No._____

IN THE SUPREME COURT OF THE UNITED STATES

SCOTT ALLAN MOSER,
Petitioner,

v.

SECRETARY, DEPARTMENT OF CORRECTIONS, STATE OF FLORIDA et al,
Respondents.

On Petition for a Writ of Certiorari to the
Eleventh Circuit Court of Appeals

APPENDIX

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INDEX OF APPENDICES

Opinion ..... A
Order ..... B

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APPENDIX A

Opinion

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-12301
Non-Argument Calendar

D.C. Docket No. 6:14-cv-00989-RBD-TBS

SCOTT ALLAN MOSER,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

(April 28, 2020)

Before WILLIAM PRYOR, JILL PRYOR and MARCUS, Circuit Judges.

PER CURIAM:

Scott Moser, a Florida prisoner convicted of two counts of aggravated assault with a firearm and one count of shooting at or within, or into, an occupied vehicle,

challenges the district court's denial of his 28 U.S.C. § 2254 petition. The district court granted a certificate of appealability on whether the exception established in Martinez v. Ryan, 566 U.S. 1 (2017), excuses procedurally defaulted claims of ineffective assistance of appellate counsel. On appeal, Moser argues that the district court erred in finding that the Martinez exception did not apply to excuse his procedurally defaulted claims of ineffective assistance of appellate counsel. After careful review, we affirm.

We review the district court's denial of a § 2254 petition de novo. McNair v. Campbell, 416 F.3d 1291, 1297 (11th Cir. 2005). Further, exhaustion and procedural default present mixed questions of law and fact, subject to de novo review. Fox v. Kelso, 911 F.2d 563, 568 (11th Cir. 1990); Judd v. Haley, 250 F.3d 1308, 1313 (11th Cir. 2001). Under the prior precedent rule, we are bound to follow prior binding precedent "unless and until it is overruled by our court en banc or by the Supreme Court." United States v. Vega-Castillo, 540 F.3d 1235, 1236 (11th Cir. 2008). Appellate courts are bound by controlling Supreme Court precedent. United States v. Johnson, 921 F.3d 991, 1001 (11th Cir. 2019).

In Martinez, the Supreme Court established an exception to the requirement under the Antiterrorism and Effective Death Penalty Act that requires all petitioners to exhaust all available remedies in state court. The Court held:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural

> default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Martinez, 566 U.S. at 17. Under Martinez, a petitioner must still establish that the underlying claim is "substantial" and has "merit" before the procedural default can be excused. Id. at 14.

In Davila v. Davis, the Supreme Court considered whether the Martinez exception allowed a federal court to hear a substantial, but procedurally defaulted, claim of ineffective assistance of appellate counsel. 137 S. Ct. 2058, 2065 (2017). The Court held that Martinez did not extend or apply to excuse procedurally defaulted claims of ineffective assistance of appellate counsel. Id. at 2065-70.

As Moser acknowledges, his argument that the Martinez exception applies to ineffective-assistance-of-appellate-counsel claims is foreclosed by Supreme Court precedent. See id. That precedent is binding, even if it was wrongly decided, as Moser argues. Accordingly, the district court did not err in finding that Moser's procedurally defaulted claims of ineffective assistance of appellate counsel were not excusable under Martinez, and we affirm.

AFFIRMED.

No._____

IN THE SUPREME COURT OF THE UNITED STATES

SCOTT ALLAN MOSER,
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v.

SECRETARY, DEPARTMENT OF CORRECTIONS, STATE OF FLORIDA et al,
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APPENDIX B

Order

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

SCOTT ALLAN MOSER,

Petitioner,

v. CASE NO. 6:14-cv-989-Orl-37TBS

SECRETARY, DEPARTMENT OF CORRECTIONS, et al.,

Respondents.
_____/

ORDER

This cause is before the Court on an Amended Petition for Writ of Habeas Corpus ("Amended Petition") filed pursuant to 28 U.S.C. § 2254 (Doc. 10) and a Memorandum of Law (Doc. 11). Thereafter, Respondents filed a Response to the Amended Petition (Doc. 17). Petitioner filed a Reply to the Response. (Doc. 20).

Petitioner alleges twenty-four claims for relief in the Amended Petition. For the following reasons, the Amended Petition denied.

I. PROCEDURAL HISTORY

Petitioner was charged with two counts of aggravated assault with a firearm (counts one and two) and one count of shooting at, within, or into an occupied vehicle (count three) (Doc. 6 at 4-6). At trial, Ryan Smeltzer ("Smeltzer") testified that he has known Petitioner for most of his life (Doc. 6 at 33). On May 8, 2009, Smeltzer saw Petitioner at the Amber Keg bar in Orange County, Florida, and Petitioner appeared to be upset. *Id.* at 38-39. According to Smeltzer, Petitioner asked to borrow money, and Smeltzer said he didn't

have money to lend (Doc. Nos. 6 at 39; 6-1 at 1). Smeltzer testified that Petitioner appeared to be intoxicate and became angry and yelled at him (Doc. 6-1 at 1-2). The two argued, and Smeltzer testified that Petitioner threatened him by saying, "I got a bullet with your name on it." *Id.* at 2. Smeltzer responded by telling Petitioner he would protect himself by any means necessary. *Id.* Petitioner then left the Amber Keg. *Id.*

Smeltzer also stated that he had come into contact with Petitioner's wife, Debbie Moser ("Debbie") earlier that evening, and she was crying, stated, "F-him," and repeated she was "done." *Id.* at 3. Smeltzer left the Amber Keg and while traveling, he received phone calls from Debbie. *Id.* at 4-5. Smeltzer also stated that he had tried to "catch" Petitioner to talk and noticed Petitioner was driving his motorcycle erratically. *Id.* at 5.

Smeltzer testified that he had several beers and food but he was not intoxicated. *Id.* at 7. Smeltzer returned to the Amber Keg, and very soon after he arrived, Petitioner also returned and kept stating "kill me then. Kill me since you're such a bad a- - . . . ." *Id.* at 9-10. Petitioner then left the Amber Keg. *Id.* at 11. Smeltzer stated that he decided to drive over to Petitioner's house because he was worried about Petitioner's threats. *Id.* at 12-13. Donald Black ("Black"), Smeltzer's friend, drove them to the Moser residence. *Id.* at 14.

When Smeltzer and Black arrived at Petitioner's home, Smeltzer noticed the lights were off in the home and the front door was open. *Id.* at 17. Black parked in the driveway. *Id.* Smeltzer testified that he opened the passenger door, stepped partially out of the vehicle, and began yelling obscenities. *Id.* at 18. Smeltzer stated that he never walked toward the front door and didn't throw anything at the house. *Id.* at 19. After

approximately two minutes, Smeltzer returned to the car, and at the same time he heard shots being fired. *Id.* at 19-20. Smeltzer and Black dove down in the car, and then Black drove away. *Id.* at 21, 26-27. Smeltzer also testified that he knows Petitioner is a "good shot" and that he has a .38 special firearm. *Id.* at 21 and 25.

Black corroborated Smeltzer's testimony that Petitioner and Smeltzer had argued, and when they later saw Petitioner, he was acting angry (Doc. 6-2 at 27-31, 34). Black testified that he drove to Petitioner's house, parked in the driveway, Smeltzer stood near the vehicle door, yelled, and after Smeltzer got back into the car, Petitioner shot at them (Doc. Nos. 6-2 at 37-40; 6-3 at 1-2).

Deputies Dickens and Lees responded to the scene, and according to Deputy Lees, Smeltzer did not appear to be intoxicated (Doc. 6-3 at 26). Deputy Dickens testified that he noticed a bullet hole in the driver's side headrest of Smeltzer's vehicle (Doc. 6-4 at 6). Deputy Reynolds testified that when he arrived at the Moser residence, Petitioner made a spontaneous statement that "it was his gun and he was only doing it to defend himself." *Id.* at 32. Petitioner's firearm had six spent shell casings in the chamber. *Id.* at 34. Deputy Reynolds stated that after he read Petitioner his *Miranda*[1] warnings, Petitioner agreed to speak with him. *Id.* According to Deputy Reynolds, Petitioner appeared to be intoxicated, and Petitioner told him that he had consumed six beers after he had returned home (Doc. Nos. 6-4 at 37-38; 6-5 at 2). Deputy Reynolds stated that Smeltzer and Black did not appear

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

to be intoxicated (Doc. 6-5 at 15). Petitioner told the deputy that he thought Smeltzer had a weapon, however, he could not tell Deputy Reynolds what the weapon was nor could he describe it (Doc. 6-4 at 40). Deputy Reynolds also testified that there were freshly made tire tracks in the yard of Petitioner's home (Doc. 6-5 at 3-4). The tire tracks were made as if a vehicle was "peeling out" very quickly in a backward moving direction. *Id.* at 19.

Debbie testified that she had not argued with Petitioner that day, and she left the Petitioner at the Amber Keg and met her son (Doc. 6-5 at 31-32). Petitioner later returned to their home, and he appeared to be frightened or scared. *Id.* at 35. Petitioner then left the home and returned around 9:30 or 9:45 p.m. *Id.* at 36. Debbie testified that Petitioner did not seem to be intoxicated. *Id.* at 37.

Debbie stated that at approximately 11:30 p.m. she heard a noise like metal or glass breaking, and when she looked out of her bedroom door, she could see out of the front window, where Smeltzer was standing. *Id.* at 38-39. Smeltzer was yelling and his vehicle was parked very close to the front porch. *Id.* at 39-41. Debbie stated that as Smeltzer yelled, he began approaching their front door (Doc. 6-5 at 41-42). Petitioner had left their front door open, and he stood in the doorway (Doc. 6-6 at 23, 25). Debbie stated that she observed Smeltzer's vehicle and another car outside the home. *Id.* at 28. Debbie testified that she hid in a closet, where she heard several gunshots. *Id.* at 29-30.

Petitioner testified that he was at the Amber Keg on May 8, 2009, and Smeltzer got angry with him for "some reason," began cursing at him, and threw a screwdriver at him (Doc. 6-7 at 5). Petitioner stated that he was very surprised because there was no reason

for Smeltzer to be upset. *Id.* Petitioner testified that he began to fear Smeltzer based on what Smeltzer had said to him. *Id.* at 7. Petitioner then left the Amber Keg and returned to his home, where he told his wife, step-son, and grandson to leave because he was scared for their lives as well based on Smeltzer's statements. *Id.* at 8-9.

Petitioner subsequently left his home and went to a restaurant and another bar, and returned home around 11:00 p.m. *Id.* at 12. Petitioner was scared, so approximately one hour later he loaded his .38 special revolver and reclined on the couch. *Id.* at 13-14. Petitioner testified that he fell asleep and awoke to a large boom in the front yard. *Id.* at 14-15. Petitioner also stated that he heard Smeltzer yelling, and when he looked out the door, he observed that the windshield of the vehicle in the carport was smashed. *Id.* at 15.

Petitioner walked to the door and observed a vehicle parked within "a couple" of steps from the door and Smeltzer walking aggressively toward him while screaming at him. *Id.* at 16-21. Petitioner saw another person standing near Smeltzer's vehicle. *Id.* at 21. Petitioner testified that he told Smeltzer to get off his property, and Smeltzer began stating that he would kill Petitioner, his wife, his children, and his mother. *Id.* at 21-22. Petitioner was in fear, so he grabbed his gun and shot six shots at Smeltzer's vehicle to scare him away. *Id.* at 22-23. Smeltzer and Black then jumped into the vehicle and drove off. *Id.* at 23.

A jury convicted Petitioner as charged and made special findings that Petitioner discharged a firearm during the commission of the offenses (Doc. 6-11 at 12-16). The trial court sentenced Petitioner to concurrent twenty-year terms of imprisonment for counts one and two, to be served as a minimum mandatory term pursuant to section 775.087(2),

Florida Statutes, and to a five-year term of imprisonment for count three (Doc. Nos. 6-11 at 19-24; 6-12 at 1-5). Petitioner appealed, and the Fifth District Court of Appeal ("Fifth DCA") affirmed *per curiam*. *Moser v. State*, 49 So. 3d 1283 (Fla. 5th DCA 2010) (table).

Petitioner filed a motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure (Doc. 6-15 at 18-26). After filing an amended motion (Doc. 6-15 at 28-30), the trial court summarily denied the motion (Doc. 6-17 at 19-34). The Fifth DCA affirmed *per curiam*. (Doc. 6-18 at 19).

II. LEGAL STANDARDS

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

Pursuant to the AEDPA, federal habeas relief may not be granted with respect to a claim adjudicated on the merits in state court unless the adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The phrase "clearly established Federal law," encompasses only the holdings of the United States Supreme Court "as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

"[S]ection 2254(d)(1) provides two separate bases for reviewing state court decisions; the 'contrary to' and 'unreasonable application' clauses articulate independent

considerations a federal court must consider." *Maharaj v. Sec'y for Dep't of Corr.*, 432 F.3d 1292, 1308 (11th Cir. 2005). The meaning of the clauses was discussed by the Eleventh Circuit Court of Appeals in *Parker v. Head*, 244 F.3d 831, 835 (11th Cir. 2001):

> Under the "contrary to" clause, a federal court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the United States Supreme Court] on a question of law or if the state court decides a case differently than [the United States Supreme Court] has on a set of materially indistinguishable facts. Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the United States Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case.

Even if the federal court concludes that the state court applied federal law incorrectly, habeas relief is appropriate only if that application was "objectively unreasonable." *Id.* Whether a state court's decision was an unreasonable application of law must be assessed in light of the record before the state court. *Holland v. Jackson*, 542 U.S. 649, 652 (2004) (*per curiam*).

Finally, under § 2254(d)(2), a federal court may grant a writ of habeas corpus if the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." A determination of a factual issue made by a state court, however, shall be presumed correct, and the habeas petitioner shall have the burden of rebutting the presumption of correctness by clear and convincing evidence. *See Parker*, 244 F.3d at 835-36; 28 U.S.C. § 2254(e)(1).

B. Standard for Ineffective Assistance of Counsel

The United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984),

established a two-part test for determining whether a convicted person is entitled to relief on the ground that his counsel rendered ineffective assistance: (1) whether counsel's performance was deficient and "fell below an objective standard of reasonableness"; and (2) whether the deficient performance prejudiced the defense.[2] *Id.* at 687-88. A court must adhere to a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* at 689-90. "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *Gates v. Zant*, 863 F.2d 1492, 1497 (11th Cir. 1989).

As observed by the Eleventh Circuit Court of Appeals, the test for ineffective assistance of counsel:

> has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial. Courts also should at the start presume effectiveness and should always avoid second guessing with the benefit of hindsight. *Strickland* encourages reviewing courts to allow lawyers broad discretion to represent their clients by pursuing their own strategy. We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.

White v. Singletary, 972 F.2d 1218, 1220-21 (11th Cir. 1992) (citation omitted). Under those

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[2] In *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993), the United States Supreme Court clarified that the prejudice prong of the test does not focus solely on mere outcome determination; rather, to establish prejudice, a criminal defendant must show that counsel's deficient representation rendered the result of the trial fundamentally unfair or unreliable.

rules and presumptions, "the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between." *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994).

III. ANALYSIS

A. Claim One

Petitioner alleges the prosecutor made impermissible comments on his post-*Miranda* silence during cross-examination (Doc. 10 at 5). Petitioner takes issue with the following exchange:

> Q. He [Deputy Reynolds] read you your Miranda warnings, correct?
>
> A. Yes.
>
> Q. You didn't tell them any of this, did you?
>
> A. No.
>
> Q. You told him you were threatened? You told him you were threatened?
>
> A. Yes.
>
> Q. But you didn't tell them how?
>
> A. He kept twisting stuff around, so I just said, I'm not talking no more.

(Doc. 6-8 at 5). The prosecutor then asked Petitioner about whether he told Deputy Reynolds that Smeltzer was angry. *Id.* at 7. The prosecutor also questioned Petitioner about whether he told police that Smeltzer was walking toward his front door or any

other details about how he was threatened. *Id.* at 7-8. Finally, the prosecutor asked Petitioner whether he had "six months to conjure up this story . . ." *Id.* at 8. Defense counsel then objected, arguing that the question was an improper comment on Petitioner's right to remain silent. *Id.* at 8. The trial court stated, "I'm gonna overrule the objection, but I'm not gonna allow you to ask that question." *Id.* Petitioner raised this claim on direct appeal (Doc. Nos. 6-13 at 17-23; 6-14 at 1-4), and the Fifth DCA affirmed *per curiam*. *Moser*, 49 So. 3d at 1283.

Florida courts have held that "'[c]ommenting on the defendant's exercise of his right to remain silent is serious error.'" *Floyd v. State*, 159 So. 3d 987, 989 (Fla. 1st DCA 2015) (quoting *Rimmer v. State*, 825 So. 2d 304, 322 (Fla. 2002)). However, comments on a defendant's right to remain silent are reviewed under the harmless error test. *Poole v. State*, 997 So. 2d 382, 391 n. 3 (Fla. 2008).

Petitioner cannot show that the improper comment on his right to remain silent had a substantial and injurious effect or influence in determining the verdict in light of the evidence presented at trial. *See Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). There was ample evidence indicating Petitioner's guilt and discrediting his claim of self-defense, including Smeltzer and Black's testimony that Petitioner shot at them even though Smeltzer merely yelled at Petitioner from the door of the vehicle. Furthermore, Deputy Reynolds noted that Petitioner appeared to be intoxicated and Smeltzer was not, thus contradicting Petitioner and his wife's testimony. Petitioner has not shown there is a reasonable probability that he would have been acquitted absent these comments.

Therefore, Petitioner cannot demonstrate that but for counsel's actions, the result of the trial would have been different in light of the evidence presented. The state court's denial of this claim was not contrary to or an unreasonable application of *Strickland*. Accordingly, claim one is denied.[3]

B. Claim Two

Petitioner argues trial counsel was ineffective for failing to timely object to the prosecutor's improper questions regarding Petitioner's post-*Miranda* silence (Doc. 10 at 7). Petitioner raised this claim in his Rule 3.850 motion, and the trial court denied the claim, noting that Petitioner had raised the error with regard to the comment on his post-*Miranda* silence on appeal (Doc. 6-17 at 20-21). The Fifth DCA affirmed *per curiam* (Doc. 6-18 at 19).

As the Court noted above, counsel did object to the improper comments made regarding Petitioner's post-*Miranda* silence. There is no indication that had counsel objected in a more timely fashion that the trial court would have sustained the objection. Additionally, even assuming counsel acted in a deficient manner, Petitioner cannot demonstrate that the result of the trial would have been different absent these improper comments. Therefore, the state court's denial of this claim was neither contrary to nor an

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[3] To the extent Petitioner now asserts that appellate counsel was ineffective for failing to properly argue this claim on direct appeal (Doc. 11 at 10), his claim is unexhausted (Doc. 13). Petitioner does not dispute this in his Reply, therefore, the Court will not address this portion of claim one (Doc. 20).

unreasonable application of *Strickland*. Thus, claim two is denied pursuant to § 2254(d).

C. Claim Three

Petitioner asserts trial counsel was ineffective for failing to file a pre-trial motion alleging he was immune from prosecution. Petitioner raised this claim in his amended Rule 3.850 motion, and the trial court denied the claim pursuant to *Strickland*, stating that counsel did not provide deficient performance merely because he presented the defense at trial rather than a pre-trial motion (Doc. 6-17 at 23). The Fifth DCA affirmed *per curiam* (Doc. 6-18 at 19).

Florida courts have held that a criminal defendant is entitled to file a motion to dismiss a prosecution pursuant to section 776.032, Florida Statutes, on the basis that he was justified in using force as permitted in sections 776.013 or 776.031, Florida Statutes,[4] against another in self-defense of their home or vehicle. *See Dennis v. State*, 51 So. 3d 456, 458 (Fla. 2010). Essentially, section 776.032(1) provides statutory immunity from prosecution in certain circumstances. When a question of statutory immunity is raised in a motion to dismiss, the trial court must determine whether the defendant has shown by

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[4] Section 776.013(3), Florida Statutes, provides that a person who is attacked in his home has no duty to retreat and "has the right to stand his . . . ground and use or threaten to use force, including deadly force, if he uses that force in accordance with section 776.012 or 776.031(1) or (2). Section 776.031, Florida Statutes, provides that a person is justified in using or threatening to use force against another, except deadly force, and without a duty to retreat, when that person reasonably believes such force is necessary to prevent or terminate another's trespass to his real or personal property. The statute also states that a person may use deadly force, and does not have a duty to retreat, if he believes that the force is necessary to prevent the commission of a forcible felony. § 776.031(2), Fla. Stat (2009).

a preponderance of the evidence that the immunity attaches. *See Bretherick v. State*, 135 So. 3d 337, 340 (Fla. 5th DCA 2013) (citing *Dennis*, 51 So. 3d at 460).

As discussed above, the State presented ample evidence disputing Petitioner's claim of self-defense, and the jury found Petitioner guilty beyond a reasonable doubt. Thus, Petitioner cannot demonstrate that a motion to dismiss would have been sustained on a greater weight standard. In light of Smeltzer and Black's testimony at trial, Petitioner cannot show that he was entitled to immunity from prosecution and dismissal of the criminal case. Therefore, even assuming counsel's failure to file a motion to dismiss amounts to deficient performance, Petitioner cannot demonstrate prejudice. The state court's denial of this claim was neither contrary to, nor an unreasonable application of, *Strickland*. Accordingly, claim three is denied pursuant to § 2254(d).

D. Claim Four

Petitioner contends that counsel was ineffective for failing to request a pre-trial bond reduction hearing (Doc. 10 at 11). Petitioner argues that had such a hearing been held, the trial court would have considered the fact that Petitioner had no previous criminal history, was a homeowner in the community, was married and had children, and had various medical issues for which he saw a doctor regularly (Doc. 11 at 17). Petitioner alleges that when considering these factors, the trial court would have determined that he was not a flight risk and would have reduced his bond. *Id.* Petitioner further states that because he could not meet his bond, he was unable to effectively prepare his defense or meet with defense counsel. *Id.* at 18. Petitioner asserts that had he

been able to post bond, he would have ensured that defense counsel talked to various witnesses, including an expert regarding the trajectory of the bullets. *Id.* Finally, Petitioner contends that had he been able to post bond, he would have been appropriately dressed at trial. *Id.*

Petitioner raised this claim in his Rule 3.850 motion, and the trial court summarily denied the claim, concluding that Petitioner could not demonstrate that prejudice resulted from counsel's failure to hold a bond hearing (Doc. 6-17 at 23). The Fifth DCA affirmed *per curiam* (Doc. 6-18 at 19).

The instant claim is speculative. Petitioner cannot demonstrate that had counsel moved for a second bond hearing that the trial court would have reduced his bond. Additionally, even assuming that counsel's failure to request a second bond hearing amounts to deficient performance, Petitioner cannot show that he was prejudiced. Petitioner has not provided the Court with any evidence demonstrating that he could have obtained an expert or other witnesses who were willing to testify in the manner he suggests. Further, there is no indication that his alleged appearance in "shabby" clothing was held against him or affected the outcome in any way. Petitioner's speculative and unsupported claim does not warrant habeas relief. *See Tejeda v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991). Accordingly, claim four is denied pursuant to § 2254(d).

E. Claim Five

Petitioner contends that counsel was ineffective for failing to impeach and cross-examine Smeltzer (Doc. 10 at 13). Petitioner asserts that counsel failed to elicit from

Smeltzer that he was convicted of four felonies instead of one or two, he was on probation at the time of the shooting, and his driver's license was suspended (Doc. 6-15 at 22-23). Petitioner also contends that counsel failed to request Standard Criminal Jury Instruction 2.5, which would have instructed the jury that they could use prior convictions to weigh the credibility of Smeltzer's testimony. *Id.*

Petitioner raised this claim in his Rule 3.850 motion, and the trial court summarily denied the claim, noting first that Smeltzer was convicted in two felony cases of four charges and Smeltzer appeared to confuse "the number of felony cases with the number of convictions." (Doc. 6-17 at 24). The trial court made a finding that even if defense counsel had clarified this issue, there is no reasonable probability that the jury would have given Smeltzer's testimony less weight or that Petitioner would not have been convicted. *Id.* Additionally, the trial court stated that Smeltzer could not properly be impeached with the fact that he was on probation and had his license suspended. *Id.* at 25. The Fifth DCA affirmed *per curiam* (Doc. 6-18 at 19).

Smeltzer testified on cross-examination that he had been convicted of one or two felonies, and noted that he had been convicted of possession of cannabis over twenty grams and possession of cocaine with intent to sell (Doc. 6-1 at 30). Defense counsel did not impeach Smeltzer with the records of his prior convictions,[5] or the fact that Smeltzer

[5] The records attached to the State's Response to Petitioner's Rule 3.850 motion indicate that Smeltzer was convicted in state court case number 01-cr-6769 of possession of cannabis with intent to sell or deliver and possession of 20 or more grams of marijuana (Doc. 6-17 at 13). Smeltzer was also convicted in state court case number 06-CF-4726 of

was on probation and his license was suspended (Doc. Nos. 6-1 at 29-39; 6-2 at 1-12).

Florida law provides that a witness can be impeached with the certified copies of his or her prior convictions if they falsely testify as to the number of crimes for which they have been convicted. *Pryor v. State*, 855 So. 2d 134, 136 (Fla. 1st DCA 2003). It is unclear whether Smeltzer was falsely testifying or whether he merely confused the number of cases with the number of convictions. Nevertheless, counsel's failure to impeach Smeltzer on this matter did not result in prejudice. The jury heard that Smeltzer had two prior felony convictions. Petitioner has failed to demonstrate that learning about an additional felony conviction would have changed the outcome of the trial, particularly with the corroborative element of Black's testimony. Therefore, a reasonable probability does not exist that the failure to impeach Smeltzer with his prior convictions would have resulted in a different outcome at trial.

Additionally, Petitioner's claims regarding impeachment of Smeltzer about his probationary status and suspended license[6] fail for the same reason. Petitioner has not shown that counsel's failure to conduct additional impeachment and request a jury instruction on weighing Smeltzer's credibility resulted in prejudice. The jury was

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possession of oxycodone, possession of cocaine, and possession of drug paraphernalia. *Id.* at 15.

[6] Although trial counsel arguably could have impeached Smeltzer regarding his probation, the issue regarding Smeltzer's license was irrelevant because Smeltzer and Black testified that Black drove the vehicle to Petitioner's house.

instructed that they could use their common sense in determining what evidence or testimony was reliable (Doc. 6-9 at 27). The trial court also stated that the jurors could evaluate whether witnesses were straightforward and honest, could consider whether a witness had been convicted of a crime, and could believe or disbelieve any testimony of any witness. *Id.* at 27-28. Clearly the jury instruction should have been requested and likely would have been given but the instructions, taken as a whole, adequately covered credibility, and Petitioner has not demonstrated prejudice even assuming deficient performance. Accordingly, this claim is denied pursuant to § 2254(d).

F. Claim Six

Petitioner alleges counsel was ineffective for failing to obtain a ballistics expert to "evaluate the bullet trajectories" (Doc. 10 at 14). In support of this claim, Petitioner states that such an expert could have introduced physical evidence and testimony to demonstrate that it was not possible to place Smeltzer inside the vehicle when Petitioner fired his pistol and hit the vehicle's windshield. *Id.*

Petitioner raised this claim in his Rule 3.850 motion, and the trial court denied the claim as conclusory, stating that Petitioner had not demonstrated how an expert would have shown that the vehicle was unoccupied when Petitioner fired his weapon (Doc. 6-17 at 28). Respondents argue that this claim is procedurally barred because the trial court denied it as conclusory. However, the Eleventh Circuit has held that "a Florida state court's dismissal of a post-conviction claim for facial insufficiency constitutes—at least for purposes of procedural default analysis—a ruling 'on the merits' that is not barred

from . . . review." *Pope v. Sec'y for Dep't of Corr.*, 680 F.3d 1271, 1286 (11th Cir. 2012). Therefore, contrary to Respondents' assertions, this claim is not procedurally barred.[7]

"[E]vidence about the testimony of a putative witness must generally be presented in the form of actual testimony by the witness or an affidavit. A defendant cannot simply state that the testimony would have been favorable; self-serving speculation will not sustain an ineffective assistance claim." *United States v. Ashimi*, 932 F.2d 643, 650 (7th Cir. 1991) (footnotes omitted); *Sibley v. Culliver*, 377 F.3d 1196, 1206 (11th Cir. 2004) (noting that a habeas petitioner cannot demonstrate actual innocence when he has "presented no evidence to the court, by affidavit or otherwise, to show [that a witness] would have, in fact, testified."); *Johnson v. Alabama*, 256 F.3d 1156, 1187 (11th Cir. 2001) (stating "Johnson offers only speculation that the missing witnesses would have been helpful. This kind of speculation is insufficient to carry the burden of a habeas corpus petitioner.") (quotation omitted). Petitioner's claim is speculative because he has not presented an affidavit demonstrating that an expert witness would have testified in the manner he suggests. Therefore, Petitioner has not made the requisite factual showing, and his self-serving speculation will not sustain this claim of ineffective assistance of counsel. Accordingly, claim six is denied pursuant to § 2254(d).

G. Claim Seven

Petitioner asserts that trial counsel was ineffective for failing to take measurements

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[7] The Court concludes that claims seven, eight, and ten are also not procedurally barred for the same reason.

of the driveway and the grass area of his home to demonstrate to the jury the distances involved in the case (Doc. 10 at 15). Petitioner raised this claim in his Rule 3.850 motion, and the trial court summarily denied the claim, concluding it was conclusory (Doc. 6-17 at 28). The Fifth DCA affirmed *per curiam* (Doc. 6-18 at 19).

Petitioner cannot demonstrate that he is entitled to relief on his claim. Smeltzer and Black testified that they were not parked near Petitioner's front door and that neither walked up to the front door. Petitioner and his wife testified to the contrary. Even assuming the distance from the driveway to the front door was less than what Smeltzer and Black estimated, Petitioner cannot show that a reasonable probability exists that but for counsel's introduction of this information, that the result of the trial would have been different. The jury heard the contradictory stories and chose not to believe Petitioner's version of events or that he acted in self-defense. The state court's denial of this claim was neither contrary to, nor an unreasonable application of, clearly established federal law. Accordingly, claim seven is denied pursuant to § 2254(d).

H. Claim Eight

Petitioner asserts that counsel was ineffective for failing to introduce photographs of a vehicle's broken windshield (Doc. 10 at 16). Petitioner maintains that the day after the crime, he discovered that a "disabled vehicle parked under the carport" had a "broken out" windshield and observed fragments of a Budweiser bottle were on the ground. *Id.* Petitioner states that he took photographs of this evidence and gave them to counsel to submit to the jury. *Id.* Petitioner raised this claim in his Rule 3.850 motion, and the trial

court denied the claim as conclusory (Doc. 6-17 at 29). The Fifth DCA affirmed *per curiam* (Doc. 6-18 at 19).

Even assuming the photographs (which are not in the record) were sufficiently authenticated to be admissible at trial (however unlikely), they would have been contradicted by Deputy Reynolds. Both Petitioner and Debbie Moser testified about the conditions at the scene said to be depicted in the photographs taken the following day. (Doc. 6-7 at 15; Doc. 6-6 at 2, 34). The deputy testified that when he arrived at the Moser residence, he examined the vehicle in the Moser's carport and nothing appeared out of the ordinary (Doc. 6-5 at 10-11). Whether the purported photographs were not introduced as a strategic decision of counsel as inconsistent with the testimony, as unnecessarily cumulative or because they could not be authenticated requires speculation. Counsel's asserted failure to introduce this evidence has not been shown to be deficient. Further, the absence of the purported photographs did not result in prejudice because there is not a reasonable probability that the outcome of trial would have been different had the photographs been admitted. The state court's denial of this claim was neither contrary to, nor an unreasonable application of, clearly established federal law. Claim eight is denied pursuant to § 2254(d).

I. Claim Nine

Petitioner alleges that counsel was ineffective for failing to question Debbie Moser regarding her statement that she saw "at least one more vehicle behind Smeltzer's car" (Doc. 10 at 17). Petitioner asserts that this fact would have demonstrated that he had a

reason to fear Smeltzer because he brought "two additional car loads of people for back up." *Id.* Petitioner also contends that counsel failed to investigate and call his neighbor Beth Davis to support his defense and the suggestion that two additional cars, other than Smeltzer's, were parked outside Petitioner's house. *Id.* Petitioner raised this claim in his Rule 3.850 motion, and the trial court denied the claim pursuant to *Strickland* (Doc. 6-17 at 30). The Fifth DCA affirmed *per curiam* (Doc. 6-18 at 19).

Debbie testified on direct and cross-examination that she observed Smeltzer approaching her house, a second person off to the left near a vehicle, and another vehicle behind Smeltzer's vehicle (Doc. Nos. 6-5 at 41-42; 6-6 at 25, 28). Counsel did not propound any follow up questions regarding the alleged second vehicle in the driveway. *Id.* It is unclear what additional follow up questions defense counsel should have asked because the jury heard Debbie testify at least twice that there were two vehicles in her driveway without the residents' permission.

Furthermore, contrary to Petitioner's assertions, he did not testify that there were two carloads of people at his house the night the crimes were committed. Instead, Petitioner told the jury he did not see another car (Doc. 6-6 at 45). Furthermore, Deputy Reynolds testified that when he arrived at the Moser residence, there were at least two other cars parked which were not involved in the crime (Doc. 6-5 at 12-13). Therefore, Petitioner cannot demonstrate deficient performance or prejudice.

Furthermore, to the extent Petitioner contends that counsel should have called Beth Davis to testify, the Court concludes that the claim is speculative. Petitioner has not

presented an affidavit demonstrating that Beth Davis would have testified in the manner he suggests. *See Ashimi*, 932 F.2d at 650; *Sibley*, 377 F.3d at 1206; *Johnson*, 256 F.3d at 1187. Petitioner has not made the requisite factual showing, and his self-serving speculation will not sustain this claim of ineffective assistance of counsel. Accordingly, claim nine is denied pursuant to § 2254(d).

J. Claim Ten

Petitioner alleges counsel was ineffective for failing to discuss the facts of the case with him (Doc. 10 at 19). In support of this claim, Petitioner states that counsel "simply did not know the facts of [his] case because he did not take time or have the time to prepare for trial." *Id.* Petitioner argues that had counsel spent more time with him and his wife, he would have been better prepared for trial and it is likely the jury would have believed Petitioner's testimony. *Id.* Petitioner raised this claim in his Rule 3.850 motion, and the trial court denied the claim as conclusory (Doc. 6-17 at 30). The Fifth DCA affirmed *per curiam* (Doc. 6-18 at 30).

Petitioner has not demonstrated that he is entitled to relief on his claim because this claim is vague and unsupported. Petitioner has not shown how additional discussions with counsel would have made counsel better prepared for trial. Petitioner also cannot demonstrate that counsel would have discovered additional exculpatory information. Petitioner's conclusory claim does not warrant habeas relief. *See Tejeda*, 941 F.2d at 1559. Therefore, Petitioner has not demonstrated that counsel acted in a deficient manner or that the result of the proceeding would have been different. Consequently,

claim ten is denied pursuant to § 2254(d).

K. Claim Eleven

Petitioner contends that counsel was ineffective for failing to investigate the victim's prior arrest record (Doc. 10 at 21). Petitioner asserts that Smeltzer's prior arrest record would have cast additional doubt on his credibility. *Id.* Petitioner raised this claim in his Rule 3.850 motion, and the trial court summarily denied the claim pursuant to *Strickland* (Doc. 6-17 at 24). The Fifth DCA affirmed *per curiam* (Doc. 6-18 at 19).

Section 90.610(1), Florida Statutes, provides that a party may attack the credibility of any witness by presenting evidence that "the witness has been convicted of a crime if the crime was punishable by death or imprisonment in excess of 1 year . . . or if the crime involved dishonesty or false statement . . . ." However, evidence of arrests that do not result in a conviction are inadmissible. *See Schofield v. State*, 67 So. 3d 1066, 1071 (Fla. 2d DCA 2011). Therefore, counsel was not deficient for failing to investigate and present evidence of Smeltzer's prior arrest record because such evidence would have been inadmissible at trial. Accordingly, this claim is denied pursuant to § 2254(d).

L. Claim Eleven (a)[8]

Petitioner asserts that counsel was ineffective for "handing over closing argument" to his co-counsel (Doc. 11 at 30). According to Petitioner, co-counsel failed to zealously attack Smeltzer's credibility during closing argument. *Id.* Petitioner raised this

[8] Petitioner labels two grounds for relief as "Claim Eleven," therefore, the Court has relabeled the second as Claim Eleven (a).

claim in his Rule 3.850 motion, and the trial court denied the claim, concluding that Petitioner had not suffered prejudice (Doc. 6-17 at 31). The Fifth DCA affirmed *per curiam* (Doc. 6-18 at 19).

Petitioner has not demonstrated that he is entitled to relief on this claim. Although co-counsel did not mention Smeltzer's criminal history during closing argument, counsel argued Smeltzer and Black's testimony was not credible (Doc. Nos. 6-9 at 22-23, 27, 29-33; 6-10 at 1-2). Petitioner has not demonstrated that had counsel made a more specific argument with regard to Smeltzer's credibility, the outcome of the trial would have been different. The state court's denial of this claim was neither contrary to, nor an unreasonable application of, *Strickland*. Accordingly, this claim is denied pursuant to § 2254(d).

M. Claim Twelve

Petitioner alleges that trial counsel was ineffective for failing to obtain and introduce telephone records from the night of the crimes (Doc. 10 at 22). Petitioner states that these records would have demonstrated that he called 911 after the incident occurred (Doc. 10 at 22). Petitioner raised this claim in his Rule 3.850 motion, and the trial court denied the claim, concluding that although the 911 call records would have corroborated Petitioner's testimony, it would not have bolstered his credibility in any way (Doc. 6-17 at 32). The Fifth DCA affirmed *per curiam* (Doc. 6-18 at 19).

Even assuming the 911 records would have corroborated Petitioner's testimony that he called 911 after the incident, there is no indication that this evidence would have

strengthened his testimony in light of the evidence presented against him. Consequently, Petitioner has not shown there a reasonable probability that but for counsel's failure to present this evidence the result of the trial would have been different. Accordingly, claim twelve is denied pursuant to § 2254(d).

N. Claim Thirteen

Petitioner contends that counsel was ineffective for failing to investigate, subpoena, and call additional witnesses to testify at trial (Doc. 10 at 24). Specifically, Petitioner states that counsel should have called Beth Davis, Neil Lachowicz, and Sandra Pelaquins to testify (Doc. 11 at 34).[9] Petitioner raised this claim in his Rule 3.850 motion, and the trial court denied the claim, concluding that counsel was not deficient for failing to present this testimony (Doc. 6-17 at 33). The Fifth DCA affirmed *per curiam* (Doc. 6-18 at 19).

The Court addressed counsel's failure to call Beth Davis in relation to ground nine, therefore, it will not readdress the matter here. Furthermore, Petitioner has not presented an affidavit demonstrating that Neil Lachowicz and Sandra Pelaquins would have testified in this manner. *See Ashimi*, 932 F.2d at 650; *Sibley*, 377 F.3d at 1206; *Johnson*, 256 F.3d at 1187. Petitioner has not made the requisite factual showing, and his self-serving

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[9] Petitioner claims that Neil Lachowicz, his son, would have testified that Petitioner was scared of Smeltzer on the night that the crimes had been committed because he believed Smeltzer was going to kill him (Doc. 11 at 34). Additionally, Petitioner states that Sandra Pelaquins would have testified regarding the fact that Smeltzer was intoxicated on that evening. *Id.*

speculation will not sustain this claim of ineffective assistance of counsel. Additionally, Petitioner cannot show that the failure to present this testimony resulted in prejudice because the testimony was merely cumulative to that already presented at trial. Accordingly, claim thirteen is denied pursuant to § 2254(d).

O. Claim Fourteen

Petitioner asserts that counsel was ineffective for failing to object to Smeltzer's "hearsay answer on cross-examination," and ask for the answer to be stricken and disregarded (Doc. 10 at 25). Petitioner takes issue with the following testimony that occurred on cross examination:

> Q. Did you ever call Scott Moser's cell phone that night?
>
> A. I don't recall.
>
> Q. Well, you wanted to speak with Scott Moser, right?
>
> A. No, I wanted to speak with Debbie to find out if she was okay, because I heard she was punched in the face twice before she went out, which I heard from a few of my friends that I do trust, that her hair was pulled and she was hit, and I was concerned about her. I offered to give her a ride to her daughter's house so she would be safe just in case he didn't calm down.

(Doc. 6-1 at 36-37). Defense counsel did not object to this testimony. *Id.*

Petitioner raised this claim in his Rule 3.850 motion, and the trial court summarily denied the claim pursuant to *Strickland* (Doc. 6-17 at 21-22). The Fifth DCA affirmed *per curiam* (Doc. 6-18 at 19).

Smeltzer's response included an improper hearsay statement, and counsel was

deficient for failing to object and moving to strike it. § 90.801, Fla. Stat. (2008) (defining hearsay as a statement made by someone other than the declarant offered in evidence to prove the truth of the matter asserted). The defense later called Debbie Moser who testified that she and Petitioner were not arguing earlier in the day and that Petitioner had not made her cry (Doc. 6-5 at 31). Therefore, the substance of Smeltzer's inadmissible response was contradicted by her testimony, It is true that this conflict may have implicated Debbie's credibility and whether she was testifying falsely in order to protect Petitioner and support his version of events. However, even assuming counsel's failure to object and move to strike amounts to deficient performance, the Petitioner cannot demonstrate that the introduction of this hearsay statement resulted in prejudice in light of the evidence of his guilt presented at trial. Accordingly, claim fourteen is denied pursuant to § 2254(d).

P. Claims Sixteen through Twenty[10]

In claim sixteen, Petitioner alleges that appellate counsel was ineffective for failing to argue that the trial court erred by failing to "instruct the jury on the read-back of testimony . . . to answer their questions" (Doc. 11 at 36). Petitioner argues in claim seventeen that appellate counsel was ineffective for failing to assure that voir dire was transcribed for appeal. *Id.* at 37. In claim eighteen, Petitioner contends that appellate counsel was ineffective for failing to argue that the prosecutor improperly represented

[10] In claim fifteen, Petitioner raises a claim of cumulative error. Therefore, the Court will address this claim at the conclusion of the order.

the facts during opening statement. *Id.* at 38. Petitioner next claims with regard to claim nineteen that appellate counsel was ineffective for failing to argue that fundamental errors were committed at trial. *Id.* at 39. Finally, in claim twenty, Petitioner asserts that appellate counsel was ineffective for failing to argue that trial counsel was ineffective when he failed to move for a curative instruction after a comment was made on his post-*Miranda* silence. *Id.* at 40.

Respondents assert that these claims are unexhausted because they were not raised in the state court (Doc. 17 at 22). Pursuant to the AEDPA, federal courts are precluded, absent exceptional circumstances, from granting habeas relief unless the petitioner has exhausted all means of available relief under state law. 28 U.S.C. § 2254(b); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842–44 (1999). In order to satisfy the exhaustion requirement a "petitioner must 'fairly present[ ]' every issue raised in his federal petition to the state's highest court, either on direct appeal or on collateral review." *Isaac v. Augusta SMP Warden*, 470 F. App'x 816, 818 (11th Cir. 2012) (quoting *Castille v. Peoples*, 489 U.S. 346, 351 (1989)). A petitioner must apprise the state court of the federal constitutional issue, not just the underlying facts of the claim or a similar state law claim. *Snowden v. Singletary*, 135 F.3d 732, 735 (11th Cir. 1998).

Petitioner did not raise these claims in the state court and he admits that they are unexhausted (Doc. 20 at 5). Therefore, the Court is precluded from considering the claims because they would be procedurally defaulted if Petitioner returned to state court. *See id.* at 736. Petitioner could not return to the state court to raise these grounds because any

state habeas petition would be untimely filed. Thus, Petitioner's claims are procedurally defaulted.

Procedural default may be excused only in two narrow circumstances: if a petitioner can show (1) cause and prejudice or (2) actual innocence. *Murray v. Carrier*, 477 U.S. 478, 496 (1986); *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999). Petitioner asserts that pursuant to *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), he can establish cause for the procedural default (Doc. 20 at 5). However, Petitioner's argument is misplaced. *Martinez* excuses the procedural default of a substantial ineffective assistance of trial counsel claim asserted in a first initial-review collateral proceeding. *Id.* at 1309. The procedural default asserted here involves a claim of ineffective assistance of appellate counsel, and therefore, *Martinez* is not applicable. *See Dansby v. Hobbs*, 766 F.3d 809, 833 (8th Cir. 2014); *Reed v. Stephens*, 739 F.3d 753, 778 n. 16 (5th Cir. 2013); *Hodges v. Colson*, 727 F.3d 517, 531 (6th Cir. 2013); *Banks v. Workman*, 692 F.3d 1133, 1148 (10th Cir. 2012); *Smith v. Jones*, No. 8:12–cv–833–T–36TBM, 2015 WL 7444825, at *27 (N.D. Fla. Oct. 6, 2015); *but see Ngyugen v. Curry*, 736 F.3d 1287, 1296 (9th Cir. 2013) (concluding *Martinez* extends to procedurally defaulted claims of ineffective assistance of appellate counsel). Petitioner has failed to demonstrate cause or prejudice for the procedural default. Likewise, he cannot show the applicability of the actual innocence exception. Accordingly, these claims are procedurally barred.[11]

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[11] The Court notes that reasonable jurists could disagree with regard to this matter. Therefore, the Court grants a certificate of appealability on the issue of whether

Q. Claims Twenty-One through Twenty-Three

Petitioner contends in claim twenty-one that post-conviction counsel was ineffective for failing to assert a claim that trial counsel was ineffective for failing to request Standard Criminal Jury Instruction 4.4 (Doc. 11 at 42). In claim twenty-two, Petitioner claims that post-conviction counsel was ineffective for failing to assert that trial counsel was ineffective for failing to impeach Smeltzer's testimony. *Id.* at 43. Finally, in claim twenty-three, Petitioner alleges that post-conviction counsel was ineffective for failing to argue that trial counsel was ineffective for failing to "raise Smeltzer's working relationship with arresting officer and other members of the Sheriff's Office." *Id.* at 46.

Petitioner is not entitled to relief on these claims because a claim that state post-conviction counsel was ineffective is not cognizable on habeas review. *See Mendoza v. Sec'y, Florida Dep't of Corr.*, 659 F. App'x 974, 982 (11th Cir. 2016) (noting there is no constitutional right to post-conviction counsel).

To the extent Petitioner asserts in his reply these are ineffective assistance of trial counsel claims that were not raised in his Rule 3.850 motion due to post-conviction counsel's failure to raise them, his claims are unexhausted (Doc. Nos. 17 at 25; 20 at 5). However, Petitioner also argues that pursuant to *Martinez*, 132 S. Ct. at 1309, he can establish cause for the procedural default. *Id.*

The *Martinez* Court held a prisoner may establish cause for the procedural default

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Martinez applies to ineffective assistance of appellate counsel claims.

of an ineffective assistance counsel claim that was not raised in an initial or first post-conviction motion if: (1) the state court did not appoint counsel in the initial-review collateral proceeding or (2) if counsel was appointed in the initial-review proceeding but failed to raise the claim. *Id.* at 1318-19. It is arguable that Petitioner's failure to properly exhaust these claims was because post-conviction counsel failed to raise these claims in Petitioner's Rule 3.850 motion. However, Petitioner must also show that the defaulted claim is substantial, or in other words, that the claim has some merit. Id. at 1319.

1. Failure to Request to Standard Criminal Jury Instruction 4.4

Petitioner contends that counsel should have requested standard jury instruction 4.4, which advises the jury regarding a read-back of testimony or a play-back of audio or videotape. Fla. Std. (Crim.) Jury Instr. 4.4. During trial, the jury had a question regarding the 911 call, and asked, "Who made the first 911 call, and did Mr. Moser make a 911 call at all?" (Doc. 6-11 at 6). The trial court instructed the jury to rely upon their collective memory as to what the testimony stated. *Id.*

Petitioner's claim is without merit. Instruction 4.4 is only given if a jury specifically requests a read-back or play-back. *See* Fla. R. Crim. P. 3.410, *Hazuri v. State*, 91 So. 3d 836, 840-41 (Fla. 2012) (noting that Instruction 4.4 was drafted to assist a trial judge when granting, denying, or deferring a jury's request for a read-back of testimony) (citations omitted). The jury in this case did not request a read-back of testimony. Furthermore, there is no indication that the trial court improperly handled the jury's question. Petitioner cannot show that counsel's failure to request this instruction resulted in

prejudice. Accordingly, Petitioner has not demonstrated that his claim is substantial. As such, this claim is denied as procedurally barred.

2. Failure to Impeach Smeltzer's testimony

Petitioner contends that counsel's failure to impeach Smeltzer on the matter of whether he repeatedly called Debbie Moser and "not 'vise-versa' as he claimed during trial." (Doc. 11 at 43). Although counsel did not impeach Smeltzer regarding this issue, Petitioner cannot demonstrate prejudice. The jury heard Smeltzer's testimony that he called Debbie at least five times (Doc. 6-1 at 5, 9, and 35). The jury also heard Debbie's testimony that Smeltzer called her "many times" (Doc. 6-6 at 17). There is no indication that further questioning on the matter would have resulted in a different outcome at trial. Therefore, Petitioner cannot demonstrated that he sustained prejudice. Petitioner has not shown that this claim is substantial. Consequently, this claim is denied as procedurally barred.

3. Failure to "Raise Smeltzer's Working Relationship" with Police

Petitioner claims that counsel should have raised "Smeltzer's working relationship with [the] arresting officer and other members of the Sheriff's Office." *Id.* at 46. In support of this claim, Petitioner states that Smeltzer was a customer of an Italian restaurant frequented by the deputy sheriffs involved in the case and was an informant for Deputy Reynolds. *Id.* Petitioner states that Deputy Reynolds arrived at the scene of the crime due to his relationship with Smeltzer and not because he was called in by his office. *Id.*

The Court concludes that Petitioner is not entitled to relief on this claim. The fact

that Smeltzer was a customer at a restaurant also visited by deputies involved in this matter, absent more, is irrelevant to the case. Additionally, Petitioner has presented no evidence that Smeltzer was actually a police informant. Deputy Reynolds testified that he responded to the Moser's home because the Orange County Sheriff's Office received a call in reference to an aggravated battery (Doc. 6-4 at 30). Petitioner's claim that Smeltzer was an informant who had a personal relationship with Deputy Reynolds is speculative and will not support a claim of ineffective assistance of counsel. *See Tejeda*, 941 F.2d at 1559. Accordingly, this claim is not substantial and is therefore is denied as procedurally barred.

R. Claim Fifteen

Petitioner raises a claim that the cumulative effect of counsel's errors is sufficient to undermine the confidence in the outcome of trial (Doc. 10 at 26). Although the cumulative effect of several errors that are harmless by themselves could result in prejudice, *United States v. Preciado-Cordoba*, 981 F.2d 1206, 1215 n.8 (11th Cir. 1993), in addressing a claim of cumulative error, the trial as a whole must be examined to determine whether Petitioner's trial was fundamentally unfair. *Conklin v. Schofield*, 366 F.3d 1191, 1210 (11th Cir. 2004). The Court has considered the cumulative effect of Petitioner's ineffective assistance of counsel claims and concludes that he cannot demonstrate cumulative error sufficient to entitle him to habeas relief. Therefore, this claim is denied.

Any of Petitioner's allegations not specifically addressed herein have been found to be without merit.

IV. CERTIFICATE OF APPEALABILITY

This Court should grant an application for certificate of appealability only if the Petitioner "makes a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). To make such a showing "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Lamarca v. Sec'y Dep't of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009). When a district court dismisses a federal habeas petition on procedural grounds without reaching the underlying constitutional claim, a certificate of appealability should issue only when a Petitioner shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*; *Lamarca*, 568 F.3d at 934. However, a prisoner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

The Court concludes that Petitioner has made the requisite showing with regard to claims sixteen, seventeen, eighteen, nineteen, and twenty. However, Petitioner has not made the requisite showing with regard to the remainder of the claims raised in the Amended Petition. Petitioner is entitled to a certificate of appealability on claims sixteen through twenty.

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. The Amended Petition for Writ of Habeas Corpus filed by Scott Moser (Doc. 10) is **DENIED**, and this case is **DISMISSED WITH PREJUDICE**.

2. Petitioner is **GRANTED** a certificate of appealability on claims sixteen through twenty. A certificate of appealability is **DENIED** as to the remaining claims.

3. The Clerk of the Court is directed to enter judgment and close the case.

DONE AND ORDERED in Orlando, Florida, this 28th day of February, 2017.

ROY B. DALTON JR.
United States District Judge

Copies to:
OrlP-3 2/28
Counsel of Record
Scott Moser