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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-CV-60692-COOKE
MAGISTRATE JUDGE P.A. WHITE

JEFFREY LAGASSE, :

Petitioner, :

v. : REPORT OF MAGISTRATE JUDGE

JULIE L. JONES, :

Respondent. :

I. Introduction

Jeffrey Lagasse, who is presently confined at Jefferson Correctional Institution in Monticello, Florida, has filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, attacking his conviction in case number 03-019606-CF10A from the Seventeenth Judicial Circuit Court for Broward 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, the Respondent's response to an order to show cause with appendix of exhibits, and the petitioner's reply.

II. Procedural History

The petitioner was charged with six counts of lewd or lascivious molestation against three victims. (DE# 20-1, p. 223-225). The petitioner's first trial ended in a conviction on five of the six counts of lewd and lascivious molestation. As to the sixth

count, the petitioner was convicted of battery as a lesser included offense. The petitioner's convictions were reversed on appeal when the court found that the trial court had erred in denying a motion to suppress his statement to police after faulty Miranda warnings. Lagasse v. State, 923 So.2d 1287 (Fla. 4th DCA 2006).

After remand, the state amended the information, deleting the charge for which the petitioner had been found guilty of the lesser included offense of battery. (DE# 20-1, p. 409-411). The petitioner's second trial commenced in October 2006.

At trial the state presented the testimony of the victims and their parents. Shery Smith, the mother of one of the victims, testified that she was hosting a party for her daughter's ninth birthday. Smith was friends with the petitioner and had mentioned the party to him, but had not invited him. On the day of the party the petitioner showed up unannounced. The petitioner offered to help supervise the girls in the pool while Smith worked in the kitchen.

The petitioner played with the girls in the pool. He would pick them up and throw them in the pool. One of the girls, M.N., testified that the girls' butts would be sitting on the petitioner's hands as he threw them. M.N. did not like it because the petitioner would give them wedgies as he threw her in. V.F. testified that the girls splashed the petitioner and got him wet. Another girl, S.F., testified that the petitioner put her in time out for splashing him.

The petitioner had M.N. get out of the pool to play a game. He told M.N. that the game was a secret so he took her into A.S.'s bedroom. V.F. testified that she saw the petitioner and M.N. go

into the room. Inside the room M.N. sat on the bed and the petitioner stood in front of her. He touched her vagina on top of her bathing suit with his fingers, then took M.N.'s feet and put them on his penis and held them there. M.N. did not say anything because she was scared and did not know what the petitioner might do. The petitioner told M.N. not to tell anyone what happened.

After the petitioner changed his clothes he and the girls watched a movie as Sherry Smith cleaned up the kitchen. As she was cleaning up, Sherry Smith injured her head. The petitioner helped her bandage her head, then told her to lie down while he watched the girls.

The petitioner and the girls watched a movie. M.N. sat far away from the petitioner as a result, she could not see what the petitioner or the other girls did during the movie. S.F. testified that the petitioner told her he was scared and to come rub his nipples. At first, S.F. did so, then she wanted to stop. The petitioner kept telling her to do it. A.S. testified that the petitioner told S.F. that she owed him for splashing him in the pool. A.S. saw the petitioner make S.F. rub his nipples and testified that S.F. was reluctant and almost crying. A.S. told S.F. she could stop if she wanted to.

At another point in the movie, V.F. was sitting on the floor in front of the petitioner. S.F. saw V.F.'s hands in the area of the petitioner's penis. V.F. testified that the petitioner took her hands and placed them on his penis under his clothes. When V.F. tried to move her hands, the petitioner placed them back on his penis. V.F. wanted to get up and tell Shery Smith, but the petitioner told her not to wake her. V.F. sat away from the petitioner for the rest of the movie.

The petitioner later told S.F. that he wanted to play a game with her outside because she had missed out on the game earlier. The petitioner took S.F. outside. Once outside, he tucked her nightgown into her underwear and touched her vagina with his hands. He told her it was part of the secret game. While they were outside, Shery Smith came to the kitchen to clean up. The petitioner moved S.F. and had her stand by the jacuzzi while he touched her waist. After they went back inside, S.F. did not say anything to Shery Smith because she thought it was part of the game.

The next morning at breakfast the girls were talking about the party and decided to tell Shery Smith what the petitioner had done. As they were talking, the petitioner came in the house. Shery Smith told the petitioner to leave, or she would call the police. Smith later called the girls' parents and told them to talk to their daughters about what happened at the party.

Shery Smith did not immediately call the police because she did not think she had enough information. After the other parents talked to their daughters, the police were contacted. Detective Edward McCardle met with S.F, V.F. and their parents three days after the party. He also spoke with Shery Smith and A.S. He asked that they have the other parents contact him. No other parents contacted him.

The mother of S.F. and V.F. both testified at trial. S.F.'s mother testified that when she spoke to her daughter about the party, S.F. told her she had touched a man's penis. Although S.F. was good friends with A.S., they had to sue Shery Smith to get money to pay for her daughter's counseling. M.N.'s mother testified that her daughter was quiet and withdrawn when she came home from

the party. After receiving a call from Shery Smith, M.N.'s mother spoke to her daughter. M.N. did not want to speak about the events at first. They did not call the police because they wanted to handle the situation within the family to avoid court. A few days after the party, M.N. and her mother were at a restaurant when M.N. saw the petitioner and pointed him out to her mother. M.N. was scared and tried to hide. M.N.'s mother identified the petitioner in court as the man who her daughter had pointed out. M.N.'s mother joined the lawsuit against Shery Smith.

The petitioner was again found guilty of five counts of lewd and lascivious molestation. (DE# 20-1, p. 413-417). The petitioner was adjudicated guilty and sentenced to five concurrent twenty four year terms, to be followed by fifteen years of sex offender probation. (DE# 20-1, p. 422-445). The petitioner appealed. (DE# 20-1, p. 454).

On appeal the petitioner raised the following two issues:

1. The trial court reversibly erred when it allowed Rachelle Diener to testify at the petitioner's sentencing hearing over defense objection, because Diener was not listed as a witness.

2. The trial court erred in denying the petitioner's motion for continuance.

(DE# 20-1, p. 458). The petitioner's conviction was affirmed on March 5, 2008. Lagasse v. State, 975 So.2d 1150 (Fla. 4th DCA 2008). The court denied rehearing on April 16, 2008. (DE# 20-1, p. 513-523). The petitioner did not seek certiorari review in either the Florida Supreme Court or the United States Supreme Court.

The history of the petitioner's post conviction proceedings in state court is convoluted. The petitioner's first motion for post conviction relief was summarily denied as insufficient despite the

state's concession that he should be granted leave to amend under Florida law. (DE# 20-1, p. 525-622). The denial of the first motion was reversed in part and remanded so that the petitioner could file an amended motion. (DE# 20-1, p. 711). That amended motion was followed by additions and supplements. When the state was asked to file its response it filed a notice with the court that the history of the petitioner's pleadings made it difficult to determine which claims the petitioner was pursuing. After the petitioner obtained counsel, the issues being raised were clarified in a correspondence with the state. As a result of that correspondence it was agreed that the issues raised included those from the petitioner's second amended complaint of October 20, 2009 (DE# 20-1, P. 872-891) and an amended supplement and addendum filed on May 10, 2011 (DE# 20-1, p. 961-972).

After conducting an evidentiary hearing and considering the petitioner's arguments, the state trial court identified the following four claims[1] of ineffective assistance of counsel:

1. Counsel was ineffective in her argument for a judgment of acquittal.

2. Counsel was ineffective in failing to move for a severance.

3. Counsel was ineffective in failing to object to prosecutorial misconduct.

4. Counsel was ineffective in failing to conduct additional investigation and call additional witnesses.

(DE# 20-1, p. 1175). The court addressed each claim applying the standard for ineffective assistance found in Strickland v. Washington, 466 U.S. 668 (1984). The court denied each of the

[1]During the evidentiary hearing the petitioner agreed that he was presenting four issues. (DE# 21-7, p. 20).

claims. (DE# 20-1, p. 1172-1177). The first claim was denied because counsel had presented a motion for judgment of acquittal. The court found that the arguments raised by the petitioner presented issues which were matters to be determined by the jury. The second claim was denied with the court finding that the charges were properly joined as part of a single episode. The third claim was denied with the court finding that the prosecutor's closing arguments were fair comments on the evidence. The fourth claim was denied because counsel had testified that she and the petitioner had agreed not to conduct any further investigation or call any other witnesses because they were concerned about new allegations against the petitioner being raised. Counsel also testified that the petitioner agreed to the strategy of challenging the lack of evidence and lack of investigation. The court, after reviewing a deposition of one of the girls who was not called, rejected the petitioner's assertion that the girl would have helped his case. The court found counsel's strategy to be reasonable and that counsel had considered other courses of action in reaching that strategy.

In appealing the denial of his motion, the petitioner raised the following two issues:

1. Whether the trial court erred in denying petitioner's post conviction claim that trial counsel was ineffective for failing to move to sever the charges.

2. Whether the trial court erred in denying petitioner's claim that counsel was ineffective for failing to call witnesses.

(DE# 20-1, p. 1185). The denial was affirmed on January 15, 2015 in a per curiam decision without written opinion. Lagasse v. State, 158 So.3d 598 (Fla. 4th DCA 2015). Mandate issued on March 27, 2015 after the court denied the petitioner's motion for rehearing. (DE#

20-1, p.

On November 1, 2019, while the petitioner's post conviction motion in the trial court was being litigated, he filed a petition for writ of habeas corpus in the appellate court alleging ineffective assistance of appellate counsel. (DE# 20-1, p. 716-723). He raised the following claims:

1. Counsel was ineffective in failing to argue that the trial court erred by denying the motion for judgment of acquittal on three counts with regard to the victim M.N.

2. Counsel was ineffective in failing to argue that the trial court erred by denying petitioner's timely motion for new trial.

3. Counsel was ineffective in failing to obtain a written order denying the motion for new trial in order to preserve appellate review of the issue.

4. Counsel was ineffective in failing to file a motion to relinquish jurisdiction so that the trial court could issue a written order denying the motion for new trial.

On May 12, 2009, the appellate court denied the petition on the merits. (DE# 20-1, p. 847).

On January 8, 2015, the petitioner filed a motion to correct illegal sentence. (DE# 20-1, p. 1301-1314). In that motion he argued that his habitual felony offender sentence was illegal because his two prior convictions did qualify as predicate offenses because adjudication had been withheld and he had successfully completed his probation. That motion was denied on July 24, 2015 and rehearing was denied on September 2, 2015. (DE# 20-1, p. 1347-1365). The appellate court affirmed the denial on May 17, 2016, with mandate issuing on June 3, 2016. (DE# 20-1, p. 1403-1414).

The petitioner filed the instant petition on April 3, 2017.[2] He raises the following four claims:

1. Counsel was ineffective for failing to move to sever the charges for trial.

2. The prosecutor's statements denied the petitioner due process and counsel was ineffective for failing to object.

3. The sentence was enhanced in violation of the ex post facto clause and counsel was ineffective for failing to object to this violation.

4. The admission of testimony from child victims without adequate indication of veracity denied the petitioner due process.

III. Statute of Limitations and Exhaustion

The state properly concedes that the petition was filed timely. However, the state argues that the petitioner's second and fourth claims are unexhausted. The state contends that these two claims were not exhausted because the petitioner did not present them in his appeal of the denial of the motion for post conviction relief.

An applicant's federal writ of habeas corpus will not be granted unless the applicant exhausted his state court remedies. 28 U.S.C. § 2254(b), (c). A claim must be presented to the highest court of the state to satisfy the exhaustion requirement. O'Sullivan v. Boerckel, 526 U.S. 838 (1999); Richardson v. Procunier, 762 F.2d 429, 430 (5th Cir. 1985); Carter v. Estelle, 677 F.2d 427, 443 (5th Cir. 1982). In a Florida non-capital case, this means the applicant must have presented his claims in a

[2] The Eleventh Circuit recognizes the "mailbox" rule in connection with the filing of a prisoner's petition for writ of habeas corpus. Adams v. United States, 173 F.3d 1339 (11th Cir. 1999) (prisoner's pleading is deemed filed when executed and delivered to prison authorities for mailing).

district court of appeal. Upshaw v. Singletary, 70 F.3d 576, 579 (11th Cir. 1995). The claims must be presented in State court in a procedurally correct manner. Id. Moreover, the habeas applicant must have presented the State courts with the same federal constitutional claim that is being asserted in the habeas petition. "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 v. Sec'y, Dep't of Corr., 377 F.3d 1317 (11th Cir. 2004) (citing Picard v. Connor, 404 U.S. 270, 275-76 (1971); Anderson v. Harless, 459 U.S. 4, 6 (1982)). A petitioner is required to present his claims to the state courts such that the courts have the "opportunity to apply controlling legal principles to the facts bearing upon [his] constitutional claim." Picard v. Connor, 404 U.S. 270, 275-77 (1971). To satisfy this requirement, "[a] petitioner must alert state courts to any federal claims to allow the state courts an opportunity to review and correct the claimed violations of his federal rights." Jimenez v. Fla. Dep't of Corr., 481 F.3d 1337 (11th Cir. 2007) (citing Duncan v. Henry, 513 U.S. 364, 365 (1995)). "Thus, to exhaust state remedies fully the petitioner must make the state court aware that the claims asserted present federal constitutional issues." Snowden v. Singletary, 135 F.3d 732, 735 (11th Cir. 1998).

The Respondent contends that Claims 2 and 4 are unexhausted and procedurally defaulted from federal habeas review because they were not raised in the Petitioner's initial post-conviction brief in the Third District Court of Appeal. The Eleventh Circuit has held in unpublished opinions that a petitioner's failure to raise claims in a post-conviction appeal does not waive those issues. See Darity v. Sec'y, Dep't of Corr., 244 Fed. Appx. 982 (11th Cir.

2007); Cortes v. Gladish, 216 Fed. Appx. 897 (11th Cir. 2007). The case law upon which the Eleventh Circuit relied, Webb v. State, 757 So. 2d 608 (Fla. 5th DCA 2000), has been receded from. See Ward v. State, 19 So. 3d 1060, 1061 (Fla. 5th DCA 2009); see also Walton v. State, 58 So. 3d 887 (Fla. 2d DCA 2011) (*pro se* post-conviction petitioner can waive facially insufficient claims by failing to raise them in his brief); Watson v. State, 975 So. 2d 572, 573 (Fla. 1st DCA 2008) (petitioner appealing a summarily denied post-conviction motion must address all arguments in his brief that he wishes to preserve for appellate review). Therefore, a petitioner's failure to raise claims in a post-conviction initial brief following summary denial in the trial court now constitutes abandonment of those claims. See, e.g., Bolling v. Jones, 2015 WL 6769103 (N.D. Fla. Oct. 16, 2015); Flynn v. Screws, 2014 WL 10677554 (S.D. Fla. Nov. 20, 2014); Williams v. Sec'y, Dept. Of Corrections, 2015WL 3891540 (N.D.Fla. Jan. 21, 2015).

Here the petitioner had argued in his motion for post conviction relief that counsel was ineffective for failing to object to the prosecutor's closing argument. This argument corresponds to his second claim in the instant petition. The state court denied this claim summarily, without an evidentiary hearing. The petitioner did not present this claim in the appeal of the denial of his motion for post conviction relief, therefore it was abandoned and the petitioner has failed to exhaust this claim.

As to the petitioner's fourth claim, concerning the admission of the child victim's testimony, the undersigned has scoured the record of the extensive state court proceedings and cannot find where this claim was raised either on direct appeal or in any post conviction proceedings. Even if this claim was somehow raised in one of the numerous iterations of the motion for post conviction

relief, it was certainly not raised in the appeal of the denial of the motion for post conviction relief. Since this claim was not raised on either direct appeal or in post conviction proceedings, it is also unexhausted and barred from review.

In response to the state's argument that these two claims are unexhausted, the petitioner contends these issues were exhausted. He argues that because there is now no state remedy available his claims meet the definition of exhaustion. In support of this argument the petitioner quotes Coleman v. Thompson, 501 U.S. 722 (1992), in which the court stated: "A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer "available" to him." Id. at 732. He also cites to Woodford v. Ngo, 548 U.S. 81 (2006), for the proposition that "In habeas, state court remedies are no longer available because the prisoner failed to comply with the deadline for seeking state court review or for taking an appeal, those remedies are technically exhausted." The petitioner's reading of these two cases is taken out context as they do not support his contention that his claims have been exhausted. The petitioner argument, taken to its logical end, would eliminate the exhaustion requirement because simply failing to raise the issue in state court until there was no avenue for relief would meet the exhaustion requirement.

The problem with the petitioner's argument is that he has taken quotes from the two cases out of context. In Ngo, the court's entire discussion is as follows:

> [I]f state-court remedies are no longer available because the prisoner failed to comply with the deadline for seeking state-court review or for taking an appeal, those remedies are technically exhausted, **but exhaustion in this sense does not automatically entitle the habeas petitioner to litigate his or her claims in federal**

> **court. Instead, if the petitioner procedurally defaulted those claims, the prisoner generally is barred from asserting those claims in a federal habeas proceeding.**

Ngo at 93 (emphasis added, citations omitted). Here the petitioner, having failed to present these two claims to the highest state court, has failed to exhaust these claims and is barred from presenting them in this federal habeas proceeding.

The petitioner asks the court to consider Martinez v. Ryan, 566 U.S. 1 (2012) to find that his claims are not procedurally defaulted for lack of exhaustion. Martinez provides a narrow non-constitutional equitable exception to excuse the procedural default of claims of ineffective assistance of trial counsel. "Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." Martinez at 16 (2012). Therefore, relief is available if (1) state procedures make it virtually impossible to actually raise ineffective assistance of trial counsel claims on direct appeal; and (2) the petitioner's state collateral counsel was ineffective for failing to raise ineffective assistance of trial counsel claims in the state proceedings. See Lambrix v. Sec'y, Fla. Dep't of Corr's, 756 F.3d 1246, 1261 n.31 (11th Cir. 2014).

The petitioner's attempts to excuse his default by relying on Martinez, supra, arguing that the claim was not raised on appeal following its denial in the Rule 3.850 trial court proceeding because he did not have counsel. Under the circumstances presented, Martinez does not provide a basis to excuse the procedural default.

The Martinez court noted that its holding did not include the failure to appeal from initial-review collateral proceedings. Martinez at 16. ("The holding in this case does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings[.]"; see also Lambrix v. Sec'y, Fla. Dep't of Corr., 756 F. 3d 1246, 1260 (11th Cir. 2014). Therefore, Martinez does not provide relief from the petitioner's procedural default of these claims for failure to exhaust them.

IV. 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 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. In the habeas context, clearly established federal law refers to the holdings of the Supreme Court's decisions as of the time of the relevant state-court

decision. Hall v. Head, 310 F.3d 683, 690 (11th Cir. 2002) (citing Williams, 529 U.S. at 412). However, in adjudicating a petitioner's claim, the state court does not need to cite Supreme Court decisions and the state court need not even be aware of the Supreme Court cases. See Early v. Packer, 537 U.S. 3, 8 (2002); Parker v. Sec'y, Dep't of Corr., 331 F.3d 764, 775-76 (11th Cir. 2003).

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. Id. Further, 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).

More recently, the U.S. Supreme Court in Wilson v. Sellers, ___ U.S.___, ____, 138 S.Ct. 1188, 1194 (2018), concluded there is a "look through" presumption in federal habeas corpus law, as silence implies consent. See also Kernan v. Hinojosa, __ U.S. ___, 136 S.Ct. 1603, 1605-1606 (2016)(*per curiam*)(adopting the presumption that silence implies consent, but refusing to impose an irrebutable presumption). Where the state court's adjudication on the merits of a claim is unaccompanied by an explanation, the U.S. Supreme Court instructs that:

> [T]he federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning.

Wilson v. Sellers, 138 S.Ct. at 1192. In other words, if the last state court to decide a prisoner's federal claim provides an explanation for its merits-based decision in a reasoned opinion, "a

federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." Wilson v. Sellers, 138 S.Ct. at 1192. However, if the relevant state-court decision on the merits is not accompanied by a reasoned opinion, because it was summarily affirmed or denied, a federal court "should 'look through' the unexplained decision to the last state-court decision that does provide a relevant rationale." Id.

The presumption, however, may be rebutted by showing the state court's adjudication most likely relied on different grounds than the lower state court's reasoned decision, such as persuasive alternative grounds briefed or argued to the higher court or obvious in the record. Wilson v. Sellers, 138 S.Ct. at 1192, 1196. "Where there are convincing grounds to believe the silent record had a different basis for its decision than the analysis followed by the previous court, the federal habeas court is free, as we have said, to find to the contrary." Wilson v. Sellers, 138 S.Ct. at 1197.

Moreover, the Supreme Court repeatedly has admonished that "[t]he petitioner carries the burden of proof" and that the §2254(d)(1) standard is a high hurdle to overcome. See Bobby v. Dixon, 565 U.S. 23, 24, 132 S.Ct. 26, 27, 181 L.Ed.2d 328 (2011)(quoting Richter, 560 U.S. at 102-103 (quotation marks omitted)); Cullen v. Pinholster, 563 U.S. 170, 180, 131 S.Ct. 1388, 1398, 179 L.Ed.2d 557 (2011) (acknowledging that Section 2254(d) places a difficult burden of proof on the petitioner); Renico, 559 U.S. at 777, 130 S.Ct. at 1866 ("AEDPA prevents defendants-and federal courts-from using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts."); Woodford v. Visciotti, 537 U.S. 19, 24, 123 S.Ct. 357, 362, 154

L.Ed.2d 279 (2002)(Section 2254(d) "demands that state-court decisions be given the benefit of the doubt."). See also Rimmer v. Sec'y, Fla. Dep't of Corr's, 876 F.3d 1039, 1053 (11 Cir. 2017)(opining that to reach the level of an unreasonable application of federal law, the ruling must be objectively unreasonable, not merely wrong or even clear error).

Thus, state court decisions are afforded a strong presumption of deference even when the state court adjudicates a petitioner's claim summarily—without an accompanying statement of reasons. Richter, 560 U.S. at 96-100, 131 S.Ct. at 780-84 (concluding that the summary nature of a state court's decision does not lessen the deference that it is due); Gill v. Mecusker, 633 F.3d 1272, 1288 (11 Cir. 2011) (acknowledging the well-settled principle that summary affirmances are presumed adjudicated on the merits and warrant deference, citing Richter, 560 U.S. at 100-101, 131 S.Ct. at 784-85 and Wright v. Sec'y for the Dep't of Corr's, 278 F.3d 1245, 1254 (11th Cir. 2002)). See also Renico, 559 U.S. at 773, 130 S.Ct. at 1862 ("AEDPA ... imposes a highly deferential standard for evaluating state-court rulings ... and demands that state-court decisions be given the benefit of the doubt." (citations and internal quotation marks omitted)).

Because the "AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court, Burt v. Titlow, 134 S.Ct. 10, 16 (2013), federal courts can "grant habeas relief only when a state court blundered in a manner so 'well understood and comprehended in existing law' and 'was so lacking in justification' that 'there is on possibility fairminded jurists could disagree.'" Tharpe v. Warden, 834 F.3d 1323, 1338 (11 Cir. 2016). This standard is "meant to be" a "difficult" one to meet. Harrington v. Richter, 562 U.S. 86, 102

(2011).

The petitioner raises claims of ineffective assistance of counsel. The United States Supreme Court clearly established the law governing claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984). Strickland requires a criminal defendant to show that: (1) counsel's performance was deficient and (2) the deficiency prejudiced him. Id. at 690. As to the first prong, deficient performance means performance outside the wide range of professionally competent assistance. Id. The judiciary's scrutiny of counsel's performance is highly deferential. Id. at 689.

As to the second prong, a defendant establishes prejudice by showing that, but for counsel's deficient performance, there is a reasonable probability the outcome of the proceedings would have been different. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceedings. Id. In the context of a guilty plea, the second prong of the Strickland test requires a showing that but for counsel's errors, the movant would not have pleaded guilty and would have insisted upon going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

A defendant must satisfy both the deficiency and prejudice prongs set forth in Strickland to obtain relief on an ineffective assistance of counsel claim. Failure to establish either prong is fatal and makes it unnecessary to consider the other. Strickland, 466 U.S. at 697.

Combining AEDPA's habeas standard and Strickland's two-pronged test provides the relevant inquiry in this case. To obtain habeas

relief, a petitioner must show the state court "applied Strickland to the facts of his case in an objectively unreasonable manner" when it rejected his claims of ineffective assistance of counsel. Bell v. Cone, 535 U.S. 685, 699 (2002).

V. Discussion

In his first exhausted claim, the petitioner argues that counsel was ineffective for failing to move to sever the five charges of lewd and lascivious molestation. He argues that the five charges involved different victims and occurred in different locations. He contends that the prejudicial effect of trying the charges together denied him due process and that counsel should have moved to sever the charges for trial.

This claim was raised in the petitioner's motion for post conviction relief. The state court denied this claim without an evidentiary hearing. In denying this claim the court adopted the state's response in which the state argued that it was proper under Florida law to try all the charges together. Therefore, the state contended that counsel was not ineffective because a motion to sever the charges would have been denied.

In Florida the joinder of offenses for trial is permitted where two or more offenses are based on the same act or transaction or on two or more connected acts. See Fla.R.Crim.P. 3.150. The "connected acts or transactions" requirement set forth in rule 3.150(a) requires that the charges joined for trial must be considered in an episodic sense. Shermer v. State, 935 So. 2d 74, 76 (Fla. 4th DCA 2006)(citing Garcia v. State, 568 So.2d 896, 899 (Fla.1990). However, severance shall be granted where it is appropriate to a fair determination of the defendant's guilt or innocence of each offense. See Fla.R.Crim.P. 3.152(a)(2). To deny

severance there must be a temporal or episodic connection. Shermer at 77.

In the instant case there was both a temporal an episodic connection. All of the acts committed by the defendant occurred during the course of a party at one of the victim's homes. All of the victims were present and testified regarding the events that occurred during the course of the party. Since there was both a temporal and episodic connection, any motion to sever would not have been granted. The state court's finding the charges were properly tried together was essentially a finding that any motion to sever would have been denied. Since counsel cannot be ineffective for failing to pursue a meritless argument, the state court properly denied this claim. See Chandler v. Moore, 240 F.3d 907, 917 (11th Cir. 2001); United States v. Sanders, 165 F.3d 248, 253 (3rd Cir. 1999). This claim should be denied.

In the petitioner's next exhausted claim he contends that his sentence is unconstitutional in violation of the *Ex Post Facto* Clause. The petitioner properly notes that the prior convictions which lead to his habitual offender sentence resulted in probation and a withhold of adjudication. He also is correct that at the time of these prior convictions a withhold of adjudication followed by successful completion of probation would not have been qualifying convictions under Florida's recidivist statutes. He argues that the intervening change in Florida law which rendered these prior convictions qualifying offenses violates *ex post facto* principles.

"The *Ex Post Facto* Clause bars laws from retroactively altering the definition of a crime or increasing the punishment for a criminal act." United States v. Reynolds, 215 F.3d 1210, 1213 (11th Cir. 2000). To violate the *Ex Post Facto* Clause, a criminal

law must: (1) "apply to events occurring before its enactment"; and (2)"disadvantage the offender affected by it." Id. In Reynolds the court held that an enhancement of a sentence under the Armed Career Criminal Act based on a qualifying predicate crime that was not a qualifying offense at the time it was committed did not violate the *Ex Post Facto* Clause. Id. at 1213. The court found that the sentence did not impose or increase a sentence for a crime committed before the ACCA was enacted, but rather stiffened the penalty for a crime committed after the enactment of the ACCA. Id. Moreover, the United States Supreme Court has held that enhanced sentencing for recidivism does not violate *ex post facto* principles despite the fact that the prior offenses forming a basis for enhancement occurred prior to enactment of the enhancement provision. See Parke v. Raley, 506 U.S. 20, 113 S.Ct. 517, 121 L.Ed.2d 391 (1992)

In the instant case, as in Reynolds, the petitioner qualified as an habitual offender based on prior convictions which at the time they were committed did not qualify as predicate convictions. At the time of the prior convictions Florida did not count as convictions prior crimes where adjudication had been withheld and probation successfully concluded. However, prior to the commission of the offenses that are the subject of this proceeding, Florida amended the habitual offender statute to include as qualifying offenses those prior convictions for which adjudication had been withheld and probation completed. See Ch. 99-188, Laws of Fla. As in Reynolds, the application of the habitual offender enhancement did not impose or increase the sentence for a crime committed prior to the amendment of Florida's habitual offender law. Since there was no increase in the punishment for a crime committed prior to the amendment, *ex post facto* principles are not implicated. This claim should be denied as the state court's denial was not contrary

to, or an unreasonable application of, controlling federal precedent.

VI. Certificate of Appealability

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

After review of the record, Petitioner is not entitled to a certificate of appealability. "A certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). To merit a certificate of appealability, Petitioner must show that reasonable jurists would find debatable both (1) the merits of the underlying claims and (2) the procedural issues he seeks to raise. Slack v. McDaniel, 529 U.S. 473, 478, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). See also Eagle v. Linahan, 279 F.3d 926, 935 (11th Cir. 2001). Because the claims raised are clearly without merit, Petitioner cannot satisfy the *Slack* test. Slack, 529 U.S. at 484.

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

to this report and recommendation.

Based upon the foregoing, it is recommended that this petition for writ of habeas corpus be denied, that no Certificate of Appealability issue and the case be closed.

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

SIGNED this 19th day of November, 2018.

UNITED STATES MAGISTRATE JUDGE

cc: Jeffrey Lagasse
DOC# 680445
Jefferson Correctional Institution
Inmate Mail/Parcels
1050 Big Joe Road
Monticello, FL 32344
PRO SE

Jeanine Marie Germanowicz
Attorney General Office
1515 N Flagler Drive
Suite 900
West Palm Beach, FL 33401-3432

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No: 17-60692-Civ-COOKE/REID

JEFFREY LAGASSE,

Petitioner,

vs.

JULIE L. JONES,

Respondent.
_____/

*pg 2 or Back

ORDER ADOPTING REPORT OF MAGISTRATE JUDGE

THIS MATTER was referred to the Honorable Patrick A. White, United States Magistrate Judge, pursuant to 28 U.S.C. § 636(b)(1)(B), Rules 8 and 10 of the Rules Governing Section 2254 Cases in the United States District Courts, and Administrative Order 2003-19, for a ruling on all pre-trial, non-dispositive matters and for a Report and Recommendation on any dispositive matters.

On November 19, 2018, Judge White issued a Report of Magistrate Judge (ECF No. 23) recommending: 1) that the Petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus (ECF No. 1) be denied; 2) that no Certificate of Appealability issue; and 3) that the case be closed.[1] Petitioner filed Objections on December 10, 2018 (ECF No. 24). After considering Judge White's Report, the Objections, the record, and the relevant legal authorities, I find Judge White's Report clear, cogent, and compelling.

Moreover, Petitioner has not demonstrated that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *accord Lott v. Attorney Gen., Fla.*, 594 F.3d 1296, 1301 (11th Cir. 2010) (explaining that a "petitioner need not show he will ultimately succeed on appeal" in order to warrant a certificate of appealability).

[1] On January 4, 2019, this case was reassigned to Magistrate Judge Lisette M. Reid (ECF No. 25).

* Judgement Date and signature on Back.

It is therefore **ORDERED and ADJUDGED** as follows:

- This Court **AFFIRMS and ADOPTS** Judge White's Report of Magistrate Judge (ECF No. 23) and **DENIES** the Petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus (ECF No. 1).
- This Court **DENIES** a Certificate of Appealability.
- The Clerk shall **CLOSE** this case.

DONE and ORDERED in chambers, at Miami, Florida, this 30th day of April 2019.

Marcia G. Cooke

MARCIA G. COOKE
United States District Judge

Copies furnished to:
Lisette M. Reid, U.S. Magistrate Judge
Jeffrey Lagasse, pro se
Counsel of record

petition dismissed

APPENDIX PAGES

3&4

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12183-D

JEFFREY LAGASSE,

Petitioner-Appellant,

versus

FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

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

ORDER:

To merit a certificate of appealability, appellant must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Appellant's motion for a certificate of appealability is DENIED because he failed to make the requisite showing.

/s/ Gerald B. Tjoflat
UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

January 28, 2020

Jeffrey Lagasse
Jefferson CI - Inmate Legal Mail
1050 BIG JOE RD
MONTICELLO, FL 32344-0430

Appeal Number: 19-12183-D
Case Style: Jeffrey Lagasse v. Florida Department of Corr.
District Court Docket No: 0:17-cv-60692-MGC

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause.

The enclosed order has been ENTERED.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Scott O'Neal, D/lt
Phone #: (404) 335-6189

MOT-2 Notice of Court Action

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12183-D

JEFFREY LAGASSE,

Petitioner-Appellant,

versus

FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

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

Before: ROSENBAUM and TJOFLAT, Circuit Judges.

BY THE COURT:

Jeffrey Lagasse has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's December 6, 2019, order denying a certificate of appealability in his appeal of the district court's denial of his *pro se* 28 U.S.C. § 2254 habeas corpus petition. Upon review, Lagasse's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

January 28th 2020
See Attached Pg 1 → for date

Pg 2

APPENDIX PAGES

5&6

S.A.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, 1525 PALM BEACH LAKES BLVD., WEST PALM BEACH, FL 33401

March 05, 2015

CASE NO.: 4D13-1746
L.T. No.: 03019606CF10A

JEFFREY LAGASSE v. STATE OF FLORIDA

Appellant / Petitioner(s) Appellee / Respondent(s)

BY ORDER OF THE COURT:

ORDERED that appellant's motion for rehearing filed February 11, 2015 is denied.

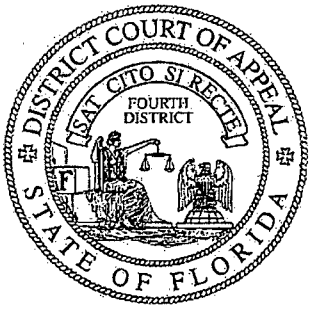
Served:

cc: Attorney General-W. P. B. Jeanine Marie Germanowicz Jeffrey Lagasse

kb

Lonn Weissblum

LONN WEISSBLUM, Clerk
Fourth District Court of Appeal



IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, 1525 PALM BEACH LAKES BLVD., WEST PALM BEACH, FL 33401

May 17, 2016

CASE NO.: 4D15-4142
L.T. No.: 03-19606 CF10A

JEFFREY LAGASSE v. STATE OF FLORIDA

Appellant / Petitioner(s) Appellee / Respondent(s)

BY ORDER OF THE COURT:

ORDERED that the appellant's April 25, 2016 motion for rehearing is denied.

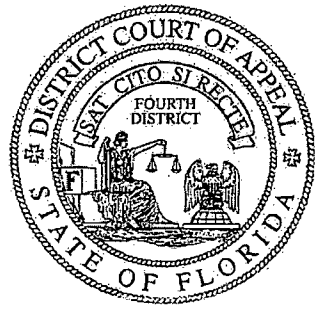
Served:

cc: Attorney General-W. P. B. Jeffrey Lagasse

kb

Lonn Weissblum

LONN WEISSBLUM, Clerk
Fourth District Court of Appeal



APPENDIX EXHIBIT

"A"

A Yes.

Q In fact your divorce was final April 22nd, 2002?

A Yes.

Q Four days before this party?

A Yes.

Q Isn't it true it was your ex-husband's girlfriend that picked the girls up on Saturday?

A Yes.

Q You testified before you didn't see your girls until Sunday afternoon about four o'clock?

A That's correct.

Q They were dropped off at your parents' house?

A Yes.

Q So when Sherrie Smith called you between six and six-thirty Saturday night, that's what you said before, correct?

A Yes.

Q And seemed concerned in your mind after you spoke to Sherrie, you believed something inappropriate had happened, correct?

A Yes.

Q In fact Sherrie told you to speak to your daughters about what had happened?

A Yes.

Q At that point isn't it true you didn't ask if the girls were still there?

A That's correct.

Q Now isn't it true the deputy arranged for you to take the girls to the Sexual Assault Treatment Center the next day?

A Yes.

Q Isn't it true that your ex-husband was there as well?

A Yes.

Q Since that time your ex-husband has not been involved in the criminal case, correct?

A Correct.

Q But you and your ex-husband are the ones actually going to file the civil lawsuit together?

A Yes.

Q You are seeking money damages?

A Yes.

Q And you have a belief that it would be helpful to your civil case, your position in the civil case to have a conviction in the criminal case?

A Yes.

Q In your civil suit, you listed you are seeking damages for physical injuries, correct?

A That's the way it's stated, yes.

Q The girls didn't suffer any physical injuries though, did the?

A No, they did not.

Q You said you are seeking money to help pay for the counseling that your daughters have had, correct?

A Yes.

Q But before this party, your daughters had also been to counseling, correct?

A They had gone twice before when we started filing the divorce, yes.

Q To deal with the divorce they had gone to counseling?

A Yes.

MS. STEINSALTZ: I have nothing further, Judge.

THE COURT: Redirect.

REDIRECT EXAMINATION

BY MS. GRESS:

Q Suzanne, did you come up with this story for your kids to tell so you can make money on a civil case?

MS. STEINSALTZ: Objection.

THE COURT: Overruled.

THE WITNESS: No.

BY MS. GRESS:

Q Would you use your kids as a con to make money in a civil case?

A No.

MS. STEINSALTZ: Argumentative.

THE COURT: Overruled.

BY MS. GRESS:

Q Your kids are still going to counseling today?

A Yes.

you and your husband have filed a civil lawsuit in this case?

A A joint lawsuit.

Q Well, initially you actually filed a suit and then you joined it with the other one with the Franklin's, correct?

A No, it was an ongoing suit that we joined.

Q You just said that you found out that Sarah and Tory's mom was suing so you decided --

MS. GRESS: Objection --

BY MS. STEINSALTZ:

Q Was an ongoing lawsuit from who?

A The Franklins.

Q You found out they were suing?

A Correct.

Q You decided you were going to sue as well, that you guys were going to join in the suit as well?

A Correct.

Q You also are seeking money damages?

A I'm sorry, I didn't hear you.

Q You and your husband also are seeking money damages?

A Correct.

Q In your lawsuit you are seeking damages for emotional distress, correct?

A Correct.

Q Just to be clear again, your daughter never received counseling since that date?

A That is correct.

Q It was damages for physical injuries as well, correct?

A I don't know.

Q Is it correct that your husband is the one who is more involved in the civil suit than you?

A That is correct.

Q Other than discussions at home, your husband hasn't been involved in the criminal case?

A That is correct, he has not been to court.

Q He hasn't been to court in the criminal case?

A No.

MS. STEINSALTZ: I have nothing further.

REDIRECT EXAMINATION

BY MS.GRESS:

Q When you talked to Marina after you phone call with Sherrie, you said that she wasn't forthcoming with information?

A Correct.

Q What did you mean be that?

A I meant that she didn't say this happened to me and then this happened to me, and this happened. No one ever laid out a scenario for me that went from point A to point B to point C.

Q Was it something that she appeared to want to talk to you about?

A No, she did not want to talk about it.

Q Did you have to pry her for information?

happened.

Now, as I said before, Ms. Steinsaltz, as the judge told you, is going to get up to talk to you again. Traditionally, stuff the person doesn't want to respond to. So what I'm going to have to ask you, when Ms. Steinsaltz gets up to talk to you, when she makes her final arguments, when you go back into that jury room, first of all, you remember that none of what we say is evidence, the evidence is the evidence. What we say is how we remember it. You go by what you remember.

But, also, when you go back into that jury room, think about the last thing she said and think about how I would have responded to it. What would be my response to that argument? What would I have pointed out? And once you take that role, try to think of how I would have responded to those type of arguments.

I'm sure she's going to talk about what the motives are, because, really, that is the most striking thing in this case. This isn't one little girl that went to a birthday, it's not even two little girls that said this happened, three different little girls were at this birthday party and were molested by that man.

The only person who knew Jeffrey Lagasse was

Ms. Gress, you may continue.

MS. GRESS: Thank you, judge.

Like I was saying, the defendant is charged with five counts of lewd or lucivious molestation. You're going to get an instruction for each of those counts. And the judge is going to tell you that each of those counts is a separate crime and a finding of guilt of one doesn't influence the other, you have to consider each of them separately. You can consider all the evidence together, but each count has a separate verdict form.

Now, the instructions which you're going to be given have three elements for the crime that Mr. Lagasse is charged with. Each count he's charged with has three elements. And two of the three elements on all of them are exactly the same. And I would argue that those two things that are exactly the same on all the counts are things that are not in contention.

For example, in all of them, one of the elements is at the time of the touching Jeffrey Lagasse was 18 years of old age or older. His birth date was given during the trial by Dectective Marcartell. He was 40 or 41 when this happened. So the fact that he's over 18 has never been contested. I haven't

Q Did you want to see that man?

A No.

MS. GRESS: Thank you, Marina. The other lawyer is going to ask you some questions, okay.

THE COURT: Cross examination.

CROSS EXAMINATION

BY MS. STEINSALTZ:

Q Do you remember you were at another court hearing at another time and there was also a judge here. It wasn't this room, but it was a similar room like this.

A Yes.

Q There was a judge up there?

A Yes.

Q There was a court reporter like that lady next to you?

A Yes.

Q There was a lawyer that asked you questions, remember?

A Yes.

Q Do you remember one of the lawyers asked you if you saw the man in court that had done these things, do you remember that?

A Yes.

Q Do you remember you didn't see the man there?

A Yes.

Q That was back in about 2004, right?

A I think.

Q A couple of years ago?

Q Who were the adults that were there?

A Ashley's mom and another man.

Q Did you know that other man?

A No.

Q Did you learn his name during the night?

A No.

Q Had you ever seen that other man before?

A No.

Q Had you ever met him?

A No.

Q Did he seem to know anybody at the party?

A He knew Ashley.

Q Did he know Ashley's mom?

A Yes.

Q Was he the only man that was at the party that night?

A Yes.

Q The whole night?

A Yes.

Q Do you remember what that man looked like?

A Yes.

Q Do you see that man here today?

A Yes.

see 675

Q Can you point him out to us?

A Yes, he is in the blue shirt.

Q What did you guys do when you got to the party?

reasonable? That doesn't make any sense whatsoever.

And how do you explain Marina's reaction? How do you explain the way she reacted at that McDonald's when she saw the defendant three days later? Janet told you she hadn't seen her react that way before and that she looked terrified. How do you explain it?

And I'm sure we're going to hear more about how [redacted] didn't identify the defendant in court. But let's think about that. Did she point to the right person? Absolutely, she did not. But, does that matter? How many men were at that party? One. Him. He was the only man at that party. Every single witness testified to that. Do you remember what we say isn't evidence, what the witnesses say is evidence?

Even Sheri said that there was a guy there that put up a cabana. He left before the party started. All the girls said the only man at the party was the defendant. All the girls said the only adult watching the movie, and especially the only man watching the movie, was the defendant. The man that [redacted] saw walk [redacted] into the house, where [redacted] says they went into the bedroom, and she told you about what happened in the bedroom, the man [redacted] saw, was the defendant. He was the only man there. That's evidence. You

REDACTED

* see 357 358 390 391

Q. Had you done that that night?

A. Yes.

Q. Do you know what you had?

A. Yes, it was Seagrams Seven, I think, with club soda.

MS. GRESS: I don't have any further questions.

THE COURT: Okay. Cross Examination?

CROSS EXAMINATION

BY MS. STEINSALTZ:

Q. Ms. Smith, you said there was no other men there. A man showed up to help you put up the canopy over the sand boxes?

A. Yes. He he left.

Q. He showed up during the party?

A. Wasn't during the party, he actually came before any of the girls got there to help me put up the canopy. He was not at the party.

Q. Was that Buddy?

A. No.

Q. That Kenny?

A. I don't know a Buddy or Kenny. Don't know either one of those people.

Q. Wasn't there a man also who came to take your son to go over to a friend's house?

A. He just dropped Taylor off at about 11:00 and

left. He wasn't at the party.

Q. But other men did show up at least at some point?

A. Not at the party.

Q. Not at, I'm sorry?

A. Not at the party. They were not there during the party.

Q. He came to the house?

A. Yes, to drop my son off and left.

Q. Now, while you say that Jeff was watching the girls, you would come back and check on them, correct?

A. Yes.

Q. You said there was a window looking out to the pool?

A. Yes.

Q. You never saw him go anywhere with the girls?

A. He went outside when we went to the arts and crafts. I noticed him.

Q. I'm talking about during the pool, during the playing at the pool. You never saw him go anywhere with any of the girls while they were playing at the pool?

A. No.

Q. In fact, during the party, you were always trying to keep track of the kids by counting heads because with the pool and everything, you were

Q. That was back in January of 2003, right?

A. Yes.

MS. STEINSALTZ: May I approach, Judge?

THE COURT: Yes, ma'am.

BY MS. STEINSALTZ:

Q. Read it to yourself. Okay.

You were asked, is it okay to tell lies? You said, no. And then asked, why not? You said: It is okay but you can't really do it all the time.

Didn't you say that?

A. Yes.

Q. Okay. That's the time, remember, somebody you were also sworn in like you did today, right? Remember that?

A. Yes.

Q. And they told you that you had to tell the truth, right?

A. Yes.

Q. And there was, like I said, a video camera that was recording what you were saying to make sure we got all correctly, right?

A. Yes.

Q. Now, you said just before there were no other adults at the party. Isn't it true that Ashley's dad was at the party?

A. I don't remember seeing him.

Q. Do you remember giving a different answer in the past?

A. No.

Q. Remember speaking to a detective a few days after this all happened, the pool party?

A. Yes.

Q. His name was Detective McCardle?

A. Yes.

Q. And he taped your statement, didn't he?

A. Don't remember.

Q. Did he have you speak in a microphone?

A. Yes.

Q. Because he told you he was taking down what you were saying, making sure everything was okay and he also told you that you had promised to tell the truth, didn't he?

A. Yes.

MS. STEINSALTZ: May I approach, Judge?

THE COURT: Yes, ma'am.

BY MS. STEINSALTZ:

Q. Victoria, when Detective McCardle asked: Was her dad there that night? You said, yes, but left to take her brother somewhere. Didn't you?

A. Yes.

APPENDIX EXHIBIT

"B"

parents to allow me to interview their children.

Q Now at some point did you place Jeffrey Lagasse under arrest?

A Yes, I did.

Q Did he tell you his date of birth?

A Yes.

Q What was his date of birth?

A May 14th, 1961.

MS. GRESS: I don't have anything further.

CROSS EXAMINATION

BY MS. STEINSALTZ:

Q Good afternoon, detective.

A How you doing.

Q Is it true, detective, when you were assigned to this case in April 2002 you only been a detective in the sex crimes unit for approximately seven months?

A No, September 10th, 2001 would have been my first day, the day before 9/11.

Q Just over seven months?

A Okay, yeah, seven months, yeah, I guess you are right.

Q You said based on the allegations you weren't expecting to find any physical evidence?

A Correct.

Q No DNA, correct?

A Correct.

Q Isn't it true that Nurse Jean Swaby did do exams of the girls' genital areas?

A Uh-huh.

Q You have to answer?

A I'm sorry, yes.

Q Isn't it true those were top to bottom exams?

A I don't know what Nurse Swaby did exactly. I was not present in the room.

Q So you don't know what an exam is for the Sexual Assault Treatment Center?

A Well, I know what an exam is, but I can't sit there and say exactly what she did that day. I know that there was an exam performed, but obviously I wasn't present in the room. Maybe she did not do something that she would normally do, I don't know.

Q Isn't it true there were no physical findings?

A I believe so, yes.

Q Isn't it true the statements of the girls were taken after the exam?

A That I do not know, if I can refer to my report maybe it will refresh my memory.

Q Would it also help you to look at the exam date, I mean time?

A Yeah, if you would have that. Yes, that's correct the exam was performed prior to my taking a statement from Victoria.

Q Isn't it true, detective, that since this case has no

physical evidence, this case is simply statements of witnesses?

A Yes.

Q So isn't it true that it makes extremely important that the interviews of the witnesses be done correctly when you are relying on totally witnesses?

A Correctly sure.

Q You interviewed the girls separately, correct?

A Yes.

Q Isn't it true it's important to interview witnesses separately so they don't hear what the other one is saying and be influenced by the other person?

A Correct.

Q Isn't it also true that since you weren't involved in this case for three days, you don't know how many other times these girls told their stories without being separated?

A That's true.

Q You don't know how many times they heard what the other one was saying about what they say happened?

A That's true.

Q Isn't it true that Deputy St. Valtare (phonetic) was actually the first law enforcement officer to meet with the girls and their family?

A Yes.

Q And are you ware that Deputy St. Valtare interviewed all the girls together?

A That I do not know.

Q As a detective in that unit, isn't it true that you learn, you are told that the presence of a parent during an interview can have an impact on the information that a child would give?

A Yes.

Q In some cases a parent can even pressure a child to make allegations?

A Yes.

Q Some cases a parent's presence is likely to encourage pressure that a child feels to repeat an allegation that they have already made, correct?

A Oh, yes, it is possible.

Q Now in fact in your case you didn't have the parents in the room when you interviewed Victoria and Sarah?

A That is correct.

Q But you did have Sherrie Smith in the room when you interviewed Ashley?

A Yes.

Q And Ashley in the room when you interviewed her mother Sherrie?

A I believe she was present, yes.

Q But you don't know what Deputy St. Valtare did?

A Other than by reading his report, no.

Q So are you aware that he had the parents in the room with him?

MS. GRESS: I'm going to object, he just said he doesn't know. It's not something he did.

THE COURT: Sustained.

BY MS. STEINSALTZ:

Q Isn't it also true, detective, that if an interviewer asks leading questions of a child, it could lead to a child giving inaccurate information?

A Yes, by leading questions, yes, it is possible.

Q Again, you are saying you're not sure what questions exactly were asked of the girls leading up to your involvement in the case?

A That's correct.

Q Isn't it true, detective, that before you go on tape and do these taped statements you do a pre-interview?

A Yes.

Q You discuss with any witness and in this case Sarah and Victoria and eventually Ashley and Sherrie, you go over what the person is going to say?

A Yes.

Q But everything you do on the pre-interview is then on the tape?

A Yeah, you try to capture everything, yes.

Q Before we came in here, you had a chance to review the statements that Victoria and Sarah gave you, correct?

A Yes.

Q Nowhere in those statements do those girls ever say that Mr.

Lagasse threatened the girls if he told anyone he would hurt them, did they?

A That is correct.

Q However, you did put that in your probable cause affidavit?

MS. GRESS: I'm going to object to what's in his probable cause affidavit.

THE COURT: Overruled.

THE WITNESS: Yes.

BY MS. STEINSALTZ:

Q Now isn't the Sexual Assault Treatment Center set up for video taping witnesses?

A Now they are, yes.

Q They weren't back in 2002?

A You know what I don't remember to be honest with you I don't remember. I believe that they were but I don't want to say definitively.

Q In fact isn't it recommended that when children are being interviewed they be video taped to insure nobody is coaching them or encouraging them to say something?

A No.

Q It is not recommended that you have children video taped?

A No. We at the sheriff's office and actually we were in a meeting the other day with the other law enforcement agencies in Broward County, BSO kind of has an unwritten policy that we will conduct video recorded interviews of children five and under at the

time?

A No, I would not refer to myself as a rookie detective.

Q Seven months on the job?

A Actually, no. I was hired by the Broward Sheriff's Office in 1996, so that would have been six year.

Q Seven months in that department?

A In the sex crimes division. But I was a detective in another division prior to working sex crimes.

Q But in the six crimes division, seven months on the job; is that correct?

A September 11, 2001 would have been my hire. Yes, approximately around seven months.

Q Thank you, sir.

Did you know me or anyone in my family at that time?

A No.

Q Thank you, sir.

There was no reason for you to have anything against me then, if you didn't know me, correct?

A No.

Q Thank you, sir.

And in 2006 Ms. Steinsaltz questioned you about

was ineffective.

MS. ODZER HUGENTUGLER: Actually, I take that back. Judge, in his Amended Addendum With the Supplemental Retractions, which was... in that particular pleading on page three Mr. LaGasse added the names of Sherry Smith, Ralph Nazzario, Mr. Franklin, Cody LeBrun, Jean Swaybe, Sergeant McCardle, Ashley Smith, Sarah Franklin...

I'd better slow down. Sorry.

Victoria Franklin, Marina Nazzario, Susanne Franklin, Janet Nazzario, a Jasmine, Andrea and a Sherry Smith as possible potential witnesses.

THE COURT: Okay.

MS. ODZER HUGENTUGLER: I'm not sure.

THE COURT: All right. Continue.

Q (By The Defendant) How many cases would you say you have handled over the years, sir, roughly?

A Personally investigated or been supervised?

Q Been a part of in any way, shape or form.

A Probably eight or 9,000.

Q And of those eight or 9,000, did you ever falsify documents in anybody's case besides mine?

A Never.

Q So I was the lucky number?

MS. ODZER HUGENTUGLER: Objection. That's

argumentative.

THE COURT: Sustained.

Q What would cause you, if you were so diligent in all those other cases, what would cause you not to be so diligent in mine?

MS. ODZER HUGENTUGLER: Objection again.

THE COURT: Sustained.

Q Is falsifying documents, police documents, a jailable offense?

MS. ODZER HUGENTUGLER: Your Honor, I'm going to object again.

THE COURT: Sustained.

Q You built the foundation of this case, is that not correct, by doing your investigation? You were the lead detective on the case?

A Not necessarily. Road patrol, obviously, conducted their initial investigation would be the basis, or would be the initial investigators of the crime. They would build the foundation, per se.

Q They were only involved the first day and then you took over; isn't that correct?

A That's correct.

Q I would venture to say you picked up where they left off. And then you built a foundation off of that, correct?

A Yes.

Q So you were responsible for building...

You were the same person that falsified my documents and the same person that was responsible for building the foundation of my case, correct?

MS. ODZER HUGENTUGLER: Objection to the question.

THE COURT: Sustained.

Q All right. In your... You said that you knew all... the names of all the witnesses. But for some reason did not contact them all; is that correct?

A Yes.

Q Do you still have those names?

A I believe if I looked through the report I could find them. Off the top of my head, no, I don't.

Q Could you possibly provide me with those names? I have been trying to get those names for five years now. There's two names, Jasmine and Andrea, I need the last name of those two people.

A I believe back when... Once again, I'm not an attorney. But I believe all of the police reports that I either wrote or someone with Broward Sheriff's Office authored were presented to you and your Defense Attorneys during the discovery process. So any documents that I have, you would have had. Both in the

he is admitting that he falsified the documents. That's all. Thank you, sir.

THE COURT: Ask him. Are you admitting that you falsified documents?

Q (By The Defendant) Did you falsify that one line that you put in my Police Affidavit that was not true?

A Yes, that line is not true.

Q And you've never done that to anybody but me, correct, in 8,000 cases?

A Not that I can recall.

Q And that's not a typical practice at the Broward Sheriff's Office?

A No.

THE DEFENDANT: Thank you very much.

MS. ODZER HUGENTUGLER: I do have a question.

CROSS-EXAMINATION

BY MS. ODZER HUGENTUGLER:

Q Does that mean you falsified something?

A No.

MS. ODZER HUGENTUGLER: That's all. Thank you.

THE DEFENDANT: That means...

Okay. Then I have another question.

REDIRECT EXAMINATION

BY THE DEFENDANT:

Q That means you lied, correct?

A I can't explain it. I don't recall why that was in there. Whenever my response is I said at trial.

Q Let me ask you this. Let me ask you a completely different question. Did you put in your Police Affidavit that I helped little old ladies across the street?

MS. ODZER HUGENTUGLER: Objection, Your Honor. That's irrelevant.

THE DEFENDANT: I can't even ask that? That's a relevant question.

Q Did you put that I volunteer at the Red Cross? No, sir, you didn't. You put that I threatened girls' lives with violence, sir. There is a difference. And yes, that does make a difference.

THE COURT: Anything further from Detective McCardle?

THE DEFENDANT: Is something funny, sir? You think it's funny that you --

MS. ODZER HUGENTUGLER: Objection.

THE COURT: Sustained.

MR. LOWRY: Mr. LaGasse, stop.

THE DEFENDANT: Nothing further. Thank you.

MS. ODZER HUGENTUGLER: I have no questions.

THE DEFENDANT: For the record, I just want to

make sure that it's on the record that he was laughing.

THE COURT: All right. Anything further from Detective McCardle?

MS. ODZER HUGENTUGLER: No. Except I did not see any laughter.

THE WITNESS: Thank you, Your Honor.

THE COURT: All right. Bring in Ms. Steinsaltz.

Raise your right hand.

THEREUPON:

DEBRA STEINSALTZ

A witness of lawful age, being first duly sworn in accordance with law, was examined and testified as follows:

THE COURT: State your name and spell your name for the Court Reporter.

THE WITNESS: Debra Steinsaltz. S-T-E-I-N-S-A-L-T-Z. First name D-E-B-R-A.

THE COURT: All right. You can inquire.

DIRECT EXAMINATION

BY THE DEFENDANT:

Q Good afternoon, ma'am.

A Hi.

Q Didn't you used to work for a private practice?

APPENDIX EXHIBIT

"C"

know. Let the jury decide if this is evidence that will impeach her. It is simply impeachment.

THE COURT: I'm saying-- I'm not saying that. We're trying to hone in on how you're going to do that. I agree with you that if there is-- Hold on, Ms. Gress.

Ms. Franklin says that no one was whispering to her, I think the defendant should be entitled to present some evidence. Because, I guess, it is arguable that that was going on. It doesn't make a lot of sense to me that the detective would say anything to her while he is taking her statement, but I guess anything is possible.

I think you have a right to try to impeach her testimony in that regard to show that she was being coached somehow. The question is how to do that. And you're certainly not in a position to have her authenticate the tape right now.

MS. STEINSALTZ: At this point, it's impeachment because she said that nobody-- Now I can't remember if she said she doesn't remember somebody whispering when asked the first time around. I guess I can ask if she remembers somebody whispering.

THE COURT: That's how you got-- You're trying

to refresh her recollection.

MS. STEINSALTZ: And then I still think I have the right to also have her repeat the fact that she said it sounded like the person asking the questions as far as laying the foundation.

THE COURT: Why do you want to do that?

MS. STEINSALTZ: As far as-- Because she admitted that it sounded like the person who was asking her the questions when she heard it the first time. Her comment was it sounded like the person--

THE COURT: Bring her back in. Pick up with the jury. More predicate need to be layed if there was anyone else in the room.

MS. STEINSALTZ: As far as foundation, she can listen to the tape, say if it is her voice. I-mean, is that her voice.

THE COURT: I doubt she is going deny that.

MS. STEINSALTZ: She might.

MS. GRESS: She is not able to say that the tape is a true and accurate representation and that it hasn't been altered in any way.

THE COURT: Let's see where it goes and if we need to break, we'll break.

Let's bring her in. Bring the jury back.

MS. GRESS: What are we going to do in front of the jury?

THE COURT: We're not going to play the tape right now. You can follow-up and see if that refreshed her recollection, see what she says and lay whatever predicate you need to see who else was in the room. I think you need to clarify it more. If at the end of this section you think that you need to use her to authenticate that tape, I'll break for the day and allow her on listen to the tape and allow you to continue with that tomorrow afternoon.

MS. STEINSALTZ: I'm really impeaching her with refreshed recollection.

THE COURT: Okay. That was whole objective of this.

Get the jury.

THE COURT: Ladies and gentlemen, welcome back. You may be seated.

Ms. Steinsaltz, may continue.

MS. STEINSALTZ: Thank you.

BY MS. STEINSALTZ:

Q. Sarah, does that refresh your recollection about whether somebody was whispering to you?

A. No.

Q. Somebody was whispering to you, weren't they?

A. No.

MS. GRESS: Judge--

THE COURT: No. Go ahead.

BY MS. STEINSALTZ:

Q. Sarah, was anyone else in the room with you when you gave the statement to Detective McCardle besides you and Detective McCardle?

A. Don't remember.

Q. Was Detective McCardle there?

A. Yes.

Q. And did it refresh your recollection about who's voice was on the tape besides yours? Did you hear? Did you refresh your recollection about who asked you questions?

A. Okay. What is recollection?

Q. I'm sorry. I apologize.

You remember who asked you questions when you gave you the statement?

A. No.

Q. You don't remember who asked you questions? Not his name necessarily, but what his job was?

A. Yes.

Q. What was his job?

A. Was to ask me questions and to get testimony.

Q. You remember him telling the detective, Detective McCardle? Do you remember that?

A. Yes.

Q. Did Detective McCardle ask you questions?

A. Yes.

Q. Did anybody else ask you questions?

A. No.

Q. And did listening to that part of the tape you heard before refresh your recollection at all whether anybody else was in the room besides yourself and Detective McCardle?

MS. GRESS: She doesn't know what recollection is.

MS. STEINSALTZ: I'll change the word.

BY MS. STEINSALTZ:

Q. Does it help you remember who else, whether anybody else was in the room besides you and Detective McCardle?

A. No.

Q. It doesn't help you remember who was in the room with you?

A. Right.

Q. Let's go, Sarah, to when you say that Mr. Lagasse asked you to rub his nipples. That's what you said today, correct?

A. Correct.

Q. Do you remember saying anything different in the past where you testified in a previous court proceeding, previous court hearing?

A. I probably said something like he made us rub his chest.

Q. In the past you said chest, not nipples, correct?

A. Correct.

Q. Isn't it true that at some point you said that one of the other girls took over for you rubbing his chest?

A. Yes.

Q. That Cody rubbed his chest?

A. Yes.

Q. Do you remember in that statement to Detective McCardle that you said it was your hand that Jeff grabbed and put on his private part?

A. No.

Q. Isn't it true that you told Detective McCardle that my hands touched the low part of his body?

A. No.

MS. GRESS: I'm going to object, improper impeachment. She needs to show her.

THE COURT: She does. Why don't you show that,

show it to her before you ask the question at this point.

BY MS. STEINSALTZ:

Q. Let me ask this way. Sarah, didn't your hands touch the lower part of Jeff's body?

A. No.

Q. Well, do you remember giving a statement when you promised to tell the truth to Detective McCardle? Do you remember saying something different to Detective McCardle when he talked to you?

A. No, but I was probably confused about whether he was talking about me or my sister.

Q. Did you tell him that your hands touched the low part of his body?

A. Yes.

Q. And did you tell him that he kept pulling my hand right there?

A. What?

Q. That you told Detective McCardle that he kept pulling my hand right there?

A. Like I was probably confused between me and my sister. Like, I was confused. He was asking about my sister and not asking about me.

Q. When you said my hand, were you talking about your sister's?

A. I don't think I said that, though.

Q. Sarah, when you said that you don't remember saying my hand touched the low part of his body, would it help you to remember if you saw a transcript of your statement to Detective McCardle?

A. No.

Q. Would it help you remember whether you said that he kept pulling my hand right there if you were to look at this transcript and see it?

A. I have a copy.

Q. Would it help you remember?

A. No.

Q. What about if you listened to the tape?

A. No.

Q. Would it help you-- Well, let me ask you, isn't it true that you said he made me rub it, about Jeff?

A. What do you mean?

Q. When you were talking about that you touched the lower private part, you said that to Detective McCardle: My hand touched his lower part of his body and he made be rub it.

A. No.

Q. And isn't it true that all the girls saw what happened to you?

A. No.

Q. Do you remember giving a different statement when you talked to Detective McCardle saying something differently to him?

A. No.

Q. Would it help you remember if you looked at the transcript from your statement to him?

A. Yes.

MS. STEINSALTZ: Judge, may I approach?

THE COURT: Yes, ma'am.

BY MS. STEINSALTZ:

Q. Okay. Did anybody else see this happen, Sarah. Didn't you say all the girls saw it happen?

A. On that paper it says I did.

Q. You think this is wrong?

A. Yes.

Q. Well, Detective McCardle, you said, made a tape of what you said, right?

A. Right.

Q. And it is your voice on that tape, right?

A. Right.

MS. GRESS: Judge, I object. She hasn't heard the whole tape.

THE COURT: I'm going to sustain the objection at this point based on the reasons I articulated

before.

Why don't you continue with your Cross Examination?

BY MS. STEINSALTZ:

Q. So, Sarah, what you're saying, even though it says here on this paper, you didn't say it?

A. Right. Wait, what's the question again?

Q. It says, when I just read you, okay, anybody else see this happen? You said, all-- It says all the girls saw it happen. Is that what you said to Detective McCardle?

A. I don't remember, but it says it on that paper.

Q. Okay. And just now you said, but you didn't say it. Isn't that what you just told us a minute ago?

A. What is the question?

Q. Did you tell Detective McCardle that all the girls saw it happen?

A. That's the question? That's the question?

Q. That is what I'm asking you. Did you the detective that all the girls saw it happen?

A. Yes. It says that on the paper.

Q. But you don't think this transcript would help you.

MS. GRESS: I'll object. This has been asked

and answered like four times.

THE COURT: At this point, I'll sustain that.

BY MS. STEINSALTZ:

Q. You said today that you saw your sister, Victoria, touching Mr. Lagasse's penis area, right?

A. Right.

Q. Do you remember saying something different in the past when you spoke to Detective McCardle?

A. No.

Q. Would it help you remember if you were to look took at this transcript of your statement to Detective McCardle? Do you think that might help you remember?

A. No.

Q. Why wouldn't it help you remember?

A. Because I have seen it before.

Q. And it wouldn't help you remember what you told Detective McCardle?

A. No, because I know that answer is right.

Q. So even though you told Detective McCardle that your sister rubbed up here on the boobies--

A. But my sister did not do that, I did that.

Q. Do you remember saying something different to Detective McCardle?

A. No.

Q. Again, this was taped, your statement to him,

correct?

A. Correct.

Q. Getting back to when you told what you told to Detective McCardle about your hands touching the lower part of his body, didn't you tell Detective McCardle once for a very long time until the movie was over?

A. What was the first part of the question?

Q. That when he asked you about your hands touching his lower part of his body, you told Detective McCardle that it was once for a very long time until the movie was over?

A. It wasn't me, it was my sister.

Q. That is not what you told Detective McCardle, right?

A. Apparently.

Q. Let me ask back to when you guys were playing in the pool. You said Jeff was throwing you girls all in the pool, correct?

A. Correct.

Q. There were six girls at this party that you remember, right?

A. Six or seven.

Q. You all went to the same school, you knew each other from school, correct?

A. Right.

Q. And Marina, was your best friend, right?

A. No.

Q. Do you remember telling Detective McCardle that Marina was your best friend?

A. Not at all.

Q. Do you think it might help you remember if you looked at the transcript when Detective McCardle talked to you about Marina? Do you think that might help you if you were to look at the transcript to remember what you told Detective McCardle?

A. No.

Q. Isn't it true that you never saw Jeff go anywhere with any of the other girls?

A. Yes.

Q. And you're saying, you have said today you told the prosecutor, this lady right here, that it upset you when you got a time out. That's what you told her, right?

A. Right.

Q. You remember saying something differently when you were here for a prior court hearing?

A. No.

Q. You think it might help you remember if you look at the transcript from that prior court hearing?

A. Yes.

MS. STEINSALTZ: Judge, may I approach?

THE COURT: Yes, ma'am.

BY MS. STEINSALTZ:

Q. Do you remember, Sarah, you were asked: Were you mad at him for that? Your answer was: I thought he because playing around.

Do you remember giving that answer?

A. No.

Q. But you read it here, right?

A. Right.

Q. Before you came here today, didn't this lady here get you a copy of this transcript to read?

A. Yes.

Q. And you read it over?

A. Right.

Q. And you didn't go to this lady here and tell her that something is wrong there and there were mistakes, did you? You didn't go say, oh, this is wrong, there's mistakes here?

A. Yes. Not on-- not on-- wait. On that one, I didn't say that there was anything wrong with that one, I don't think.

Q. You didn't say-- I'm sorry?

A. I don't think I said there was anything wrong with that one.

Q. Did she also send you the transcript from when you spoke to the detective?

A. Yes.

Q. And you read that over, correct?

A. Right.

Q. And you told her, you told this lady right here, that there were mistakes and things wrong with this transcript?

A. Yes.

MS. STEINSALTZ: Judge, may we approach?

THE COURT: Yes.

Take the jury back to the jury room.

Whereupon, the following proceedings were had outside the presence of the jury:)

THE COURT: Ms. Franklin, would you step out one more time?

Ms. Steinsaltz, what would you like to tell me?

MS. STEINSALTZ: If it is actually true that the prosecutor was told, which I don't necessarily think it is true, but I don't know, she's saying under oath that she told the prosecutor that there are mistakes in the transcript and it should have been revealed to me.

MS. GRESS: What she said to me was, when going

over her testimony, that she remembers touching his chest or his nipples and that her sister touched his penis; that she does not remember her touching his penis. I did not tell Ms. Steinsaltz that. I don't think I'm under an obligation to do that. That is what she said at the first trial and at her deposition. She said that that didn't happen. So now she says, maybe I was confused.

THE COURT: Let me focus on this. You're contending that-- The State is saying that she told you that she did not remember saying that Mr. Lagasse-- she touched Mr. Lagasse?

MS. GRESS: What she said to me that she knows she didn't touch his penis, just what she said. She just knows that it's her assist that touched his penis and that she can't explain why that--

THE COURT: Again, I'm-- And I haven't seen the police statement. What does the police statement say?

MS. GRESS: The police statement-- In the police statement, I can sum it up. It says that she touched his penis.

THE COURT: That Sarah touched the lower part of the body.

MS. GRESS: But at the deposition and at the

first trial, she always said that she wasn't the one who touched his penis; that it was her sister who touched his penis, although, she didn't use the word penis at the time.

She has said, since the deposition and the first trial that it was the her sister that touched his penis and she is the one who touched his chest. It is different in the statement but I didn't feel any obligation to turn it over because it was something she already knew before.

THE COURT: Okay. Ms. Steinsaltz, what is your response?

MS. STEINSALTZ: My only concern is that if she told Ms. Gress that this is wrong, which I asked directly, did you tell this lady here that the transcript than you read was wrong, then for her to now sit here and say that she don't know what it says, and I was never told that she specifically said this is wrong, then--

THE COURT: I mean, I assume you have reviewed the prior testimony. How did she testify that that was not accurate at the first trial and deposition?

MS. STEINSALTZ: Exactly. She testify like she does today. She knew that.

THE COURT: I understand. But if she is going to be allowed today, how is this-- How do you feel this is wrong? If she doesn't know, she says she doesn't remember anything. You ask her the question and she answered it.

MS. STEINSALTZ: I would ask for a Richardson hearing. There was evidence that I guess I didn't know about.

THE COURT: Let's have a Richardson hearing here. So we're conducting a hearing under Richardson. The issue is, you say you don't know about-- didn't know about is what?

MS. STEINSALTZ: That she told the prosecutor that this-- specifically this statement to Detective McCardle was inaccurate, was not right.

THE COURT: Ms. Gress, she told you that it was inaccurate in the sense that she never touched Mr. Lagasse's penis?

MS. GRESS: Correct. What show told me was: I didn't touch his penis, I touched his chest. Victoria didn't touch his chest, she touched his penis. This is all stuff that she testified to at trial and testified to at deposition. She is sitting here now saying the statement is wrong because, as she remembers things, she is the one

who touched his chest and her sister touched his penis.

THE COURT: This is just semantics what we're going through. The State is telling what she was told, which was was the problem I had. It wasn't what I felt like the witness was saying, you know. I don't believe I need a Richardson hearing. I'm concluding it at this point.

To the extent it was not a disclosed, I'm finding that that was an inadvertent disclosure on the basis of Ms. Gress believed the context was fully disclosed and testified to by this particular witness at a prior trial and deposition.

I'm also going to find the violation, if there was one, was trivial. I'm also going to find, if there was such a violation, in light of the fact that the information had been available to the defense; that it had the ability to prepare for trial, I'm finding there is no basis to take any further action with this discovery issue.

Now, wer're not done. There are a couple of issues that in terms of the testimony of Ms. Franklin. And the first one is the issue with regard to whether or not somebody is whispering. On the tape she is listening to the tape and she

says that doesn't refresh her recollection. As I said at sidebar, I believe that if the defense wishes to offer extrinsic evidence to show she was being coached in an attempt to do that--

MS. STEINSALTZ: Judge, she said-- when I asked her was somebody whispering to her, she said it directly. Then she stated that that was her voice on the tape. And now I think that, paved on that, I should have the right to play that part of the tape to the jury.

THE COURT: I'm not saying you can't. You can move the tape into evidence.

MS. STEINSALTZ: I don't believe I have to.

THE COURT: You're trying to impeach her, but if you read the transcript, it's just another version of the transcript. Why isn't that cumulative? You have already read the transcript.

MS. STEINSALTZ: She said that didn't help her and it didn't impeach her directly.

THE COURT: I think you're mixing apples with oranges. You're attempting to refresh recollection and have been unsuccessful. Now, you're impeaching--

MS. STEINSALTZ: She didn't even give the same-- It doesn't refresh her recollection.

THE COURT: I'm not saying you can't introduce the tape, just play the tape to that. She has already-- To have her say that doesn't refresh my recollection, I'm not going to allow that. I'm going allow you to, quite frankly, in light of what I heard so far, is to introduce the tape or at least a portion of the tape in an effort to impeach her testimony to show she is being impeached.

MS. STEINSALTZ: What I'm trying to say, what I asked her again, I asked her directly again: Isn't it true that somebody was whispering to you? I didn't ask: Isn't it true that somebody is whispering to you and she said no. That means that impeachment-- I mean, I don't know if there is anything that limits my sources of impeachment. Anything that impeaches, you can read her transcript. You can read from something else. I want to play the tape. I don't know why it has to be from the transcript. You cannot hear whispering in the transcript.

THE COURT: You're not following me. I'm allowing you to present that evidence. Present the tape.

MS. STEINSALTZ: It shouldn't have to be put into evidence.

THE COURT: Why do you want to put something before the jury that is not in evidence in that sense?

MS. STEINSALTZ: Because it has to do with the sandwich. If I put it into evidence, I have waived my sandwich. I don't think that's necessary. I think it is just like my reading a transcript. How is it different from another source? It is the as reading from a transcript.

THE COURT: I'll think about that.

Now, there is another issue. She said there was another issue that arose with regard to her on the tape saying that she didn't say something that was on the tape, right?

MS. STEINSALTZ: Exactly.

THE COURT: What do you intend to do with that?

MS. STEINSALTZ: Same thing. Simply impeachment. Just like reading a transcript. At some point she did say, I didn't say it. I know at some point she said it. I don't remember.

THE COURT: Would you be entitled-- I'm not disagreeing you can present extrinsic evidence of the statement, assuming it is material and my consensus is it probably is.

MS. STEINSALTZ: Same issue, Judge.

THE COURT: Through some other witness. I understand what you're trying to do. I don't fault you for that. I'm not so sure the rules of evidence allow it to happen that way.

MS. STEINSALTZ: I think she can authenticate. Especially with the second part. It's just her voice that I am asking about. We're just talking about her voice.

THE COURT: You can do that at 1:30 tomorrow. Have this tape attempted to be authenticated through her. Again, you're authenticating the tape through the child, you'll still need to move it into evidence. She has listened to the tape. She says: I don't remember. That doesn't refresh my recollection.

MS. STEINSALTZ: As far impeaching her, I don't need to introduce something into evidence to use as impeachment. You read from a transcript all the time. We read from a transcript all the time: Didn't you give a different answer? Yes or no. You remember now that you said this about this? Yes. Same thing. That is what I'm arguing. I think it is the same issue for both issues, for bolt situations. Playing the tape is the same as

reading from a transcript only in another form and the best evidence rule, I think, also applies here.

THE COURT: I don't think it is a best evidence issue.

MS. STEINSALTZ: I think this tape is obviously more accurate than a transcript.

THE COURT: Don't know. Again, I don't have any idea what it is that you have there. I assume it is a tape, the copy that came from the police. I have no idea.

MS. GRESS: The point is this witness is not going to be able to authenticate the tape. And if Ms. Steinsaltz wants to do that, at this point I agree, she probably has to do it the proper way, through the detective, introduce the statement through the detective. And the fact that gives her a strategic dilemma really doesn't change the fact she has to do it the proper way.

MS. STEINSALTZ: Again, I don't see why this girl she is saying this girl can't recognize her own voice on the tape. I mean, because that's basically what authenticating is. She has to say she listened to the tape.

THE COURT: We're talking about her voice in terms of this whispering. We have no idea, taking

it in the light most favorable to the State, her theory it is not her voice, it is someone else's.

MS. GRESS: She can't tell us who it is.

THE COURT: That's another issue as to the second phase. The question that you asked, she said that she didn't say--

MS. STEINSALTZ: About that she put her hand on the lower part of the body or-- I'll find the exact wording. My hand touched the lower part of the body. I kept pulling my hand right there. He made my rub it. How many times? Once for a very, very long time until the movie was over. She gives exact-- She doesn't say my sister. It's very clear, my, my, my. She's clearly talking about her hand. She told the exact same story that is now Victoria's story. And, in fact, when talking about her sister, she says it was Victoria who rubbed his penis. So it's exactly reversed. And now she says ~~she didn't. She has now reversed and she told the~~ prosecute it was wrong.

MS. GRESS: We're not going into that again.

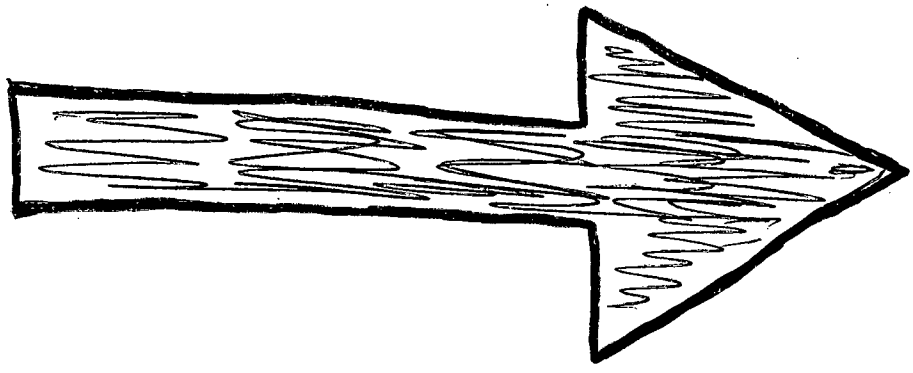
THE COURT: I think what you say about that, she wants to play that portion of the tape. In other words, she asked the question of Sarah Franklin. Sarah franklin said, I didn't say that.

S.C.

ATTACHMENT

D

APPENDIX EXHIBIT



D

Q. In fact, that was the phrase you used to Detective McCardle, I do things that we felt were inappropriate, correct?

A. Yes.

Q. You were seven at that time?

A. Yes.

Q. And the reason you said you thought it was inappropriate was because he made her hands go into the middle of his back, correct?

A. Correct.

Q. Isn't it true that Jeff left right after the movie?

A. Yes.

Q. And it was about 10:00?

A. Yes.

Q. When you saw Jeff the next morning, isn't it true that he didn't have anything with him that you saw?

A. Yes.

Q. ~~Little bit more Victoria. I want to talk to~~ you about what was going on back then.

Your dad dropped you off at the party, you said, correct?

A. Yes.

Q. And he had his girlfriend pick you and your sister up, right?

A. My hand.

Q. Was touching his?

A. Chest.

Q. How many times do you think he told you that he was scared and he wanted you to rub him?

A. Probably bike four times.

Q. While this was going on, while you were rubbing his chest, did Ms. Shery ever come out?

A. No.

Q. While you saw Tori's hand on his penis, did Ms. Shery ever come out?

A. No.

Q. Did anything else happen at that party between you and Jeff that made you feel uncomfortable?

A. Yes.

Q. What else happened?

A. After the movie, we went outside in the backyard, just me and Jeff.

~~Q. Why did you go outside?~~

A. Because we were doing this code thing.

Q. What code thing?

A. It's like a password thing. So like when they were playing in the pool, he's like, we're going to do this code thing. And then because I splashed him, I wasn't allowed to do it.

scared from the movie?

A. Yes.

Q. And at some point, you guys were all jumping around on the couch?

A. Yes.

Q. You never saw Jeff leave with any of the girls while the movie was playing, correct?

A. Correct.

Q. You never saw him leave with any of the girls after the movie was over?

A. No.

Q. And because I said earlier, like I talked about earlier, this was your birthday party, you were sort of in charge. You didn't want anything to happen to your friends that they didn't want to do, right?

A. Right.

Q. When you said you spoke to your mom the next day, she got pretty upset, didn't she?

A. Yes.

Q. In fact, she told you she was going to call the police?

MS. GRESS: Objection. Can we go sidebar?

THE COURT: Let's go sidebar.

(Whereupon, the following proceedings were had between counsel and the Court at sidebar:)

concerned, correct?

A. Yes.

Q. Every time you checked on them and while you were over this side of the house, the girls were all laughing and screaming, correct?

A. Yes, they were playing.

Q. You saw Jeff throwing them in the pool, right?

A. Yes.

Q. Never saw anything that made you suspicious while they're playing at the pool?

A. No.

Q. Do you remember the size of the yard?

A. No.

Q. Did the pool take up most of the backyard?

A. There was a side area where the sandbox was.

Q. Just to get a timeline, you all went inside around 9:00?

A. About 9:00, 9:30.

Q. When you went to lay down, because you had hurt your head, that was about 10:30 or 20 to 11:00?

A. Yeah, about a quarter to, actually.

Q. Okay. Just to go back one second, when you said you hurt your head that was when you hit your head and you got hurt. Jeff was the one that helped you try and stop the bleeding?

A. Yes.

Q. At some point, the girls came in, they were all screaming about the bleeding?

A. They saw me. They saw the blood.

Q. They kind of got a little freaked out for a minute screaming a little?

A. They just were concerned about what happened to me.

Q. Did they start screaming?

A. I don't remember.

Q. So you went to go lay down around quarter to 11:00 and said you only were gone about 15 or 20 minutes?

A. About 15 minutes.

Q. You came back around 11:00?

A. Yes.

Q. The movie was still going on?

A. Yes.

Q. Didn't notice anything usual about the girls or their behavior when you came back?

A. No.

Q. And, in fact, when you came back, when you left, Jeff had been sitting on the couch, correct?

A. Yes.

Q. You got everybody situated to watch the movie,

some girls were sitting on the floor, right?

A. Yes.

Q. Jeff was sitting on the couch?

A. Yes.

Q. And you made some popcorn, got some sodas for the girls before you went to lay down?

A. Yes.

Q. You came back and you said it was 11:00?

A. Yes.

Q. When you came back, Jeff got up and said to you, I've got to go. I should have been someplace a long time ago, right?

A. Yes.

Q. He, in fact, got up and left?

A. Yes.

Q. But you stayed with the girls and watched the end of the movie, correct?

A. Yes.

Q. The movie still had about another, what, hour and a half to go?

A. No, because they were-- That movie that I put in, they already watched part of it earlier.

Q. Which movie was that?

A. The Birds.

Q. They actually watched the end of it? Weren't

they watching the movie until about 12:30 a.m.?

A. I don't recall the time.

Q. Well, would it help you remember if you saw-- help you refresh your recollection to see your testimony from a prior court hearing?

A. Yes. I don't remember the exact time I said.

Q. Do you remember in a prior court proceeding staying about 12:30 they finished watching their movie and the lights went out?

A. If that's what it says, yes. I mean, it sounds about right.

Q. Okay. So from 11:00 until approximately 12:30, Jeffrey was gone, right?

A. Yes.

Q. And the movie hadn't finished when he left?

A. No.

Q. And none of the girls gave you any indication that anything was wrong?

A. No.

Q. They still, in fact, after the lights went out, wasn't unusual they were still up playing even though the lights were out?

A. Yes.

Q. You could hear them pretty much until late into the night, correct?

Q. That was back in January of 2003, right?

A. Yes.

MS. STEINSALTZ: May I approach, Judge?

THE COURT: Yes, ma'am.

BY MS. STEINSALTZ:

Q. Read it to yourself. Okay.

You were asked, is it okay to tell lies? You said, no. And then asked, why not? You said: It is okay but you can't really do it all the time.

Didn't you say that?

A. Yes.

Q. Okay. That's the time, remember, somebody you were also sworn in like you did today, right? Remember that?

A. Yes.

Q. And they told you that you had to tell the truth, right?

A. Yes.

Q. And there was, like I said, a video camera that was recording what you were saying to make sure we got all correctly, right?

A. Yes.

Q. Now, you said just before there were no other adults at the party. Isn't it true that Ashley's dad was at the party?

A. I don't remember seeing him.

Q. Do you remember giving a different answer in the past?

A. No.

Q. Remember speaking to a detective a few days after this all happened, the pool party?

A. Yes.

Q. His name was Detective McCardle?

A. Yes.

Q. And he taped your statement, didn't he?

A. Don't remember.

Q. Did he have you speak in a microphone?

A. Yes.

Q. Because he told you he was taking down what you were saying, making sure everything was okay and he also told you that you had promised to tell the truth, didn't he?

A. Yes.

MS. STEINSALTZ: May I approach, Judge?

THE COURT: Yes, ma'am.

BY MS. STEINSALTZ:

Q. Victoria, when Detective McCardle asked: Was her dad there that night? You said, yes, but left to take her brother somewhere. Didn't you?

A. Yes.