Exhibit "A"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-10346-C

RICKY WILLIAMS,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

ORDER:

Ricky Williams's motion for a certificate of appealability is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

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

Exhibit "B"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-10346-C

RICKY WILLIAMS,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

Before: WILLIAM PRYOR and ROSENBAUM, Circuit Judges.

BY THE COURT:

Ricky Williams has filed a motion for reconsideration, pursuant to 11th Cir. R. 27-2, of this Court's March 30, 2020, order denying him a certificate of appealability. Upon review, Williams's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

Exhibit "C"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 0:17-cv-21863-UU/LMM

RICKY WILLIAMS,

Petitioner,

v.

SEC'Y, FLA. DEP'T OF CORR., et al.

Respondents.

_____/

ORDER ON MAGISTRATE'S REPORT AND RECOMMENDATION

This Cause is before the Court upon Petitioner's *pro se* Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (the "Petition") (D.E. 1).

THE COURT has reviewed the Petition and pertinent parts of the record and is otherwise fully advised in the premises.

This matter was referred to Magistrate Judge Lisette M. Reid who, on October 1, 2019, issued a Report (D.E. 24) (the "Report") recommending that the Petition be denied because:

1. Petitioner's claim that his counsel on direct appeal ineffectively filed a brief under *Anders v. California*, 386 U.S. 738 (1967), is unexhausted and procedurally barred;
2. The state post-conviction court's rejection of Petitioner's claim that his trial counsel ineffectively failed to impeach the complaining witness, Valle, with a prior inconsistent statement was not contrary to, or an unreasonable application of, clearly established federal law or an unreasonable determination of the facts;
3. Petitioner's claim that his trial counsel ineffectively failed to impeach other witnesses with unidentified prior inconsistent statements fails because the claim is wholly

contrary to, or an unreasonable application of, clearly established federal law or an unreasonable determination of the facts;

9. The state post-conviction court's rejection of Petitioner's claim that his trial counsel ineffectively advised him to reject an alleged 7-year plea offer because Valle (the complainant) was nowhere to be found was not contrary to, or an unreasonable application of, clearly established federal law or an unreasonable determination of the facts;

10. The state post-conviction court's rejection of Petitioner's claim that his trial counsel ineffectively failed to play for the jury the complaining witness's sworn, videotaped statement to the police was not contrary to, or an unreasonable application of, clearly established federal law or an unreasonable determination of the facts;

11. The state post-conviction court's rejection of Petitioner's conclusory claim that the trial court erred in denying his motion for judgment of acquittal was not contrary to, or an unreasonable application of, clearly established federal law or an unreasonable determination of the facts;

12. The state post-conviction court's rejection of Petitioner's claims that the trial court denied him due process by instructing the jury on lesser-included offenses and principals was not contrary to, or an unreasonable application of, clearly established federal law or an unreasonable determination of the facts; and

13. The state post-conviction court's rejection of Petitioner's claim that the trial court the trial court erred in denying his motion to correct sentencing on double jeopardy grounds was not contrary to, or an unreasonable application of, clearly established federal law or an unreasonable determination of the facts.

The state post-conviction court rejected the argument raised in Claim 9, reasoning that trial counsel's alleged advice was not deficient because it "did not 'fall below an objective standard of reasonableness because the absence of a critical prosecutorial witness would be a relevant factor an attorney would consider when advising his or her client whether to plead guilty.'" D.E. 9-3 at 156–58 (quoting *Berry v. State*, 336 S.W.3d 159, 166 (Mo. Ct. App. 2011)). The Report further posits that counsel's alleged misadvice was not deficient because, as an essential prosecution witness, "it is arguable that counsel reasonably advised petitioner to reject the plea offer because, absent [Valle's] testimony, the prosecution could not prove its case." D.E. 24 at 22; *see also Mostowicz v. United States*, 625 F. App'x 489, 494 (11th Cir. 2015) (per curiam) (holding that counsel's advice to deny plea offer because the court might grant the motion to suppress was not deficient). "Simply put, advice, although incorrect in retrospect, does not necessarily rise to the level of ineffective assistance of counsel." *Mostowicz*, 625 F. App'x at 494. "[A]n erroneous strategic prediction . . . is not necessarily deficient performance." *Lafler v. Cooper*, 566 U.S. 156, 174 (2012). The state post-conviction court's finding that trial counsel did not perform deficiently was not contrary to, or an unreasonable application of, clearly established federal law or an unreasonable determination of the facts.

Moreover, to show *Strickland* prejudice regarding counsel's advice whether to plead guilty, a defendant "must allege and prove a reasonable probability, defined as a probability sufficient to undermine confidence in the outcome, that (1) he . . . would have accepted the offer had counsel advised [him] correctly, (2) the prosecutor would not have withdrawn the offer, (3) the court would have accepted the offer, and (4) the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Alcorn v.*

Exhibit "D"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 17-62420-CV-UNGARO
MAGISTRATE JUDGE REID

RICKY WILLIAMS,

Petitioner,

v.

SEC'Y, DEP'T OF CORRECTIONS et al.,

Respondents.
_____/

REPORT OF MAGISTRATE JUDGE

Petitioner has filed a *pro se* petition for writ of habeas corpus under 28 U.S.C. § 2254. His habeas petition attacks the constitutionality of his judgment of conviction for strongarm robbery. The trial court entered this judgment following a jury verdict in Case No. 10-007927-CF-10A, Seventeenth Judicial Circuit of Florida, Broward County.

The undersigned has reviewed the entire record, including the operative § 2254 petition. [ECF 1]. As discussed below, the petition should be DENIED.

I. Background

A. Information and Trial Testimony

The state charged petitioner with strongarm robbery. [ECF 9-1, p. 7].[1] The case went to trial. The following witnesses gave the following relevant testimony.

1. *Jose Valle*

On the night in question, Valle was walking in public. [ECF 10-2, pp. 5, 11]. Two black men approached him. The bigger guy grabbed him, choked him, and threw him on the ground. [*Id.* pp. 6-8].

The robbers took his wallet and $140 [*Id.* pp. 7-8, 18-19]. Shortly thereafter, a patrol car passed by. The robbers started to run, but Valle never lost sight of them. [*Id.* pp. 8-9, 15-16, 20].

Valle pointed out the robbers to the officer, who pursued them. Later, on or near the scene, Valle identified the robbers to the police as the men who robbed him. [*Id.* pp. 9-10].

Valle admitted that he drank, but claimed on that night he had had one drink. [*Id.* pp. 7, 10, 11, 17]. He was not drunk when the men robbed him. [*Id.* p. 18].

[1] All page citations for ECF entries refer to the page-stamp number located at the top, right-hand corner of the page.

2. *Lee Martin*

Martin is a police officer for the Broward County Sheriff's Office ("Sheriff's Office"). [*Id.* pp. 21-22]. On that night, Martin was on patrol. [*Id.* pp. 22-24]. An anxious Valle flagged him down. [*Id.* p. 24]. Valle pointed out two black men who were 30 to 40 feet away. [*Id.* pp. 25-26]. Martin called for the men to come back. [*Id.* p. 25]. One of them, Mr. Allen, complied; the other fled. [*Id.*]

The fugitive wore dark shorts and a white T-shirt. [*Id.* p. 26]. He was detained within minutes. [*Id.* p. 27].

3. *James Ippolito*

Ippolito was riding with Martin as a citizen observer. [*Id.* pp. 29-30]. A panicking Valle flagged them down and said that he had been robbed. [*Id.* pp. 30-31]. Valle pointed out two black males who were walking away at 40 to 50 yards. [*Id.* pp. 31-32]. One of the men, who wore red shorts and a white shirt, fled. [*Id.* pp. 32, 36].

Ippolito did a "show-up identification" approximately five minutes later after another officer had detained the fugitive. [*Id.* p. 37]. Valle identified the fugitive as one of the robbers. [*Id.* p. 33]. Ippolito identified petitioner in court as the fugitive. [*Id.* pp. 33-34].

4. *Danny Freiberger*

Freiberger is a police officer for the Sheriff's Office. [*Id.* p. 38]. Freiberger received an alert regarding a suspect wearing a white T-shirt and dark shorts. [*Id.* p. 39]. Freiberger detained a man wearing a white shirt within two blocks of the robbery. [*Id.* pp. 39-40]. Freiberger identified petitioner in court as that individual. [*Id.* at 40]. Freiberger searched petitioner and found only eight $1 bills. [*Id.* pp. 42-43]. Valle identified petitioner as a robber during the show-up identification. [*Id.* pp. 45-46].

5. *Trevor Goodwin*

Goodwin is a detective for the Sheriff's Office. [*Id.* p. 47]. Goodwin interviewed petitioner on that night. [*Id.* p. 48].

The prosecutor played the video of the interview in court. [*Id.* pp. 49-50]. During the interview, petitioner initially said that he did not know anything about a robbery and did not see anything happen. [*Id.* pp. 56-58]. Petitioner then said that Valle wanted to buy marijuana and got mad because petitioner did not have it. [*Id.* p. 58].

Also during the interview, petitioner initially denied touching Valle. [*Id.* p. 59]. Goodwin then stated that the investigators found petitioner's DNA on Valle. [*Id.* pp. 59-60]. After that, petitioner stated that he "could have touched" Valle. [*Id.*

p. 60]. Further, petitioner stated that Valle had grabbed him and that Valle was "very drunk." [*Id.* pp. 61-62].

Goodwin testified that he falsely told petitioner that the investigators found his DNA on Valle as a "detective ploy." [*Id.* p. 66]. The ploy worked because petitioner "[w]ent from not knowing him to I made contact with him." [*Id.*]

Goodwin recovered eight $1 bills on petitioner. [*Id.* p. 68].

Petitioner did not testify or call any witnesses.

B. Verdict and Post-Trial Proceedings

The jury found petitioner guilty of strongarm robbery. [*Id.* p. 126]. The trial court sentenced him to 30 years in prison as a habitual felony offender, with a 15-year mandatory minimum as a prison releasee reoffender. [ECF 9-1, pp. 10-21].

After his attorney filed an *Anders* brief, petitioner filed a *pro se* appeal. [*Id.* pp. 23, 26]. The Fourth District Court of Appeal ("Fourth District") affirmed without comment. [*Id.* p. 81].

Petitioner filed a postconviction motion, which he twice amended. The postconviction court entered a corrected order directing petitioner to file a legally sufficient postconviction motion as to claim 5. [ECF 9-3, p. 27]. The court otherwise denied petitioner's second amended postconviction motion for the reasons in the state's response. [*Id.*] Later, the court denied petitioner's motion for postconviction relief amending claim 5 for the reasons in the state's response. [ECF 9-4, p. 204].

Petitioner appealed. The Fourth District affirmed without comment. [*Id.* p. 237].

Petitioner filed a § 2254 motion. [ECF 1]. The state filed a response, [ECF 8], and supporting appendices, [ECF 9; 10]. Petitioner replied. [ECF 13]. In his reply, petitioner does not address the state's arguments and contends that the postconviction court erred by not conducting an evidentiary hearing. Furthermore, petitioner requests a federal evidentiary hearing.

II. Legal Standard Under 28 U.S.C. § 2254

Title 28 U.S.C. § 2254(d) sets forth the following standards for granting federal habeas corpus relief:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings 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.

Under § 2254(d)(1)'s "contrary to" clause, courts may grant the writ if the state court: (1) reaches a conclusion on a question of law opposite to that reached by the Supreme Court; or (2) decides a case differently than the Supreme Court has on

materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). Under its "unreasonable application" clause, courts may grant the writ if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the case. *Williams*, 529 U.S. at 413. "[C]learly established Federal law" consists of Supreme Court "precedents as of the time the state court renders its decision." *Greene v. Fisher*, 565 U.S. 34, 38 (2011) (citation and emphasis omitted).

An unreasonable application of federal law differs from an incorrect application of federal law. *Renico v. Lett*, 559 U.S. 766, 773 (2010) (citation omitted). For § 2254(d)(1) purposes, the application must be "objectively unreasonable." *Id.* (citation omitted). "This distinction creates a substantially higher threshold for obtaining relief than *de novo* review." *Id.* (citation omitted). Under this standard, "a state prisoner must show that the state court's ruling . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

Courts "apply this same standard when evaluating the reasonableness of a state court's decision under § 2254(d)(2)." *Landers v. Warden*, 776 F.3d 1288, 1294 (11th Cir. 2015). That is, "[a] state court's . . . determination of facts is unreasonable

only if no 'fairminded jurist' could agree with the state court's determination." *Id.* (citation omitted).

Under § 2254(d), "when the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion[,]" "a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018).

However, when the decision of the last state court to decide a prisoner's federal claim contains no reasoning, federal courts must "'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale." *Id.* "It should then presume that the unexplained decision adopted the same reasoning." *Id.*

A contrastable situation occurs when the decision of the last state court to decide a federal claim contains no reasoning and there is "no lower court opinion to look to." *Id.* at 1195. In this case, "it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Richter*, 562 U.S. at 99 (citation omitted). Thus, in this scenario, "[s]ection 2254(d) applies even [though] there has been a summary denial." *Cullen v. Pinholster*, 563 U.S. 170, 187 (2011) (citation omitted). Because § 2254(d) applies, and because the last state court decision is unreasoned and there is no lower court decision to look through to, "a habeas court must determine what

arguments or theories . . . could have supported[] the state court's decision[.]" *Richter*, 562 U.S. at 102.

III. Ineffective Assistance of Counsel Principles

To establish a claim of ineffective assistance of counsel, petitioner must show that his attorney's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

To prove deficiency, he must show that his attorney's performance "fell below an objective standard of reasonableness" as measured by prevailing professional norms. *Id.* at 688. Courts must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

To prove prejudice, petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.*

It is "all the more difficult" to prevail on a *Strickland* claim under § 2254(d). *Richter*, 562 U.S. at 105. As the standards that *Strickland* and § 2254(d) create are both "highly deferential," review is "doubly" so when the two apply in tandem. *Id.* (citation omitted). Thus, "[w]hen § 2254(d) applies, the question is not whether counsel's actions were reasonable." *Id.* Rather, "[t]he question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.*

Petitioner has the burden of proof on his ineffectiveness claim, *Holsey v. Warden*, 694 F.3d 1230, 1256 (11th Cir. 2012), as well as the burden of proof under § 2254(d), *Pinholster*, 563 U.S. at 181.

IV. Analysis

A. Claim 1

Claim 1 is procedurally barred. Petitioner appears to argue that counsel ineffectively filed an *Anders* brief because he did not have grounds to do so. *See* [ECF 1, p. 6]. On direct appeal, counsel filed an *Anders* brief. [ECF 9-4, p. 248]. The Fourth District allowed counsel to withdraw, stating that "the appeal [was] wholly frivolous." [*Id.* p. 264]. This claim is unexhausted because petitioner did not raise it in state court. *See* [ECF 9-1, pp. 193-229]. *See also Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (citation omitted).

An unexhausted claim is procedurally defaulted for purposes of federal habeas review if the court to which the petitioner would be required to present the claim in order to meet the exhaustion requirement would now find the claim procedurally barred. *See Raleigh v. Sec'y, Fla. Dep't of Corr.*, 827 F.3d 938, 956-57 (11th Cir. 2016) (citation omitted).

Under Florida law, a defendant generally must file a Rule 3.850 motion within two years after his "judgment and sentence become final." Fla. R. Crim. P. 3.850(b). "A judgment and sentence become final for the purpose of rule 3.850 when any

or prejudice. [ECF 9-3, pp. 27, 50, 149-51]. The Fourth District affirmed without comment. [ECF 9-4, p. 237].

Here, the postconviction court reasonably concluded that counsel's failure to so impeach Valle did not prejudice petitioner. The court reasonably could have concluded that, had counsel so impeached Valle, there was no reasonable probability of a more favorable outcome.

Valle testified that two men robbed him. Officers Martin and Ippolito found him in a nervous and agitated state. Valle immediately pointed out two men to them, one of whom fled. The officers set up a perimeter and found a man in the vicinity who matched the description of the fugitive. Shortly thereafter, Valle identified that man as petitioner. Likewise, Ippolito and Freiberger identified that man in court as petitioner. Moreover, although petitioner denied robbing Valle during his interview with Goodwin, he changed his story and acknowledged that there was physical contact between them. True, the officers did not discover the $140 or Valle's wallet on petitioner. However, petitioner could have discarded the property while fleeing; the state so argued during closing argument.

On this record, the jury could have believed Valle's trial testimony versus the prior inconsistent statement. Furthermore, counsel attacked Valle's credibility during closing argument, and the jury evidently rejected these arguments in finding petitioner guilty.

direct review proceedings have concluded and jurisdiction to entertain a post-conviction motion returns to the trial court." *Lewis v. State*, 196 So. 3d 423, 424 (Fla. 4th DCA 2016) (citation omitted). Where, as here, the defendant does not pursue an appeal to the Florida Supreme Court, this occurs when the District Court of Appeals issues its mandate. *Miller v. State*, 601 So. 2d 604, 604 (Fla. 4th DCA 1992) (citations omitted).

Here, the Fourth District issued its mandate affirming petitioner's conviction on September 28, 2012. [ECF 9-1, p. 83]. More than two years have elapsed since this date. Petitioner could not return to state court and raise this claim; the court would deny it as untimely.

In sum, claim 1 is procedurally defaulted.

B. Claim 2

Claim 2 lacks merit. Petitioner alleges that counsel ineffectively failed to impeach Valle. As noted, Valle testified that the men took $140 from him. However, Officer Martin's report says that Valle told the officers that petitioner took the eight $1 bills that the officers found on petitioner. [ECF 9-3, p. 40]. Petitioner suggests that, had counsel impeached Valle with this prior inconsistent statement, the outcome would have been different.

Petitioner raised this claim in state court. [ECF 9-1, pp. 199-202; ECF 9-3, pp. 36-39]. The postconviction court held that petitioner could not show deficiency

Additionally, had counsel so impeached Valle, the state could have introduced statements Valle made during a sworn, videotaped interview with investigators after the robbery "to rebut an express or implied charge . . . of . . . recent fabrication[.]" Fla. Stat. § 90.801(2)(b). During that interview, Valle stated that the robbers "took $140 . . . [and his] wallet." [ECF 9-4, p. 191]. Thus, it is arguable that counsel reasonably decided not to so impeach Valle.

In sum, the state courts' rejection of claim 2 was not contrary to, or an unreasonable application of, clearly established federal law or an unreasonable determination of the facts.

C. Claim 3

Claim 3 lacks merit. Petitioner contends that counsel ineffectively failed to impeach witnesses with prior inconsistent statements. However, petitioner has not identified these alleged inconsistencies. [ECF 1, p. 9]. Hence, this claim is wholly conclusory and fails for this reason alone. *See McFarland v. Scott*, 512 U.S. 849, 856 (1994) ("Habeas corpus petitions must meet heightened pleading requirements[.] . . ."); *see also Wilson v. United States*, 962 F.2d 996, 998 (11th Cir. 1992) (per curiam) ("Conclusory allegations of ineffective assistance are insufficient." (citation omitted)).

Furthermore, this claim would fail even if it were adequately alleged. In the postconviction court, petitioner contended that counsel ineffectively failed to

impeach Valle with three prior inconsistent statements: (1) the man the officers detained was not wearing red shorts; (2) the robbers took $120 from him; and (3) the robbers took $8 from him. [ECF 9-3, pp. 36-39]. The court held that he could not show deficiency or prejudice. [*Id.* pp. 27, 50, 149-51]. The Fourth District affirmed without comment. [ECF 9-4, p. 237].

Here, the postconviction court reasonably concluded that, had counsel so impeached Valle, there was no reasonable probability of a more favorable outcome. The undersigned already addressed the third inconsistency and declines to do so further. Regarding the second, it is not materially inconsistent with Valle's testimony that the men stole $140. And, again, Valle stated during his interview that the robbers took $140. The state could have introduced this statement to rebut the charge of recent fabrication.

Regarding the first, petitioner did not testify at trial that the robbers wore red shorts. Furthermore, although Ippolito testified that the fugitive wore red shorts, Martin and Freiberger testified that he wore dark shorts. Thus, petitioner's prior statement that the man he identified on the scene was not wearing red shorts did not materially contradict the state's trial testimony. And, even if it did, the state would have been able to rebut the charge of recent fabrication with statements from the interview expressing confidence in his identification of petitioner. *See* [ECF 9-4, pp. 196-97].

In sum, the state courts' rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law or an unreasonable determination of the facts.

D. Claim 4

Claim 4 lacks merit. Petitioner contends that counsel ineffectively failed to strike juror Castro because he expressed bias. [ECF 1, p. 11]. During jury selection, defense counsel asked the jurors if hearing anything related to drugs would affect their ability to sit as a juror. [ECF 10-1, pp. 74-75]. Castro answered "Yes." [*Id.* p. 75]. Castro did not elaborate and counsel did not ask any follow-up questions.

The postconviction court rejected this claim, holding that: (1) the record refuted the claim; and (2) petitioner did not show deficiency or prejudice. [ECF 9-3, pp. 27, 151-53]. The Fourth District affirmed without comment. [ECF 9-4, p. 237].

Here, it is arguable that counsel's failure to move to strike Castro was not deficient. Petitioner stated that he participated in jury selection and found the selected jury acceptable. His consent to the selected jury "[is] probative of the reasonableness of the chosen strategy and of trial counsel's performance." *Bell v. Evatt*, 72 F.3d 421, 429 (4th Cir. 1995); *see also Pitts v. Sec'y, DOC & Fla. Att'y Gen.*, No. 2:15-CV-13-FTM-29MRM, 2016 WL 128559, at *5 (M.D. Fla. Jan. 12, 2016) ("If the Defendant consents to counsel's strategy, there is no merit to a claim of ineffective assistance of counsel." (citation omitted)). Furthermore, while Castro

said that drugs could affect his ability to sit as a juror, he did not elaborate. Immediately thereafter, counsel asked the jurors if they would like to discuss anything that had come up during jury selection and Castro did not speak. [ECF 10-1, p. 5]. Thus, on the whole, the record indicates that counsel did not question Castro's ability to be a fair and impartial juror. Accordingly, there is a reasonable argument that counsel's failure to move to strike Castro was not deficient.

In sum, the state courts' rejection of claim 4 was not contrary to, or an unreasonable application of, clearly established federal law or an unreasonable determination of the facts.

E. Claim 5

Claim 5 lacks merit. Petitioner contends that counsel unprofessionally accused Valle of being a drunk during cross-examination. [ECF 1, p. 17]. This unprofessionalism allegedly caused the judge to cut off any further inquiry regarding his alleged alcoholism. The postconviction court rejected this claim summarily. [ECF 9-3, pp. 27, 153-55]. The Fourth District affirmed without comment. [ECF 9-4, p. 237].

During cross-examination, the judge sustained the prosecutor's objection to the question, "[Y]ou're a drunk, correct[?]" [ECF 10-2, p. 18]. However, counsel extensively cross-examined Valle about whether he was drunk on the night in

question and an alcoholic in general. [*Id.* pp. 11-13, 17-18]. Counsel also made these points during closing argument.

Even if the question was legally objectionable, it is arguable that it was not deficient because it promoted petitioner's defense theory. And, for this and other reasons, the postconviction court reasonably concluded that the question did not prejudice petitioner.

In sum, the state courts' rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law or an unreasonable determination of the facts.

F. Claim 6

Claim 6 is conclusory and somewhat unclear. Petitioner appears to allege that counsel ineffectively failed to: (1) cross-examine Valle, Martin, and Goodwin with prior inconsistent statements; and (2) call Allen (the other robber) to contradict the state's story. [ECF 1, p. 17]. Petitioner adds that counsel was "never prepared." [*Id.*] The postconviction court rejected this claim, holding that petitioner could not show deficiency or prejudice. [ECF 9-3, p. 50; ECF 9-4, p. 204]. The Fourth District affirmed without comment. [ECF 9-4, p. 237].

Alleged deficiency (1) is a rehash of claims 2 and 3 and fails for the same reasons. Regarding alleged deficiency (2), the record does not indicate why counsel failed to call Allen. Therefore, the court must "presume that . . . what witnesses

[defense counsel] . . . did not present[] [was an] act[] that some reasonable lawyer might do." *Jones v. Campbell*, 436 F.3d 1285, 1293 (11th Cir. 2006) (citation omitted). Notably, Freiberger testified that Allen gave the police petitioner's name, telling them that "Ricky" fled the scene. [ECF 9-3, p. 53; ECF 10-2, p. 43]. Thus, counsel likely concluded that any testimony from Allen would have been incriminating. And the contention that counsel was not otherwise "prepared" for trial is completely conclusory.

In sum, the state courts' rejection of claim 6 was not contrary to, or an unreasonable application of, clearly established federal law or an unreasonable determination of the facts.

G. Claim 7

Claim 7 lacks merit. The trial court sentenced petitioner 30 years in prison as a habitual felony offender, with a 15-year mandatory minimum sentence as a prison releasee reoffender. [ECF 9-1, pp. 18-19].

Petitioner alleges that counsel misadvised him as to his eligibility for gain time and the length of the sentence to be imposed. [ECF 1, p. 18]. This misadvice, he adds, caused him to reject a more favorable plea offer. [*Id.*]

Petitioner does not allege any facts to support this claim even though the court earlier granted him leave to amend his petition for this purpose. [*Id.*] *See also* [ECF

11; 12; 13]. This claim is wholly conclusory and fails for this reason alone. *See McFarland*, 512 U.S. at 856; *Wilson*, 962 F.2d at 998.

This claim would fail even if it were adequately pleaded. Petitioner argued in his postconviction motion that counsel misadvised him that he could be sentenced as a habitual felony offender or prison releasee reoffender, but not both. [ECF 9-1, pp. 221-22]. The postconviction court rejected this claim, holding that he could not show prejudice. [ECF 9-3, pp. 27, 155-56]. The Fourth District affirmed without comment. [ECF 9-4, p. 237].

The postconviction court's decision was reasonable. Petitioner conceded that he knew that the state sought both enhancements. [ECF 9-1, pp. 221-22]. *See also* [ECF 9-4, pp. 184-85 (the state's notices thereof)]. Furthermore, because the state charged petitioner with a second-degree felony, petitioner faced a 30-year maximum habitual felony offender sentence. Fla. Stat. § 775.084(4)(a)2. And the court imposed a 30-year sentence. Thus, petitioner cannot show that counsel's alleged misadvice that the court could not impose both enhancements prejudiced him. The record shows that he knew that, if he went to trial, he could receive the sentence that the court imposed. Petitioner has not alleged here or below that he lacked such awareness. [ECF 1 at 18; ECF 9-1, pp. 221-22; ECF 9-3, p. 155].

Furthermore, petitioner maintained his innocence during his interview with Goodwin and at trial. This fact, likewise, indicates that petitioner had no intention to

accept the putative plea offer. *Osley v. United States*, 751 F.3d 1214, 1224 (11th Cir. 2014) (denial of guilt is "a relevant consideration" in determining whether the defendant "would have accepted the government's plea offer").

In sum, the state courts' rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law or an unreasonable determination of the facts.

H. Claim 8

Petitioner contends that counsel ineffectively failed to object to the standard jury instruction on principals. [ECF 1, p. 18]. Petitioner reasons that the instruction was improper because he "was charged solo for the case[.]" [*Id.*] The state court rejected this claim, holding that petitioner could not show deficiency. [ECF 9-3, pp. 27, 156]. The Fourth District affirmed without comment. [ECF 9-4, p. 237]. As discussed below, it is arguable that counsel's failure to object to the instruction was not deficient.

Jury instructions requested by the State "must relate to issues concerning evidence received at trial." *Lewis v. State*, 693 So. 2d 1055, 1057 (Fla. 4th DCA 1997) (citations omitted). "Therefore, it is generally error to instruct the jury on principals where there is no evidence to support an aiding and abetting theory of guilt because the jury may be confused by the instruction." *Id.*

Here, it is arguable that Valle's testimony warranted an instruction on principals. The evidence supported reasonable inferences that: (1) petitioner threw Valle down; (2) Allen took Valle's wallet; and (3) Allen then gave the wallet to petitioner, who got rid of it before being detained. Consistent with these reasonable inferences, the state argued that petitioner threw Valle down and left open the possibility that Allen took the property, at least initially. *See* [ECF 10-2, p. 104 ("Regardless of whether [petitioner] or *Mr. Allen took the wallet*, [petitioner] played a significant role in committing this crime." (emphasis added))]. Thus, it is arguable that the instruction on principals related to issues concerning evidence received at trial. Consequently, the judge likely would have overruled any objection to said instruction. *See Freeman v. Att'y Gen.*, 536 F.3d 1225, 1233 (11th Cir. 2008) ("A lawyer cannot be deficient for failing to raise a meritless claim[.]" (citation omitted)).

In sum, the state courts' rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law or an unreasonable determination of the facts.

I. Claim 9

Claim 9 lacks merit. Petitioner alleges that counsel misadvised him to reject the state's alleged 7-year plea offer. In support, petitioner alleges that counsel told him before trial that Valle was "[nowhere] to be found." [ECF 1, p. 19]. Further,

petitioner alleges that counsel told him that the prosecution could not convict him without Valle's testimony. [*Id.*] However, Valle testified, the jury convicted petitioner, and the court sentenced him to 30 years in prison. Therefore, counsel's alleged misadvice prejudiced him. *See* [*id.*]

The postconviction court rejected this claim, holding that petitioner failed to show deficiency. [ECF 9-3, pp. 27, 157]. The court reasoned that the "trial court's alleged advice did not 'fall below an objective standard of reasonableness because the absence of a critical prosecutorial witness would be a relevant factor an attorney would consider when advising his or her client whether to plead guilty.'" [*Id.* p. 157 (quoting *Berry v. State*, 336 S.W.3d 159, 166 (Mo. Ct. App. 2011))]. The Fourth District affirmed without comment. [ECF 9-4, p. 237].

This claim is conclusory and fails for this reason alone. *See McFarland*, 512 U.S. at 856; *Wilson*, 962 F.2d at 998. Petitioner has not alleged any details about any communications between him and counsel regarding the purported 7-year plea offer.

Furthermore, it is arguable that counsel's alleged misadvice was not deficient. Valle was an essential prosecutorial witness. Thus, it is arguable that counsel reasonably advised petitioner to reject the plea offer because, absent his testimony, the prosecution could not prove its case. *Berry*, 336 S.W.3d at 166; *see also Mostowicz v. United States*, 625 F. App'x 489, 494 (11th Cir. 2015) (per curiam) (counsel's advice to deny plea offer because court might grant motion to suppress,

which would have led to a more favorable outcome, was not deficient). True, counsel's alleged prediction that Valle would not appear for trial was incorrect. However, "a mistaken prediction is not enough in itself to show deficient performance, even when that mistake is great[.]" *United States v. Barnes*, 83 F.3d 934, 940 (7th Cir. 1996); *see Lafler v. Cooper*, 566 U.S. 156, 174 (2012) ("[A]n erroneous strategic prediction . . . is not necessarily deficient performance.").

In sum, the state courts' rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law or an unreasonable determination of the facts.

J. Claim 10

Claim 10 lacks merit. Petitioner contends that counsel ineffectively failed to play for the jury Valle's sworn, videotaped statement to the police after the robbery. [ECF 1, p. 19]. Petitioner contends that, had counsel played the video, the jury would have heard his slurred speech and inconsistent statements. [*Id.*] This would have "supported [the] fact that [Valle] was surely intoxicated at the time he falsely accused [petitioner] of . . . robbery[.]" [*Id.*] "And for this cause the verdict would have been different." [*Id.*]

The postconviction court rejected this claim, holding that petitioner failed to show deficiency. [ECF 9-3, pp. 27, 158-59]. The court reasoned, *inter alia*, that: (1) the statement would have harmed petitioner because the victim cried during the

interview and expressed concerns about his and others' safety; and (2) it was consistent with his testimony. [*Id.*] The Fourth District affirmed without comment. [ECF 9-4, p. 237].

Here, it is arguable that counsel did not deficiently fail to play the video for the jury. Playing the video likely would have prejudiced the defense because: (1) Valle's statements were consistent with his trial testimony; and (2) he cried throughout it and expressed safety concerns. [*Id.* pp. 190-202].

True, Valle stated, without elaboration, "I'm a drunk" during the interview. [*Id.* at 198]. However, as the postconviction court found, it appears that he "merely meant that he is not God and it is not his place to judge others[.]" [ECF 9-3, p. 158]. *See also* [ECF 9-4, p. 198]. Furthermore, consistent with his trial testimony, Valle stated earlier in the interview, "I drink, no drugs." [ECF 9-4, p. 191].

In sum, the state courts' rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law or an unreasonable determination of the facts.

K. Claim 11

Claim 11 lacks merit. Petitioner conclusorily contends that the trial court violated his federal rights by denying his motion for judgment of acquittal. [ECF 1, p. 21; ECF 9-1, p. 29]. The Fourth District rejected this "wholly frivolous" claim. [ECF 9-1, p. 81; ECF 9-4, p. 264].

"[Florida] Rule [of Criminal Procedure] 3.380(a) provides that a motion for judgment of acquittal should be granted if, at the close of the evidence, the court is of the opinion that the evidence is insufficient to warrant a conviction." *Tibbs v. State*, 397 So. 2d 1120, 1123 n.9 (Fla. 1981). "There is sufficient evidence to sustain a conviction if, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt." *Baugh v. State*, 961 So. 2d 198, 204 (Fla. 2007) (citation omitted). As indicated above, *supra* Part I(A), the state's evidence was sufficient for a rational juror to find that petitioner robbed Valle, especially when taken in the most favorable light.

In short, the Fourth District's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law or an unreasonable determination of the facts.

L. Claim 12

Claim 12 lacks merit. Petitioner contends that the trial court violated due process by instructing the jury on: (1) the lesser-included offenses of battery, petty theft, and robbery by sudden snatching; and (2) principals. The Fourth District rejected this "wholly frivolous" claim. [ECF 9-1, p. 81; ECF 9-4, p. 264].

Whether the instructions were proper under Florida law is an issue this habeas court cannot reexamine. *See Waddington v. Sarausad*, 555 U.S. 179, 192 n.5 (2009)

(citation omitted). Thus, the issue is whether they "so infused the trial with unfairness as to deny due process of law." *Estelle v. McGuire*, 502 U.S. 62, 75 (1991) (citation omitted).

Here, petitioner has not meaningfully alleged, much less shown, such unfairness. As discussed, the evidence supported an instruction on principals. Furthermore, there is no indication that the instructions for robbery by sudden snatching, battery, and petty theft rendered petitioner's trial unfair. All these crimes are listed as lesser-included offenses in the standard jury instructions. Fla. Std. Jury Instr. (Crim.) 15.1. Petitioner has not meaningfully alleged, much less shown, that "the allegations of [strongarm robbery] [do not] contain all the elements of the lesser offense[s] and [that] the evidence at trial would [not] support a verdict on the lesser offense." *Williams v. State*, 957 So. 2d 595, 599 (Fla. 2007) (citation omitted). And there is no indication that the inclusion of the lesser-included offenses, even if improper, confused the jury or increased the likelihood of a conviction for strongarm robbery.

In sum, the Fourth District's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law or an unreasonable determination of the facts.

M. Claim 13

Claim 13 fails. The trial court sentenced petitioner 30 years in prison as a habitual felony offender, with a 15-year mandatory minimum sentence as a prison releasee reoffender. [ECF 9-1, pp. 18-19].

On appeal, petitioner contended that this sentence violated double jeopardy. The Fourth District rejected this claim, finding that it was "wholly frivolous." [*Id.* p. 81; ECF 9-4, p. 264]. Petitioner has re-raised this claim here. [ECF 1, p. 22].

The Double Jeopardy Clause "protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). This protection "is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature." *Ohio v. Johnson*, 467 U.S. 493, 499 (1984). "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter*, 459 U.S. 359, 366 (1983).

Under Florida law, the prison releasee reoffender statute "is properly viewed as a mandatory minimum statute, [whose] effect is to establish a sentencing floor." *Grant v. State*, 770 So. 2d 655, 658 (Fla. 2000) (citation omitted). "If a defendant is eligible for a harsher sentence pursuant to [the habitual offender statute] . . . , the court may[.] . . impose the harsher sentence." *Id.* (citation omitted).

Here, petitioner was eligible for a 30-year sentence as a habitual felony offender, and the trial court imposed this sentence. Thus, the Fourth District reasonably concluded that this sentence did not violate double jeopardy.

In sum, the Fourth District's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law or an unreasonable determination of the facts.

IV. Evidentiary Hearing

"[B]efore a habeas petitioner may be entitled to a federal evidentiary hearing on a claim that has been adjudicated [on the merits] by the state court, he must demonstrate a clearly established federal-law error or an unreasonable determination of fact on the part of the state court, based solely on the state court record." *Landers*, 776 F.3d at 1295. Here, except claim 1, the state courts adjudicated petitioner's claims on the merits, and he has not demonstrated an error in clearly established federal law or an unreasonable determination of fact. Thus, he is not entitled to an evidentiary hearing on these claims.

Nor is he entitled to an evidentiary hearing on claim 1. Because it is unexhausted and procedurally defaulted, "the record . . . precludes habeas relief[.]" *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007). Likewise, the court could "adequately assess [petitioner's] claim without further factual development." *Turner v. Crosby*, 339 F.3d 1247, 1275 (11th Cir. 2003).

Petitioner contends in his reply that the postconviction court erred in not holding an evidentiary hearing. However, "[a] state prisoner has no federal constitutional right to post-conviction proceedings in state court." *Lawrence v. Branker*, 517 F.3d 700, 717 (4th Cir. 2008) (citations omitted). Consequently, challenges to a state's collateral proceedings are not cognizable under § 2254. *See, e.g., Carroll v. Sec'y, DOC*, 574 F.3d 1354, 1365 (11th Cir. 2009). And, even if such a claim were cognizable, the postconviction court's failure to hold an evidentiary hearing did not violate any clearly established federal law.

V. Certificate of Appealability

"The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11(a), Rules Governing § 2254 Cases. "If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." *Id.* "If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22." *Id.* "A timely notice of appeal must be filed even if the district court issues a certificate of appealability." Rule 11(b), Rules Governing § 2254 Cases.

"A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district court rejects a petitioner's constitutional claims on the merits, "a

petitioner must show that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). By contrast, "[w]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a [certificate of appealability] should issue when the prisoner 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." *Slack*, 529 U.S. at 484.

Here, the undersigned denies a certificate of appealability. If petitioner disagrees, he may so argue in any objections filed with the district court. *See* Rule 11(a), Rules Governing § 2254 Cases ("Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue.").

VI. Recommendations

As discussed above, it is recommended that petitioner's habeas petition [ECF 1] be DENIED; that no certificate of appealability issue; that final judgment be entered; and that this case be closed.

Objections to this report may be filed with the district judge within fourteen days of receipt of a copy of the report. Failure to file timely objections shall bar

petitioner from a *de novo* determination by the district judge of an issue covered in this report and shall bar the parties from attacking on appeal factual findings accepted or adopted by the district judge except upon grounds of plain error or manifest injustice. *See* 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140, 148-53 (1985); *RTC v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir. 1993).

SIGNED this 1st day of October, 2019.

UNITED STATES MAGISTRATE JUDGE

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Exhibit "E"

Additional material from this filing is available in the Clerk's Office.