Appendix A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-11228-C

IVERYLEE ARASHELLA JOHNSON,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

Before: WILLIAM PRYOR and ROSENBAUM, Circuit Judges.

BY THE COURT:

Iverylee Johnson has filed a motion for reconsideration, pursuant to 11th Cir. R. 27-2, of this Court's October 8, 2019, order denying him a certificate of appealability from the district court's denial of his 18 U.S.C. § 2254 petition, and Fed. R. Civ. P. 59(e) motion, and motion for leave to proceed on appeal *in forma pauperis*. Upon review, Johnson's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

Appendix B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-11228-C

IVERYLEE ARASHELLA JOHNSON,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

ORDER:

Iverylee Johnson's motion for a certificate of appealability is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). Johnson's motion for leave to proceed on appeal *in forma pauperis* is DENIED AS MOOT.

/s/ William H. Pryor Jr.
UNITED STATES CIRCUIT JUDGE

Appendix C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

IVERYLEE ARASHELLA JOHNSON,

Petitioner,

v. **Case No: 6:17-cv-1630-Orl-41DCI**

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

Respondents.
_____/

ORDER

THIS CAUSE is before the Court on Petitioner's Motion for Reconsideration and to Alter or Amend Final Judgment pursuant to Defendant. R. Civ. P. 59(e) ("Motion for Reconsideration," Doc. 23). Petitioner seeks to alter or amend the Court's Order (Doc. 21) denying his Petition for Writ of Habeas Corpus and the corresponding Judgment (Doc. 22).

Petitioner has filed the Motion for Reconsideration pursuant to Federal Rule of Civil Procedure 59(e). The decision to alter or amend a judgment pursuant to Rule 59(e) is committed to the sound discretion of the trial court. *Am. Home Assur. Co. v. Glenn Estess & Assocs.*, Inc., 763 F.2d 1237, 1238 (11th Cir. 1985). A Rule 59(e) motion may not be used to relitigate old matters or to raise arguments or present evidence that were available prior to the entry of judgment. *Michael Linet, Inc. v. Vill. of Wellington, Fla.*, 408 F.3d 757, 759 (11th Cir. 2005). Generally, there are four reasons for granting a Rule 59(e) motion: (1) to correct manifest errors of law or fact upon which the judgment is based; (2) to enable a party to present newly discovered or previously unavailable evidence; (3) to prevent manifest injustice; or (4) because of an intervening change in

controlling law. *Moton v. Walker,* No. 8:09–cv–1986–T–33TBM, 2012 WL 919980, at *1 (M.D. Fla. March 19, 2012).

Here, Petitioner has presented no grounds warranting relief under Rule 59. Petitioner does not allege that a change in the controlling law has intervened, nor does he claim that new evidence has become available. Moreover, Petitioner has not shown that the Court's Order constituted clear error or manifest injustice that the Court must correct. Instead, Petitioner has merely taken this opportunity to relitigate issues that have already been decided and adjudicated by the Court. The Court has carefully reviewed Petitioner's arguments and finds that he has failed to demonstrate a basis for relief under Rule 59(e).

Accordingly, it is **ORDERED** that Petitioner's Motion for Reconsideration (Doc. 23) is **DENIED**. Further, because Petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability is denied with regard to the denial of this motion.

DONE and **ORDERED** in Orlando, Florida on March 27, 2019.

CARLOS E. MENDOZA
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party

Appendix D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

IVERYLEE ARASHELLA JOHNSON,

Petitioner,

v. **Case No: 6:17-cv-1630-Orl-41DCI**

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

Respondents.
_____/

ORDER

THIS CAUSE is before the Court on the Amended Petition for Writ of Habeas Corpus ("Amended Petition," Doc. 3) filed by Petitioner pursuant to 28 U.S.C. § 2254. Petitioner also filed a supporting Amended Memorandum of Law ("Amended Memorandum," Doc. 4). Respondents filed a Response to Petition ("Response," Doc. 15) in compliance with this Court's instructions and with the *Rules Governing Section 2254 Cases in the United States District Courts*. Petitioner filed a Reply (Doc. 20) to the Response. For the reasons set forth herein, the Amended Petition is denied.

I. PROCEDURAL BACKGROUND

The State Attorney in and for the Eighteenth Judicial Circuit charged Petitioner by criminal information in Seminole County, Florida with one count of robbery with a deadly weapon with a firearm. (Doc. 17-1 at 30). A jury found Petitioner guilty as charged. (Doc. 17-2 at 29). The trial court adjudicated Petitioner guilty of the offense and sentenced him, as a prison releasee reoffender, to life imprisonment. (*Id.* at 30-32, 56-57). Petitioner filed a direct appeal with

Florida's Fifth District Court of Appeal ("Fifth DCA"), which affirmed *per curiam*. (Doc. 17-6 at 158).

Petitioner next filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850, which he later amended. (Doc. 17-6 at 162-69, Doc. 17-7 at 1-43). The trial court denied the motion, and the Fifth DCA affirmed *per curiam*. (*Id.* at 65-70, 122).

Finally, Petitioner filed a petition for writ of habeas corpus, which the Fifth DCA denied. (*Id.* at 134-65, 209).

II. LEGAL STANDARDS

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

The AEDPA sets forth the standard for granting habeas relief on a claim that a state court has adjudicated on the merits. *See White v. Woodall*, 134 S. Ct. 1697, 1702 (2014). Under AEDPA, a federal court may only grant habeas relief on a claim if the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

A state court decision is "contrary" to clearly established federal law if the state court "arrives at a conclusion opposite to that reached by" the Supreme Court or decides a case differently than the Supreme Court when faced with a case involving materially indistinguishable facts. *Wellington v. Moore*, 314 F.3d 1256, 1260 (11th Cir. 2002). Moreover, a state court decision constitutes an "unreasonable application" of clearly established federal law, where the court identifies the correct governing principles, but unreasonably applies those principles to a petitioner's case. *Id.* at 1261.

B. Standard for Ineffective Assistance of Appellate Counsel

It is well established that a defendant has the right to effective counsel on appeal. *Alvord v. Wainwright*, 725 F.2d 1282, 1291 (11th Cir. 1984). The standard for analyzing ineffective assistance claims is the same for trial and appellate counsel. *Matire v. Wainwright*, 811 F.2d 1430, 1435 (11th Cir. 1987). The Eleventh Circuit has applied the Supreme Court's test for ineffective assistance at trial to guide its analysis of ineffective assistance of appellate counsel claims. *Heath v. Jones*, 941 F.2d 1126, 1130 (11th Cir. 1991).[1]

Appellate counsel need not raise issues that he (or she) reasonably concludes will not be considered on the merits by the appellate court. *Francois v. Wainwright*, 741 F.2d 1275, 1285 (11th Cir. 1984). Likewise, appellate counsel need not brief issues reasonably considered to be without merit. *Alvord*, 725 F.2d at 1291. Appellate counsel must be allowed to exercise his (or her) reasonable professional judgment in selecting those issues most promising for review, and "[a] brief that raises every colorable issue runs the risk of burying good arguments . . . . " *Jones v. Barnes*, 463 U.S. 745, 753 (1983).

III. ANALYSIS

A. Claims One, Four, and Five

These claims pertain to the State's witness, Demarious Powell, who testified at trial without being sworn in. In particular, Petitioner argues as follows: trial counsel was ineffective "by allowing unsworn testimony to be presented to the jury" (Claim One); the "admission of unsworn

[1] The Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), established a two-part test for determining whether a convicted person is entitled to relief on the ground that his counsel rendered ineffective assistance. The first prong of the *Strickland* test requires that the defendant demonstrate that counsel's performance was deficient and "fell below an objective standard of reasonableness." *Id.* at 688. The second prong of the *Strickland* test requires the defendant to show that the deficient performance prejudiced the defense. *Id.* at 687.

testimony violated Florida Statute 90.605" (Claim Four); and appellate counsel was ineffective for failing to argue "an obvious fundament error when Powell testified without being sworn in . . ." (Claim Five). (Doc. 3 at 5, 10; Doc. 4 at 20). Claims One and Four were raised in Petitioner's Rule 3.850 motion, and Claim Five was raised in Petitioner's state petition for writ of habeas corpus. The claims were denied.

In the present case, Powell was not placed under oath prior to testifying. There was no indication that Powell refused to take the oath; rather, the failure to administer the oath appears to have been through inadvertence. (Doc. 17-7 at 67). Powell testified that he and Petitioner had committed the robbery together. (Doc. 17-4 at 153). Powell described what they each wore and carried, and he described their actions in committing the robbery. (*Id.* at 156-59).

Petitioner relies on *Griffin v. Harrington*, 915 F. Supp. 2d 1091, 1112 (C.D. Cal. 2012), in which the district court found that trial counsel's failure to object to a witness' unsworn testimony was not objectively reasonable and that the petitioner had demonstrated prejudice sufficient to call into question the outcome of the trial. In *Griffin*, the witness refused to take the oath and recanted his statements identifying the petitioner as the shooter, which allowed the prosecution to introduce the witness's prior inconsistent statements made in a recorded interview incriminating the petitioner. There was also evidence that the witness would have refused to take the oath if recalled as a witness and pressed to do so. Thus, by failing to object to the unsworn testimony, the petitioner's trial counsel missed the opportunity to keep out the most incriminating evidence in the case.

The *Griffin* case is distinguishable. Here, unlike the witness in *Griffin*, there is no evidence that Powell refused to take the oath; instead, the oath was not administered through apparent inadvertence. Further, Powell did not recant or otherwise change any of his prior statements.

Additionally, there is no evidence that any of the parties were aware that Powell failed to take the oath at the time he was testifying. Any assertion by Petitioner that Powell would have refused to take the oath or would have testified differently if placed under oath is speculative. As such, the Court finds that there has been no showing that counsel acted deficiently with regard to this matter or that Petitioner suffered prejudice.

Petitioner next argues that the admission of unsworn testimony violated § 90.605, Florida Statutes. Under 28 U.S.C. § 2254(a),

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to a judgment of a State court only *on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.*

(Emphasis added). Here, Petitioner has not alleged a violation of the United States Constitution or federal law. Petitioner's failure to plead such a violation warrants denial of this claim.

In addition, "[f[ederal habeas corpus relief based on evidentiary rulings will not be granted unless it goes to the fundamental fairness of the trial." *McCoy v. Newsome*, 953 F.2d 1252, 1265 (11th Cir. 1992); *see also Tejada v. Dugger*, 941 F.2d 1551, 1560 (11th Cir. 1991) ("[w]e review questions of state law in federal habeas proceedings only to determine whether the alleged errors were so critical or important to the outcome of the trial to render `the entire trial fundamentally unfair.'"). The state trial error must have been "material in the sense of a crucial, critical, highly significant factor." *Tejada*, 941 F.2d at 1560 (quotation omitted) (citations omitted).

In the present case, Petitioner has not demonstrated that he was deprived of a fundamentally fair trial or that the alleged error had a "substantial and injurious effect or influence in determining the jury's verdict." *See Brecht v. Abrahamson*, 507 U.S. 619, 622 (1993).

Finally, Petitioner states that appellate counsel was ineffective for failing to argue that fundament error occurred when Powell testified without being sworn. Section 90.605, Florida Statutes (2012), requires that each witness take an oath before testifying. Florida courts have held, however, that failure to object to the lack of an oath waives the issue. *Murphy v. State*, 667 So. 2d 375 (Fla. 1st DCA 1995); *Jaffe v. Jaffe*, 147 So. 3d 578, n. 2 (Fla. 3d DCA 2014). In addition, the failure to lodge a proper evidentiary objection below waives the issue for appellate review. *Spivey v. State*, 12 So. 3d 880, 881 (Fla. 5th DCA 2009). In the present case, there was no objection made. Appellate counsel was therefore not ineffective for failing to raise an unpreserved issue.

Under the circumstances, the Court finds that Claims One, Four, and Five are without merit. Further, Petitioner has failed to demonstrate that the state court's decision rejecting these claims was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. Applying the AEDPA's deferential standard, Claims One, Four, and Five are denied.

B. Claim Two

Petitioner states that trial counsel was ineffective for failing to object to the State vouching for Powell during his direct testimony. According to Petitioner, the State elicited testimony from Powell that he was facing a life sentence but received a five-year sentence as part of a plea deal that included a requirement that he testify truthfully against Petitioner. This claim was raised in Petitioner's Rule 3.850 motion and was denied because there was no basis upon which to raise an objection. (Doc. 17-7 at 68).

Powell testified that he had been charged with two felony crimes that "potentially could have carried a life sentence." (*Id.* at 165-66). As a result of a plea agreement, Powell stated that he

was required to testify "truthfully" in Petitioner's case, and he received a sentence of five years' imprisonment. (*Id.* at 166).

In *Rogowski v. State*, 643 So. 2d 1144, 1145 (Fla. 4th DCA 1994), the state appellate court discussed that

> the state attorney committed no error in eliciting on several occasions from three of the state's witnesses that they had entered into certain plea agreements as co-defendants in the case to testify truthfully against the defendant upon pain of being prosecuted for perjury. The nature of the plea agreement was highly relevant and clearly admissible at trial.

Consequently, the Court rejects Petitioner's claim that the State was in some manner vouching for Powell's credibility and finds that counsel had no basis upon which to raise an objection.

As such, Petitioner has failed to demonstrate that counsel acted deficiently with regard to this matter or that he sustained prejudice. Further, Petitioner has failed to demonstrate that the state court's decision rejecting this claim was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. Applying the AEDPA's deferential standard, Claim Two is denied.

C. Claim Three

Petitioner argues that trial counsel failed to investigate the owner of the firearm that was recovered by law enforcement. According to Petitioner, Timothy Murphy was the owner of the firearm, and "there are unanswered questions as to how [Murphy's] firearm was allegedly used in the robbery and located in the area." (Doc. 4 at 16). Petitioner states that Murphy "could have shed some light into" the involvement of another individual in the crimes. (*Id.*). This claim was raised in Petitioner's Rule 3.850 motion and was denied because Petitioner failed to indicate at trial that there were other witnesses that counsel should have investigated.

"Which witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it on that [this Court] will seldom, if ever, second guess." *Conklin v. Schofield*, 366 F.3d 1191, 1204 (11th Cir. 2004) (quotation omitted). Here, Petitioner did not produce any evidence that the proposed witness was prepared to testify. In addition, Petitioner failed to show that there was a reasonable probability that, had Murphy testified, the outcome of the pretrial proceeding would have been different, considering the overwhelming evidence of his guilt. *Strickland*, 466 U.S. at 694.

As such, Petitioner has failed to demonstrate that counsel acted deficiently with regard to this matter or that he sustained prejudice. Further, Petitioner has failed to demonstrate that the state court's decision rejecting this claim was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. Applying the AEDPA's deferential standard, Claim Three is denied.

IV. CERTIFICATE OF APPEALABILITY

This Court should grant an application for a certificate of appealability only if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Lamarca v. Sec'y, Dep't of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009). However, the petitioner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

Petitioner fails to demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. Moreover, Petitioner cannot demonstrate that jurists of reason would find this Court's procedural rulings debatable. Petitioner

fails to make a substantial showing of the denial of a constitutional right. Thus, the Court will deny Petitioner a certificate of appealability.

V. CONCLUSION

Therefore, it is **ORDERED** and **ADJUDGED** as follows:

1. The Petition for Writ of Habeas Corpus (Doc. 1) is **DENIED**.
2. This case is **DISMISSED with prejudice**.
3. The Clerk of the Court is directed to enter judgment in favor of Respondents and to close this case.
4. Petitioner is **DENIED** a certificate of appealability in this case.

DONE and **ORDERED** in Orlando, Florida on March 1, 2019.

CARLOS E. MENDOZA
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party