NO._____

IN THE

SUPREMEM COURT OF THE UNITED STATES

JOHN LEE BARRON

PETITIONER-APPELANT,

V.

JULIE JONES
RESPONDENTS-APPELLEES,

On Petition For Writ of of Certiorari to the United State States Supreme Court

APPENDIX OF PETITIONER

John Lee Barron
South Bay Correctional
Rehabilitation Facility
P.O. Box. 7171
South Bay, Fl. 33493
Pro se

INDEX OF APPENDIX

APPENDIX - A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-14860-A

JOHN LEE BARRON,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

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

ORDER:

To merit a certificate of appealability, appellant must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). Because appellant has failed to make the requisite showing, his motion for a certificate of appealability is DENIED.

Appellant's other pending motions are DENIED AS MOOT.

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

APPENDIX "B"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-23407-CIV-LENARD/WHITE

JOHN LEE BARRON,

Petitioner,

v.

JULIE JONES,

Respondent.
_____/

ORDER ADOPTING IN PART AND REJECTING IN PART REPORT OF THE MAGISTRATE JUDGE (D.E. 44), GRANTING IN PART AND DENYING IN PART PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS, DENYING CERTIFICATE OF APPEALABILITY, AND CLOSING CASE

THIS CAUSE is before the Court on the Report of Magistrate Judge Patrick A. White, ("Report," D.E. 44), issued September 29, 2017, recommending that the Court deny Petitioner John Lee Barron's Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus, ("Petition," D.E. 1). Petitioner filed Objections to the Report on or about November 21, 2017. ("Objections," D.E. 49.) Upon review of the Report, Objections, and the record, the Court finds as follows.

I. Background

Because the Court cannot improve upon Judge White's unobjected-to recitation of the relevant factual and procedural background, the Court repeats it here for consistency:[1]

[1] Unless otherwise noted, citations to exhibits are to Respondent's exhibits. (See Report at 4 n.1.)

Petitioner's underlying criminal case involved a home invasion and armed robbery, which resulted in the death of one of Petitioner's co-defendant[s], Reginald Harris, and paralysis of the victim, Ed Cody. Petitioner was charged with second degree felony-murder (Count 1), attempted strong-arm robbery (Count 2), attempted armed robbery (Count 3), use or display of a firearm while committing a felony which resulted in death or serious bodily injury (Count 4), and attempted first degree murder with a deadly weapon (Count 5).[2] (Ex. A).

Petitioner proceeded to trial. The evidence adduced at trial generally established that a female decoy was used to lure the victim, Ed Cody, out of his home and that Petitioner and his codefendants then entered the home. Ed Cody was shot by a codefendant, which paralyzed him, as he ran to the house to protect his son, Derrick Cody, who was in the house. Derrick Cody then shot and killed Petitioner's co-defendant, Reginald Harris, inside the house. Petitioner was convicted as charged on Counts 1-4. (Ex. B). He was also convicted of attempted second degree murder with a firearm, as a lesser included of attempted first degree murder with a deadly weapon as charged in Count 5. (Id.).

Petitioner was initially sentenced to life on Count 1, 15 years on Counts 2 and 4, and thirty years on Counts 3 and 5, with a ten-year mandatory minimum for Counts 1, 2, 3 and 5, and with the sentences all running consecutively to each other. (Ex. C). An order correcting sentence was later entered, vacating the mandatory minimum sentence as to Count 2, and ordering that all the remaining mandatory minimum sentences run concurrent to each other, rather than consecutively. (Ex. C-1). Judgment of acquittal was also entered as to Count 4, and that sentence was thus also vacated. (Ex. C-2).

Petitioner's case has an extensive procedural history. Pertinent here, after he was convicted and sentenced, Petitioner pursued a direct appeal in the state courts. In a lengthy written opinion issued on August 22, 2007, the Florida Third District Court of Appeal affirmed Movant's convictions. Barron v. State, 990 So. 2d 1098 (Fla. 3d DCA 2007). Petitioner then pursued discretionary review in the Florida Supreme Court. On May 21, 2009, the Florida Supreme Court denied Petitioner's petition. See Barron v. State, 11 So. 3d 355 (Fla. 2009).

Approximately two months after the direct appeal proceeding concluded, Petitioner commenced his pursuit of pro se postconviction

[2] A sixth count was dropped prior to trial.

relief. He filed a motion to correct illegal sentence pursuant to Fla.R.Crim.P. 3.800(a); a motion for postconviction relief pursuant to Fla.R.Crim.P. 3.850, subsequently amended; and state habeas corpus petitions, see Barron v. State, 75 So. 3d 284 (Fla. 3d DCA 2011); Barron v. State, 162 So. 3d 1011 (Fla. 3d DCA 2014)(table). Numerous appeals were taken to the Florida Third District Court of Appeal from the postconviction court's orders, denying Petitioner relief. See e.g., Barron v. State, 31 So. 3d 184 (Fla. 4th DCA 2010); Barron v. State, 100 So. 3d 230 (Fla. 3d DCA 2012); Barron v. State, 146 So. 3d 38 (Fla. 3d DCA 2013); Barron v. State, 150 So. 3d 1151 (Fla. 3d DCA 2014).

In addition to the above-referenced proceedings, on November 18, 2014, Movant also filed in the trial court a Motion to Correct Illegal Sentence pursuant to Fla.R.Crim.P. 3.800(a). See Petition at ¶18. (DE# 1). That motion was granted by order entered on December 29, 2014. Id. This Court's review of the online records of the Clerk, Miami-Dade County Circuit Court, has revealed that the trial court's order entered on December 29, 2014, granting Petitioner's motion states in pertinent part as follows:

> This court has reviewed the court file and records, and finds that the Defendant is entitled to 506 days of prison credit (Date of conviction to date of resentencing) therefore it is
>
> ORDERED AND ADJUDGED that the Defendant's motion is granted and the Judgment and sentence entered January 7th, 2005 is corrected to reflect 506 days prison credit.

(Order Granting Defendant's Motion for Prison Time Credit entered on December 29, 2014).[3] Petitioner was advised that he had thirty days in which to take an appeal from the trial court's ruling. (Id.). No appeal was taken from the corrected sentence.

On September 3, 2015, approximately eight months after his sentence had been corrected, Petitioner then filed the instant federal petition for writ of habeas corpus (DE#1).[4]

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[3] This Court takes judicial notice of the information available at the database maintained by the Clerk of Court, Miami-Dade County Circuit Court in State v. Barron, Case No. 00-28348 (Fla. 11th Jud. Cir. Ct.); https://www2.miami-dadeclerk.com/cjis, viewed this date. See Fed.R.Evid. 201.

[4] Prisoners' documents are deemed filed at the moment they are delivered to prison authorities for mailing to a court, and absent evidence to the contrary, will be presumed to be the date the document was signed. See

(Report at 4-6 (footnotes in original).) Judge White found that the instant Petition was timely filed. (Id. at 7-10.)

The Petition raises twenty-four grounds for relief, some of which contain multiple claims, which are summarized below:

Ground One:	Confrontation and Due Process Clause violations.
Ground Two:	Brady violation.
Ground Three:	Insufficient evidence and defective jury instructions.
Ground Four:	Ineffective assistance of trial counsel in failing to argue the State's failure to prove the essential element of corpus delicti.
Ground Five:	Ineffective assistance of trial counsel in failing to object to the prosecutor arguing facts not in evidence.
Ground Six:	Ineffective assistance of trial counsel in failing to correct the prosecutor's misleading impression that Petitioner lied about being shot outside of the residence.
Ground Seven:	Ineffective assistance of trial counsel in failing to object to the court's "read-back" instruction, and in failing to request that the jurors be queried about their discussion of the evidence prior to their deliberations.
Ground Eight:	Ineffective assistance of trial counsel in failing to object and move for a Richardson hearing after a police witness changed her testimony.
Ground Nine:	Ineffective assistance of trial counsel in failing to call an officer whose testimony would have contradicted key police witness testimony.

Washington v. United States, 243 F.3d 1299, 1301 (11th Cir. 2001); see also Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245 (1988) (setting forth the "prison mailbox rule").

Ground Ten: Ineffective assistance of trial counsel in failing to object to the prosecution bolstering key witness testimony.

Ground Eleven: Ineffective assistance of trial counsel in failing to object to the prosecutor arguing facts not in evidence.

Ground Twelve: Ineffective assistance of trial counsel in failing to correct false testimony by the lead detective.

Ground Thirteen: Ineffective assistance of trial counsel in failing to move for a Richardson hearing after a key State witness prejudicially changed his testimony.

Ground Fourteen: Ineffective assistance of trial counsel in failing to investigate and submit the BOLO of 911 tapes at trial.

Ground Fifteen: Ineffective assistance of trial counsel in failing to investigate the witnesses who made the 911 calls.

Ground Sixteen: Ineffective assistance of trial counsel in failing to impeach the victim with his alleged sexual relationship with one of the alleged robbers.

Ground Seventeen: Ineffective assistance of trial counsel in failing to subpoena a detective who would have contradicted a key prosecution witness, and in failing to impeach the witness with a prior inconsistent statement.

Ground Eighteen: Ineffective assistance of trial counsel in failing to argue a petition filed in federal court for the production of DEA files.

Ground Nineteen: Ineffective assistance of trial counsel in failing to impeach a State witness with his prior statement of the victim's character and reputation in the community.

Ground Twenty: Ineffective assistance of trial counsel in failing to provide Petitioner with pertinent data and knowledge of Florida law in order to preserve for appellate review the racial makeup of the jury panel.

Ground Twenty-One:	Trial counsel's errors deprived Petition of effective assistance of counsel in a trial that was fundamentally unfair.
Ground Twenty-Two:	Ineffective assistance of appellate counsel in failing to raise the trial court's abuse of discretion in denying defense motion to exclude a police report.
Ground Twenty-Three:	Ineffective assistance of appellate counsel in failing to advance constitutional violations to the Florida Supreme Court for discretionary review.
Ground Twenty-Four:	Ineffective assistance of appellate counsel in failing to raise on direct appeal the trial court's erroneous jury instruction regarding manslaughter.

(See Petition at 4-12.) Judge White found that Petitioner was not entitled to relief on any of these claims. (Report at 15-60.) Petitioner objects to some, but not all, of Judge White's findings. (See D.E. 49.)

II. Legal Standards

Upon receipt of the Magistrate Judge's Report and Petitioner's Objections, the Court must "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1); accord Fed. R. Civ. P. 72(b)(3). The court must conduct a de novo review of any part of the Report that has been "properly objected to." Fed. R. Civ. P. 72(b)(3); see 28 U.S.C. § 636(b)(1) (providing that the district court "shall make a de novo determination of those portions of the [R & R] to which objection is made"). "Parties filing objections to a magistrate's report and recommendation must specifically identify those findings objected to. Frivolous, conclusive, or general objections need not be considered by the district court." Marsden v. Moore, 847 F.2d 1536, 1548 (11th Cir.

1988). Those portions of a magistrates report and recommendation to which no objection has been made are reviewed for clear error. See Lombardo v. United States, 222 F. Supp. 2d 1367, 1369 (S.D. Fla. 2002); see also Macort. v. Prem, Inc., 208 F. App'x 781, 784 (11th Cir. 2006) ("Most circuits agree that [i]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.") (internal quotation marks and citations omitted). The Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1).

Because this case was filed after April 24, 1996, the Court's review of Petitioner's claims is circumscribed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996). See Abdul-Kabir v. Quarterman, 550 U.S. 233, 246 (2007); Davis v. Jones, 506 F.3d 1325, 1331 n.9 (11th Cir. 2007). Under 28 U.S.C. § 2254(d), as Amended by AEDPA, a federal court may grant habeas relief from a state court judgment only if the state court's decision on the merits of the issue was (1) contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States; or (2) 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); Evans v. Sec'y, Dep't of Corrs., 703 F.3d 1316, 1325 (11th Cir. 2013) (citing Johnson v. Upton, 615 F.3d 1318, 1329 (11th Cir. 2010) (quoting Berghuis v. Thompkins, 560 U.S. 370, 380 (2010))).

Insofar as Petitioner's claims involve allegations of ineffective assistance of counsel, the two-pronged test established in Strickland v. Washington, 466 U.S. 668 (1984) applies. "First, the defendant must show that counsel's performance fell below a threshold level of competence. Second, the defendant must show that counsel's errors due to deficient performance prejudiced his defense such that the reliability of the result is undermined." Tafero v. Wainwright, 796 F.2d 1314, 1319 (11th Cir. 1986). Under the first prong of the Strickland test, Petitioner "must establish that no competent counsel would have taken the action that his counsel did take." Chandler v. United States, 218 F.3d 1305, 1315 (11th Cir. 2000) (en banc). Under the second prong, Petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

III. Discussion

Judge White found that none of the claims contained in the Petition merit federal habeas relief. (Report at 15-60.) Petitioner did not object to Judge White's findings as to Grounds 5, 6, 8, 9, 10, 11, 12, 13, 16, 17, 18, 21, and 23. The Court has reviewed those findings and has found no clear error. Accordingly, the Court adopts Judge White's findings as to those claims.

Petitioner objected to, and the Court has reviewed de novo, Judge White's findings as to Grounds 1, 2, 3, 4, 7, 14, 15, 19, 20, 22, and 24. For the reasons that follow, the Court finds that Petitioner is entitled to relief on Ground 24 only.

a. Ground One

Construed liberally, in Ground One Petitioner argues that the trial court violated his rights under the Due Process clause when it failed to conduct the fact-finding inquiry required by Florida evidence law before admitting the 911 recording under the excited utterance exception to the hearsay rule. (See Petition at 4.) He also argues that introducing the 911 recordings violated his rights under the Confrontation Clause because they were testimonial and there was no evidence that the two witnesses were unavailable to testify. (Id.)

Petitioner presented these issues to the state court on direct appeal. (See D.E. 18-1 at 34.) The court of appeals found that the 911 calls qualify as "spontaneous statements" under Section 90.803(1), Florida Statutes (2003), and/or "excited utterances" under Section 90.803(2), Florida Statutes (2003), and were therefore properly admitted. Barron v. Florida, 990 So. 2d 1098, 1101 (Fla. Dist. Ct. App. 2007). It further found that because "the calls were made to obtain assistance rather than in response to police questioning, . . . they were nontestimonial in nature and, therefore, do not violate the Sixth Amendment or the holding in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)." Id.

Judge White found that "to the extent that Petitioner takes issue with the state trial court's violation of Florida law, his claim is not cognizable" in a federal habeas petition. (Report at 18 (citing Machin v. Wainwright, 758 F.2d 1431, 1433 (11th Cir. 1985)) ("It is established that [a] state's interpretation of its own laws or rules provides no basis for federal habeas corpus relief, since no question of a constitutional nature is involved.")

(internal quotation marks and citations omitted).) Judge White further found that to the extent Petitioner couched this claim in terms of a due process violation, the claim fails because "there is no 'liberty interest' in the admission or non-admission of evidence," and the admission of the 911 tapes did not deny Petitioner of a fundamentally fair trial, "particularly in light of the other overwhelming evidence presented of Petitioner's guilt." (Id. at 19.) Finally, Judge White found that admission of the 911 tapes did not violate the Confrontation Clause because they did not contain testimonial statements. (Id. at 19-20.)

Petitioner does not object to Judge White's findings regarding the Confrontation Clause, and the Court finds those findings are not clearly erroneous.

Rather, Petitioner argues only that the state court's failure to conduct the fact-finding inquiry required by Florida law violated his rights under the Due Process Clause. (Obj at 1-2 (citing Bourjailly v. United States, 483 U.S. 171 (1987)).) Under Florida law, there are three essential elements for a statement to fall within the excited utterance exception to the hearsay rule: "(1) there must be an event startling enough to cause nervous excitement; (2) the statement must have been made before there was time to contrive or misrepresent; and (3) the statement must be made while the person is under the stress of excitement caused by the event." Florida v. Jano, 524 So. 2d 660, 661 (Fla. 1988) (citation omitted). While a 911 call may qualify for admission under this exception, "[t]he fact that a call is placed on a 911 line does not, standing alone, qualify it for admission under" the exception. Tucker v. Florida, 884 So. 2d 168, 173 (Fla. Dist. Ct. App. 2004) (citation omitted). When faced with an objection to an excited utterance,

the trial court must make the factual findings necessary to determine whether the statements qualify as an admissible excited utterance. Id.

Here, the trial court admitted the 911 tapes as excited utterances over defense counsel's objection that they did not contain an excited utterance, but the court did not make the requisite findings of fact. (See T. 598-99.) However, the court of appeals found that the trial court committed no error because the statements contained on the tapes fell within the excited utterance and spontaneous statement exceptions to the hearsay rule. Barron, 990 So. 2d at 1101.

A federal court will not grant federal habeas corpus relief based on an evidentiary ruling unless "the error was of such magnitude as to deny fundamental fairness to the criminal trial." Baxter v. Thomas, 45 F.3d 1501 (11th Cir. 1995) (quoting Alderman v. Zant, 22 F.3d 1541, 1555 (11th Cir. 1994)); see also Sims v. Singletary, 155 F.3d 1297, 1312 (11th Cir. 1998). Here, the state court of appeals concluded that the trial court committed no error in admitting the 911 tapes because the tapes did, in fact, contain admissible hearsay under the excited utterance and spontaneous statement exceptions. Barron, 990 So. 2d at 1101. Therefore, Petitioner has not and cannot establish a due process violation.

Consequently, the Court finds that the state court of appeals' resolution of this claim was not contrary to, or an unreasonable application of clearly established federal law, or based on an unreasonable determination of the facts in light of the evidence presented.

b. Ground Two

In Ground Two, Petitioner argues that (1) the State failed to disclose Brady[5] information—specifically, the Drug Enforcement Administration's ("DEA") investigative files concerning Ed Cody's narcotics activities; and (2) the Court limited the defense's cross-examination of Cody regarding the DEA investigation. (Petition at 5.)

Although both of these arguments were presented on direct appeal, (see D.E. 18-1 at 73-79), the court of appeals only addressed the State's alleged failure to produce the DEA's files, finding that because the State did not have the files it was not required to produce them. See Barron, 990 So. 2d at 1101-02.

Judge White likewise found that no Brady violation occurred because Petitioner has not established that the State had the DEA's files on Cody. (Report at 21-22.) Judge White further found that the state court's alleged limitation of the defense's cross-examination of Mr. Cody regarding the DEA investigation did not violate Petitioner's Confrontation Clause rights. (Id. at 22-23.)

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[5] In Brady v. Maryland, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). The Supreme Court has determined that "[i]mpeachment evidence, [ ] as well as exculpatory evidence, falls within the Brady rule." See United States v. Bagley, 473 U.S. 667, 676 (1985). To establish a Brady violation a defendant must prove the following: (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence), see id.; (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence, see United States v. Valera, 845 F.2d 923, 927–28 (11th Cir. 1988); (3) that the prosecution suppressed the favorable evidence, see United States v. Burroughs, 830 F.2d 1574, 1577 (11th Cir. 1987), cert. denied sub nom. Rogers v. United States, 485 U.S. 969 (1988); and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different, see Bagley, 473 U.S. at 682.

Petitioner's objections to Judge White's findings on Ground Two are vague and, frankly, inadequate. (See Obj. at 2-4 (citing Breedlove v. Moore, 279 F.3d 952 (11th Cir. 2002)).) He argues only that Breedlove supports his claim. Breedlove does not contain a Confrontation Clause issue, and therefore the Court deems Judge White's finding as to that claim to be unobjected to. The Court finds that Judge White's finding is not clearly erroneous.

Furthermore, although Breedlove contained a Brady issue, the Eleventh Circuit's opinion in Breedlove was limited to whether the petitioner was entitled to an evidentiary hearing on the Brady issue. 279 F.3d at 959 ("Breedlove acknowledges that he has had no opportunity to prove any facts relevant to his Brady claim; therefore, granting the petition on the basis of this claim, when so many facts remain in dispute, is impossible. The remainder of this opinion will address the narrower issue of whether Breedlove has made allegations sufficient to entitle him to an evidentiary hearing on his Brady claim."). As such, the Court finds that Breedlove does not substantively support Petitioner's Brady claim.

To the extent Petitioner cites Breedlove for the proposition that he is entitled to an evidentiary hearing on his Brady claim—and to be clear, he does not appear to make this argument—the Court finds that Petitioner is not entitled to an evidentiary hearing on this issue. In habeas cases:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> (A) the claim relies on--

> **(i)** a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> **(ii)** a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> **(B)** the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254. The Court finds that Petitioner has failed to make the requisite showing that he is entitled to an evidentiary hearing on this issue.

Upon de novo review, the Court finds that the state trial court's limitation of the cross-examination of Mr. Cody is not contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or 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). Therefore, Petitioner is not entitled to relief on Ground Two.

c. Ground Three

In Ground Three, Petitioner argues that there was insufficient evidence to support a principal theory for a conviction of second-degree felony-murder, and that the jury instructions regarding second-degree murder were wrongly-labeled and misleading. (See Petition at 6.)

Petitioner included these claims in his direct appeal. (See D.E. 18-1 at 79.) The court of appeals found that the evidence was sufficient to support the second-degree

felony-murder conviction under the "principal theory," but did not specifically address the adequacy of the jury instruction. Barron, 990 So. 2d at 1102-08.

Judge White found that (1) the record supported the state court of appeals' findings as to the sufficiency of the evidence, and (2) "there is nothing in the record to indicate that the jury charge as a whole was inadequate, or to establish a due process violation as a matter of federal law." (Report at 25.) Petitioner does not object to Judge White's finding as to the jury instruction issue, and the Court finds that it is not clearly erroneous.

With respect to the sufficiency of the evidence, Petitioner appears to argue that Judge White applied the wrong standard of review. (Obj. at 4.) Specifically, although he appears to concede that Judge White correctly identified Jackson v. Virginia, 443 U.S. 307 (1979) as the "correct precedent," he argues that Judge White failed to look to Florida law for the substantive elements of the crime, as required by Coleman v. Johnson, 566 U.S. 650 (2012).

The standard of review for the sufficiency of the evidence on a petition for federal habeas corpus relief "is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson, 443 U.S. at 319 (emphasis in original). In Coleman, the Supreme Court observed that "[u]nder Jackson, federal courts must look to state law for 'the substantive elements of the criminal offense,' 443 U.S., at 324, n. 16, 99 S. Ct. 2781, but the minimum amount of evidence that the Due Process Clause requires to prove the offense is purely a matter of federal law." 566 U.S. at 655.

Here, Judge White correctly identified and applied this standard. (See Report at 23-25.) He found that the record supported the findings of the state court of appeals, (id. at 25), which thoroughly discussed the evidence as it applied to the substantive elements of second-degree felony-murder under Florida law, see Barron, 990 So. 2d at 1102-08. The Report explains that

> in Petitioner's direct appeal, Florida's Third District focused on whether the attempted murder of Edmond Cody was committed in furtherance of the initial common design or purpose, or whether the shooting constituted an independent act outside of and foreign to the original criminal scheme. Barron v. State, 990 So. 2d 1098, 1104. The Court found that the evidence established that Petitioner, the other three gunmen, and the female decoy, were all participants in a common scheme to rob Edmond Cody. As the attempted murder of Edmond Cody occurred during the course of the attempted robbery, the appellate court concluded that the evidence was sufficient to hold the petitioner criminally liable as a principal for the attempted second degree murder of Edmond Cody. Id. at 1106. And review of the record reveals that this conclusion was amply supported by the evidence adduced at trial.

(Report at 24-25 (citing Maharaj v. Sec'y for Dep't of Corrs., 432 F.3d 1292, 1315 (11th Cir. 2005)).) Because Judge White applied the correct legal standard, the Court finds Petitioner's objections on this issue to be frivolous.

Despite the frivolous objections, the Court has reviewed this claim de novo and finds that the state court of appeals' resolution of this claim was not contrary to, or an unreasonable application of clearly established federal law, or based on an unreasonable determination of the facts in light of the evidence presented.

d. Ground Four

In Ground Four, Petitioner argues that that he was denied effective assistance of trial counsel when his attorney failed to argue that the State failed to prove the essential

element of corpus delicti. (Petition at 7.) In this regard, he argues that the Information charged him as a principal in the unlawful killing of Reginald Harris, but there was no evidence presented to the jury that the individual killed was Reginald Harris. (See Rule 3.850 Motion, D.E. 18-3 at 4-6.)

Petitioner raised this claim in a Rule 3.850 motion for post-conviction relief in state court. (Id.) The state trial court rejected that claim as refuted by the record because Dr. Bruce Hyma, the Medical Examiner, testified that he conducted the autopsy on Reginald Harris. (D.E. 18-5 at 75.) The court further noted that Defendant did not argue that the identity of the victim was in dispute, and that any argument regarding the sufficiency of the evidence should have been raised on direct appeal. (Id.)

Judge White found that counsel had no basis for an objection on these grounds because Dr. Hyma testified that he performed an autopsy on Reginald Harris, and counsel cannot be ineffective for failing to raise non-meritorious objections. (Report at 26 (citing Chandler v. Moore, 240 F.3d 907, 917 (11th Cir. 2001) (observing that counsel cannot be ineffective for failing to object when there was no reason to object); Bolender v. Singletary, 16 F.3d 1547, 1573 (11th Cir. 1994) ("[I]t is axiomatic that the failure to raise nonmeritorious issues does not constitute ineffective assistance.").) And, even now, Petitioner offers nothing that would call into question the victim's identity. (Id.) Thus, Judge White found that "counsel's decision to not raise this issue can only be presumed to have been made in the exercise of reasonable professional judgment." (Id. (citing Strickland, 466 U.S. at 690 ("[C]ounsel is strongly presumed to have rendered adequate

assistance and made all significant decisions in the exercise of reasonable professional judgment.")).)

In his Objections, Petitioner argues that Dr. Hyma did not testify that he knew Reginald Harris in his lifetime, and a medical examiner's testimony that he performed an autopsy on Reginald Harris is insufficient to establish identity. (Obj. at 5 (citing Trowell v. Florida, 288 So. 2d 506 (Fla. Dist. Ct. App. 1973)).) He further argues that Judge White failed to cite any authority requiring identity to be in dispute before relief can be granted on this basis. (Id.) Petitioner's argument has some merit.

In Trowell, the defendant was accused of shooting the victim, Raymond Jones, in the neck with a rifle after a fight broke out at a bar. 288 So. 2d at 506. An ambulance removed Jones from the bar and took him to a hospital. Id. at 506-07. Five days later, a pathologist performed an autopsy at a separate hospital on a body identified as that of Raymond Jones. Id. at 507. The pathologist found a bullet which he determined had entered the victim's neck, but the bullet was not proffered or otherwise identified. Id. On cross-examination, the doctor testified he did not know the victim during his lifetime and had no knowledge of the identity of the person upon whom he performed the autopsy. Id. The court granted the defendant's motion to strike the pathologist's testimony, subject to the State being able to rehabilitate it. Id. Upon redirect the doctor admitted that no medical records were sent to him containing the name of the decedent upon whom he performed the autopsy, and there was no record evidence as to how the body got to the second hospital where the pathologist performed the autopsy. Id. Nevertheless, the trial judge admitted the doctor's testimony, finding that the State had

"adduced sufficient evidence to establish the corpus delicti," and denied the defendant's motions to strike the testimony and for judgment of acquittal. Id. The defendant was convicted of manslaughter. Id. at 506.

The defendant appealed arguing that the state failed to prove the identity of the victim, and the court of appeals agreed. Id. It held that the State had failed to establish the third element of the corpus delecti,[6] which requires the State to prove the identity of the victim beyond a reasonable doubt. Id. The court then gave examples of how the State could have carried its burden of proof:

> 1. There could have been the testimony of a relative or friend who saw his dead body as late as the funeral service;
>
> 2. The funeral director, if he knew him personally;
>
> 3. Any person who saw his corpse at the hospital who knew him personally;
>
> 4. A photograph could have been taken of the cadaver which was autopsied which could later at trial have been identified by any person who knew him in his lifetime;
>
> 5. A picture properly identified as Raymond Jones [the victim] when alive could have been identified at trial as the person upon whom Doctor Klein performed the autopsy;
>
> 6. Since allegedly death occurred sometime after the incident at the Santa Fe Bar, a certified copy of the death certificate could have been proffered;
>
> 7. Circumstantial evidence, such as the contents of the body's billfold, rings and other personal effects, garments, etc., could have been utilized;

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[6] In Florida, "[i]n homicide cases, the corpus delicti consists of three component elements: First, the fact of death; second, the criminal agency of another person as the cause thereof; and, third, the identity of the deceased person." Lee v. Florida, 117 So. 699, 701 (1928).

> 8. Scientific evidence, such as fingerprints, identification of teeth, hair, etc., tending to establish identity, may have been available to the State; and finally
>
> 9. The prosecution could have at least proffered the hospital records where presumably Raymond Jones died, as well as the bullet which caused the death of the person whose body was somehow delivered to the autopsy room of the Alachua General Hospital on July 3, 1972.

Id. at 508.

Here, Dr. Hyma, the Medical Examiner, testified that he conducted the autopsy on Reginald Harris. (T. 806 (D.E. 34-11 at 58).) Dr. Hyma identified Mr. Harris in a photograph, but it is unclear whether the photograph depicted Mr. Harris alive or dead.[7] (Id.) Dr. Hyma testified that the autopsy was the first time he came into contact with Reginald Harris. (T. 807.) He further testified that the Medical Examiner's office transported the body from North Shore hospital to the Medical Examiner's office where the autopsy took place. (Id. at 807-08.) Dr. Hyma then identified photographs depicting Mr. Harris's autopsy. (Id. at 808.) Defense counsel declined to cross-examine Dr. Hyma. (Id. at 810.) Unless the first photograph Dr. Hyma identified was a picture of Mr. Harris while alive, Dr. Hyma's testimony appears to be insufficient under Trowell to prove the victim's identity beyond a reasonable doubt. 288 So. 2d at 507-08.

However, what both Parties (and Judge White) failed to mention is that there was an additional witness who identified Harris as the victim—lead homicide investigator, Detective Jeffrey Lewis, testified that during his investigation he learned that Reginald Harris was the deceased victim. (T. 778 (D.E. 34-11 at 30).) Defense counsel objected

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[7] The photograph was introduced into evidence at trial but was not, apparently, made part of the record evidence in this habeas proceeding.

to Detective Lewis's identification of Mr. Harris on hearsay grounds, but the court overruled the objection. (Id.)

The question becomes whether the state court's rejection of Petitioner's claim that he was denied the effective assistance of counsel when his lawyer failed to challenge the sufficiency of the evidence as to the identity of the victim, Reginald Harris, was an unreasonable application of Strickland. In making this determination, this Court need only decide "whether the state court's decision of the issue is objectively unreasonable." Wright v. Sec'y for Dep't of Corrs., 278 F.3d 1245, 1256 (11th Cir. 2002). The Court finds that the state court's rejection of this claim was not objectively unreasonable. See Harris v. Giles, No. 1:08–CV–814–TMH, 2011 WL 904456, at *20 (M.D. Ala. Feb. 17, 2011) (finding that the state court's determination that counsel was not ineffective for failing to challenge the sufficiency of the evidence was not an unreasonable application of Strickland). Both the medical examiner and Detective Lewis testified that Reginald Harris was the victim who died. It was not unreasonable for the state court to conclude that counsel was not deficient for failing to object to the sufficiency of the evidence of the victim's identity.

Consequently, upon de novo review, the Court finds that the state court's resolution of this claim was not contrary to, or an unreasonable application of clearly established federal law, or based on an unreasonable determination of the facts in light of the evidence presented.

e. Ground Seven

In Ground Seven, Petitioner argues that trial counsel was ineffective in failing to object to the court's "read back" instruction, and in failing to request that the jurors be queried about whether they discussed evidence prior to their deliberations. (Petition at 8.)

During deliberations the jury wrote a note to the Court asking: "From Officer Star Eugene's testimony, we need an orientation of Mr. Barron on the ground when [Officer Eugene] arrived, the direction of the head and the legs." (T. 1085 (D.E. 34-14 at 54).) The trial court responded to the question with the following written answer: "Ladies and gentlemen of the jury, you must rely on your own individual and collective recollection of the evidence." (T. 1089 (D.E. 34-14 at 59).) All attorneys agreed upon this response. (See id.)

Defense counsel expressed concern that he overheard alternate jurors discussing the orientation of Petitioner's body on the ground during a lunch break prior to receiving the court's jury instructions. (T. 1086.) The court placed the two alternate jurors under oath outside the presence of the other jurors and asked whether there was any discussion at all about the case in the jury room prior to the jury instructions being given. (T. 1087-88.) Both jurors answered "no." (Id.) The court asked defense counsel whether he wanted the court to voir dire the entire jury, and defense counsel said "no." (Id. at 1088.)

1. Questioning the jury

Petitioner argued to the state court in a Rule 3.850 Motion that counsel was ineffective for failing to request the court to question the entire jury regarding whether

they had discussed evidence before receiving the jury instructions. (D.E. 18-4 at 13.) The court found that the claim was refuted by the testimony of the two alternate jurors who answered, under oath, that the jury did not discuss the case prior to receiving jury instructions. (D.E. 18-5 at 77.)

Judge White found that "the fact that counsel raised this issue and then made a considered decision not to question the rest of the panel tends to establish that counsel concluded that it was not necessary to question the remaining jurors, and may well have had strategic reasons for not wanting to highlight the issue by questioning the entire panel." (Report at 32.) Thus, Judge White found that "the record supports the conclusion that this was a strategic decision by counsel, and it is beyond question that reasonable strategic choices by counsel regarding the various plausible options in a given case are 'virtually unchallengeable.'" (Id. (quoting Strickland, 466 U.S. at 690).)

Petitioner objects, arguing that "[n]o reasonable attorney strategically would have waived questioning of the very jurors who will be deciding his client's fate, given that his client is facing a mandatory life sentence." (Obj. at 8.)

The Court rejects this claim. After two alternate jurors testified under oath that the jury did not discuss the case prior to receiving the Court's jury instructions, trial counsel's decision not to request that the entire jury be questioned was not objectively unreasonable. Therefore, Petitioner cannot show deficient performance under Strickland. See Wright, 278 F.3d at 1256. Additionally, Petitioner has not shown that but for counsel's failure to request that the entire jury be questioned, the result of the proceeding

would have been different. As such, he cannot show Strickland prejudice. 466 U.S. at 694.

2. "Read back" instruction

Petitioner also argued to the state court in a Rule 3.850 Motion that counsel was ineffective in failing to object to the Court's instruction that the jury members must rely on their own recollection of the evidence, rather than informing the jury that they could have portions of the testimony read back to them. (D.E. 18-4 at 14.) The state court rejected the claim, finding it was not error to instruct the jury to rely on their recollections, and, therefore, that counsel was not ineffective for failing to object to the instruction. (D.E. 18-5 at 77.)

Judge White found that the Court's instruction was not erroneous because the jury did not ask to hear the testimony read back and, in any event, the court has broad discretion in deciding whether to refuse to read back testimony to a jury. (Id. at 31 (citing United States v. Pacchioli, 718 F.3d 1294 (11th Cir. 2013)).

Petitioner appears to argue that Judge White erroneously applied Pacchioli because that was a case on direct appeal where the standard of review was whether the district court abused its discretion in denying the jury's request to read back certain testimony, whereas here the question is whether counsel was ineffective for failing to object to the court's decision not to inform the court that they could have the testimony read back to them. (Obj. at 6.)

The Court rejects Petitioner's argument. Under Florida law, even when the jury specifically requests the court to read back testimony, the court retains discretion to

decline the request. Fla. R. Crim. P. 3.140. (stating that if the jury requests to have testimony read back to them, the court "may order such testimony read to them"); see also Roper v. Florida, 608 So. 2d 533 (Fla. Dist. Ct. App. 1992). Here, the jury did not even ask to have the testimony read back to them—rather, they asked how, according to Officer Eugene's testimony, Petitioner's body was positioned on the ground when Officer Eugene arrived. (T. 1085 (D.E. 34-14 at 54).) In any event, the Court's instruction was not improper and, therefore, counsel cannot be deemed deficient for failing to object to it. Daugherty v. Dugger, 839 F.2d 1426, 1428 (11th Cir. 1988) ("To prove ineffective assistance of counsel, [the petitioner] must show that the instruction was improper, that a reasonably competent attorney would have objected to the instruction, and the failure to object was prejudicial."). Moreover, Petitioner has failed to show that even if the instruction had been improper and counsel had objected to the instruction, there is a reasonable probability that the result of the proceedings would have been different.

Therefore, the Court finds that the state court's resolution of this claim was not contrary to, or an unreasonable application of clearly established federal law, or based on an unreasonable determination of the facts in light of the evidence presented.

f. Grounds Fourteen

In Ground Fourteen, Petitioner argues that trial counsel was ineffective in failing to investigate and submit the BOLO ("be on the lookout") police dispatch tape into evidence at trial. (Petition at 10.)

Petitioner presented this claim to the state court in a Rule 3.850 Motion, where he explained that police dispatchers informed the officers responding to the scene of the

crime that nearby neighbors saw four black male suspects flee in a late model Chrysler-type vehicle. (D.E. 18-4 at 33.) Petitioner argued that trial counsel should have investigated the BOLO tape and moved for it to be admitted at trial. (Id. at 34.)

The state court found that the alleged failure to seek to have the BOLO tape admitted into evidence does not constitute ineffective assistance because the contents of the tape are inadmissible hearsay. (Id. at 91 (citing Conley v. Florida, 620 So. 2d 180, 182-83 (Fla. 1993) (observing that the practice of admitting the contents of police dispatch report "must be avoided," as such contents are "not relevant," and constitute inadmissible hearsay when relied upon for the truth of the matter asserted)).)

Likewise, Judge White found that counsel cannot be deemed ineffective for failing to seek to have the tapes admitted because the statements contained on the tapes are inadmissible hearsay. (Report at 43.)

Petitioner's objections on this issue are not entirely clear. First, he appears to argue that Judge White accused Petitioner of lying about what was on the BOLO tapes without listening to the tapes, (see Obj. at 9), but the Report does no such thing. Second, he argues that Judge White erroneously relied only on federal cases, but Petitioner cited no state law case that would support the argument that he is entitled to relief on this claim. (Id. at 10.) As such, these objections are due to be summarily rejected..

Regardless, upon de novo review, the Court finds that the state court's determination that counsel was not ineffective for failing to investigate the BOLO tape and seek its admission at trial is not contrary to or an unreasonable application of Strickland, nor is it based on an unreasonable determination of the facts in light of the

evidence presented. The tapes contain inadmissible hearsay, and counsel cannot be deemed ineffective for failing to seek admission of evidence that is inadmissible. Conley, 620 So. 2d at 182-83.

g. Ground Fifteen

In Ground Fifteen, Petitioner argues that counsel was ineffective in failing to investigate the identities of the witnesses who made the 911 calls. (Petition at 10.)

Petitioner presented this argument in a Rule 3.850 Motion where he argued that trial counsel should have attempted to locate the witnesses who called 911 to determine whether they could have identified Petitioner as one of the individuals seen fleeing from Mr. Cody's home. (D.E. 18-4 at 36.)

The state court found that the alleged failure to investigate is insufficient to show ineffective assistance. (D.E. 18-5 at 90-92 (citing Williamson v. Florida, 559 So. 2d 723, 723-24 (Fla. Dist. Ct. App. 1990) (rejecting ineffective assistance of counsel claim based on failure to investigate and locate unnamed, but identifiable, witnesses for trial, because the defendant failed to allege the identities of the witnesses and failed to state whether those witnesses were available for trial); Nelson v. Florida, 875 So. 2d 579 (Fla. 2004) (holding that "as part of the requirement to show that counsel's ineffectiveness prejudiced the defendant's case, a facially sufficient postconviction motion alleging the ineffectiveness of counsel for failing to call certain witnesses must include an assertion that those witnesses would in fact have been available to testify at trial").)

Judge White found that Petitioner failed to establish ineffective assistance for failing to investigate the witnesses because Petitioner failed to allege "what the foregone

investigation would have yielded, and how or why there is a reasonable probability that it would have resulted in a different outcome at trial." (Id. at 44 (citing Ceja v. Stewart, 97 F.3d 1246, 1255 (9th Cir. 1996) (rejecting claim of ineffective assistance where the defendant failed to explain what compelling evidence additional investigation would have unearthed that would have negated evidence of guilt)).)

In his Objections, Petitioner argues that Judge White erroneously found that Petitioner failed to allege what the potential witnesses would have revealed and how their testimony would have led to a different outcome in his case. (Id. at 10-11.) In this regard, Petitioner points to his Rule 3.850 Motion and his Reply to the state's Response in this case where he argued that "counsel should have investigated and obtained the identities of the 911 callers in order to determine can those witnesses identify the Petitioner as the individual they saw coming out of the house." (Id. at 11.)

Thus, Petitioner admittedly has no idea how the witnesses who called 911 would have testified. (See id.) He apparently hopes that they would have testified that they did not recognize him as one of the four individuals fleeing from Mr. Cody's home after the shots rang out. (See id.) This, of course, would not be particularly unusual considering that the evidence revealed that Petitioner was wearing a mask over his face. See Barron, 990 So. 2d at 1100.

Upon de novo review, Petitioner has not shown a reasonable probability that if counsel would have investigated the witnesses who called 911 that they would have been available to testify. Accordingly, he has not sufficiently alleged or demonstrated deficient performance under Strickland. See Putman v. Head, 268 F.3d 1223, 1247 (11th

Cir. 2001) (finding counsel was not deficient for failing to call prison deputy as a witness because the appellant "has not shown the prison deputy was willing or available to testify at . . . trial" or that he would have given favorable testimony).

Moreover, Petitioner has not sufficiently alleged or established that even if these witnesses had been found, available, and had testified, that the result of his trial would have been different. There was ample evidence that Petitioner was, in fact, one of the individuals fleeing from Mr. Cody's home. A recitation of the evidence produced at trial, as summarized by the court of appeals on Petitioner's direct appeal, will help demonstrate why Petitioner cannot establish prejudice:

> [I]n September 2000, Ed Cody was at home with his teenage son, Derrick, when a woman rang the buzzer to the gate surrounding Cody's home. When Cody responded, the woman explained that she had car trouble and needed assistance. Cody went outside to help the woman. While looking under the hood of the woman's car, a second car entered the gate and pulled up next to Cody. The driver of this second car exited the car and placed a gun to Cody's head. Immediately thereafter, three more men, armed with firearms, exited the car, and Cody realized that the woman was a decoy. Although the four men wore caps or masks, Cody testified that he saw their faces before they covered them. While the driver held Cody at gunpoint, the other three gunmen, one of whom Cody identified as the defendant, approached Cody's home, and Cody yelled to his sixteen-year-old son, Derrick, to call 911. Derrick retrieved a gun from his father's bedroom and began to dial 911. When the men entered the house, Derrick became frightened that he would be heard and, therefore, did not complete the call. While hiding in the bathroom, he watched as the men rifled through drawers and beneath his father's mattress. Derrick exited the bathroom and began firing at the men.
>
> Meanwhile, outside of the Cody home, the driver of the second vehicle tried to restrain Cody with handcuffs. When Cody heard shots being fired from inside his home, he believed the gunmen were shooting at his son, Derrick, and he tried to break away to get to his son. As he started towards the house, the woman yelled for the driver to shoot Cody because he had seen her face. The driver shot Cody twice in the back as he was attempting

> to get to his son. Cody took a few more steps and then collapsed. As he lay bleeding on the ground, he saw the three gunmen who entered his home, exit. The first was uninjured, the second was shot in the chest, and the third man, who Cody identified as the defendant, was shot in the neck. Cody testified that he saw the defendant, who stumbled out of the house with a mask pulled up over his face and a gun in his hand, fall to the ground, clutching his neck. He also testified that the defendant was the first one to go through the gate and to enter his home. The driver and the two other gunmen fled in their vehicle leaving the wounded defendant behind, and the woman fled in her vehicle. The defendant, who collapsed in front of Cody's home, was found wearing a bandana which had fallen away from his face. Next to him was a pair of gloves, and a gun was found lying under his body. The other wounded gunman who fled with the other robbers died from his wounds.

990 So. 2d at 1100. In light of this evidence that Petitioner was one of the individuals who fled Mr. Cody's home, there is not a reasonable probability that but for counsel's failure to investigate the witnesses on the 911 tapes, the result of his trial would have been different.

For these reasons, the Court finds that the state court's determination that counsel was not ineffective for failing to investigate the witnesses mentioned on the BOLO tapes is not contrary to or an unreasonable application of Strickland, nor is it based on an unreasonable determination of the facts in light of the evidence presented.

h. Ground Nineteen

In Ground Nineteen, Petitioner argues that trial counsel was ineffective for failing to impeach a State witness with his prior statement of the victim's character and reputation in the community. (Petition at 11.)

Petitioner presented this claim to the state court in a Rule 3.850 Motion where he argued that counsel should have impeached James Ferguson about his deposition

statement that Mr. Cody had a reputation in the community as a drug dealer. (D.E. 18-5 at 6.) The state court found the claim to be meritless because: (1) the deposition testimony was "vague at best"; (2) it is questionable whether the deposition testimony would have impeached the witness at all; and, in any event, (3) the defense was able to highlight Mr. Cody's involvement in drug dealing because Petitioner's theory of defense was that Mr. Cody and the perpetrators were involved in a dispute over a drug deal. (D.E. 18-5 at 99.)

Judge White found that because Mr. Ferguson's deposition testimony is vague, "counsel could have reasonably concluded that it would not have been useful impeachment material." (Report at 49 (citing Strickland, 466 U.S. at 690 ("[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment")).) Judge White further found that Petitioner cannot establish Strickland prejudice because the defense was able to (and did) portray Mr. Cody as a drug dealer and Petitioner was nevertheless convicted. (Id.) Finally, Judge White noted that attempting to impeach Mr. Ferguson on this point could have backfired—i.e., Mr. Ferguson could have denied Mr. Cody had a reputation as a drug dealer. (Id. at 49-50 (citing Cox v. Del Papa, 542 F.3d 669, 683 (9th Cir. 2008) (finding the defendant's argument that counsel should have sought out and presented witnesses at resentencing did not merit relief where having those witnesses testify "would have been a risky strategy"); Kinder v. Bowersox, 272 F.3d 532, 553 (8th Cir. 2001) (finding that the state court's determination that calling victim's mother was a risky strategy was not an unreasonable application of Strickland); United States v. Morales, 1

F. Supp. 2d 389, 393 (S.D.N.Y. 1998) ("The decision of experienced defense counsel not to call unwilling witnesses in a risky effort to collaterally challenge the credibility of one of the Government's witnesses is a matter of trial tactics that will not support a claim of ineffective assistance of counsel absent far more extreme circumstances")).)

In his Objections, Petitioner argues that the cases to which Judge White cited are distinguishable because in those cases the strategy was to not call the witness at all. (Obj. at 14.) The Court rejects this objection—Judge White cited cases finding that counsel was not ineffective for failing to pursue a risky strategy, which is directly relevant to his finding.

Petitioner also argues that Judge White overlooked evidence in the record where the trial court, upon the State's objection, advised the State that defense counsel may ask how Mr. Ferguson knew Mr. Cody, and that reputation evidence is allowed. (Obj. at 14.) The Court finds this to be irrelevant, as Judge White did not find that defense counsel was not permitted to impeach Mr. Ferguson. If anything, the fact that the court advised the State that reputation evidence was allowed shows that defense counsel made a strategic choice not to impeach Mr. Ferguson with testimony regarding Defendant's reputation. And because such a maneuver could have been risky, Petitioner cannot show that counsel's choice was patently unreasonable. See Dorsey v. Chapman, 262 F.3d 1181, 1186 (11th Cir. 2001) (holding that counsel's decision not to call an expert witness "was not so patently unreasonable a strategic decision that no competent attorney would have chosen this strategy") (citing Kelly v. United States, 820 F.2d 1173, 1176 (11th Cir. 1987)).

Therefore, upon de novo review, the Court finds that the state court's resolution of this claim was not contrary to, or an unreasonable application of clearly established federal law, or based on an unreasonable determination of the facts in light of the evidence presented.

i. Ground Twenty

In Ground Twenty, Petitioner claims that trial counsel was ineffective for "failing to provide Petitioner with pertinent data and knowledge of" Florida Rule of Criminal Procedure 3.290 so that he could properly preserve for appellate review an objection to the racial makeup of the jury panel. (Petition at 11.)

In his Rule 3.850 Motion, Petitioner argued that counsel was ineffective for failing to preserve the objection for appellate review, not that counsel was ineffective for failing to provide Petitioner with information so that Petitioner could properly preserve the objection. (D.E. 18-5 at 11.)

The Court finds that the claim Petitioner presented in his federal habeas Petition is procedurally barred.

> Habeas petitioners generally cannot raise claims in federal court if those claims were not first exhausted in state court. 28 U.S.C. § 2254(b)(1); Kelley v. Sec'y for Dept. of Corr., 377 F.3d at 1343. In order to be exhausted, a federal claim must be fairly presented to the state courts. Picard v. Connor, 404 U.S. 270, 275, 92 S. Ct. 509, 512, 30 L. Ed. 2d 438 (1971). "It is not sufficient merely that the federal habeas petitioner has been through the state courts . . . nor is it sufficient that all the facts necessary to support the claim were before the state courts or that a somewhat similar state-law claim was made." Kelley, 377 F.3d at 1343-44 (citing Picard, 404 U.S. at 275-76, 92 S. Ct. at 512 and Anderson v. Harless, 459 U.S. 4, 6, 103 S. Ct. 276, 277, 74 L. Ed. 2d 3 (1982)). Rather, in order to ensure that state courts have the first opportunity to hear all claims, federal courts "have required a state prisoner to present the state

> courts with the same claim he urges upon the federal courts." Picard, 404 U.S. at 275, 92 S. Ct. at 512 (citations omitted). While we do not require a verbatim restatement of the claims brought in state court, we do require that a petitioner presented his claims to the state court "such that a reasonable reader would understand each claim's particular legal basis and specific factual foundation." Kelley, 377 F.3d at 1344-45 (citing Picard, 404 U.S. at 277, 92 S. Ct. at 513).

McNair v. Campbell, 416 F.3d 1291, 1302 (11th Cir. 2005). Claiming that counsel was ineffective for failing to object to the racial make-up of the jury panel is "somewhat similar" to, but not the same as, claiming that counsel was ineffective for failing to explain the law to Petitioner so that Petitioner may object to the racial make-up of the jury panel.

"[I]f the petitioner simply never raised a claim in state court, and it is obvious that the unexhausted claim would now be procedurally barred due to a state-law procedural default, the federal court may foreclose the petitioner's filing in state court; the exhaustion requirement and procedural default principles combine to mandate dismissal." Bailey v. Nagle, 172 F.3d 1299, 1303 (11th Cir. 1999) (citations omitted). Because Petitioner clearly would be barred from now pursuing this claim in state court, see Fla. R. Crim. P. 3.850(b), (h), (m) it is procedurally defaulted and foreclosed from federal review absent a showing of cause and prejudice or a fundamental miscarriage of justice. Id. at 1304 n.9.

Petitioner cannot show cause for failing to present this claim to the state court, as he had all the information necessary to articulate it in his Rule 3.850 Motion—indeed, he articulated a somewhat similar claim in that Motion. Moreover, he cannot show prejudice or a manifest injustice because, as explained in Judge White's Report, there

was no legal basis for objecting to the racial makeup of the jury panel. (See Report at 50-52.)

Therefore, the Court finds that the state court's resolution of this claim was not contrary to, or an unreasonable application of clearly established federal law, or based on an unreasonable determination of the facts in light of the evidence presented.

j. Ground Twenty-two

In Ground Twenty-two, Petitioner claims ineffective assistance of appellate counsel for failing to argue on appeal that the trial court abused its discretion in denying the defense's motion to exclude the police report. (Petition at 11.) The at-issue police report was entered into evidence, over the defense's objection, pursuant to the business records exception to the hearsay rule to prove that a certain projectile matched the firearm that caused the death of the victim. (D.E. 18-7 at 17-18.)

Petitioner presented this claim to the state court in a petition for writ of habeas corpus. (See id.) The state court of appeals summarily denied the petition. (D.E. 18-7 at 44.)

Judge White found that this claim is "arguably a legally meritorious issue that appellate counsel could have raised." (Report at 56.) Specifically, the police report was offered to prove that a certain projectile matched the firearm at issue which "would appear to be classic hearsay within the police report, with no independent exception for its admission." (Id.) Thus, Judge White turned to whether appellate counsel was Constitutionally ineffective for failing to raise the issue on appeal. (See id.) In this regard, Judge White observed:

> Petitioner's theory of defense and his own testimony was that . . . Petitioner had never gone inside the Cody home, but that he had been held at gunpoint and shot at by unknown perpetrators outside the house, when these perpetrators and Edmond Cody were arguing over a drug deal. In light of this theory, whether the projectile at issue matched the firearm made little difference to Petitioner's case. Appellate counsel thus could have reasonably concluded that, given this theory of the case and the overwhelming evidence of Petitioner's guilt, the appellate court likely would have concluded that any error in admitting the police report was harmless. Therefore, Petitioner cannot establish that appellate counsel's decision to forego this potential issue on appeal was not made in the exercise of reasonable professional judgment, or that he was prejudiced thereby. See Jones, 463 U.S. 745, 753-54 (appellate counsel need not raise every non-frivolous issue); Robbins, 528 U.S. at 288 (appellate counsel may select arguments in order to maximize the likelihood of success); Murray, 477 U.S. at 536 (the practice of "winnowing out" weaker arguments is the "hallmark of effective appellate advocacy"); see also Card, 911 F.2d at 1520 (appellate counsel is not required to raise meritless issues); Eagle, 279 F.3d at 943 ("prejudice" for ineffective assistance of appellate counsel refers to a reasonable probability that the outcome of the appeal would have been different); Cross, 893 F.2d at 1290 (same); Smith, 528 U.S. at 285-86 (claim for ineffective assistance of appellate counsel requires showing that appellate counsel's performance was deficient and that, but for counsel's deficient performance, the defendant would have prevailed on appeal); Shere, 537 F.3d at 1310 (same).

(Id. at 56-57.) Accordingly, Judge White found that Petitioner was not entitled to federal habeas relief on this claim. (See id.)

In his Objections, Petitioner argues that Judge White failed to evaluate appellate counsel's performance objectively and instead evaluated Petitioner's theory of defense. (Obj. at 15.) Petitioner argues that any reasonable appellate attorney would have raised the claim on appeal. (Id. at 16.)

Under the totality of the circumstances, the Court finds that appellate counsel's failure to raise this issue on appeal was not objectively unreasonable in light of the fact that the contents of the police report were unrelated to Petitioner's theory of defense. The

Court further finds that Petitioner has failed to establish that there is a reasonable probability that but for counsel's failure to raise this issue on appeal, the outcome of his appeal would have been different. To this point, the Court notes that the at-issue police report was prepared and signed by the State's firearm's expert, Officer Jess Galan, and introduced during Officer Galan's testimony. (T. 764-65 (D.E. 34-11 at 16-17).) The Report merely contains the results of Officer Galan's forensic examination of the projectiles. (T. 767-79.) Even if the trial court had sustained defense counsel's objection to the introduction of the Report, the results of Officer Galan's examination still would have come in through his testimony. Consequently, Petitioner cannot establish prejudice from appellate counsel's failure to argue that the trial court abused its discretion by introducing Officer Galan's Report. See Esty v. McDonough, No. 3:04cv363/MCR/EMT, 2007 WL 1294602, at *24 (N.D. Fla. May 1, 2007) (finding that the petitioner could not establish prejudice for failing to request a Frye hearing because the evidence would have been admitted anyway).

Therefore, the Court finds that the state court's resolution of this claim was not contrary to, or an unreasonable application of clearly established federal law, or based on an unreasonable determination of the facts in light of the evidence presented.

k. Ground Twenty-four

Finally, in Ground Twenty-four, Petitioner claims that appellate counsel was ineffective for failing to raise on direct appeal that the trial court issued an erroneous jury instruction on manslaughter under Montgomery v. Florida, 70 So. 3d 603 (Fla. Dist. Ct. App. 2009). (Petition at 12.)

Count Five of the Information charged Petitioner with attempted first-degree murder with a firearm. (See D.E. 18-1 at 7.) The trial court instructed the jury as to the lesser included offenses of attempted second-degree murder with a depraved state of mind, and attempted manslaughter. (T. 1062 (D.E. 34-14 at 31).) The court gave the following instruction on attempted manslaughter:

> Before you can find the defendant guilty of attempted manslaughter as a lesser-included offense of Count V, the State must prove the following element beyond a reasonable doubt:
>
> John Lee Barron committed an act or procured the commission of an act which was intended to cause the death of Ed Cody, except that someone prevented John Lee Barron from killing Ed Cody, or he failed to do so.

(T. 1063 (D.E. 34-14 at 32).)) This instruction is consistent with Florida Standard Jury Instruction 6.6 (2003) for attempted manslaughter by act.[8]

On August 20, 2003, the jury convicted Petitioner in Count Five of attempted second-degree murder with a firearm, as a lesser included offense of attempted first-degree murder. (Verdict, D.E. 18-1 at 19.)

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[8] In Florida, "[m]anslaughter may be committed in one of three ways: by act, by procurement, or by culpable negligence." Del Valle v. Florida, 52 So. 3d 16, 17 (Fla. Dist. Ct. App. 2010) (citing Florida v. Montgomery, 39 So. 3d 252, 256 (Fla. 2010)). In 2003, Florida's standard jury instruction for attempted manslaughter by act provided:

> To prove the crime of Attempted Voluntary Manslaughter, the State must prove the following element [sic] beyond a reasonable doubt:
>
> (Defendant) committed an act which was intended to cause the death of (victim) and would have resulted in the death of (victim) except that someone prevented (defendant) from killing (victim) or [he] [she] failed to do so."

Florida Standard Jury Instruction (Criminal) 6.6 (2003).

On August 22, 2007, the Third District Court of Appeals affirmed Petitioner's convictions and sentence. Barron, 990 So. 2d at 1108. Thereafter, Petitioner petitioned the Florida Supreme Court for discretionary review. See Barron v. Florida, 11 So. 3d 335 (Fla. 2009).

On February 12, 2009, while Petitioner's case was pending before the Florida Supreme Court, Florida's First District Court of Appeal issued its opinion in Montgomery, 70 So. 3d 603. In Montgomery, the defendant ("Montgomery") was charged with first-degree murder. 70 So. 3d at 604. The court instructed the jury as to the lesser-included offenses of second-degree murder and manslaughter by act. Id. Relevant here, the court instructed the jury that to convict the defendant of manslaughter the State was required to prove "two things: The first being again that [the victim] is dead and, secondly, that Mr. Montgomery intentionally caused her death." Id. This was consistent with the Florida standard jury instruction for manslaughter by act. Id. Ultimately, the jury convicted Montgomery of second-degree murder. Id. at 603. Montgomery appealed arguing that the trial court's jury instructions constituted fundamental error. Id. at 604. The court of appeals agreed and reversed Montgomery's conviction for second-degree murder, holding that the State is not required to prove intent to kill in order to establish the crime of manslaughter by act, and that the trial court committed fundamental error by issuing a jury instruction that improperly imposed that element.[9] 70 So. 3d at 606-08.

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[9] The First District Court of Appeals subsequently held that the reasoning in Montgomery also applies to the standard jury instruction for attempted manslaughter by act,

On May 7, 2009, the Florida Supreme Court accepted jurisdiction to review Montgomery.[10] See Florida v. Montgomery, 11 So. 3d 943 (Fla. 2009) (granting review).

On May 21, 2009, the Florida Supreme Court declined to accept jurisdiction in Petitioner's case. See Barron v. Florida, 11 So. 3d 355 (Fla. 2009) (declining review).

On April 8, 2010, the Florida Supreme Court issued its opinion in Montgomery, agreeing with the First District Court of Appeal "that the crime of manslaughter by act does not require the State to prove that the defendant intended to kill the victim." 69 So. 3d 252, 254 (Fla. 2010). It further agreed with the First District that "the use of the standard jury instruction on manslaughter, which required that the State prove the defendant's intent to kill the victim, constituted fundamental error in Montgomery's case." Id.

Petitioner argued to the state court in his state habeas petition that appellate counsel was ineffective for failing to request the Supreme Court to hold his case in abeyance until Montgomery was decided. (D.E. 18-7 at 95 (citing Lopez v. Florida, 68 So. 3d 332 (Fla. Dist. Ct. App. 2011); Dill v. Florida, 79 So. 3d 849 (Fla. Dist. Ct. App. 2012); 82 So. 3d 1153 (Fla. Dist. Ct. App. 2012); Mendenhall v. Florida, 82 So. 3d 1153 (Fla. Dist. Ct. App. 2012); Gayle v. Florida, 84 So. 3d 364 (Fla. 2012)).) As will be discussed below, these cases (and others) clearly establish that Petitioner's appellate

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which is the jury instruction at issue in the instant case. Lamb v. Florida, 18 So. 3d 734, 735 (Fla. Dist. Ct. App. 2009).

[10] The First District noted in Montgomery that its opinion conflicted with the Fifth District Court of Appeal's decision in Barton v. Florida, 507 So. 2d 638 (Fla. Dist. Ct. App. 1987), quashed on other grounds, 523 So. 2d 152 (Fla. 1988).

counsel rendered ineffective assistance;[11] nevertheless, on July 10, 2014, the court of appeals summarily denied his state petition without written opinion. (D.E. 18-7 at 103.)

In Lopez, a case out of the Fifth District Court of Appeals, the defendant ("Lopez") was charged with first-degree murder. 68 So. 3d at 333. The jury was instructed on the lesser-included offenses of second-degree murder and manslaughter by act, using Florida's standard jury instruction for the latter. Id. The jury ultimately found Lopez guilty of second-degree murder. Id. Six months before Lopez filed his initial brief on appeal, the First District rendered its opinion in Montgomery, finding that the standard manslaughter by act instruction—the very instruction given in Lopez's case—constituted fundamental error. Id. The First District's Montgomery decision was not brought to the Fifth District's attention in Lopez's direct appeal,[12] and the court of appeals affirmed Lopez's conviction. Id.

Lopez subsequently filed a petition for writ of habeas corpus alleging ineffective assistance of appellate counsel for failing to argue that the standard jury instruction for manslaughter by act constituted fundamental error under Montgomery. Id. The Fifth District granted the petition, finding that appellate counsel was ineffective for failing to argue that, based on Montgomery, the manslaughter by act instruction constituted

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[11] In Florida, "[t]he criteria for proving ineffective assistance of appellate counsel parallel the Strickland standard for ineffective trial counsel." Wilson v. Wainwright, 474 So. 2d 1162, 1163 (Fla. 1985).

[12] Indeed, there is no indication that Lopez's appellate counsel was even aware of the Montgomery decision.

fundamental error. Id. at 334. Thus, the court vacated Lopez's second-degree murder conviction and remanded for a new trial. Id. at 335.

The court of appeals in Lopez relied heavily on Del Valle v. Florida, 52 So. 3d 16 (Fla. Dist. Ct. App. 2010), a materially indistinguishable case where Florida's Second District Court of Appeals granted a petition for writ of habeas corpus for appellate counsel's failure to raise the Montgomery issue on direct appeal. In Del Valle, the Defendant ("Del Valle") was convicted of second-degree murder, but the jury was also given the standard jury instruction on manslaughter by act as a lesser included offense. 52 So. 3d at 17. Del Valle did not object to the manslaughter instruction.[13] Id. Del Valle appealed his conviction; before his initial brief was due the First District had rendered its opinion in Montgomery, and the Florida Supreme Court had accepted review thereof. Id. at 18. However, Del Valle's appellate attorney failed to argue that the manslaughter by act instruction was fundamentally erroneous under Montgomery.[14] Id. The court of appeals affirmed Del Valle's conviction and sentence, and Del Valle filed a petition for writ of habeas corpus. Id. at 17.

The state habeas court held that appellate counsel was ineffective for failing to argue on direct appeal that the manslaughter by act instruction was fundamentally erroneous based on Montgomery. Id. at 18. The court stated that although it would have

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[13] In Hall v. Florida, 951 So. 2d 91, 96 (Fla. Dist. Ct. App. 2007) (en banc), Florida's Second District Court of Appeals had stated in dicta that the standard jury instruction on manslaughter by act was not erroneous. Id.

[14] Indeed, there is no indication that Del Valle's appellate counsel was even aware of the Montgomery decision.

affirmed Del Valle's conviction for second-degree murder, it would have been compelled to certify conflict with the First District's Montgomery decision, "and we can only conclude that Mr. Del Valle would have ultimately been afforded relief as part of the direct appeal process." Id. at 19. Accordingly, the court reversed Del Valle's second-degree murder conviction, vacated his sentence, and remanded for a new trial. Id. See also Gayle v. Florida, 84 So. 3d 364 (Fla. Dist. Ct. App. 2012) (granting petition for writ of habeas corpus and reversing and remanding for a new trial after finding ineffective assistance of appellate counsel for failing to argue on appeal that the standard jury instruction for manslaughter by act constituted fundamental error under Montgomery, where the First District had decided Montgomery, and the Florida Supreme Court had accepted review of Montgomery, before the court of appeals had issued its opinion in Gayle's appeal); Asberry v. Florida, 32 So. 3d 718 (Fla. Dist. Ct. App. 2010) (finding ineffective assistance of appellate counsel for failing to request supplemental briefing on the Montgomery issue where Montgomery was decided after briefing on direct appeal had been completed, but before the court of appeals had decided Asberry's appeal); Toby v. Florida, 29 So. 3d 1138, 1138 (Fla. Dist. Ct. App. 2009) (same).

More analogous to the instant case, in Hodges v. Florida, the defendant ("Hodges") was charged with, inter alia, attempted first-degree murder on a law enforcement officer with a firearm. 64 So. 3d 142, 143 (Fla. Dist. Ct. App. 2011). The trial court instructed the jury on lesser included offenses, including the standard instruction for attempted manslaughter by act, id., which is the instruction at issue in the instant case. Ultimately, the jury convicted Hodges of attempted second-degree murder.

Id. While his direct appeal was pending in the court of appeals, the First District issued its opinion in Montgomery, and the Florida Supreme Court accepted review thereof. Id. However, Hodges' appellate attorney never sought to raise the jury instruction issue,[15] and the court of appeals affirmed Hodges's conviction and sentence. Id.

Thereafter, Hodges filed a petition for writ of habeas corpus arguing that appellate counsel rendered ineffective assistance for failure to raise the issue of whether the standard jury instruction for attempted manslaughter by act was fundamental error under Montgomery. Id. The court of appeals initially denied the petition, but on rehearing granted it, finding that appellate counsel rendered ineffective assistance. Id. "Given the Florida Supreme Court's April 2010 Montgomery decision, we are bound to conclude that appellate counsel should have raised the issue at the appellate level before our decision in the appeal was final." Id. Thus, the court of appeals vacated Hodges's judgment and remanded for a new trial. Id.

Likewise, in Dill v. Florida, the defendant ("Dill"), like Petitioner here, was charged with attempted first-degree murder with a firearm. 79 So. 3d 849, 850 (Fla. Dist. Ct. App. 2012). Also like Petitioner's case, the court in Dill instructed the jury on attempted second-degree murder, and gave the standard jury instruction for attempted manslaughter by act. Id. The jury ultimately convicted Dill of attempted second-degree murder with a firearm as a lesser included offense. Id. Dill appealed: before his initial brief was filed, the First Circuit rendered its opinion in Montgomery, and the Florida

[15] Indeed, there is no indication that Hodges's appellate counsel was even aware of the Montgomery decision.

Supreme Court accepted review thereof. Id. at 851. Moreover, the First District's opinion in Lamb—which extended the holding in Montgomery to the standard jury instruction for attempted manslaughter by act—had been decided while Dill's direct appeal was pending. Id. However, appellate counsel failed to argue that the standard jury instruction for attempted manslaughter by act was fundamental error based on Montgomery and Lamb.[16] See id. The court of appeals affirmed Dill's conviction and sentence on December 30, 2009, before the Florida Supreme Court had resolved Montgomery. Id.

Thereafter, Dill filed a petition for writ of habeas corpus, arguing that appellate counsel was ineffective for failing to argue that the attempted manslaughter by act instruction was fundamental error based on the First District's opinions in Montgomery and Lamb. Id. The court of appeals agreed, granted Dill's petition for writ of habeas corpus, and remanded for a new trial. Id. at 852. See also Pierce v. Florida, 121 So. 3d 1091, 1093 (Fla. Dist. Ct. App. 2013) (granting petition for writ of habeas corpus for ineffective assistance of appellate counsel for failing to argue on appeal that the trial court's use of the standard jury instruction for attempted manslaughter by act constituted fundamental error under Montgomery); Mendenhall v. Florida, 82 So. 3d 1153, 1154 (Fla. Dist. Ct. App. 2012) (same).

Finally, in Minnich v. Florida, the defendant ("Minnich") was convicted in 2006 of attempted second-degree murder, but the trial court also issued the standard instruction

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[16] Indeed, there is no indication that Dill's appellate counsel was even aware of the Montgomery decision.

for attempted manslaughter by act. 130 So. 3d 695, 696 (Fla. Dist. Ct. App. 2011). In 2008, the court of appeals affirmed Minnich's judgment. Id. Thereafter, Minnich filed a petition for writ of certiorari in the U.S. Supreme Court. Id. While the petition for writ of certiorari was pending, the First District Court of Appeal issued its decision in Montgomery. Id. Petitioner's conviction became final when the U.S. Supreme Court denied the petition for writ of certiorari on May 11, 2009. Id.

Minnich subsequently filed a petition for writ of habeas corpus arguing that, based on Montgomery, the trial court committed fundamental error by issuing the standard instruction for attempted manslaughter by act as a lesser included offense. Id. The state court agreed, observing that "because petitioner's conviction was not yet final when this court issued the opinion in Montgomery, the holding in that case applied to petitioner's case." Id. It further observed that "[u]nder such circumstances, a motion to recall mandate in his direct appeal would have been appropriate, however, petitioner was unable to file such a motion because this court was no longer in the same term in which the mandate was issued." Id. (citing Williams v. State, 947 So. 2d 694 (Fla. Dist. Ct. App. 2007)). Thus, because the trial court had committed fundamental error under Montgomery, Minnich's direct appeal was still pending before the United States Supreme Court when the First District decided Montgomery, and there was no other avenue for relief, the state court granted Minnich's petition for writ of habeas corpus. Id.

The inescapable conclusion to be drawn from the cases discussed above is this: if (1) the trial court issued the standard jury instruction for manslaughter by act or attempted manslaughter by act during the defendant's trial, (2) the defendant's direct

appeal was pending in some appellate court when the First District Court of Appeal rendered its opinion in Montgomery, and (3) appellate counsel failed (or was unable) to raise the Montgomery issue in some way while the direct appeal was pending,[17] then (4) the defendant is entitled to a writ of habeas corpus.

Here, the trial court issued the standard jury instruction for attempted manslaughter by act at Petitioner's trial, Petitioner's direct appeal was pending before the Florida Supreme Court when the First District Court of Appeal decided Montgomery, and appellate counsel failed to raise the Montgomery issue in any way. Thus, Petitioner should be entitled to a writ of habeas corpus.

The fact that Petitioner's case was pending in the Florida Supreme Court when the First District rendered Montgomery, rather than in the court of appeals like Lopez, Del Valle, Gayle, Asberry, Toby, Hodges, Mendenhall, and Dill, is irrelevant. What is relevant is that Petitioner's direct appeal was not yet final. See Smith v. Florida, 598 So. 2d 1063, 1066 ("[A]ny decision of this Court announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case pending on direct review or not yet final.") (citing Griffith v. Kentucky, 479 U.S. 314, 320 (1987)); see also

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[17] Because the court of appeals had already decided Petitioner's direct appeal when Montgomery was decided, appellate counsel's failure to argue the Montgomery issue to the court of appeals amounts to a failure to anticipate a change in the law, which is not a basis for finding ineffective assistance of counsel. Dill, 79 So. 3d at 851; Lopez, 68 So. 3d at 334. It is on these grounds that Judge White recommended the Court reject this claim. (See Report at 59-60.) However, Petitioner's claim is not that appellate counsel was ineffective for failing to argue to the court of appeals that the standard jury instruction for manslaughter by act constitutes fundamental error; rather, his claim is that appellate counsel was ineffective for failing to raise the issue by moving the Florida Supreme Court to hold his case in abeyance pending its resolution of Montgomery. (See D.E. 18-7 at 95.)

Minnich, 130 So. 3d at 696 ("[B]ecause petitioner's conviction was not yet final when this court issued the opinion in Montgomery, the holding in that case applied to petitioner's case.").

"Although appellate counsel is not required to anticipate changes in the law, . . . 'appellate counsel is ineffective for failing to raise favorable cases decided by other jurisdictions during the pendency of an appeal, which could result in a reversal." Dill, 79 So. 3d at 851; see also Lopez, 68 So. 3d at 334 (same); Shabazz v. Florida, 955 So. 2d 57 (Fla. Dist. Ct. App. 2007) (holding appellate counsel ineffective for failing to raise favorable cases from other districts in Florida even though controlling law in district in which appeal was heard was unfavorable); Ortiz v. Florida, 905 So. 2d 1016 (Fla. Dist. Ct. App. 2005) (determining that the appellant's counsel's failure to request supplemental briefing on favorable appellate decision from other district court constituted ineffective assistance of counsel); Whatley v. Florida, 679 So. 2d 1269 (Fla. Dist. Ct. App. 1996) (determining that although issue was not completely settled, counsel was ineffective for failing to cite favorable binding case law from another district in effect at time of pending appeal). That is precisely what happened in Petitioner's case.

Despite the fact that all of the opinions discussed above had been issued by the time Petitioner filed his state court petition for writ of habeas corpus—and despite the fact that Petitioner cited and/or quoted Dill, Mendenhall, Lopez, and Gayle in his state court petition—the state court summarily denied Petitioner's petition on July 9, 2014. (D.E. 18-7 at 103.) By that time, the Florida Supreme Court had explicitly held that the crime of attempted manslaughter by act does not require an intent to kill, and that a trial

court commits fundamental error by giving the standard jury instruction on attempted manslaughter by act—the very instruction given in Petitioner's case—which requires proof of intent to kill. Williams v. Florida, 123 So. 3d 23, 27, 30 (Fla. 2013).

In light of the overwhelming authority discussed above, the Court finds that appellate counsel was constitutionally ineffective for failing to raise the Montgomery issue while Petitioner's direct appeal was pending before the Florida Supreme Court. First, the Court finds that no competent attorney would have failed to keep Petitioner's appeal alive before the Florida Supreme Court by moving to hold the appeal in abeyance pending the Florida Supreme Court's resolution of Montgomery. See Perez v. Dep't of Corrs., 227 F. Supp. 2d 1298, 1310-12 (S.D. Fla. 2002) (granting petition for writ of habeas corpus on grounds that appellate counsel was ineffective for failing to keep direct appeal alive where the petitioner, who had been found guilty of attempted felony murder, would have benefited from the Florida Supreme Court's decision in Florida v. Gray, 654 So. 2d 552 (Fla. 1995), which abolished the doctrine of attempted felony murder and was pending before the Florida Supreme Court when the court of appeals affirmed his convictions).

The Court further finds that Petitioner was prejudiced by appellate counsel's failure to raise the Montgomery issue, i.e., that "but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. Specifically, if appellate counsel had, for example, moved the Florida Supreme Court to hold Petitioner's appeal in abeyance pending its decision in Montgomery, there is a reasonable probability that the Court would have granted the motion, and Petitioner

would have benefited from the Court's subsequent opinion. See Smith, 598 So. 2d at 1066 ("[A]ny decision of this Court announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case pending on direct review or not yet final.") (citing Griffith, 479 U.S. at 320). Therefore, the state court's resolution of this issue was an objectively unreasonable application of Strickland.

Consequently, the Petition for Writ of Habeas Corpus is granted as to the issue raised in Ground Twenty-Four.

IV. Conclusion

Accordingly, it is **ORDERED AND ADJUDGED** that:

1. The Report of the Magistrate Judge is ADOPTED IN **PART AND REJECTED IN PART** consistent with this Order;
2. Petitioner's Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus is **GRANTED** as to Ground Twenty-Four and DENIED as to all other Grounds asserted;
3. Petitioner's conviction and sentence on Count Five are hereby **VACATED** and Respondent is directed to forthwith take all action necessary to ensure that the state trial court is apprised of this ruling, that trial counsel is appointed to represent Petitioner, and that a new trial (or other appropriate disposition) is ordered as to Count Five in an expeditious fashion;

4. Respondent shall have **NINETY DAYS** from the date of this Order to file a status report informing this Court of the date of the new trial or other disposition of Count Five;

5. A Certificate of Appealability **SHALL NOT ISSUE**;

6. All pending motions are **DENIED AS MOOT**; and

7. This case is now **CLOSED**.

DONE AND ORDERED in Chambers at Miami, Florida this 20th day of June, 2018.

Joan A. Lenard

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

APPENDIX "C"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-CIV-23407-LENARD
MAGISTRATE JUDGE P.A. WHITE

JOHN LEE BARON,

Petitioner,

v.

JULIE JONES,

Respondent.

REPORT OF MAGISTRATE JUDGE

Introduction

John Lee Baron, who is presently confined at Okeechobee Correctional Institution in Okeechobee, Florida, has filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, attacking his conviction and sentence in case number F00-28348, entered in the Eleventh Judicial Circuit Court of Miami-Dade County. 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.

The court has before it the petition for writ of habeas corpus (DE#1), Respondent's response to an order to show cause and appendix of exhibits (DE#17, 18), Petitioner's reply (DE#19), a motion for rehearing filed in Petitioner's state 3.850 proceedings appended to Petitioner's Third Motion for Expansion of Record (DE#21; see also DE#24), Respondent's supplemental response to a supplemental order to show cause, supplemental exhibits, and notice of filing trial transcripts (DE#33, 34, 35), Petitioner's Motion for Expansion of Record (DE#39; see also DE#40), Petitioner's supplemental reply (DE#41), and the trial information sheet

appended to another one of Petitioner's Motion(s) for Expansion of Record (DE#42; see also DE#43).

Claims

Ground One: Confrontation and Due Process Clause violations.

Ground Two: Brady violation.

Ground Three: Insufficient evidence and defective jury instructions.

Ground Four: Ineffective assistance of trial counsel in failing to argue the State's failure to prove the essential element of *corpus delicti*.

Ground Five: Ineffective assistance of trial counsel in failing to object to the prosecutor arguing facts not in evidence.

Ground Six: Ineffective assistance of trial counsel in failing to correct the prosecutor's misleading impression that Petitioner lied about being shot outside of the residence.

Ground Seven: Ineffective assistance of trial counsel in failing to object to the court's "read-back" instruction, and in failing to request that the jurors be queried about their discussion of the evidence prior to their deliberations.

Ground Eight: Ineffective assistance of trial counsel in failing to object and move for a Richardson hearing after a police witness changed her testimony.

Ground Nine: Ineffective assistance of trial counsel in failing to call an officer whose testimony would have contradicted key police witness testimony.

Ground Ten: Ineffective assistance of trial counsel in failing to object to the prosecution bolstering key witness testimony.

Ground Eleven: Ineffective assistance of trial counsel in failing to object to the prosecutor arguing facts not in evidence.

Ground Twelve: Ineffective assistance of trial counsel in failing to correct false testimony by the lead detective.

Ground Thirteen: Ineffective assistance of trial counsel in failing to move for a Richardson hearing after a key State witness prejudicially changed his testimony.

Ground Fourteen: Ineffective assistance of trial counsel in failing to investigate and submit the BOLO of 911 tapes at trial.

Ground Fifteen: Ineffective assistance of trial counsel in failing to investigate the witnesses who made the 911 calls.

Ground Sixteen: Ineffective assistance of trial counsel in failing to impeach the victim with his alleged sexual relationship with one of the alleged robbers.

Ground Seventeen: Ineffective assistance of trial counsel in failing to subpoena a detective who would have contradicted a key prosecution witness, and in failing to impeach the witness with a prior inconsistent statement.

Ground Eighteen: Ineffective assistance of trial counsel in failing to argue a petition filed in federal court for the production of DEA files.

Ground Nineteen: Ineffective assistance of trial counsel in failing to impeach a State witness with his prior statement of the victim's character and reputation in the community.

Ground Twenty: Ineffective assistance of trial counsel in failing to provide Petitioner with pertinent data and knowledge of Florida law in order to preserve for appellate review the racial makeup of the jury panel.

Ground Twenty-One: Trial counsel's errors deprived Petitioner of effective assistance of counsel in a trial that was fundamentally unfair.

Ground Twenty-Two: Ineffective assistance of appellate counsel in failing to raise the trial court's abuse of discretion in denying a defense motion to exclude a police report.

Ground Twenty-Three: Ineffective assistance of appellate counsel in failing to advance constitutional violations to the Florida Supreme Court for discretionary review.

Ground Twenty-Four: Ineffective assistance of appellate counsel in failing to raise on direct appeal the trial court's erroneous jury instruction regarding manslaughter.

Procedural History[1]

Petitioner's underlying criminal case involved a home invasion and armed robbery, which resulted in the death of one of Petitioner's co-defendant, Reginald Harris, and paralysis of the victim, Ed Cody. Petitioner was charged with second degree felony-murder (Count 1), attempted strong-arm robbery (Count 2), attempted armed robbery (Count 3), use or display of a firearm while committing a felony which resulted in death or serious bodily injury (Count 4), and attempted first degree murder with a deadly weapon (Count 5).[2] (Ex. A).

Petitioner proceeded to trial. The evidence adduced at trial generally established that a female decoy was used to lure the victim, Ed Cody, out of his home and that Petitioner and his co-defendants then entered the home. Ed Cody was shot by a co-defendant, which paralyzed him, as he ran to the house to protect his son, Derrick Cody, who was in the house. Derrick Cody then shot and killed Petitioner's co-defendant, Reginald Harris, inside the house. Petitioner was convicted as charged on Counts 1-4.

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[1]Unless otherwise noted, citations to exhibits are to the respondent's exhibits.

[2]A sixth count was dropped prior to trial.

(Ex. B). He was also convicted of attempted second degree murder with a firearm, as a lesser included of attempted first degree murder with a deadly weapon as charged in Count 5. (Id.).

Petitioner was initially sentenced to life on Count 1, 15 years on Counts 2 and 4, and thirty years on Counts 3 and 5, with a ten-year mandatory minimum for Counts 1, 2, 3 and 5, and with the sentences all running consecutively to each other. (Ex. C). An order correcting sentence was later entered, vacating the mandatory minimum sentence as to Count 2, and ordering that all the remaining mandatory minimum sentences run concurrent to each other, rather than consecutively. (Ex. C-1). Judgment of acquittal was also entered as to Count 4, and that sentence was thus also vacated. (Ex. C-2).

Petitioner's case has an extensive procedural history. Pertinent here, after he was convicted and sentenced, Petitioner pursued a direct appeal in the state courts. In a lengthy written opinion issued on August 22, 2007, the Florida Third District Court of Appeal affirmed Movant's convictions. Barron v. State, 990 So.2d 1098 (Fla. 3d DCA 2007). Petitioner then pursued discretionary review in the Florida Supreme Court. On May 21, 2009, the Florida Supreme Court denied Petitioner's petition. See Barron v. State, 11 So.3d 355 (Fla. 2009).

Approximately two months after the direct appeal proceeding concluded, Petitioner commenced his pursuit of pro se postconviction relief. He filed a motion to correct illegal sentence pursuant to Fla.R.Crim.P. 3.800(a); a motion for postconviction relief pursuant to Fla.R.Crim.P. 3.850, subsequently amended; and state habeas corpus petitions, see Barron v. State, 75 So.3d 284 (Fla. 3d DCA 2011); Barron v. State, 162 So.3d 1011 (Fla. 3d DCA 2014)(table). Numerous appeals were taken to the Florida Third District Court of Appeal from the postconviction court's orders, denying Petitioner relief. See e.g., Barron v. State, 31

So.3d 184 (Fla. 4th DCA 2010); Barron v. State, 100 So.3d 230 (Fla. 3d DCA 2012); Barron v. State, 146 So.3d 38 (Fla. 3d DCA 2013); Barron v. State, 150 So.3d 1151 (Fla. 3d DCA 2014).

In addition to the above-referenced proceedings, on November 18, 2014, Movant also filed in the trial court a Motion to Correct Illegal Sentence pursuant to Fla.R.Crim.P. 3.800(a). See Petition at ¶18. (DE# 1). That motion was granted by order entered on December 29, 2014. Id. This Court's review of the online records of the Clerk, Miami-Dade County Circuit Court, has revealed that the trial court's order entered on December 29, 2014, granting Petitioner's motion states
in pertinent part as follows:

> This court has reviewed the court file and records, and finds that the Defendant is entitled to 506 days of prison credit (Date of conviction to date of resentencing) therefore it is
>
> ORDERED AND ADJUDGED that the Defendant's motion is granted and the Judgment and sentence entered January 7th, 2005 is corrected to reflect 506 days prison credit.

(Order Granting Defendant's Motion for Prison Time Credit entered on December 29, 2014).[3] Petitioner was advised that he had thirty days in which to take an appeal from the trial court's ruling. (Id.). No appeal was taken from the corrected sentence.

On September 3, 2015, approximately eight months after his sentence had been corrected, Petitioner then filed the instant federal petition for writ of habeas corpus (DE#1).[4]

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[3]This Court takes judicial notice of the information available at the database maintained by the Clerk of Court, Miami-Dade County Circuit Court in State v. Barron, Case No. 00-28348 (Fla. 11th Jud. Cir. Ct.); https://www2.miami-dadeclerk.com/cjis, viewed this date. See Fed.R.Evid. 201.

[4]Prisoners' documents are deemed filed at the moment they are delivered to prison authorities for mailing to a court, and absent evidence to the contrary, will be presumed to be the date the document was signed. See Washington v.

Statute of Limitations

Because 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.[5] 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 ...."). Once the limitations period is triggered, the AEDPA clock begins to run.

A properly filed application for state post-conviction relief stops the AEDPA clock, and tolls the limitations period. See 28 U.S.C. §2244(d)(2)(tolling the limitation period for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment

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United States, 243 F.3d 1299, 1301 (11th Cir. 2001); see also Houston v. Lack, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988)(setting forth the "prison mailbox rule").

[5]The statute 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 is prevented from filing by such State 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 collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims could have been discovered through the exercise of due diligence.

28 U.S.C. §2244(d)(1).

or claim is pending"). The AEDPA clock and limitations period then resumes running when the state's highest court issues its mandate disposing of the motion for post-conviction relief.[6] Lawrence v. Florida, 549 U.S. 327, 331-32, 127 S.Ct. 1079, 166 L.Ed.2d 924 (2007). In order to toll the limitations period, however, the state motion for post-conviction relief must be filed before the limitations period expires. See Tinker v. Moore, 255 F.3d 1331, 1332 (11th Cir. 2001)(holding that a state petition filed after expiration of the federal limitations period cannot toll the period, because there is no period remaining to be tolled); Webster v. Moore, 199 F.3d 1256, 1258-60 (11th Cir. 2000)(holding that even properly filed state court petitions must be pending in order to toll the limitations period), cert. denied, 531 U.S. 991 (2000).

In this case, Respondent contends that the date of finality for purposes of triggering the statute of limitations under § 2244(d)(1)(A) is August 19, 2009, when the 90-day period for seeking a writ of certiorari from the United States Supreme Court expired. (DE#17). According to respondent, then, the instant petition is untimely because more than one year of untolled time elapsed since that date. (Id.).

Respondent, however, conveniently failed to submit a copy of Petitioner's motion to correct sentence filed on November 18, 2014, or of the trial court's order entered on December 29, 2014 granting Petitoiner's motion, in the extensive set of state court records filed in response to this Court's initial Order to Show Cause. (See DE#18). Rather, Respondent only submitted a copy of the online docket sheet of the state trial court, which includes docket entries for Petitioner's Rule 3.800 motion and the trial court order. (DE# 18-9; Ex. AAA.). Respondent's response to the Order to

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[6]In cases where the defendant does not file a notice of appeal, the AEDPA's limitations period resumes again when the time to seek appellate review of the order resolving the motion for post-conviction relief expires. See Cramer v. Sec'y, Dep't of Corr., 461 F.3d 1380, 1383 (11th Cir. 2006).

Show Cause also sets forth a lengthy and detailed procedural history of this case, yet never specifically mentions the subject motion and order. (See DE#17, pp.1-15). Rather, in its discussion of the statute of limitations, Respondent merely makes a passing reference to a "corrected" sentence and cites case law pertaining to a resentencing and its impact on finality of a conviction or sentence. (Id. at 17, *citing* Ferreira v. Sect'y, Dept. of Corr., 494 F.3d 1286 (11th Cir. 2007); Insignares v. Sect'y, Dept. of Corr., 755 F.3d 1273, 1281 (11th Cir. 2014).

In Ferreira, supra, the Eleventh Circuit concluded that "AEDPA's statute of limitations begins to run from the date both the conviction *and* the sentence the petitioner is serving at the time he files his application become final because judgment is based on both the conviction and the sentence." Ferreira, 494 F.3d at 1293 (emphasis in original) *(citing* Burton v. Stewart, 549 U.S. 147, 127 S.Ct. 793, 166 L.Ed.2d 628 (2007)). "The judgment to which [section 2254(a)] refers is the underlying conviction and most recent sentence that authorizes the petitioner's current detention." Id. at 1292.

Thus, the limitations period must be calculated from the date of the resentencing judgment, as mandated by Ferreira. Stites v. Secretary, 278 F.App'x. 933, 934-935 (11th Cir.2008). In this case that date is December 29, 2014, when the state trial court granted Petitioner's motion to correct illegal sentence, agreeing that he was entitled to jail credit. See Chavis v. Jones, 2015 WL 428672, *3-5 (N.D.Fla. Feb. 2, 2015). This is so because, in Florida, a sentence which incorrectly calculated jail credit is an illegal sentence. Id., *citing* State v. Mancino, 714 So.2d 429, 433 (Fla. 1998)(stating that "a sentence that does not mandate credit for time served would be illegal since a trial court has no discretion to impose a sentence without crediting a defendant with time

served"). Accordingly, a "[j]udgment setting out the corrected sentence is a new judgment." Id., *citing* Brown v. Sec'y, Dep't of Corr., 2014 WL 2991131, *3-4 (N.D.Fla. July 3, 2014). The fact that the trial court's order amending the sentence was not labeled a "judgment" does not alter the undersigned's conclusion. As aptly noted by the Northern District, "a 'judgment' under AEDPA is the state-court order imposing the sentence on which the petitioner is in custody, whether the state calls the order a 'judgment' or a 'sentence' or 'Mary Beth.'" Walker v. Sec'y, Dep't of Corr., 2014 WL 2095370, at *1-2 (N.D. Fla. May 20, 2014). See also Sorey v. Jones, 2015 WL 5468671, at *4 (N.D.Fla. May 25, 2015), report and recommendation adopted, 2015 WL 5468651 (N.D. Fla. Sept. 16, 2015).

The date of finality for purposes of triggering the statute of limitations in this case is thus January 28, 2015, which is the expiration date to file an appeal from the trial court's order granting the motion to correct sentence and awarding Petitioner jail credit. When using this date as the date that convictions and sentences became final, Petitioner had until January 28, 2016 to file a timely §2254 petition, absent any statutory or equitable tolling.[7] And as set forth above, the instant petition was filed in this Court on September 3, 2015, pursuant to the "prison mailbox rule." As such, the petition is timely.

In sum, based on the principles established in Ferreira, supra, the Court concludes that Petitioner is entitled to the later date of January 28, 2015 for purposes of triggering the AEDPA's federal limitations period, based on the state court's order correcting Petitioner's sentence. Respondent's suggestion that the date of finality is August 19, 2009 is wholly without merit.

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[7]The one-year limitations period is also subject to equitable tolling in rare and exceptional cases. See Holland v. Florida, 560 U.S. 631, 130 S.Ct. 2549 (2010).

Standard of Review

A prisoner in state custody may not be granted a writ of habeas corpus for any claim that was adjudicated on the merits in state court unless the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "based on an unreasonable determination of the facts in light of the evidence presented" to the State court. 28 U.S.C. § 2254(d)(1), (2); see also Williams v. Taylor, 529 U.S. 362, 405-06 (2000); Fugate v. Head, 261 F.3d 1206, 1215-16 (11th Cir. 2001). A state court decision is "contrary to" or an "unreasonable application of" the Supreme Court's clearly established precedent within the meaning of § 2254(d)(1) only if the state court applies a rule that contradicts the governing law as set forth in Supreme Court case law, or if the state court confronts a set of facts that are materially indistinguishable from those in a decision of the Supreme Court and nevertheless arrives at a result different from Supreme Court precedent. Brown v. Payton, 544 U.S. 133, 141 (2005); Williams, 529 U.S. at 405-06. A federal court must presume the correctness of the state court's factual findings, unless the petitioner overcomes them by clear and convincing evidence. See, 28 U.S.C. § 2254(e)(1); Putman v. Head, 268 F.3d 1223, 1241 (11th Cir. 2001). So long as neither the reasoning nor the result of the state court decision contradicts Supreme Court decisions, the state court's decision will not be disturbed. See Early v. Packer, 537 U.S. 3, 8 (2002). To obtain habeas relief on a claim of ineffective assistance of counsel, the petitioner must show that the state court applied Strickland an

objectively unreasonable manner." Bell v. Cone, 535 U.S. 685, 699 (2002).[8]

It is well settled that a habeas petitioner must allege facts that, if proved, would entitle him to relief. See Blackledge v. Allison, 431 U.S. 63, 75 n. 7, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977) (noting that notice pleading is not sufficient for habeas petition) (citing Advisory Committee Note to Rule 4, Rules Governing Section 2254 Cases); Rule 2, Rules Governing § 2254 Cases (requiring petitioner to state "facts supporting each ground" and "relief requested"); see also Schriro v. Landrigan, 550 U.S. 465, 474-75, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007) (holding that if the record refutes the factual allegations in the petition or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing). The pleading requirements for a petition for writ of habeas corpus under §2254 apply equally with regard to claims of ineffective assistance of counsel. Conclusory allegations of ineffective assistance of counsel are insufficient to state a claim. See Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)(conclusory allegations of ineffective assistance of counsel are insufficient to raise a constitutional issue). A petitioner's claims of ineffective assistance of counsel are thus subject to summary dismissal when they "are merely 'conclusory allegations unsupported by specifics' or 'contentions that in the face of the record are wholly incredible.'" Tejada v.

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[8]To prevail on a claim of ineffective assistance of counsel, the defendant must demonstrate both (1) that his counsel's performance was deficient, and (2) that he suffered prejudice as a result of that deficient performance. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). "To establish deficient performance, a defendant must show that his counsel's representation fell below an objective standard of reasonableness in light of prevailing professional norms at the time the representation took place." Cummings v. Sec'y for Dep't of Corr., 588 F.3d 1331, 1356 (11th Cir.2009). To demonstrate prejudice, the 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." Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Dugger, 941 F.2d 1551, 1559 (11th Cir. 1991)(citations omitted). A habeas petitioner's claim of ineffective assistance of counsel will thus fail unless he affirmatively demonstrates both attorney error and resulting prejudice by alleging facts or specific details to identify precisely how his attorney failed to fulfill his obligations. See Spillers v. Lockhart, 802 F.2d 1007, 1010 (8th Cir. 1986).

With regard to claims of ineffective assistance of counsel, it is particularly important to bear in mind that not such claim shall lie unless the matter that counsel failed to pursue or object to had some merit and could have changed the result of the proceeding. There is no duty to pursue issues which have little or no chance of success, and a lawyer's failure to raise a meritless issue cannot prejudice a client. See Chandler v. Moore, 240 F.3d 907, 917 (11 Cir. 2001)(counsel is not ineffective for failing to raise a non-meritorious objection); Bolender v. Singletary, 16 F.3d 1547, 1573 (11th Cir. 1994)("[I]t is axiomatic that the failure to raise non-meritorious issues does not constitute ineffective assistance" of counsel); United States v. Winfield, 960 F.2d 970, 974 (11th Cir. 1992)(failure to raise meritless issues cannot prejudice a client); Card v. Dagger, 911 F.2d 1494, 1520 (11 Cir. 1990)(counsel is not required to raise meritless issues).

The above-referenced rule is particularly applicable in the context of claims of ineffective assistance of appellate counsel. The Sixth Amendment does not require attorneys to press every non-frivolous issue that might be raised on appeal, provided that counsel uses professional judgment in deciding not to raise those issues. Jones v. Barnes, 463 U.S. 745, 753-54 (1983). The Supreme Court has recognized that "a brief that raises every colorable issue runs the risk of burying good arguments - those that . . . 'go for the jugular.'" Id. at 753. To be effective, therefore, appellate counsel may select among competing non-frivolous

arguments in order to maximize the likelihood of success on appeal." Smith v. Robbins, 528 U.S. 259, 288, 120 S.Ct. 746, 765, 145 L.Ed.2d 756, 781-82 (2000). Indeed, the practice of "winnowing out" weaker arguments on appeal, so to focus on those that are more likely to prevail, is the "hallmark of effective appellate advocacy." Smith v. Murray, 477 U.S. 527, 536, 106 S.Ct. 2661, 2667, 91 L.Ed.2d 434, 445 (1986). In considering the reasonableness of an appellate attorney's decision not to raise a particular claim, therefore, 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. In the context of an ineffective assistance of appellate counsel claim, "prejudice" refers to the reasonable probability that the outcome of the appeal would have been different. Eagle v. Linahan, 279 F.3d 926, 943 (11th Cir. 2001); Cross v. United States, 893 F.2d 1287, 1290 (11th Cir. 1990); see also Robbins, 528 U.S. at 285-86 (claim for ineffective assistance of appellate counsel requires showing that appellate counsel's performance was deficient and that, but for counsel's deficient performance, the defendant would have prevailed on appeal); Shere v. Sec'y Fla. Dep't of Corr., 537 F.3d 1304, 1310 (11th Cir. 2008)(same). Thus, in determining whether the failure to raise a claim on appeal resulted in prejudice, the courts must review the merits of the omitted claim and, only if it is concluded that it would have had a reasonable probability of success, then can counsel's performance be deemed necessarily prejudicial because it affected the outcome of the appeal. Eagle, 279 F.3d at 943; see, also, Card v. Dugger, 911 F.2d 1494, 1520 (11 Cir. 1990)(holding that appellate counsel is not required to raise meritless issues).

Discussion[9]

In Ground One, Petitioner claims that his rights under the Confrontation and Due Process Clauses were violated. In support of this claim, Petitioner alleges that the trial court violated state hearsay law by failing to conduct the requisite fact-finding before admitting the 911 tape under the excited utterance exception, and that the 911 tapes were testimonial and there was no evidence that the two witnesses at issue were unavailable to testify.

The Confrontation Clause of the Sixth Amendment affords the accused the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. It has long been established that "[t]he Sixth Amendment's Confrontation Clause ... applies to both federal and state prosecutions." Crawford v. Washington, 541 U.S. 36, 42 (2004)(*citing* Pointer v. Texas, 380 U.S. 400, 406 (1965)). The primary purpose of the Confrontation Clause is to prevent out-of-court statements from being used against a criminal defendant in lieu of in-court testimony subject to the scrutiny of cross-examination. See Douglas v. Alabama, 380 U.S. 415, 418-19 (1965). It "guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." Coy v. Iowa, 487 U.S. 1012, 1016 (1988). This right serves the purposes of insuring reliability by means of oath, exposing the witness to cross-examination, and permitting the trier of fact to weigh the demeanor of the witness. California v. Green, 399 U.S. 149, 158, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970); see also Maryland v. Craig, 497 U.S. 836, 845, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990) ("The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary

[9]The Court notes that Respondent's response on the merits is *pro forma* at best, consisting of nothing more than a conclusory paragraph or two for most of Petitioner's 24 claims.

proceeding before the trier of fact."). A criminal defendant's right under the Sixth Amendment to confront his accusers which includes the right to effective cross-examination. Delaware v. Van Arsdall, 475 U.S. 673, 678, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986).

For purposes of both the Confrontation Clause and the Federal Rules of Evidence, hearsay statements are defined as out-of-court statements offered to prove the truth of the matter asserted. See United States v. Gari, 572 F.3d 1352, 1361 n. 7 (11th Cir.2009). Similarly, Florida Statutes § 90.801(1)(c) defines hearsay as a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted.

Hearsay admitted pursuant to a "firmly rooted" hearsay objection does not violate the Confrontation Clause. Lilly v. Virginia, 527 U.S. 116, 125, 119 S. Ct. 1887, 1894, 144 L. Ed. 2d 117 (1999)(citations omitted); see also Conner v. State, 748 So.2d 950, 956 (Fla.1999). And it is well settled that excited utterances are one such firmly-rooted exception to the hearsay rule. See Idaho v. Wright, 497 U.S. 805, 827, 110 S. Ct. 3139, 3152, 111 L. Ed. 2d 638 (1990); Conner, 748 So.2d at 956.

Here, there is no dispute that the statements on the 911 tapes were admitted as excited utterances. Indeed, this aspect of Petitioner's claim is predicated upon his allegation that the state trial court did not adhere to its own procedures for determining whether the statement was an excited utterance. Thus, because it is undisputed that the statements on the 911 calls were admitted as excited utterances, the Confrontation Clause is not implicated. See Wright, 497 U.S. at 827; Conner, 748 So.2d at 956.[10]

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[10]Indeed, Petitioner's exclusive focus on the state trial court's alleged failure to make the necessary excited utterance determinations violated his due process rights (See DE#41) is an effective admission that his claim with regard to the admission of the statements on the 911 recordings is grounded in the Due

Petitioner contends the state trial court nevertheless violated his right to due process when it failed to make the requisite findings for admission pursuant to Florida law. Specifically, pursuant to Florida law, the trial court must find three essential elements before admitting hearsay testimony the excited utterance exception: "(1) there must be an event startling enough to cause nervous excitement; (2) the statement must be made before there was time to contrive or misrepresent; and (3) the statement must be made while the person is under the stress of excitement caused by the event." State v. Jano, 524 So. 2d 660 (Fla. 1988)(citation omitted). While a 911 call may certainly qualify under the exception, "[t]he fact that a call is placed on a 911 line does not, standing alone, qualify it for admission under 90.803." State v. Skolar, 692 So.2d 309, 311 (Fla. 5th DCA 1997); see also State v. Frazier, 753 So.2d 644, 646 (Fla. 5th DCA 2000) (court must determine whether 911 statements qualify as excited utterance).

> Because of these three factual preconditions to the admission of an excited utterance, the procedures for preliminary questions outlined in section 90.105(1), Florida Statutes (2002), apply when a party seeks to introduce an excited utterance into evidence over the objection of the opposing party. See Perry v. State, 675 So.2d 976, 979 (Fla. 4th DCA 1996) *(citing* Jano, 524 So.2d 660); see also Charles W. Ehrhardt, Florida Evidence § 105.1 at 38-41 (2004 ed.). Thus, when faced with an objection to an excited utterance, a trial court should conduct a hearing outside the presence of the jury to consider the necessary evidence and make the findings of fact essential to determine whether the statement constitutes an admissible excited utterance. This is not a situation of conditional relevance governed by section 90.105(2), Florida Statutes (2002), in which the evidence can be admitted based on prima facie proof of the condition. To admit an excited utterance, the trial court must conclude that the preponderance of the evidence supports the factual circumstances permitting the

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Process Clause, and not the Confrontation Clause.

introduction of the statement as an excited utterance. Cf. McDole v. State, 283 So.2d 553, 554 (Fla.1973)

Tucker v. State, 884 So. 2d 168, 173 (Fla. Dist. Ct. App. 2004).

Here, review of the record confirms Petitioner's contention that the state trial court did not make the specific factual findings as required by Florida law. And when a federal court considers whether habeas corpus is warranted, the decision is limited to whether a conviction violated the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2254; Rose v. Hodges, 423 U.S. 19, 21, 96 S.Ct. 175, 46 L.Ed.2d 162 (1975) (per curiam). "It is established that '[a] state's interpretation of its own laws or rules provides no basis for federal habeas corpus relief, since no question of a constitutional nature is involved.'" Machin v. Wainwright, 758 F.2d 1431, 1433 (11th Cir. 1985) (citations omitted). Thus, to the extent that Petitioner takes issue with the state trial court's violation of Florida law, his claim is not cognizable.

However, as set forth above, Petitioner attempts to avoid application of this rule by couching his claim in terms of due process. Petitioner is correct that, as a general matter, "[w]hen, . . . a State creates a liberty interest, the Due Process Clause requires fair procedures for its vindication—and federal courts will review the application of those constitutionally required procedures." Swarthout v. Cooke, 562 U.S. 216, 220, 131 S. Ct. 859, 862, 178 L. Ed. 2d 732 (2011). So for example, although there is no right under the Federal Constitution to be conditionally released before the expiration of a valid sentence, and the States are under no duty to offer parole to their prisoner, when a State creates such a liberty interest, federal courts will review the application of the constitutionally required procedures to protect that interest. Id.

Regardless, the problem for Petitioner is that there is no "liberty interest" in the admission or non-admission of evidence, such as there is in something like being granted parole. The admission of the excited utterance in Petitioner's case was, rather, a state evidentiary ruling. And it is equally well settled that questions regarding the admissibility of evidence are matters of state law, generally not cognizable on federal habeas review. See Engle v. Isac, 456 U.S. 107, 119 (1982); Lisenba v. California, 314 U.S. 219, 228, 62 S.Ct. 280, 86 L.Ed. 166 (1941); Sims v. Singletary, 155 F.3d 1297, 1312 (11th Cir. 1998); McCoy v. Newsome, 953 F.2d 1252, 1265 (11th Cir. 1992); Osborne v. Wainwright, 720 F.2d 1237, 1238 (11th Cir. 1983). Absent a showing that the admission of the evidence violated a specific constitutional guarantee, therefore, a federal court can issue a writ of habeas corpus on the basis of a state court evidentiary ruling only when the ruling was of such magnitude as to deny the defendant a fundamentally fair trial. See Baxter v. Thomas, 45 F.3d 1501, 1509 (11th Cir. 1995); Osborne, 720 F.2d at 1238. If the evidence objected to was not so crucial, critical, or highly significant as to deny the petitioner a fundamentally fair trial, habeas corpus relief should be denied. Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1984); Jameson v. Wainwright, 719 F.2d 1125 (11th Cir. 1983). Moreover, such trial court errors are subject to the harmless error analysis and will not be the basis of federal habeas relief unless the error "had substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 623 (1993). Here, review of the record reveals that Petitioner cannot meet that exacting standard, particularly in light of the other overwhelming evidence presented of Petitioner's guilt.

Petitioner also claims that the admission of the 911 tapes violated his Confrontation rights because the tapes were

testimonial. The Confrontation Clause does bar the admission of "testimonial" hearsay unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination. Crawford, 541 U.S. at 68. Hearsay statements are testimonial when "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Id., 541 U.S. at 52. The problem for Petitioner in this regard is that it is equally well settled that excited utterances are generally not considered "testimonial" statements. More specifically, initial police-victim interactions do not involve interrogation and resulting statements are not testimonial. Davis v. Washington, 547 U.S. 813, 831, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). This is particularly true when the statements made by the victim are excited utterances. See Bartee v. State, 922 So.2d 1065, 1069 n. 3 (Fla. 5th DCA 2006) (An excited utterance by a crime victim to a police officer, made in response to minimal questioning, is not testimonial.); United States v. Brun, 416 F.3d 703, 707-708 (8th Cir.2005); United States v. Luciano, 414 F.3d 174, 179-180 (1st Cir.2005).

In Ground Two, Petitioner claims that the State failed to disclose Brady information. In support of this claim, Petitioner alleges that the state trial court denied defense counsel's request for DEA investigative files concerning Ed Cody's narcotics activities, and that the court also unduly limited the defense's cross-examination of Cody regarding the DEA investigation.

In Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id. at 87, 83 S.Ct. at 1196-97. The Supreme Court has determined that "[i]mpeachment evidence, [ ] as well as

exculpatory evidence, falls within the Brady rule." See United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481 (1985). To establish a Brady violation a defendant must prove the following: (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence), see id.; (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence, see United States v. Valera, 845 F.2d 923, 927-28 (11th Cir.1988); (3) that the prosecution suppressed the favorable evidence, see United States v. Burroughs, 830 F.2d 1574, 1577 (11th Cir.1987), *cert. denied sub nom.* Rogers v. United States, 485 U.S. 969, 108 S.Ct. 1243, 99 L.Ed.2d 442 (1988); and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different, see Bagley, 473 U.S. at 682, 105 S.Ct. at 3383.

Here, Petitioner fails to even allege that, had the DEA investigation file been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. But even if he had, Petitioner still would not be able to establish that the State possessed the DEA file and suppressed it. This is because the trial record is clear that, when the lead detective was deposed by defense counsel, he turned over all the information he had in his custody. More importantly, the trial court found that the DEA file was not in the possession of the State, and that the State could not turn over something it did not have. (See Ex. E, pp.43-44). This finding is, of course, entitled to substantial deference. Maharaj v. Sec'y for Dep't of Corr., 432 F.3d 1292, 1315 (11th Cir. 2005)(*citing* 28 U.S.C. §2254(e)(1)(noting that "a determination of a factual issue made by a State court shall be presumed to be correct" and that an "applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence")). Petitioner fails

to make any allegations that would rebut the presumption of correctness afforded to the state court's finding that the State did not have the DEA investigation files in its possession, and that it could thus not turn them over.

With regard to the trial court's alleged limitation of the defense's attempt to cross-examine Mr. Cody regarding the DEA investigation, it first bears noting that this has nothing whatsoever to do with the State's failure to turn over any evidence. As such, it does not implicate the rule of Brady. Moreover, to the extent that Petitioner means to claim that this amounted to some violation of his confrontation rights which, as set forth above, encompasses the right to cross-examination, any such claim fails for essentially the same reasons set forth in the discussion of Ground One, above.

In Delaware v. Van Arsdall, the Supreme Court stated that, although the right to cross-examine is important,

> [i]t does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. And as we observed earlier this Term, "the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."

Id., quoting Delaware v. Fensterer, 474 U.S. 15, 20, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985)(emphasis in original).

The "extent" of cross-examination "rests in the sound discretion of the trial judge." District of Columbia v. Clawans,

300 U.S. 617, 632, 57 S.Ct. 660, 81 L.Ed. 843 (1937). In Florida, as in federal court, a trial judge retains wide latitude to impose reasonable limits on cross-examination. See Moore v. State, 701 So. 2d 545 (Fla. 1997), cert. denied, 523 U.S. 1083 (1998); Childers v. Floyd, 642 F.2d 953, 976 (11th Cir. 2011)("As a limitation on cross-examination, we would review the district court's ruling only for an abuse of discretion."); United States v. Maxwell, 579 F.3d 1282, 1295 (11th Cir. 2009)("We review [the] claim that the district court improperly limited the scope of ... cross-examination for clear abuse of discretion." (citations omitted)).

The state trial judge's decision to limit the scope of cross-examination thus effectively amounts to an evidentiary ruling. However, as set forth in the discussion of Ground One, state evidentiary rulings are generally beyond federal habeas review, unless the defendant can establish that the exclusion of evidence "had substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 623. And here, not only can Petitioner not meet that standard, but the record also fails to reveal any abuse of discretion by the trial judge on this point. See Childers, 642 F.2d at 976.

In Ground Three, Petitioner claims insufficient evidence and defective jury instructions. In support of this claim, Petitioner alleges that there was insufficient evidence to support a principal theory for a conviction of second degree felony-murder, and that the jury instructions regarding second degree murder were wrongly labeled and misleading.

The standard for review of the sufficiency of the evidence on a petition for federal habeas corpus relief is whether the evidence presented, viewed in a light most favorable to the state, would have permitted a rational trier of fact to find the petitioner guilty of the crimes charged beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979); Smith v. White, 815 F.2d 1401 (11th

Cir. 1987). This familiar standard gives full play to the responsibility of the jury to resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. See Wilcox v. Ford, 813 F.2d 1140, 1143 (11th Cir. 1987), citing Jackson, 443 U.S. at 326. This standard of review is equally applicable to direct or circumstantial evidence. Jackson v. Virginia, 443 U.S. at 320; United States v. Peddle, 821 F.2d 1521, 1525 (11th Cir. 1987).

In Florida, the test for the sufficiency of the evidence is whether a "rational trier of fact could have found proof of guilt beyond a reasonable doubt." Melendez v. State, 498 So.2d 1258, 1261 (Fla. 1986) (citing Jackson v. Virginia, 443 U.S. 307 (1979)). A defendant who challenges the sufficiency of the evidence admits not only the facts stated and the evidence adduced, but also every reasonable inference to be drawn from the evidence that is favorable to the state. Gant v. State, 640 So.2d 1180, 1181 (Fla. 4th DCA 1994). It is for the jury to decide what inferences are to be drawn from the facts. Taylor v. State, 583 So.2d 323, 328 (Fla. 1991). So long as there is sufficient evidence in the record to support such inferences, the appellate court will affirm the judgment. Adkins v. Adkins, 650 So.2d 61, 62 (Fla. 3rd DCA 1994). Similarly in Florida, the Jackson standard for the sufficiency of the evidence is equally applicable to direct or circumstantial evidence. In Florida, proof based entirely on circumstantial evidence can be sufficient to sustain a conviction provided that other conditions established by Florida caselaw are satisfied. See Orme v. State, 677 So.2d 258, 258-62 (Fla. 1996) and cases cited therein.

Here, in Petitioner's direct appeal, Florida's Third District focused on whether the attempted murder of Edmond Cody was committed in furtherance of the initial common design or purpose, or whether the shooting constituted an independent act outside of

and foreign to the original criminal scheme. Barron v. State, 990 So.2d 1098, 1104. The Court found that the evidence established that Petitioner, the other three gunmen, and the female decoy, were all participants in a common scheme to rob Edmond Cody. As the attempted murder of Edmond Cody occurred during the course of the attempted robbery, the appellate court concluded that the evidence was sufficient to hold the petitioner criminally liable as a principal for the attempted second degree murder of Edmond Cody. Id. at 1106. And review of the record reveals that this conclusion was amply supported by the evidence adduced at trial. See Maharaj, 432 F.3d at 1315.

With regard to Petitioner's claim that the jury instructions were wrongly labeled and misleading, it is well settled that "[a]n error in instructing the jury cannot constitute a basis for habeas relief unless the error so infected the entire trial that the resulting conviction violates due process." Jacobs v. Singletary, 952 F.2d 1282, 1290 (11 Cir. 1992)(quotation omitted); see also Estelle v. McGuire, 502 U.S. 62, 72-73, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991)(holding that to warrant reversal the error in the jury instructions must be one involving "fundamental fairness" (which is a narrow category) and "'by itself so infect[] the entire trial that the resulting conviction violates due process.'" (*quoting* Cupp v. Naughten, 414 U.S. 141, 147, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973)); Jacobs v. Singletary, 952 F.2d 1282, 1290 (11th Cir. 1992). A jury charge is adequate if, viewed as a whole, it fairly and correctly states the issues and law. United States v. Russell, 717 F.2d 518, 521 (11th Cir. 1983); United States v. Bosby, 675 F.2d 1174, 1184 (11th Cir. 1982). Here, there is nothing in the record to indicate that the jury charge as a whole was inadequate, or to establish a due process violation as a matter of federal law.

In Ground Four, Petitioner claims ineffective assistance of trial counsel in failing to argue the State's failure to prove the

essential element of *corpus delicti*. In support of this claim, Petitioner alleges that the information charged Petitioner as a principal with the unlawful killing of Reginald Harris, yet no evidence was admitted to the jury that the individual killed was Mr. Harris.

Review of the record reveals that the medical examiner, Dr. Bruce Hyma, testified that he conducted an autopsy upon the victim, Reginald Harris. (DE#34, T., p.803). Therefore, counsel had no basis to object on this ground. As such counsel cannot be deemed ineffective for having failed to do so. See Chandler, 240 F.3d at 917 (counsel is not ineffective for failing to raise a non-meritorious objection); Bolender, 16 F.3d at 1573 ("[I]t is axiomatic that the failure to raise non-meritorious issues does not constitute ineffective assistance" of counsel). Moreover, Petitioner offers nothing whatsoever that would call into question the identity of the victim. As such, counsel's decision to not raise this issue can only be presumed to have been made in the exercise of reasonable professional judgment. See Strickland, 466 U.S. at 690 ("counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment").

In Ground Five, Petitioner claims that trial counsel was ineffective in failing to object to the prosecution arguing facts not in evidence. In support of this claim, Petitioner alleges that, during closing argument, the prosecutor argued that Petitioner stated during his testimony that he was sweating because he had just been playing basketball, and that Petitioner had lied because he had three hours from the time he was picked up to get to the location where the crime took place.

To prevail on a claim of prosecutorial misconduct, a habeas petitioner must demonstrate that the prosecutor's conduct violated a specific constitutional right or infected the trial with such

unfairness as to make the resulting conviction a denial of due process. It is not enough to show that the prosecutor's conduct was undesirable or even universally condemned. Darden v. Wainwright, 477 U.S. 168, 181 (1986). To find prosecutorial misconduct based on remarks at trial, the remarks must be improper, and they must prejudicially affect the substantial rights of the defendant. Spencer v. Sec'y Dep't of Corr., 568 F. 3d 894 (11th Cir. 2009) (*citing* United States v. Eyster, 948 F.2d 1196, 1206 (11th Cir. 1991). In other words, the complained-of conduct must be so egregious as to render the entire trial fundamentally unfair. Donnelly v. DeChristoforo, 416 U.S. 637, 642-45 (1974). In assessing whether the fundamental fairness of the trial has been compromised, the totality of the circumstances are to be considered in the context of the entire trial. Hance v. Zant, 696 F.2d 940, 951 (11 Cir. 1983), *overruled on other grounds*, Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985); see, also, United States v. Hernandez, 145 F.3d 1433, 1438 (11th Cir. 1998). Factors to be considered include the degree to which the challenged remarks have a tendency to mislead the jury and prejudice the accused, whether they are isolated or extensive, whether they were deliberately or accidentally placed before the jury, and the strength of the competent proof to establish the guilt of the accused. Hance, 696 F.2d at 950, n.7. As such, a determination of whether the fundamental fairness of the trial has been compromised " . . . depends on whether there is a reasonable probability that, in the absence of the improper remarks, the outcome of the trial would have been different." Williams v. Weldon, 826 F.2d 1018, 1023 (11th Cir.1987); see, also, Hernandez, 145 F.3d at 1438. Indeed, even when a prosecutor's comments are improper, that conduct does not render a conviction fundamentally unfair where there is overwhelming evidence of the defendant's guilt. See Hance, 696 F.2d at 951. Moreover, improper comments may be rendered harmless

by adequate jury instructions. See United States v. Simon, 964 F.2d 1082, 1087 (11th Cir. 1992); see, also, United States v. Townsend, 630 F.3d 1003, 1013-14 (11th Cir. 2011)(juries are presumed to follow the law).

To assess whether defense counsel performed unreasonably by failing to object to statements by the prosecutor, the court must determine whether counsel had a meritorious basis for doing so. The Florida standard for reviewing allegedly improper comments by the prosecution is essentially the same as the federal due process standard. See Breedlove v. State, 413 So.2d 1, 8 (Fla.1982)(*quoting* Darden v. State, 329 So.2d 287, 289 (Fla.1976))(other citations omitted).

In both Florida and federal courts, the prosecutor is afforded wide latitude in arguing to a jury.[11] Lukehart v. State, 70 So.3d 503, 523 (Fla.2011); Breedlove, 413 So.2d at 8; United States v. Pearson, 746 F.2d 787, 796 (11th Cir.1984) (noting that closing argument is intended to "assist the jury in analyzing, evaluating and applying the evidence."); United States v. Henry, 545 F.3d 367, 377 (6th Cir.2008)("We afford wide latitude to a prosecutor during closing argument . . ."). "It has long been held that a prosecutor may argue both facts in evidence and reasonable inferences from

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[11]The Florida standard for determining when a prosecutor's remarks deprive the defendant of a fair trial and thereby constitute a "fundamental error" is the same as the federal standard. See, e.g., Brown v. State, 473 So.2d 1260, 1264 (Fla. 1985)(applying the federal standard); Hance v. Zant, 696 F.2d 940, 951 (11 Cir. 1983), *overruled on other grounds*, Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985)(claims of prosecutorial misconduct are to be considered in the totality of the circumstances and the context of the entire trial); Rivera v. State, 840 So.2d 284, 287 (Fla. 5th DCA 2003)(noting that prosecutor's comments must be analyzed in the context of the closing argument as a whole and considered cumulatively); see, also, Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)(To prevail on a claim of prosecutorial misconduct, a petitioner must demonstrate that the resulting conviction amounted to a denial of due process.); Pollock v. State, 818 So.2d 654, 655-57 (3rd DCA 2002)(prosecutor's closing argument, coupled with erroneous jury instructions, denied defendant due process of law, thereby entitling defendant to application of fundamental error exception to state-law waiver doctrine/contemporaneous-objection rule); State v. Delva, 575 So.2d 643, 648 (Fla. 1991)(relying on federal law to determine whether un-objected to errors were fundamental).

those facts." Tucker v. Kemp, 762 F.2d 1496, 1503 (11th Cir.1985)(citations omitted); United States v. Johns, 734 F.2d 657, 663 (11th Cir.1984) (noting that a prosecutor is not limited to a bare recitation of the facts, that the prosecutor may "comment" on the evidence, and that the prosecutor may "state his contention as to the conclusions the jury should draw from the evidence."). Moreover, "a prosecutor's comments are not improper where they fall into the category of an invited response by the preceding argument of defense counsel concerning the same subject." United States v. Suggs, 755 F.2d 1538, 1540 (11th Cir. 1985); see also United States v. Young, 470 U.S. 1, 12-13, 105 S.Ct. 1038, 84 L.Ed. 1 (1985)("the import of the evaluation has been that if the prosecutor's remarks were invited, and did no more than respond substantially in order to right the scale, such comments would not warrant reversing a conviction).

Here, review of the record reveals that the prosecutor's comments during closing were fair comments to the evidence, as well as responsive to the defense theory of the case. Petitioner's allegations of prosecutorial misconduct are thus belied by the record. The prosecutor did not make any comments that would have a tendency to mislead the jury and prejudice Petitioner, and the remarks at issue were extremely isolated. Moreover, there is nothing to suggest that the prosecutor deliberately made any improper comments. Indeed, when viewed in context and in its entirety, review of the record can only support the conclusion that the prosecutor's closing argument was made in good faith. In addition, there was more than enough competent proof to establish Petitioner's guilt, and the jury received appropriate instructions. Under these circumstances, Petitioner cannot establish that the complained-of comments rendered his trial fundamentally unfair. Consequently, this claim fails. See Donnelly, 416 U.S. at 642-45 (prisoner must demonstrate that the prosecutor's conduct violated

a specific constitutional right or infected the trial with such unfairness as to make the resulting conviction a denial of due process). And because Petitioner cannot establish that the prosecutor's comments were objectionable, he cannot establish that counsel was ineffective in failing to object to them. See Chandler, 240 F.3d at 917 (counsel is not ineffective for failing to raise a non-meritorious objection); Bolender, 16 F.3d at 1573 ("[I]t is axiomatic that the failure to raise non-meritorious issues does not constitute ineffective assistance" of counsel); see also Strickland, 466 U.S. at 690 ("counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment").

In Ground Six, Petitioner claims that trial counsel was ineffective in failing to correct the prosecutor's misleading impression that Petitioner lied about being shot outside of the residence. In support of this claim, Petitioner alleges that, during closing, the prosecutor argued that no projectiles or shell casings were recovered outside the house, when Petitioner had testified that he was shot outside by an assailant who tried to take him inside the residence.

The legal standard applicable to claims of ineffective assistance in failing to object to alleged prosecutorial misconduct during closing argument is set forth in Ground Five, above. And as with Ground Five, above, here review of the record reveals that the prosecutor's comment regarding the projectiles and casings was a fair comment on the evidence and made in good faith. Thus as with Ground Five, above, counsel had no basis to object on the basis that the prosecutor's comment regarding the projectiles and casings was improper. Indeed, as Petitioner himself admits, three crime scene technicians testified to this. Therefore, the comment was not improper. As such, counsel cannot be deemed ineffective in having failed to object to it. See Chandler, 240 F.3d at 917

(counsel is not ineffective for failing to raise a non-meritorious objection); Bolender, 16 F.3d at 1573 (same).

In Ground Seven, Petitioner claims that trial counsel was ineffective in failing to object to the court's "read-back" instruction, and in failing to request that the jurors be queried about their discussion of the evidence prior to their deliberations. In support of this claim, Petitioner alleges that, after the jury stated that they needed more information from Officer Eugene about the orientation of Petitioner's body on the ground when she arrived, the trial court instructed the jury to rely on their own recollection of evidence. Petitioner also alleges that defense counsel informed the state trial court that this was the same question that he had overheard two of the alternate jurors posing and that, after counsel was asked if he wanted to query the entire panel, he said no.

With regard to counsel's failure to object to the trial court's instruction that the jury was to rely on their own recollection, there was nothing improper about this instruction. As Petitioner himself admits, a significant factor in whether a jury should be provided with a "read-back" of certain testimony is whether or not any such request was made by the jury. See United States v. Pacchioli, 718 F.3d 1294 (11th Cir. 2013). Moreover, as a general matter, a trial court has broad discretion in deciding whether to refuse a to read back testimony to a jury. Id. Here, review of the record reveals that the jury never asked to re-hear the officer's testimony or to see a transcript of it. Thus, when the jury's question is viewed in context, there was simply nothing improper about the trial court's instruction to the jury that they must rely on their recollection of the testimony. And it is of course well settled that, to establish ineffective assistance of counsel for failing to object to a jury instruction, the Petitioner must show that the instruction was improper; that a reasonably

competent attorney would have objected to the instruction; and that the failure to object was prejudicial. Daugherty v. Dugger, 839 F.2d 1426, 1428 (11th Cir.1988) (*citing* Strickland, 466 U.S. at 686-87).

With regard to counsel's failure to have the entire jury panel queried about whether they had discussed the evidence prior to commencing deliberations, Petitioner offers nothing that would rebut the strong presumption that counsel made this decision in the exercise of reasonable professional judgment. Petitioner focuses much on the fact that the trial court allowed defense counsel to query the alternate jurors at issue, but that when the alternates stated that they had not discussed the evidence, counsel specifically declined the state trial court's offer to question the rest of the panel. This fact cuts against Petitioner, rather than in his favor. Specifically, the fact that counsel raised this issue and then made a considered decision not to question the rest of the panel tends to establish that counsel concluded that it was not necessary to question the remaining jurors, and may well have had strategic reasons for not wanting to highlight the issue by questioning the entire panel. See Strickland, 466 U.S. at 690 ("counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment"). As such, the record supports the conclusion that this was a strategic decision by counsel, and it is beyond question that reasonable strategic choices by counsel regarding the various plausible options in a given case are "virtually unchallengeable." Strickland, 466 U.S. at 690. Even if in retrospect the strategy to pursue one line of defense over another appears to have been wrong, the decision will be held ineffective only if it was so patently unreasonable that no competent attorney would have chosen it. Adams v. Wainwright, 709 F.2d 1443, 1145 (11th Cir. 1983). Accordingly, tactical or

strategic choices by counsel cannot support a collateral claim of ineffective assistance. See Chandler v. United States, 218 F.3d 1305, 1314 (11th Cir. 2000)(en banc), cert. denied, 531 U.S. 1204 (2001)(holding that counsel cannot be deemed incompetent for performing in a particular way in a case as long as the approach taken "might be considered sound trial strategy")(quoting Darden v. Wainwright, 477 U.S. 168 (1986)).

In Ground Eight, Petitioner claims that trial counsel was ineffective in failing to object and move for a Richardson hearing after a police witness changed her testimony. In support of this claim, Petitioner alleges that Officer Eugene testified on direct examination that Petitioner had on one of the gloves allegedly worn at the crime scene, but that she did not state that Petitioner had one of the gloves in his hand in her initial police report or in her deposition.

With respect to discovery violations generally, Florida law provides that a defendant is not entitled to have his conviction reversed unless the record discloses that non-compliance with the rule at issue resulted in prejudice or harm to him. Richardson v. State, 246 So.2d 771 (Fla.1971). In order to make that determination, the trial judge must conduct what has come to be known as a Richardson inquiry; i.e., the judge must conduct a hearing at which the state attorney has the burden of proving that the defendant was not prejudiced by the error. Richardson v. State, supra; Wilcox v. State, 367 So.2d 1020 (Fla.1979); Brown v. State, 485 So.2d 413 (Fla.1986). "A Richardson inquiry is designed to ferret out procedural prejudice resulting from the prosecutor's noncompliance with the discovery rules." Distefano v. State, 526 So.2d 110, 114. Pursuant to Richardson the trial judge must first decide whether the discovery violation prevented the defendant from properly preparing for trial and, if so, determine a just and proper sanction. Id.

Petitioner relies heavily on Major v. State, 979 So. 2d 243 (Fla. Dist. Ct. App. 2007), for the proposition that his trial attorney was ineffective in failing to request a Richardson hearing. However, Major differs significantly from Petitioner's case. In Major, the record was clear that the prosecutor knew of and attempted to obfuscate a material change in the testimony of the medical examiner, a key witness in Major's case. 979 So.2d at 244. In addition, the record in Major revealed that defense cousel "scrambled" to attempt to impeach the medical examiner with a prior inconsistent report, Id. at 245, and that testimony at issue was critical and "crippled the defense's theory of the case." Id. at 246.

Here, by contrast, the record does not reflect any circumstances that would support a finding of an intentional discovery violation, or of bad faith on the part of the prosecutor. Conversely, the record reflects that, rather than "scrambling," Petitioner's defense counsel thoroughly and effectively cross-examined Officer Eugene on this point. Indeed, review of the record reveals that defense counsel successfully caused Officer Eugene to retract her statement on direct examination as to the location of the glove. As such, unlike the circumstances in Major, where counsel was apparently put at a significant disadvantage regarding a key issue in the case (i.e., the type of gun that was used in the crime), here counsel dealt effectively with what was only one piece of a plethora of evidence. Moreover, given that there was no evidence of bad faith on the part of the prosecutor, counsel for Petitioner could have reasonably concluded that requesting a Richardson hearing would not result in suppression of Officer Eugene's testimony but rather, at best, a brief continuance that could have allowed the State time to better prepare this witness for cross-examination on this point.

In sum, under the particular facts and circumstances of this case, Petitioner cannot rebut the strong presumption that counsel's decision not to request a Richardson hearing was made in the exercise of reasonable professional judgment. See Strickland, 466 U.S. at 690 ("counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment"). Moreover, unlike the situation in Major, Officer Eugene's testimony about the glove was not a key piece of critical evidence that "crippled" the theory of defense, and defense counsel was successful in having her retract it. Thus, even assuming *arguendo* that the trial court would have suppressed the testimony (which Petitioner cannot establish for the reasons set forth above), Petitioner cannot establish a reasonable probability that the result of the proceeding would have been different, given the overwhelming evidence against him. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, . . . and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding . . . " Strickland, 466 U.S. at 693-94. As such, Petitioner cannot establish prejudice. See Id. at 697 (where "it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed").

In Ground Nine, Petitioner claims that trial counsel was ineffective in failing to call an officer whose testimony would have contradicted key police witness testimony. In support of this claim, Petitioner alleges that counsel failed to subpoena the first arriving officer on the scene, Michael George, to testify that he noticed a gun laying in close proximity to Petitioner, and as to the location of the glove at issue.

Complaints regarding uncalled witnesses are not favored. Buckelew v. United States, 575 F.2d 515, 521 (5th Cir. 1978). Which witnesses to call, if any, is a strategic decision that should seldom be second-guessed. Conklin v. Schofield, 366 F. 3d 1193, 1204 (11th Cir. 2004) *cert. denied*, 544 U. S. 952 (2005); see, also, United States v. Guerra, 628 F.2d 410, 413 (5th Cir. 1980)("Complaints concerning uncalled witnesses impose a heavy showing since the presentation of testimonial evidence is a matter of trial strategy and often allegations of what a witness would have testified to are largely speculative"). Moreover, "evidence about the testimony of a putative witness must generally be presented in the form of actual testimony by the witness or on affidavit. A defendant cannot simply state that the testimony would have been favorable; self-serving speculation will not sustain an ineffective assistance claim." United States v. Ashimi, 932 F.2d 643, 650 (7th Cir. 1991) (footnotes omitted). In other words, to successfully assert that trial counsel should have called a witness, a petitioner must first make a sufficient factual showing substantiating the proposed witness testimony. United States v. Schaflander, 743 F.2d 714, 721 (9th Cir. 1984).

Here, Officer George's deposition testimony regarding the firearm does not contradict Officer Eugene's. Rather it is nearly identical, and thus would not have supported Petitioner's theory that the gun was dropped by one of the other alleged perpetrators as they were fleeing the scene. Therefore, Petitioner cannot establish that counsel was ineffective in failing to call Officer George to testify regarding the location of the firearm. See Buckelew, 575 F.2d at 521; see also Conklin, 366 F. 3d at 1204 (which witnesses to call, if any, is a strategic decision that should seldom be second-guessed).

With regard to calling Officer George to contradict Officer Eugene about the location of the glove, the record is clear that

counsel had no reason to know in advance of trial that the testimony might differ. Indeed, as set forth above, Petitioner's claim raised in Ground Eight is premised entirely on his allegation that Officer Eugene suddenly changed her testimony at trial. However, as further set forth in the discussion of Ground Eight, counsel effectively cross-examined Officer Eugene on this point, and succeeded in having her retract her statement on direct regarding the location of the glove. Having done so, counsel then could have reasonably concluded that it was not necessary to attempt to bring in Officer George at that point. As such, Petitioner similarly cannot establish that counsel was ineffective in making the strategic decision not to call Officer George to testify about the location of the glove. See Buckelew, 575 F.2d at 521; see also Conklin, 366 F. 3d at 1204 (which witnesses to call is a strategic decision); Strickland, 466 U.S. at 690 (reasonable strategic decisions by counsel are "virtually unchallengeable").

In Ground Ten, Petitioner claims trial counsel was ineffective in failing to object to the prosecution bolstering key witness testimony. In support of this claim, Petitioner alleges that, during closing, the prosecutor stated that Edward Cody responded to the questions, looked the jury in the eyes and told them what happened, and wasn't evasive.

Improper bolstering occurs when the jury could reasonably believe, from the prosecutor's comments, that the prosecutor indicated a personal belief in the witness's credibility. United States v. Eyster, 948 F.2d 1196, 1206 (11th Cir.1991). As with improper vouching, "[i]mproper bolstering occurs when the government places its prestige behind the witness, or when the government suggests that information not presented to the jury actually supports the witness's credibility." United States v. Reeves, 742 F.3d 487, 502 (11th Cir. 2014) (*citing* United States v. Bernal-Benitez, 594 F.3d 1303, 1313-14 (11th Cir.2010); see also

Eyster, 948 F.2d at 1206 (stating that a jury could reasonably believe a prosecutor's indications of a personal belief in a witness's credibility if the prosecutor either places the prestige of the government behind the witness by making explicit personal assurances of the witness's veracity, or implicitly vouches for the witness's veracity by indicating that information not presented to the jury supports the witness's testimony). "The rule against bolstering does not, however, prevent the prosecutor from commenting on a witness's credibility, which can be central to the government's case." Bernal-Benitez, 594 F.3d at 1314.

Here, the complained-of statement regarding Mr. Cody's testimony was nothing more than a proper comment on the testimony itself, and upon Mr. Cody's credibility. As such, it was not improper. Bernal-Benitez, 594 F.3d at 1314. Therefore, counsel had no basis to object to the comment, and cannot be deemed ineffective for having failed to do so. Chandler, 240 F.3d at 917 (counsel is not ineffective for failing to raise a non-meritorious objection); Bolender, 16 F.3d at 1573 (failure to raise non-meritorious issues does not constitute ineffective assistance of counsel).

In Ground Eleven, Petitioner claims that trial counsel was ineffective in failing to object to the prosecutor arguing facts not in evidence. In support of this claim, Petitioner alleges that, during closing, the prosecutor argued that Petitioner gave false testimony when he testified that, after being picked up, he went straight to Edmond Cody's house.

The legal standard applicable to claims of ineffective assistance in failing to object to alleged prosecutorial misconduct during closing argument is set forth in Ground Five, above. And as with Ground Five, above, here review of the record reveals that the prosecutor's comment regarding Petitioner's credibility was a fair comment on the evidence and made in good faith. Moreover, this

comment would not have a tendency to mislead the jury and prejudice Petitioner, and the remark at issue was extremely isolated. In addition, as set forth in the discussion of Ground Five, above, there was more than enough competent proof to establish Petitioner's guilt, and the jury received appropriate instructions. Under these circumstances, Petitioner cannot establish that the complained-of comment rendered his trial fundamentally unfair. Consequently, this claim fails. See Donnelly, 416 U.S. at 642-45 (prisoner must demonstrate that the prosecutor's conduct violated a specific constitutional right or infected the trial with such unfairness as to make the resulting conviction a denial of due process). And because Petitioner cannot establish that the prosecutor's comments were objectionable, he cannot establish that counsel was ineffective in failing to object to them. See Chandler, 240 F.3d at 917 (counsel is not ineffective for failing to raise a non-meritorious objection); Bolender, 16 F.3d at 1573 (same).

In Ground Twelve, Petitioner claims that trial counsel was ineffective in failing to correct false testimony by the lead detective. In support of this claim, Petitioner alleges Detective Lewis initially stated in his police report that Ed Cody positively identified the female decoy, Melissa Nunn, from a photo array, but that on cross-examination Detective Lewis testified "No, he did not."

Neither party has provided the Court with citations to the record establishing where Detective Lewis initially stated that Mr. Cody had positively identified Ms. Nunn. However, the parties seem to agree that it was in his initial police report. Moreover, Petitioner himself alleges that this alleged statement by Detective Lewis was based on what was reported to him by Sgt. Monheim, and that Detective Lewis' report specifically referred to Sgt. Monheim's report as the basis for the statement.

The statement in Detective Lewis' report that Mr. Cody had identified Ms. Nunn was, at best, a prior inconsistent statement that counsel could have used to impeach Det. Lewis. Stated another way, the fact that a witness testifies inconsistently with a prior statement does not mean that the trial testimony is "false," nor does it typically provide a basis to object to the testimony. As such, counsel cannot be deemed ineffective for having failed to raise a non-meritorious objection. Chandler, 240 F.3d at 917; Bolender, 16 F.3d at 1573. Moreover, Petitioner alleges that the statement in Detective Lewis' report was based on a statement provided to him by Sgt. Monheim. If that is so, then Detective Lewis could have easily explained that he was just reporting what he was told, and that he personally never witnessed any positive identification. Under these circumstances, Petitioner cannot overcome the strong presumption that counsel's decision as to how to handle this alleged inconsistency was made in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 690 ("counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment"). More importantly, however, Petitioner fails to explain how or why there is a reasonable probability that this minor inconsistency, had it been corrected, would have changed the outcome of his trial. As previously noted, to establish prejudice, it is "not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Strickland, 466 U.S. at 693-94. Therefore, even if Petitioner could establish deficient performance, he claim would nevertheless fail on the prejudice prong of the Strickland inquiry. See Id. at 697 (Where "it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed.")

In Ground Thirteen, Petitioner claims ineffective assistance of trial counsel in failing to move for a Richardson hearing after a key State witness prejudicially changed his testimony. In support of this claim, Petitioner alleges that Derrick Cody testified at trial that he observed the perpetrators in the bedroom of the house with firearms in their hands through a reflection in a mirror, but that he had never stated in his deposition that he saw weapons in the robbers' hands.

The standard for Richardson hearings to resolve alleged discovery violations under Florida law is set forth in the discussion of Ground Eight, above. With regard to this claim, the record reflects that defense counsel cross-examined Derrick Cody with his prior statements to police, in which he stated that he did not see any guns. (DE#34, T., pp.585-88). Also, defense counsel elicited from Detective Lewis that Cody had advised him, shortly after the crimes, that he had not seen the individuals inside the house with any weapons, whether inside or outside. (Id. at 797). Moreover, defense counsel not only cross-examined Derrick Cody on the change in his statements, but also presented an impeachment witness, Detective Lewis, with respect to the alleged change of testimony.

As with Ground Eight, above, Petitioner cannot establish that counsel was ineffective in failing to request a Richardson hearing based on Derrick Cody's changed testimony regarding whether he saw a gun in any of the perpetrator's hands. As with Ground Eight, here, there is similarly no basis to conclude that the State acted in bad faith and, accordingly, the best that counsel could have reasonably gained was perhaps a brief continuance to allow the defense to prepare for confronting or rebutting the alleged change in testimony. Conversely, however, this could have allowed the State to better prepare Derrick Cody for cross-examination. And given that the record reflects that counsel was already prepared to

address this issue and even called an impeachment witness, the particular facts and circumstances of this case support the presumption that counsel made the decision to proceed in this manner, rather than to request a Richardson hearing, in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 690 ("counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment").

Moreover, unlike the situation in Major, supra, here Derrick Cody's changed testimony regarding whether he saw any perpetrator with a gun had little bearing on the theory of defense. Specifically, Petitioner's theory of defense and his own testimony was that Petitioner had never gone inside the Cody home, but that he had been held at gunpoint and shot at by unknown perpetrators outside the house, when these perpetrators and Edmond Cody were arguing over a drug deal. (DE#34, pp. 820-26, 845-56). Thus, whether or not the unknown individuals inside the Cody house did not or did have guns while inside the house was irrelevant to the theory of defense. As such, and in light of the overwhelming evidence of Petitioner's guilt, even if Petitioner could establish deficient performance with regard to this claim, Petitioner would not be able to establish prejudice. See Strickland, 466 U.S. at 693-94 (to establish prejudice, the 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; a reasonable probability is a probability sufficient to undermine confidence in the outcome).

In Ground Fourteen, Petitioner claims that trial counsel was ineffective in failing to investigate and submit the BOLO of 911 tapes at trial. In support of this claim, Petitioner alleges that

a tape recording existed of a BOLO[12] where the police unit asked the dispatcher for an update, and the dispatcher allegedly informed the unit that the neighbors on the scene said that four black male suspects fled in a late model Chrysler-type vehicle.

The statements contained in the alleged tape recording of the BOLO were, of course, hearsay. As such, they would have been inadmissible. Therefore, counsel cannot be deemed ineffective in failing to attempt to have the tapes admitted at trial. Bolender, 16 F.3d at 1573 (failure to raise non-meritorious issues does not constitute ineffective assistance of counsel).

To the extent that Petitioner claims that counsel was also ineffective in failing to investigate the BOLO in order to locate the witnesses and interview them, effective assistance of counsel of course embraces adequate pretrial investigation. See Strickland, 466 U.S. at 691 (1984). The correct approach toward investigation, however, "reflects the reality that lawyers do not enjoy the benefit of endless time, energy or financial resources." Rogers v. Zant, 13 F.3d 384, 387 (11th Cir. 1994). To be effective, a lawyer is not required to "pursue every path until it bears fruit or until all hope withers." Williams v. Head, 185 F.3d 1223, 1237 (11th Cir. 1999) (citation omitted). "The question is whether ... ending an investigation short of exhaustion, was a reasonable tactical decision. If so, such a choice must be given a strong presumption of correctness, and the inquiry is generally at an end." Mills v. Singletary, 63 F.3d 999, 1024 (11th Cir. 1995) (citation omitted). And it is axiomatic, of course, that in all cases the defendant must establish prejudice in addition to any alleged deficient performance. See Strickland, 466 U.S. at 687-88.

Here, assuming that counsel failed to investigate the witnesses who provided the information contained in the BOLO,

[12]"Be on the lookout."

Petitioner fails to allege any facts that would establish that counsel was ineffective in doing so. It is well settled that a claim of ineffectiveness based on failure to investigate must allege what the foregone investigation would have yielded, and how or why there is a reasonable probability that it would have resulted in a different outcome at trial. See Ceja v. Stewart, 97 F.3d 1246, 1255 (9th Cir. 1996). Here, Petitioner fails to make any such allegations. His claim of ineffectiveness based on the alleged failure to investigate the witnesses who provided the information for the BOLO is thus subject to summary denial on this basis alone. See Id. (rejecting claim of ineffective assistance where defendant failed to explain what compelling evidence additional investigation would have unearthed that would have negated evidence of guilt). And regardless, Petitioner fails to explain how anything that these alleged witnesses might have said would have had a reasonable probability of changing the outcome of Petitioner's trial, in light of the overwhelming evidence of his guilt. See Rogers, 13 F.3d at 387 (noting limitations on counsel's resources); Williams, 185 F.3d at 1237 (noting that, to be effective, counsel need not "pursue every path"); Saranchak v. Beard, 616 F.3d 292, 309-11 (3rd Cir. 2010)(defendant not prejudiced by counsel's alleged deficient performance in failing to investigate where state presented overwhelming evidence of guilt); Bray v. Cason, 375 Fed.Appx. 466, 470-71 (6th Cir. 2010)(same); Turner v. Runnels, 322 Fed.Appx. 525, 526 (9th Cir. 2009)(same); U.S. v. Best, 426 F.3d 937, 946-47 (7th Cir. 2005)(same).

In Ground Fifteen, Petitioner claims that trial counsel was ineffective in failing to investigate the witnesses who made the 911 calls. In support of this claim, Petitioner alleges that counsel listened to all the 911 calls, yet failed to investigate and determine the identities of those witnesses and what they saw.

The standard governing claims of ineffective assistance in failing to investigate is set forth in the discussion of Ground Fourteen, above. And just as with Ground Fourteen, here Petitioner wholly fails to state what, if anything, these alleged witnesses would have said, much less how or why there is any reasonably probability that it would have changed the outcome of the trial given the overwhelming evidence of Petitioner's guilt. Thus, as with Ground Fourteen, above, this claim is also subject to summary denial. See Ceja, 97 F.3d at 1255 (rejecting claim of ineffective assistance where defendant failed to explain what compelling evidence additional investigation would have unearthed that would have negated evidence of guilt); see also Saranchak, 616 F.3d 309-11 (defendant not prejudiced by counsel's alleged deficient performance in failing to investigate where state presented overwhelming evidence of guilt); Bray, 375 Fed.Appx. at 470-71 (same); Turner, 322 Fed.Appx. at 526 (same); Best, 426 F.3d at 946-47 (same).

In Ground Sixteen, Petitioner claims that his trial counsel was ineffective in failing to impeach the victim with his alleged sexual relationship with one of the alleged robbers. In support of this claim, Petitioner alleges that counsel should have adduced evidence from Edmond Cody that he was having a sexual relationship with the alleged decoy, Melissa Nunn, in order to establish that he had a motive to lie.

Petitioner does not dispute that, in this case, counsel did in fact attempt to impeach Edmond Cody with the alleged sexual relationship, but was prohibited from doing so by the trial court. (See DE#33, pp.27-28). Rather, Petitioner alleges that counsel's attempt to impeach Cody was not good enough, because counsel did not cite certain specific case law. (DE#41, pp.45-46). However, as the Eleventh Circuit has explained:

> In reviewing counsel's performance, a court must avoid using the distorting effects of hindsight and must evaluate the reasonableness of counsel's performance from counsel's perspective at the time.... The widespread use of the tactic of attacking trial counsel by showing what 'might have been' proves that nothing is clearer than hindsight-except perhaps the rule that we will not judge trial counsel's performance through hindsight.

Chandler, 218 F.3d at 1316-17 (quotations and citation omitted).

In other words, the courts recognize that "the trial lawyers, in every case, could have done something more or something different," and that omissions are inevitable. Id. at 1313. That is precisely the case here; Petitioner admits that counsel raised the issue, but argues now with the benefit of hindsight that counsel could have done it better. Such allegations are simply insufficient to support a claim of ineffective assistance of counsel. See Id.; see also Cano v. United States, 2009 WL 3526564, *3 (M.D. N.C. 2009) ("Petitioner cannot succeed on an ineffective assistance of counsel claim simply because his attorney did not win"); Lockard v. United States, 2008 WL 5104222, *3 (S.D. Ill. 2008) ("it should go without saying that merely because [counsel] failed to prevail on his arguments does not render [him] ineffective").

In Ground Seventeen, Petitioner claims that trial counsel was ineffective in failing to subpoena a detective who would have contradicted a key prosecution witness, and in failing to impeach the witness with a prior inconsistent statement. In support of this claim, Petitioner alleges that counsel failed to subpoena Sgt. Monheim to contradict, or to otherwise impeach, Mr. Wilder, who Petitioner alleges was the only witness who stated that he saw a gun fall out of Petitioner's hand.

The record reflects that, at trial, Mr. Wilder initially stated he saw a gun "roll out" of a person's hand (DE#35, p.614),

which person he could not identify. However, Mr. Wilder then immediately clarified that the gun was already on the ground by the time he arrived, and he did not see it falling out of anyone's hand. (Id. at 615). It was thus not necessary to impeach Mr. Wilder. Therefore, Petitioner cannot establish that counsel performed deficiently in failing to do so. See Chandler, 240 F.3d at 917 (counsel is not ineffective for failing to raise non-meritorious issues); Bolender, 16 F.3d at 1573 (same). Moreover, the most damaging testimony with respect to the identification of Petitioner, his possession of the gun, and his role in the alleged crimes was from three other witnesses at the trial, not from Mr. Wilder. Therefore, Petitioner cannot establish that he was prejudiced by counsel's failure to call Sgt. Monjeim to contradict Mr. Wilder, or to otherwise impeach, Mr. Wilder. See Strickland, 466 U.S. at 693-94 (to establish prejudice, a 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).

In Ground Eighteen, Petitioner claims that trial counsel was ineffective in failing to argue a petition filed in federal court for the production of DEA files. In support of this claim, Petitioner alleges that counsel stated that he would argue a pro se petition for mandatory injunctive relief seeking the alleged DEA files, but that counsel later told Petitioner that he would not argue it due to a conflict of interest.

As an initial matter, as the record reflects, the issue of whether the DEA investigative files should have been produced was raised by counsel in the state court proceedings, and the denial of those efforts was the subject of Petitioner's direct appeal. (See Ex. D). Thus what Petitioner really takes issue with is not that counsel failed to seek the DEA files, but rather the manner in which counsel chose to do it. However, as repeatedly set forth

throughout this report, the wisdom of the particular course of action counsel choose generally cannot form the basis of a claim of ineffective assistance, unless that course was so far outside the realm of reasonableness that no competent attorney would have followed it. See Cummings v. Sec'y for Dep't of Corr., 588 F.3d 1331, 1356 (11th Cir. 2009) ("To establish deficient performance, a defendant must show that his representation fell below an objective standard of reasonableness in light of prevailing professional norms at the time the representation took place."). And here, the fact that Petitioner's federal petition, but not to the DEA file in the trial court's pro se filing, supports that the former course was prudent. Strickland, 466 U.S. at 690 ("counsel rendered adequate assistance and made decisions in the exercise of reasonable professional judgment"); also Cáno, 2009 WL 3526564 at *3 (M.D. N.C. 2009) ("Petitioner cannot succeed on an ineffective assistance of counsel claim merely because his attorney did not win"); Lockard, 2008 WL 5104... at *3 ("it should go without saying that merely because [counsel] failed to prevail on his arguments does not render [him] ineffective").

Moreover, it bears noting that, with regard to prejudice, Petitioner alleges merely that the alleged DEA investigative files *might* have revealed the identities of the perpetrators, and *might* have been useful against Mr. Cody. This is of course insufficient to establish that Petitioner was prejudiced by counsel's failure to assist him with this pro se federal petition, even if Petitioner could have established that counsel was deficient in doing so, particularly in light of the overwhelming evidence of Petitioner's guilt in this case. See Ceja, 97 F.3d at 1255 (rejecting claim of ineffective assistance where defendant failed to explain what

compelling evidence additional investigation would have unearthed that would have negated evidence of guilt); see also Saranchak, 616 F.3d 309-11 (defendant not pr... by counsel's alleged deficient performan... estigate where state presented over... ray, 375 Fed.Appx. at 470-71 (same); ... same); Best, 426 F.3d at 946-47 (same...

In Ground ... t trial counsel was ineffective in i... ness with his prior statement of t... eputation in the community. In s... oner alleges that counsel failed to... s Ferguson about Edmond Cody's repu... a statement that Ferguson made at a...

Review of the ... reveals that Mr. Ferguson's deposition testimony is vague, at best. Therefore, counsel could have reasonably concluded that it would not have been useful impeachment material. See Strickland, 466 U.S. at 690 ("counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment"). Moreover, as set forth above, the theory of defense and Petitioner's own testimony were that he had never gone inside the victim's house. Rather, his defense was that he had been held at gunpoint and shot at by unknown perpetrators outside the house, when those perpetrators and Edmond Cody were arguing over drug deal. Thus, given that the defense did bring out that the perpetrators and Edmond Cody were allegedly engaged in a dispute over a drug deal through other means and Petitioner was nevertheless convicted, Petitioner similarly cannot establish that he was prejudiced by counsel's failure to also make the risky move of attempting to establish that Mr. Cody had a reputation for being a drug dealer which, if it had backfired, could have undermined

Petitioner's defense (i.e., if Mr. Ferguson denied that Mr. Cody indeed had such a reputation). See Strickland, 466 U.S. at 693-94 (to establish prejudice, a 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); see also Cox v. Del Papa, 542 F.3d 669, 683 (9th Cir. 2008)(defendant's argument that counsel should have sought out and presented witnesses at resentencing did not merit relief where having the witnesses that defendant identified testify "would have been a risky strategy"); Kinder v. Bowersox, 272 F.3d 532, 553 (8th Cir. 2001)(state court determination that calling victim's mother was a risky strategy was not an unreasonable application of Strickland); United States v. Morales, 1 F.Supp.2d 389, 393 (S.D.N.Y. 1998)("[t]he decision of experienced defense counsel not to call unwilling witnesses in a risky effort to collaterally challenge the credibility of one of the Government's witnesses is a matter of trial tactics that will not support a claim of ineffective assistance of counsel absent far more extreme circumstances").

In Ground Twenty, Petitioner claims that trial counsel was ineffective in failing to provide Petitioner with pertinent data and knowledge of Florida law in order to preserve for appellate review the racial makeup of the jury panel. In support of this claim, Petitioner alleges that counsel failed to provide Petitioner with knowledge of Fla.R.Crim.P. 3.290, which provides that the state or defendant may challenge the jury panel on the ground that the prospective jurors were not selected or drawn according to law, that there were only 3 African American jurors on each panel of approximately thirty-three jurors, and that defense counsel advised Petitioner that he was not going to object.

In Duran v. Missouri, 439 U.S. 357, 364 (1979), the Supreme Court set out these factors for determining whether a violation of

the fair cross-section requirement exists. Specifically, in order to make a *prima facie* showing of a violation of the fair-cross section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this representation is due to systematic exclusion of the group in the jury selection process. With respect to the second Duran factor, the difference between the percentage of the distinctive group among the population eligible for jury service and the percentage of the distinctive group on the venire wheel, must be examined. If the absolute disparity between these two percentages is 10 per cent or less, this second element is not satisfied. United States v. Grisham, 63 F.3d 1074, 1078-79 (11th C r. 1995).

In this case, the record reflects that the first two jury panels were struck for reasons other than racial make-up. (DE#34, pp.9-172). Thereafter, multiple panels had to be brought down over the course of the next two days. On the last day of *voir dire*, there were 15 potential jurors remaining from the prior panels, and a new panel of 20 prospective jurors had been brought in to be preliminarily examined by the court. (Id. at 234-80). Petitioner lodged a pro se objection with regard to this "panel as being racially imbalanced," which was the panel of 20 new prospective jurors. (Id. at 269). Thus, the record reflects that the complaint herein was with respect to there being only 3 African Americans on a penal of 20, a 15% ratio, which does not satisfy Grisham. More importantly, Petitioner's allegations with respect to the demographics in Miami-Dade County are deficient. Merely stating the population of the county "comprise of 18.9% blacks," does not reflect what percentage of this population would be eligible for jury service (i.e., citizens/legal residents, over the age of 18,

etc., in accordance with the Florida statutory requirements for jury service. In addition, Petitioner fails to allege facts whatsoever that would demonstrate that counsel would have had a basis for objecting as to the third element of the Duran test; that is, that the under representation of the group was due to systematic exclusion of the group in the jury selection process.

In sum, because Petitioner has failed to allege facts that would establish that there was any legal basis to object to the racial makeup of the jury panels, Petitioner cannot establish that counsel was ineffective in failing to do so. Chandler, 240 F.3d at 917 (counsel is not ineffective for failing to raise a non-meritorious objection); Bolender, 16 F.3d at 1573 (failure to raise non-meritorious issues does not constitute ineffective assistance of counsel). Petitioner makes much of the fact that he raised a pro se objection, and that counsel refused to join it and thereby better preserve the issue for appeal. However, this demonstrates only that counsel was well aware of the potential issue and made a conscious choice not to raise it, and Petitioner offers nothing that would rebut the presumption that counsel made this choice in the exercise of reasonable professional judgment. See Strickland, 466 U.S. at 690 ("counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment"). Indeed, the fact that there does not appear to have been any legal basis to make any such objection only reinforces the conclusion that counsel made a reasoned, strategic decision not to raise the issue. And as previously noted, it is beyond question that reasonable strategic choices by counsel regarding the various plausible options in a given case are "virtually unchallengeable." Strickland, 466 U.S. at 690.

In Ground Twenty-One, Petitioner claims that trial counsel's errors deprived him of effective assistance of counsel in a trial

that was fundamentally unfair. In support of this claim, Petitioner alleges that the totality of counsel's cumulative errors claimed in Grounds Four through Twenty-One, above, worked to deprive him of effective assistance of counsel and a fair trial.

"A defendant is entitled to a fair trial but not a perfect one." United States v. Ramirez, 426 F.3d 1344, 1353 (11th Cir. 2005) (*quoting* Lutwak v. United States, 344 U.S. 604, 619, 73 S.Ct. 481, 490, 97 L.Ed. 593 (1953)). "[T]he 'cumulative effect' of multiple errors may so prejudice a defendant's right to a fair trial that a new trial is required, even if the errors considered individually are non-reversible." Ramirez, 426 F.3d at 1353 (*quoting* United States v. Thomas, 62 F.3d 1332, 1343 (11th Cir. 1995)). The cumulative error analysis should thus evaluate only matters determined to be in error, not the cumulative effect of non-errors. See, Fuller v. Roe, 182 F.3d 699, 704 (9th Cir. 1999) (holding in federal habeas corpus proceeding that where there is no single constitutional error existing, nothing can accumulate to the level of a constitutional violation), *overruled on other grounds*, Slack v. McDaniel, 529 U.S. 473, 482 (2000); see, also, United States v. Rivera, 900 F.2d 1462, 1470 (10th Cir. 1990) (stating that "a cumulative-error analysis aggregates only actual errors to determine their cumulative effect."); Mullen v. Blackburn, 808 F.2d 1143, 1147 (5th Cir. 1987) (petitioner could not obtain habeas relief through aggregation of individual meritless claims he had averred; "[t]wenty times zero is zero"); Moore v. Reynolds, 153 F.3d 1086, 1113 (10th Cir. 1998) ("Cumulative error analysis applies where there are two or more actual errors; it does not apply to the cumulative effect of non-errors."), *cert. denied*, 526 U.S. 1025, 119 S.Ct. 1266, 143 L.Ed.2d 362 (1999). In some cases, however, counsel's failure or inability to subject the prosecution's case to meaningful adversarial testing violates the Sixth Amendment and makes the adversarial process presumptively

unreliable. United States v. Cronic, 466 U.S. 648, 659 (1984). When this occurs, no specific showing of prejudice is required. Id. The Eleventh Circuit applies the Cronic dicta only in a "narrow range of cases" where there is a "fundamental breakdown of the adversarial process." Chadwick v. Green, 740 F.2d 897, 900-01 (11th Cir. 1984). The focus in such cases is on whether or not the accused was denied a fair trial. Hammonds v. Newsome, 816 F.2d 611, 613 (11th Cir. 1987).

Here, all of Petitioner's asserted grounds of error by trial counsel fail for the reasons set forth elsewhere in this report. As such, Petitioner cannot establish any claim of cumulative error. Ramirez, 426 F.3d at 1353; Fuller, 182 F.3d at 704; Rivera, 900 F.2d at 1470; Mullen, 808 F.2d at 1147; Moore, 153 F.3d at 1113. When viewing the record as a whole and the evidence in its entirety, the alleged errors, neither individually nor cumulatively, infused the trial with such unfairness as to deny petitioner due process of law. Contrary to petitioner's assertion, the result of the trial was not fundamentally unfair or unreliable. Moreover, the record reflects that counsel did, in fact, present cogent theory and vigorously defend the case, and did otherwise subject the state's case to meaningful adversarial testing. Petitioner is thus entitled to no relief on this claim. See, Lockhart v. Fretwell, 506 U.S. 364, 369-70 (1993); Cronic, 466 U.S. at 659; See, Fuller, 182 F.3d at 704.

In Ground Twenty-Two, Petitioner claims ineffective assistance of appellate counsel in failing to raise the trial court's abuse of discretion in denying a defense motion to exclude a police report. In support of this claim, Petitioner alleges that the trial court admitted a police report into evidence over defense objection based on the business records exception to the hearsay rule.

Section 90.803(6) of the Florida Statutes sets forth Florida's codification of the business records exception to the hearsay rule.

That rule, of course, provides that records of regularly conducted business activities are admissible. See Id. The exception thus makes it possible to introduce relevant evidence, without the inconvenience of producing all persons who had a part in preparing the documents.

Pursuant to Florida law, business records are reliable because they are of a type that is relied upon by a business in the conduct of its daily affairs, and the records are customarily checked for correctness during the course of the business activities. Hawthorne v. State, 399 So.2d 1088, 1090 (Fla. 1st DCA 1981). In order to be admissible under this exception under Florida law, the record must be kept by that business. Garcia v. State, 564 So.2d 124 (Fla. 1990), Stern v. Gad, 575 So.2d 158, 260 (Fla. 3d DCA 1991).

Here, however, Petitioner alleges that the prosecutor offered the police report to prove that a ceratin projectile matched the firearm that caused the death of the victim. (DE#1, p.52, *citing* p.771 of the trial transcript). And it is well settled that, while a police report may be admissible under the business records exception to the hearsay rule, there must be an independent basis for the admission of any hearsay statements contained within that report itself. See, e.g., Carter v. State, 951 So.2d 939, 943-44 (Fla. 4th DCA 2007) (holding that a victim's affidavit attached to a police report was "classic hearsay" and "[did] not fit within the business or public records exception to the hearsay rule"); Burgess v. State, 831 So.2d 137, 140 (Fla.2002) (noting that police reports or criminal arrest affidavits are not admissible into evidence in criminal proceedings as a public record exception to the hearsay rule because that exception expressly excludes them); Reichenberg v. Davis, 846 So.2d 1233, 1234 (Fla. 5th DCA 2003) (holding that reports of DCF investigators which contained witness interviews were not admissible under the business or public records exception

to the hearsay rule because the statements in the reports were not based upon the personal knowledge of an agent of the business or agency); Harris v. Game & Fresh Water Fish Comm'n, 495 So.2d 806, 809 (Fla. 1st DCA 1986) (*quoting* Charles Ehrhardt, Florida Evidence § 90.805, at 563 (2d ed. 1984): "For example, if a business record includes a statement of a bystander to an accident, the bystander's statement is hearsay and not included within the business records exception because the statement was not made by a person with knowledge who was acting within the regular course of the business activity.").

Here, as set forth above, the police report was offered to prove that a certain projectile matched the firearm at issue. This would appear to be classic hearsay within the police report, with no independent exception for its admission. Therefore, this was arguably a legally meritorious issue that appellate counsel could have raised. The question thus becomes whether appellate counsel was ineffective in foregoing the issue.

As set forth elsewhere in this report, Petitioner's theory of defense and his own testimony was that theory of defense and his own testimony was that Petitioner had never gone inside the Cody home, but that he had been held at gunpoint and shot at by unknown perpetrators outside the house, when these perpetrators and Edmond Cody were arguing over a drug deal. In light of this theory, whether the projectile at issue matched the firearm made little difference to Petitioner's case. Appellate counsel thus could have reasonably concluded that, given this theory of the case and the overwhelming evidence of Petitioner's guilt, the appellate court likely would have concluded that any error in admitting the police report was harmless. Therefore, Petitioner cannot establish that appellate counsel's decision to forego this potential issue on appeal was not made in the exercise of reasonable professional judgment, or that he was prejudiced thereby. See Jones, 463 U.S.

745, 753-54 (appellate counsel need not raise every non-frivolous issue); Robbins, 528 U.S. at 288 (appellate counsel may select arguments in order to maximize the likelihood of success); Murray, 477 U.S. at 536 (the practice of "winnowing out" weaker arguments is the "hallmark of effective appellate advocacy"); see also Card, 911 F.2d at 1520 (appellate counsel is not required to raise meritless issues); Eagle, 279 F.3d at 943 ("prejudice" for ineffective assistance of appellate counsel refers to a reasonable probability that the outcome of the appeal would have been different); Cross, 893 F.2d at 1290 (same); Smith, 528 U.S. at 285-86 (claim for ineffective assistance of appellate counsel requires showing that appellate counsel's performance was deficient and that, but for counsel's deficient performance, the defendant would have prevailed on appeal); Shere, 537 F.3d at 1310 (same).

In Ground Twenty-Three, Petitioner alleges that appellate counsel was ineffective in failing to advance constitutional violations to the Florida Supreme Court for discretionary review. In support of this claim, Petitioner alleges that appellate counsel filed a petition for discretionary review raising certain issues with regard to Petitioner's second degree felony-murder conviction, but that counsel failed to raise that (1) the 911 tapes were testimonial and there was no showing that the two witnesses were unavailable and no prior opportunity for cross-examination, (2) the trial court erroneously refused to order the state to obtain Edmond Cody's DEA file and limited cross- examination on the DEA investigation, (3) the trial court erred in precluding cross-examination of the victim Edmond Cody about his investigation by the DEA.

In order for the Florida Supreme Court to exercise its discretion and accept a case for review, the lower court opinion must expressly and directly conflict with a decision of the Florida Supreme Court, or of a District Court of Appeal.

Florida Star v. B.J.F., 530 So.2d 286, 289 (Fla. 1988); First Union National Bank v. Turney, 832 So.2d 768 (Fla. 1st DCA 2002). Here, Petitioner's counsel's raised in her petition for discretionary review the only plausible issues that existed in which it could be argued in good faith there was an express and direct conflict with an opinion of a District Court of Appeal or the Florida Supreme Court. Petitioner, for his part, fails to cite any cases with which the decision in his appeal was in conflict with respect to the first two points he urges appellate counsel should have raised on discretionary review, and the appellate court in Petitioner's case did not even address the third point regarding the trial court's limitation of the cross-examination of Edmond Cody. Appellate counsel thus had no good faith basis to raise these issues in the petition for discretionary review and, as such, cannot be deemed ineffective for failing to have done so. See Jones, 463 U.S. 745, 753-54 (appellate counsel need not raise every non-frivolous issue); Card, 911 F.2d at 1520 (appellate counsel is not required to raise meritless issues); see also Eagle, 279 F.3d at 943 ("prejudice" for ineffective assistance of appellate counsel refers to a reasonable probability that the outcome of the appeal would have been different).

In Ground Twenty-Four, Petitioner alleges that appellate counsel was ineffective in failing to raise on direct appeal the trial court's erroneous jury instruction regarding manslaughter. In support of this claim, Petitioner alleges that appellate counsel failed to ask the court to hold his appeal in abeyance pending resolution of the Florida Supreme Court's decision in Montgomery v. State, 70 So.3d 603 (Fla. 2009), which was decided during the pendency of Petitioner's appeal and held that the State is not required to prove intent to kill to establish the crime of manslaughter by act.

As Judge Carnes aptly explained in his concurring opinion to the order denying rehearing en banc in United States v. Ardley, 273 F.3d 991, 993-94 (11th Cir.2001):

> In this circuit, we have a wall of binding precedent that shuts out any contention that an attorney's failure to anticipate a change in the law constitutes ineffective assistance of counsel. See, e.g., Spaziano v. Singletary, 36 F.3d 1028, 1039 (11th Cir.1994) ("We have held many times that '[r]easonably effective representation cannot and does not include a requirement to make arguments based on predictions of how the law may develop.'"); ...Davis v. Singletary, 119 F.3d 1471, 1476 (11th Cir.1997) ('[i]t was not professionally deficient for [counsel] to fail to anticipate that the law in Florida would be changed in the future to bar the admission of hypnotically induced testimony.") [;] Pitts v. Cook, 923 F.2d 1568, 1572-74 (11th Cir.1991); Thompson v. Wainwright, 787 F.2d 1447, 1459 n. 8 (11th Cir.1986) ("defendants are not entitled to an attorney capable of foreseeing the future development of constitutional law"). That rule applies even if the claim based upon anticipated changes in the law was reasonably available at the time counsel failed to raise it. See, e.g., Pitts, 923 F.2d at 1572-74 (holding that even though a claim based upon the 1986 Batson decision was "reasonably available" to counsel at the time of the 1985 trial, failure to anticipate the Batson decision and raise that claim was not ineffective assistance of counsel).
>
> Further, the rule that it is not ineffective assistance for an attorney to fail to foresee a change in the law applies even when the change is such that the forfeited issue was, in hindsight, a sure fire winner. Wright v. Hopper, 169 F.3d 695, 707-08 (11th Cir.1999) (Batson issue); Elledge v. Dugger, 823 F.2d 1439, 1443 (11th Cir.1987) (Michigan v. Mosley issue); Thompson, 787 F.2d at 1459 n. 8 (Ake issue).

273 F.3d at 993-94.

Here, Petitioner's claim regarding counsel's failure to seek to have Petitioner's appeal held in abeyance pending resolution of the Florida Supreme Court's decision in Montgomery, supra, amounts to a claim that counsel failed to anticipate a change in the law.

As set forth above, however, this is simply not a basis for a claim of ineffective assistance of counsel. Id.

Certificate of Appealability

Rule 11(a) of the Rules Governing Section 2254 Cases provides that "the district court must issue or deny a certificate of appealability when it enters a final order adverse to the 2applicant," and that 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)." Rule 11(a), Rules Governing Section 2254 Cases in the United States District Courts. Rule 11(a) further provides that "[b]efore entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." Id. Regardless, a timely notice of appeal must still be filed, even if the court issues a certificate of appealability. Rule 11(b), Habeas Rules.

A certificate of appealability may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where a habeas petitioner's constitutional claims have been adjudicated and denied on the merits by the district court, the petitioner must demonstrate reasonable jurists could debate whether the issue should have been decided differently or show the issue is adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). Where a petitioner's constitutional claims are dismissed on procedural grounds, a certificate of appealability will not issue unless the petitioner can demonstrate both "(1) 'that jurists of reason would find it debatable whether the petition [or motion] states a valid claim of denial of a constitutional right' and (2) 'that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" Rose v. Lee, 252 F.3d 676, 684 (4th

Cir.2001)(quoting Slack, 529 U.S. at 484). "Each component of the §2253(c) showing is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments." Slack, 529 U.S. at 484-85.

Having determined that Petitioner is not entitled to relief on the merits, the court considers whether Petitioner is nonetheless entitled to a certificate of appealability with respect to one or more of the issues presented in the instant petition. After reviewing the claims presented in light of the applicable standard, the court finds reasonable jurists would not find the court's treatment of any of petitioner's claims debatable or wrong and none of the issue are adequate to deserve encouragement to proceed further. Accordingly, a certificate of appealability is not warranted. See Miller-El, 537 U.S. at 336-38; Slack, 529 U.S. at 483-84.

Conclusion

Based upon the foregoing, it is recommended that this petition for writ of habeas corpus be DENIED, and that no certificate of appealbility be issued.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report, including any objections to the recommendation that no certificate of appealability be issued.

SIGNED this 29th day of September, 2017.

UNITED STATES MAGISTRATE JUDGE

cc: John Lee Barron
390017
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APPENDIX "D"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-14860-A

JOHN LEE BARRON,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

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

Before: WILSON and NEWSOM, Circuit Judges.

BY THE COURT:

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

APPENDIX "E"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-23407-CIV-LENARD/WHITE

JOHN LEE BARRON,

Petitioner,

v.

JULIE JONES,

Respondent.
_____/

ORDER GRANTING MOTION FOR RECONSIDERATION (D.E. 60), VACATING IN PART THE COURT'S ORDER GRANTING IN PART AND DENYING IN PART PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS (D.E. 56), AND VACATING FINAL JUDMGENT (D.E. 57)

THIS CAUSE is before the Court on Respondent's Motion for Reconsideration, ("Motion," D.E. 60), filed June 28, 2018. Respondent moves pursuant to Federal Rule of Civil Procedure 59 for reconsideration of the Court's Order Granting in Part and Denying in Part Petitioner John Lee Barron's Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus. ("Order," D.E. 56.)

I. Relevant Background

Petitioner John Lee Barron was charged by Information in state court with, inter alia, attempted first degree murder with a firearm ("Count Five"). (Order at 38.) The Court instructed the jury on lesser included offenses, including the standard jury instruction for attempted manslaughter by act which, at the time, required the State to prove that the defendant intended to cause the death of the victim. (Id.)

On August 20, 2003, the jury convicted Petitioner in Count Five of attempted second-degree murder with a firearm.[1] (Id.) On August 22, 2007, the Third District Court of Appeals affirmed Petitioner's conviction. (Id. at 39.) Thereafter, Petitioner sought discretionary review in the Florida Supreme Court. (Id.) On February 12, 2009, while Petitioner's case was pending before the Florida Supreme Court, Florida's First District Court of Appeal issued its opinion in Montgomery v. Florida, 70 So. 3d 603 (Fla. Dist. Ct. App. 2009). (Id.) In Montgomery, the First District held that (1) manslaughter by act does not require the State to prove an intent to kill, and (2) a trial court commits fundamental error if it issues the standard jury instruction for manslaughter by act which, at the time, imposed that element. 70 So. 3d at 606-08.

On May 7, 2009, while Petitioner's case was still pending before the Florida Supreme Court, the Florida Supreme Court accepted review of Montgomery. (Order at 40.) On May 21, 2009, the Florida Supreme Court declined to accept jurisdiction in Petitioner's case. (Id.) On April 8, 2010, the Florida Supreme Court affirmed the First District's opinion in Montgomery, holding "that the crime of manslaughter by act does not require the State to prove that the defendant intended to kill the victim." 39 So. 3d 252, 254 (Fla. 2010). It further agreed with the First District that "the use of the standard jury instruction on manslaughter, which required that the State prove the defendant's intent to kill the victim, constituted fundamental error in Montgomery's case." Id.

[1] Petitioner was found guilty of other charges, including second-degree felony murder, for which he is serving a life sentence. (see D.E. 18-1 at 21.)

Petitioner filed a petition for writ of habeas corpus in state court arguing, inter alia, that appellate counsel was ineffective for failing to move the Florida Supreme Court to hold his appeal in abeyance pending its decision in Montgomery. (Order at 40.) The state court of appeals summarily denied his state petition without written opinion. (Id.)

Petitioner filed a federal habeas petition raising the same claim for ineffective assistance of appellate counsel ("Ground Twenty Four" of his federal habeas Petition). (See D.E. 1 at 12.) The Court referred the Petition to Magistrate Judge Patrick A. White who issued a Report recommending that the Court deny the Petition on all grounds. ("Report," D.E. 44.)

The Court agreed with Judge White as to Grounds One through Twenty Three, but disagreed as to Ground Twenty Four. (Order at 37-51.) In its Order, this Court thoroughly discussed the extensive line of case law from Florida's appellate courts finding that appellate counsel's failure to raise the Montgomery issue during the pendency of a defendant's direct appeal constitutes ineffective assistance where the trial court had issued the standard jury instruction for manslaughter by act or attempted manslaughter by act, and the defendant's appeal was still pending on direct review when the First District rendered Montgomery. (See Order at 41-46 (discussing Pierce v. Florida, 121 So. 3d 1091, 1093 (Fla. Dist. Ct. App. 2013) (attempted manslaughter by act); Gayle v. Florida, 84 So. 3d 364 (Fla. Dist. Ct. App. 2012) (manslaughter by act); Mendenhall v. Florida, 82 So. 3d 1153 (Fla. Dist. Ct. App. 2012) (attempted manslaughter by act); Dill v. Florida, 79 So. 3d 849 (Fla. Dist. Ct. App. 2012) (attempted manslaughter by act); Lopez v. Florida, 68 So. 3d 332 (Fla. Dist. Ct. App. 2011)

(manslaughter by act); Hodges v. Florida, 64 So. 3d 142, 143 (Fla. Dist. Ct. App. 2011) (attempted manslaughter by act); Del Valle v. Florida, 52 So. 3d 16 (Fla. Dist. Ct. App. 2010) (manslaughter by act); Asberry v. Florida, 32 So. 3d 718 (Fla. Dist. Ct. App. 2010) (manslaughter by act); Toby v. Florida, 29 So. 3d 1138, 1138 (Fla. Dist. Ct. App. 2009) (manslaughter by act); Minnich v. Florida, 130 So. 3d 695, 696 (Fla. Dist. Ct. App. 2011) (granting petition for writ of habeas corpus where the defendant's appeal was pending before the U.S. Supreme Court on a petition for writ of certiorari when the First District decided Montgomery and by the time the Supreme Court had denied the petition it was too late for the defendant to file a motion to recall judgment) (attempted manslaughter by act).

The Court found that the "inescapable conclusion to be drawn" from these cases is this:

> if (1) the trial court issued the standard jury instruction for manslaughter by act or attempted manslaughter by act during the defendant's trial, (2) the defendant's direct appeal was pending in some appellate court when the First District Court of Appeal rendered its opinion in Montgomery, and (3) appellate counsel failed (or was unable) to raise the Montgomery issue in some way while the direct appeal was pending,[2] then (4) the defendant is entitled to a writ of habeas corpus.

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[2] Because the court of appeals had already decided Petitioner's direct appeal when Montgomery was decided, appellate counsel's failure to argue the Montgomery issue to the court of appeals amounts to a failure to anticipate a change in the law, which is not a basis for finding ineffective assistance of counsel. Dill, 79 So. 3d at 851; Lopez, 68 So. 3d at 334. It is on these grounds that Judge White recommended the Court reject this claim. (See Report at 59-60.) However, Petitioner's claim is not that appellate counsel was ineffective for failing to argue to the court of appeals that the standard jury instruction for manslaughter by act constitutes fundamental error; rather, his claim is that appellate counsel was ineffective for failing to raise the issue by moving the Florida Supreme Court to hold his case in abeyance pending its resolution of Montgomery. (See D.E. 18-7 at 95.)

(Order at 46-47 (footnote in original).) The Court further found:

> The fact that Petitioner's case was pending in the Florida Supreme Court when the First District rendered Montgomery, rather than in the court of appeals like Lopez, Del Valle, Gayle, Asberry, Toby, Hodges, Mendenhall, and Dill, is irrelevant. What is relevant is that Petitioner's direct appeal was not yet final. See Smith v. Florida, 598 So. 2d 1063, 1066 ("[A]ny decision of this Court announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case pending on direct review or not yet final.") (citing Griffith v. Kentucky, 479 U.S. 314, 320 (1987)); see also Minnich, 130 So. 3d at 696 ("[B]ecause petitioner's conviction was not yet final when this court issued the opinion in Montgomery, the holding in that case applied to petitioner's case.").
>
> "Although appellate counsel is not required to anticipate changes in the law, . . . 'appellate counsel is ineffective for failing to raise favorable cases decided by other jurisdictions during the pendency of an appeal, which could result in a reversal." Dill, 79 So. 3d at 851; see also Lopez, 68 So. 3d at 334 (same); Shabazz v. Florida, 955 So. 2d 57 (Fla. Dist. Ct. App. 2007) (holding appellate counsel ineffective for failing to raise favorable cases from other districts in Florida even though controlling law in district in which appeal was heard was unfavorable); Ortiz v. Florida, 905 So. 2d 1016 (Fla. Dist. Ct. App. 2005) (determining that the appellant's counsel's failure to request supplemental briefing on favorable appellate decision from other district court constituted ineffective assistance of counsel); Whatley v. Florida, 679 So. 2d 1269 (Fla. Dist. Ct. App. 1996) (determining that although issue was not completely settled, counsel was ineffective for failing to cite favorable binding case law from another district in effect at time of pending appeal).

(Id. at 47-48.) Finally, the Court observed that

> Despite the fact that all of the opinions discussed above had been issued by the time Petitioner filed his state court petition for writ of habeas corpus—and despite the fact that Petitioner cited and/or quoted Dill, Mendenhall, Lopez, and Gayle in his state court petition—the state court summarily denied Petitioner's petition on July 9, 2014. (D.E. 18-7 at 103.) By that time, the Florida Supreme Court had explicitly held that the crime of attempted manslaughter by act does not require an intent to kill, and that a trial court commits fundamental error by giving the standard jury instruction on attempted manslaughter by act—the very instruction given in

> Petitioner's case—which requires proof of intent to kill. Williams v. Florida, 123 So. 3d 23, 27, 30 (Fla. 2013).

(Id. at 48-49.) The Court found that "no competent attorney would have failed to keep Petitioner's appeal alive before the Florida Supreme Court by moving to hold the appeal in abeyance pending the Florida Supreme Court's resolution of Montgomery." (Id. at 49 (citing Perez v. Dep't of Corrs., 227 F. Supp. 2d 1298, 1310-12 (S.D. Fla. 2002) (granting petition for writ of habeas corpus on grounds that appellate counsel was ineffective for failing to keep direct appeal alive where the petitioner, who had been found guilty of attempted felony murder, would have benefited from the Florida Supreme Court's decision in Florida v. Gray, 654 So. 2d 552 (Fla. 1995), which abolished the doctrine of attempted felony murder and was pending before the Florida Supreme Court when the court of appeals affirmed his convictions).) The Court further found that Petitioner was prejudiced by counsel's failure—specifically, "if appellate counsel had, for example, moved the Florida Supreme Court to hold Petitioner's appeal in abeyance pending its decision in Montgomery, there is a reasonable probability that the Court would have granted the motion, and Petitioner would have benefited from the Court's subsequent opinion. (Id. at 49-50 (citing Smith, 598 So. 2d at 1066)).

Accordingly, based on the overwhelming authority from the Florida state courts, the Court found that the state court's resolution of this issue was an objectively unreasonable application of Strickland. (Id. at 50.)

Respondent now moves for reconsideration pursuant to Federal Rule of Civil Procedure 59. (D.E. 60.)

II. Legal Standard

Rule 59(e) permits a party to move to alter or amend a judgment within 28 days after the entry of the judgment. "'The only grounds for granting [a Rule 59] motion are newly-discovered evidence or manifest errors of law or fact.'" Arthur v. King, 500 F.3d 1335, 1343 (11th Cir. 2007) (quoting In re Kellogg, 197 F.3d 1116, 1119 (11th Cir. 1999)). "'[A] Rule 59(e) motion [cannot be used] to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment.'" Id. (quoting Michael Linet, Inc. v. Vill. of Wellington, Fla., 408 F.3d 757, 763 (11th Cir. 2005)).

III. Discussion

Respondent argues that the Court committed manifest errors of both fact and law. Because the Court finds that reconsideration is warranted on a legal issue, the Court will confine its analysis to that issue.

The Court pauses here to make an important observation. In its initial Response to Petitioner's petition, Respondent wholly failed to address the merits of Petitioner's claims. (See D.E. 17.) Consequently, Judge White was compelled to order Respondent to file a supplemental response that addressed the merits of Petitioner's claims. (See D.E. 29.) On July 28, 2016, Respondent filed a second Response that minimally addressed Petitioner's claims on the merits. (D.E. 33.) As Judge White noted: "Respondent's response on the merits is pro forma at best, consisting of nothing more than a conclusory paragraph or two for most of Petitioner's 24 claims." (Report at 15 n. 9.) With regard to

Ground Twenty Four—which is the ground on which the Court granted Petitioner relief—the Response cited absolutely no supporting authority.

Thus, it is disingenuous for Respondent to now argue, as she does in the instant Motion, that the Court "may have . . . overlooked" relevant case law from the Eleventh Circuit. (Mot. at 4.) The Court "overlooked" it because Respondent did not bring it to the Court's attention. One of the cases Respondent now relies upon, Pimental v. Florida Department of Correctinos, 560 F. App'x 942 (11th Cir. 2014), was issued by the Eleventh Circuit more than two years before Respondent filed her Response. Even more egregious is the fact that, Rambaran v. Secretary, Department of Corrections, 821 F.3d 1325 (11th Cir. 2016)—which is dispositive of Ground Twenty Four and compels the Court to decide that issue in Respondent's favor—was rendered two-and-a-half months before Respondent filed her brief on the merits, but Respondent failed to bring it to the Court's attention.[3] For that reason, the Court would be justified in denying the instant Motion, as "'a Rule 59(e) motion [cannot be used] to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment.'" Arthur, 500 F.3d at 1343 (quoting Michael Linet, Inc., 408 F.3d at 763).

However, the Court's primary concern is deciding legal issues correctly and, because Rambaran compels reconsideration of the Court's Order, the Court will therefore reach the merits of Respondent's Motion.

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[3] Judge White's failure to identify Rambaran was undoubtedly precipitated by Respondent's failure to cite it.

In Rambaran, the defendant ("Rambaran") was tried in Florida state court in April 2008 for, inter alia, first degree murder. 821 F.3d at 1327. The trial court issued jury instructions on lesser included offenses, including the standard instruction for manslaughter by act. Id. The jury ultimately found Rambaran guilty of second degree murder (as a lesser included offense of first degree murder), for which he was sentenced to life in prison. Id.

In February 2009, before Rambaran filed his initial brief in the Third District Court of Appeal, the First District Court of Appeal issued its decision in Montgomery. Id. at 1328. In May 2009, the Florida Supreme Court accepted review of Montgomery. Id. Thereafter, Rambaran's attorney filed his initial brief but did not raise the Montgomery issue. Id. After that, in December 2009, the Third District Court of Appeals held that the standard instruction for manslaughter by act was not fundamental error, and certified conflict with Montgomery to the Florida Supreme Court. Id. (citing Valdes-Pinto v. Florida, 23 So. 3d 871, 872 (Fla. Dist. Ct. App. 2009)). On February 5, 2010, Rambaran's attorney filed his reply brief in the Third District Court of Appeal but did not raise the Montgomery issue, or the conflict between Montgomery and Valdes-Pinto. Id. at 1328-29.

On April 8, 2010, one day before the mandate issued in Rambaran's case, the Florida Supreme Court issued its opinion in Montgomery, holding that Florida's 2006 standard jury instruction for manslaughter by act was fundamental error because it erroneously required the jury to find an intent to kill in order to convict. Id. at 1329.

Rambaran's attorney had from April 9, 2010 to July 13, 2010 to move to recall the mandate, but he did not do so. Id.

Rambaran subsequently filed a petition for writ of habeas corpus in state court, arguing that he received ineffective assistance of appellate counsel based on counsel's failure to argue on direct appeal that the 2006 standard instruction on manslaughter was fundamental error. Id. The Third District Court of Appeal summarily denied the petition without written opinion. Id.

Thereafter, Rambaran filed a federal habeas petition challenging the Third District Court of Appeal's denial of his state petition, arguing that appellate counsel rendered ineffective assistance by failing to challenge the manslaughter by act instruction. Id. The magistrate judge recommended that the court grant Rambaran's petition, noting that while counsel is not required to anticipate a change in the law, "counsel's failure to anticipate the change in the law was ineffective assistance because raising the jury instruction claim could have kept Rambaran's appeal in the appellate 'pipeline,' which may have allowed him to obtain relief from the Florida Supreme Court later." Id. at 1329-30. The district court adopted the magistrate judge's report, "determining that Rambaran's appellate counsel performed deficiently because Florida courts had found 'comparable failures of appellate counsel to be deficient.'" Id. at 1330.

The respondent appealed and the Eleventh Circuit reversed. Id. at 1331-34. First, the court of appeals observed that the district court erroneously disregarded 28 U.S.C. § 2254(d)(1), which provides that a district court may not grant a 2254 petition "unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an

unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Id. at 1331-32.

> The district court granted Rambaran relief under § 2254 because it determined that even though he was not entitled to relief on the jury instruction issue under Florida law at the time of his direct appeal, a reasonable attorney in Florida would have preserved the issue in light of the conflict certified between the First and Third District Courts of Appeal. In reaching that determination, the district court failed to apply the double deference standard mandated by § 2254 and Strickland. See Harrington, 562 U.S. at 105, 131 S. Ct. at 788. It should have evaluated the reasonableness of the state habeas court's denial of Rambaran's ineffective assistance claim but instead it bypassed that test and went straight to the reasonableness of appellate counsel' actions. See id.; Gissendaner, 735 F.3d at 1323.
>
> . . .
>
> The district court's error in disregarding the requirements of § 2254(d)(1) led it to skip the dispositive question of whether there was any "clearly established Federal law, as determined by the Supreme Court," 28 U.S.C. § 2254(d)(1), holding that appellate counsel provided ineffective assistance by failing to preserve an issue that was percolating in the courts at the time.

Id. To this point, the Eleventh Circuit noted that the district court erroneously grounded its decision on Mendenhall and Lopez, cases from the Florida court of appeals: "[A] state intermediate appellate court is not the United States Supreme Court. Only the decisions of the nation's highest court can clearly establish federal law for § 2254(d)(1) purposes. The district court should not have relied on state court decisions." Id. at 1333 (citation omitted).

Finally, the Eleventh Circuit distinguished Rambaran's case from the facts in Overstreet v. Warden, 811 F.3d 1283, 1288 & n.5 (11th Cir. 2016), where the Eleventh Circuit held "unreasonable under § 2254(d)(1) the decisions of state courts rejecting a

claim that counsel had rendered ineffective assistance on appeal by not raising a meritorious issue based on a recent change in state law." Id. In Overstreet, "at the time that counsel in that case filed his appellate brief there were two intermediate state appellate court decisions and one state supreme court decision that were directly on point and would have led to reversal of some of the convictions." Id. (citing Overstreet, 811 F.3d at 1284-88). Thus, when Overstreet's attorney filed his initial brief he "could and should have cited existing law that entitled his client to relief." Id. at 1334.

However, in Rambaran's case, "[r]aising the manslaughter by act jury instruction issue in Rambaran's initial brief, reply brief, or supplemental brief would not have afforded him relief." Id.

> When he filed his initial brief in the Third District Court of Appeal, only the First District Court of Appeal had invalidated the jury instruction. See Montgomery I, 70 So. 3d at 603, 608. By the time he filed his reply brief, the Third and the Second District Courts of Appeal had held, to the contrary, that the jury instruction was not erroneous. See Valdes–Pino, 23 So. 3d at 871–72; Zeigler, 18 So. 3d at 1239, 1245. The Florida Supreme Court did not issue Montgomery II, holding that giving the jury instruction was fundamentally erroneous, until after the Third District Court of Appeal had already affirmed Rambaran's convictions and sentences—specifically, one day before the mandate issued in his direct appeal. See Montgomery II, 39 So. 3d at 252, 254, 257–60.
>
> When counsel was filing his briefs, the law was at best unsettled. And "[w]e have held many times that reasonably effective representation cannot and does not include a [r]equirement to make arguments based on predictions of how the law may develop." Spaziano v. Singletary, 36 F.3d 1028, 1039 (11th Cir.1994) (quotation marks omitted) (second alteration in original); Pitts v. Cook, 923 F.2d 1568, 1573–74 (11th Cir. 1991) (concluding that, although the Supreme Court had granted certiorari in Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), several weeks before the petitioner's trial, and a Batson-type claim was therefore available to trial counsel, counsel's failure to raise such a claim was not ineffective assistance because "an ordinary, reasonable lawyer may

> fail to recognize or to raise an issue, even when the issue is available, yet still provide constitutionally effective assistance") (quotation marks omitted); Funchess v. Wainwright, 772 F.2d 683, 691 (11th Cir. 1985) ("The failure of counsel to anticipate that an otherwise valid jury instruction would later be deemed improper by the state judiciary does not constitute ineffective assistance of counsel."); Sullivan v. Wainwright, 695 F.2d 1306, 1309 (11th Cir. 1983) ("Counsel's failure to divine [a] judicial development . . . does not constitute ineffective assistance of counsel.").

Id. at 1333.[4] Because "[n]o holding of the Supreme Court clearly establishes that in order to perform within the "wide range of reasonable professional assistance," Strickland, 466 U.S. at 689, 104 S. Ct. at 2065, counsel must accurately predict how the law will turn out or hedge every bet in the hope of a favorable development[,]" the Eleventh Circuit found that the district court erred when it granted Rambaran's 2254 petition, and reversed. Id. at 1334.

Rambaran compels the Court to reconsider its Order granting Petitioner relief on Ground Twenty-Four. When Petitioner's case was pending before the Florida Supreme Court, "the law was at best unsettled" with regard to whether the standard jury instruction for manslaughter by act or attempted manslaughter by act[5] constituted fundamental error.

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[4] The Eleventh Circuit further found that appellate counsel's failure to move to recall the mandate was not unreasonable because the Florida Supreme Court's opinion did not address whether the manslaughter by act instruction "was fundamental error even if the jury was also instructed on manslaughter by culpable negligence. Appellate counsel may have reasonably concluded that Rambaran's case was distinguishable because that additional instruction was given." Id. at 1334. In this regard, the Eleventh Circuit observed that Florida's Third District Court of Appeals made this distinction in Cubelo v. Florida, 41 So. 3d 263, 267 (Fla. Dist. Ct. App. 2010) during the time in which Rambaran's appellate counsel could have moved to recall the mandate. Here, the trial court did not instruct the jury as to manslaughter by culpable negligence, so this part of the Eleventh Circuit's opinion is inapposite.

[5] Indeed, the Florida Supreme Court did not hold that the standard jury instruction for attempted manslaughter by act constituted fundamental error until Williams v. Florida, 123

Id. at 1334. Thus, the "dispositive question" presented by Ground Twenty Four is "whether there was any 'clearly established Federal law, as determined by the Supreme Court,' 28 U.S.C. § 2254(d)(1), holding that appellate counsel provided ineffective assistance by failing to preserve an issue that was percolating in the courts at the time." Id. at 1332. This Court, like the district court in Rambaran, erroneously grounded its decision on cases from the Florida court of appeals. (See Order at 40-49.) However, "a state intermediate appellate court is not the United States Supreme Court. Only the decisions of the nation's highest court can clearly establish federal law for § 2254(d)(1) purposes." Rambaran, 821 F.3d at 1333. Because no holding of the Supreme Court clearly establishes that in order to perform within the "wide range of reasonable professional assistance," Strickland, 466 U.S. at 689, 104 S. Ct. at 2065, appellate counsel must preserve an unsettled issue that is "percolating in the courts at the time," the state court's resolution of Ground Twenty Four was not contrary to or and unreasonable application of clearly established Federal law. Rambaran, 821 F.3d at 1332, 1334.

IV. Conclusion

Accordingly, it is **ORDERED AND ADJUDGED** that:

1. Respondent's Motion for Reconsideration (D.E. 60) is **GRANTED**;
2. The Court's Order Granting in Part and Denying in Part Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus (D.E. 56), issued June 20, 2018 is **VACATED IN PART** and solely with regard to Ground Twenty Four;

So. 3d 23, 27, 30 (Fla. 2013), which was issued almost four years after Petitioner's conviction became final.

3. Final Judgment (D.E. 57) is hereby **VACATED**; and

4. The Court will issue an Amended Order on Petitioner's Section 2254 Petition and a new Final Judgment in due course.

DONE AND ORDERED in Chambers at Miami, Florida this 29th day of June, 2018.

Joan A. Lenard

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

APPENDIX "F"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-23407-CIV-LENARD/WHITE

JOHN LEE BARRON,

Petitioner,

v.

JULIE JONES,

Respondent.
_____/

ORDER DENYING PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60(b) (D.E. 64)

THIS CAUSE is before the Court on Petitioner John Lee Barron's Motion for Relief from Judgment Pursuant to Rule 60(b), filed July 12, 2018. ("Motion," D.E. 64.) Petitioner subsequently filed a Motion for Expansion of Record, (D.E. 65), a Notice of Supplemental Authority, (D.E. 66), and a Notice Supplementing Record, (D.E. 67). Upon review of the Motion, the related pleadings, and the record, the Court finds as follows.

I. Relevant background[1]

Petitioner was convicted in Florida state court of second degree felony-murder (Count 1), attempted strong-arm robbery (Count 2), attempted armed robbery (Count 3),

[1] For a detailed recitation of the factual and procedural background, see Docket Entry 62 at 2-6.

and attempted first degree murder with a deadly weapon (Count 5).[2] He was sentenced to life imprisonment on Count 1, fifteen years' imprisonment on Count 2, and thirty years' imprisonment on Counts 3 and 5, all to run concurrently.

After pursuing his state court remedies, he filed in this Court a Petition under 28 U.S.C § 2254 for Writ of Habeas Corpus raising twenty-four grounds for relief. ("Petition," D.E. 1.) The Petition was referred to Magistrate Judge Patrick A. White who issued a Report recommending that the Court deny the petition on the merits. ("Report," D.E. 44.) Petitioner objected to some, but not all, of Judge White's findings. ("Objections," D.E. 49.) On June 20, 2018, the Court entered an Order adopting in part and rejecting in part Judge White's Report and granting in part and denying in part the Petition, finding that Petitioner was entitled to relief on Ground Twenty-Four only. (D.E. 56.) Briefly, based on several cases from Florida appellate courts, the Court found that Petitioner had received ineffective assistance of counsel when his appellate counsel failed to keep Petitioner's direct appeal alive pending the Florida Supreme Court's decision in Montgomery v. Florida, 39 So. 3d 252 (Fla. 2010).[3] (Id. at 37-50.)

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[2] Petitioner was also found guilty of Count 4, which charged him with use or display of a firearm while committing a felony which resulted in death or serious bodily injury, but the trial court later entered a judgment of acquittal on that count. A sixth count was dropped prior to trial.

[3] In Montgomery, the Florida Supreme Court held "that the crime of manslaughter by act does not require the State to prove that the defendant intended to kill the victim[,]" and that that "the use of the standard jury instruction on manslaughter, which required that the State prove the defendant's intent to kill the victim, constituted fundamental error[.]" 39 So. 3d at 254. The trial court had issued the standard jury instruction on manslaughter in Petitioner's criminal case.

On June 28, 2018, Respondent filed a Motion for Reconsideration, bringing to the Court's attention (for the first time) relevant authority from the Eleventh Circuit Court of Appeals addressing claims of ineffective assistance of counsel vis à vis Montgomery. (D.E. 60 (discussing, e.g., Rambaran v. Sec'y, Dep't of Corrs., 821 F.3d 1325 (11th Cir. 2016)).) In Rambaran, the Eleventh Circuit held that the state court's conclusion that appellate counsel's failure to preserve the jury instruction claim pending the Florida Supreme Court's Montgomery decision was not contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, as required to prevail on a 2254 petition. 821 F.3d at 1331-32. Finding that Rambaran was both dispositive of the claim raised in Ground Twenty-Four and binding on the Court, the Court granted Respondent's Motion for Reconsideration. (D.E. 61.) The Court subsequently entered an Amended Order adopting Judge White's Report and denying the Section 2254 Petition. ("Amended Order," D.E. 62.)

On July 12, 2018, Petitioner filed the instant Motion for Relief from Judgment Pursuant to Rule 60(b). (D.E. 64.) Therein, he challenges the Court's Amended Order as to Grounds Two, Four, Twenty, and Twenty-Four. (Id.)

II. Legal Standard

Federal Rule of Civil Procedure provides authorizes a court to relieve a party from a judgment or order for five specific reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void; [or]
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable[.]

Fed. R. Civ. P. 60(b)(1) - (5). Additionally, Rule 60(b)(6) contains a "catch all" provision authorizing the court to grant relief for "any other reason that justifies relief."

> In order to reconsider a judgment there must be a reason why the court should reconsider its prior decision, and the moving party must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision. Sussman, 153 F.R.D. at 694. A "motion for reconsideration should not be used as a vehicle to present authorities available at the time of the first decision or to reiterate arguments previously made." Z.K. Marine Inc., 808 F. Supp. at 1563. Instead, a motion for reconsideration is appropriate where the "Court has patently misunderstood a party, or has made a decision outside of the adversarial issues presented to the Court by the parties, or has made an error not of reasoning, but of apprehension . . . . Such problems rarely arise and the motion to reconsider should be equally rare." Z.K. Marine Inc., 808 F. Supp. at 1563 (citing Above the Belt, Inc. v. Mel Bohannan Roofing, Inc., 99 F.R.D. 99, 101 (E.D. Va. 1983); Moog, Inc. v. United States, No. 90–215E, 1991 WL 255371, at *1, 1991 U.S. Dist. Lexis 17348, at *2 (W.D.N.Y. Nov.21, 1991)).

Burger King Corp. v. Ashland Equities, Inc., 181 F. Supp. 2d 1366, 1369 (S.D. Fla. 2002). "[R]econsideration of a previous order is an extraordinary remedy to be employed sparingly." Id. (citation omitted). "For reasons of policy, courts and litigants cannot be repeatedly called upon to backtrack through the paths of litigation which are often laced with close questions." Id. (citation omitted). "There is a badge of dependability necessary to advance the case to the next stage." Id. Ultimately, however, the Court retains "substantial discretion" to grant or deny a motion for reconsideration. Id. at 1370.

III. Discussion

Petitioner seeks reconsideration of the Amended Order as to Grounds Two, Four, Twenty, and Twenty-Four. The Court will discuss each argument in turn.

a. Ground Two

In Ground Two, Petitioner argued that (1) the State failed to disclose Brady[4] information—specifically, the Drug Enforcement Administration's ("DEA") investigative files concerning victim Ed Cody's narcotics activities; and (2) the Court improperly limited the defense's cross-examination of Mr. Cody regarding the DEA investigation. (Petition at 5.)

Although both of these arguments were presented on direct appeal, (see D.E. 18-1 at 73-79), the court of appeals only addressed the State's alleged failure to produce the DEA's files, finding that because the State did not have the files it was not required to produce them. See Barron, 990 So. 2d at 1101-02.

Judge White likewise found that no Brady violation occurred because Petitioner did not establish that the State had the DEA's files on Mr. Cody. (Report at 21-22.)

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[4] In Brady v. Maryland, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). The Supreme Court has determined that "[i]mpeachment evidence, [ ] as well as exculpatory evidence, falls within the Brady rule." See United States v. Bagley, 473 U.S. 667, 676 (1985). To establish a Brady violation a defendant must prove the following: (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence), see id.; (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence, see United States v. Valera, 845 F.2d 923, 927–28 (11th Cir. 1988); (3) that the prosecution suppressed the favorable evidence, see United States v. Burroughs, 830 F.2d 1574, 1577 (11th Cir. 1987), cert. denied sub nom. Rogers v. United States, 485 U.S. 969 (1988); and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different, see Bagley, 473 U.S. at 682.

Judge White further found that the state court's alleged limitation of the defense's cross-examination of Mr. Cody regarding the DEA investigation did not violate Petitioner's Confrontation Clause rights because the state trial judge's decision to reasonably limit the scope of cross-examination amounts to an evidentiary ruling that does not violate the Sixth Amendment. (Id. at 22-23.)

Petitioner objected, arguing matter-of-factly that Breedlove v. Moore, 279 F.3d 952 (11th Cir. 2002) supported his argument. (Obj. at 3.)

In its Amended Order, the Court found that Petitioner's objections were "vague and, frankly, inadequate." (Am. Order at 13.) The Court observed that "Breedlove does not contain a Confrontation Clause issue, and therefore the Court deems Judge White's finding as to that claim to be unobjected to." (Id.) The Court further found that "although Breedlove contained a Brady issue, the Eleventh Circuit's opinion in Breedlove was limited to whether the petitioner was entitled to an evidentiary hearing on the Brady issue." (Id.) The Court found that Petitioner did not appear to be arguing that he was entitled to an evidentiary hearing on his Brady claim, and that, in any event, he was not entitled to an evidentiary hearing. (Id. at 13-14.) Ultimately, the Court found that "the state trial court's limitation of the cross-examination of Mr. Cody is not contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." (Id. at 14 (citing 28 U.S.C. § 2254(d)).)

In his Motion for Reconsideration, Petitioner argues that the Court "misconstrued the facts and argument . . . ." (Mot. at 2.) He argues that the trial court denied him the right to cross-examine Mr. Cody because Mr. Cody was never charged with a crime, and that Breedlove refutes the trial court's reasoning. (Id. at 3.) He argues that Breedlove "support[s] his factual position, whether or not the victim was under an indictment or DEA investigation, he was entitled to question him to show possible bias, motive, or intent." (Id. at 4.)

The Court again finds Breedlove to be inapposite because it does not involve a Confrontation Clause claim. Rather, in Breedlove, the Eleventh Circuit held that the Florida Supreme Court did not unreasonably apply Brady by denying a post-conviction claim that the State violated the defendant's right to due process when it suppressed evidence that two prosecution witnesses were under investigation for criminal activities. 279 F.3d at 961-64. It further held that because the petitioner could not establish a Brady violation, he was not entitled to an evidentiary hearing. Id. at 964. As such, Petitioner has not established that he is entitled to relief under Rule 60(b).

b. Ground Four

In Ground Four, Petitioner argued that that he was denied effective assistance of trial counsel when his attorney failed to argue that the State failed to prove the essential element of corpus delicti.[5] (Petition at 7.) Specifically, he argued that the Information charged him as a principal in the unlawful killing of Reginald Harris, but there was no

[5] In Florida, "[i]n homicide cases, the corpus delicti consists of three component elements: First, the fact of death; second, the criminal agency of another person as the cause thereof; and, third, the identity of the deceased person." Lee v. Florida, 117 So. 699, 701 (1928).

evidence presented to the jury that the individual killed was Reginald Harris. (See Rule 3.850 Motion, D.E. 18-3 at 4-6.)

Petitioner raised this claim in a Rule 3.850 motion for post-conviction relief in state court. (Id.) The state trial court rejected the claim as refuted by the record because Dr. Bruce Hyma, the Medical Examiner, testified that he conducted the autopsy on Reginald Harris. (D.E. 18-5 at 75.) The court further noted that Petitioner did not argue that the identity of the victim was in dispute, and that any argument regarding the sufficiency of the evidence should have been raised on direct appeal. (Id.)

Judge White found that counsel had no basis for an objection on these grounds because Dr. Hyma testified that he performed an autopsy on Reginald Harris, and counsel cannot be ineffective for failing to raise non-meritorious objections. (Report at 26 (citations omitted).) Judge White further found that because Movant offered nothing that would call into question the victim's identity, "counsel's decision to not raise this issue can only be presumed to have been made in the exercise of reasonable professional judgment." (Id. (citing Strickland, 466 U.S. at 690).)

In his Objections, Petitioner argued that Dr. Hyma's testimony that he performed an autopsy on Reginald Harris is insufficient to establish identity because he did not testify that he knew Reginald Harris in his lifetime. (Obj. at 5 (citing Trowell v. Florida, 288 So. 2d 506 (Fla. Dist. Ct. App. 1973)).) He further argued that Judge White failed to cite any authority requiring identity to be in dispute before relief can be granted on this basis. (Id.)

In its Amended Order, the Court found that Petitioner's argument had "some merit" under Trowell.[6] (Am. Order at 18-20.) Specifically, the Court noted that "[u]nless

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[6] In Trowell, the defendant was accused of shooting the victim, Raymond Jones, in the neck with a rifle after a fight broke out at a bar. 288 So. 2d at 506. An ambulance removed Jones from the bar and took him to a hospital. Id. at 506-07. Five days later, a pathologist performed an autopsy at a separate hospital on a body identified as that of Raymond Jones. Id. at 507. The pathologist found a bullet which he determined had entered the victim's neck, but the bullet was not proffered or otherwise identified. Id. On cross-examination, the doctor testified he did not know the victim during his lifetime and had no knowledge of the identity of the person upon whom he performed the autopsy. Id. The court granted the defendant's motion to strike the pathologist's testimony, subject to the State being able to rehabilitate it. Id. Upon redirect the doctor admitted that no medical records were sent to him containing the name of the decedent upon whom he performed the autopsy, and there was no record evidence as to how the body got to the second hospital where the pathologist performed the autopsy. Id. Nevertheless, the trial judge admitted the doctor's testimony, finding that the State had "adduced sufficient evidence to establish the corpus delicti," and denied the defendant's motions to strike the testimony and for judgment of acquittal. Id. The defendant was convicted of manslaughter. Id. at 506.

The defendant appealed arguing that the state failed to prove the identity of the victim, and the court of appeals agreed. Id. It held that the State had failed to establish the third element of the corpus delecti, which requires the State to prove the identity of the victim beyond a reasonable doubt. Id. The court then gave examples of how the State could have carried its burden of proof:

> 1. There could have been the testimony of a relative or friend who saw his dead body as late as the funeral service;
>
> 2. The funeral director, if he knew him personally;
>
> 3. Any person who saw his corpse at the hospital who knew him personally;
>
> 4. A photograph could have been taken of the cadaver which was autopsied which could later at trial have been identified by any person who knew him in his lifetime;
>
> 5. A picture properly identified as Raymond Jones [the victim] when alive could have been identified at trial as the person upon whom Doctor Klein performed the autopsy;

the first photograph Dr. Hyma identified was a picture of Mr. Harris while alive, Dr. Hyma's testimony appears to be insufficient under Trowell to prove the victim's identity beyond a reasonable doubt." (Id. at 20.) However, the Court noted that both Parties and Judge White had failed to mention that an additional witness identified Harris as the victim—lead homicide investigator, Detective Jeffrey Lewis. (Id. at 20.) Ultimately, the Court found that the state court's rejection of this claim was not an unreasonable application of Strickland: "Both the medical examiner and Detective Lewis testified that Reginald Harris was the victim who died. It was not unreasonable for the state court to conclude that counsel was not deficient for failing to object to the sufficiency of the evidence of the victim's identity." (Id. at 21.)

In his Motion for Reconsideration, Petitioner argues that the Court should not have considered Detective Lewis's testimony because the state trial court did not mention it, and that Detective Lewis's identification is insufficient under Trowell because he did not

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> 6. Since allegedly death occurred sometime after the incident at the Santa Fe Bar, a certified copy of the death certificate could have been proffered;
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> 7. Circumstantial evidence, such as the contents of the body's billfold, rings and other personal effects, garments, etc., could have been utilized;
>
> 8. Scientific evidence, such as fingerprints, identification of teeth, hair, etc., tending to establish identity, may have been available to the State; and finally
>
> 9. The prosecution could have at least proffered the hospital records where presumably Raymond Jones died, as well as the bullet which caused the death of the person whose body was somehow delivered to the autopsy room of the Alachua General Hospital on July 3, 1972.

Id. at 508.

testify that he knew Mr. Harris personally or that he observed photographs of Mr. Harris while he was alive. (Mot. at 4-6.) Movant further argues that the photograph Dr. Hyma identified as Reginald Lewis was an autopsy photograph of a cadaver. (Mot. at 4-6.) Movant attached the photographs discussed during Dr. Hyma's testimony to the instant Motion, and they appear to depict a deceased individual with bullet wounds.[7] (See id. at 17, 25, 29, 32.)

To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test espoused in Strickland v. Washington, 466 U.S. 668 (1984). "First, the defendant must show that counsel's performance fell below a threshold level of competence. Second, the defendant must show that counsel's errors due to deficient performance prejudiced his defense such that the reliability of the result is undermined." Tafero v. Wainwright, 796 F.2d 1314, 1319 (11th Cir. 1986). Under the first prong of the Strickland test, Petitioner "must establish that no competent counsel would have taken the action that his counsel did take." Chandler v. United States, 218 F.3d 1305, 1315 (11th Cir. 2000) (en banc). Under the second prong, Petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

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[7] Movant also attached one photograph to his Motion for Expansion of the Record. (D.E. 65.)

Additionally, a federal district court may grant habeas relief only if the state court's decision resolving a claim was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). For claims of ineffective assistance, the clearly established federal law is Strickland. See Cullen v. Pinholster, 563 U.S. 170, 189 (2011).

Thus, when a state prisoner asks a federal court to set aside a sentence due to ineffective assistance of counsel, federal courts apply "a 'doubly deferential' standard of review that gives both the state court and the defense attorney the benefit of the doubt." Burt v. Titlow, 571 U.S. 12, 15 (2013) (quoting Cullen v. Pinholster, 563 U.S. 170, 190 (2011)). That is, the Court takes "a 'highly deferential' look at counsel's performance," Cullen, 563 U.S. at 190 (quoting Strickland, 466 U.S. at 689), "through the 'deferential lens of § 2254(d)," id. (quoting Knowles v. Mirzayance, 556 U.S. 111, 121 n.2 (2009)).

The Court finds that Movant has not established entitlement to the "extraordinary remedy" of reconsideration on Ground Four. Arthur v. Thomas, 739 F.3d 611, 628 (11th Cir. 2014) (citing Booker v. Singletary, 90 F.3d 440, 442 (11th Cir. 1996)). Given that Dr. Hyma and Detective Lewis both identified Mr. Harris as the victim, and Petitioner never disputed the victim's identity, the state court's rejection of this claim was not an "objectively unreasonable" application of Strickland. Williams, 529 U.S. at 409 (setting forth the "objectively unreasonable" standard). As Judge White noted, because Petitioner offered nothing that would call into question the victim's identity, counsel's decision to not raise this issue must be presumed to have been made in the exercise of reasonable

professional judgment. See Strickland, 466 U.S. at 690 ("[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.").

c. Ground Twenty

In Ground Twenty, Petitioner claimed that trial counsel was ineffective for "failing to provide Petitioner with pertinent data and knowledge of" Florida Rule of Criminal Procedure 3.290 so that he could properly preserve for appellate review an objection to the racial makeup of the jury panel. (Petition at 11.) Pursuant to Florida Rule of Criminal Procedure 3.290, a challenge to a jury panel must be "made and decided before any individual juror is examined," and "shall be in writing and shall specify the facts constituting the ground of the challenge." Petitioner argues that although he voiced an oral, pro se objection to the racial makeup of the jury panel, "absent the pertinent information as to the number of African Americans in the county of Dade and an objection that was not posed by counsel prior to examination of the jurors, the appeals court would not and could not review the instant claim on the racial make-up of the jury panel." (Petition at 64.)

In its Amended Order, the Court found that Petitioner had raised a similar, but different, argument in his Rule 3.850 Motion.[8] (Am. Order at 34.) As such, the Court

[8] Specifically, the Court found that Petitioner had argued to the state court that counsel was ineffective for failing to preserve the objection for appellate review, not that counsel was ineffective for failing to provide Petitioner with information so that Petitioner could properly preserve the objection. The Court's confusion was precipitated by the state court's order denying Petitioner's 3.850 motion, which misconstrued the claim. (See infra Note 9.)

found the claim raised in Ground Twenty was procedurally barred. (Id. at 34-36 (citing McNair v. Campbell, 416 F.3d 1291, 1302 (11th Cir. 2005) (observing that a state prisoner is required to present the state court with the "same claim" he presents the federal court)).)

In his Motion for Reconsideration, Petitioner refers the Court to Ground Thirty-Three of his "Second Motion Supplementing Pending (3.850)" in which he did present to the state court the argument asserted in Ground Twenty of his Petition.[9] (See D.E. 18-4 at 84.) Consequently, the Court agrees with Petitioner that Ground Twenty of the Petition is not procedurally barred and will proceed to the merits.

Judge White found that Petitioner is not entitled to relief on Ground Twenty because he failed to allege facts that would establish there was any legal basis to object to the racial make-up of the jury panels. (Report at 52.) Specifically, he found that Petitioner failed to establish a prima facie case that the jury selection process did not produce a fair cross-section of the community because there were enough African Americans on the relevant jury panel to satisfy the standard set forth in Duren v. Missouri, 439 U.S. 357, 364 (1979) and United States v. Graham, 63 F.3d 1074, 1078-79 (11th Cir. 1995). (Id. at 51-52.) Judge White found that the relevant panel contained three African Americans on a panel of twenty potential jurors, a 15% ratio. (Id. at 51.)

[9] However, in its order denying Petitioner's 3.850 motion, the state court labeled this claim as "Ground Thirty-Four" and construed it as a claim for ineffective assistance of counsel for failing to preserve an objection to the racial makeup of the jury panel. (See D.E. 18-5 at 103.)

In his Objections, Petitioner argues that Judge White failed to address counsel's failure to provide "pertinent data" to Petitioner so that Petitioner could have preserved an objection pro se. (Obj. at 14.) Petitioner did not object to Judge White's finding that the relevant panel was comprised of 15% African Americans.

"The Sixth Amendment guarantees a criminal defendant the right to be indicted and tried by juries drawn from a fair cross-section of the community." Grisham, 63 F.3d at 1078.

> To establish a prima facie case that a jury selection process does not produce a fair cross-section of the community, a defendant must show (1) that the group alleged to be excluded is a distinctive group in the community, (2) that representation of the group in venires is not fair and reasonable in relation to the number of such persons in the community, and (3) that the underrepresentation is due to systemic exclusion of the group in the jury-selection process.

Id. (citing Duren, 439 U.S. at 364). With respect to the second element, the Court must "compare the difference between the percentage of the distinctive group among the population eligible for jury service and the percentage of the distinctive group" on the qualified jury wheel. Id. (citing United States v. Pepe, 747 F.2d 632, 649 (11th Cir. 1984)). "If the absolute disparity between these two percentages is 10 percent or less, the second element is not satisfied." Id. (citing United States v. Rodriguez, 776 F.2d 1509, 1511 (11th Cir. 1985)).

The Court agrees with Judge White that Petitioner's claim fails because he failed to allege facts establishing a legal basis to object to the racial makeup of the jury panel. Specifically, Movant stated in his Second Motion Supplementing Pending (3.850) that Miami-Dade County is comprised of "18.9% blacks . . . [but] only represented

approximately 10% of all jury panels assembled in Dade County from 1998 to 2003." (D.E. 18-4 at 85.) Assuming arguendo that all of the African Americans in Miami-Dade County are eligible for jury service, Petitioner cannot satisfy the second element of the Duren test because the difference between the percentage of African Americans in Miami-Dade County (18.9%) and the percentage of African Americans on the qualified jury wheel (10%) is less than 10 percent—specifically, 8.9%. See Grisham, 63 F.3d at 1078 ("If the absolute disparity between these two percentages is 10 percent or less, the second element is not satisfied.").

Because there was no legal basis to challenge the jury panel, counsel cannot be deemed ineffective for "failing to provide Petitioner with pertinent data and knowledge of" Florida Rule of Criminal Procedure 3.290 so that he could properly preserve for appellate review an objection to the racial makeup of the jury panel. See Chandler v. Moore, 240 F.3d 907, 917 (11th Cir. 2001) (finding that counsel was not ineffective for failing to raise a nonmeritorious issue).

d. Ground Twenty-Four

Finally, Movant argues that the Court should not have granted Respondent's Rule 59(e) Motion because it merely presented an argument that could have been raised prior to the entry of judgment—specifically, that the Eleventh Circuit's decision in Rambaran, 821 F.3d at 1331-32, was dispositive of the claim asserted in Ground Twenty-Four and required rejection of that claim. (Mot. at 10-11.)

Although a Rule 59(e) motion should not be used to present authorities or assert arguments that could have been raised before the entry of judgment, Arthur v. King, 500

F.3d 1335 , 1343 (11th Cir. 2007), "[t]he decision to alter or amend judgment is committed to the sound discretion of the district judge[.]" Am. Home Assurance Co. v. Glenn Estess & Assocs., Inc., 763 F.2d 1237, 1238-39 (11th Cir. 1985) (citations omitted). The Court reiterates that its primary concern is deciding legal issues correctly, and Rambaran compelled the Court to reject the claim asserted in Ground Twenty-Four—a point Petitioner concedes. (See Mot. at 11 (acknowledging that Rambaran "does compel reconsideration" but arguing that "reconsideration is not per se warranted").) Reconsideration under Rule 60(b) may be appropriate to correct a manifest error of law, but it is not a vehicle to reinstate an error already corrected.

IV. Conclusion

Accordingly, it is **ORDERED AND ADJUDGED** that Movant's Motion for Relief from Judgment Pursuant to Rule 60(b) is **DENIED**.

DONE AND ORDERED in Chambers at Miami, Florida this 24th day of October, 2018.

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

APPENDIX "G"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-23407-CIV-LENARD/REID

JOHN LEE BARRON,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.
_____/

ORDER ON REMAND DENYING CERTIFICATE OF APPEALABILITY

THIS CAUSE is before the Court upon limited remand from the Eleventh Circuit Court of Appeals. (D.E. 81.)

On September 9, 2015, Petitioner John Lee Barron filed a Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus, raising twenty-four grounds for relief. ("Petition," D.E. 1.) On June 20, 2018, the Court entered an Order rejecting the claims contained in Grounds One through Twenty-three of the Petition, but granting the Petition as to Ground Twenty-four. (D.E. 56.)

On June 28, 2018, Respondent filed a Rule 59(e) Motion for Reconsideration, bringing to the Court's attention (for the first time) relevant authority from the Eleventh Circuit Court of Appeals on an issue materially identical to the one presented in Ground Twenty-four. (D.E. 60.) On June 29, 2018, the Court granted the Motion for Reconsideration, (D.E. 61), and issued an Amended Order denying the 2254 Petition in

toto, finding, inter alia, that the claim raised in Ground Twenty-four "is squarely foreclosed by the Eleventh Circuit's opinion in Rambaran v. Secretary, Department of Corrections, 821 F.3d 1325 (11th Cir. 2016)." (D.E. 62 at 41.) The Court also denied Petitioner a certificate of appealability. (Id. at 47.)

On July 17, 2018, Petitioner filed a Rule 60(b) Motion for Relief from Judgment seeking reconsideration of the Court's Amended Order as to Grounds Two, Four, Twenty, and Twenty-four. (D.E. 64.) On October 24, 2018, the Court denied the Rule 60(b) Motion, but failed to state whether Petitioner was entitled to a certificate of appealability for any of the issues raised in the Motion. (D.E. 68.) Petitioner has appealed the Court's Order denying the Rule 60 motion to the Eleventh Circuit Court of Appeals. (D.E. 69.)

On March 26, 2019, the Eleventh Circuit issued the instant Order of Limited Remand, instructing the Court to determine whether a certificate of appealability is appropriate for any of the issues Petitioner seeks to raise on appeal. (D.E. 81.) In his Motion for Certificate of Appealability to the Eleventh Circuit, Petitioner argues that:

1. Reasonable jurists could differ as to whether the district court properly denied ineffective assistance of counsel claim where trial counsel failed to argue the State's failure to prove the essential element of corpus delicti; identify of the victim;

2. Reasonable jurists could differ as to whether the district court was obligated to follow binding United States Supreme Court precedent Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008), where the Court granted Respondent's Rule 59(e) motion based on cases that were decided prior to habeas relief entered in appellant's favor, thus, denying Appellant equal treatment and due process of law under the United States Constitution.

Barron v. Sec'y, Fla. Dep't of Corrs., Case No. 18-14860 (11th Cir. Jan. 14, 2019) (hereafter, "Motion for COA").

"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. The United States Supreme Court has explained that to obtain a certificate of appealability, a habeas petitioner must show "'that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983))).

As to the first issue, Petitioner argues that counsel was ineffective for failing to object to the State's failure to present evidence regarding the victim's identity. (Motion for COA at 4.) The Court finds that Petitioner has failed to make a substantial showing of the denial of a constitutional right. As explained in the Court's Order denying Petitioner's Rule 60(b) Motion, Dr. Hyma and Detective Lewis both identified Reginald Harris as the victim, and Petitioner never disputed the victim's identity. (See D.E. 68 at 12.) Because the victim's identity was not in question, counsel's decision to not raise this issue must be presumed to have been made in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 690.

As to the second issue, Petitioner argues that the Court violated his rights to equal protection and due process when it granted Respondent's Rule 59(e) motion based upon Eleventh Circuit case law that existed at the time Respondent filed its brief in opposition to the 2254 Petition, but was not cited in Respondent's brief. (Motion for COA at 5.) In this regard, Petitioner cites Exxon Shipping Co. v. Baker, in which the Supreme Court

observed in a footnote that "Rule 59(e) permits a court to alter or amend a judgment, but it 'may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.'" 554 U.S. at 478 n.5 (quoting 11 C. Wright & Miller, Federal Practice and Procedure § 2810.1, pp. 127-128 (2d ed. 1995)).

To begin with, nothing in Exxon Shipping suggests that granting a Rule 59(e) motion under the circumstances presented here constitutes an equal protection or due process violation, and the Court has found no other authority so holding. Rather, "[t]he decision to alter or amend judgment is committed to the sound discretion of the district judge[.]" Am. Home Assurance Co. v. Glenn Estess & Assocs., Inc., 763 F.2d 1237, 1238-39 (11th Cir. 1985) (citations omitted). Here, the Court exercised its discretion to grant Respondent's Rule 59(e) motion because binding authority from the Eleventh Circuit foreclosed the claim presented in Ground Twenty-four. (D.E. 62 at 46.) Stated differently, the Court granted the Rule 59(e) Motion to correct a manifest error of law. The Court finds that reasonable jurists would not debate whether a Court has the authority to grant a Rule 59(e) motion to correct a manifest error of law. See Arthur v. King, 500 F.3d 1335, 1343 (11th Cir. 2007) ("The only grounds for granting [a Rule 59] motion are newly-discovered evidence or manifest errors of law or fact.") (quoting In re Kellogg, 197 F.3d 1116, 1119 (11th Cir. 1999)).

Accordingly, it is **ORDERED AND ADJUDGED** that a Certificate of Appealability **SHALL NOT ISSUE** with respect to Petitioner's Rule 60 Motion.

DONE AND ORDERED in Chambers at Miami, Florida this 27th day of March, 2019.

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

APPENDIX – H

John Lee Barron, Appellant, vs. The State of Florida, Appellee.

COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

990 So. 2d 1098; 2007 Fla. App. LEXIS 13007; 32 Fla. L. Weekly D 2002

No. 3D03-2689

August 22, 2007, Opinion Filed

Editorial Information: Subsequent History

En banc, Rehearing denied by Barron v. State, 2008 Fla. App. LEXIS 17475 (Fla. Dist. Ct. App. 3d Dist., Oct. 8, 2008)Review denied by Barron v. State, 11 So. 3d 355, 2009 Fla. LEXIS 826 (Fla., May 21, 2009)Post-conviction proceeding at Barron v. State, 31 So. 3d 184, 2010 Fla. App. LEXIS 5725 (Fla. Dist. Ct. App. 3d Dist., Mar. 24, 2010)Writ of habeas corpus denied Barron v. State, 75 So. 3d 284, 2011 Fla. App. LEXIS 13107 (Fla. Dist. Ct. App. 3d Dist., June 15, 2011)Post-conviction proceeding at, Remanded by Barron v. State, 100 So. 3d 230, 2012 Fla. App. LEXIS 18881 (Fla. Dist. Ct. App. 3d Dist., Oct. 31, 2012)Writ of habeas corpus denied Barron v. State, 162 So. 3d 1011, 2014 Fla. App. LEXIS 11796 (Fla. Dist. Ct. App. 3d Dist., July 9, 2014)Post-conviction proceeding at Baron v. State, 150 So. 3d 1151, 2014 Fla. App. LEXIS 14977 (Fla. Dist. Ct. App. 3d Dist., Sept. 24, 2014)Magistrate's recommendation at, Habeas corpus proceeding at Baron v. Jones, 2017 U.S. Dist. LEXIS 162435 (S.D. Fla., Sept. 29, 2017)

Editorial Information: Prior History

An Appeal from the Circuit Court for Miami-Dade County, Diane V. Ward, Judge. Lower Tribunal No. 00-28348.Barron v. State, 795 So. 2d 66, 2001 Fla. App. LEXIS 13956 (Fla. Dist. Ct. App. 3d Dist., Aug. 30, 2001)

Disposition:

Affirmed.

Counsel Karen M. Gottlieb, Special Assistant Public Defender, for appellant. Bill McCollum, Attorney General, and Jill K. Traina, Assistant Attorney General, for appellee.

Judges: Before SHEPHERD and ROTHENBERG, JJ., and LEVY, Senior Judge.

CASE SUMMARY

PROCEDURAL POSTURE: After the Circuit Court for Miami-Dade County (Florida) convicted defendant of second-degree felony murder, attempted armed robbery, and attempted second-degree murder, he appealed.Upon defendant's appeal, a 911 tape was properly admitted under 90.803(1), Fla. Stat. (2003), and/or 90.803(2), Fla. Stat. (2003); the State was not required to produce DEA files that it did not possess or control; and sufficient evidence supported finding defendant criminally liable as a principal of attempted second-degree murder.

OVERVIEW: Upon a review of defendant's claims, the appeals court first found that admission of a 911 tape containing two anonymous calls qualified as either spontaneous statements pursuant to 90.803(1), Fla. Stat. (2003), and/or excited utterances pursuant to 90.803(2), Fla. Stat. (2003). Second, as the calls were made to obtain assistance rather than in response to police questioning, they were non-testimonial in nature. Third, the trial court properly denied defendant's motion to compel the production of Drug Enforcement Administration investigative files of the attempted second-degree murder victim, as the files sought were not in the State's possession or control. Fourth, the State's evidence presented surrounding the shooting of that victim was sufficient to hold defendant criminally liable as a principal, as the shooting occurred while the victim was attempting to resist an attempted robbery. Thus, it fell within the original criminal design and was not an independent criminal act. While defendant was unable to flee due to his

injuries, said injuries were fortuitous and did not shield him from criminal responsibility for acts committed in furtherance of his criminal purpose.

OUTCOME: The judgment was affirmed.

LexisNexis Headnotes

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Right to Confrontation

Evidence > Hearsay > Exemptions > General Overview

The United States Supreme Court in Crawford v. Washington did not foreclose the ability of individual states to develop hearsay laws that exempt non-testimonial statements from confrontation clause scrutiny. And, Florida law clearly provides for the admission of non-testimonial hearsay.

Criminal Law & Procedure > Discovery & Inspection > Discovery by Defendant > Tangible Objects

Fla. R. Crim. P. 3.220(b)(1) requires the State to provide to the defense all information and material within its possession and control. The Florida Supreme Court has specifically interpreted the rule to include records in the State's constructive possession, including data it has the ability of obtaining by virtue of the State being a party to any compact or agreement with the Federal Bureau of Investigation.

Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Conspiracy > Elements

Criminal Law & Procedure > Accessories > Aiding & Abetting

Felons are generally held responsible for the acts of their co-felons. As perpetrators of an underlying felony, co-felons are principals in any homicide committed to further or prosecute the initial common criminal design. One who participates with another in a common criminal scheme is guilty of all crimes committed in furtherance of that scheme regardless of whether he or she physically participates in that crime. On the other hand, an act in which a defendant does not participate and which is outside of and foreign to, the common design of the original felonious collaboration may not be used to implicate the non-participant in the act.

Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Conspiracy > Elements

Criminal Law & Procedure > Accessories > Aiding & Abetting

A killing in the face of either verbal or physical resistance by a victim is properly viewed as being within the original criminal design.

Criminal Law & Procedure > Criminal Offenses > Homicide > Murder > Second-Degree Murder > Elements

Under 782.04(3), Fla. Stat. (2003), in order to be guilty of the crime of either the attempt or the completed act of second degree felony murder, the person who kills or attempts to kill the victim must be someone who was not involved in the underlying felony.

Criminal Law & Procedure > Criminal Offenses > Homicide > Murder > General Overview

Criminal Law & Procedure > Accessories > General Overview

The principal theory of prosecution may be applied regardless of whether a shooting was premeditated or not and regardless of whether the victim lives or dies.

Opinion

Opinion by: ROTHENBERG

Opinion

{990 So. 2d 1099} ROTHENBERG, Judge.

The defendant, John Lee Barron, appeals his convictions for second degree felony murder, attempted armed robbery, and attempted second degree murder. We affirm.

{990 So. 2d 1100} According to the State's case, in September 2000, Ed Cody was at home with his teenage son, Derrick, when a woman rang the buzzer to the gate surrounding Cody's home. When Cody responded, the woman explained that she had car trouble and needed assistance. Cody went outside to help the woman. While looking under the hood of the woman's car, a second car entered the gate and pulled up next to Cody. The driver of this second car exited the car and placed a gun to Cody's head. Immediately thereafter, three more men, armed with firearms, exited the car, and Cody realized that the woman was a decoy. Although the four men wore caps or masks, Cody testified that he saw their faces before they covered them. While the driver held Cody at gunpoint, the other three gunmen, one of whom Cody identified as the defendant,

approached Cody's home, and Cody yelled to his sixteen-year-old son, Derrick, to call 911. Derrick retrieved a gun from his father's bedroom and began to dial 911. When the men entered the house, Derrick became frightened that he would be heard and, therefore, did not complete the call. While hiding in the bathroom, he watched as the men rifled through drawers and beneath his father's mattress. Derrick exited the bathroom and began firing at the men.

Meanwhile, outside of the Cody home, the driver of the second vehicle tried to restrain Cody with handcuffs. When Cody heard shots being fired from inside his home, he believed the gunmen were shooting at his son, Derrick, and he tried to break away to get to his son. As he started towards the house, the woman yelled for the driver to shoot Cody because he had seen her face. The driver shot Cody twice in the back as he was attempting to get to his son. Cody took a few more steps and then collapsed. As he lay bleeding on the ground, he saw the three gunmen who entered his home, exit. The first was uninjured, the second was shot in the chest, and the third man, who Cody identified as the defendant, was shot in the neck. Cody testified that he saw the defendant, who stumbled out of the house with a mask pulled up over his face and a gun in his hand, fall to the ground, clutching his neck. He also testified that the defendant was the first one to go through the gate and to enter his home. The driver and the two other gunmen fled in their vehicle leaving the wounded defendant behind, and the woman fled in her vehicle. The defendant, who collapsed in front of Cody's home, was found wearing a bandana which had fallen away from his face. Next to him was a pair of gloves, and a gun was found lying under his body. The other wounded gunman who fled with the other robbers died from his wounds.

At trial, the defendant claimed that he had not been involved in any of the crimes committed at the Cody home. He testified that he accompanied the woman to the Cody home because she told him that she wanted to settle a business problem with Cody. While he waited in the car, another car arrived, containing a driver and three passengers, who he did not know. The driver exited the car and approached Cody and the woman. The defendant claimed that he watched from the woman's car as Cody, the woman, and the driver engaged in a heated conversation. The defendant

contends that he exited the car and was urging the woman to leave, when one of the passengers of the other car approached him and pulled him towards the Cody house at gunpoint. The defendant testified that he was shot while resisting the gunman, who was attempting to force him into the house. He denied having any involvement with the attempted robbery or the shootings that occurred.

Ed Cody is a paraplegic as a result of this shooting. The gunman who died had {990 So. 2d 1101} a gunshot wound to the neck and abdomen. The bullets were found to have been fired from the firearm used by Derrick.

THE 911 CALLS

The first issue we address is whether the trial court erred by permitting the State to introduce a 911 tape containing two anonymous calls. As we conclude that the two calls qualify as spontaneous statements pursuant to section 90.803(1), Florida Statutes (2003), and/or excited utterances pursuant to section 90.803(2), Florida Statutes (2003), we find that they were properly admitted.

The two calls were made following the shooting of Ed Cody in the back, and the shots fired by Derrick. The first call was made one minute before Derrick's 911 call, and the second call was placed simultaneously with that of Derrick's. The anonymous calls were placed close to the violent events, thereby precluding an opportunity to contrive or misrepresent. Therefore, we find that the trial court properly admitted the two anonymous calls as either spontaneous statements or excited utterances.

As the calls were made to obtain assistance rather than in response to police questioning, we additionally conclude that they were nontestimonial in nature and, therefore, do not violate the

Sixth Amendment or the holding in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). *See Towbridge v. State*, 898 So. 2d 1205, 1206 (Fla. 3d DCA2005)(holding *Crawford* inapplicable to nontestimonial spontaneous statements); *Herrera-Vega v. State*, 888 So. 2d 66, 69 (Fla. 5th DCA2004)("Whatever the United States Supreme Court eventually decides 'testimonial' evidence consists of, it does not appear to include the spontaneous statements made by [the victim] to her mother while being dressed . . . ."), *review denied*, 902 So. 2d 790 (Fla. 2005); *Lopez v. State*, 888 So. 2d 693, 699 (Fla. 1st DCA2004)("Many courts have concluded that a hearsay statement made in a 911 call is not testimonial, because the statement is not made in response to police questioning, and because the purpose of the call is to obtain assistance, not to make a record against someone."). We additionally agree with the Fifth District that the United States Supreme Court in *Crawford* did not foreclose the ability of individual states to develop hearsay laws that exempt nontestimonial statements from confrontation clause scrutiny. *Herrera-Vega*, 888 So. 2d at 69. As Florida law clearly provides for the admission of nontestimonial hearsay, which the two complained-of calls qualify as, we find no error in their admission.

THE DEA INVESTIGATION FILES

During the pendency of this case, the defendant attempted to obtain the production of the Drug Enforcement Administration ("DEA") investigative files of Ed Cody. Instead of subpoenaing the DEA, the defense filed a motion with the trial court requesting that it compel the State to produce them. We find that the trial court properly denied the motion as the files the defendant sought were not in the State's possession or control.

Rule 3.220(b)(1), Florida Rules of Criminal Procedure, requires the State to provide to the defense all information and material within its possession and control. The Florida Supreme Court has specifically interpreted the rule to include records in the State's constructive possession, including data it has the ability of obtaining "by virtue of the State being a party to any compact or

agreement with the Federal Bureau of Investigation . . . ." *State v. Coney*, 294 So. 2d 82, 84 (Fla. 1973). As the State did not have the files sought in its actual or constructive possession (no showing was made that the State has a compact {990 So. 2d 1102} or agreement with the DEA), it was not required to produce the materials the defense sought. *See State v. Miranda*, 777 So. 2d 1173, 1174 (Fla. 3d DCA2001)(holding that the trial court cannot compel the State to produce DEA records not in its custody or control).

THE ATTEMPTED MURDER OF ED CODY

The defendant was charged with the second degree felony murder of a co-perpetrator, Reginal Harris (Count I); attempted strongarm robbery (Count II); attempted armed robbery (Count III); use or display of a firearm during the commission of a felony (Count IV); and the attempted first degree murder with a deadly weapon of Ed Cody (Count V). He was found guilty as charged in Counts I through IV, and guilty of the lesser-included offense of attempted second degree murder for the shooting of Ed Cody in Count V. 1

The defendant claims that the evidence, when viewed in the light most favorable to the State, *Pollen v. State*, 834 So. 2d 380, 383 (Fla. 3d DCA2003), is insufficient to hold him criminally liable as a principal for the attempted second degree murder of Ed Cody. We disagree.

The State's witnesses testified that when Ed Cody was shot, the defendant was either inside of the Cody home or lying wounded in the front yard. When Cody heard gunshots, he was being held at gunpoint outside of his home by the driver of the vehicle, who was attempting to restrain Cody by putting handcuffs on him, and the other three gunmen, including the defendant, were in his home. Upon hearing the gunshots, Ed Cody started running towards the house because he believed the gunmen were shooting at his son, Derrick. As he ran towards his house, the woman yelled for the driver to kill Cody because he had seen her face. The driver replied, "I will put him in a

wheelchair," and fired twice, shooting Ed Cody in the back. Cody fell to the ground. When he looked up, he saw the shooter and the woman jump into the cars they arrived in and two of the robbers, running from the house. One of the robbers was carrying a gun and the other robber was holding his chest. He then observed the defendant, who was wearing a mask and carrying a gun, stumble out of the house and collapse.

The defendant argues that because there is no evidence that the defendant intended that Ed Cody be murdered, and there was no evidence that he aided or abetted in the attempted murder of Ed Cody, he cannot be held criminally responsible for the crime as a principal.

In support of his argument, the defendant and the dissent rely upon three cases decided by the Second District Court of Appeal, *Giniebra v. State*, 787 So. 2d 51 (Fla. 2d DCA2001), *Hedgeman v. State*, 661 So. 2d 87 (Fla. 2d DCA1995), and *Collins v. State*, 438 So. 2d 1036 (Fla. 2d DCA1983). None of these cases, however, addresses the issue presented in this case, and, therefore, do not apply. In the instant case, the State argued that the attempted murder of Ed Cody was committed in furtherance and during the commission of the attempted armed robbery of Ed Cody. No such argument was made in *Giniebra*, nor did the Second District analyze the case under this theory of law. In *Hedgeman*, there was no underlying felony, and in *Collins*, the defendant's convictions were reversed because no one could identify the defendant or his car as being involved in the crimes committed.

{990 So. 2d 1103} Giniebra was convicted of kidnapping and second degree murder. The Second District Court of Appeal reversed the murder conviction, finding that there was no evidence presented that Giniebra intended or participated in the victim's murder, and that the evidence, viewed in the light most favorable to the State, was that Giniebra was merely present at the scene. The District Court did not address, nor does it appear that it was even argued, that the murder was committed in furtherance of the kidnapping. In fact, the State's theory of the case was that the

victim was murdered by drug suppliers after the victim, acting as a middleman between the suppliers and another man named Williams, consummated the deal with fake money given to him by Williams. There was no evidence presented that Giniebra was involved in the drug transaction. The murder was committed as a consequence of the drug transaction, to which Giniebra was neither charged with nor implicated in. *Giniebra*, therefore, is inapplicable as Barron was charged with and convicted of committing the underlying felony of attempted armed robbery and the attempted murder was committed during the commission and in furtherance of the attempted armed robbery.

Hedgeman is equally unavailing, as Hedgeman was only charged with second degree murder. There was no other felony involved. The murder was clearly not committed during the commission or in furtherance of an underlying felony. This is an important and critical distinction because, since the murder was not committed during the commission of a separate felony that the defendant intended to commit and/or assisted others to commit, the State was required to prove that the defendant intended to commit the *murder* and did something in furtherance of and/or to assist others to commit the murder. *Hedgeman* is inapplicable because in the instant case, Barron was charged with and convicted of committing the underlying felony of attempted armed robbery, and the attempted murder of Ed Cody was committed during the commission and in furtherance of the attempted armed robbery, a distinction ignored by the defendant and the dissent.

The third case relied upon by the defendant and the dissent is *Collins*. *Collins* held that:

[T]o be guilty of a crime physically committed by another, [the defendant] must not only have the conscious intent that the criminal act be committed, but he must also do some act to assist the other person to actually commit the crime. Mere knowledge that an offense is being committed is not the same as participation with criminal intent, and mere presence at the scene, including

driving the perpetrator to and from the scene or a display of questionable behavior after the fact, is not sufficient to establish participation.*Collins*, 438 So. 2d at 1038 (citations omitted).

In *Collins*, the defendant was charged with burglary and theft of a Winn-Dixie store. The State claimed that while Collins was not the person who broke into the store or took items from inside the store, he aided and abetted the co-defendant by transporting the co-defendant to the store and serving as a "look-out." The co-defendant was arrested on the scene with the stolen property. Based upon a description of a car seen in the area, Collins was stopped and subsequently identified by an eyewitness to the crime. The problem was that the eyewitness recanted his identification at trial and testified that, because the lights in the parking lot were dim, he could not say for sure whether he had seen Collins or his vehicle outside the store that {990 So. 2d 1104} night. The Second District Court of Appeal, therefore, reversed the convictions because Collins was not identified at trial as the driver of the vehicle and there was insufficient evidence to exclude Collins' reasonable hypothesis of innocence (Collins claimed he was out that night to buy milk). *Collins*, therefore, is not relevant to the analysis of whether the defendant in our case can be held responsible for the attempted second degree murder of Ed Cody, which was committed during the commission and in furtherance of the attempted armed robbery of Ed Cody.

In contrast to these cases decided by the Second District Court and relied upon by the defendant and the dissent, *Giniebra*, where no evidence was presented nor argument made that the murder was committed in the course or in furtherance of the kidnapping; *Hedgeman*, where there was no underlying felony; and *Collins*, where the issue was the insufficiency of the evidence to link the defendant to the crimes committed, are the cases decided by the Florida Supreme Court and this court that specifically address the issue we are faced with, whether co-felons may be held criminally responsible for the acts of co-perpetrators committed during the course or in furtherance of their initial criminal purpose.

Felons are generally held responsible for the acts of their co-felons. *Adams v. State*, 341 So. 2d 765 (Fla. 1976). "As perpetrators of an underlying felony, co-felons are principals in any homicide committed to further or prosecute the initial common criminal design." *Lovette v. State*, 636 So. 2d 1304, 1306 (Fla. 1994). "'One who participates with another in a common criminal scheme is guilty of all crimes committed in furtherance of that scheme regardless of whether he or she physically participates in that crime.'" *Id.* at 1306 (emphasis added)(quoting *Jacobs v. State*, 396 So. 2d 713, 716 (Fla. 1981)). On the other hand, "an act in which a defendant does not participate and which is 'outside of and foreign to, the common design' of the original felonious collaboration may not be used to implicate the non-participant in the act." *Parker v. State*, 458 So. 2d 750, 752 (Fla. 1984)(quoting *Bryant v. State*, 412 So. 2d 347, 349 (Fla. 1982)).

Thus, our examination in this case focuses on whether the attempted murder of Ed Cody was committed in furtherance of the initial common design or purpose, or whether the shooting constituted an independent act outside of and foreign to the original criminal scheme. The issue is not whether the defendant participated or was even present when the attempted murder of Ed Cody took place nor, as the dissent claims, that the defendant must have planned to kill Ed Cody with his cohorts or aided them in some manner to commit the deed. The issue is, instead, as the jury found the defendant guilty of the common scheme or design to commit an armed robbery, whether the shooting of Ed Cody was in furtherance of that crime or an independent act to which there was no causal connection.

In *Parker*, the Florida Supreme Court upheld Parker's conviction for the murder of the victim, which was committed by the co-defendant, even though Parker claimed that the killing was an independent act for which he should not be held criminally responsible. The Florida Supreme Court found that since Parker was a principal of the *underlying criminal purpose* (the kidnapping of the victim when he failed to pay a drug debt), he was a principal in the homicide which was committed during the course of the criminal enterprise. The Court concluded that "[t]he murder was a natural and foreseeable culmination of the motivations for the original kidnapping" {990 So.

2d 1105} and "[a]s a principal to the kidnapping, Parker [was] a perpetrator of the underlying felony and thus a principal in the homicide." *Id.* at 753 (citing *Goodwin v. State*, 405 So. 2d 170 (Fla. 1981)).

In *Lovette v. State*, 636 So. 2d 1304 (Fla. 1994), the defendant and Thomas Wyatt escaped from prison. During their crime spree, they committed an armed robbery of a Domino's pizza store. Wyatt shot and killed the manager, the manager's wife, and a delivery man. The defendant claimed that he believed Wyatt was going to lock the three victims in a closet so that they could make their getaway, but instead, while Wyatt was with them in a back room of the store, he killed them. The Florida Supreme Court concluded that while "Lovette did not fire the shots that killed the victims, he was a willing participant in the armed robbery of the store," and *because there was a causal connection between the robbery and the homicides, the evidence did not support an independent-acts theory of defense and the defendant was properly convicted as a principal to these murders.* *Id.* at 1307.

Likewise, in *Ray v. State*, 755 So. 2d 604 (Fla. 2000), the Florida Supreme Court upheld the defendant's convictions for first degree murder, robbery, and grand theft, even though the murder was committed by a co-defendant. The defendant, Terry Paul Ray, and the co-defendant planned and committed an armed robbery of a liquor store. After robbing the store, they left the scene but were forced to pull off of the road when the pickup truck they were traveling in developed mechanical problems. Deputy Lindsey stopped to investigate and was subsequently killed by the co-defendant. While the Court recognized that a defendant may escape punishment for acts committed by a co-felon "'which fall outside of, and are foreign to, the common design of the original collaboration,'" *Ray*, 755 So. 2d at 609 (quoting *Dell v. State*, 661 So. 2d 1305, 1306 (Fla. 3d DCA1995)(quoting *Ward v. State*, 568 So. 2d 452 (Fla. 3d DCA1990))), it concluded that since "both Ray and [the co-defendant] were participants in the robbery and the murder resulted from forces they set in motion," Ray was equally responsible for the murder. *Ray*, 755 So. 2d at 609 (emphasis added). Because the killing of Deputy Lindsey occurred while Ray and the co-defendant were

fleeing from the robbery, the Florida Supreme Court found that the criminal episode had not ceased. "As we have previously held, the term 'during the course of a robbery' encompasses the period of time when the felons are in flight from the scene of the crime." *Id.* (citing *Griffin v. State*, 639 So. 2d 966 (Fla. 1994)).

In the instant case, the jury found the defendant guilty of attempted armed robbery. The evidence established that the defendant, the other three gunmen, and the woman who was used to lure Ed Cody outside, were all participants in the common scheme to rob Ed Cody. While one of the gunmen held Ed Cody at gunpoint outside, the defendant and the other gunmen went into the Cody home and began rifling through Cody's belongings in an effort to carry out their scheme. Ed Cody's son, Derrick, who was hiding in the bathroom, began shooting at them, causing the defendant, who had been shot, and the other two gunmen who had accompanied him inside the house to commit the robbery, to flee. Meanwhile, the fourth gunman, who was guarding Ed Cody and attempting to place handcuffs on his hands, shot Ed Cody in the back after he broke away and attempted to reach his son in the house. Thus, the evidence clearly establishes that the shooting occurred during the course of the robbery. "A killing in the face of either verbal or physical resistance {990 So. 2d 1106} by a victim is properly viewed as being within the original criminal design." *Jones v. State*, 804 So. 2d 551, 552 (Fla. 3d DCA2002)(emphasis added); *see also Lovette*, 636 So. 2d at 1306-07. As the attempted murder of Ed Cody occurred while he was attempting to resist during the commission of the attempted robbery, we conclude, as we did in *Jones*, that the shooting fell within the original criminal design and thus, the shooting did not constitute an independent criminal act.

Additionally, we conclude that the attempted murder of Ed Cody was committed in furtherance of the attempted robbery, as it occurred while the defendant and his co-conspirators and partners-in-crime were attempting to flee the attempted robbery and/or was committed after the female co-perpetrator ordered one of the gunmen to shoot Cody because he had seen her face. *See Perez v. State*, 711 So. 2d 1215, 1217 (Fla. 3d DCA1998) (holding that as the defendant was a willing

participant in the armed robbery, the murder of an innocent bystander, who was killed during a shoot-out with the store owner as the perpetrators were attempting to flee the scene of the robbery, was committed in furtherance of the robbery, and a causal connection existed between the robbery and the homicide of the bystander since it enabled the perpetrators to flee the scene). The shooting of Ed Cody allowed the co-perpetrators to flee the scene without meeting further resistance from Cody, who, as a result of being shot, was paralyzed and unable to resist. While the defendant was unable to flee with his companions due to his injuries, we conclude that his incapacitating injuries were fortuitous and will not shield him from criminal responsibility for acts committed in furtherance of his criminal purpose. *See Hall v. State*, 403 So. 2d 1321 (Fla. 1981) (decedent's unexpected use of a gun in the robbery was not an intervening act as a matter of law); *Dell*, 661 So. 2d at 1306-07 (holding that the murder of a clerk during an armed robbery of a 7-Eleven store by a co-perpetrator after the defendant had exited the store, was in furtherance of the robbery, not an independent act, as the shooting was an effort to eliminate an eyewitness to the robbery); *Diaz v. State*, 600 So. 2d 529, 530 (Fla. 3d DCA1992)("Diaz was [] clearly liable for any acts, whether he knew of them ahead of time or not, committed by an accomplice in the furtherance of that offense."); *Gonzalez v. State*, 503 So. 2d 425, 427 (Fla. 3d DCA1987) ("[The defendant], by intending to aid the perpetrator in the robbery, is guilty of crimes committed in furtherance of the scheme."). As the attempted murder of Ed Cody occurred "during the course of the attempted robbery;" was in response to his resistance; made it easier for the co-perpetrators to effectuate their escape; and was done to eliminate an eyewitness to the common criminal purpose and design of the perpetrators, we conclude that the evidence was sufficient to hold him criminally liable as a principal for the attempted second degree murder of Ed Cody.

We further note that the defendant's defense at trial was not that he had withdrawn from the criminal activity of his co-perpetrators and that the shooting of Ed Cody was an independent act for which he should not be held responsible. He claimed, rather, that he had not been involved in any of the criminal activities at the Cody home. It is clear that the jury rejected that defense which conflicted with both the testimonial and physical evidence presented.

The dissent incorrectly posits that it is the majority's position that because the attempted murder of Ed Cody was committed during the course and in furtherance of the attempt to rob Ed Cody, that the defendant is guilty of attempted second {990 So. 2d 1107} degree felony murder. The dissent, however, misunderstands both the majority's findings and the law regarding second degree felony murder and attempted second degree felony murder. That is *not* the majority's position, nor do the facts or the law support such a finding. The defendant was properly convicted of attempted second degree murder, not attempted second degree felony murder.

In order to be guilty of the crime of either the attempt or the completed act of second degree felony murder, the person who kills or attempts to kill the victim must be someone who *was not involved* in the underlying felony. *See* 782.04(3), Fla. Stat. (2003). That was the situation regarding the death of the co-perpetrator, who was shot and killed by Ed Cody's son, who was not a co-perpetrator in the attempted armed robbery. The defendant was guilty as a principal of the second degree felony murder of his partner-in-crime by Ed Cody's son. That conviction is not in dispute by either the defendant or the dissent.

The defendant was properly convicted of the attempted second degree murder of Ed Cody, which is governed by section 782.04(2), *not* section 782.04(3), Florida Statutes (2003), which contains very different elements than second degree felony murder. By the jury's verdict, it is clear that the jury concluded that the attempted murder of Ed Cody was *not* planned in advance. It was not premeditated. Thus, the attempted murder was an attempted second degree murder, and because the defendant was a co-perpetrator in the commission of the attempted armed robbery, and the attempted killing of Ed Cody was during the commission and in furtherance of the attempted armed robbery, not outside of or foreign to their criminal purpose, the defendant was also guilty as a principal to that attempted murder.

It is also *not* the majority's position that because the shooting of Ed Cody occurred during the attempted robbery, that the defendant was guilty of attempted second degree murder as a matter of law. The issue is clearly one which must be resolved by the jury. There must be a causal connection between the two, *Lovette*, 636 So. 2d at 1304; the attempted murder cannot be foreign to the common scheme of the original collaboration, *Dell*, 661 So. 2d at 1306; and the attempted murder must have resulted from forces the defendant and his co-perpetrators set in motion, *Ray*, 755 So. 2d at 609. The jury answered these questions adverse to the defendant and the evidence clearly supports the jury findings.

We additionally take issue with the following statement made by the dissent:

There is no evidence defendant intended the shooting or that defendant undertook any act to assist the shooter to commit the attempted murder. This crime could just as easily have been developed and executed at a separate time or place. Mere coincidence of time and place--the only connections of this crime to the robbery--is insufficient to convict defendant of second-degree murder as a co-principal of the crime committed by the shooter and woman decoy under the theory of liability advanced by the State in this case.The evidence was undisputed that Ed Cody, the *victim* of the robbery, was shot *during* the robbery after Ed Cody *resisted* their attempts to *restrain* him after he heard shots fired in the house where his son was located and when Cody attempted to reach him. The shooting was not a "mere coincidence of time and place." It was directly related to the attempted robbery and as a consequence of the attempted robbery, because the defendant and the man who shot Ed Cody "were participants {990 So. 2d 1108} in the [attempted] robbery and the [attempted] murder resulted from forces they set in motion." *Ray*, 755 So. 2d at 609. A co-perpetrator of the attempted robbery, which the defendant helped plan and commit, shot Ed Cody. Cody was the actual target of their common scheme and/or plan to commit armed robbery, and he was shot during the course of the attempted robbery. He was not some stranger unrelated to the common scheme or plan to rob Ed Cody. Ed Cody was shot because he had seen their faces and had tried to escape in an effort to reach his son, who he believed had

been shot by the robbers during their attempt to commit the robbery. Thus, the defendant was equally responsible for the shooting.

The dissent also suggests that because *Ray*, *Lovette*, *Parker*, *Hall*, *Jones*, *Dell*, and *Perez* are all first degree murder cases, they do not apply to the instant case because the defendant was convicted of attempted second degree murder. We must respectfully disagree. The following are examples where these same principles were applied to convictions of second degree murder. In *Williams v. State*, 261 So. 2d 855 (Fla. 3d DCA1972), this court affirmed the defendant's conviction for second degree murder where the co-perpetrator shot and killed the victim during the commission of a robbery that both the defendant and co-perpetrator had planned to commit. Likewise, in *Staten v. State*, 519 So. 2d 622 (Fla. 1988), the Florida Supreme Court affirmed Staten's convictions for second degree murder, armed robbery, and aggravated battery, 2 finding sufficient evidence to sustain Staten's convictions as a principal. The court found that Staten, who helped plan the robbery of a drug dealer, was properly convicted as a principal to the second degree murder of the drug dealer who was shot and killed during the robbery, and the aggravated battery of a bystander who was also shot during the robbery, even though Staten, who served as the get away driver, remained in the car. *See also Hampton v. State*, 336 So. 2d 378 (Fla. 1st DCA1976) (affirming defendant's convictions for assault with intent to commit robbery (attempted robbery) and for an assault with intent to commit murder in the second degree (attempted second degree murder)).

Therefore, it is clear that the principal theory of prosecution may be applied regardless of whether the shooting was premeditated or not and regardless of whether the victim lives or dies. "One who participates with another in a common criminal scheme is guilty of all crimes committed in furtherance of that scheme," *Lovette*, 636 So. 2d at 1306 (quoting *Jacobs v. State*, 396 So. 2d 713, 716 (Fla. 1981), unless the acts committed by a co-perpetrator "fall outside of, and are foreign to, the common design of the original collaboration." *Ray*, 755 So. 2d at 609 (quoting *Dell v. State*,

661 So. 2d 1305, 1306 (Fla. 3d DCA1995) (quoting *Ward v. State*, 568 So. 2d 452 (Fla. 3d DCA1990))).

As the remaining issues raised are without merit, we need not specifically address them.

Affirmed.

LEVY, Senior Judge, concurs.

Concur

Concur by: SHEPHERD (In Part)

Dissent

Dissent by: SHEPHERD (In Part)

SHEPHERD, J., concurring in part and dissenting in part.

I concur in the opinion of the majority affirming the introduction of the 911 calls {990 So. 2d 1109} into evidence in this case, as well as the denial of the defendant's motion to compel the State to provide the DEA investigation files. I respectfully disagree with the majority's decision to affirm defendant's conviction of attempted second-degree murder.

As the majority correctly states, the State charged defendant with attempted first-degree murder with a deadly weapon for the crime committed on Ed Cody. *See* 782.04(1)(first degree murder); 775.087, Fla. Stat. (2000)(possession of a deadly weapon in the commission of a felony). But because everyone admitted defendant was not the shooter, the State necessarily had to do more to secure a conviction against defendant. *G.C. v. State*, 407 So. 2d 639, 640 (Fla. 3d DCA1981)

("Presence at the scene, without more, is not sufficient to establish either intent to participate or act of participation."). The theory the State selected to hold defendant responsible for the criminal act of the actual shooter was "principal liability" under section 777.011 of the Florida Statutes (2000). Under statutory principal liability in Florida, a principal can include not only the actual actor responsible for the crime, but also, in some cases, a non-participant to the actual act. The statute reads as follows in full:

777.011 Principal in first degree.---Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he or she is or is not actually or constructively present at the commission of such offense. 777.011, Fla. Stat. (2006)(emphasis added); *Staten v. State*, 519 So. 2d 622, 624 (Fla. 1988)("Under our law, both the actor and those who aid and abet in the commission of a crime are principals in the first degree.").

Principal liability has long been interpreted by our supreme court to consist of two elements: (1) the defendant "must intend that the crime be committed;" and (2) the defendant "[must] do some act to assist the other person in actually committing the crime." *Staten*, 519 So. 2d at 624 (citing *Ryals v. State*, 112 Fla. 4, 150 So. 132 (Fla. 1933)). It also is settled that the "criminal offense" referenced in section 777.011 is the criminal offense for which the defendant is sought to be convicted--in this case, the attempted murder of Ed Cody--rather than any underlying offense that may be associated with or have precipitated the charged offense. *See, e.g., Watkins v. State*, 826 So. 2d 471, 475 (Fla. 1st DCA2002)(evidence that the defendant uttered [a counterfeit] check insufficient to convict defendant "as a principal to [underlying, separate and distinct crime of] forgery"); *Mickenberg v. State*, 640 So. 2d 1210, 1211 (Fla. 2d DCA1994)(evidence that a person aided and abetted another in the commission of an offense, although sufficient to convict the person as a principal to that offense is insufficient to convict the person of a conspiracy to commit the subject offense).

In this case, the jury found defendant guilty of three crimes: attempted armed robbery, second-degree felony murder for the shooting death of a co-perpetrator, and attempted second-degree murder of Ed Cody. The verdicts on the first two of these crimes are sustainable because they either were indisputably part of the common plan (the robbery) or, legally speaking, a reasonably foreseeable consequence of carrying out the plan (the second-degree {990 So. 2d 1110} felony murder for the shooting death of the co-perpetrator). *See United States v. Carter*, 144 U.S. App. D.C. 193, 445 F.2d 669, 673 (D.C. Cir. 1971)(finding the defendant guilty of first-degree felony murder by co-felon of victim cab driver during the course of a robbery); *see also State v. Smith*, 748 So. 2d 1139, 1143 (La. 1999) (shooting of robbery victim deemed one of the "foreseeable consequences of carrying out the plan" making co-felons guilty of felony murder). On the other hand, as clearly demonstrated by the trial testimony, the shooting of Cody was part of a different plan conceived by the woman decoy with its own purpose--to prevent Cody from later being able to identify her. In Cody's own words:

[A]s soon as the other guys run into the front door, I said, oh, my God. They are in the house.

And I heard four gun shots. . . . And the first thing I did was, oh, my God. They killed my son. And I said, man, you killed my son. My son is in there. I said, I got to go. Just leave. Just leave. I got to go.

And I broke to run towards the house. My first concern, my only concern, was for Derrick.

So as I started to run from the house, the girl screamed to the guy, kill him, kill that son-of-a-bitch. He saw my face.

And he said, and I will never forget these words. He said, ["]I will put him in a wheelchair.["] That was the only words he spoke. (Emphasis added.)

Q: Who said that, the driver?

A: The driver.

Then he fired twice. I didn't hear the gunshots, but could smell the gunpowder.

Applying section 777.011 to this crime, the attempted murderer was the shooter; the woman who exhorted the shooter to shoot was a principal. Defendant is not liable under either theory. At the time the plan to shoot Cody was developed and executed, defendant was either in the house or on the ground holding his bleeding neck. There is no evidence defendant intended the shooting or that defendant undertook any act to assist the shooter to commit the attempted murder. This crime could just as easily have been developed and executed at a separate time or place. Mere coincidence of time and place--the only connections of this crime to the robbery--is insufficient to convict defendant of second-degree murder as a co-principal of the crime committed by the shooter and woman decoy under the theory of liability advanced by the State in this case. Three recent Second District Court of Appeal decisions compel this result: *Giniebra v. State*, 787 So. 2d 51 (Fla. 2d DCA2001); *Hedgeman v. State*, 661 So. 2d 87 (Fla. 2d DCA1995); and *Collins v. State*, 438 So. 2d 1036 (Fla. 2d DCA1983).

In *Giniebra*, the Second District reversed a jury decision that Giniebra should suffer principal liability for second-degree murder of Wooding, a co-worker, who, while serving as the intermediary between the buyer of cocaine and Giniebra as the seller, delivered less than the purchase price of the product to Giniebra. *Giniebra*, 787 So. 2d at 52. Giniebra kidnapped Wooding and delivered him to some of his confederates. *Id.* One of them killed Wooding. *Id.* The only testimony connecting Giniebra to the shooting was Giniebra's statement to an FBI agent after his arrest, "I was there but didn't shoot anybody." *Id.* at 53. Reversing the conviction for second-degree murder, the Second District Court of Appeal stated:

To convict as a principal, the State must show that Giniebra intended the crime {990 So. 2d 1111} to be committed and assisted the actual perpetrator in committing the crime. The record contains no evidence that Giniebra intended or participated in Wooding's murder. In the light most favorable to the State, the record shows, at most, that Giniebra was at [the same location as Wooding]. Mere presence at the scene or knowledge that an offense is being committed is insufficient to convict.*Id.* (internal citations omitted). Just as the evidence was insufficient for a jury to conclude that Giniebra, while present at the scene, intended that Wooding be murdered or participated in the deed, similarly, here, there is insufficient evidence for a jury to conclude defendant, while also present at the scene, intended that Cody be shot, or that he aided, abetted, or participated in the shooting.

Hedgeman also is instructive. Like defendant in our case, Hedgeman appealed a second-degree murder conviction, arguing that his motion for judgment of acquittal should have been granted because of insufficient evidence. *Hedgeman*, 661 So. 2d at 88. Like defendant, Hedgeman was indicted for murder in the first degree. *Id.* The State prosecuted Hedgeman for both first-degree premeditated murder and felony murder. *Id.* The trial testimony showed that the victim owed Hedgeman ten dollars. *Id.* There were prior altercations over the debt in which Hedgeman stated he was going to get the victim. *Id.* On the night the victim was killed, Hedgeman accompanied Daniel White and two other males to a neighbor's apartment where the victim was visiting. *Id.* White entered the apartment and shot the victim three times. *Id.* Hedgeman either was behind White or entered the apartment immediately after the shooting. *Id.* Hedgeman walked over to and kicked the victim. *Id.* The Second District stated:

In light of the lack of evidence to establish that Hedgman knew of White's intent to kill the victim and that he took action to aid him in the act, there was not sufficient evidence to convict Hedgeman of second-degree murder on the principal theory.*Id.* at 88-89 . Of note, the court stated, "Hedgeman could not have been convicted of second-degree felony murder because the killing was committed by a principal." *Id.* at 88. Similarly, here, there is no evidence defendant knew of the driver's intent to shoot Cody or that defendant intended the shooting be committed. There is

no evidence defendant took any action before or during the shooting to aid, encourage, or participate in the driver's act of shooting the victim.

Finally, in *Collins*, a security guard for a neighboring business observed a vehicle drive to the front of a store at 1:40 a.m. and drop off an individual named Alvin Scott, who had a crowbar in hand. *Collins*, 438 So. 2d at 1037 . The vehicle returned sometime later, approximately thirty seconds before the police arrived, but left without Scott. Scott was arrested for burglary, and Collins, who allegedly had dropped Scott at the store, was stopped and arrested nearby. *Id.* The State sought to inflict principal liability on Collins for the burglary. *Id.* At the close of the State's case-in-chief, Collins moved for judgment of acquittal in part based upon the ground that no evidence had been presented to indicate Collins' involvement beyond his alleged presence at the scene. *Id.* The trial court denied the motion, but the Second District reversed, stating:

[W]e agree with defense counsel's argument that there was no evidence of any relationship between appellant and Scott to indicate that appellant knew Scott, was aware of Scott's activities, or did something, other than merely being {990 So. 2d 1112} present in the vicinity, by which appellant intended to help commit the burglary. . . . [F]or one to be guilty of a crime physically committed by another, he must not only have the conscious intent that the criminal act be committed, but he must also do some act to assist the other person to actually commit the crime. Mere knowledge that an offense is being committed is not the same as participation with criminal intent, and mere presence at the scene, including driving the perpetrator to and from the scene or a display of questionable behavior after the fact, is not sufficient to establish participation.*Id.* at 1037-38 (internal citations omitted). The Second District further stated:

As there was nothing truly to connect appellant with the crime or to exclude his reasonable hypothesis of innocence, we hold that appellant's alleged behavior on the night Scott attempted to burglarize the [store] provides insufficient evidence to sustain appellant's convictions and those convictions are, therefore, reversed.*Id.* at 1038 (emphasis added). Here, defendant's hypothesis of innocence is that he neither intended that Cody be shot for the benefit of the woman decoy nor

took any action to further the shooting. The State offered no evidence to refute this hypothesis. 3

3

Although not supported by record evidence, the majority does offer *passim* alternate hypotheses of its own for the shooting of Cody, including that the shooting "was in response to [Cody's] resistance" and "made it easier for the co-perpetrators to effectuate their escape." *See supra* majority at 18. However, these inferences--none argued by the State-are legally insufficient to sustain defendant's attempted second-degree murder conviction. *See Collins*, 438 So. 2d at 1038 ("Where two or more inferences in regard to the existence of criminal intent and criminal acts must be drawn from the evidence and then pyramided to prove the offense charged, the evidence lacks the conclusive nature to support the conviction."). The legally offending inferences that would need to be drawn by the majority are: (1) defendant knew at the outset that the unidentified shooter planned to shoot, or had been instructed to shoot Ed Cody for the benefit of the decoy woman; and (2) defendant intended to actively assist in the intended shooting.

As I read the majority opinion, the majority is of the view that because the attempted murder of Cody occurred during the course of the robbery, the decision by the shooter to seek to silence Cody at the request of the woman decoy must be imputed to the defendant as a matter of law. Although the majority bridles at the thought, its affirmance of the attempted second-degree murder conviction of defendant for the shooting of Cody is, in actuality, a disguised affirmance on the basis of a crime not charged -- attempted second degree felony murder. The fact that the majority reasons almost exclusively from a potpourri of authorities treating persons convicted of felony murder, *see Jones v. State*, 804 So. 2d 551, 552 (Fla. 3d DCA2002) (affirming conviction for first-degree felony murder); *Ray v. State*, 755 So. 2d 604, 608 (Fla. 2000)(affirming a conviction for first-degree felony murder); *Perez v. State*, 711 So. 2d 1215, 1217 (Fla. 3d DCA1998)(affirming a conviction for first-degree felony murder); *Dell v. State*, 661 So. 2d 1305, 1305 (Fla. 3d DCA1995)(affirming a conviction for first degree felony murder); *Griffin v. State*, 639 So. 2d 966, 971 (Fla. 1994)(affirming a conviction for first-degree felony murder and attempted first degree murder); *Lovette v. State*, 636 So. 2d 1304, 1307 (Fla. 1994)(affirming three convictions for first-degree felony murder); *Diaz v. State*, 600 So. 2d 529, 529 (Fla. 3d DCA1992)(affirming a conviction

for second-degree felony murder); *Gonzalez v. State*, 503 So. 2d 425, 426 (Fla. 3d DCA1987)(affirming a conviction for first-degree {990 So. 2d 1113} felony murder); *Parker v. State*, 458 So. 2d 750, 753 (Fla. 1984) (affirming a conviction for first-degree felony murder); *Bryant v. State*, 412 So. 2d 347, 350 (Fla. 1982)(affirming a conviction for first-degree felony murder); *Goodwin v. State*, 405 So. 2d 170, 172 (Fla. 1981)(affirming a conviction for first-degree felony murder); *Adams v. State*, 341 So. 2d 765, 767 (Fla. 1976)(affirming a conviction for first-degree felony murder), confirms this view. 4

4

Admittedly, the majority does sprinkle into this sea of irrelevant authority a scattering of principal liability cases which it suggests call for affirmance of defendant's attempted second-degree murder conviction. However, a casual examination of these cases confirms instead that reversal is required. For example, in *Staten v. State*, 519 So. 2d 622, 624 (Fla. 1988), *supra* majority at 21, the Florida Supreme Court affirmed the conviction of Susan Staten as a principal in the first degree within the meaning of section 777.011 of the Florida Statutes for the commission of the crime of robbery where, contrary to the facts supporting the charged crime in the instant case, "there was direct testimony that [she] was present on numerous occasions when the crime was planned, [t]here was further discussion as the group, including [Staten] drove to the scene, [she] waited across the street while the robbery and murder took place, and then drove the getaway car." Likewise, in *Hall v. State*, 403 So. 2d 1321 (Fla. 1981), *supra* majority at p. 17, the court affirmed the conviction of Hall as a principal where Hall drove the victim to a secluded area and "[t]he evidence show[ed] that either Hall or [co-defendant] killed [the victim]" and also "demonstrate[d] that the other was an aider and abettor." Similarly, in *Hampton v. State*, 336 So. 2d 378 (Fla. 1st DCA1976), *supra* majority at 21, the First District Court of Appeal affirmed the robbery conviction of Hampton conviction under the predecessor statute, section 776.011, Fla. Stat. (1973), for "aiding and abetting" the crime of robbery where it was undisputed that he accompanied two others to the robbery site, positioned himself as a lookout outside the store, and shot into the store near the victim as the perpetrators left the scene. Further, in *Jacobs v. State*, 396 So. 2d 713, 716 (Fla. 1981), *supra* majority at 12, the court affirmed a principal theory for

kidnapping where the defendant, in furtherance of the kidnapping, participated in a murder and coerced the victim into a car. Finally, in *Williams v. State*, 261 So. 2d 855 (Fla. 3d DCA1972), *supra* majority at 20, this court affirmed the conviction of Williams for "aiding and abetting" the killing of a store clerk, which occurred while Williams physically restrained the victim as agreed while his confederate emptied the victim's pockets and shot him.

In contrast, there was no plan or intent to shoot Cody for the benefit of the woman decoy prior to the decision of the shooter to do so at her behest and for her benefit during the course of the robbery. The fact that the jury found defendant guilty of second-degree murder rather than first-degree murder as charged confirms this fact. *See* 782.04(2), Fla. Stat. (2000)("The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, is murder in the second degree . . . .")(emphasis added). Nor, of course, did defendant "do [any] act to assist [the shooter]," as required for conviction of the crime charged. *See supra* majority at 25. Finally, and perhaps most illuminating, the convictions in each of these principal liability cases was, in stark contrast to the rationale of the affirming majority in the instant case, properly based upon "the criminal offense for which the defendant [was] sought to be convicted." *Id.*

However, the majority's use of a second-degree felony murder theory and supporting case law is irrelevant to the issue presently under discussion because the crime of second-degree felony murder is a separate statutory crime not charged here. *See* 782.051(1). *United States v. Lacher*, 134 U.S. 624, 628, 10 S. Ct. 625, 33 L. Ed. 1080 (1890)("before a man can be punished, his case must be plainly and unmistakably within the statute [charged]"). More significantly, under section 782.051(1), an attempted felony-murder conviction requires proof not only that the defendant participated in the underlying crime, but also that the defendant "commit[ted] {990 So. 2d 1114} (or aids and abets) an intentional act that is not an essential element of the [underlying] felony. *Id.* (emphasis added); *Battle v. State*, 911 So. 2d 85, 87 (Fla. 2005); *King v. State*, 800 So. 2d 734, 739 (Fla. 5th DCA2001). In this case, the evidence is undisputed that defendant did not and likely was not even in a position to aid, abet, or assist in the crime against Cody. It is not

surprising the State elected not to pursue an imputation based theory in the trial court. The majority errs in affirming on this theory in this case.

I would reverse the conviction for attempted second-degree murder.

Footnotes

1

Counts II and IV were ultimately vacated by the trial court.

2

Staten's convictions of accessory after the fact were, however, reversed because the Court concluded that Staten's convictions as a principal precluded additional convictions as an accessory after the fact to the same crimes.

3

Although not supported by record evidence, the majority does offer *passim* alternate hypotheses of its own for the shooting of Cody, including that the shooting "was in response to [Cody's] resistance" and "made it easier for the co-perpetrators to effectuate their escape." *See supra* majority at 18. However, these inferences--none argued by the State-are legally insufficient to sustain defendant's attempted second-degree murder conviction. *See Collins*, 438 So. 2d at 1038 ("Where two or more inferences in regard to the existence of criminal intent and criminal acts must be drawn from the evidence and then pyramided to prove the offense charged, the evidence lacks the conclusive nature to support the conviction."). The legally offending inferences that would need to be drawn by the majority are: (1) defendant knew at the outset that the unidentified shooter planned to shoot, or had been instructed to shoot Ed Cody for the benefit of the decoy woman; and (2) defendant intended to actively assist in the intended shooting.

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robbery. The fact that the jury found defendant guilty of second-degree murder rather than first-degree murder as charged confirms this fact. *See* 782.04(2), Fla. Stat. (2000)("The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, is murder in the second degree . . . .")(emphasis added). Nor, of course, did defendant "do [any] act to assist [the shooter]," as required for conviction of the crime charged. *See supra* majority at 25. Finally, and perhaps most illuminating, the convictions in each of these principal liability cases was, in stark contrast to the rationale of the affirming majority in the instant case, properly based upon "the criminal offense for which the defendant [was] sought to be convicted." *Id.*

APPENDIX "I"

JOHN LEE BARRON, Petitioner(s) vs. STATE OF FLORIDA, Respondent(s)

SUPREME COURT OF FLORIDA

11 So 3d 35511 So. 3d 355; 2009 Fla LEXIS 8262009 Fla. LEXIS 826

CASE NO.: SC08-2156

May 21, 2009, Decided

Notice:

DECISION WITHOUT PUBLISHED OPINION

Editorial Information: Prior History

Lower Tribunal No(s).: 3D03-2689.Barron v. State, 990 So. 2d 1098, 2007 Fla. App. LEXIS 13007 (Fla. Dist. Ct. App. 3d Dist., Aug. 22, 2007)

Judges: QUINCE, C.J., and PARIENTE, LEWIS, POLSTON, and LABARGA, JJ., concur.Opinion

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

QUINCE, C.J., and PARIENTE, LEWIS, POLSTON, and LABARGA, JJ., concur.11 So. 3d 356::Fla. Bar v. Fox::May 20, 2009

APPENDIX "J"

John Lee Barron, Appellant, vs. The State of Florida, Appellee.

COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

100 So 3d 230100 So. 3d 230; 2012 Fla App LEXIS 188812012 Fla. App. LEXIS 18881; 37 Fla L Weekly D 255437 Fla. L. Weekly D 2554

No. 3D12-1301

October 31, 2012, Opinion Filed

Editorial Information: Subsequent History

Released for Publication November 30, 2012.Rehearing denied by Barron v. State, 2012 Fla. App. LEXIS 20926 (Fla. Dist. Ct. App. 3d Dist., Nov. 30, 2012)

Editorial Information: Prior History

An Appeal under Florida Rule of Appellate Procedure 9.141(b)(2) from the Circuit Court for Miami-Dade County. Lower Tribunal No. 00-28348 A. Beth Bloom, Judge.Barron v. State, 990 So. 2d 1098, 2007 Fla. App. LEXIS 13007 (Fla. Dist. Ct. App. 3d Dist., Aug. 22, 2007)

Counsel John Lee Barron, in proper person.

Pamela Jo Bondi, Attorney General, and Jill D. Kramer, Assistant Attorney General, for appellee.

Judges: Before WELLS, C.J., and SHEPHERD and LAGOA, JJ.Opinion

{100 So. 3d 231} Per Curiam.

This is an appeal of an order summarily denying a motion under Florida Rule of Criminal Procedure 3.850. On appeal from a summary denial, this Court must reverse unless the postconviction record, see Fla. R. App. P. 9.141(b)(2)(A), shows conclusively that the appellant is entitled to no relief. See Fla. R. App. P. 9.141(b)(2)(D).

Because the record now before us fails to make the required showing, we reverse the order and remand for an evidentiary hearing or other appropriate relief. If the trial court again enters an order summarily denying the postconviction motion, the court

shall attach record excerpts conclusively showing that the appellant is not entitled to any relief.

Reversed and remanded for further proceedings.117 So. 3d 422::Laurencio v. State::October 31, 2012

APPENDIX "K"

John Lee Baron, Appellant, vs. The State of Florida, Appellee.
COURT OF APPEAL OF FLORIDA, THIRD DISTRICT
150 So. 3d 1151; 2014 Fla. App. LEXIS 14977
No. 3D14-1415
September 24, 2014, Opinion Filed

Notice:

DECISION WITHOUT PUBLISHED OPINION

Editorial Information: Prior History

An Appeal under Florida Rule of Appellate Procedure 9.141(b)(2) from the Circuit Court for Miami-Dade County, Teresa Mary Pooler, Judge. Lower Tribunal No. 00-28348.Barron v. State, 990 So. 2d 1098, 2007 Fla. App. LEXIS 13007 (Fla. Dist. Ct. App. 3d Dist., Aug. 22, 2007)

Counsel John Lee Barron, in proper person.
Pamela Jo Bondi, Attorney General, for appellee.

Judges: Before ROTHENBERG, LAGOA, and SCALES, JJ.

Opinion

PER CURIAM.

Affirmed.