NO.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2020

ROBERT LUNDBERG,

Petitioner,

v.

MARK INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI, VOLUME 2

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IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR ST. LUCIE COUNTY, FLORIDA

STATE OF FLORIDA

vs.

ROBERT T. LUNDBERG,

Defendant.
_____/

FELONY DIVISION
CASE NO.: 562002CF1597A

OCT 29 2010

COPY

THIS matter came before the Court at hearing on July 14, 2010 on the Court's Order On Defendant's Post Conviction Motion, Denying In Part, Granting A Hearing, And Setting Status Hearing With The Defendant To Appear Telephonically.

The Court finds and determines as follows:

On December 5, 2003, the Defendant was convicted of attempted battery on a child under 12 by a person 18 years or older, and lewd or lascivious molestation of a victim under 12 by a person 18 years or older. (Exhibit 1: Information; Statement of Particulars; Verdict)(all references to "Exhibits" refer to those Exhibits attached to the Court's Order On Defendant's Post Conviction Motion, Denying In Part, Granting A Hearing, And Setting Status Hearing With The Defendant To Appear Telephonically)

On February 18, 2004, the Defendant was sentenced as a sexual predator to a total of 45 years in prison. (Exhibit 2: Judgment and sentence; punishment scoresheet, as corrected *nunc pro tunc*).

The Defendant appealed his conviction and sentence; the judgment and sentence were affirmed with opinion; and he sought and was denied review in the Florida Supreme Court. *Lundberg v. State*, 918 So.2d 444 (Fla. 4th DCA 2006) *cert. denied* 932 so.2d 193 (Fla. 2006) (Issued May 22, 2006).

The Defendant challenges his convictions and sentences, raising multiple claims

of ineffective assistance of counsel. In order to establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 677 (1984). To establish prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 694. A defendant is entitled to an evidentiary hearing on an ineffective assistance of counsel claim if he specifies facts, not conclusively rebutted by the record, demonstrating that counsel rendered ineffective assistance and that the defendant was prejudiced as a result. *Kennedy v. State*, 547 So. 2d 912 (Fla. 1989). If the defendant fails to satisfy either prong, the ineffectiveness claim fails. *Stancle v. State*, 980 So.2d 619, 621 (Fla. 4th DCA 2008).

Facts of the Case as adduced at trial

The Defendant alleges 7 pages of "facts," interspersed with argument, and citing to trial transcripts. (See motion, pp.6-13). In *Lundberg*, 918 So.2d at 445, the court summarized the facts of the case as to the appeal affirming the Court's decision that the Defendant's statements to his girlfriend should not be suppressed. (See Exhibit 3: Opinion).

First criminal incident

At trial, the victim, 11 years old at the time of the trial, (Transcript, p.235), testified that on one occasion when she was in the first or second grade, during a period when the power was out, (Transcript, p.247, 249, during a hurricane), she was sleeping on the couch when she felt something and woke up. (Transcript, pp. 206-212). The victim testified that the Defendant had stuck his hand inside her underwear and tapping—touching—the outside of her vagina with his hand. (Transcript, pp. 212-216; 249, 262-263).

Second criminal incident

The victim testified that when she was about eight, still in second grade, (Transcript, pp.218-225), she awoke because "something was hurting me and it was Robert ...[p]utting his finger – he put it inside me," (Transcript, p.225, ll. 22-25), "He went under my clothes and put it in." (Transcript, p.226, l.8).

She testified further that the Defendant had pulled her clothes down to her knees, and put his finger *in* her vagina. (Transcript, p.226, 257-258, 262). When she awoke, he stopped, she went to the bathroom, and testified "it was hurting me," (Transcript, p.227, ll.16-17), and that the hurting began when she started to use the bathroom. (Transcript, p.229).

The victim testified that the abuse only occurred twice, (Transcript, p.232, ll.24-25), and testified that her hope for the outcome of the case was for the Defendant to say he was sorry and not do it again. (Transcript, p.246).

The Defendant gave a statement to police in which he remembered touching the victim when her panties were down and rubbing her vagina. (State's Response, exhibit 1: interview 5/2/2002). However, much of the statement, including that admission, was suppressed and is not being considered by the Court in regard to the Defendant's claims in this motion. (*See* Transcript, pp.500-501, Defense counsel attempted to bring up subject matter from suppressed part of interview).

However, part of his statements did become evidence, including statements made to his girlfriend/ex-wife:

> THE DEFENDANT: I was talking about I was drunk. I really don't remember a lot of what happened, you know? She said that I touched her. I could have. I have to pay the price of what I did.
>
> MS. FIGUEROA: Did you do it?
>
> THE DEFENDANT: I kind of – I kind of remember touching (the victim). I

don't –
(Transcript, p.454, l.22 through p. 455, l.3)

> (THE DEFENDANT): Drinking at night – when I drink, I do stupid stuff, you know, sexual stuff, and I don't know why I do it. I don't understand why I do it. You know, I don't do it sober, it's only when I get drunk, I just do stupid shit.

(Transcript, p.455, ll.14-18).

The Defendant testified in his own behalf, and denied that the touched the child inappropriately. (Transcript, pp. 520, 531).

The Court had an extensive evidentiary hearing on Defendant's claim III (shackles); and claims IV; V, VI, VII; IX; XII (bolstering witness credibility); and XXIII (cumulative error).

The State has responded well, and shown what appears to be a tactical decision to attack the victim's credibility and her version of what happened, through extensive questioning of her actual veracity.

A strategic or tactical decision is not a valid basis for an ineffective claim unless a defendant is able to show that no competent trial counsel would have utilized the tactics employed by trial counsel. *See White v. State,* 729 So.2d 909 at 912 [Fla. 1999] (citing *Provenzano v. Singletary,* 148 F.3d 1327, 1332 (11th Cir.1998)). There is a strong presumption that counsel's performance was not deficient. *Strickland.* 466 U.S., at 689.

While the State argues well, it remained unclear from the record until the completion of this evidentiary hearing that allowing the admission of statements vouching for the victim's credibility without objection was a clear tactical decision, or that the admission was not prejudicial. "A trial court cannot deny a motion for post conviction relief by finding that defense counsel's decision was tactical or trial strategy without first holding an evidentiary hearing ." *Button v. State,* 941 So.2d 531, 533 (Fla. 4th DCA 2006). *Coissy*

v. State, 957 So.2d 53 (Fla. 4th DCA 2007); *Evans v. State*, 737 So. 2d 1167, 1168 (Fla. 2d DCA 1999).

There is a strong presumption that trial counsel's performance was not ineffective. *See Strickland,* 466 U.S. at 690, 104 S.Ct. 2052. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689, 104 S.Ct. 2052.

The Defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* (quoting *Michel v. Louisiana,* 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* In *Occhicone v. State,* 768 So.2d 1037 (Fla.2000), the court explained that "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Id.* at 1048.

Here, it is clear from the record and the Defendant's motion that strategic decisions were made and that alternative courses of conduct were considered and rejected. Given the overwhelming facts of the case, the Defendant cannot show prejudice. Under *Strickland,* a defendant seeking post conviction relief must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced his defense. *Id.* at 697. To prove prejudice, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. *See also Hendrix v. State*, 908 So. 2d 412, 425-426 (Fla. 2005). The Defendant has failed to prove either prong of *Strickland.*

Claim III: Failure to object to leg restraints (restated) (Motion pp.15-17).

The Defendant claims that counsel was ineffective for failing to object to his being placed in leg restraints during the trial. This claim appears to have been abandoned at hearing, no evidence was presented, no arguments made and the claim is therefore denied.

(Claims IV, V, VI, and VII: eliciting, presentation of, failure to object to, and otherwise allowing testimony regarding the victim's statements to others and their comments on her truthfulness(restated) (*See also* claims 9 and 12 below)

The Court has previously adopted the State's Response to the following four claims, (Attached as Exhibit 5 to the Court's Order On Defendant's Post Conviction Motion, Denying In Part, Granting A Hearing, And Setting Status Hearing With The Defendant To Appear Telephonically. Response, items 47-80), and found that the four claims are essentially variations on the same issues. However, the Court does, hereby, address the issues. The claims presented were:

> **Claim IV** (Motion, pp.17-18).
>
> The Defendant claims counsel was ineffective for failing to object or request relief, where the prosecution "repeatedly elicited" from the victim "self-serving testimony" that the victim swore to other state witnesses that she was telling the truth. (Motion, p.17). He claims the evidence, detailed in the motion on pp.17-18, was admitted only because defense counsel failed to timely object and failed to move to strike the questions, or request a curative instruction. He claims the prejudice is that the jury "may/would have been inclined to give credence" to the victim's "inconsistent" testimony of sexual abuse. (Motion, p.18).

Claim V (Motion, pp.18-20).

The Defendant claims trial counsel was ineffective for failing to object and request relief, where the prosecution elicited "prejudicial, self-serving hearsay testimony" that the victim stated "to each one of them that she swore she was telling the truth..." (Motion, p.18). The Defendant lists the testimony (Motion, pp.18-20) and claims it was only admitted because counsel failed to object. (Motion, p.19). As in claim IV, the Defendant claims the testimony invaded the province of the jury and impermissibly bolstered the victim's testimony, and the jury "may/would have been inclined to give credence" to the victim's "inconsistent" testimony of sexual abuse. He claims absent the alleged bolstering, the evidence "may/would not have amounted to proof beyond a reasonable doubt." (motion, p.20).

Claim VI (Motion, pp.20-21).

The Defendant claims counsel was ineffective for failing to object and request relief, where the victim's father testified that he took the victim to a psychologist who said "without a doubt" he believed the victim's accusations. (Motion, p.20). The Defendant claims this hearsay would not have been admissible, but for counsel's failure to object, that it improperly invaded the province of the jury, and resulted in a guilty verdict. (Motion, p.21).

Claim VII (Motion, pp.22-23).

The Defendant claims that counsel was ineffective for failing to timely and adequately move to exclude evidence that the victim had been to a counselor / psychologist. (Motion, p.22). He claims that three members of the victim's family testified that she went to a counselor to determine the truthfulness of her allegations against the Defendant, that the testimony had no probative value, and was unduly prejudicial. (Motion, p.22). The Defendant claims that trial counsel knew or should have known from discovery that the victim went to the counselor, not for counseling, but to determine the truthfulness of her accusations, and that failure to object or suppress the evidence was ineffective and prejudicial. (Motion, p.22-23).

The State has responded well, both in writing and at the hearing. The evidence adduced at hearing shows that a tactical and strategic trial decisions was made to attack

the victim's credibility and her version of what happened, through the continual questioning of her veracity and facts surrounding her veracity. Mr. Frizzell testified that the strategy was to discredit the victim to show that the act or acts did not occur and to bring out the various inconsistencies in her statements to other people. One of these ways was to show that even her own family did not initially believe her allegations of abuse. In fact, the family took her to a mental health professional to make sure that she was not making up her statements. Mr. Frizzell attempted to show the jury that the victim had been manipulated by her own family members and law enforcement and that those third parties ultimately had misinterpreted what the victim had actually said. Trial counsel employed trial strategy and tactics to show that other people questioned the victim's truthfulness due to conflicting statements to various family members because they were in effect questioning the victims own capacity for truthfulness. The issue as to her veracity or capacity for truthfulness was essentially two sides of the same coin: the family questioning her truthfulness versus bolstering the victim's statements and testimony. The verdict itself shows that Mr. Frizzell was at a minimum partially correct in his tactics and strategy. The verdict came back against the Defendant for attempted sexual battery and lascivious molestation, and not for sexual battery on a child even though much of the evidence shows that the Defendant actually penetrated the victim. Clearly the strategy had some remedial effect as it related to the ultimate verdict rendered against Mr. Lundberg.

A strategic or tactical decision is not a valid basis for an ineffective claim unless a defendant is able to show that no competent trial counsel would have utilized the tactics employed by trial counsel. *See White v. State,* 729 So.2d 909 at 912 [Fla. 1999] (citing *Provenzano v. Singletary,* 148 F.3d 1327, 1332 (11th Cir.1998)). There is a strong presumption that counsel's performance was not deficient. *Strickland.* 466 U.S., at 689. In this case, Defendant's trial counsel did make strategic and tactical decisions, based upon

accepted logic and procedure as employed by reasonable and diligent defense counsel in the 19th Judicial Circuit.

However, it is error to admit the testimony of a witness that is offered to vouch for the credibility of another witness. *Norris v. State,* 525 So.2d 998 (Fla. 5th DCA 1988); *see also Francis v. State,* 512 So.2d 280 (Fla. 2d DCA 1987)(testimony of expert witness cannot be used to vouch for credibility of another witness). *Rhue v. State*, 693 So.2d 567, 568 (Fla. 2d DCA 1996). An expert cannot comment on or vouch for a child-victim's credibility. *See Feller v. State,* 637 So.2d 911, 915 (Fla.1994); *State v. Townsend,* 635 So.2d 949, 958 (Fla.1994); *Tingle v. State,* 536 So.2d 202, 205 (Fla.1988). While the *Tingle* court suggested that expert testimony may be helpful to a jury in assessing the veracity of a child sexual abuse victim by " 'generally testifying about a child's ability to separate truth from fantasy,' " the court concluded that "the ultimate conclusion as to the victim's credibility always will rest with the jury. *Cunningham v. State*, 801 So.2d 244, 247 (Fla. 4th DCA 2001).

This case was essentially a swearing match between a child-victim and her accused abuser, with the Defendant's statements *that were not suppressed* weighing heavily against him. That the victim saw a psychologist not for counseling, but to ascertain the truth of her allegations, and testimony that the counselor found her allegations to be truthful appears to be inadmissible as to truthfulness, but not as to confusion or changes in testimony/statements on the victim's part.

It no longer remains unclear to this Court now that the Court has reviewed the record, testimony of both the Defendant and his attorney and other evidence in this cased that allowing the admission of statements vouching for the victim's credibility without objection was a clear tactical and strategic decision made on the part of trial counsel that could have cut both ways, both in favor of the Defendant and against the Defendant. In any event, from a review of the totality of the evidence, this Court cannot say with the least

bit of certainty that the ultimate admission of this evidence as overly or substantially prejudicial. "A trial court cannot deny a motion for post conviction relief by finding that defense counsel's decision was tactical or trial strategy without first holding an evidentiary hearing ." *Button v. State,* 941 So.2d 531, 533 (Fla. 4th DCA 2006). *Coissy v. State*, 957 So.2d 53 (Fla. 4th DCA 2007); *Evans v. State*, 737 So. 2d 1167, 1168 (Fla. 2d DCA 1999). This hearing has been held and this Court does find the decisions made by trial counsel were tactical and strategic and not ineffective in any way.

Claim IX: testimony bolstering victim credibility (Motion, pp.23-25) (*See also* claims 4 through 7 and 12).

The Defendant claims that counsel was ineffective at trial for failing to object and request relief where the prosecution elicited testimony from the detective regarding the credibility and truthfulness of the victim. (Motion, p.23-24). The Defendant claims this testimony would not have been admitted but for counsel's failure to object, and that the defense theory was that the victim's aunt had instigated the allegations. (Motion, p.24).

The Court has previously adopted and has previously attached the State's response to the prior referenced order. (Exhibit 6: Response, items 87-93). A strategic or tactical decision is not a valid basis for an ineffective claim unless a defendant is able to show that no competent trial counsel would have utilized the tactics employed by trial counsel. *See White,* 729 So.2d, at 912; *Provenzano,* 148 F.3d, at 1332. However, it is error to admit the testimony of a witness that is offered to vouch for the credibility of another witness. *Norris,* 525 So.2d.

The decision not to challenge the testimony regarding the victim's credibility was tactical, and not prejudicial. The Court further adopts its reasoning as outlined above as it related to claims 3-7.

Claim XII: Suppression of victim credibility (Motion, pp.26-27).

The Defendant claims counsel was ineffective for failing to move, pre-trial, to suppress recorded statements of the detective which were furnished to counsel pre-trial, and played for the jury at trial. The statements complained of are: that the victim's memory was pretty good; she told details that made the detective believe she was telling the truth; that the detective didn't think the victim's aunt had anything to do with the allegations; that the victim wasn't lying or influenced; and that "...what I'm seeing in your background and her allegations, maybe you need help." (Motion, pp.26-27). The Defendant claims that counsel was ineffective for failing to move to suppress these statements, and that the evidence was prejudicial. The Defendant does not cite where within the record these statements may be found.

As in Claims 4 through 7 and 9 above it is now clear from the review of the record and the testimony at the hearing that the decision not to challenge the testimony regarding the victim's credibility was tactical, and not prejudicial.

Attorney jack Frizzell has been a criminal defense attorney since 1997. In 2002 he had been a member of the Florida Bar for five years having handled many cases as an Assistant Public Defender. Attorney Frizzell was unfortunately caught between the proverbial rock and a hard place due to the tacit admission of abuse made by his client to his client's girlfriend (mother of the abused victim). These admissions were caught on audio tape in a situation where the defendant had no reasonable expectation of privacy. The cases presented by the State make it clear to this Court that the Defendant had, nor was he required to be afforded any reasonable expectation of privacy in a law enforcement interrogation room with his girlfriend and mother of the sexually abused child, especially when it was the Defendant himself who requested the ability to speak with the girlfriend/mother in that particular setting.

Claim XXIII (Motion, pp.54-55).

The Defendant claims all errors complained of are cumulative and must be

considered cumulatively. (Motion, pp.54-55). To the extent there may be errors, it cannot be said they are cumulative to the point of being prejudicial. These claims have been shown to not have merit based on the ruling as outline above.

All pending claims are DENIED for the reasons above stated. The Motion for Post Conviction Relief is denied in its entirety.

THIS IS A FINAL APPEALABLE ORDER. The Defendant has thirty days to appeal. The Defendant is remanded to the custody of the Department of Corrections.

DONE AND ORDERED in Chambers in Port St. Lucie, St. Lucie County, Florida on October 19, 2010.

WILLIAM L. ROBY
CIRCUIT COURT JUDGE

Certificate of Service

I hereby certify that a true copy of the foregoing order and any attachments have been provided by U.S. Mail or courthouse mail to the following addresses this 20th day of October, 2010.

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Judicial Assistant to Judge William Roby

A-6

127 So.3d 562 (2012)

Robert LUNDBERG, Appellant,

v.

STATE of Florida, Appellee.

No. 4D10-4902.

District Court of Appeal of Florida, Fourth District.

November 21, 2012.

563 *563 Carey Haughwout, Public Defender, and Gary Lee Caldwell, Assistant Public Defender, West Palm Beach, for appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Jeanine M. Germanowicz, Assistant Attorney General, West Palm Beach, for appellee.

WARNER, J.

The defendant appeals the denial of his motion for postconviction relief from his convictions and sentences for attempted sexual battery and lewd or lascivious molestation. We affirm and write to address two issues. Defendant alleged that his trial counsel was ineffective for failing to move to suppress the videotape of defendant's conversation at the police station with his girlfriend. Based upon the totality of circumstances in this case, we conclude that defendant has not shown that the police violated a reasonable expectation of privacy in recording his conversations. Second, defendant alleged that counsel was ineffective in failing to object to testimony which was tantamount to victim bolstering. Although the court found that the evidence was part of counsel's trial strategy, we also conclude that the introduction of the evidence did not create *Strickland* prejudice. We affirm as to all issues raised.

Defendant Robert Lundberg was convicted of attempted sexual battery on a child under the age of twelve by a perpetrator eighteen years of age or older, and lewd or lascivious molestation on a child under the age of twelve by an offender eighteen years of age or older. These charges were based on testimony that defendant molested his minor niece on one occasion by penetrating her vagina with his finger and on another occasion by touching her vagina. He was sentenced to thirty years in prison for the first count and a consecutive term of fifteen years in prison for the second. He appealed, arguing trial court erred in the denial of his motion to suppress statements he made to his girlfriend in a police interview room. We affirmed in *Lundberg v. State*, 918 So.2d 444 (Fla. 4th DCA 2006), *rev. denied*, 932 So.2d 193 (Fla.2006). Although the trial court had suppressed statements defendant had made to the police because of coercion, we rejected his argument that the statements to his girlfriend were obtained through an exploitation of the initial coercion and were "fruit of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471, 487-88, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). While he also made a claim on appeal that the statement should be suppressed because the police induced him into a reasonable expectation of privacy, we found that the issue had not been properly preserved for appellate review. *Lundberg*, 918 So.2d at 445.

564 *564 Defendant filed a motion for postconviction relief raising twenty-three claims of ineffective assistance of counsel. In one claim, he maintained that counsel erred in not moving to suppress his statements to his girlfriend on the grounds that the police created a false belief that his conversation would be private. Defendant had voluntarily appeared for questioning when the child's parents reported the incidents with their daughter. The detective interviewing the defendant read him his rights even though she told him he was not in custody. He agreed to speak to her without an attorney. Through the course of the interview he admitted at least one of the events, but he claimed that the touching was accidental when he was carrying the child to bed. Defendant then asked to see his girlfriend who was at the station. The detective agreed and turned off the tape recorder on the interview room table. She told him that she would not tell the girlfriend anything but that it was up to him what to tell her. Then the detective brought the girlfriend into the interview room and as she left said, "I'm going to give you all privacy." Defendant then told his girlfriend what had just transpired and that he thought that he might have touched the little girl when he was drunk. Essentially, what he told his girlfriend coincided with what he told the detective. This conversation was recorded on the video camera in the interview room.

In his postconviction motion, defendant claimed that because the detective had told him that he was giving him "privacy," counsel should have moved to suppress the conversation based upon a violation of privacy and that counsel's failure to do so constituted ineffective assistance.

The state responded to this claim by arguing that no defendant has any expectation of privacy in the interview room of a police station. The trial court summarily denied the claim, agreeing with the state. It ordered an evidentiary hearing on other claims. During the evidentiary hearing, however, the issue of the failure to suppress the statement to the girlfriend was addressed. Defense counsel testified that he did not move to suppress the conversation because there was no expectation of privacy in the interrogation room. The trial court did not readdress the issue in its ruling following the evidentiary hearing.

Ineffective assistance of counsel requires the defendant to prove two requirements:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The first prong is established by showing that "counsel's representation fell below an objective standard of reasonableness" under "prevailing professional norms." *Id.* at 688, 104 S.Ct. at 2064-65. The second prong is established by showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. at 2068.

The question presented in this case is whether counsel was ineffective for failing to move to suppress the recorded
565 conversation between the defendant and his girlfriend as violating the Fourth Amendment, *565 because of an invasion of the defendant's reasonable expectation of privacy. In *Williams v. State*, 982 So.2d 1190, 1194 (Fla. 4th DCA 2008), we set forth the test to be applied:

> A citizen's right to privacy under the Fourth Amendment of the Constitution of the United States is determined by a two prong test: 1) whether the citizen had a subjective expectation of privacy; and 2) whether that expectation was one that society recognizes as reasonable. *State v. Smith*, 641 So.2d 849, 851 (Fla. 1994) (citing *Katz v. United States*, 389 U.S. 347, 360, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring)). Under this test, a prisoner does not have a right to privacy because areas of confinement do not share the same attributes as a private car, home, office, or hotel room. *Id.*

In the present case the trial court summarily denied this claim of ineffective assistance, because it concluded that no reasonable expectation of privacy had been violated. Defendant was well aware of his previous conversation in the interview room having been recorded. Therefore, he had no reasonable expectation of privacy. The trial court concluded that the surreptitious taping of the conversation in this case was not employed to circumvent the exercise of the defendant's right to remain silent, as he had already relinquished that right when interviewed with the detective.

The court cited *Boyer v. State*, 736 So.2d 64 (Fla. 4th DCA 1999), in which this court held that a defendant had no subjective expectation of privacy in conversations occurring at the jailhouse. There, the defendant had voluntarily relinquished his right to remain silent by speaking with the detectives at the police station, but he did not confess to the crimes. After his interview, he requested to speak to his sister-in-law. The officer allowed the sister-in-law to come in, saying that he would get out of the room so that the defendant could talk to her. The subsequent conversation with the sister-in-law was recorded, and the defendant made incriminating statements to her. In upholding the denial of the motion to suppress, our court found that the defendant had no subjective expectation of privacy nor reasonable expectation of privacy, because the defendant did not ask for privacy and the police did nothing to foster a sense of privacy in the conversation. *Id.* at 67.

Defendant relies primarily on *State v. Calhoun*, 479 So.2d 241 (Fla. 4th DCA 1985), to establish that counsel's failure to move to suppress the recorded conversation with his girlfriend on grounds of police creating a false sense of privacy in the conversation was ineffective assistance. In *Calhoun,* we suppressed a videotaped jailhouse conversation between an inmate and his brother. The facts, however, are markedly different than the facts of this case. Calhoun, the defendant, was in jail on unrelated charges when officers sought to question him about another charge. He was taken to an interview room equipped with a concealed video camera. Although the officers read him his *Miranda* rights, they did not inform him that he

was a suspect in the new case. The defendant did not waive his rights but asked to speak to his brother. The brother was brought into the interview room for a private conversation with the defendant, which the officers were able to monitor through the video hookup. Neither brother was aware that the officers could hear their conversation. After about five minutes, the lead detective terminated the brothers' conversation and again informed the defendant of his *Miranda* rights.
566 The defendant invoked his right to remain silent and asked to see the public defender. The detective *566 then terminated the interview, but he left the defendant in the room. The detective allowed his brother to re-enter the room so that his conversation with his brother could now be monitored for "investigative" purposes. Neither brother consented to the monitoring or taping of their conversation. During the conversation, the defendant made several incriminating statements.

The trial court granted a motion to suppress the statements. Our court upheld the court's ruling. While acknowledging that a defendant would normally have no reasonable expectation of privacy in the interview room, the defendant's expectation of privacy was deliberately fostered by the officers *after* the defendant had invoked both his right to remain silent and right to counsel. "To rule that under these circumstances the defendant's statements to his brother are admissible is to make a mockery of the *Miranda* rights." *Id.* at 243.

For further support, defendant cites to *Allen v. State*, 636 So.2d 494 (Fla.1994). In *Allen,* the supreme court refused to suppress recordings of statements made by Allen to his co-defendant in a murder case when they were both placed in the holding cell at the jail. Prior to that, detectives had interviewed Allen about the murder after reading him his *Miranda* rights, but he did not confess. In conversing with the co-defendant in the cell, Allen made incriminating statements. Because voluntary jailhouse conversations were not entitled to a reasonable expectation of privacy, the court refused to suppress the statements, noting that there was no improper police involvement. Acknowledging *Calhoun,* the court said that "police impropriety would exist if police deliberately fostered an expectation of privacy in the inmates' conversation, ... especially where the obvious purpose was to circumvent a defendant's assertion of the right to remain silent." *Id.* at 497 (internal citation omitted). *See also* *Larzelere v. State*, 676 So.2d 394 (Fla.1996) (suppression of conversation between co-defendants, mother (the appellant) and son, not required even though the mother had invoked right of silence, where the mother had not requested to speak to son in private and they were merely placed in holding cell together before a hearing where conversation was recorded).

The deliberate fostering of an expectation of privacy led our court to reverse an order denying suppression of a taped conversation between a defendant and his co-defendant in *Cox v. State*, 26 So.3d 666 (Fla. 4th DCA 2010). There, the defendant had invoked his *Miranda* rights and refused to discuss the crime for fear that his statements would be recorded. The detective then offered the co-defendant leniency in sentencing if the co-defendant could elicit incriminating statements from the defendant. The investigating detective brought the co-defendant into the room and first interviewed both the defendant and the co-defendant together. When the co-defendant implicated the defendant, the detective exited the room and left the two defendants alone. Having earlier been assured that the room was not wired, the defendant began a conversation with the co-defendant in which he made incriminating statements. Because the defendant had invoked his *Miranda* rights, and because the detective had assured him that his conversations were not being recorded, the detective orchestrated a situation in which his actions created a reasonable expectation of privacy in the room. The detective's conduct was specifically designed to circumvent the defendant's assertion of his *Miranda* rights.

567 In *Calhoun, Allen, Larzelere,* and *Cox,* the defendants had all invoked their rights *567 of silence. Despite the invocation of those rights, the detectives in *Calhoun* and *Cox* deliberately fostered an expectation of privacy in the conversation in order to overcome each defendant's assertion of his constitutional right of silence. On the other hand, even though rights were invoked in *Allen* and *Larzelere,* statements in the jailhouse were not suppressed where the police did not record them as part of a deliberate attempt to circumvent the defendants' assertions of the right of silence. A determinative factor, therefore, appears to be whether the conduct of the detectives deliberately creates a false sense of privacy for the purpose of overcoming the assertion of constitutional rights in order to obtain incriminating statements from the defendant.

In this case the defendant waived his *Miranda* rights and made admissions to the detective. The defendant then asked to speak to his girlfriend. The detective handcuffed the defendant and went through his wallet, for security purposes. Before she brought the girlfriend in, she told the defendant that she was ending the tape recording. He asked what he would be charged with, and the officer told him that the charges would be two sexual batteries. She would not directly answer his question of whether he would have to do "time" for the crimes. She told him that she would not tell the girlfriend anything and that it was up to him what he would tell his girlfriend. She then brought the girlfriend in and left the room saying the she would give them privacy. The defendant told his girlfriend that he was going to jail for sexual battery. He then apologized to her and related essentially the same information that he told the detective, as well as what the detective had told him about

the two incidents. In addition, however, he admitted to her that he might have touched the victim when he was drunk, an admission he did not make to the detective.

Although the detective used the word "privacy" when leaving the room, we find this hard to distinguish from *Boyer* where the officer told the defendant that he would get out of the room so the defendant could talk to his sister-in-law. That, too, could foster a notion in a defendant that people would not be listening to his conversation. Yet, in *Boyer* we held that the statement should not be suppressed. Here, the defendant had already made admissions to the detective and had specifically asked to see his girlfriend. He had not asked for privacy, even though the officer did vacate the room. And all he apparently wanted to do was to tell his girlfriend how sorry he was for the situation and explain what he had told the detective. The officer's statement that she wanted to give them privacy more likely conveyed to the defendant that he could tell his girlfriend about his arrest out of the public eye — to save embarrassment to them both. This conduct is not the type of deliberate fostering of an expectation of privacy in order to avoid the defendant's assertion of his constitutional rights which led the trial court to suppress the recorded conversation in *Calhoun* and *Cox*.

The defendant asks us to follow *State v. Munn*, 56 S.W.3d 486 (Tenn.2001), which held that a juvenile murder suspect had a subjective expectation of privacy which the court recognized as reasonable when detectives asked the juvenile if he wanted to talk alone with his mother, then left the room and closed the door, after having turned off the tape recorder at the juvenile's request even though another hidden camera picked up the conversation. However, in that case not only had the juvenile not been read his *Miranda* rights, but he had not incriminated himself in his earlier statements to the detectives. The
568 court *568 found that the detectives had deceived both the juvenile and the parents that their conversations were private. In this case, however, the defendant had already confessed and had not been assured that his conversations were private. *Munn* is thus distinguishable from this case.

While we acknowledge that this is a close case factually, and each case turns on its specific facts, for that very reason we cannot conclude that counsel made a serious error such that he was not functioning as counsel within the Sixth Amendment. As he stated at the evidentiary hearing, "I think it's well founded in the case law that you don't have a reasonable expectation of privacy under those conditions.... You're in an interrogation room, you're in handcuffs...." Counsel did try to get the statements suppressed under *Wong Sun,* but both the trial court and this court rejected that approach. And while this issue was at least arguable, meaning that he could have filed a motion to suppress in good faith and made an argument based upon *Calhoun,* that does not mean that he was ineffective under the *Strickland* standard for failing to do so. We thus affirm the trial court's denial of postconviction relief on this ground.

The court held a hearing on several of the claims of ineffectiveness. In particular, defendant alleged that counsel was ineffective in failing to object to repeated bolstering of the child victim's credibility by various witnesses. The victim was allowed to testify that both of her parents repeatedly asked her if her allegations of abuse were true, and she told them they were. Likewise, her aunt, to whom she first reported the abuse, as well as both her parents, each testified that they asked the victim if she was telling the truth, and she swore that she was. Her father even testified that he took her to a counselor who said that "without a doubt" her story was true. The detective also testified that the victim was not deceptive when questioned.

At the hearing, defense counsel testified that, given the fact that the state would produce defendant's incriminating statement to his girlfriend, he had to formulate a strategy to discredit the victim's testimony. He intended to do this by showing where there were differences in her various statements that she made both to law enforcement and to her family. Part of that strategy was to show that her own family was not sure she was telling the truth — that the contacts may have been unintentional or fabricated. It also required showing that there may have been some manipulation of the victim by both family and law enforcement. In particular, the defendant and the aunt had a very acrimonious relationship. Counsel attempted to show that the aunt had a motive to manipulate the victim's testimony. Revealing to the jury all the efforts the parents made to determine that the victim was telling the truth, could permit the jury to conclude that reasonable doubt would exist if the parents had a hard time believing their own child. Additionally, the victim told the detective she was penetrated, yet other witnesses testified that the victim did not say she was penetrated. Therefore, allowing the detective to testify that she believed the victim was telling the truth as to the statement she made to the detective could also discredit the victim's testimony, when it was apparent that there were various versions of the "truth."

In its order the trial court found that counsel's trial strategy of showing that the victim's own family did not initially believe her allegations was a reasonable trial strategy. "The issue as to [the victim's] veracity or capacity for truthfulness was essentially
569 two sides of the same coin: the family questioning her truthfulness versus *569 bolstering the victim's statements and

testimony." Although it found that the evidence could have cut both ways, either for or against the defendant, that the defendant was not convicted of sexual battery but of attempted sexual battery showed that counsel's tactics could have partially succeeded, because the victim testified that defendant's fingers penetrated her vagina. Based upon the court's review of the totality of the evidence, it was convinced that the decisions did not constitute ineffective assistance.

Strickland establishes a strong presumption that counsel's strategic choices are reasonable:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.... A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

466 U.S. at 689, 104 S.Ct. 2052 (citations omitted). In addition, review of this issue involves a mixed question of law and fact. The trial court made the factual finding that counsel had made a tactical, strategic decision to allow some of the questioning in order to build a case to discredit the victim. This was supported by counsel's testimony. Based upon our own review of the trial transcript, and giving the deference required under *Strickland,* we cannot conclude that the strategy was completely unreasonable.

Moreover, having reviewed the trial transcript, we cannot say that had all of the evidence bolstering the victim's credibility been excluded, the result would have been any different or that the jury would have had a reasonable doubt respecting guilt, thus failing the second prong of *Strickland.*

> To establish the second prong under *Strickland,* the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." [466 U.S.] at 694, 104 S.Ct. 2052, 80 L.Ed.2d 674. When reviewing a trial court's ruling after an evidentiary hearing on an ineffective assistance claim, this Court gives deference to the trial court's factual findings to the extent they are supported by competent, substantial evidence, but reviews de novo the trial court's determinations of deficiency and prejudice, which are mixed questions of fact and law. *See Arbelaez v. State,* 898 So.2d 25, 32 (Fla.2005).

Morris v. State, 931 So.2d 821, 828 (Fla. 2006).

In this case, the victim's testimony was clear and precise. She was able to recount the events with complete detail and firmly rejected the defendant's version of the events. The defendant admitted to his girlfriend in the taped conversation that
570 he might have touched the child when he was drunk. Even when he testified, his explanation *570 was that he might have accidentally touched her, although his version of the incidents was markedly different than the child's version. In his testimony, he was much less certain with respect to his description. He also admitted that he might have accidentally touched the victim as he was carrying her to bed. His attempt to explain away his statements to his girlfriend at the jail were weak and ineffective. Further, many of the victim's statements to her parents and relatives likely were admissible as a child hearsay statement. *See* § 90.803(23), Fla. Stat. Thus, not all of the evidence presented by the parents and relatives was inadmissible. We cannot say that the bolstering of the victim's testimony caused *Strickland* prejudice.

We find no error in the denial of the remaining multiple claims raised by the defendant in his postconviction motion.

For the foregoing reasons, we affirm the trial court's orders denying defendant's motion for postconviction relief.

STEVENSON and CIKLIN, JJ., concur.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 14-CV-14347-ROSENBERG
MAGISTRATE JUDGE P. A. WHITE

ROBERT T. LUNDBERG, :

Petitioner, :

v. : REPORT OF MAGISTRATE JUDGE

JULIE L. JONES,[1] :

Respondent. :

I. Introduction

Robert Lundberg, who is presently confined at the Mayo Correctional Institution Annex in Mayo, Florida, has filed a *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, attacking his conviction and sentence in case number 02-1597, entered in the Nineteenth Judicial Circuit Court for St. Lucie 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 Undersigned has reviewed the amended petition for writ of habeas corpus (DE# 29), the Respondent's response to an order to show cause (DE# 31), appendix of exhibits (DE# 33-1), and the Petitioner's reply (DE# 37).

[1] The proper respondent to a federal habeas petition is the person who has custody over the petitioner. Rumsfeld v. Padilla, 542 U.S. 426 (2004). The appropriate respondent is therefore the Secretary of the Florida Department of Corrections, Julie L. Jones, who is automatically substituted as a party. See Fed. R. Civ. P. 25.

Construing the *pro se* movant's arguments liberally, he appears to raise the following claims in his amended Section 2254 petition:[2]

1. The State violated the Fifth and Sixth Amendments by intentionally creating a situation to induce him to make incriminating statements without the assistance of counsel;

2. The following claims of ineffective assistance of counsel:

   (1) trial counsel failed to investigate and timely move to suppress P's videotaped conversation with his girlfriend because the police created the false belief that the conversation was unrecorded and private;

   (2) trial counsel failed to move to suppress all audio and video statements based on defective Miranda[3] warning that did not advise P of his right to counsel during questioning;

   (3) trial counsel failed to move to suppress videotape marked "ZB," because it was not properly authenticated and the State did not establish chain of custody, and failing to investigate apparent tampering;

   (4) appellate counsel should have argued on direct appeal that judgment of acquittal should have been granted for Count (2) because the evidence was legally insufficient to support the conviction;

   (5) trial counsel failed to request that the court take judicial notice that Hurricane Floyd and its evacuation, charged in Count (2), occurred

[2] The claims that the Petitioner has clearly set forth with a supporting factual basis are discussed in this Report. They have been reorganized to eliminate repetition and group like arguments together. To the extent that the Petitioner has failed to provide any factual support, they should be summarily dismissed. After independent review of the entire record, any sub-claim not specifically identified or addressed in this Report has been considered and found to be without merit, thus warranting no further discussion.

[3] Miranda v. Arizona, 384 U.S. 436 (1966).

> September 14,-15, 1999, and that no hurricane affected Florida 2000-2002, and presented the foregoing as grounds for judgment of acquittal;
>
> (6) trial counsel failed to timely and adequately challenge the court's jurisdiction and venue over Count (2), where the prosecutor fraudulently swore to untrue facts in the amended information, and where there was a fatal variance between the amended information and the evidence at trial;
>
> (7) appellate counsel failed to argue that the jury instruction on attempted sexual battery, a category 2 permissive lesser of sexual battery, was fundamental error because the State only proved completed sexual battery;
>
> (8) trial counsel failed to object to the jury instruction on attempted capital sexual battery by penetration with an object, failed to present an adequate motion for judgment of acquittal, where this permissive category 2 lesser included offense was not supported by the evidence;
>
> (9) trial counsel failed to prevent extensive evidence bolstering the victim's credibility;
>
> (10) appellate counsel failed to argue on direct appeal that the trial court erred in denying the Petitioner's motion to sever the charges; and
>
> (11) the cumulative effect of the foregoing errors deprived the Petitioner of a fair trial.

(DE# 29).

II. Procedural History

The Petitioner was charged by amended information with: (1) sexual battery on a child under twelve by a perpetrator eighteen years of age or older between October 1, 2001, and December 31, 2001; and (2) lewd or lascivious molestation by an offender over eighteen of a victim under twelve between August 1, 2001, and December 31, 2001. (DE# 33-1 at 23).

The allegations concern acts that the victim reported to her father's sister, Lillian, when she was nine years old. The victim's father, George, had known the Petitioner for approximately fifteen years since the Petitioner was about sixteen years old and introduced the Petitioner to his girlfriend Tania's sister, Xiomara. Both couples ended up marrying and George and Tania had two children, the victim and her younger brother. The Petitioner and Xiomara had a son about the same age as the victim's brother. The Petitioner and Xiomara divorced after less than a year of marriage but were dating again at the time of the offenses. Lillian and the Petitioner worked together at an Ale House restaurant - he as a manager and she as a line cook - at the time the victim told Lillian about the offenses. Lillian and her brothers including George also sometimes worked at night cleaning restaurants.

The defense moved for a statement of particulars with regards to Count (2) seeking the exact time, date and place that the offense was committed, other material facts of the crime charged, exact manner and means of committing the offense, and a descriptive narration of events the State of Florida intends to prove. (DE# 33-1 at 32). The State filed a statement of particulars pursuant to Florida Rule of Criminal Procedure 3.220(f) stating that the Petitioner touched victim's vaginal area with his finger and that the victim associated this event with a hurricane in her statement to Detective Dennis. (DE# 33-1 at 35).

Counsel filed a motion to sever the counts pursuant to Florida Rule of Criminal Procedure 3.152(a)(2)(A), arguing that the two counts are distinct charges with different standards of proof and that trying the two charges together would cause the Petitioner undue prejudice. (DE# 33-1 at 37). Counsel argued that the two counts are separate incidents that occurred at separate times

without a causal link, that evidence of one is not necessarily evidence of the other, and that a joint trial would contaminate the jury's consideration of each distinct charge. (DE# 33-1 at 56-57). The State countered that the counts are connected because they share a victim, were reported at the same time, the manner of both assaults is very similar, and in any event the State would seek to introduce evidence of the other as similar fact evidence even if the counts were severed for trial. (DE# 33-1 at 58). The trial court denied the motion to sever as unnecessary. (DE# 33-1 at 64). Defense counsel renewed the motion to sever at the start of trial and it was denied. (DE# 33-1 at 221).

Counsel filed a motion to suppress an illegally obtained statement, confession or admission. (DE# 33-1 at 27). At the suppression hearing, Detective Dennis and the Petitioner both testified that Dennis phoned the Petitioner on May 2, 2002, and asked to speak to him about a family matter. The Petitioner said he knew what it was about because Tania had told his girlfriend Xiomara about the victim's allegations. He said that the issue was due to Lillian, with whom he had personal problems, and he wanted to explain that there was an incident where he had tripped while holding the victim. Xiomara drove him to the police station to see Detective Dennis that same evening. The detective told him he was not under arrest and advised him of his Miranda rights, which he waived. He did not believe he was in custody at that time. The State played Exhibit ZB, which was a copy of the audio and video recording of the Petitioner's interview. Detective Dennis recognized it because it contained her handwriting and personal stamp and she testified that it accurately depicts the conversation she had with the Petitioner. (DE# 33-1 at 785). Defense counsel cross-examined Dennis about the recording and she explained that there is a hidden video recorder in the interview room and that she

also uses a visible audio recorder as backup. (DE# 33-1 at 786). The tape was admitted as Exhibit 102 without objection. (DE# 33-1 at 787).

The tape depicts Detective Dennis' interview with the Petitioner which is approximately two hours long. He initially denied the allegations. Detective Dennis intentionally deceived him by embellishing the victim's allegations in hopes that the Petitioner would confess to his less serious conduct. (DE# 33-1 at 803). He still maintained his innocence. Then Dennis implied that he would get probation for just a rub or a tap but that more severe conduct could result in a capital sexual battery charge with the possibility of the death penalty or life in prison. (DE# 33-1 at 794-95). He then told Dennis that he remembered touching the victim. (DE# 33-1 at 800). Detective Dennis told him that he was under arrest. (DE# 33-1 at 803).

The Petitioner testified at the suppression hearing that he lied and told the detective that he touched the victim because he thought he would get probation or help for his alcoholism and avoid the death penalty. (DE# 33-1 at 818-19). He asked to talk to his girlfriend Xiomara after he was placed under arrest and they had a conversation that was videotaped without the Petitioner's knowledge. (DE# 33-1 at 824). He told Xiomara that he may have touched the victim, did not remember, and had been drinking. He had come to the interview straight from work and had been awake for more than thirty hours when he made the inculpatory statements. Id.

The court found that the interview was initially non-custodial interview and Miranda warnings were not required, however, Detective Dennis' mention of the death penalty and life imprisonment, which was followed closely by the Petitioner's change

in demeanor and inculpatory statements, rendered those statements involuntary. (DE# 33-1 at 854-55). The court therefore granted the Petitioner's motion to suppress his statements to the police. (DE# 33-1 at 30). Defense counsel moved *in limine* at the start of trial to prevent the Petitioner's statements to law enforcement from being used against him for impeachment. (DE# 33-1 at 219). The court granted the motion. (DE# 33-1 at 220).

At trial, the State explained in opening the victim was "not real sure about the dates" when the allegations occurred but that they were when she was seven, eight, or nine years old. (DE# 33-1 at 229-30). The incidents came to light when she confided in her Aunt Lillian in March 2002. (DE# 33-1 at 232).

The defense's opening focused on lack of evidence. Detective Dennis only interviewed the victim and the Petitioner and had not investigated Lillian - who was the first person to hear about the offenses and had personal problems with the Petitioner - and also failed to interview the victim's mother, father, or the Petitioner's girlfriend Xiomara. (DE# 33-1 at 236). The victim is a small child and the Petitioner will say the offenses did not happen. Defense counsel also noted that his recorded statement to Xiomara happened after the detective threatened him with death. The State's objection was sustained because the defense cannot "have it both ways," *i.e.*, suppress the detective's reference to the death penalty yet refer to it. (DE# 33-1 at 248).

The victim, who had just turned eleven at the time of trial, testified that something happened to her when she was seven or eight years old while she was in first or second grade. (DE# 33-1 at 251). The Petitioner is the victim's uncle by marriage and he touched her inappropriately on two occasions. The first incident

happened at the victim's house at the Tiffany Club Apartments and the second happened at the apartment the Petitioner shared with the victim's Aunt Xiomara at the Hillmoor Village complex, both of which are in Port St. Lucie. (DE# 33-1 at 267, 282).

The Tiffany Club incident occurred when the Petitioner, Xiomara and their son spent the night at the victim's home for a hurricane. (DE# 33-1 at 268). The victim was sleeping on the couch in the living room and her cousin and brother were on the living room floor. Her mother and Xiomara were in her parents' bedroom. The Petitioner, who she thought had been drinking beer, was supposed to sleep in a back bedroom. (DE# 33-1 at 270, 277). The victim was asleep on the couch when she felt something in her private part and woke up with the Petitioner leaning over her with his hand inside her pajama bottoms and underpants. (DE# 33-1 at 274). He stopped and left; she was too scared to do anything or tell anyone. (DE# 33-1 at 276).

The Hillmoor incident happened a little while after the hurricane when the victim was probably eight years old. (DE# 33-1 at 278). The Petitioner picked up the victim, her brother, and her cousin from their grandmother's house in the evening. (DE# 33-1 at 279). He stopped and 7-11 and bought snacks, then stopped at the Ale House where he worked while the kids waited in the car, and brought out a cup of beer which he drank on the way home. (DE# 33-1 at 281). He drove them to his house at the Hillmoor apartments to spend the night while Xiomara and the victim's mother went out dancing. (DE# 33-1 at 282). All three children went to sleep in the Petitioner's son's bed with one boy on each side and the victim between them. (DE# 33-1 at 283). The victim woke up after a little while because something was hurting her. The Petitioner was leaning over his son, had pulled the victim's clothes down to her knees,

and was putting his finger inside her private part. (DE# 33-1 at 285). Neither boy woke up. (DE# 33-1 at 285). The victim was scared and the Petitioner asked if she had trouble sleeping. She said no and he stopped and went to his room. The victim went to use the bathroom and it hurt. (DE# 33-1 at 286-88).

The victim tried to tell her parents that something had happened the next day in the car but her father "freaked out" and scared her so she stayed quiet. (DE# 33-1 at 291). She told her Aunt Lillian about a year later when she was nine. (DE# 33-1 at 292-93). She had not been doing well in school and felt bad about what had happened. (DE# 33-1 at 292-93). She told Lillian while several family members were cleaning a restaurant one night. (DE# 33-1 at 294). Lillian was shocked, asked if she was sure, and said she had to tell the victim's parents. (DE# 33-1 at 295). Each of the victim's parents questioned the victim about the allegations and she swore that it was true. (DE# 33-1 at 299-300). Later, they went to see a counselor and the victim told the counselor what had happened. (DE# 33-1 at 300). The victim briefly talked to a police officer at Aunt Lillian's house then went to the station to talk to Detective Dennis and told her everything as best she could remember. (DE# 33-1 at 301-03). She is doing much better at school. (DE# 33-1 at 304). She wants the Petitioner to say he is sorry and not do it again. (DE# 33-1 at 305).

On cross-examination the victim recalled telling Detective Dennis it happened when she was five years old. (DE# 33-1 at 306). The first incident was over her private part, not inside, but the second incident was inside. (DE# 33-1 at 308). She denied that the second incident happened when the Petitioner stumbled while carried her upstairs to put her to bed after she fell asleep watching a movie downstairs. (DE# 33-1 at 315).

The victim's Aunt Lillian testified that she was cleaning a restaurant one night with several family members including the victim and the victim's father. (DE# 33-1 at 324). The victim disclosed the incidents and said she was not lying. (DE# 33-1 at 329). The victim wanted Lillian to tell her father and get the Petitioner to apologize and say he would never do it again. (DE# 33-1 at 330). Lillian admitted she and the Petitioner worked together and dislike each other. (DE# 33-1 at 335). She and the Petitioner had a confrontation at the Ale House where there both worked after the victim confided in her; Lillian hit the Petitioner and was fired. (DE# 33-1 at 337-41). Lillian denied that the victim's disclosure occurred while Lillian was complaining about the Petitioner. (DE# 33-1 at 345). The police never asked Lillian for a statement. (DE# 33-1 at 347). Lillian never told the victim to say something about the Petitioner because she disliked him. (DE# 33-1 at 349).

The victim's father, George, testified that he had known the Petitioner for about fifteen years since the Petitioner was a teenager. He remembered there was a hurricane threatening St. Lucie County "so long ago, I don't remember the exact date or time ... I don't know if it was Hurricane Floyd" that was threatening St. Lucie about four years ago while they were living at the Tiffany Apartments. (DE# 33-1 at 364, 385). He worked night shift and the Petitioner, Xiomara, and their son stayed over at the apartment with his wife and two kids. (DE# 33-1 at 365).

George recalled an incident when he was diving and the victim mentioned something had happened between her and the Petitioner. He thought it must have been an accident because the Petitioner is a touchy feely person who talks with his hands. (DE# 33-1 at 380). The victim clammed up after seeing her parents' reactions. (DE# 33-

1 at 356, 362-63, 380).

George was working one night cleaning a restaurant with Lillian and his kids when he saw the victim crying; Lillian said she would talk to him later. (DE# 33-1 at 366). When Lillian told him that the victim said the Petitioner had touched her, he had "flashing" in his head and found it hard to believe. (DE# 33-1 at 367). He asked the victim if she was sure it happened and "I guess I had a problem believing her" because the Petitioner was his long-time friend. (DE# 33-1 at 369). The victim swore it was true and he saw in his daughter's eyes that she was not lying. (DE# 33-1 at 370-71). The Petitioner called George the same night asking what the accusations were. George said, "you know, sometimes you blackout [from drinking], you don't remember things" and hung up. (DE# 33-1 at 368). He and his wife wanted to be totally sure so they called a counselor and asked if he would listen to the victim's story. (DE# 33-1 at 373). The counselor saw her the next day and "said without a doubt that he believes her" and that he was obligated to call the police if they did not do so. (DE# 33-1 at 374-75).

The victim's mother Tania recall an occasion when the Petitioner and his family arrived one evening when a hurricane was supposed to come. (DE# 33-1 at 411). She remembered that the kids were small but did not recall the month or year. (DE# 33-1 at 414) The Petitioner was drinking beer and they were discussing what to do if the hurricane came because the eye of the storm was supposed to hit Port St. Lucie. (DE# 33-1 at 413, 416). Tania went to bed in her bedroom with her sister, Xiomara, because she was scared to be alone. The three kids were in the living room and the Petitioner was supposed to be in a back room. (DE# 33-1 at 414).

The victim's mother also testified that the Petitioner babysat the kids a few times. (DE# 33-1 at 417). She recalled one night when he took care of the kids. (DE# 33-1 at 418).

The victim tried to tell her parents something had happened but "I guess we scared her." (DE# 33-1 at 418). It occurred a while before March 2002, when the incidents finally came to light. (DE# 33-1 at 392). She asked the victim what had happened and told her it was really important and had to make sure it was true because it was a serious allegation; "it's not that I didn't believe her - or maybe I didn't want to. And, uh, she said, mommy, I swear, it happened - it happened - I swear." (DE# 33-1 at 395). Tania kept reiterating to the victim that it was serious, told the victim that the Petitioner could go to jail, and the victim insisted it was true. (DE# 33-1 at 397). She did not ask the victim for details because she wanted to wait until the counselor could meet with her the next day. Xiomara did not believe the allegations and stooped talking to them until the Petitioner was arrested. (DE# 33-1 at 419). The Petitioner called Tania and told her that Lillian was behind the allegations. (DE# 33-1 at 424). The victim told Tania that she felt a weight was lifted off her after these incidents came to light. (DE# 33-1 at 409). Both Tania and George have seen a change in the victim. She seems more excited about things, seems happier, and is doing better at school. (DE# 33-1 at 377, 419).

Detective Theresa Dennis testified that she met the family on March 20, 2002, interviewed the victim on April 3, 2002, and interviewed the Petitioner on May 2, 2002. (DE# 33-1 at 431, 445). The interview occurred when the victim was nine. (DE# 33-1 at 439). Detective Dennis repeatedly stressed to the victim the importance of telling the truth. (DE# 33-1 at 437). The victim described the two incidents but had difficulty with time frames like most

children. (DE# 33-1 at 438). The victim knew the Tiffany Club incident was during a hurricane which Dennis recalled was in October 1999. (DE# 33-1 at 541). The victim said she thought she was five but Dennis knew she would have been six or seven in 1999. (DE# 33-1 at 542). Dennis approximated that the Hillmoor incident occurred between Halloween and Christmas, 2001. (DE# 33-1 at 439).

As she had testified at the suppression hearing, Detective Dennis testified that she called the Petitioner and asked him to come to the police station on May 2, 2002. The prosecution introduced as Exhibit B Dennis' interview with the Petitioner and as Exhibit C the Petitioner's conversation with Xiomara; Detective Dennis testified that the exhibits accurately reflect her conversation with the Petitioner and the Petitioner's conversation with Xiomara. (DE# 33-1 at 453-54). Defense counsel objected to their admission because he did not have the opportunity to review either of the tapes and because the original single tape had been split into two separate tapes. (DE# 33-1 at 454). During a break in the proceedings, defense counsel explained that they had previewed the tape and only objected that it ended on page forty-eight rather than fifty, and asked that the missing portion be read into the record. (DE# 33-1 at 464). The State noted that more was redacted because it was getting close to the objectionable words and that the State was not obligated to include more. The court overruled the defense objection but explained it could present more during its case. (DE# 33-1 at 465). The State requested an instruction on blank spaces and loud noises because it was "very obvious" the tape had been edited. (DE# 33-1 at 469). The defense agreed. (DE# 33-1 at 469). The court therefore instructed the jury that "[t]here are some things that have been edited out that are not relevant to your consideration of the case, so you need not be concerned if there are any, if you will, blank spots. What you are concerned with is

what is on the tape for your viewing." (DE# 33-1 at 469).

The Petitioner's interview with Detective Dennis was played for the jury with portions edited out in accordance to the court's suppression ruling. The Petitioner's statement to Xiomara was then played, which included the following:

> THE DEFENDANT: I was talking about I was drunk. I really don't remember a lot of what happened, you know? **She said that I touched her. I could have. I have to pay the price of what I did.**
> MS. FIGUEROA: Did you do it?
> THE DEFENDANT: I kind of - **I kind of remember touching [the victim]**. I don't --
> ...
> **I'm so embarrassed** (indiscernible). **I've disappointed this whole family** and myself and everybody. And I don't - I'm so sorry.... Drinking at night - **when I drink, I do stupid stuff, you know, sexual stuff,** and I don't know why I do it. I don't understand why I do it. You know, I don't do it sober, it's only when I get drunk, I just do stupid shit. (Pause) I don't know (Indiscernible) you know? (Pause) She's (indiscernible) during the hurricane.
> MS. FIGUEROA: You were there. You (indiscernible).
> THE DEFENDANT: I slept with you that night in [the victim's] room. She said that I touched her that night. We were all there and I slept with you that night....

(DE# 33-1 at 523-24) (emphasis added).

Detective Dennis testified that she did not formally interview the victim's parents, Lillian, Xiomara, the victim's brother or the victim's cousin. (DE# 33-1 at 530, 534). This was because victim had said that nobody else was awake when the incidents happened and because of the children's ages. (DE# 33-1 at 536). A medical examination showed no physical findings of sexual abuse which is what Dennis expected based on the allegations. (DE# 33-1 at 532).

At the close of the State's case, defense counsel conceded there was sufficient evidence for Count (1) to go to the jury based on the victim's and detective's testimony. (DE# 33-1 at 574). However, counsel moved for judgment of acquittal on Count (2) because the information alleged that the offense occurred between August 1 December 31, 2001, but no evidence supported those dates. The evidence showed that the hurricane incident happened in 1998 or 1999 when the victim was five or six years old so it could not have happened during period alleged in information. Counsel also noted that the State never amended the information to reflect the time period - during a hurricane - even though the State was aware of it pursuant to the statement of particulars. (DE# 33-1 at 576). Further, there was no evidence of intent. (DE# 33-1 at 572-73). The State argued that the variance between the information and proof in Count (2) did not prejudice the Petitioner because it was within the statute of limitations and occurred before the information was filed. (DE# 33-1 at 575). The prosecutor noted that, in the statement of particulars, "[w]e did not ... specify a date, because we couldn't.... I did not know when that hurricane was." (DE# 33-1 at 576). The court denied the motion.

The Petitioner testified on his own behalf. (DE# 33-1 at 582). He recalled a hurricane incident in 1998 or 1999. (DE# 33-1 at 586). His family arrived at the victim's apartment at the Tiffany Club in the evening. (DE# 33-1 at 586). He went to bed in a back bedroom alone before anyone else. (DE# 33-1 at 587). He woke up with Xiomara with him. (DE# 33-1 at 588). It was early when he got up; the victim's father had arrived home from his night shift at work but the kids were not up yet. They were not in the living room and he thinks they were in Tania's room. (DE# 33-1 at 589). He had a couple of beers that night but never touched the victim; what she alleged never happened.

The second incident when he was babysitting the kids was two or three years prior to interview with Detective Dennis, which would have put it in 1999 or 2000 when the victim was seven. (DE# 33-1 at 619-20, 631). He had picked the kids up so Xiomara and Tania could go dancing. (DE# 33-1 at 590). He stopped at 7/11 to get snacks for the kids and a beer but denied stopping at the Ale House. (DE# 33-1 at 591-93). He took the kids home to his Hillmoor apartment and fell asleep on the living room couch while the kids watched TV. He awoke a few hours later to find the victim asleep on another couch in the living room. The boys had gone up to his son's room. (DE# 33-1 at 595). He picked up the victim, took her upstairs to his son's room and found the boys asleep on the floor under a comforter. As he carried the victim over to put her in bed, he stepped on one of the boys. (DE# 33-1 at 597). He nearly dropped the victim and kind of fell and tossed her onto the bed. (DE# 33-1 at 598-99). He asked her if she was ok and she did not really say anything. She could have said ouch or made a scared sound. (DE# 33-1 at 599). He put the covers over her and went to sleep. (DE# 33-1 at 599). He denied pulling down her pants and putting finger in her vagina. (DE# 33-1 at 600).

When the Petitioner went to talk to Detective Dennis on May 2, 2002, he had about two hours of sleep in the prior thirty-six hours. (DE# 33-1 at 611). With regards to his taped conversation with Xiomara, he claimed that he was "frazzled" and "fried," and was referring to the incident where he lost his grip while carrying the victim and had to punch or push her in the groin area to toss her into bed. (DE# 33-1 at 614). The admission that he kind of remembered touching her was not in the context of a sexual touch. (DE# 33-1 at 643). His statement that he was embarrassed was because there was contact between him and the victim that could have been taken the wrong way. (DE# 33-1 at 644). He never touched

the victim in a sexual manner. (DE# 33-1 at 615-16). Statements that he could not control himself referred to alcoholism. (DE# 33-1 at 649-50).

Xiomara, who no longer had a relationship with the Petitioner at the time of trial, testified that she recalled spending a hurricane at her sister's house in 1999 or 2000. (DE# 33-1 at 676, 685). She slept in Tania's bed with all three of the kids. (DE# 33-1 at 677). The Petitioner, who she not remember going to bed early, slept in another bedroom. Xiomara got up in the night, went outside to smoke, then joined the Petitioner in the back bedroom at 3 or 3:30 AM. (DE# 33-1 at 678). She thinks the kids were still in Tania's bed and did not recall seeing them in the living room. (DE# 33-1 at 679). She did not have any knowledge of the Hillmoor incident. (DE# 33-1 at 683). She drove the Petitioner to talk to Detective Dennis on May 2. When he told her after the interview with Detective Dennis that he does sexual things when he is drunk, she thought he was talking about the victim. (DE# 33-1 at 696).

The State called Tania on rebuttal. (DE# 33-1 at 699). She thought that she was the first to go to bed during the hurricane and that Xiomara came with her. The kids went to bed in the living room. They were no in bed with her when she went to sleep and they were not there in the morning when she woke up. (DE# 33-1 at 699). She woke up in bed with Xiomara. (DE# 33-1 at 700).

Defense counsel renewed the motion for judgment of acquittal and the court again denied it. (DE# 33-1 at 701).

In closing, defense counsel argued that the Petitioner is a touchy feely person and children can blow things out of proportion, especially after adults get involved and a story gets re-told. (DE#

33-1 at 713-14). He suggested that the victim was doing poorly at school because the family moved several times. Counsel argued there was insufficient evidence to convict, for instance, there was no medical or DNA evidence and Detective Dennis did not talk to all the witnesses including Lillian. (DE# 33-1 at 715-16). With regards to the hurricane incident at the Tiffany Club apartment, counsel noted that details were lost to time because "we're asking people to remember something that occurred back in 1999." (DE# 33-1 at 724).

The jury found the Petitioner guilty of the lesser offense of attempted sexual battery on a child under twelve by a perpetrator eighteen years of age or older in Count (1), and guilty of lewd and lascivious molestation by an offender over eighteen and a victim under twelve as charged in Count (2). (DE# 33-1 at 40, 758). At the sentencing hearing, the Petitioner apologized to the family, for the grief he had put them through, and for using the court's time. He asked for leniency because he had an alcohol problem but could be rehabilitated and rejoin society. (DE# 33-1 at 762). The court adjudicated him guilty and sentenced him to thirty years' imprisonment as a sexual predator for Count (1), and fifteen years' imprisonment for Count (2), consecutive. (DE# 33-1 at 42. 44).

The Petitioner argued on direct appeal that the trial court erred by denying the Petitioner's motion to suppress his statements to Xiomara in the police interview room. (DE# 33-1 at 981). The Fourth District Court of Appeal affirmed in a written opinion on January 25, 2006. It found that the Petitioner's statements to Xiomara were not obtained through an exploitation of the primary illegality. Rather, the statements were made at his insistence, he voluntarily spoke to her, and they were not coerced by any interrogation. Thus, they were sufficiently attenuated from the

initial illegality. Further, the Petitioner's argument that the police deliberately induced him in a reasonable expectation of privacy in his conversation with Xiomara was not made at trial and was therefore unpreserved for appellate review. Lundberg v. State, 918 So. 2d 444 (Fla. 4th DCA 2006) (4D04-904). The Fourth District issued its mandate on February 10, 2006. (DE# 33-1 at 1052). The Florida Supreme Court denied discretionary review on May 22, 2006. Lundberg v. State, 932 So. 2d 193 (Fla. 2006).

On August 3, 2006, the Petitioner filed a State habeas petition alleging that appellate counsel was ineffective for failing to argue on direct appeal: (1) the trial court erred by denying the motion to sever because severance was needed to achieve a fair determination of guilt or innocence of each charge and the trial court failed to consider whether the probative value of the alleged collateral acts outweighed the potential for prejudice; and (2) judgment of acquittal should have been granted on Count (2) because the information contained in the bill of particulars was inconsistent with the evidence which resulted in a fatal variance of two to three years between the dates charged in the information and the evidence at trial. (DE# 33-1 at 1098). The Fourth District denied the petition on the merits on September 27, 2006, and denied rehearing and clarification on November 2, 2006. (DE# 33-1 at 1279, 1292) (4D06-3152).

On January 3, 2007, the Petitioner filed a Rule 3.800 motion to correct an illegal sentence seeking credit for all time served prior to sentencing. (DE# 33-1 at 1294). The State conceded that the Petitioner was entitled to credit for 659 days rather than the 626 days included in the sentencing order. (DE# 33-1 at 1303). The trial court granted the motion to correct illegal sentence. (DE# 33-1 at 1313). The corrected sentence was docketed on April 10,

2007, *nunc pro tunc* to February 18, 2004. (DE# 33-1 at 1317).

On November 17, 2007, the Petitioner filed a Rule 3.850 motion for post-conviction relief raising twenty-one grounds for relief. (DE# 33-1 at 1323). He sought leave to amend, which was granted, and filed an amended Rule 3.850 motion on May 16, 2008. (DE# 33-1 at 1390, 1396). He withdrew the original Rule 3.850 motion and proceeded only with the amended motion (DE# 33-1 at 1498), in which he argued that counsel was ineffective for: (1) waiving his right to a speedy trial; (2) failing to object to the jury instruction on *attempted* capital sexual battery because the State's evidence showed only a completed offense; (3) failing to object or request a hearing when he was put into leg restraints at trial which; (4) failing to object when the prosecution elicited bolstering testimony from the victim; (5) failing to object when the prosecution elicited bolstering testimony from other witnesses; (6) failing to object when the prosecution elicited testimony from the victim's father that he took her to a psychologist who determined he believed the victim without a doubt; (7) failing to adequately and timely move pre-trial to exclude any mention during trial that the victim had seen a counselor; (8) eliciting bolstering testimony from Detective Dennis; (9) failing to object when the prosecution elicited bolstering testimony from Detective Dennis; (10) failing to object when evidence of collateral crimes was introduced pursuant to Section 90.404; (11) failing to move to suppress evidence regarding the Petitioner's criminal history; (12) failing to move to suppress recorded statements where Detective Dennis stated her personal belief in the Petitioner's guilt and vouching for the victim's credibility; (13) failing to move to suppress the videotape of the Petitioner's conversation with Xiomara because it depicted him handcuffed; (14) failing to move to suppress the videotape of the Petitioner's conversation with Xiomara because the

police falsely asserted it would be private; (15) failing to move to suppress his statement based on defective Miranda warning; (16) failing to suppress his statement due to (a) the prosecutor's failure to authenticate the videotape "ZB" before it was entered into evidence at the suppression hearing, (b) the state's failure to establish a chain of custody for all taped evidence, (c) apparent tampering with the videotape "ZB" which counsel failed to investigate, and stopping and starting the audiotaped evidence; (17) failing to object and request any relief when the court expressed its opinion regarding the weight of the State's evidence, witness credibility, and the Petitioner's guilt; (18) failing to request the court take judicial notice that Hurricane Floyd and its evacuation occurred on September 14-15, 1999, and that no hurricanes affected Florida in 2000-2002; (19) failing to investigate, consult with, and call at trial, a child psychologist to explain "parental alienation syndrome;" (20) failing to object and request relief when the prosecutor made a Golden Rule argument; (21) failing to contemporaneously object when the prosecutor intentionally violated the suppression order and orders *in limine*; (22) failing to timely and adequately challenge the court's jurisdiction over Count (2) of the amended information where it was based on fraud; and (23) cumulative error.

The court denied issues (14) and (20), and ordered the State to respond to the remaining claims. (DE# 33-1 at 1507, 1575). Following the State's response, the court denied in part, granted an evidentiary hearing on issues (3), (4), (5), (6), (7), (9), (12), and reserved ruling on the claim of cumulative error (23). (DE# 33-1 at 1975).

At the start of the Rule 3.850 hearing, the Petitioner withdrew his claim with regards to leg irons. (DE# 33-1 at 2336).

He testified that counsel was ineffective for failing to object to testimony bolstering the victim's credibility and Detective Dennis' personal belief about his guilt and background. (DE# 33-1 at 2355, 2357). He also felt that Detective Dennis created an expectation of privacy by turning off the visible tape recorder, removing the tape, telling the Petitioner and Xiomara she was giving them privacy, and leaving the room. (DE# 33-1 at 2377). He admitted on cross-examination that the defense strategy was to discredit the victim by proving her family did not believe her. (DE# 33-1 at 2366).

Defense trial counsel, Jack Frizzell, testified that it was the defense strategy to discredit the victim by showing she made inconsistent statements and that her family did not initially believe her, and that her story was manipulated by Aunt Lillian and was misinterpreted by her parents. (DE# 33-1 at 2398-99). With regards to the family questioning her truthfulness, counsel testified "I certainly wanted that to be presented to the jury because not it's not just, you know, the credibility of the witness as far as the Defense position is concerned, but we're also injecting into that picture that the victim's own family was questioning her integrity and we wanted that to be presented to the jury as part of our strategy, as part - as a tactical consideration." (DE# 33-1 at 2400). Further, counsel could not have prevented the statements from the victim's parents and Aunt Lillian from being introduced pursuant to the child hearsay rule. (DE# 33-1 at 2401). He intentionally allowed Detective Dennis' questions about the difference between a lie and the truth because they are basic questions and showed the inconsistency in the victim's story between touch versus penetration. (DE# 33-1 at 2404). With regards to the Petitioner's statement to Xiomara, counsel did everything he could to suppress the entire statement but he knew there was no

expectation of privacy in an interrogation room. (DE# 33-1 at 2403). He tried to get the Petitioner's statements to Xiomara suppressed but the court refused. (DE# 33-1 at 2417).

Defense counsel argued that post-conviction relief should be granted because counsel's trial strategy was unsound. The State argued that the strategy was reasonable because it revealed that the victim's family only reported the allegations when a counselor told them it was mandatory to do so, and the strategy was ultimately successful because they convicted the Petitioner of the lesser offense of attempted sexual battery. (DE# 33-1 at 2433). The court agreed that the tactic was at least partially successful. (DE# 33-1 at 2428).

The court denied the remaining post-conviction claims after the evidentiary hearing. (DE# 33-1 at 3048). The Fourth District *per curiam* affirmed on appeal, and denied rehearing and certification. Lundberg v. State, 127 So. 3d 562 (Fla. 4th DCA 2012) (4D10-4902); (DE# 33-1 at 2592). The Florida Supreme Court accepted jurisdiction on October 24, 2013, Lundberg v. State, 130 So. 3d 693 (Fla. 2013), then dismissed review as improvidently granted on June 26, 2014. Lundberg v. State, 149 So. 3d 1126 (Fla. 2014) (SC13-66). It denied rehearing on October 17, 2014. (DE# 33-1 at 2821). The Petitioner filed a petition for writ of certiorari in the United States Supreme Court which was denied on February 23, 2015. Lundberg v. Florida, 135 S.Ct. 1459 (2015) (14-7897).

Meanwhile, on November 21, 2008, the Petitioner filed a second petition for writ of habeas corpus in the Fourth District in which he argued that appellate counsel was ineffective for failing to argue that the trial court fundamentally erred by instructing the jury on *attempted* sexual battery because the evidence only proved

the completed offense or no offense at all. (DE# 33-1 at 2823). The Fourth District dismissed the petition as successive and untimely on January 28, 2009, and denied rehearing and certification on March 17, 2009. (DE# 33-1 at 2958, 2977) (4D08-4889).

The Petitioner filed the original Section 2254 petition in the instant case on August 21, 2014, and the operative amended petition on January 6, 2015.[4]

III. Statute of Limitations

The Respondent concedes that the instant petition was timely filed. (DE# 31 at 35).

IV. Cognizability

Federal habeas relief is available only to correct constitutional injury. 28 U.S.C. § 2241(c)(3); 28 U.S.C. § 2254(a); see Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) (holding errors that do not infringe a defendant's constitutional rights provide no basis for federal habeas corpus relief); Barclay v. Florida, 463 U.S. 939, 958-59 (1983) ("[m]ere errors of state law are not the concern of this court ... unless they rise for some other reason to the level of a denial of rights protected by the United States Constitution.") (citations omitted). Questions of state law and procedure "rarely raise issues of federal constitutional significance, because '[a] state's interpretation of its own laws provides no basis for federal habeas corpus relief, since no question of a constitutional nature is involved.'" Tejada v. Dugger, 941 F.2d 1551, 1560 (11th Cir. 1991) (quoting Carrizales v. Wainwright, 699 F.2d 1053, 1053-54 (11th Cir. 1983)). Federal

[4] 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).

habeas corpus review of a state law claim is, therefore, precluded if no due process violations or facts indicating such violations are alleged. This limitation on federal habeas review is of equal force when a petition, which actually involves state law issues, is "couched in terms of equal protection and due process." Branan v. Booth, 861 F.2d 1507, 1508 (11th Cir. 1988) (quoting Willeford v. Estelle, 538 F.2d 1194, 1198 (5th Cir. 1976)).

The Petitioner raises as a sub-claim to several of his main arguments that the trial court erred by denying his Rule 3.850 motion for post-conviction relief without an evidentiary hearing or relied on inadequate or inadmissible evidence in denying relief.

The Florida courts' conduct of their post-conviction proceedings is a matter of purely state law. Therefore, this sub-claim is not cognizable on federal habeas review and does not support Section 2254 relief. See Branan, 861 F.2d at 1508. These sub-claims should therefore be denied without further consideration and will not be separately addressed in the Discussion section, *infra*.

V. Procedural Default

A procedural-default bar in federal court can arise in two ways: (1) when a petitioner raises a claim in state court and the state court correctly applies a procedural default principle of state law; or (2) when the petitioner never raised the claim in state court, and it is obvious that the unexhausted claim would now be procedurally barred in state court. Bailey v. Nagle, 172 F.3d 1299, 1302-03 (11th Cir. 1999). In the first instance, the federal court must determine whether the last state court rendering judgment clearly and expressly stated that its judgment rested on a procedural bar. In the second instance, the federal court must

determine whether any future attempt to exhaust state remedies would be futile under the state's procedural default doctrine. Id. at 1303. In Florida, a District Court of Appeal's *per curiam* affirmance of a circuit court's ruling explicitly based on procedural default "is a clear and express statement of its reliance on an independent and adequate state ground which bars consideration by the federal courts." Harmon v. Barton, 894 F.2d 1268, 1273 (11th Cir. 1990).

Under the doctrine of procedural default, "[i]n all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 750 (1991)(internal quotations omitted). The Eleventh Circuit has established a three-part test to determine whether a state court's procedural ruling constitutes an independent and adequate state rule of decision: First, the last state court rendering a judgment in the case must clearly and expressly state that it is relying on state procedural rules to resolve the federal claim without reaching the merits of that claim. Second, the state court's decision must rest solidly on state law grounds and may not be intertwined with an interpretation of federal law. Third, the state procedural rule must be adequate. Judd v. Haley, 250 F.3d 1308, 1313 (11th Cir. 2001). The Courts have interpreted the adequacy requirement to mean that the rule must be "firmly established and regularly followed," and not applied in an arbitrary or unprecedented fashion. Ford v. Georgia, 498 U.S. 411, 423-25 (1991); Judd, 250 F.3d at 1313.

Whether an issue could have raised on direct appeal depends on whether that claim was cognizable on direct appeal, or was more appropriately raised in a motion for post-conviction relief. As a general matter "the main question on direct appeal is whether the trial court erred, [and] the main question in a Strickland[5] claim is whether trial counsel was ineffective." Bruno v. State, 807 So. 2d 55, 63 (Fla. 2001); accord Franqui v. State, 59 So. 3d 82, 96 (Fla. 2011). Both substantive and ineffective assistance claims may arise out the same underlying facts but the claims themselves are usually distinct. Id. A claim of trial court error may generally be raised on direct appeal but not in a post-conviction motion, and a claim of counsel's ineffectiveness may generally be raised in a post-conviction motion but not on direct appeal. Id. However, Florida courts have also held a defendant may not "counter the procedural bar" on issues that could have been raised on appeal by "couch[ing] his claim ... in terms of ineffective assistance of counsel in failing to preserve or raise those claims." Cherry v. State, 659 So. 2d 1069, 1072 (Fla. 1995); Medina v. State, 573 So. 2d 293 (Fla. 1990). However, Cherry does not apply where the underlying claims were raised and rejected on direct appeal because they were unpreserved for review. Pietri v. State, 885 So. 2d 245, 256 (Fla. 2004); see Smith v. Crosby, 159 Fed. Appx. 76 (11th Cir. 2005).

A petitioner can avoid the application of procedural default by establishing objective cause for failing to properly raise the claim in state court and actual prejudice from the alleged constitutional violation. Spencer v. Sec'y, Dep't of Corr., 609 F.3d 1170, 1179-80 (11th Cir. 2010). To show cause, a petitioner "must demonstrate that some objective factor external to the

[5] Strickland v. Washington, 466 U.S. 668 (1984).

defense impeded the effort to raise the claim properly in state court." Wright v. Hopper, 169 F.3d 695, 703 (11th Cir. 1999); see also Murray v. Carrier, 477 U.S. 478 (1986). To show prejudice, a petitioner must demonstrate there is a reasonable probability the outcome of the proceeding would have been different. See Crawford v. Head, 311 F.3d 1288, 1327-28 (11th Cir. 2002).

If a petitioner is unable to show cause and prejudice, yet another avenue for considering the merits of the claims despite procedural default exists. "[I]n an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." Carrier, 477 U.S. at 496. This exception is "exceedingly narrow in scope" and requires proof of actual innocence, not just legal innocence. Carrier, 477 U.S. at 496; Ward v. Hall, 592 F.3d 1144, 1157 (11th Cir. 2010); Spencer, 609 F.3d at 1180.

The Respondent appears to concede that all of the Petitioner's claims have been exhausted in the Florida courts. However, the Respondent argues that Claim (2)(7) is procedurally defaulted because it was raised in the Petitioner's of his 2009 Rule 9.141 petition alleging ineffective assistance of appellate counsel which the Fourth District dismissed as successive and untimely. This rule is firmly established and regularly followed. See Fla. R. App. P. 9.141(c)(4)(B) ("A petition alleging ineffective assistance of appellate counsel on direct review shall not be filed more than 2 years after the judgment and sentence become final on direct review unless it alleges under oath with a specific factual basis that the petitioner was affirmatively misled about the results of the appeal by counsel."); Hernandez v. State, 990 So. 2d 1116 (Fla. 3d DCA 2008). The Petitioner has not attempted to establish cause and

prejudice to excuse this procedural default. Therefore, Claim (2)(7) is procedurally defaulted from federal habeas review. It will be addressed on the merits in the alternative in the Discussion section, *infra*.

VI. Standard of Review

Section 2254 relief is available for "a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

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's decision is "contrary to" clearly established federal law if: (1) the state court applies a rule that contradicts the governing law set forth in United States Supreme Court cases, or (2) the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from the Supreme Court's precedent. Williams, 529 U.S. at 405-06.

The "unreasonable application" inquiry is a two-step analysis. First the Court "must determine what arguments or theories

supported or, [if none were stated], could have supported the state court's decision." Johnson v. Sec'y, Dep't of Corr., 643 F.3d 907, 910 (11th Cir. 2011) (quoting Harrington v. Richter, 131 S.Ct. 770, 786 (2011)). Second, the Court must ask "whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." Id. In other words, habeas may issue only "where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with ... precedents" of the Supreme Court of the United States." Harrington, 131 S.Ct. at 786. The petitioner carries the burden to show the state court's decision was contrary to, or an unreasonable application, of federal law. Cullen v. Pinholster, 131 S.Ct. 1388, 1398 (2011).

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).

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).

In the instant case, the Petitioner seeks habeas relief based on ineffective assistance of counsel. The United States Supreme Court clearly established the law governing such claims 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.

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.

VII. Discussion

(1) Trial Court Error: Suppression

The Petitioner contends that the State violated the Fifth and Sixth Amendments by intentionally creating a situation to induce him to make incriminating statements without the assistance of counsel. The Petitioner waived his rights and denied the allegations until Detective Dennis threatened him with the death penalty, which led him to say he may have touched the victim while drunk. Detective Dennis then allowed the Xiomara to talk to the Petitioner after turning off the room recorder and saying she was ending the tape and giving them privacy. However, a hidden camera continued recording. The Petitioner then told Xiomara that he may have touched the victim while drunk. The Fourth District erred by

affirming the admissibility of the Petitioner's statement to Xiomara, finding that it was not obtained through exploiting the primary illegality. He contends that the Fourth District did not consider the totality of the circumstances which revealed a continuous series of psychological and emotional events that culminated with Detective Dennis' misstatement that the discussion with Xiomara would be private. He contends that his statement to Xiomara that was surreptitiously recorded should be suppressed as fruit of the poisonous tree.

As a general matter, a federal court may not grant habeas relief based on an alleged Fourth Amendment violation "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim...." Stone v. Powell, 428 U.S. 465, 480 (1976). However, this prohibition does not apply to claims alleging a confession was involuntary. See Jarrell v. Balkcom, 735 F.2d 1242, 1251-52 (11th Cir. 1984) (noting that Stone has not been extended to deny federal habeas review of claims under Miranda or Jackson v. Denno, 378 U.S. 368 (1964)). It is clearly established that the State cannot introduce a suspect's statement taken outside the presence of an attorney without first showing that the suspect made a knowing, voluntary and intelligent waiver of his right to counsel. Miranda, 384 U.S. at 475. Determining whether a waiver was voluntary, knowing and intelligent depends on whether, under the totality of the circumstances: (1) it was the product of a free and deliberate choice, not coercion, intimidation or deception; and (2) it was made with a full awareness of the nature of the right being abandoned and the consequences of the decision to abandon it. Moran v. Burbine, 475 U.S. 412, 421 (1986). The Supreme Court has made clear that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." Colorado v.

Connelly, 479 U.S. 157, 167 (1986). Coercion "can be mental as well as physical, and ... the blood of the accused is not the only hallmark of an unconstitutional inquisition." Blackburn v. Alabama, 361 U.S. 199, 206 (1960). Actual violence by a governmental agent is not necessary to coerce a confession; "a credible threat is sufficient." Arizona v. Fulminante, 499 U.S. 279, 287 (1991). Absent police overreaching which is causally related to the confession, however, "there is simply no basis for concluding that a state actor has deprived a criminal defendant of due process of law." Connelly, 469 U.S. at 164; see United States v. Thompson, 422 F.3d 1285, 1296 (11th Cir. 2005) ("Government coercion is a necessary predicate to a finding of involuntariness under the Fifth Amendment."). Where law enforcement proceeds with interrogation techniques intended to undermine Miranda, successive custodial statements should be suppressed unless curative steps are taken by law enforcement to correct the prior violation. Missouri v. Seibert, 542 U.S. 600 (2004). Further, a citizen's right to privacy under the Fourth Amendment is determined by determining whether the citizen had a subjective expectation of privacy and whether that expectation was one that society recognizes as reasonable. See Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)). Under the AEDPA habeas standard, the appropriate inquiry is whether the state court's legal determination of voluntariness was contrary to or an unreasonable application of Supreme Court precedent under the totality of the circumstances. Land v. Allen, 573 F.3d 1211, 1217 (11th Cir. 2009); see Burch v. Sec'y, DOC, 535 Fed. Appx. 789 (11th Cir. 2013).

The State concedes that the Petitioner exhausted this claim of substantive error when he argued on direct appeal that the trial court erred by denying the Petitioner's motion to suppress his statement to Xiomara in the police interview room. (DE# 33-1 at

981). The Fourth District Court of Appeal affirmed in a written opinion on January 25, 2006. It found that the Petitioner's statements to his girlfriend were not obtained through an exploitation of the primary illegality. Rather, the statements were made at his insistence, he voluntarily spoke to her, and they were not coerced by any interrogation. Thus, they were sufficiently attenuated from the initial illegality. Further, the Petitioner's argument that the police deliberately induced him in a reasonable expectation of privacy in his conversation with his girlfriend was not made at trial and was therefore unpreserved for appellate review. Lundberg, 918 So. 2d at 444.[6]

This claim fails on the merits. The record reveals that the Petitioner's statement to Detective Dennis was involuntary because it was induced by her threat that he would be subject to the death penalty unless he confessed. However, it was not contrary to or an unreasonable application of clearly established federal law for the Fourth District to conclude that the Petitioner's request to speak to Xiomara was independent from and sufficiently purged the primary taint of his confession to Detective Dennis. See Autry v. Estelle, 706 F.2d 1394 (5th Cir. 1983) (involuntary written statement did not taint admissions the defendant made to his mother over the phone nearly seven hours later where the two events were separated by approximately six hours, occurred after the defendant had a chance to sleep, and was at his request; it was not the product of resumed interrogation nor was it directed at any custodian, therefore, his overheard statements to his mother were admissible).

Nor was it contrary to or an unreasonable application of

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[6] See Claim (2)(1), *infra*, for the analysis of the Petitioner's claim that trial counsel was ineffective for failing to seek suppression based on his expectation of privacy.

clearly established federal law for the Florida courts to conclude that there was no reasonable expectation to privacy when the Petitioner, who had already been arrested, was permitted to speak to his girlfriend in a police interview room that was routinely monitored via hidden video equipment. See United States v. Delibro, 347 Fed. Appx. 474, 475 (11th Cir. 2009) (arrestee and his mother did not have a reasonable expectation of privacy in an actively-monitored police interview room, as arrestee was well aware that police could be monitoring his conversations, and as a result there was no basis to suppress conversations between them that the police had recorded without a warrant); Lumpkins v. Sec'y, Dep't of Corr., 449 Fed. Appx. 879 (11th Cir. 2011) (state court was not unreasonable in finding that detectives did not engage in unlawful activities by allowing the defendant's sister to talk to him and explain that she had already told police what he had told her; there was no evidence that police pressured the sister to reveal this information or used the sister to cajole the defendant into confessing; no case law exists holding that the police improperly coerced a confession by permitting a defendant to speak to his family).

No habeas relief is warranted because the State court's rejection of this claim is not contrary to or an unreasonable application of clearly established federal law under the totality of the circumstances and was not based on an unreasonable determination of fact.

(2)(1) Ineffective Trial Counsel: Suppression (Privacy)

The Petitioner contends that trial counsel was ineffective for failing to investigate and timely move to suppress the Petitioner's videotaped conversation with Xiomara because the police created the false belief that the conversation was unrecorded and private. He

claims that counsel was unaware of case law addressing suppression based on the expectation of privacy. The appellate court was unreasonable for finding, without an evidentiary hearing, that there was no subjective expectation of privacy because the Petitioner did not ask for privacy and because the detective "more likely" conveyed to the Petitioner that he could tell his girlfriend about his arrest out of the public eye to save embarrassment. He argues that he was prejudiced because the State admitted the statement was extremely probative and became a feature of trial.

The State concedes that the Petitioner exhausted in his Rule 3.850 motion the claim that trial counsel was ineffective for failing to move to suppress the videotape of the Petitioner's conversation with his girlfriend because the police falsely asserted it would be private. The Fourth District specifically found as follows with regards to the claim that the surreptitious taping of his conversation with Xiomara violated his expectations of privacy:

> In this case the defendant waived his Miranda rights and made admissions to the detective. The defendant then asked to speak to his girlfriend. The detective handcuffed the defendant and went through his wallet, for security purposes. Before she brought the girlfriend in, she told the defendant that she was ending the tape recording. He asked what he would be charged with, and the officer told him that the charges would be two sexual batteries. She would not directly answer his question of whether he would have to do "time" for the crimes. She told him that she would not tell the girlfriend anything and that it was up to him what he would tell his girlfriend. She then brought the girlfriend in and left the room saying the she would give them privacy. The defendant told his girlfriend that he was going to jail for sexual battery. He then apologized to her and related essentially the same information that he told the detective, as well as what the detective had told him

> about the two incidents. In addition, however, he admitted to her that he might have touched the victim when he was drunk, an admission he did not make to the detective.
>
> Although the detective used the word "privacy" when leaving the room, we find this hard to distinguish from Boyer where the officer told the defendant that he would get out of the room so the defendant could talk to his sister-in-law. That, too, could foster a notion in a defendant that people would not be listening to his conversation. Yet, in Boyer we held that the statement should not be suppressed. Here, the defendant had already made admissions to the detective and had specifically asked to see his girlfriend. He had not asked for privacy, even though the officer did vacate the room. And all he apparently wanted to do was to tell his girlfriend how sorry he was for the situation and explain what he had told the detective. The officer's statement that she wanted to give them privacy more likely conveyed to the defendant that he could tell his girlfriend about his arrest out of the public eye—to save embarrassment to them both. This conduct is not the type of deliberate fostering of an expectation of privacy in order to avoid the defendant's assertion of his constitutional rights which led the trial court to suppress the recorded conversation in [State v. Calhoun, 479 So. 2d 241 (Fla. 4th DCA 1985)][7] and [Cox v. State, 26 So. 3d 666 (Fla. 4th DCA 2010)].[8]

Lundberg, 127 So. 3d at 567.

This claim fails on the merits. Reasonable counsel could have concluded that a suppression motion on the basis of privacy would

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[7] In State v. Calhoun, 479 So. 2d 241 (Fla. 4th DCA 1985), the Fourth District held that surreptitious videotaping of conversation between defendant and his brother in an interrogation room which occurred after the defendant invoked his rights was an unreasonable interception of a private conversation, made a mockery of the Miranda rights, and should have been suppressed.

[8] In Cox v. State, 26 So. 3d 666 (Fla. 4th DCA 2010), the Fourth District found that officers actively participated in a plan to elicit incriminating statements after defendant had invoked his right to counsel by plating co-defendant in the interrogation room with specific intent to evoke an incriminatory response and intended to spark a debate between the two subjects, and therefore the statements should have been suppressed.

not have been meritorious where officers granted the arrestee's request to speak to his girlfriend in a surreptitiously recorded police interview room where a visible audio recording device was removed and the officer left to give them "privacy." See Davis v. State, 121 So. 3d 462 (Fla. 2013) (no expectation of privacy where detective excused himself from interview and told defendant's parents to knock if they wanted him, and closed the door; he never assured the defendant or his parents that their conversation was private and did not take any actions designed to lead them to believe the room was not under surveillance); Larzelere v. State, 676 So. 2d 394 (Fla. 1996) (no expectation of privacy where defendant did not ask to speak to her son and officers did not foster an expectation of privacy; they were simply placed in a cell together before a hearing); Allen v. State, 636 So. 2d 494 (Fla. 1994) (voluntary jailhouse statements admissible because there was no improper police involvement in inducing the conversation nor any intrusion into a privileged or otherwise confidential communication); Johnson v. State, 730 So. 2d 368, 370 (Fla. 4th DCA 1999) (police did not violate the Fourth Amendment by recording, without a warrant, conversations arrestee and his wife in a secretly monitored interview room at a police station because no reasonable expectation of privacy existed and wife admitted that she did not know if they were being surveilled or recorded); Boyer v. State, 736 So. 2d 64 (Fla. 4th DCA 1999) (defendant had no expectation of privacy when he waived his rights, spoke to detectives at the police station but did not confess, asked to talk to his sister-in-law, and the officer allowed her to come in, stating he would get out of the room so the defendant could talk to her).

The Petitioner argues that the Fourth District's finding that it was "more likely" that Detective Dennis stated that she wanted

to give them privacy was to convey to the defendant that he could tell his girlfriend about his arrest out of the public eye to save embarrassment to them both, was an unreasonable determination of fact. He contends that this conclusion is unreasonable, however, he has failed to overcome this finding by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1); Putman, 268 F.3d at 1241. It is therefore entitled to deference.

Therefore, the Florida courts' rejection of this claim is not contrary to or an unreasonable determination of clearly established federal law and was not based on an unreasonable determination of fact.

(2)(2) Ineffective Trial Counsel: Suppression (Miranda)

The Petitioner contends that trial counsel was ineffective for failing to move to suppress his audio and video statements based on defective Miranda warnings that did not advise him of his right to counsel during questioning. If he had been correctly advised of his rights, he would have asked for counsel when questioning became accusatory. He argues that this error rendered trial and verdict fundamentally unfair.

The Respondent concedes this claim was exhausted in the Petitioner's Rule 3.850 motion for post-conviction relief.

The trial court denied this issue in a written order, concluding that the warnings were sufficient because they advised the Petitioner of the right to have counsel present at the time of questioning, and that he could stop questioning to speak to a lawyer, and because the suppressed portion of his confession erased any doubt that he knew and waived his right to have an attorney present during the interview. See (DE# 33-1 at 1994). The Fourth

District affirmed without comment.

The United States Supreme Court established the procedural safeguards that are required before police commence custodial interrogations in Miranda v. Arizona, 384 U.S. 436 (1966). A suspect must be told that "he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." Id. at 479. The introduction of incriminating statements taken from defendants in violation of Miranda is subject to harmless error analysis. Arizona v. Fulminante, 499 U.S. 279 (1991).

The Petitioner was warned of his rights pursuant to a Port St. Lucie Police Department rights waiver form as follows:

> #1 You have the right to remain silent.
> #2 Anything you say can and will be used against you in court of law.
> #3 You have the right to an attorney and to have him here with you before any questioning.
> #4 If you cannot afford to hire an attorney one will be appointed for you before we ask you any questions.
> #5 If you decide to answer questions now, without an attorney You will still have the right to stop answering questions at any time.

(DE# 33-1 at 1707).

In Roberts v. State, 874 So. 2d 1225 (Fla. 4th DCA 2004), the Fourth District held that a similar Broward County rights form was deficient because it informed defendants of the right to have counsel present *before* but not *during* questioning. The St. Lucie County form from which the Petitioner was warned of his rights appears to suffer from the same deficiency. However, no relief is

warranted.

First, no Miranda warnings were required because the Petitioner's statements were made to Xiomara who was not a State agent and was not acting at the direction of a State agent. See Rhode Island v. Innis, 446 U.S. 291, 301 (1980) (defining "interrogation" as express questioning or "any words or actions on the part of the *police*... that the police should know are reasonably likely to elicit an incriminating response.") (emphasis added); Noto v. State, 42 So. 3d 814 (Fla. 4th DCA 2010) (affirming the denial of a motion to suppress where the defendant, after invoking his rights, was placed in an interview room with another subject and made inculpatory statements that were surreptitiously recorded). Because the statements were not the product of a custodial interrogation, any deficiency in the formal rights waiver form did not render his statements inadmissible.

Second, even if Miranda warnings were required, counsel cannot be deemed deficient for failing to object based on Roberts because that 2004 case had not yet been issued at the time of the Petitioner's May 2, 2002, statement to police or his October-December, 2003, trial. An attorney's failure to anticipate a change in the law does not constitute ineffective assistance of counsel under Strickland. See United States v. Ardley, 273 F.3d 991, 993 (11th Cir. 2001); Funchess v. Wainwright, 772 F.2d 683, 691 (11th Cir. 1985). Counsel's failure to challenge the standard waiver form before Florida courts called it into question was reasonable under the professional norms prevailing at that time. See, e.g., Stancle v. McNeil, 2009 WL 2948394 (S.D. Fla. Sept. 14, 2009); James v. McNeil, 2008 WL 2594088 (S.D. Fla. June 27, 2008). Therefore, counsel was not constitutionally deficient for failing to raise the Miranda issue at trial and preserve it for appeal.

Therefore, the Florida courts' rejection of this claim is not contrary to or an unreasonable determination of clearly established federal law and was not based on an unreasonable determination of fact.

(2)(3) Ineffective Trial Counsel: Suppression (Authentication & Chain of Custody)

The Petitioner contends that trial counsel was ineffective for failing to move to suppress videotape "ZB" because it was not properly authenticated and the State did not establish chain of custody, and failing to investigate apparent tampering. Counsel failed to investigate the authenticity of the tape entered at the suppression hearing and pursued the "bizarre" strategy of choosing not to challenge the tape's integrity because he did not want the police to look like liars.

A sufficient showing of the chain of custody is made where the object "has been kept in proper custody since the time it was under possession and control until the time it is produced at trial." Armstrong v. State, 73 So. 3d 155, 171 (Fla. 2011). Even where the chain of custody is broken, relevant physical evidence is admissible unless there is an indication of "probable tampering." Murray v. State, 838 So. 2d 1073, 1082 (Fla. 2002); Overton v. State, 976 So. 2d 536 (Fla. 2007).

The Florida Evidence Code requires the authentication or identification of a document prior to its admission into evidence. § 90.901, Fla. Stat. The requirements of Section 90.901 "are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." § 90.901, Fla. Stat.; see generally Gosciminski v. State, 132 So. 3d 678 (Fla.

2013). Evidence may be authenticated by examination of its appearance, contents, substance, internal patterns, or other distinctive characteristics in conjunction with the circumstances. Coday v. State, 946 So. 2d 988, 1000 (Fla. 2006). The testimony of a single, persuasive witness is sufficient on the question of admissibility. Hunt v. State, 746 So. 2d 559 (Fla. 1st DCA 1999).

The Respondent concedes that the Petitioner exhausted this claim in his Rule 3.850 motion for post-conviction relief. The trial court found that the tape was authenticated and properly admitted, and that the fact the tape had been edited was obvious, discussed, and benefitted the Petitioner. (DE# 33-1 at 1996-98). The Fourth District affirmed without comment. Lundberg, 127 at 562.

This claim lacks merit. At the suppression hearing, Detective Dennis testified that she recognized Exhibit ZB, the tape of her interview with the Petitioner followed by the Petitioner's statements to Xiomara, because it contained her handwriting and personal stamp. She further testifies that it accurately depicts the conversation on May 2, 2002. (DE# 33-1 at 785). Defense counsel cross-examined Dennis about the recording and she explained that there is a hidden video recorder in the interview room and that she also uses a visible audiotape as backup. (DE# 33-1 at 786). Tape ZB was admitted as Exhibit 102 without objection. (DE# 33-1 at 787). Detective Dennis' testimony and the tape's contends were sufficient to establish its authenticity and that no tampering had occurred.

At trial, the State introduced two tapes instead of one, with the Petitioner's statements to Detective Dennis and Xiomara appearing separately. Counsel objected that the State had redacted some relevant statements but did not challenge the tapes' chain of custody or authenticity. Indeed, the parties discussed the tapes'

obvious editing and agreed that the jury should be instructed to ignore the obvious splices and pauses because they are irrelevant.

The Petitioner's self-serving contention that there was apparent tampering that counsel failed to investigate is conclusory and speculative, unsupported by the record, and should be rejected. Nor does he explain how counsel's objection would have probably changed the outcome of the suppression hearing or trial.

Therefore, the Florida courts' rejection of this claim is not contrary to or an unreasonable determination of clearly established federal law and was not based on an unreasonable determination of fact.

(2)(4) & (6) Ineffective Trial & Appellate Counsel: Variance

The Petitioner contends that trial counsel failed to timely and adequately challenge the court's jurisdiction and venue over Count (2) because the prosecutor fraudulently swore that the dates alleged in the amended information could not be narrowed further, and there was a fatal variance between the amended information and the evidence presented at trial. The State produced "newly discovered evidence" six years after trial in the post-conviction proceedings showing that Count (2) occurred during Hurricane Irene, and not Hurricane Floyd. Counsel should have objected to the prosecutor's fraud with regards to the date charged in Count (2), and should have raised lack of jurisdiction and venue because the pertinent statute was enacted on October 1, 1999, after the incident occurred in 1998-99. The evidence at trial amounted to collateral crime evidence without notice, was inherently prejudicial, and undermined the defense. There is a reasonable probability that Count (2) would have been dismissed had counsel brought the prosecutor's fraudulent action to the court's

attention. The Petitioner further contends that appellate counsel should have argued on direct appeal that he was entitled to judgment of acquittal for Count (2) because the evidence was legally insufficient to support the conviction and the relevant statute became effective after the incident occurred.

The Respondent concedes that the Petitioner raised the claim of ineffective assistance of trial counsel in his Rule 3.850 motion for post-conviction relief. The court denied relief because the Petitioner had failed to demonstrate either deficient performance or prejudice:

> ... The State did not charge the incident occurred during Hurricane Floyd, and alleged only that it occurred *during a hurricane*. The incident in count 2 did not occur during Hurricane Floyd, but rather during the later hurricane, Irene, at which time the statute under which the Defendant was charged and convicted was effective, and the evidence supports a conviction based on the information.

(DE# 33-1 at 2007).

The Respondent concedes that the claim of ineffective assistance of appellate counsel was exhausted in the Petitioner's 2006 State habeas petition. The Fourth District denied relief. (DE# 33-1 at 1279).

The Florida Rules of Criminal Procedure provide as follows with regards to defects or variances in an indictment or information:

> No indictment or information, or any count thereof, shall be dismissed or judgment arrested, or new trial granted on account of any defect in the form of the indictment or information or of misjoinder of offenses or for any cause whatsoever, unless the court shall be of

> the opinion that the indictment or information is so vague, indistinct and indefinite as to mislead the accused and embarrass him or her in the preparation of a defense or expose the accused after conviction or acquittal to substantial danger of a new prosecution for the same offense.

Fla. R. Crim. P. 3.140(o).

An information must state as accurately as possible the time and place of the commission of the offense charged. Fla. R. Crim. P. 3.140(d)(3). An information is generally sufficient if it tracks the statute and reasonably informs the defendant of the actions with which he is charged. State v. Dilworth, 397 So. 2d 292, 293-94 (Fla. 1981); Martinez v. State, 368 So. 2d 338, 340 (Fla. 1979). The State need not present proof with which it intends to establish its case. State v. Lee, 651 So. 2d 1221, 1222 (Fla. 2d DCA 1995). Time "is not ordinarily a substantive part of an indictment or information and there may be variance between the dates provided at trial and those alleged in the indictment and information as long as: (1) the crime was committed before the return date of the indictment; (2) the crime was committed during the applicable statute of limitations; and (3) the defendant has been neither surprised nor hampered in preparing his defense." Tingley v. State, 549 So. 2d 649, 651 (Fla. 1989). "[T]he proof adduced at trial must substantially conform to the allegations of the information in order that the defendant not be prejudiced in preparation of a defense or subject to reprosecution for the same offense." Romero v. State, 790 So. 2d 468, 470 (Fla. 5th DCA 2001). This principle is subject to the caveats that: (1) "an objection to a variance between the allegata and probata must be raised in the court either by motion to dismiss or ... by motion for judgment of acquittal...," and (2) "the variance may be deemed immaterial where it did not mislead the defendant or subject him to a substantial

possibility of reprosecution for the same offense." Romero, 790 So. 2d at 470. Counsel can move for a statement of particulars if the time and date stated are too indefinite for counsel to prepare a defense. Fla. R. Crim. P. 3.140(n). A fatal variance between the information and trial testimony is fundamental error. Green v. State, 714 So. 2d 594, 595 (Fla. 2d DCA 1998).

In the instant case, the information was filed on May 20, 2002, and the amended information adding Count (2), was filed on August 1, 2003. (DE# 33-1 at 23). The amended information alleged that the lewd and lascivious assault occurred between August 1, 2001, and December 31, 2001. However, the evidence a trial revealed that Count (2) occurred during a hurricane in October 1999. (DE# 33-1 at 541). Defense counsel moved for judgment of acquittal on Count (2) because the information alleged that the offense occurred between August 1 December 31, 2001, whereas the evidence showed that the hurricane incident happened outside that time period in 1998 or 1999 when the victim was five or six years old. Counsel also noted that he filed a motion for statement of particulars and statement came back saying it happened during a hurricane, however, the information was never amended to reflect the time period even though the State was aware of it. (DE# 33-1 at 576). The State argued that the motion should be denied because the offense occurred before the information was filed and that the statute of limitations had not expired. See § 800.04(5)(b), Fla. Stat. (lewd and lascivious molestation against a victim less than twelve by an offender eighteen or older is a life felony); § 775.15(1), Fla. Stat. (prosecution for a life felony may be commenced at any time). A review of the trial transcript reveals that the defense was not surprised or hampered by the date's uncertainty. See, e.g.,33-1 at 586-90) (the Petitioner testifying that he recalled both events upon which the victim's allegations were based). The court denied

the motion for judgment of acquittal and the Petitioner has failed to explain what further argument counsel could have made that probably would have changed the outcome of the proceeding. See Knowles v. Mirzayance, 556 U.S. 111 (2009)(defense counsel not required to pursue every claim or defense, regardless of its merit, viability or realistic chance for success). Further, the Petitioner's contentions that the variance deprived the court of jurisdiction and venue is meritless because the evidence a trial demonstrated that the offenses occurred within St. Lucie County within the relevant statute of limitations, and the statute at issue had become effective before Count (2) occurred. See Claim (2)(5), *infra*.

Nor was appellate counsel ineffective for failing to raise the variance on appeal because it was meritless. Count (2) was committed before the information was filed, during the statute of limitations, and that the defense was not surprised or hampered. See United States v. Nyhuis, 211 F.3d 1340, 1344 (11th Cir. 2000) (appellate counsel is not ineffective for failing to raise a claim "reasonably considered to be without merit"); Hardwick v. Benton, 318 Fed. Appx. 844 (11th Cir. 2009) (where no trial error occurred, appellate counsel is not deficient for failing to raise the issue).

The Florida courts' rejection of these claims is not contrary to or an unreasonable determination of clearly established federal law and was not based on an unreasonable determination of fact.

(2)(5) Ineffective Trial Counsel: Judicial Notice

The Petitioner contends that trial counsel failed to request that the court take judicial notice that Hurricane Floyd and its evacuation occurred September 14-15, 1999, and that no hurricane affected Florida 2000-2002.

The Respondent concedes that this claim has been exhausted in the Petitioner's Rule 3.850 motion for post-conviction relief. In denying this claim, the court stated in part:

> The Defendant would have the Court find that the incident occurred during Hurricane Floyd during an evacuation. The Defendant relies upon an excerpt from a publication called the Florida Almanac, 2004-05, which apparently provides an *overview of the highlights* of the season's weather. The Almanac may or may not be correct, but it is not published by a recognized government agency, nor does the Almanac or the Defendant indicate upon what the documentation is based.
>
> The Defendant also relies on testimony which does not support his conclusions - the witnesses were clear that they did not know for sure if it was hurricane "Floyd," only that the incident occurred in "a hurricane," a hurricane in which the eye passed over land near St. Lucie County.
>
> The Court takes judicial notice of the data and documentation from the National Oceanographic and Atmospheric Administration (NOAA), a federal agency with a stellar reputation for recording what *has* happened, if not always 100% accurate as to what is about to happen, in the nation's weather. NOAA records indicate that Hurricane Floyd passed parallel to, and well off of, the coast of Florida and did not pass over St. Lucie County. However, NOAA records also indicate that Hurricane Irene passed *through* northern Palm Beach County on its way across the state and tracking maps indicate the eye passed offshore just south of Stuart - just south of St. Lucie County.
>
> The Court has considered the testimony at trial, and compared it with the storm histories of both Hurricane Floyd and Hurricane Irene.... The Court finds that, based on the comparison of the testimony to the storm records; the hurricane discussed at trial was Hurricane Irene, not Hurricane Floyd.
>
> Hurricane Irene struck the Port St. Lucie area between October 13 and October 19, 1999. Thus, the Defendant's claim factually fails as Hurricane Irene

> struck St. Lucie County after the implementation of the later statute during which the crime coudl have been committed.

(DE# 33-1 at 2004).

The Florida Evidence Code provides as follows with regards to matters which may be judicially noticed:

> A court may take judicial notice of the following matters, to the extent that they are not embraced within s. 90.201:
>
> ... Facts that are not subject to dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned....

§ 90.202(12), Fla. Stat.

Counsel was not ineffective for failing to request that the court take judicial notice of the records the Petitioner appended to his Section 3.850 motion for post-conviction relief. On Rule 3.850 review, the court found that the Florida Almanac, upon which the Petitioner relied, was not a source whose accuracy could not be questioned. Counsel cannot be deemed deficient for failing to request judicial notice of that source and, in any event, the court would have likely denied the request. Had the court judicially noticed at trial the reliable NOAA records it noticed on post-conviction relief, the hurricane at issue would have been revealed to be Irene, not Floyd, and the Petitioner's reliance of Floyd's dates would have been undermined. The Petitioner has not demonstrated deficiency or prejudice under these circumstances.

The Petitioner's suggestion that counsel was ineffective for failing to seek judgment of acquittal because the offense occurred before the statute at issue came into effective is also meritless. The evidence at trial demonstrated that the offense occurred during

a hurricane that threatened St. Lucie County in October 1999. (33-1 at 541). The version of the statute under which the Petitioner was charged became effective October 1, 1999. The Petitioner's suggestion that the victim's father, George, conclusively established the hurricane as Floyd, misconstrues the record. (DE# 33-1 at 364) (George testifying "[i]t was so long ago, I don't remember the exact date or time. I know there was a hurricane. I don't know if it was Hurricane Floyd that was threatening St. Lucie."). The court found on Rule 3.850 review that the hurricane at issue was Irene, not Floyd, and that Irene affected St. Lucie County on October 13-19, 1999, after the amended statute became effective. See (DE# 33-1 at 1953). It was within the court's discretion to take judicial notice of the NOAA records upon which it based this finding, and the Petitioner has failed to overcome it with clear and convincing evidence.

Therefore, the Florida courts' rejection of this claim is not contrary to or an unreasonable determination of clearly established federal law and was not based on an unreasonable determination of fact.

(2)(7) Ineffective Appellate Counsel: Jury Instructions

The Petitioner contends that appellate counsel failed to argue that the jury instruction on attempted sexual battery, a category two permissive lesser of sexual battery, was fundamental error because the State only proved completed sexual battery. The Petitioner argues that he prepared and tried case as charged, not as an attempt. The only issue for trial was whether the Petitioner put his finger in the victim's vagina, as she testified, or whether this incident did not occur, as the Petitioner testified. There was no competent substantial evidence that he committed an overt act but that he failed to complete it. Therefore, the jury should not

have been instructed on attempt pursuant to Rule 3.510(a), because there was no evidence to support it. The appellate record demonstrated that the error occurred at trial. The appellate court denied issue because counsel should have objected at trial, which was an unreasonable determination of fact.

This claim is procedurally defaulted from federal habeas review as set forth in Section V, supra.

Even if this claim was not procedurally defaulted, it would fail on the merits. It is not fundamental error to convict a defendant under an erroneous lesser included charge when he had an opportunity to object to the charge and failed to do so if: 1) the improperly charged offense is lesser in degree and penalty than the main offense or 2) defense counsel requested the improper charge or relied on that charge as evidenced by argument to the jury or other affirmative action. Ray v. State, 403 So. 2d 956, 961 (Fla. 1981). Failure to timely object precludes relief from such a conviction. Moreover, reasonable appellate counsel could have concluded that the attempt instruction was not a meritorious appellate issue because the attempt instruction was supported by the evidence. See Claim (2)(8), *infra.*

Therefore, even if this claim was not procedurally defaulted, it would fail on the merits.

(2)(8) Ineffective Trial Counsel: Jury Instructions

The Petitioner contends that trial counsel failed to object to the jury instruction on attempted capital sexual battery although it was not supported by the evidence and failed to present an adequate motion for judgment of acquittal. In the motion for judgment of acquittal, counsel did not move for discharge but

conceded the state presented a *prima facie* case of completed penetration. Counsel's failure to object allowed the court to charge the Petitioner with an uncharged crime which was not supported by the evidence, resulting in miscarriage of justice. The Petitioner is serving thirty years and was adjudicated a sexual predator whereas the jury would have had to choose between verdicts of misdemeanor battery or not guilty. The trial court erroneously found that this was a strategic decision without an evidentiary hearing, and the appellate court erred by affirming without remanding for an evidentiary hearing.

The Respondent concedes this claim was exhausted in the Petitioner's Rule 3.850 motion for post-conviction relief. The trial court denied this claim, finding:

> The Defendant was facing a mandatory life sentence if convicted as charged, and giving the attempt instruction would allow the jury to "pardon" the Defendant and find him guilty of a lesser crime....
>
> ...
>
> The Defendant has not and cannot show that trial counsel's failure to object to a proper lesser included instruction adversely affected him. Furthermore, even had counsel objected, it is clear that the State could and would have requested the instruction, the request would have been granted, and the objection would have been fruitless.

(DE# 33-1 at 1981).

Florida law provides that a jury must be instructed on category one lesser included offenses. State v. Montgomery, 39 So. 3d 252, 259 (Fla. 2010). A "necessarily lesser included offense" is a lesser offense that is always included in the major offense. Id. The trial judge has no discretion in whether to instruct the jury on a necessarily lesser included offense. Unlike necessary lessers, category two lesser included offenses are not contained in the

information "as a matter of law." Johnson v. State, 572 So. 2d 957, 959 (Fla. 1st DCA 1990). The existence of category two lessers is only discoverable upon close examination of the allegations and proof connected with the charge. See Brown v. State, 206 So. 2d 377, 383 (Fla. 1968) *superseded by rule on other grounds by* Fla. R. Crim. P. 3.510. Whether the jury is instructed on category two lesser included offenses depends on the trial judge's determination of whether the elements of "category 2 crimes may have been alleged and proved." State v. Wimberly, 498 So. 2d 929, 931 (Fla. 1986).

The Florida Rules of Criminal Procedure provide as follows with regards to determining attempts and lesser included offenses:

> On an indictment or information on which the defendant is to be tried for any offense the jury may convict the defendant of:
>
> (a) an attempt to commit the offense if such attempt is an offense and is supported by the evidence. The judge shall not instruct the jury if there is no evidence to support the attempt and the only evidence proves a completed offense....

Fla. R. Crim. P. 3.510.

In the instant case, the Petitioner was charged in Count (1) with sexual battery on a minor under twelve by a perpetrator aged eighteen years or older. In addition to proof of the victim's and perpetrator's ages, the State must prove that the defendant committed an act upon victim in which the anus or vagina of the victim was penetrated by an object. See Fla. Std. Jury Instr. (Crim.) § 11.1(2)(b); § 794.011(2)(a), Fla. Stat. Attempt is proven when the defendant did some act towards committing the crime that went beyond just thinking or talking about it, and would have committed the crime except that someone prevented him from committing the crime or he failed. See Fla. Std. Jury Instr.

(Crim.) § 5.1; § 777.04(1), Fla. Stat.

Counsel was not ineffective for failing to object to the instruction on attempted sexual battery because it was supported by the evidence. The victim testified that she woke up when the Petitioner put his finger in her private part and that it hurt when she used the bathroom afterwards. The Petitioner testified that he stumbled while carrying her to bed and tossed her onto the bed by punching or pushing her groin area. Defense counsel's strategy was to discredit the witness and attempt to demonstrate inconsistencies about whether there was a touch or penetration. (DE# 33-1 at 2404-07). The victim's medical examination was negative and there was evidence that she had suffered from urinary tract infections, which may have caused her pain. (DE# 33-1 at 429). The attempt instruction was supported by the evidence under these circumstances because penetration was a disputed issue. Further, reasonable counsel could have concluded that an attempt instruction was beneficial because it would have made a jury pardon possible.

Further, the Petitioner has not demonstrated prejudice. The jury found the Petitioner guilty of the lesser offense of attempted sexual battery. His supposition that the jury would have acquitted him if it was only given the choice between the completed act and acquittal, is too speculative to support relief. See generally Harris v. Crosby, 151 Fed. Appx. 736, 738 (11th Cir. 2005).

The Florida courts' rejection of this claim is not contrary to or an unreasonable determination of clearly established federal law and was not based on an unreasonable determination of fact.

(2)(9) Ineffective Trial Counsel: Bolstering

The Petitioner contends that trial counsel was ineffective for

failing to prevent extensive evidence bolstering the victim's credibility. For instance, the victim repeatedly swore to her parents the allegations were true, the victim's aunt, father, and mother asked her if it was true and she said it was, the victim's father could tell she was not lying and further testified that he took the victim to a psychologist who did not testify at trial but determined without a doubt he believed the victim's allegations, and Detective Dennis testified that the victim was not deceptive. In addition, Detective Dennis made statements during the Petitioner's interrogation stating that the victim's story was detailed and credible. The State admitted in its Rule 3.850 response that these bolstering statements would not have come in had counsel objected pursuant to Section 90.803(23)(a)(c), however, this issue was not fully developed at evidentiary hearing. The court erred by finding this was a tactical and strategic decision.

With regards to bolstering, the Fourth District found that counsel's decision not to object was a reasonable strategic decision:

> At the hearing, defense counsel testified that, given the fact that the state would produce defendant's incriminating statement to his girlfriend, he had to formulate a strategy to discredit the victim's testimony. He intended to do this by showing where there were differences in her various statements that she made both to law enforcement and to her family. Part of that strategy was to show that her own family was not sure she was telling the truth—that the contacts may have been unintentional or fabricated. It also required showing that there may have been some manipulation of the victim by both family and law enforcement. In particular, the defendant and the aunt had a very acrimonious relationship. Counsel attempted to show that the aunt had a motive to manipulate the victim's testimony. Revealing to the jury all the efforts the parents made to determine that the victim was telling the truth, could permit the jury to conclude that reasonable doubt would exist if the parents had a hard time believing their own child.

> Additionally, the victim told the detective she was penetrated, yet other witnesses testified that the victim did not say she was penetrated. Therefore, allowing the detective to testify that she believed the victim was telling the truth as to the statement she made to the detective could also discredit the victim's testimony, when it was apparent that there were various versions of the "truth."
>
> In its order the trial court found that counsel's trial strategy of showing that the victim's own family did not initially believe her allegations was a reasonable trial strategy. "The issue as to [the victim's] veracity or capacity for truthfulness was essentially two sides of the same coin: the family questioning her truthfulness versus bolstering the victim's statements and testimony." Although it found that the evidence could have cut both ways, either for or against the defendant, that the defendant was not convicted of sexual battery but of attempted sexual battery showed that counsel's tactics could have partially succeeded, because the victim testified that defendant's fingers penetrated her vagina. Based upon the court's review of the totality of the evidence, it was convinced that the decisions did not constitute ineffective assistance.

Lundberg, 127 So. 3d at 569-70.

The Fourth District also found that the bolstering statements did not prejudice the Petitioner:

> In this case, the victim's testimony was clear and precise. She was able to recount the events with complete detail and firmly rejected the defendant's version of the events. The defendant admitted to his girlfriend in the taped conversation that he might have touched the child when he was drunk. Even when he testified, his explanation was that he might have accidentally touched her, although his version of the incidents was markedly different than the child's version. In his testimony, he was much less certain with respect to his description. He also admitted that he might have accidentally touched the victim as he was carrying her to bed. His attempt to explain away his statements to his girlfriend at the jail

> were weak and ineffective. Further, many of the victim's statements to her parents and relatives likely were admissible as a child hearsay statement. See § 90.803(23), Fla. Stat. Thus, not all of the evidence presented by the parents and relatives was inadmissible. We cannot say that the bolstering of the victim's testimony caused Strickland prejudice.

Lundberg, 127 So. 3d at 570-71.

The trial court's conclusion that counsel's decision not to object to the bolstering was a reasonable strategic decision is supported by the record. Specifically, defense counsel testified that he purposefully allowed the testimony to be introduced because he wanted to show that the victim's family did not find her credible. (DE# 33-1 at 2400). The Petitioner has failed to refute this finding by clear and convincing evidence. Indeed, he confirmed at the post-conviction hearing that the defense strategy at trial was to discredit the victim by proving her family did not believe her. (DE# 33-1 at 2366). This strategy was, apparently, at least partially successful because the Petitioner was convicted in Count (1) of *attempted* sexual battery rather than capital sexual battery as charged.

Therefore, the Florida courts' rejection of this claim is not contrary to or an unreasonable determination of clearly established federal law and was not based on an unreasonable determination of fact.

(2)(10) Ineffective Appellate Counsel: Severance

The Petitioner contends that appellate counsel was ineffective for failing to argue on direct appeal that the trial court erred in denying the Petitioner's motion to sever Counts (1) and (2). The trial court erred by denying trial counsel's request to sever and counsel preserved the error by renewing the motion at trial.

Severance was warranted because the charges involved separate episodes committed at different locations and times, and have different elements. The offenses were not connected in a significant way and were unrelated in terms of time and sequence. Further, the probative value was outweighed by undue prejudice. Therefore, appellate counsel should have raised this claim on direct review.

The Respondent concedes that this claim was exhausted in the Petitioner's State habeas petition. The Fourth District denied relief without comment. (DE# 33-1 at 1279).

In Florida, separate trials are required on unconnected charges to assure that evidence adduced on one charge will not be misused to dispel doubts on the other and so effect a mutual contamination of the jury's consideration of each distinct charge. See Paul v. State, 365 So. 2d 1063 (Fla. 1st DCA 1979)(Smith, J., dissenting), *rev'd*, 385 So. 2d 1371 (Fla. 1980). On the other hand, offenses are properly charged in a single information when they involve the same victim and/or are connected in an episodic sense. Parker v. State, 421 So. 2d 712, 713 (Fla. 3d DCA 1982)(holding that trial court did not err in denying defendant's motion to sever counts charging possession of cocaine and resisting an officer without violence from a count charging defendant with robbery, since the offenses were part of the same course of conduct and occurred within a period of a few hours at the same location).

In this case, joinder of offenses was not objectionable because the offenses were based on connected acts or transactions. See Fla. R. Crim. P. 3.151(a). They involved the same victim and similar acts. See, e.g., Snyder v. State, 564 So. 2d 193 (Fla. 5th DCA 1990) (no abuse of discretion in denying severance for two

counts of aggravated child abuse that occurred three months apart where the victim was the same in both and they were based on connected acts). Further, the State noted that it would sought to introduce evidence of the other as similar fact evidence even if the motion to sever was granted. (DE# 33-1 at 58); see § 90.404(2)(b)1. ("In a criminal case in which the defendant is charged with a crime involving child molestation, evidence of the defendant's commission of other crimes, wrongs, or acts of child molestation is admissible and may be considered for its bearing on any matter to which it is relevant"). Reasonable appellate counsel could have concluded that it would be fruitless to raise this claim on appeal. See Knowles, 556 U.S. at 127. Further, the Petitioner fails to explain how appellate counsel's failure to raise this claim prejudiced him under the foregoing circumstances.

Therefore, the Florida courts' rejection of this claim is not contrary to or an unreasonable determination of clearly established federal law and was not based on an unreasonable determination of fact.

(2)(11) Cumulative Error

Finally, the Petitioner contends that the cumulative effect of the foregoing errors undermined the verdict and deprived him of due process and a fair trial.

In addressing a claim of cumulative error, the trial as a whole must be examined to determine whether the appellant was afforded a fundamentally fair trial. See United States v. Calderon, 127 F.3d 1314, 1333 (11th Cir. 1997); United States v. Vasquez, 225 Fed. Appx. 831, 836 (11th Cir. 2007). Where there is no error or only a single error, there can be no cumulative error. See United States v. Waldon, 363 F.3d 1103, 1110 (11th Cir. 2004); United

States v. Barshov, 733 F.2d 842, 852 (11th Cir. 1984) ("Without harmful errors, there can be no cumulative effect compelling reversal.").

Because none of the alleged errors that the Petitioner has identified constitute federal constitutional error, he has likewise failed to demonstrate the existence of cumulative error with regards to those claims.

VIII. Evidentiary Hearing

To the extent petitioner requests an evidentiary hearing, this should be denied. To be entitled to an evidentiary hearing on habeas claims, a petitioner must allege facts that, if proved at the hearing, would entitle him to relief. See Schriro v. Landrigan, 550 U.S. 465, 474-75 (2007)(a district court is not required to hold an evidentiary hearing if record refutes the factual allegations in the petition or otherwise precludes habeas relief); Atwater v. Crosby, 451 F.3d 799, 812 (11th Cir. 2006) (an evidentiary hearing should be denied "if such a hearing would not assist in the resolution of his claim."). For the reasons discussed herein, an evidentiary hearing is not required for the disposition of this case and the petitioner has failed to demonstrate the existence of any factual dispute that warrants a federal evidentiary hearing.

IX. Certificate of Appealability

Section 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)." "Before entering the final order, the court may direct the parties to

submit arguments on whether a certificate should issue." 28 U.S.C. § 2254, Rule 11(a). A timely notice of appeal must be filed even if the court issues a certificate of appealability. 28 U.S.C. § 2254, Rule 11(b).

After review of the record, the Undersigned finds no substantial showing of the denial of a constitutional right as to movant's claims. See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000) (habeas petitioner must demonstrate reasonable jurists could debate whether the petition should have been resolved in a different manner or that the issues were adequate to deserve encouragement to proceed further). Therefore, it is recommended that the Court deny a certificate of appealability in its final order. 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 objections to this report.

X. Conclusion

Based upon the foregoing, it is recommended that this petition for writ of habeas corpus be denied, a certificate of appealability not be issued, and this case be closed.

Objections to this report, including any objection with regards to the recommendation regarding the certificate of appealability, may be filed with the District Judge within fourteen days of receipt of a copy of the report.

SIGNED this 28th day of September, 2015.

UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 2:14-CV-14347-ROSENBERG/WHITE

ROBERT T. LUNDBERG,

Petitioner,

v.

JULIE L. JONES,

Respondent.
_____/

ORDER ADOPTING MAGISTRATE'S REPORT AND RECOMMENDATION

THIS MATTER is before the Court upon *pro se* Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 [DE 1], which was previously referred to the Honorable Patrick A. White for a Report and Recommendation on any dispositive matters. *See* DE 3. On September 28, 2015, Magistrate Judge White issued a Report and Recommendation [DE 44] recommending that the Petition be denied.

No objections to Magistrate Judge White's Report and Recommendation have been filed and the time period for such objections has passed.[1] The Court has nonetheless conducted a *de novo* review of Magistrate Judge White's Report and Recommendation and the record and is otherwise fully advised in the premises.

Upon review, the Court finds Magistrate Judge White's recommendations to be well reasoned and correct. The Court agrees with the analysis in Magistrate Judge White's Report and Recommendation and concludes that the Petition should be denied for the reasons set forth

[1] The Court notes that it has granted Petitioner two extensions of time within which to file objections. *See* DE 49 (extending the time to file objections through November 16, 2015); DE 53 (extending the time to file objections through November 27, 2015).

therein.

For the foregoing reasons, it is hereby **ORDERED AND ADJUDGED** as follows:

1. Magistrate Judge White's Report and Recommendation [DE 44] is **ADOPTED**;

2. Petitioner's Petition for Writ of Habeas Corpus [DE 1] is **DENIED**;

3. A certificate of appealability **SHALL NOT ISSUE**; and

4. The Clerk of the Court is directed to **CLOSE THIS CASE**.

DONE AND ORDERED in Chambers, Fort Pierce, Florida, this 30th day of November, 2015.

ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel of Record
Robert T. Lundberg

A-9

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-15793-G

ROBERT T. LUNDBERG,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

ORDER:

Robert T. Lundberg is a Florida prisoner serving a 45-year sentence after a jury convicted him of attempted sexual battery on a child under the age of 12 (Count 1), and lewd or lascivious molestation of a child under the age of 12 (Count 2). Mr. Lundberg seeks a certificate of appealability (COA).[1]

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[1] Because Mr. Lundberg's COA motion exceeds this Court's 30-page limit, he moves for leave to file a COA motion over the page limit. Mr. Lundberg's motion for enlargement of the page limit is GRANTED.

I. FACTUAL BACKGROUND

Mr. Lundberg was charged based on allegations that he had molested his minor niece on one occasion by penetrating her vagina with his finger and on another occasion by touching her vagina. Mr. Lundberg voluntarily appeared for questioning when the child's parents reported the incidents. Detective Teresa Dennis told Mr. Lundberg that he was not in custody but then read him his Miranda[2] rights. Specifically, she informed Mr. Lundberg:

> (1) You have the right to remain silent. (2) Anything you say can and will be used against you in court of law. (3) You have the right to an attorney and to have him here with you *before* any questioning. (4) If you cannot afford to hire an attorney one will be appointed for you before we ask you any questions. (5) If you decide to answer questions now, without an attorney, you will still have the right to stop answering questions at any time.

Mr. Lundberg signed the written copy of the Miranda waiver, indicating that he understood his rights and was willing to answer questions without an attorney present.

During questioning, Detective Dennis used a tape recorder that was visible to Mr. Lundberg to record his answers. Initially, Mr. Lundberg maintained his innocence. Dennis told Mr. Lundberg that she did not "want to go to the State Attorney . . . [I]f it was just a rub or a tap . . . [Mr. Lundberg] could get some counseling and some probation." But she cautioned him that he did not want to

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966).

"leave here and go with some kind of capital sexual battery charge." She explained that capital sexual battery meant some type of penetration with the sex organs, and resulted in "life in prison" or "death." Detective Dennis warned Mr. Lundberg that the victim's allegations looked like capital sexual battery and that, "with [his] background," it did not "look real good." Mr. Lundberg then explained that he had been drunk, and he could not remember, but it might have been possible that he touched the victim. He denied doing anything other than touching her. Detective Dennis placed Mr. Lundberg under arrest.

Shortly after being placed under arrest, Mr. Lundberg asked to speak to his girlfriend. Detective Dennis agreed to let Mr. Lundberg see his girlfriend, but explained that Mr. Lundberg would have to remain handcuffed. Detective Dennis then told Mr. Lundberg that she was "going to end the tape" and switched off the audio recorder. What Detective Dennis did not tell Mr. Lundberg was that there was a hidden video camera in the investigation room and that this hidden camera would continue to record him during his conversation with his girlfriend. Detective Dennis then left the room and returned with Mr. Lundberg's girlfriend. Before leaving the room, Detective Dennis said, "I'm going to give you all privacy." Once Detective Dennis left, Mr. Lundberg immediately told his girlfriend about the situation and said that he "kind of remember[ed]" touching the victim. He also told her that he had confessed on tape to Detective Dennis. He

commented to his girlfriend that he did "stupid stuff . . . you know, sexual stuff" when he was drunk. This conversation was captured on the hidden video camera.

The trial court suppressed Mr. Lundberg's confession to Detective Dennis on the ground that it was the result of coercion. Specifically, the court noted that immediately following Dennis's mention of the death penalty and life imprisonment, Mr. Lundberg displayed a marked change in demeanor and then confessed. The court determined that Detective Dennis's actions rendered Mr. Lundberg's inculpatory statements involuntary. However, the trial court concluded that Mr. Lundberg's videotaped statements to his girlfriend were admissible because the statements were not made to a law enforcement officer. The jury convicted Mr. Lundberg on both counts.

II. PROCEDURAL BACKGROUND

A. STATE COURT PROCEEDINGS

On direct appeal, the Florida Fourth District Court of Appeal (4th DCA) determined that the admission of the statements Mr. Lundberg made to his girlfriend did not violate his Fourth Amendment rights because the statements were not obtained through Detective Dennis's actions, but were voluntarily made after Mr. Lundberg requested to speak to his girlfriend. See Lundberg v. State, 918 So. 2d 444, 445 (Fla. Dist. Ct. App. 2006). Mr. Lundberg then filed a petition for writ of habeas corpus in the 4th DCA, alleging ineffective assistance of appellate

counsel, which the 4th DCA denied. Mr. Lundberg filed a second petition for writ of habeas corpus that the 4th DCA dismissed as successive and untimely. Mr. Lundberg next filed a post-conviction motion, pursuant to Fla. R. Crim. P. 3.850, raising 23 claims based on ineffective assistance of counsel and cumulative error. The state court summarily denied several claims, and held a hearing on the remaining claims. Following the hearing, the state court denied the remaining claims. The 4th DCA affirmed.

B. FEDERAL HABEAS PETITION

Mr. Lundberg filed an amended petition, pursuant to 28 U.S.C. § 2254, raising the following claims:

(1) the State violated the Fifth Amendment by creating a coercive environment to induce Mr. Lundberg to make incriminating statements to his girlfriend;

(2) counsel was ineffective for failing to move to suppress the videotaped conversation between Mr. Lundberg and his girlfriend, where he was led to believe that the conversation was private;

(3) counsel was ineffective for failing to move to suppress all audio and video statements based on defective Miranda warnings;

(4) counsel was ineffective for failing to move to suppress the videotape marked "ZB" because it was not properly authenticated;

(5) appellate counsel was ineffective for failing to argue that Mr. Lundberg was entitled to a judgment of acquittal on Count 2, where the evidence was legally insufficient to support the conviction;

(6) counsel was ineffective for failing to seek acquittal on Count 2, which purportedly took place during a hurricane, where no hurricane affected Florida during the timeframe alleged;

(7) counsel was ineffective for failing to challenge the court's jurisdiction over Count 2, where the prosecutor fraudulently swore to untrue facts and there was a fatal variance between the amended information and the evidence at trial;

(8) appellate counsel was ineffective for failing to argue that the jury instruction on attempted sexual battery was fundamental error;

(9) counsel was ineffective for failing to object to the jury instruction on attempted sexual battery by penetration and for failing to present an adequate motion for judgment of acquittal on Count 1;

(10) counsel was ineffective for failing to object to the admission of extensive evidence bolstering the victim's credibility;

(11) appellate counsel was ineffective for failing to argue that the trial court erred in denying Mr. Lundberg's motion to sever the charges; and

(12) the cumulative effect of these errors deprived Mr. Lundberg of a fair trial.

A Magistrate Judge issued a report and recommendation (R&R) recommending that Mr. Lundberg's § 2254 petition be denied. As to Claim 1, the Magistrate Judge determined that it was not an unreasonable application of federal law for the state court to conclude that Mr. Lundberg's request to speak to his girlfriend sufficiently purged the taint on his confession to Detective Dennis. Mr. Lundberg's second claim failed, according to the Magistrate Judge, because

counsel did not perform deficiently for failing to seek suppression of a conversation about which Mr. Lundberg could not have had a reasonable expectation of privacy.

The Magistrate Judge next determined that Claim 3 failed because the statement at issue was made to Mr. Lundberg's girlfriend and not to a police officer, and thus no Miranda warnings were required. Claim 4 failed because exhibit ZB, a videotape, was properly authenticated at trial and there was no evidence of tampering. As to Mr. Lundberg's fifth, sixth, and seventh claims, the Magistrate Judge concluded that the state court's denial of these claims was not based upon an unreasonable application of federal law, as a review of the record established that the defense was not surprised or hampered by the uncertainty of the date of the offense.

The Magistrate Judge then determined that Mr. Lundberg's eighth claim was procedurally defaulted and lacked merit because appellate counsel could have reasonably concluded that the evidence supported the attempt instruction. Similarly, Mr. Lundberg's ninth claim failed because the evidence supported the attempt charge and any objection raised by counsel would have been overruled. The Magistrate Judge concluded that Claim 10 was without merit, as the state court determined that counsel made a strategic decision not to object to testimony that bolstered the victim's credibility. Claim 11 failed because the joinder of the

charged offenses was not objectionable, as the offenses were based on connected acts. Finally, his claim of cumulative error failed because he did not identify any actual error.

The District Court adopted the R&R and denied Mr. Lundberg's § 2254 petition. The District Court then denied a COA but granted Mr. Lundberg leave to proceed in forma pauperis on appeal.

III. DISCUSSION

To obtain a COA, a § 2254 petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The movant satisfies this requirement by demonstrating that "reasonable jurists would find the District Court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604 (2000) (quotation omitted).

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), if a state court has adjudicated a claim on the merits, a federal court may grant habeas relief only if the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court," or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d)(1), (2).

For an ineffective assistance of counsel claim raised in a § 2254 petition, the inquiry turns on whether the relevant state court decision was contrary to, or an unreasonable application of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). To succeed on an ineffective assistance claim under Strickland, the § 2254 petitioner must show: (1) that his attorney's performance was deficient, and (2) that the deficient performance prejudiced his defense. Strickland, 466 U.S. at 687, 697, 104 S. Ct. at 2064, 2070. Counsel's performance is deficient only if it falls below an objective standard of reasonableness considering all the circumstances. Id. at 688, 104 S. Ct. at 2065. Prejudice is established if there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S. Ct. at 2068.

Claim 1

In his first claim, Mr. Lundberg argued that the State violated the Fifth Amendment by creating a coercive situation that was likely to induce Mr. Lundberg to make incriminating statements to his girlfriend. The Fifth Amendment prohibits the admission of an involuntary confession in a criminal trial. Bram v. United States, 168 U.S. 532, 542, 18 S.Ct. 183, 187 (1897). The standard for determining the voluntariness of a confession is whether, in light of the totality of the circumstances, the statement is "the product of a free and

deliberate choice rather than intimidation, coercion or deception." United States v. Thompson, 422 F.3d 1285, 1295 (11th Cir. 2005) (citation omitted).

The trial court found that Mr. Lundberg's confession to Detective Dennis was involuntary because it was induced by her threat that he would be subject to the death penalty unless he confessed. Mr. Lundberg argues that the statements he made to his girlfriend, which were surreptitiously recorded, should also be suppressed because they are fruit of the poisonous tree. The District Court denied this claim on the ground that Mr. Lundberg's request to speak with his girlfriend constituted a break in the stream of events and removed the taint of his coerced confession to Detective Dennis. See Leon v. Wainwright, 734 F.2d 770, 773 (11th Cir. 1984).

It is not clear that this is correct. To begin with, Mr. Lundberg asked to speak with his girlfriend immediately after making his coerced confession to Detective Dennis, so there was very little time for the taint to dissipate. Wong Sun v. United States, 371 U.S. 471, 487, 83 S. Ct. 407, 417 (1963). Even more importantly, Detective Dennis took deceptive action after Mr. Lundberg asked to speak with his girlfriend. She falsely led Mr. Lundberg to believe the conversation was private, as she shut off the only visible tape recorder and specifically told Mr. Lundberg and his girlfriend that she was giving them "privacy." She never informed Mr. Lundberg or his girlfriend that their conversation was being recorded

by a hidden video camera. Thus, Mr. Lundberg's statements to his girlfriend were arguably part of a continuous set of coercive events initiated by Detective Dennis's initial unconstitutional interrogation. Reasonable jurists could debate whether the District Court erroneously denied this claim, because the 4th DCA arguably based its conclusion on an unreasonable application of clearly established federal law or an unreasonable determination of the facts. Mr. Lundberg is therefore entitled to a COA. See Slack, 529 U.S. at 484, 120 S. Ct. at 1604.

Claim 2

In his second claim, Mr. Lundberg argued that counsel was ineffective for failing to move to suppress his statement to his girlfriend based on Detective Dennis's actions in creating a false belief of privacy. Mr. Lundberg contended that Detective Dennis's surreptitious recording of his conversation with his girlfriend amounted to an illegal search and seizure, in light of his reasonable expectation of privacy. The 4th DCA concluded that Detective Dennis's actions did not create a reasonable expectation of privacy, and therefore his counsel could not be faulted for failing to seek suppression of his statement to his girlfriend. Lundberg, 127 So. 3d at 567-68.

This determination was arguably based on an unreasonable application of federal law or an unreasonable determination of the facts. See 28 U.S.C. § 2254(d). A reasonable person in Mr. Lundberg's situation would have

interpreted Detective Dennis's express grant of "privacy," along with her shutting down the only visible recording device, to mean that the conversation in the room would be private. United States v. Robinson, 62 F.3d 1325, 1328 (11th Cir. 1995). Although a police interrogation room, in most circumstances, might not allow for a reasonable expectation of privacy, here the police took deliberate steps and made an explicit statement to foster that expectation in Mr. Lundberg. Thus, Mr. Lundberg had a compelling argument that his statement to his girlfriend was induced by a reasonable expectation of privacy and that his counsel performed deficiently in failing to seek suppression of that statement. See Strickland, 466 U.S. at 688, 104 S. Ct. at 2065. If Mr. Lundberg's inculpatory statement to his girlfriend had been suppressed, there is a reasonable probability that the outcome of the trial would have been different. See id. at 694, 104 S. Ct. at 2068. Therefore, reasonable jurists could debate whether the District Court erroneously denied this claim, where the 4th DCA's conclusion that Mr. Lundberg's counsel was not ineffective was arguably the result of an unreasonable application of federal law. See Slack, 529 U.S. at 484, 120 S. Ct. at 1604. Therefore, a COA is warranted on Claim 2.

Claim 3

In his third claim, Mr. Lundberg contended that counsel was ineffective for failing to move to suppress Mr. Lundberg's statements (both to Detective Dennis

and to his girlfriend) on the basis that the Miranda warning he received was deficient because it did not advise him of his right to have counsel present during questioning. The District Court was correct in denying this claim.

Mr. Lundberg cannot satisfy Strickland's prejudice prong regarding his statements to Detective Dennis. Mr. Lundberg cannot show that he was prejudiced by his counsel's failure to seek suppression of his confession to Detective Dennis because that confession was already suppressed on the basis that it was the product of coercion. Strickland, 466 U.S. at 694, 104 S. Ct. at 2068.

The District Court was also correct in denying the ineffective assistance claim as to Mr. Lundberg's statements to his girlfriend because the conversation with his girlfriend did not implicate the Miranda requirements. Miranda warnings are required only for statements made in "custodial interrogation." Miranda, 384 U.S. at 444, 86 S. Ct. at 1612. Although Mr. Lundberg was in custody, he was not in "interrogation" for purposes of Miranda when he was speaking with his girlfriend. The Supreme Court has defined "interrogation" as "words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 300–01, 100 S. Ct. 1682, 1689 (1980) (emphasis added). During his conversation with his girlfriend, Mr. Lundberg was no longer interacting with the police, but

rather only with his girlfriend. Although the police were surreptitiously recording their conversation, the Supreme Court has made clear that no "interrogation" occurs when officers merely listen to a conversation as silent third parties. Arizona v. Mauro, 481 U.S. 520, 529, 107 S.Ct. 1931, 1936–1937 (1987); see also Illinois v. Perkins, 496 U.S. 292, 292–93, 110 S. Ct. 2394, 2395 (1990) (noting that situations in which "the suspect does not know that he is speaking to a government agent" do not qualify as "interrogation" within the meaning of Miranda). Therefore, the District Court correctly denied relief on this claim, and a COA is not warranted.

Claim 4

In Claim 4, Mr. Lundberg asserted that counsel was ineffective for failing to move to suppress exhibit ZB, a videotape of the interview between Detective Dennis and Mr. Lundberg and of the conversation between Mr. Lundberg and his girlfriend. Mr. Lundberg argued that the videotape was not properly authenticated and was therefore inadmissible at trial. The District Court correctly denied relief on this claim. For a recording to be admissible under Florida law, the proponent must show that (1) the recording device was operating properly, (2) the device was operated in a proper manner, (3) the recording was accurate, and (4) the voices of the individuals on the recording were identified. Jackson v. State, 979 So. 2d 1153, 1155 (Fla. Dist. Ct. App. 2008); see Fla. Stat. § 90.901 ("The requirements

of this section are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."). Here, Detective Dennis's testimony and the videotape's contents were sufficient to authenticate videotape ZB. See Fla. Stat. § 90.901; Jackson, 979 So. 2d at 1155. Because Mr. Lundberg's counsel was not deficient for failing to challenge the authentication of exhibit ZB, no COA is warranted on this claim.

Claims 5, 6, & 7

In claims 5, 6, and 7, Mr. Lundberg alleged ineffective assistance of counsel based on the way that his trial and appellate counsel handled a discrepancy between the timeframe stated in the information for when Mr. Lundberg committed Count 2 and the timeframe proven at trial. The District Court was correct to deny these claims.

Mr. Lundberg's trial counsel moved for judgment of acquittal on Count 2 because the information alleged that the offense occurred between August 1, 2001 and December 31, 2001, whereas the evidence at trial revealed that Count 2 occurred during a hurricane in October 1999. The trial court denied the motion and Mr. Lundberg has failed to explain what further argument counsel could have made that would have changed the outcome of the proceeding. Mr. Lundberg's claim that counsel was ineffective for failing to challenge the court's jurisdiction over Count 2 in light of the variance between the information and the evidence at

trial is also without merit. The evidence showed that the offenses occurred within St. Lucie County and within the relevant statute of limitations, and the statute at issue was in effect when Count 2 occurred. Because no trial error occurred, appellate counsel was not deficient for failing to raise the issue on appeal. United States v. Nyhuis, 211 F.3d 1340, 1344 (11th Cir. 2000). No COA is warranted on these claims.

Claims 8 & 9

Claims 8 and 9 asserted ineffective assistance of counsel based on the fact that the evidence at trial was insufficient to instruct the jury on attempted sexual battery, which is what the jury convicted Mr. Lundberg of under Count 1 of the indictment. Count 1 charged Mr. Lundberg with sexual battery of a minor under 12 by a perpetrator aged 18 years or older. Whether it was correct for the trial court to instruct the jury on attempted sexual battery turns on the distinction Florida law makes between "category one" and "category two" lesser included offenses. "[W]hen the commission of one offense always results in the commission of another, the latter offense is a category-one necessarily lesser included offense." Taylor v. State, 608 So. 2d 804, 805 (Fla. 1992). Under Florida law, a jury must be instructed on category one lesser included offenses. Id.; State v. Montgomery, 39 So. 3d 252, 259 (Fla. 2010). However, if the lesser offense has at least one statutory element not contained in the greater, then it is classified as a

"category-two permissive lesser included offense." Id. A jury may be instructed on category two lesser included offenses only if the elements of the offense are alleged in the pleading and proven at the trial. Id.

Because attempted sexual battery is a category two lesser included offense of sexual battery, see Fla. Std. Jury Instr. (Crim.) § 11.1, the trial court should have given the jury the attempt instruction only if the elements of attempt were alleged and proved. Moreover, the court should not have instructed the jury on attempt "if there [was] no evidence to support the attempt and the only evidence proves a completed offense." Fla. R. Crim. P. 3.510(a). At trial, the victim testified that she woke up one night to find that Mr. Lundberg had pulled down her pajama bottoms and inserted his finger into her vagina. Mr. Lundberg testified that he did not place his finger into the victim's vagina. He explained that he was carrying the victim to bed when he tripped. As he stumbled, he tossed the victim onto the bed, inadvertently punching or pushing her in the groin. The evidence thus established that Mr. Lundberg had either completed the act of sexual battery by penetrating the victim's vagina with his finger, or he did not commit any crime, only inadvertent contact when he tripped. There appears to have been no evidence to support the crime of attempted sexual battery, as nothing established that he attempted to penetrate the victim's vagina but was thwarted or failed in his attempt. See Fla. Stat. § 777.04(1); see also Fla. R. Crim. P. 3.510(a). Because the State did not

introduce evidence to support the offense of attempted sexual battery, it was error for the trial court to instruct the jury on this category two lesser included offense. See Brock v. State, 954 So. 2d 87, 88 (Fla. Dist. Ct. App. 2007) (concluding that the trial court erred in giving the attempted sexual battery instruction, as the evidence established either a sexual battery or no crime at all). Mr. Lundberg's trial counsel made no objection to this error.

Mr. Lundberg argues that his trial counsel's failure to object to the improper attempt charge, and his failure to move for a judgment of acquittal on Count 1 on the basis of the improper charge, constitute ineffective assistance of counsel. These failures of Mr. Lundberg's counsel would likely be sufficient to establish an ineffective assistance claim. Because it was error to instruct the jury on attempted sexual battery, the court would have sustained an appropriate objection. Therefore, counsel performed deficiently by failing to raise a meritorious objection. See Strickland, 466 U.S. at 688, 104 S. Ct. at 2065. There is a reasonable probability that, had the jury not been instructed on attempted sexual battery, Mr. Lundberg would not have been convicted on Count 1, as the jury acquitted Mr. Lundberg of sexual battery. See id. at 694, 104 S. Ct. at 2068. A COA is therefore warranted

on Claim 9 because reasonable jurists could debate whether the District Court properly denied this claim.[3] See Slack, 529 U.S. at 484, 120 S. Ct. at 1604.

Claim 10

In Claim 10, Mr. Lundberg argued that counsel was ineffective for failing to object to the admission of extensive testimony that bolstered the victim's credibility. At trial, the victim's parents and aunt testified that they initially did not believe the victim but later could see that she was telling the truth. The victim's father testified that they took their daughter to a child psychologist because they were skeptical of her claims. The father then testified to the psychologist's assessment: "the [psychologist] told us that he had no reason not to believe [the victim]" and that he believed the victim "without a doubt." In addition to the father's testimony about the psychologist's statements, Detective Dennis testified that she also found that the victim was not deceptive.

Mr. Lundberg raised this claim in his Rule 3.850 motion, and the state trial court held an evidentiary hearing. At the evidentiary hearing, defense counsel testified that, given the fact that the State would produce Mr. Lundberg's incriminating statement to his girlfriend, counsel had to formulate a strategy to discredit the victim's testimony. Counsel testified that part of that strategy was to

[3] Claim 8 asserted that appellate counsel was ineffective for failing to argue that the jury instruction on attempted sexual battery was fundamental error. Because Claim 8 was procedurally defaulted, and because Claim 9 addresses the issue more directly, a COA should not issue as to Claim 8.

show that her own family was not sure she was telling the truth, and that there may have been some manipulation of the victim by both family and law enforcement. Following the hearing, the court denied the claim. On appeal, the 4th DCA affirmed, explaining that there was a strong presumption that counsel's strategic choices were reasonable. See Lundberg, 127 So. 3d at 569.

Whether the 4th DCA's denial of this claim was based on an unreasonable application of Strickland presents a much closer question than the District Court recognized. While certain testimony given by the victim's parents and aunt could have been used to attack the victim's credibility by highlighting that those closest to her doubted her allegations, the same cannot be said for Detective Dennis's statement indicating that she believed in the truth of the victim's allegations. Such bolstering was surely influential to the jury, especially because Dennis explained, during cross-examination, that there had been other cases where she had doubted a victim's story. Even more problematic was the father's recounting of the psychologist's statements. None of the psychologist's statements served to challenge the victim's credibility. On the contrary, they represented the opinion of an established professional that the victim was obviously credible. And to make matters worse, Mr. Lundberg had no opportunity to challenge that opinion through cross-examination because the psychologist did not testify at trial.

Because there were no strategic reasons for counsel to conclude that this prejudicial hearsay testimony did not warrant an objection, counsel arguably performed deficiently by failing to object. See Strickland, 466 U.S. at 688, 104 S. Ct. at 2065. In light of the influential nature of the psychologist's and Detective Dennis's professional opinions that the victim was credible, there is a reasonable probability that the outcome of the trial would have been different if the jury had not heard this testimony. See id. at 694, 104 S. Ct. at 2068. Because reasonable jurists could debate the District Court's denial of this claim, a COA is warranted. See Slack, 529 U.S. at 484, 120 S. Ct. at 1604.

Claim 11

In Claim 11, Mr. Lundberg asserted that appellate counsel was ineffective for failing to argue that the trial court erred in denying Mr. Lundberg's pretrial motion to sever the capital sexual battery charge from the lewd and lascivious molestation charge.

Under Florida law, "[t]wo or more offenses which are triable in the same court may be charged in the same indictment or information in a separate count for each offense, when the offenses, whether felonies or misdemeanors, or both, are based on the same act or transaction or on two or more connected acts or transactions." Fla. R. Crim. P. 3.150(a). In determining whether two acts or transactions are connected for purposes of joinder, the court should considered the

temporal and geographical association, the nature of the crimes, and the manner in which they were committed. Bundy v. State, 455 So. 2d 330, 345 (Fla. 1984).

Here, both offenses involved the same victim, were similar in nature, and were alleged to have occurred within a few months of each other. See id. Because the offenses were sufficiently connected to be charged and tried together, the trial court did not err in denying Mr. Lundberg's motion to sever the counts. See Fla. R. Crim. P. 3.150. Consequently, Mr. Lundberg's appellate counsel was not ineffective for failing to challenge the court's denial. See Chandler v. Moore, 240 F.3d 907, 917 (11th Cir. 2001) (recognizing that appellate counsel is not ineffective for failing to raise a non-meritorious issue). Therefore, the District Court properly denied this claim, and no COA is warranted.

Claim 12

As a final claim, Mr. Lundberg asserted that the cumulative errors deprived him of a fair trial. As discussed above, there are several issues warranting a COA. Because Mr. Lundberg has identified several potential errors, Mr. Lundberg is also entitled to a COA on his cumulative error claim.

IV. CONCLUSION

Mr. Lundberg is GRANTED a COA as to the following issues:

Claim 1: Whether the State violated the Fifth Amendment by creating a coercive environment to induce Mr. Lundberg to make incriminating statements to his girlfriend, or whether these statements should have been suppressed as

the fruit of Mr. Lundberg's involuntary confession to Detective Dennis.

Claim 2: Whether Mr. Lundberg received ineffective assistance of counsel, where counsel failed to seek suppression of his statements to his girlfriend based on Detective Dennis's actions in fostering an expectation of privacy.

Claim 9: Whether Mr. Lundberg received ineffective assistance of counsel based on counsel's failure to object to the trial court's jury instruction on attempted sexual battery.

Claim 10: Whether Mr. Lundberg received ineffective assistance of counsel, where counsel failed to object to hearsay testimony that bolstered the victim's credibility.

Claim 12: Whether the cumulative effect of these errors deprived Mr. Lundberg of a fair trial.

Mr. Lundberg's motion for a COA on his remaining claims is DENIED.

Beverly B. Martin
UNITED STATES CIRCUIT JUDGE