), in order to appeal the dismissal of his 28 U.S.C. § 2254 petition. To merit a COA, Jorge must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Jorge's motion for a COA is DENIED because he failed to make the requisite showing. His motion for leave to proceed *in forma pauperis* is DENIED AS MOOT.

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-10225-B

JUAN JORGE,

Petitioner-Appellant,

versus

STATE OF FLORIDA,
SECRETARY, DEPARTMENT OF CORRECTIONS,

Respondents-Appellees.

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

Before: MARCUS and BRANCH, Circuit Judges.

BY THE COURT:

Juan Jorge has filed a motion for reconsideration of this Court's order denying a certificate of appealability and leave to proceed on appeal *in forma pauperis*, following the dismissal of his petition for a writ of habeas corpus, 28 U.S.C. § 2254. Upon review, Jorge's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 1:17-CV-22172-JLK

JUAN JORGE,

Petitioner,

v.

JULIE JONES, Secretary, Florida Department of Corrections,

Respondent.
_____/

FINAL ORDER DENYING HABEAS PETITION

THIS CAUSE comes before the Court upon the October 22, 2018 Report and Recommendation of Magistrate Judge Patrick A. White (DE 17), recommending that Juan Jorge's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (DE 1) be denied and no certificate of appealability be issued. The Court has also considered Juan Jorge's Objections to the Report & Recommendation (DE 20), filed December 10, 2018.

I. BACKGROUND

On September 24, 2009, following a jury trial, Petitioner was found guilty in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County of one count of "sexual activity with child by person in familial or custodial authority" (DE 11-3, at 65), in violation of Fla. Stat. §§ 794.011(8)(B) and 777.011 (DE 11-4, at 2). At trial, the State made the case that Petitioner forcibly sexually penetrated his biological daughter, A.J., then aged seventeen (*see* Trial Transcript, at 172–73, 187–88 (DE 12-3)). A.J. lived with her mother, but was staying with Petitioner on the night of the incident (*see id.* at 174–75 (DE 12-3)). Three witnesses testified

for the State: (1) A.J. testified that she was lying on her stomach, fell asleep, and woke up "pinned down" with someone's legs on her legs and someone's arms on her back and shoulders, and that she could feel someone inside her, whom she recognized to be Petitioner by his voice (*id.* at 187–88 (DE 12-3)); (2) A.J.'s friend Katherine Mejia ("Katherine") testified that she was lying next to A.J. on the bed and she saw Petitioner put a condom on his erect penis and have sex with A.J. (*id.* at 285–87 (DE 12-4)); and (3) Miami-Dade Police Detective Allen Foote ("Detective Foote") testified regarding A.J.'s statement to him at the police station several weeks after the incident (*id.* at 310–13 (DE 12-4)). In addition, Detective Foote had recorded a "controlled" phone call from A.J. to her father that he played for the jury; in the call, Petitioner says that he wore a condom and that it did not break, says numerous times that "it was a mistake," and states, "This shit can fucking send me [away] forever" (*id.* at 324–25, 331 (DE 12-4)). Moreover, while A.J. was on the stand during direct examination, the State gave her a document to refresh her recollection of a text message conversation between A.J. and Petitioner from after the incident, and A.J. recalled that she sent a message of "I can't believe how you could do that to me," with the response from Petitioner of "Please forgive me. I don't know what got into me. Just pretend it was Borri," A.J. clarifying that Borri refers to her friend (*see id.* at 194–97 (DE 12-3)). During cross-examination, Katherine testified that she lied to Detective Foote when he came to her house to question her, in representing then that she was not in the room where the alleged sexual assault occurred, stating that she was "scared" and that "[her] parents were there" during the questioning (*id.* at 301–04 (DE 12-4)).

The only witness who testified for Petitioner at trial was Petitioner himself, who claimed that his daughter's accusation was baseless and fabricated, and that he understood A.J.'s question on the controlled call, during which 1 a.m. call he was "half asleep" and "groggy," to be whether

he "use[s] a condom, when [he has] sex with [his] girlfriend" (*see id.* at 403, 406 (DE 12-5)). Petitioner also clarified his repeated statements on the controlled call that "it was a mistake" as "It was a mistake, allowing her to come over my house at that time. And she smoked pot, okay, in front of me. And I wouldn't say anything, because I was afraid that she would just not—drive away from me" (*id.* at 401 (DE 12-5)).

Petitioner was sentenced as a Habitual Violent Offender (DE 11-6, at 2) to life imprisonment (DE 11-4, at 5). At sentencing, the court found that the defendant had been previously convicted, on March 25, 1998, of attempted first-degree murder, kidnapping with a weapon and armed burglary with an assault, for which he was sentenced to ten years imprisonment (Sentencing Transcript, at 581 (DE 12-7)). The court also noted that the current offense occurred within six months of his January 18, 2006 release from prison (*id.*).

On December 23, 2009, Petitioner appealed his conviction and sentence to the Florida Third District Court of Appeals, raising claims of trial court error (DE 11-5, at 11).[1] On February 29, 2012, the conviction and sentence were *per curiam* affirmed. *Jorge v. State*, 93 So. 3d 1038 (Table) (Fla. 3d Dist. Ct. App. 2012). On March 29, 2012, Petitioner's motion for rehearing in the Court of Appeals was denied (DE 11-5, at 4). Because the decision of the Third District Court of Appeals was *per curiam*, Petitioner was not entitled to seek review by the Florida Supreme Court. *See Wells v. State*, 132 So. 3d 1110 (Fla. 2014).

[1] The direct appeal raised five claims: (1) that the trial court erred in excluding the evidence of prior false accusations of sexual assault by A.J; (2) that the trial court erred in excluding the testimony of sexual activities with men other than Petitioner at the time of the alleged offense; (3) that the trial court erred in permitting the state to amend the Information in the middle of the trial; (4) that the trial court erred in introducing hearsay testimony from Detective Foote regarding the content of text messages; and (5) that Petitioner was improperly designated a violent habitual offender despite the state failing to procure his prior convictions (DE 11-5, at 11).

On March 18, 2013, Petitioner filed in state court a petition for post-conviction relief pursuant to Fla. R. Cr. P. 3.850, raising five claims of ineffective assistance of counsel (DE 11-6, at 6–7).[2] Following a two-part evidentiary hearing in which Juan Jorge and defense counsel Yerry Marrero each testified (DE 12-8–12-11; DE 16-1), the court entered an eleven-page order denying the petition as to each claim (DE 11-6, at 78–88). The Third District Court of Appeals *per curiam* affirmed the denial of the petition. *Jorge v. State*, 231 So. 3d 433 (Table) (Fla. 3d Dist. Ct. App. 2017).

On June 9, 2017, Petitioner filed in this Court his Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (DE 1). Claims One through Five of the Petition are the claims of trial court error Petitioner raised in his appeal to the Third District Court of Appeals. Claims Six through Ten of the Petition are the arguments regarding ineffective assistance of counsel that Petitioner raised in his state court petition for post-conviction relief. In response to an Order to Show Cause issued by Magistrate Judge Patrick A. White (DE 6), Respondent State of Florida submitted a memorandum in opposition to the Petition (DE 11), together with exhibits from the state court record including transcripts (DE 12), on August 2, 2017. Petitioner submitted a Reply (DE 13) on September 6, 2017. Magistrate Judge White's 103-page Report & Recommendation was docketed on October 22, 2018.

[2] The arguments in Petitioner's Rule 3.850 petition for post-conviction relief were: (1) that counsel failed to obtain potentially exculpatory counseling records from A.J.'s therapist; (2) that counsel failed to adequately investigate A.J.'s prior false sexual abuse allegations and failed to properly structure her arguments in support of admission of such; (3) that counsel failed to adequately advise Jorge of the consequences of testifying at trial; (4) that counsel failed to adequately investigate whether A.J. had a reputation for being untruthful; and (5) that counsel failed to properly cross-examine the state's two crucial witnesses, A.J. and Katherine (DE 11-6, at 6–7).

II. DISCUSSION

A. Legal Standards

1. General Standard for Habeas Relief

28 U.S.C. § 2254 prohibits relitigation of a claim "adjudicated on the merits" in state court unless the state court's decision was (1) "contrary to, or involved in 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). A state court's factual finding is presumed correct, which the petitioner has the burden of rebutting by clear and convincing evidence. *Id.* § 2254(e)(1). The Supreme Court has clarified that the statute "reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 562 U.S. 86, 102–03, 131 S. Ct. 770, 786 (2011) (internal citations omitted). Moreover, "couch[ing]" a claim based exclusively on state law in terms like Due Process is not enough to proceed under § 2254(d)(1). *Branan v. Booth*, 861 F.2d 1507, 1508 (11th Cir. 1988).

2. *Strickland* Standard for Ineffective Assistance of Counsel

The U.S. Constitution's Sixth Amendment right to effective assistance of counsel is violated only where (1) a counsel's performance fell below an objective standard of reasonableness, *and* (2) the defendant suffered prejudice as a result. *Strickland v. Washington*, 466 U.S. 668, 687–88, 691–92, 104 S. Ct. 2052, 2064, 2067 (1984). The objective test is whether "the identified acts or omissions [of counsel] were outside the *wide* range of professionally competent assistance." *Id.* at 690, 2066 (emphasis added); *Dingle v. Sec'y for*

Dep't of Corr., 480 F.3d 1092, 1099 (11th Cir. 2007) ("Even if counsel's decision appears to have been unwise in retrospect, the decision will be held to have been ineffective assistance only if it was so patently unreasonable that no competent attorney would have chosen it."). In addition, to establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 2068. Moreover, a habeas petitioner proceeding pursuant to 28 U.S.C. § 2254(d) must further establish that the state court's *own* application of *Strickland* was unreasonable.

B. Petitioner's Claims

As thoroughly explained in the Report & Recommendation (DE 17, at 36–43), several of Petitioner's claims in his Petition for Writ of Habeas Corpus (DE 1) are procedurally barred because unexhausted, where Petitioner did not raise them in terms of a federal question in his direct appeal before the Florida Third District Court of Appeal. Moreover, Petitioner has not offered any new evidence of factual innocence that might overcome this procedural bar. *See House v. Bell*, 547 U.S. 518, 437–38, 126 S. Ct. 2064, 2077 (2006). Some of Petitioner's arguments newly raised in his Objections are similarly procedurally barred. Regardless, as discussed below, even construing Petitioner's claims liberally, as afforded a *pro se* plaintiff, *Haines v. Kerner*, 404 U.S. 519, 92 S. Ct. 594 (1972), Petitioner has failed to state a claim for habeas relief.

1. Claims of Trial Court Error

(a) Claim One – Trial Court Improperly Excluded Evidence of A.J.'s Previous False Accusations of Sexual Assault Against Other Family Members

Petitioner claims the trial court unconstitutionally excluded evidence of prior accusations of sexual misconduct A.J. had made against "both of her grandfathers and a gym teacher" that Petitioner claims were false (DE 1, at 5); the prior instances of sexual misconduct would have occurred when A.J. was much younger (*see* Trial Transcript, at 148 (DE 12-3)). Petitioner elaborates on his theory that the evidence was relevant: "She had made false accusations against others in the family in the past and gotten away with them. The fact that she was never punished was, in petitioner's mind, a reason for A.J. to believe that she could make a false accusation [again] without fear" (DE 1, at 7). Petitioner further claims that on the "controlled" phone call played for the jury, he "made comments about going to jail and being arrested by the police because he was aware of A.J.'s propensity to make false accusations in reckless disregard of the truth" (*id.*). However, the trial court conducted a hearing on this issue following the State's motion *in limine*, and the court concluded that the evidence should be excluded based on Florida law (Trial Transcript, at 151 (DE 12-3)). Petitioner makes no intelligible claim pursuant to 28 U.S.C. § 2254(d)(1) that this trial court decision, affirmed on direct appeal, denied him due process or was otherwise unconstitutional.[3]

[3] Petitioner mentions *Strickland* and *Brady* in his Objections under this claim (DE 20, at 2). Ineffective assistance of counsel regarding evidence of prior accusations of sexual assault by A.J. is discussed under Claim Six, as is the government's obligation to turn over any such evidence.

(b) Claim Two – Trial Court Improperly Excluded Testimony that A.J. Had Sexual Activity with Other Men During Time of Petitioner's Offense

Further, Petitioner claims the trial court unconstitutionally excluded evidence of A.J.'s consensual sexual activity with other men during the time period of the alleged offense (*see* DE 1, at 9–11). The trial court granted the State's pre-trial motion *in limine* to exclude the evidence pursuant to Florida's Rape Shield Law, Fla. Stat. § 794.022 (*id.*). Petitioner claims that, given disapproval Petitioner and her mother had expressed to A.J. regarding her "all night parties" during which she had consensual sex with other men, the evidence was relevant to establish that A.J. had a motive to fabricate her testimony (*id.* at 10–11), and to establish A.J.'s bias against Petitioner (*id.* at 10). In his Objections, Petitioner requests an evidentiary hearing on this issue (DE 20, at 4). However, the trial court also conducted a hearing on this motion *in limine*, in which Petitioner's arguments here were raised (Trial Transcript, at 213–17 (DE 12-3)). Petitioner has not articulated a cognizable claim pursuant to 28 U.S.C. § 2254(d)(1) that the trial court's conduct or decision on this issue, affirmed on direct appeal, was unconstitutional.

(c) Claim Three – Trial Court Improperly Permitted State to Amend the Information During Trial

Petitioner next contends (DE 1, at 12–14) that the State's mid-trial amendment of the Information violated his constitutional rights. The amendment by interlineation changed the typed text "INCERTING HIS PENIS IN VICTIMS VAGINA" to "INSERTING and/or penetrating HIS PENIS IN A.J.'S VAGINA" by writing the alterations in pen and signing each one (DE 11-3, at 39). The mid-trial amendment was made to match the jury instructions (Trial Transcript, at 250 –51 (DE 12-4)) ("COURT: So, if I were you, why don't you amend it. That way, there is no problem. That at any time, it wasn't stated clearly in the Information, we live in the age things are [not] pled in the Information, you cannot be convicted of[.]"). In his

Objections, Petitioner claims he was "prejudiced [by this] in his preparation of a defense at trial," and requests an evidentiary hearing (DE 20, at 5). As the Report & Recommendation thoroughly discusses (DE 17, at 59–64), the variance between the Information as amended and originally is not legally significant, because the *conduct* he was convicted of was the same as the conduct he was originally charged with. Accordingly, Petitioner's fundamental due process rights are not implicated.[4]

(d) Claim Four – Trial Court Improperly Allowed Introduction of Hearsay Testimony from Detective Foote Regarding Content of Text Messages

Petitioner next objects that the document used to refresh A.J.'s recollection on the witness stand was Detective Foote's notes regarding the text message conversation between A.J. and Petitioner, where the original text messages were not preserved at the time of the trial (DE 1, at 15–16). Petitioner cites the Confrontation Clause, but the statements of the text messages were probably not testimonial under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1254 (2004), which defines testimonial statements as those "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, 541 U.S. at 51 –52, 124 S. Ct. at 1364 (internal quotation marks omitted). However, even if Petitioner's text messages were testimonial, there was no Confrontation Clause issue here where A.J. was subject to cross-examination by the defense regarding the content of the text messages. Therefore, there is no claim pursuant to 28 U.S.C. § 2254(d)(1).

[4] As Petitioner's counsel demonstrated professional competency in objecting to mid-trial amendment of the Information (*see* Trial Transcript, at 251 (DE 12-3)), Petitioner's Sixth Amendment right to effective assistance of counsel is also not implicated.

(e) Claim Five – Sentence as Habitual Violent Offender Unlawful Where No Fingerprint Comparison Testimony Introduced to Establish Prior Predicate Conviction

Petitioner was sentenced as a habitual violent offender based on his prior predicate conviction of attempted first-degree murder, kidnapping with a weapon, and armed burglary with an assault (Case No. F97-17345) (Sentencing Transcript, at 581 (DE 12-7)). At sentencing, there was a failed attempt at using fingerprint evidence to establish the prior conviction, where a fingerprint analyst testified that the fingerprints were not a match, but that Petitioner was sweaty (*id.* at 573 (DE 12-6)). Instead, to establish that the prior conviction was in fact of Petitioner, the court considered a certified copy of the prior conviction and a certified Crime and Time Report of the conviction, which had a photograph of the offender and listed a date of birth, prior offenses, and date of last release matching those in the record for Petitioner (*see id.* at 571–83 (DE 12-6; DE 12-7); *see also* DE 11-3, at 70–109). The court stated:

> I'm looking at Exhibit 1, of the person that was convicted in . . . Case Number 97-17345. There's a photograph of that person. Clearly the photograph [is] of Juan Jorge, who is seated before me here for sentencing today.

(Sentencing Transcript, at 576 (DE 12-6)).

In his Petition, Petitioner does not argue that he was not convicted of the prior offense, but only that the procedure followed violated due process (DE 1, at 17–18); in his Objections, he also mentions *Strickland* (DE 20, at 7–8). As thoroughly discussed in the Report & Recommendation (DE 17, at 69–72), *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely v. Washington*, 542 U.S. 296 (2004) do not require a higher standard than preponderance of the evidence in establishing a prior conviction, nor do they mandate the issue be decided by a jury. In addition, there was no denial of fundamental due process here where the court had sufficient evidence to establish the prior predicate conviction. Moreover, defense counsel displayed

professional competency under *Strickland* in objecting to not using fingerprint evidence to establish the prior conviction (*see* Sentencing Transcript, at 571–83 (DE 12-6; DE 12-7)).[5]

2. Claims of Ineffective Assistance of Counsel

Regarding the five ineffective counsel claims discussed below, Petitioner's counsel at trial, Yerry Marrero, displayed professional competence within the wide range that is constitutionally acceptable. *See Strickland*, 466 U.S. at 687–88, 104 S. Ct. at 2064. Even if Petitioner can articulate a defense strategy that Marrero *could* have employed that may appear wiser with the benefit of hindsight, Marrero's testimony at the hearing on Petitioner's Rule 3.850 petition for post-conviction relief (DE 16-1), which the state court found to be credible (DE 11-6, at 85),[6] confirms that she proceeded at the time according to a reasoned strategy. *See Dingle*, 480 F.3d at 1099.

(a) Claim Six – Counsel Failed to Obtain Exculpatory Documents from A.J.'s Therapist Regarding Prior Allegations of Sexual Abuse by A.J. Against Both of Her Grandfathers[7]

Petitioner claims (DE 1, at 21–23, 24–25) that his counsel should have obtained notes from A.J.'s therapist that contained allegations of sexual abuse against her paternal grandfather, Juan Jose Jorge, and maternal grandfather, "known to the family as 'Abuelo Chavez.'" The notes were from A.J.'s time at the "Tranquility Bay" program for "at risk" teens in Jamaica when

[5] Petitioner also mentions the Eighth Amendment in connection with this claim (DE 1, at 17), clarifying in his Reply that he is claiming that a life sentence violates the Eighth Amendment's prohibition against "cruel and unusual punishment" (DE 13, at 28). Leaving aside that this claim is procedurally barred because unexhausted, the Supreme Court has rejected it. *See Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455 (2012) (holding only that mandatory life imprisonment without parole for crimes committed while a minor is cruel and unusual punishment).

[6] This state court credibility determination, affirmed on appeal, is presumed correct unless Petitioner puts forth clear and convincing evidence pursuant to 28 U.S.C. § 2254(e)(1) to rebut it. Petitioner has offered no such evidence.

[7] Petitioner's claim that counsel failed to reasonably investigate "the veracity of the victim's prior abuse allegation[s] against her grandfather" (DE 1, at 21) is folded into the analysis of Claim Seven.

she was fifteen (*see id.* at 21), and the abuse would have occurred when A.J. was five or six and nine or ten (*see id.* at 28). Petitioner maintains that the allegations were false and the therapist notes were reasonably likely to provide exculpatory or impeachment evidence (*see id.* at 23). As discussed in the Report & Recommendation (DE 17, at 77–79), Petitioner has not shown that any of the enumerated exceptions to Florida's psychotherapist privilege would apply to make these records admissible at trial. Regardless, when questioned on this very issue at the Rule 3.850 hearing, defense counsel Marrero testified that because "[t]here was no recantation, by the victim, as to any of those allegations," she was "not going to send someone out to Tranquility to get another witness, who . . . [may] add to the victim's credibility" (Rule 3.850 Jan. 20, 2015 Hearing Transcript, at 14–16 (DE 16-1)). Although Marrero describes an investigator going to A.J.'s mother's house twice to speak to the mother, the second time "because she claimed she had some records," she states Petitioner did not have unlimited money for investigation, and she advised Petitioner that the records were not essential to her defense strategy (*see id.* at 15–16). This is consistent with a competent strategy under *Strickland*, and so Petitioner's claim under 28 U.S.C. § 2254(d)(1) fails.[8]

(b) Claim Seven – Counsel Failed to Adequately Investigate A.J.'s Prior False Claims of Sexual Abuse

With this claim (DE 1, at 26–32), Petitioner argues that his counsel "failed to investigate and properly interpret the context and circumstances in which [A.J.'s] prior allegations [of sexual assault] were made" (*id.* at 26). Petitioner's theory is that "[h]aving successfully utilized allegations against both her paternal and maternal grandfathers to garner goodwill with her

[8] In his Objections (DE 20, at 8–9), Petitioner newly claims that the counseling notes are "exculpatory in nature" and that the State withheld them in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). This claim, in addition to being procedurally barred because unexhausted, is speculative at best, where Petitioner puts forth no evidence the government possessed the records, that the records even still existed at the time of the trial, or that they contained anything that could be viewed as exculpatory to Petitioner.

mother and earn a ticket back to the United States [from the program for 'at risk' teens in Jamaica], A.J. now used allegations against her father to prevent [parental] interference with her relationship with [her boyfriend]" (*id.* at 29–30). Petitioner alleges that, four days prior to the sexual assault of which Petitioner was convicted, Petitioner and his sister Marisol had barred A.J.'s boyfriend from Marisol's residence after an altercation between A.J. and her boyfriend that resulted in the police being called (*id.* at 29). Petitioner argues that proper investigation of A.J.'s accusations would have led to Marrero arguing at the *in limine* hearing that the prior accusations are evidence of A.J.'s motivation to lie and of bias to pursuant to Fla. Stat. § 90.404 (*see id.* at 26–28). Petitioner claims that Marrero's argument at the *in limine* hearing was "faulty and disjointed" (*id.* at 26), where she only argued the evidence was relevant as to A.J.'s "credibility" and "state of mind" (Trial Transcript, at 149–50 (DE 12-3)). However, Marrero testified at the Rule 3.850 hearing that, as far as she knew from her investigation, "[t]here was no recantation, by the victim, as to any of [the allegations]" (Rule 3.850 Jan. 20, 2015 Hearing Transcript, at 14–15 (DE 16-1)). Without any evidence that A.J. lied about the accusations, Marrero's not investigating the issue still further or arguing that A.J. had a motivation to lie or bias against Petitioner was all within the reasonable range of competent counsel under *Strickland*, and so this claim pursuant to 28 U.S.C. § 2254(d)(1) fails.

(c) Claim Eight – Counsel Failed to Adequately Prepare Petitioner to Testify on His Own Behalf at Trial

As he did in his Rule 3.850 petition, Petitioner claims here that his counsel did not properly prepare him to testify at trial (DE 1, at 33–35) and "left him completely unprepared to deal with questions regarding the text messages and phone conversation with A.J." (*id.* at 35). Petitioner also criticizes his counsel's strategy as "unreasonable," where Marrero did not call "any of the [other] listed defense witnesses" who could have supported his theory of the case that

A.J. fabricated the incident (*see id.*).[9] However, at the evidentiary hearing on the Rule 3.850 petition, Marrero testified regarding her extensive preparation of Petitioner for testifying at trial (Rule 3.850 Jan. 20, 2015 Hearing Transcript, at 136–40 (DE 16-1)), including Petitioner listening to the controlled call "a million and one times" (*id.* at 140) so that he "knew exactly what was on [the] tape [and] knew exactly what his explanations were going to be when he testified" (*id.* at 139). In its order denying this claim (DE 11-6, at 81–85), the state court accepted Marrero's testimony as credible and rejected Petitioner's testimony as "disingenuous" (*id.* at 85). The court further noted that Marrero had a competent strategy in offering Petitioner's testimony to explain his statements on the controlled call and to deny sending the text messages as recollected by A.J. (*see id.*). Therefore, as the *Strickland* standard was met, Petitioner's claim pursuant to 28 U.S.C. § 2254(d)(1) fails.[10]

---

[9] However, the trial featured this exchange:

COURT:	Yerry, you are resting, without calling any defense witnesses? The only witness you are going to call is your client?
MARRERO:	Yes, Your Honor. I've listed defense witnesses. I'm not calling those witnesses that I've listed thus far.
COURT:	Mr. Jorge, are you in agreement with the lawyer?
DEF.:	Yes.
COURT:	Are there any defense witnesses that you wish to call?
DEF.:	No, sir.
COURT:	All right. This is your final decision? You can't change your mind later if there are any other witnesses that you wish to call.
DEF.:	No, sir.
COURT:	Is anyone, your lawyer, your family, the State, the Court, anyone preventing you from calling defense witnesses?
DEF.:	No, sir.

Moreover, at the Rule 3.850 hearing, Marrero testified that the judge did not allow her to put on A.J.'s paternal grandfather Juan Jose Jorge as a defense witness because his testimony does "'not tend to prove or disprove the allegation in this case, many, many, many years later'" (Rule 3.850 Jan. 20, 2015 Hearing Transcript, at 21–22 (DE 16-1) (reading from Trial Transcript, at 337)), and that she would not put on Petitioner's sister Marisol as a defense witness because she understood based on prior communications with her that Marisol would perjure her testimony in order to "save her brother" (*id.*at 86–87).

(d) Claim Nine – Counsel Failed to Adequately Investigate A.J.'s Reputation for Truthfulness

Petitioner alleges that his counsel was ineffective in failing to follow up on indications A.J. may have a reputation for untruthfulness within the community with investigation so that she could impeach A.J. on this basis at trial (DE 1, at 36–39). As initial evidence with which Marrero should have followed up, Petitioner mentions affidavits from A.J.'s paternal grandfather Juan Jose Jorge and Petitioner's sister Marisol (*id.*). However, the state court's order denying this claim (affirmed on appeal) when it was brought in Petitioner's Rule 3.850 petition, clarifies that, under Florida law, family is not a sufficiently broad community to establish a reputation for untruthfulness (DE 11-6, at 84–85). Marrero's not investigating A.J.'s reputation for truthfulness in the broader community, when Petitioner does not claim any such evidence was in the record, was reasonable and well within the range of competent assistance of counsel. Accordingly, this claim fails as part of Petitioner's 28 U.S.C. § 2254 petition here.

---

[10] In his Objections, Petitioner claims that his counsel "coerced [him] to testify when [she] ordered that 'he had to'" (DE 20, at 11), implicating Petitioner's Fifth Amendment Right against Self Incrimination. However, Petitioner's trial court testimony is as follows:

COURT:	Do you understand, sir, that you have a constitutional right to remain silent?
DEF.:	Yes, sir.
COURT:	Do you realize, you don't have to say a word?
DEF.:	Yes, sir.
COURT:	You realize that nobody can force you into testifying. Your lawyer, the Court, the State, nobody can force you to testify. You understand that?
DEF.:	Yes, sir.
COURT:	Yes, sir. And in this case, whose decision is it to testify?
DEF.:	Mine.
COURT:	And you accept full responsibility for your decision?
DEF.:	Yes.
COURT:	You understand that if things don't go your way, you can't blame it on Yerry, or anybody else?
DEF.:	No, sir.
COURT:	Do you understand that?
DEF.:	Yes, sir.

(Trial Transcript, at 383–84 (DE 12-5)). As such, Petitioner knowingly and voluntarily waived his Fifth Amendment Right against Self Incrimination in deciding to testify at trial.

(e) Claim Ten – Counsel Failed to Adequately Cross Examine A.J. and Katherine

Petitioner's final claim is that his counsel failed to adequately cross-examine A.J. and Katherine, where he argues their deposition testimony contradicted their trial testimony on several points, including whether Katherine was in the room where the alleged sexual assault occurred (DE 1, at 41–43). As the state court found after its Rule 3.850 evidentiary hearing, this claim is meritless, where Marrero in fact displayed competency in cross-examining both A.J. and Katherine, including attempting to impeach each of them on the basis of prior testimony (*see* Trial Transcript, at 217–37 (DE 12-3); 301–05 (DE 12-4)), and employed an overall strategy of showing the witnesses to be liars (Rule 3.850 Jan. 20, 2015 Hearing Transcript, at 128 (DE 16-1)). As the *Strickland* standard was met, Petitioner has no claim here pursuant to 28 U.S.C. § 2254(d)(1).

III. CONCLUSION

Therefore, after *de novo* review of the record, the Court concludes that the Report & Recommendation is well-reasoned and accurately states the applicable law, under which Juan Jorge has not stated a claim for habeas relief from his state court conviction for sexual assault or life sentence as a Habitual Violent Offender. In particular, he has not stated a claim that the trial court denied his fundamental due process rights, or that his defense counsel was unconstitutionally ineffective, even if he can imagine a superior defense strategy in hindsight. Accordingly, it is **ORDERED, ADJUDGED, and DECREED** as follows:

1. Magistrate Judge White's October 22, 2018 Report & Recommendation **(DE 17)** is hereby **AFFIRMED** and **ADOPTED** as an Order of this Court;
2. Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 **(DE 1)** is hereby **DENIED**;
3. No certificate of appealabilty shall issue; and
4. The Clerk shall **CLOSE** this case.

DONE and **ORDERED** in chambers at the James Lawrence King Federal Justice Building and United States Courthouse, Miami, Florida, this 19th day of December, 2018.

JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

cc: **Juan Jorge**, *pro se*
All Counsel of Record
Magistrate Judge Patrick A. White

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