No._____

IN THE SUPREME COURT OF THE UNITED STATES

DELMAR REINHEIMER,
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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APPENDIX A

Opinion

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14603
Non-Argument Calendar

D.C. Docket No. 3:14-cv-00730-TJC-MCR

DELMAR REINHEIMER,

Petitioner - Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL,

Respondents - Appellees.

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

(September 8, 2020)

Before NEWSOM, GRANT, and LUCK, Circuit Judges.

PER CURIAM:

Delmar Reinheimer, a Florida prisoner serving a 13-year sentence for lewd or lascivious battery on a minor younger than 16 but older than 12, appeals the

district court's denial of his 28 U.S.C. § 2254 petition—in particular, the denial of his claim that his counsel was ineffective for affirmatively misadvising him about the Jimmy Ryce Act's applicability.[1] We issued a certificate of appealability to decide "[w]hether the district court erred in finding that Reinheimer's affirmative-misadvice claim regarding the Jimmy Ryce Act was procedurally defaulted in light of his failure-to-advise claim that was presented in state court." *Reinheimer v. Sec'y, Dep't of Corrs.*, No. 17-14603-D, slip op. at 23 (11th Cir. Nov. 15, 2018).

We review the district court's denial of a habeas petition on failure to exhaust and procedural default grounds *de novo*. *See Nyland v. Moore*, 216 F.3d 1264, 1266 (11th Cir. 2000). An applicant doesn't exhaust his state court remedies "if he has the right under the law of the [s]tate to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c). A claim is procedurally defaulted when a petitioner fails to exhaust the claim, the State hasn't expressly waived that failure, and the claim could no longer be brought in state court after the federal court dismisses it without prejudice. *McNair v. Campbell*, 416 F.3d 1291, 1304–05 (11th Cir. 2005). If an appellant doesn't raise an issue on appeal regarding a district court's ruling, he abandons the issue and waives our consideration of it.

[1] Fla. Stat. §§ 394.910-394.932, formerly known as the Jimmy Ryce Act, outlines a civil-commitment procedure for the long-term care and treatment of sexually violent predators. Because the parties have referred to the law as the Jimmy Ryce Act throughout the post-conviction proceedings, we do so as well.

See Fed. Sav. and Loan Ins. Corp. v. Haralson, 813 F.2d 370, 373 n.3 (11th Cir. 1987); *Johnson v. Wainwright*, 806 F.2d 1479, 1481 n.5 (11th Cir. 1986).

"To properly exhaust a claim, 'the petitioner must afford the State a full and fair opportunity to address and resolve the claim on the merits.'" *Kelley v. Sec'y for the Dep't of Corrs.*, 377 F.3d 1317, 1343 (11th Cir. 2004) (quoting *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992)). A federal habeas petitioner must present his claims "to the state courts such that the *reasonable reader* would understand each claim's *particular legal basis* and *specific factual foundation*." *Id.* at 1344–45 (emphasis added). "To ensure exhaustion, petitioners must present their claims in this manner of clarity throughout 'one complete round of the State's established appellate review process.'" *Id.* at 1345 (quoting *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999)).

Here, the district court properly found that Reinheimer failed to exhaust his claim that his trial counsel affirmatively misadvised him about the Jimmy Ryce Act. Reinheimer first raised the Jimmy Ryce Act in an evidentiary hearing before the Florida state circuit court on his amended motion for postconviction relief. In a colloquy between Reinheimer's counsel and the court, counsel indicated that before the hearing, Reinheimer had filed an amended petition where he alleged that

"he had failed to be advised of the Jimmy Ryce Act."[2] In response, the court explained that because Reinheimer had not yet been civilly detained under the Act (and it was unclear whether he ever would be), his counsel's failure to inform was not sufficient to set aside the plea. In any event, the court noted, the written plea form had contained a Jimmy Ryce warning, which Reinheimer had initialed. After this colloquy, the Jimmy Ryce Act was never mentioned again.

Reinheimer's bare allegation that he had "failed to be advised" could not, and did not, allow a reasonable reader to understand that the claim was one of affirmative misadvice. The state court understood Reinheimer's argument as a failure-to-inform claim and treated it as such. The court rejected the claim in part because Reinheimer's initials next to the Jimmy Ryce warning on his written plea form suggested that he had been informed.

Contrary to Reinheimer's assertion that his failure-to-inform and misadvice claims rest on the same premise, we have consistently distinguished between claims alleging that counsel failed to inform the defendant of the collateral consequences of a conviction and claims alleging that counsel affirmatively misadvised the defendant about such consequences. *See Holmes v. United States*, 876 F.2d 1545, 1553 (11th Cir. 1989); *Slicker v. Wainwright*, 809 F.2d 768, 770

[2] As the district court noted, however, the record did not contain any written amended petition in which Reinheimer raised a claim that counsel was ineffective for either failing to advise or misadvising him of the potential implications of the Jimmy Ryce Act.

(11th Cir. 1987); *Downs-Morgan v. United States*, 765 F.2d 1534, 1540–41 (11th Cir. 1985). Indeed here, the two claims are mutually exclusive—a defendant cannot be affirmatively misadvised about the Jimmy Ryce Act if counsel failed to inform him altogether. Reinheimer was required to consistently present the same acts or omissions supporting his claim through one complete round of Florida's appellate review process, and he did not do so. *See Kelley*, 377 F.3d at 1344.

Reinheimer relies on *Collier v. Jones*, 910 F.2d 770, 774 n.3 (11th Cir. 1990), for the proposition that his failure-to-inform and misadvice claims are "sufficiently similar" such that he properly exhausted his misadvice claim before the state courts. His reliance is misplaced. As an initial matter, *Collier* did not address exhaustion, but rather preservation for direct appeal. 910 F.2d at 772–74. And while an appellate court may under limited circumstances consider an argument made for the first time on appeal, *see Ochran v. United States*, 117 F.3d 495, 502–03 (11th Cir. 1997), a district court generally may not grant a writ of habeas corpus on an unexhausted claim, 28 U.S.C. § 2254(b)(1)(A). Moreover, the arguments raised in the district court and on appeal in *Collier* were more closely related than the argument that Reinheimer makes here. In the district court, Collier had alleged his counsel was ineffective for failing to fully investigate the background of the state's key witness. *Collier*, 910 F.2d at 774. On appeal, he argued that his counsel was ineffective for failing to move for acquittal "on the

basis that the state had presented only the uncorroborated testimony of an accomplice." *Id.* The latter was complementary to the former—had counsel investigated properly, the defense would have been able to argue that the witness was actually Collier's accomplice, and so Collier could not, under Alabama law, be convicted solely on accomplice testimony. *Id*. Here, by contrast, Reinheimer's claims are contradictory. His counsel could not have both failed to inform him altogether about the Jimmy Ryce Act, while also giving affirmative misadvice.

Finally, because Reinheimer does not contest on appeal the procedural-default aspect of the district court's order and instead argues only about whether his claim was exhausted, he has abandoned any challenge to the finding that the claim also was procedurally defaulted. *See Haralson*, 813 F.2d at 373 n.3; *Johnson*, 806 F.2d at 1481 n.5.

Because Reinheimer failed to exhaust his affirmative-misadvice claim, the State did not affirmatively waive exhaustion, and Reinheimer abandoned any challenge to the finding that future attempts to exhaust his claim would be futile under Florida law, the district court correctly determined that his unexhausted claim was also procedurally defaulted. *See McNair*, 416 F.3d at 1305. Thus, we affirm.

AFFIRMED.

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IN THE SUPREME COURT OF THE UNITED STATES

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v.

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

On Petition for a Writ of Certiorari to the
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APPENDIX B

Order Granting COA

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14603-D

DELMAR REINHEIMER,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

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

ORDER:

Delmar Reinheimer is a Florida prisoner serving a 13-year sentence after pleading guilty to lewd or lascivious battery on a minor younger than 16, but older than 12, as well as a probation violation. Reinheimer did not directly appeal his conviction, but he did file a Fla. R. Crim. P. 3.850 motion seeking state post-conviction relief. The state trial court denied Reinheimer's Rule 3.850 motion, and a state court of appeals affirmed the denial without issuing a written opinion.

Reinheimer proceeded to file a 28 U.S.C. § 2254 petition, alleging eight grounds for relief:[1]

(1) Trial counsel was ineffective for failing to contact and interview all of the witnesses that Reinheimer requested;

(2) Trial counsel was ineffective for failing to pursue a defense or elicit expert testimony based on Reinheimer's assertion that he was impotent;

(3) Trial counsel was ineffective for telling Reinheimer that he did not qualify for the Jimmy Ryce Act;

(4) Trial counsel was ineffective for failing to tell Reinheimer that the victim could be impeached for making inconsistent statements;

(5) Trial counsel was ineffective for failing to pursue Reinheimer's assertion that a fraudulent affidavit supporting an arrest warrant had been filed against him;

(6) Trial counsel was ineffective for not assuring that Reinheimer was credited with all previous time-served;

(7) Trial counsel was ineffective for failing to file any pretrial motion to suppress harmful statements made by Reinheimer; and

(8) His prosecution was personal and vindictive.

The government filed a response to Reinheimer's petition, to which Reinheimer filed a reply. Reinhemier then filed a motion to supplement his § 2254 petition, which the district court granted. In his supplemental claim, Reinheimer argued that his conviction and sentence were a manifest injustice because the Florida Legislature had not properly comported with all of the procedures necessary to

[1] These grounds for relief have been restated for the sake of clarity and brevity.

enact the statute of his conviction. Reinheimer admitted that he had never raised his claim in the state court because he had just learned about it.

After the state filed a response to Reinheimer's supplemental claim, the district court entered an order denying Reinheimer's § 2254 petition. The district court determined that Reinheimer had failed to show that the state court was unreasonable in finding that his counsel had not been ineffective. The district court also determined that Claim Three, Claim Seven, Claim Eight, and Reinheimer's supplemental claim were due to be denied as procedurally defaulted. The district court denied Reinheimer a COA.

Reinheimer has now appealed the district court's denial of his § 2254 petition and seeks a COA, leave to proceed on appeal IFP, and permission to file a brief. In his motion for a COA, Reinheimer specifically and affirmatively states that he does not seek review of the district court's disposition of Claims Five, Six, Seven, and Eight. Reinheimer does, however, request the issuance of a COA for his other claims. Therefore, Claims Five, Six, Seven and Eight will not be addressed.

BACKGROUND:

In 2010, Reinheimer was charged with lewd or lascivious battery of a victim 12 to 16 years' old and with a violation of probation from an attempted-sexual-battery conviction in 1995. The charges were based on Reinheimer's interactions with a girl named Sierra Parrott, a 14-year-old runaway.

Reinheimer received a 13-year total sentence, to be followed by 2 years' probation, and did not file a direct appeal.

Reinheimer, however, did file a Rule 3.850 motion for post-conviction relief in the state trial court. In his Rule 3.850 motion, Reinheimer argued that his trial counsel was ineffective because counsel, *inter alia*, refused to contact any of his witnesses as he requested, refused to contact an expert witness to testify on Reinheimer's behalf about his drug-induced impotence, and told Reinheimer only after he had signed the plea agreement that the victim could not recall her previous statements. Reinheimer later amended his Rule 3.850 motion to add, among other things, that his counsel was ineffective for failing to advise him of the possibility of impeaching the victim.

The record in Reinheimer's post-conviction proceeding included the deposition that Parrott gave before Reinheimer entered into his plea agreement. Parrott testified that, when they were 14, she and her friend Brandi Mosley ("Brandi") would often go to a property where Brandi's brother, Eric Johnson, and Reinheimer lived. Parrott testified that she and Brandi frequently used drugs and alcohol, sometimes provided by Reinheimer and his girlfriend, occasionally to the point that Brandi would collapse. Parrott stated that she spent the night at Reinheimer's maybe four or five times with Brandi, and once by herself with Reinheimer and his girlfriend. She stated that, every time, they all slept in the bed,

and, on one occasion, Reinheimer pulled off her pants and underwear, inserted his finger into her vagina, and touched her vagina with his penis, but "didn't actually put it all the way inside." Parrott stated that that was the first time she had seen his penis and that it looked different from other men's penises that she had seen. Parrott then gave a detailed description of Reinheimer's penis. Parrott said that she did not know why Reinheimer stopped attempting penetration. She stated that he had never penetrated her vagina with his penis and that she had no further sexual activity with him. Parrott also testified that, on one occasion, she witnessed Brandi giving Reinheimer oral sex, for which Reinheimer paid Brandi $50. On cross-examination, Parrott admitted that she had said in an earlier statement to the police that she had had sex with Reinheimer three times. She testified that she remembered that she actually did engage in sexual activity with Reinheimer three times, but he never fully penetrated her vagina with his penis. Throughout the deposition, Parrott struggled to remember the dates that things had happened, how many times things had happened, and what time of year they occurred.

The state trial court conducted an evidentiary hearing on Reinheimer's Rule 3.850 motion. Reinheimer's counsel first called Michael Gregg to the stand. Gregg testified that Reinheimer had lived in his old tool shed, and that Brandi would visit the property because her brother also lived in a camper on the property. Gregg stated that Parrott would come with Brandi to the property, but she was not

supposed to be there and Gregg would tell her to leave. Gregg stated that he was not aware of Parrott having any sexual encounters with Reinheimer, and that he never saw Brandi or Parrott drinking or doing drugs with Reinheimer. Gregg testified that he was never contacted by Reinheimer's attorney, but that, if he had been subpoenaed, he would have testified. Gregg also provided testimony that he had not told Reinheimer that Parrott was a runaway, which conflicted with Reinheimer's pre-trial statements.

Brandi then took the stand. Brandi testified that she was 14 at the time of the incidents that led to Reinheimer's conviction, and that she was friends with Parrott. Brandi stated that sometimes she would go see Reinheimer when she visited her brother, and that Parrott went to Reinheimer's sometimes without her. She testified that Reinheimer never gave her drugs or alcohol and that she never engaged in any sexual encounters with Reinheimer. Brandi also testified that Parrott lied about engaging in sexual acts with Reinheimer because her mother told her to, but that, prior to Reinheimer's arrest, Parrott had never said anything about having sexual encounters with him. Brandi also testified that she had never spent the night at Reinheimer's house. This testimony conflicted with previous statements from Reinheimer. When Brandi was confronted with the conflict, she testified that she might have stayed the night at Reinheimer's house.

Reinheimer was the next witness to testify. Reinheimer stated that he wanted his attorney to contact Brandi, Johnson, Gregg, Delora Crews, and Krista Mosely ("Krista"). He stated that Crews was Parrott's mother and would have testified that Parrott "would lie when she got herself in a predicament" and was a thief. He added that Krista would have undermined Parrott's statements by saying that an orgy that Parrott mentioned in one of her statements, which she said included Krista, did not happen.

Reinheimer testified that there were inconsistencies in Parrott's various pre-trial statements. He stated that if he had known about the inconsistencies before he entered his plea, he would have wanted counsel to follow up on those inconsistencies and go to trial. Reinheimer stated that he would have gone to trial because he "had nothing to lose" because he "got the max [he] could get anyway." Reinheimer also gave testimony about the events that occurred with Parrott that conflicted with earlier statements that he had made. Reinheimer testified that he entered into the plea agreement because he believed that he would get leniency and get 13 years, instead of 15 years, in prison. He also stated that he decided to enter the plea even though he knew there were witnesses that he would want to call at a trial. Reinheimer stated that, if he had known about Parrott's inconsistent statements, he would not have entered into a plea agreement.

Jennifer Cogdill, Reinheimer's trial counsel, then provided testimony. Cogdill stated that Reinheimer went back and forth on whether he wanted to accept a plea agreement or take the case to trial. She stated that, during negotiations, Reinheimer refused multiple plea offers until the state did not want to offer a negotiated plea at all, but finally they arrived at an agreement when Reinheimer suggested a 13-year sentence, 2 years below the 15-year maximum. Cogdill stated that she did not believe that the case could be effectively tried because of admissions of sexual behavior with Parrott and Brandi that Reinheimer had made in taped interviews. Cogdill also stated that, in her deposition, Parrott provided a specific description of Reinheimer's genitals and his genital warts that would have been extremely difficult to refute at trial. Cogdill stated that, though Reinheimer did not receive a copy of Parrott's deposition until after he entered into his plea agreement, she discussed what was in the deposition with Reinheimer before he entered his plea and told Reinheimer that Parrott had trouble remembering some things. She stated that Reinheimer's 13-year plea was less than the maximum 15-year sentence that he was facing.

Cogdill testified that she spoke to Gregg, and, as far as she could see, neither Gregg nor Brandi would have helped Reinheimer's case if they had testified. She also stated that Brandi was listed as a witness by the state and that the state wanted to investigate allegations that involved Reinheimer and Brandi, but the state could

not find Brandi. Cogdill testified that she did not want to depose Brandi because it could have resulted in new charges against Reinheimer involving his sexual encounters with Brandi. Cogdill also testified that she did not remember Reinheimer asking her to interview Crews or Johnson, but that she did not think that they would have provided helpful testimony.

Finally, Johnson came to the stand. Johnson testified that he had seen Parrott around the property where he and Reinheimer lived, but that he was unaware of any sexual contact between Reinheimer and either Parrot or Brandi. He stated that Parrott could have stayed at Reinheimer's house and he would not have known.

At the conclusion of the hearing, Reinheimer brought up that he had filed an amended motion that argued that his counsel had failed to advise him of the Jimmy Ryce Act.[2] Reinhiemer admitted that his plea agreement contained a paragraph that he read and initialed that stated that his attorney had advised him that his plea could result in the potential applicability of the Jimmy Ryce Act, but stated that there was no warning given on the record at his plea hearing. The state trial court stated that Reinheimer's allegation that his counsel had not advised him of the potential applicability of the Jimmy Ryce Act was not sufficient to set aside his

[2] The record does not show an amended motion with this claim.

plea agreement because he had not been civilly detained under the Jimmy Ryce Act and might never be, and there was a warning in the written plea agreement.

After the evidentiary hearing, the state trial court denied Reinheimer's Rule 3.850 motion. The state trial court determined that Reinheimer could not show ineffective assistance of counsel for failure to contact witnesses because one of the witnesses that Reinheimer wanted to call, Brandi, was a minor, and it was a reasonable strategic choice not to call her as a witness because it could have exposed Reinheimer to further charges. Furthermore, the state court found that Reinheimer could not show prejudice because Brandi would not have been a credible witness. The state trial court also determined that Reinheimer could not show prejudice based on the failure to contact and depose Gregg because he was only going to testify that Brandi and Parrott were not supposed to be in the area where Reinheimer lived. Finally, the state trial court found that Reinheimer could not show prejudice regarding the failure to depose Johnson because Johnson did not have any testimony that would have substantially impacted a trial. The state trial court decision did not mention the failure to contact and depose Crews and Krista.

The state trial court also concluded that Reinheimer's counsel was not ineffective for failing to contact an expert witness about Reinheimer's impotence defense. The state trial court found that the impotence issue would not have

changed the outcome of any proceedings because Parrott testified in her deposition that Reinheimer did not penetrate her vagina with his penis. Therefore, the court determined that counsel's performance had not been deficient.

The state trial court also determined that there was not a reasonable possibility that Reinheimer would have insisted on going to trial, and, therefore, he did not suffer any prejudice on his ineffective-assistance-of-counsel claims. The state trial court found that Reinheimer's sworn testimony at his plea hearing indicated that he would not have gone to trial. Furthermore, the court noted that Reinheimer accepted the plea in exchange for two years off of his sentence, and that Cogdill's testimony indicated that there was substantial damaging evidence against Reinheimer and that he would not have gone to trial.

Finally, the state trial court addressed the fact that, during the evidentiary hearing, Reinheimer had raised an argument that his counsel had failed to advise him of the potential applicability of civil commitment under the Jimmy Ryce Act. The state trial court found that Reinheimer's plea agreement contained a Jimmy Ryce Act warning and that Reinheimer had both signed the agreement and initialed next to the warning. Furthermore, the state trial court stated that, under Florida law, commitment under the Jimmy Ryce Act was a collateral consequence that could not be the basis for post-conviction applications to set aside the plea bargain.

After the state trial court issued its decision denying Reinheimer relief under Rule 3.850, Reinheimer was granted permission by the state appeals court to file a belated appeal. The state appeals court affirmed the trial court's decision without an opinion. Further, the state appeals court denied Reinheimer's motion for rehearing and written opinion.

DISCUSSION:

In order to obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The movant satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted).

If a state court has adjudicated a claim on the merits, a federal court may grant habeas relief only if the decision of the state court (1) "was contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d)(1), (2). A state court's decision is "contrary to" federal law if "the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case

differently than th[e] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000) (quotations omitted). A state court's factual findings are presumed correct absent clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1).

Before bringing a federal habeas action, a petitioner must exhaust all state court remedies available for challenging his conviction, either on direct appeal or in a state post-conviction motion. 28 U.S.C. § 2254(b), (c). In order to fully exhaust his state remedies, a petitioner "must make the state court aware that the claims asserted present federal constitutional issues." *Snowden v. Singletary*, 135 F.3d 732, 735 (11th Cir. 1998). "It is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." *Zeigler v. Crosby*, 345 F.3d 1300, 1307 (11th Cir. 2003) (quotation omitted). Rather, the petitioner must articulate the constitutional theory serving as the basis for relief. *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996) (explaining that "for purposes of exhausting state remedies, a claim for relief in habeas corpus must include reference to a specific federal constitutional guarantee").

A federal claim is subject to procedural default where: (1) the state court applies an independent and adequate ground of state procedure to conclude that the petitioner's federal claim is barred; or (2) the petitioner never raised a claim in

state court, and it is obvious that the unexhausted claim would now be procedurally barred under state procedural rules. *Bailey v. Nagle*, 172 F.3d 1299, 1302-03 (11th Cir. 1999). "If the petitioner has failed to exhaust state remedies that are no longer available, that failure is a procedural default which will bar federal habeas relief, unless either the cause and prejudice or the fundamental miscarriage of justice exception is established." *Smith v. Jones*, 256 F.3d 1135, 1138 (11th Cir. 2001). A procedural default may be excused if the movant establishes (1) "cause for not raising the claim of error on direct appeal and actual prejudice from the alleged error," or (2) a fundamental miscarriage of justice, meaning actual innocence. *McKay v. United States*, 657 F.3d 1190, 1196 (11th Cir. 2011). "To show cause, the petitioner must demonstrate some objective factor external to the defense that impeded his effort to raise the claim properly in state court." *Ward v. Hall*, 592 F.3d 1144, 1157 (11th Cir. 2010) (quotation omitted). Additionally, the cause must not be "fairly attributable to [petitioner's] own conduct." *McCoy v. Newsome*, 953 F.2d 1252, 1258 (11th Cir. 1992). A *pro se* petitioner is not exempt from these requirements. *Id.* This Court has noted that "the failure to act or think like a lawyer cannot be cause for failing to assert a claim." *Smith v. Newsome*, 876 F.2d 1461, 1465 (11th Cir. 1989).

Actual innocence means factual innocence not mere legal insufficiency. *McKay*, 657 F.3d at 1197. This Court has described the

fundamental-miscarriage-of-justice exception as "exceedingly narrow in scope" because it requires proof of actual innocence, not just legal innocence. *Johnson v. Alabama*, 256 F.3d 1156, 1171 (11th Cir. 2001). To establish a fundamental miscarriage of justice, a petitioner must present new, reliable evidence which demonstrates actual innocence. *Schlup v. Delo*, 513 U.S. 298, 324-27 (1995).

To make a successful claim of ineffective assistance of counsel, a defendant must show both that (1) his counsel's performance was deficient; and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In determining whether counsel gave adequate assistance, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. Counsel's performance was deficient only if it fell below the wide range of competence demanded of attorneys in criminal cases. *Id.* at 688. To make such a showing, a defendant must demonstrate that "no competent counsel would have taken the action that his counsel did take." *United States v. Freixas,* 332 F.3d 1314, 1319-20 (11th Cir. 2003) (quotation marks omitted). Prejudice occurs when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694. Failure to establish either prong is fatal and makes it unnecessary to consider the other. *Id.* at 697.

When analyzing a claim of ineffective assistance under § 2254(d), this Court's review is "doubly" deferential to counsel's performance. *Harrington v. Richter*, 562 U.S. 86, 105 (2011). Under § 2254(d), "the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.*

Claim One:

In Claim One, Reinheimer argued that his counsel was ineffective for failing to contact and interview five witnesses: Brandi, Johnson, Gregg, Krista, and Crews. He argued that the witnesses would have shown that Parrott was not being truthful. The state trial court concluded that Reinheimer had not made the requisite showings of deficient performance and prejudice under *Strickland* to show that his counsel was ineffective in failing to contact and interview the witnesses. The district court determined that this ground was due to be denied because the state court's ruling was not an unreasonable application of the facts or of *Strickland*.

Reasonable jurists would not debate the district court's denial of Claim One. It was not an unreasonable determination by the state trial court that counsel was not deficient in failing to contact and depose Brandi. *See* 28 U.S.C. § 2254(d). The record, specifically Parrott's deposition indicating that she witnessed Brandi giving Reinheimer oral sex when she was 14, supports counsel's testimony that she was concerned that Reinheimer would face more charges if Brandi was deposed.

Additionally, nothing in the record provided clear and convincing evidence contradicting the state court's finding that Brandi would not have been a credible witness. *See* 28 U.S.C. § 2254(e)(1). When pressed, she changed her testimony about whether she had spent the night at Reinheimer's home, which called into question her credibility. Furthermore, her testimony conflicted with previous statements by both Reinheimer and Parrott.

Furthermore, Reinheimer failed to make the requisite showing of prejudice to show that counsel was ineffective for failing to contact and depose the other witnesses. *See Strickland*, 466 U.S. at 687. The state court determined that Gregg and Johnson merely would have testified that they were unaware of any sexual relations between Parrott and Reinheimer and that Parrott was not supposed to be on the property but was often there anyway. Krista and Crews did not testify at the evidentiary hearing, and Reinheimer cannot show that their testimony would have cast such doubt on Parrott's credibility that there was a reasonable chance that, had they been deposed, Reinheimer would not have accepted the plea agreement. *See id.* at 694. Accordingly, the state's determination that Reinheimer could not make the showings required by *Strickland* was not unreasonable, and, under the doubly deferential standard, Reinheimer's counsel was not deficient. *See Harrington*, 562 U.S. at 105. Therefore, no COA is warranted on this issue.

Claim Two:

In his second claim, Reinheimer asserted that his counsel was ineffective for failing to contact an expert witness and pursue a defense based on the fact that medication that he had taken had rendered him impotent, so he could not have committed lewd and lascivious battery against Parrott. In his reply, Reinheimer also argued that the state could not rely on penile contact and digital penetration versus penile penetration because his charging document charged him with penile penetration. In support of this argument, Reinheimer cited to *Diaz v. State*, 38 So. 3d 791, 792 (Fla. 4th Dist. Ct. App. 2010). The state trial court found that Reinheimer's second claim was due to be denied because, based on Parrott's allegations of only digital penetration and penile touching, an impotence defense would not have changed the outcome of the proceedings. The district court found that the state court's determination was not unreasonable.

Reasonable jurists would not debate the district court's denial of Claim Two. In Parrott's deposition, she testified that Reinheimer did not penetrate her vagina with his penis, but rather simply touched his penis to her vagina. In light of that testimony, a defense that Reinheimer was impotent would not have cast doubt upon Parrott's testimony or indicated that he was unable to commit the alleged offense. Therefore, Reinheimer cannot make the requisite showing of prejudice because the results of the proceedings likely would not have changed. *Strickland,*

466 U.S. at 694. Furthermore, in the *Diaz* case that Reinheimer relied on, the court noted that a charging document could be amended at trial. *Diaz*, 38 So. 3d at 792. Accordingly, Reinheimer cannot show prejudice, given the fact that the charging document alleging penile penetration could have been changed if Reinheimer had gone to trial, such that the state would not have had to prove penile penetration. That change would have thereby rendered his claim of impotence irrelevant. Accordingly, it was not an unreasonable application of law or fact for the state court to deny Claim Two for lack of prejudice. No COA is warranted on this issue.

Claim Three:

In his third claim, Reinheimer argued that his counsel was ineffective for telling him that he did not have to worry about civil commitment under the Jimmy Ryce Act because he did not qualify. In his reply, Reinheimer stated that the trial court asked him during his plea hearing if his counsel had advised him of the Jimmy Ryce Act, and Reinheimer said that he "replied in the affirmative because counsel informed him that the Jimmy Ryce Act did not apply to him." He stated that his claim was based on "affirmative misadvice" from his counsel and the lower court's failure to instruct, which rendered his plea involuntary. The district court concluded that Claim Three was procedurally defaulted because it had not been presented to the state court. The district court elaborated that Reinheimer had presented a failure-to-inform claim, as opposed to an affirmative-misadvice claim.

Reasonable jurists could debate the correctness of the district court's finding that a failure-to-advise claim was different enough from an affirmative-misadvice claim that the claim was not exhausted. While making a somewhat similar claim is not sufficient to exhaust a claim, Reinheimer made an extremely similar state claim that did include a specific reference to his Sixth Amendment rights. *See Zeigler*, 345 F.3d at 1307, *Gray*, 518 U.S. at 162-63. Reasonable jurists could debate whether his failure-to-advise claim was similar enough to his misadvice claim that the issue was exhausted and his claim was not procedurally defaulted. Accordingly, it is recommended that this Court grant a COA on the following issue:

> Whether the district court erred in finding that Reinheimer's affirmative-misadvice claim regarding the Jimmy Ryce Act was procedurally defaulted in light of his failure-to-advise claim that was presented in state court?

Claim Four:

In Claim Four, Reinheimer asserted that his counsel was ineffective for failing to inform him that Parrott could be impeached based on prior inconsistent statements. The state trial court determined that Reinheimer could not make the necessary showing of prejudice on this ground because he could not show that it was more likely than not that, but for counsel's failure to inform him that he could impeach Parrott based on inconsistencies, he would not have accepted the offered

plea agreement. The district court denied relief because the state trial court's decision was not unreasonable in light of applicable deference.

Reasonable jurists would not debate the district court's denial of Claim Four. The record shows that, despite Reinheimer's assertion in the evidentiary hearing that he would have gone to trial because he "had nothing to lose," Reinheimer actually received less than the 15-year maximum sentence by entering a plea agreement. Reinheimer also faced substantial evidence against him at trial because of his own previous admissions during taped interviews that he had engaged in sexual contact with Parrott. Furthermore, Cogdill's testimony that she talked to Reinheimer about Parrott's deposition, including her memory issues, and that Reinheimer was the one who proposed the 13-year plea agreement supports the state court's finding that Reinheimer would not have proceeded to trial even if his counsel had told him that he could impeach Parrott at trial based on inconsistencies. Accordingly, it was not unreasonable for the state court to determine that Reinheimer could not show prejudice, which was fatal to his claim. *Strickland,* 466 U.S. at 697. Therefore, no COA is warranted on this issue.

Supplemental Claim:

In his supplemental claim, Reinheimer argued that his conviction and sentence were a fundamental error because, as the Florida Legislature had not followed all of the procedures necessary to properly enact the statute of conviction,

he was convicted of a nonexistent crime. He stated that he was relying on law that had been precedential in Florida since 1917. Reinheimer admitted that he had not raised the issue in state court, but argued that he was relying on new evidence and, therefore, his procedural default should be excused. The district court found that Reinheimer's supplemental claim was procedurally defaulted or, alternatively, was untimely.

Reasonable jurists would not debate the district court's denial of Reinheimer's supplemental claim. As Reinheimer admitted, he did not present the supplemental claim in state court. Accordingly, the claim is not exhausted, and as it is now too late for Reinheimer to bring the claim in state court, the claim is procedurally defaulted. *See Bailey*, 172 F.3d at 1302-03; Fla. R. Crim. P. 3.850(b) (stating that, in Florida, a state prisoner may file a post-conviction motion challenging his conviction within two years from entry of a final judgment in a noncapital case). Reinheimer cannot overcome that default because he cannot show cause and prejudice or a fundamental miscarriage of justice based on actual innocence. *McKay*, 657 F.3d at 1196. Reinheimer cannot show cause because he has not shown why he could not have brought the claim, which is based on a legal argument relying on very old case law, in the state court before the statute of limitations expired. The fact that Reinheimer did not act as a lawyer and discover the legal argument is not sufficient to establish cause. *See Ward*, 592 F.3d at 1157;

McCoy, 953 F.2d at 1258; *Newsome*, 876 F.2d at 1465. Nor has Reinheimer established a fundamental miscarriage of justice because he has not put forward new, reliable evidence that he is actually innocent, but instead has put forth an argument that attempts to establish his legal innocence. *See Schlup*, 513 U.S. at 324-27; *McKay*, 657 F.3d at 1196-97. Accordingly, the claim is procedurally defaulted, and no COA is warranted on this issue.

CONCLUSION:

Because Reinheimer showed that reasonable jurists would debate the denial of only one of his claims, a COA is GRANTED solely on the following issue:

> Whether the district court erred in finding that Reinheimer's affirmative-misadvice claim regarding the Jimmy Ryce Act was procedurally defaulted in light of his failure-to-advise claim that was presented in state court?

Because a COA is warranted on one of his claims, Reinheimer's claim is not frivolous and his motion for leave to proceed on appeal IFP is GRANTED. *See Napier v. Preslicka*, 314 F.3d 528, 531 (11th Cir. 2002) (holding that an appeal is frivolous if it is without arguable merit either in law or fact). Furthermore, because his appeal will be permitted to proceed, Reinheimer's motion to file a brief is GRANTED, to the extent that a briefing schedule will be established.

Julie Carnes

UNITED STATES CIRCUIT JUDGE

No._____

IN THE SUPREME COURT OF THE UNITED STATES

DELMAR REINHEIMER,
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 C

Order

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DELMAR REINHEIMER,

Petitioner,

v. Case No. 3:14-cv-730-J-32MCR

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, et al.,

Respondents.

O R D E R

Petitioner Delmar Reinheimer, an inmate of the Florida penal system, initiated this action by filing a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 with attached exhibits. See Doc. 1 (Petition; Pet. Ex.). Reinheimer challenges both his 2010 state court (Clay County, Florida) conviction for lewd or lascivious battery of a victim between 12 and 16 years and his 2010 violation of probation imposed in 1995. Respondents filed a response with attached exhibits. See Doc. 11 (Response; Resp. Ex.) Reinheimer replied. See Doc. 13 (Reply). With the Court's permission, see Doc. 22, Reinheimer later filed a supplement to his petition and attached exhibits. See Doc. 23 (Supp. Petition; Supp. Pet. Ex.). Respondents filed a response to the supplement and attached exhibits. See Doc. 32

(Supp. Response; Supp. Resp. Ex.). Reinheimer replied. See Doc. 33 (Supp. Reply). This case is ripe for review.[1]

I. Procedural History[2]

Following a guilty plea (Resp. Ex. L at 214-20), Reinheimer was convicted on September 16, 2010, of lewd or lascivious battery of a victim between 12 and 16 years Id. at 221-32. On the same day, Reinheimer also pled guilty to violation of probation imposed in 1995.[3] Id. at 234. On the new conviction, the court sentenced Reinheimer to thirteen years imprisonment to be followed by two years probation. Id. at 225. For the violation of probation, the court sentenced him to five years for each of the four counts of attempted sexual battery. Id. at 233-38. The court imposed concurrent sentences in both cases. Id. at 227, 238. Reinheimer did not take a direct appeal.

Reinheimer filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850, which he later amended. Resp. Ex. K at 1-11; 101-25.

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[1] The pertinent facts of this case are fully developed in the record before the Court. Because this Court can "adequately assess [Petitioner's] claim[s] without further factual development," Turner v. Crosby, 339 F.3d 1247, 1275 (11th Cir. 2003), an evidentiary hearing will not be conducted. See also Schriro v. Landrigan, 550 U.S. 465, 474 (2007) (citation omitted) ("if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing").

[2] Because Respondents set forth a detailed procedural history in their Response, see Response at 1-7, the Court will provide a limited procedural history in this Order.

[3] In 1995, Reinheimer was convicted after pleading guilty to four counts of attempted sexual battery of a child under twelve years. Resp. Ex. A at 18-27. He was sentenced to seventeen years imprisonment followed by ten years of probation. He was released in 2002.

The state court held an evidentiary hearing on ground one, at which five witnesses testified. Resp. Ex. L at 239-352. On January 3, 2012, the court denied Reinheimer's motion in a twenty-three page order, accompanied by 254 pages of exhibits. Resp. Ex. K at 190-200; Resp. Ex. L at 201-400; Resp. Ex. M at 401-468. Following briefing in the appeal, the First DCA affirmed without opinion (Resp. Ex. S); denied rehearing (Resp. Ex. T); and issued the mandate on June 2, 2014 (Resp. Ex. U). Reinheimer v. State, 138 So. 3d 443 (Fla. 1st DCA 2014).

II. Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) governs a state prisoner's federal petition for habeas corpus. See 28.U.S.C. § 2254; Ledford v. Warden, Ga. Diagnostic & Classification Prison, 818 F.3d 600, 642 (11th Cir. 2016). "'The purpose of AEDPA is to ensure that federal habeas relief functions as a guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction.'" Id. (quoting Greene v. Fisher, 565 U.S. 34, 38 (2011)).

The first task of the federal habeas court is to identify the last state court decision, if any, that adjudicated the claim on the merits. See Wilson v. Warden, Ga. Diagnostic Prison, 834 F.3d 1227, 1235 (11th Cir. 2016) (en banc), cert. granted, Wilson v. Sellers, 137 S. Ct. 1203 (2017). Regardless of whether the last state court provided a reasoned opinion, "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." Harrington v. Richter, 562 U.S. 86, 99 (2011); see also Johnson v. Williams, 568 U.S.289, 301 (2013). Thus, the state court need not issue

an opinion explaining its rationale in order for the state court's decision to qualify as an adjudication on the merits. See Richter, 562 U.S. at 100; Wright v. Sec'y for the Dep't of Corr., 278 F.3d 1245, 1255 (11th Cir. 2002).

If the claim was "adjudicated on the merits" in state court, AEDPA bars relitigation of the claim, subject only to the exceptions in § 2254(d)(1) and (d)(2). Richter, 562 U.S. at 98. As the Eleventh Circuit explained:

> First, § 2254(d)(1) provides for federal review for claims of state courts' erroneous legal conclusions. As explained by the Supreme Court in Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 146 L.Ed.2d 389 (2000), § 2254(d)(1) consists of two distinct clauses: a "contrary to" clause and an "unreasonable application" clause. The "contrary to" clause allows for relief only "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." Id. at 413, 120 S. Ct. at 1523 (plurality opinion). The "unreasonable application" clause allows for relief only "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 prisoner's case." Id.
>
> Second, § 2254(d)(2) provides for federal review for claims of state courts' erroneous factual determinations. Section 2254(d)(2) allows federal courts to grant relief only if the state court's denial of the petitioner's claim "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)(2). The Supreme Court has not yet defined § 2254(d)(2)'s "precise relationship" to § 2254(e)(1), which imposes a burden on the petitioner to rebut the state court's factual findings "by clear and convincing evidence." See Burt v. Titlow, 571 U.S. ——, ——, 134 S. Ct. 10, 15, 187 L.Ed.2d 348 (2013); accord Brumfield v. Cain, 576 U.S. ——, ——, 135 S. Ct. 2269, 2282, 192 L.Ed.2d 356 (2015). Whatever that "precise relationship" may be, "'a state-court factual determination is not unreasonable merely

> because the federal habeas court would have reached a different conclusion in the first instance.'"[4] Titlow, 571 U.S. at ——, 134 S. Ct. at 15 (quoting Wood v. Allen, 558 U.S. 290, 301, 130 S. Ct. 841, 849, 175 L.Ed.2d 738 (2010)).

Tharpe v. Warden, 834 F.3d 1323, 1337 (11th Cir. 2016); see also Daniel v. Comm'r, Ala. Dep't of Corr., 822 F.3d 1248, 1259 (11th Cir. 2016). Also, deferential review under § 2254(d) is limited to the record that was before the state court that adjudicated the claim on the merits. See Cullen v. Pinholster, 563 U.S. 170, 181 (2011) (regarding § 2254(d)(1)); Landers v. Warden, Att'y Gen. of Ala., 776 F.3d 1288, 1295 (11th Cir. 2015) (regarding § 2254(d)(2)).

Where the state court's adjudication on the merits is "'unaccompanied by an explanation,' a petitioner's burden under section 2254(d) is to 'show [ ] there was no reasonable basis for the state court to deny relief.'" Wilson, 834 F.3d at 1235 (quoting Richter, 562 U.S. at 98). Thus, "a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the] Court." Richter, 562 U.S. at 102; see also Wilson, 834 F.3d at 1235; Marshall, 828 F.3d at 1285. To determine which theories could have supported the state appellate court's decision, the federal habeas court may look to a state trial court's

[4]The Eleventh Circuit has described the interaction between § 2254(d)(2) and § 2254(e)(1) as "somewhat murky." Clark v. Att'y Gen., Fla., 821 F.3d 1270, 1286 n.3 (11th Cir. 2016); see also Landers v. Warden, Att'y Gen. of Ala., 776 F.3d 1288, 1294, n.4 (11th Cir. 2015); Cave v. Sec'y, Dep't of Corr., 638 F.3d 739, 744-47 & n.4, 6 (11th Cir. 2011); Jones, 540 F.3d at 1288 n.5.

previous opinion as one example of a reasonable application of law or determination of fact. Wilson, 834 F.3d at 1239; see also Butts v. GDCP Warden, 850 F.3d 1201, 1204 (11th Cir. 2017). However, in Wilson, the en banc Eleventh Circuit stated that the federal habeas court is not limited to assessing the reasoning of the lower court.[5] 834 F.3d at 1239. As such,

> even when the opinion of a lower state court contains flawed reasoning, [AEDPA] requires that [the federal court] give the last state court to adjudicate the prisoner's claim on the merits "the benefit of the doubt," Renico [v. Lett, 449 U.S. 766, 733 (2010)] (quoting [Woodford v. Visciotti, 537 U.S. 19, 24 (2002)]), and presume that it "follow[ed] the law," [Woods v. Donald, --- U.S. ---, 135 U.S. 1372, 1376 (2015)] (quoting Visciotti, 537 U.S. at 24).

Id. at 1238; see also Williams, 133 S. Ct. at 1101 (Scalia, J., concurring).

Thus, "AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." Titlow, 134 S. Ct. at 16. "[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable." Richter, 562 U.S. at 102; see also Tharpe, 834 F.3d at 1338 ("Federal courts may grant habeas relief only when a state court blundered in a manner so 'well understood and comprehended in existing law' and 'was so lacking in justification' that 'there is no possibility fairminded jurists could disagree.'") (quoting Richter, 562 U.S. at 102-03). "If this standard is difficult to meet, that is because it

[5] Although the Supreme Court has granted Wilson's petition for certiorari, the "en banc decision in Wilson remains the law of the [Eleventh Circuit] unless and until the Supreme Court overrules it. Butts, 850 F.3d at 1205, n.2. Moreover, this Court's decision would be the same even under the pre-Wilson AEDPA framework because this Court is deferring to the state trial court's well-reasoned post-conviction opinion.

was meant to be." Richter, 562 U.S. at 102.

III. Ineffective Assistance of Counsel

"The Sixth Amendment guarantees a defendant the effective assistance of counsel at 'critical stages of a criminal proceeding,' including when he enters a guilty plea." Lee v. United States, 137 S. Ct. 1958, 1964 (2017) (quoting Lafler v. Cooper, 566 U.S. 156, 165 (2012); Hill v. Lockhart, 474 U.S. 52, 58 (1985)). "To demonstrate that counsel was constitutionally ineffective, a defendant must show that counsel's representation 'fell below an objective standard of reasonableness' and that he was prejudiced as a result." Id. (quoting Strickland v. Washington, 466 U.S. 668, 688 (1984)). Because a petitioner must satisfy both prongs of the two-part Strickland test to show a Sixth Amendment violation, "a court need not address the performance prong if the petitioner cannot meet the prejudice prong, and vice-versa." Ward v. Hall, 592 F.3d 1144, 1163 (11th Cir. 2010) (citation omitted).

The Supreme Court has summarized the two-part Strickland standard:

> To establish deficient performance, a person challenging a conviction must show that "counsel's representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. A court considering a claim of ineffective assistance must apply a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. Id., at 689. The challenger's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id., at 687.
>
> With respect to prejudice, a challenger must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a

> probability sufficient to undermine confidence in the outcome." Id.

Richter, 562 U.S. at 104 (internal citations modified). In the context of guilty pleas, the prejudice prong requires the defendant to show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 59; see also Lee, 137 S. Ct. at 1965; Premo v. Moore, 562 U.S. 115, 131–32 (2011).[6]

Finally, "the standard for judging counsel's representation is a most deferential one." Richter, 562 U.S. at 105. "Reviewing courts apply a strong presumption that counsel's representation was within the wide range of reasonable professional assistance." Daniel, 822 F.3d at 1262 (quotations omitted). "When this presumption is combined with § 2254(d), the result is double deference to the state court ruling on counsel's performance." Id. (citing Richter, 562 U.S. at 105); see also Evans v. Sec'y, Dep't of Corr., 703 F.3d 1316, 1333-35 (11th Cir. 2013) (en banc) (Jordan, J., concurring); cf. Tharpe, 834 F.3d at 1338-39 (explaining that a federal court may grant relief only if counsel's representation fell below Strickland's highly deferential standard of objectively reasonable performance and the state court's contrary decision would be untenable to any fairminded jurist).

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[6] "[W]hen the defendant's decision about going to trial turns on his prospects of success and those are affected by the attorney's error[,]" the defendant "must also show that he would have been better off going to trial." Lee, 137 S. Ct. at 1965 (citing Moore, 562 U.S. at 118 (defendant alleged that his lawyer should have but did not seek to suppress an improperly obtained confession) and comparing Hill, 474 U.S. at 59 (discussing failure to investigate potentially exculpatory evidence)).

"The question is not whether a federal court believes the state court's determination under the Strickland standard was incorrect but whether that determination was unreasonable - a substantially higher threshold." Knowles v. Mirzayance, 556 U.S. 111, 123, 129 S. Ct. 1411, 1420, 173 L.Ed.2d 251 (2009) (quotation marks omitted). If there is "any reasonable argument that counsel satisfied Strickland's deferential standard," then a federal court may not disturb a state-court decision denying the claim. Richter, 562 U.S. at 105. As such, "[s]urmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371 (2010).

IV. Findings of Fact and Conclusions of Law

A. AEDPA Deference

With respect to grounds one, two, four, five, and six, the Court presumes that the First DCA's per curiam affirmance of the denial of Reinheimer's Rule 3.850 motion was on the merits. See Williams, 568 U.S. at 301; Richter, 562 U.S. at 99. As such, the Court applies AEDPA deference in reviewing these claims.[7] See

[7] The Court considered Respondents' contention that Reinheimer's pre-plea ineffective-assistance-of-counsel claims in grounds one, two, four, and five are not cognizable in federal habeas corpus because Reinheimer fails to assert that his plea was involuntary or resulted from counsel's misadvice. See Response at 8-9, 11, 12, 15; see also Tollett v. Henderson, 411 U.S. 258, 267 (1973) (petitioner may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in McMann v. Richardson, 39 U.S. 759, 770 (1970)); Wilson v. United States, 962 F.2d 996, 997 (11th Cir. 1992) (citation omitted) ("A defendant who enters a plea of guilty waives all nonjurisdictional challenges to the constitutionality of the conviction, and only an attack on the voluntary and knowing nature of the plea can be sustained."). After considering Reinheimer's Reply (see Reply at 2, 4, 12, 14; see also Resp. Ex. K at 105, 108, 111, 112) and his pro se status, the Court will afford him the benefit of the doubt

Richter, 562 U.S. at 99. To determine which theories could have supported the First DCA's per curiam decision without written opinion, the Court may look to the state circuit court's previous opinion as an example of a reasonable application of law or determination of fact. Wilson, 834 F.3d at 1239; see also Butts, 850 F.3d at 1204.

1. Ground One

Reinheimer asserts that his counsel was constitutionally ineffective by refusing to interview five witnesses: Brandi Mosley, Eric Johnson, Mike Gregg, Krista Mosley and Debra Crews. He asserts that these witnesses would have testified that the victim fabricated her allegations and had a general inclination to lie. Petition at 4. Reinheimer asserted this claim on collateral review in both the state circuit and appellate courts. See Resp. Ex. K at 102-05; P at 4-13. The state court held an evidentiary hearing on this claim. At the evidentiary hearing, witnesses Michael Gregg, Brandi Mosley, and Eric Johnson testified, as well as Reinheimer and his former counsel.[8]

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and liberally construe his pleadings to consider his claims, which ultimately fail as explained below.

[8] Neither Delora Crews nor Krista Mosley testified at the evidentiary hearing. As such, Reinheimer failed to substantiate his claims relating to these witnesses, and the state circuit court did not address the claims involving them. Although Reinheimer's testimony was insufficient to maintain his claims, he testified that Delora Crews (the victim's mother) would have verified that the victim would lie when she was in a predicament and that she was a thief, see Resp. Ex. L at 277, and that Krista Mosley (Brandi's sister-in-law) would have contradicted the victim's allegation of an orgy. At the evidentiary hearing, counsel testified that there was no reason to interview Delora Crews because she was not listed as a witness and was never brought up as a witness by anybody. Id. at 317. She did not recall Reinheimer ever asking her to speak with Delora Crews, and explained that Delora Crews would have no knowledge of what happened between him and the victim. Id.

The state court concluded that Reinheimer failed to show Strickland prejudice from counsel's failure to contact or depose Brandi Mosely, Mike Gregg, or Eric Johnson. Id. at 193-96. In sum, the state court found that Brandi would not have been a credible witness, which could have negatively affected a jury's perception if Reinheimer had gone to trial. Id. at 195. The state court also found that any testimony provided by Gregg or Johnson would not have substantially benefitted Reinheimer nor impacted the trial. Id. at 195-96. As such, the state court concluded that there was no reasonable probability that the outcome of the proceeding would have been different had these witnesses been deposed or called as a witness. Id.

With respect to counsel's performance, counsel testified that the prosecution could not locate Brandi Mosley at the time. She did not seek to contact Brandi, who was a minor, because it could have exposed Reinheimer to additional charges. The state court concluded that "counsel made a reasonable and informed strategic decision not to contact Brandi [Mosley] and as such, cannot be deemed to have provided ineffective assistance."[9] Id. at 193.

Applying deference under AEDPA and Strickland, the Court finds that the state court's decision was neither contrary to nor an unreasonable application of Strickland, and it did not result from an unreasonable determination of the facts as

[9] The state court made no finding but assumed arguendo that counsel should have investigated Mike Gregg and Eric Johnson. Id. at 195-96. See Ward v. Hall, 592 F.3d 1144, 1163 (11th Cir. 2010) ("a court need not address the performance prong if the petitioner cannot meet the prejudice prong, and vice-versa").

presented to the state court. The claim in ground one is denied.

2. Ground Two

Reinheimer contends that his counsel refused to pursue a defense based on impeaching the victim's credibility with an expert opinion regarding his medication-induced impotence. Petition at 4-5. He further contends that the state court denied this claim by using an uncharged offense as reason to summarily deny his claim of ineffective assistance of counsel. Id. at 5. Reinheimer exhausted this claim in state court by raising it in his amended motion for postconviction relief (Resp. Ex. K at 106-08) and on appeal to the First DCA. Resp. Ex. P at 13-19.

The state court denied his claim, concluding that counsel's performance was not deficient and that no prejudice resulted. Resp. Ex. K at 196, 198. After reviewing the facts as asserted in the victim's deposition, the state court concluded that "expert testimony regarding Defendant's alleged impotency could have been found to corroborate the victim's testimony." Id. at 197. Furthermore, the state court found that the victim's deposition testimony revealed that at the very least, Reinheimer committed a lewd and lascivious battery by digital penetration. Thus, Reinheimer failed to demonstrate a reasonable probability that, but for counsel's failure to contact an expert, the result of the proceeding would have been different. Id. at 198.

Applying AEDPA deference, the state court's decision was neither contrary to nor an unreasonable application of Strickland, and it did not result from an unreasonable determination of the facts as presented to the state court. The claim

in ground two is denied.

3. Ground Four

Reinheimer contends that counsel never informed him that the victim could be impeached for making several inconsistent statements. Petition at 5. He complains that counsel never tried to use the victim's inconsistent statements to attempt to get the charges dismissed or a more favorable plea. Id. Reinheimer exhausted this claim by raising it as ground four in his amended motion for postconviction relief in state court, Resp. Ex. K at 111-13, and as issue three on appeal to the First DCA. Resp. Ex. P at 19-26.

Without reaching the issue of deficient performance, the state circuit court found that Reinheimer suffered no prejudice under Strickland because there was no "reasonable probability that Defendant would have insisted on going to trial." Resp. Ex. L at 202. The state circuit court further explained:

> [B]ased on the plea colloquy, Defendant's signed Plea of Guilty and Negotiated Sentence, the substantial amount of evidence against Defendant, and the difference between the sentence imposed under the plea and the maximum possible sentence, Defendant cannot show there is a reasonable probability that he would have proceeded to trial but for counsel's alleged omissions.

Id. at 210-11. Applying deference under AEDPA, the state court's decision was neither contrary to nor an unreasonable application of Strickland, and it did not result from an unreasonable determination of the facts as presented to the state court. The claim in ground four is denied.

4. Ground Five

Reinheimer asserts that counsel refused to pursue an investigation of Matt Brown for filing a fraudulent affidavit for arrest warrant in order to violate Reinheimer's probation. He contends that absent the fraudulent affidavit, there was a very high probability that he never would have been violated on his probation nor charged with lewd and lascivious battery. He also contends that counsel's error denied him dismissal of the charges, or at the least, suppression of any damaging statements he made. Petition at 6. Reinheimer exhausted this claim by raising it as ground three in his amended motion for postconviction relief in state court, see Resp. Ex. K at 108-11, and as issue five on appeal to the First DCA. Resp. Ex. P at 31-37. The state circuit court concluded:

> The Court does not need to reach the issue of whether counsel performed deficiently by failing to challenge the affidavit for arrest on the charge of Sheltering and Providing Aid to a Minor Runaway, as the affidavit did not result in prejudice with regard to Defendant's charge of Lewd and Lascivious Battery. The affidavit for arrest warrant as to the charges of Lewd and Lascivious Battery substantially relied on the victim's statements that Defendant performed sexual activities with the minor victim. (Exhibit "G.") Therefore, the Court finds the issue of Officer Brown's alleged perjured affidavit filed in support of the charge of Sheltering and Providing Aid to a Minor Runaway, does not undermine that Court's confidence in Defendant's conviction for Lewd and Lascivious Battery. Accordingly, Defendant's third ground for relief is denied.

Resp. Ex. K at 198-99.

Applying AEDPA deference, the state court's decision was neither contrary to nor an unreasonable application of Strickland, and it did not result from an

unreasonable determination of the facts as presented to the state court. The claim in ground five is denied.

5. Ground Six

Reinheimer contends that counsel was ineffective for failing to ensure that he was credited for all previous actual time served on his violation of probation. He submits that he had over three years actually served in prison and jail and should have received this credit to run coterminous with his new sentence. He contends that the state court denied this ground based on an altered plea form. Petition at 6.

Reinheimer exhausted this claim by raising it as ground five in his amended motion for postconviction relief in state court, see Resp. Ex. K at 113-14, and as issue six on appeal to the First DCA. Resp. Ex. P at 37-42. The state circuit court addressed the claim as follows:

> As a practical matter, based on the State's unwillingness to negotiate a plea with Defendant for anything less than thirteen years imprisonment (Exhibit "D," page 62, 67.), the Court finds it unlikely Defendant would be offered seven years credit to the new sentence imposed in the instant case. Furthermore, the Court specifically finds [counsel's] testimony both more credible and more persuasive than the Defendant's testimony and allegations. Laramore v. State, 699 So. 2d 846 (Fla. 4th DCA 1997). At the evidentiary hearing, [counsel] explained that Defendant agreed to the following sentence:
>
> A. He entered a plea for 13 years Department of Corrections, then two years probation on a lewd and lascivious case, the 2010. And the agreement was that he would serve five years concurrent for the violation of probation, waiving any past credit except for what he received for his current incarceration.

> (Exhibit "D," page 61. The Court accepts the testimony of [counsel] and finds that she was not ineffective in advising Defendant as to the terms of his plea. Accordingly, Defendant's fifth ground for relief is denied.

Resp. Ex. K at 199-200.

Applying AEDPA deference, the state court's decision was neither contrary to nor an unreasonable application of Strickland, and it did not result from an unreasonable determination of the facts as presented to the state court. The claim in ground six is denied.

B. Procedural Default

1. Ground Three

Reinheimer asserts that counsel misinformed him prior to entering his guilty plea that he did not qualify for civil commitment under the Jimmy Ryce Act. He contends that he would have gone to trial had he known that he would be subject to the Jimmy Ryce Act. He also asserts that the sentencing court allowed him to believe and discouraged him from questioning his attorney's misadvice. Petition at 5.

Reinheimer did not raise any issue involving the Jimmy Ryce Act in the amended motion for postconviction relief he filed in state court on January 3, 2012. Resp. Ex. K at 101-125. However, after the conclusion of testimony at the evidentiary hearing in state court, the following exchange between postconviction counsel (Ms. Papa) and the court occurred:

> MS. PAPA: Your Honor, another issue that was brought up, and I know that we are just addressing the two issues from Judge Lester, is before my client got here

> and after – before he got to you, he had filed an amended petition.[10]
>
> And in that petition was that **he had failed to be advised of the Jimmy Ryce Act.** So neither Judge Lester nor yourself has made a ruling about whether we can investigate that.
>
> Your Honor, there is a plea form in the file that does have the Jimmy Ryce information and that does have my client's initials on it; however, it – and this is why at the beginning of the case I had asked for the transcripts of the plea. And in those transcripts of the plea, although it isn't a plea form, it's actually – there's no warning of that given on the record, and that was another reason my client had added, but it hasn't been litigated and I just wanted to state that for the record.
>
> THE COURT: I don't think it ought to be sufficient to set aside the plea in that your client has not yet been civilly detained by the Jimmy Ryce Act, and we don't know whether he ever would be, and the record does reflect that he initialed that paragraph on the plea form.
>
> MS. PAPA: Yes, sir. Your Honor, may I have a moment, please?
>
> THE COURT: Yes.
>
> MS. PAPA: Thank you.
>
> **(Counsel conferred briefly with the defendant.)**
>
> MS. PAPA: Your Honor, we would not have any other witnesses to call.

Resp. Ex. L at 341-42 (emphases added). The parties then continued and presented

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[10] The record does not include any written amended petition in which Reinheimer raised a claim that counsel was ineffective for either failing to advise or misadvising him of the potential implications of the Jimmy Ryce Act.

closing arguments, but no one mentioned the Jimmy Ryce Act again. Notably, despite conferring with counsel and having the opportunity to correct her description of his claim if he so desired, Reinheimer did not correct his postconviction counsel's characterization of his claim as a "failure-to-advise" claim.

In the state court's order denying postconviction relief, the court summarized by stating:

> [A]t the evidentiary hearing, Defendant informed the Court that he had filed another amended petition in which he alleged error in that **counsel and this Court failed to advise him** as to the Jimmy Ryce Act.

Id. at 211 (emphasis added). Before denying the claim, the court initially noted that Reinheimer wrote his initials next to the standard "Jimmy Ryce Warning" paragraph in the written plea of guilty and negotiated sentence form. The court then explained that civil commitment under the Jimmy Ryce Act constitutes a collateral consequence of a plea and found that the "**failure to advise** a defendant about a collateral consequence cannot be the basis for post-conviction relief to set aside the plea bargain." Id. at 211-12 (emphasis added).

Reinheimer appealed the denial of postconviction relief to the First DCA, where he asserted in his initial pro se brief that "[t]he court committed reversible error when denying defendant the right to timely submit a new amended ground pertaining to counsel's **misadvice** regarding the civil commitment pursuant to the Jimmy Ryce Act[ ] and the trial court's failure to inform defendant to this possibility." See Resp. Ex. P at 26. He argued further that "[d]efense counsel's **misadvise** (sic) about Defendant not qualifying for the Ryce Act caused Defendant to enter a plea of

guilty where had he known the truth Defendant would have never entered into a plea of guilty but would have proceeded to trial. Id. at 29. He did not assert in his appellate brief that his postconviction counsel misrepresented his claim in the trial court as a failure-to-advise claim; nor did he assert that the trial court misconstrued his claim as a failure-to-advise claim rather than an affirmative misadvice claim.

In response, the state asserted in it's appellate brief that it was "unable to locate an amended petition raising this issue in the record on appeal." Resp. Ex. Q at 43. As such, the state contended that the issue was not properly before the trial court and therefore not preserved for appellate review. Id. Assuming arguendo that the issue was properly preserved, the state contended that the claim lacked merit because the plea form bore Reinheimer's initials in two separate provisions warning of the potential ramifications of the Jimmy Ryce Act. See id. at 44-46.

Reinheimer replied that the issue was preserved because the court chose to accept the new claim orally in open court. Resp. Ex. R at 7. Regarding the merits, Reinheimer contended that the record (plea form) did not refute his claim that counsel misadvised him regarding application of the Jimmy Ryce Act. Id. The First DCA affirmed per curiam without written opinion. Resp. Ex. S.

There is a factual distinction between a claim that counsel failed to inform a defendant of potential collateral consequences and a claim that counsel affirmatively misadvised a defendant of potential collateral consequences. See Bauder v. Dep't Of Corr. of Fla., 333 F. App'x 422, 424 (11th Cir. 2009) (reversing and remanding because the district court analyzed petitioner's claim as if he only claimed that his counsel

failed to advise him of potential civil commitment and failed to analyze the effect of defense counsel's alleged affirmative misadvice regarding civil commitment).[11] The two claims are not the same. Even assuming Reinheimer fairly presented a claim to the state circuit court, he presented it as a failure-to-inform claim, see Resp. Ex. L at 341, and the state circuit court ruled on it as such. See id. at 211-12. However, Reinheimer presented a different claim -- a claim of affirmative misadvice – on appeal to the First DCA. See Resp. Ex. P at 26-31; Resp. Ex. R at 7.[12]

In his Petition, Reinheimer presents a claim of affirmative misadvice, but he failed

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[11] See also Holmes v. United States, 876 F.2d 1545, 1553 (11th Cir.1989) (reversing and remanding for an evidentiary hearing to determine whether counsel's affirmative misadvice regarding parole eligibility, a collateral consequence, rendered the appellant's guilty plea unknowing and involuntary); Slicker v. Wainwright, 809 F.2d 768, 770 (11th Cir.1987) (reversing and remanding for an evidentiary hearing because the appellant alleged that, had counsel not affirmatively misinformed him about parole eligibility, he would have insisted on proceeding to trial); Downs-Morgan v. United States, 765 F.2d 1534, 1540-41 (11th Cir.1985) (distinguishing an attorney's failure to advise his client regarding a collateral consequence of his plea from an affirmative misrepresentation, concluding that whether counsel was ineffective based on a misrepresentation should be determined based on the totality of the circumstances).

[12] The Eleventh Circuit has recognized that counsel's affirmative misadvice regarding application of the Jimmy Ryce Act could constitute deficient performance under Strickland. Bauder v. Dep't of Corr., 619 F.3d 1272, 1274 (11th Cir. 2010). Prior to doing so, however, the Eleventh Circuit "distinguished between trial counsel's failure to inform a defendant of potential collateral consequences and counsel's affirmative misadvice to a defendant regarding potential collateral consequences." Bauder, 333 F. App'x at 424. Since the Eleventh Circuit drew that distinction, the Supreme Court stated that there was "no relevant difference between an act of commission and an act of omission in th[e] context" of advice regarding the risk of deportation. Padilla v. Kentucky, 559 U.S. 356, 370 (2010) (citing Strickland, 466 U.S. at 690). However, the Supreme Court in Padilla limited its opinion to circumstances involving "the unique nature of deportation." Id. at 365; see also Kim v. Dir., Virginia Dep't of Corr., 103 F. Supp. 3d 749, 755-56 (E.D. Va. 2015).

to exhaust this claim by fairly presenting it to the state circuit court. As such, the claim in ground three is unexhausted. See 28 U.S.C. § 2254(b)(1); see also Baldwin v. Reese, 541 U.S. 27, 29 (2004) (the prisoner must give the state courts the opportunity to correct alleged constitutional violations by presenting his claims in each appropriate state court). Because any future attempts at exhaustion would be futile, Reinheimer's claims are also procedurally barred. See Owen v. Sec'y, Dep't of Corr., 568 F.3d 894, 908 n.9 (11th Cir. 2009); see also O'Sullivan v. Boerckel, 526 U.S. 838, 848 (1999). Federal habeas review is precluded.[13] See Pope v. Sec'y for Dep't of Corr., 680 F.3d 1271, 1284 (11th Cir. 2012). As such, the claim in ground three is denied.[14]

2. Grounds Seven and Eight

As ground seven, Reinheimer asserts that counsel was ineffective by neither filing any pretrial motion to suppress any harmful statements nor informing him that a suppression motion was available to him. He asserts that he informed his counsel that he was never given his Miranda rights prior to being interrogated by law enforcement prior to his polygraph. He contends that the lower court accepted an altered Miranda warning form that was used for the purpose of Reinheimer consenting to photographs of his penis, and that the date on the form predated his

[13] Reinheimer makes no effort to show either (1) cause for and actual prejudice from the default or (2) a fundamental miscarriage of justice. See Coleman v. Thompson, 501 U.S. 722, 750 (1991); Ward v. Hall, 592 F.3d 1144, 1157 (11th Cir. 2010).

[14] Even if not procedurally defaulted, given that Reinheimer's signed plea form included Jimmy Ryce warnings, an ineffective-assistance-of-counsel claim on this ground would not likely prevail.

arrest by one year. Petition at 7. Reinheimer raised this issue as ground seven in his amended motion for postconviction relief in state court.[15] The state trial court denied his claim, finding that Reinheimer could not satisfy the prejudice requirement under Strickland because he could not show a reasonable probability that he would have proceeded to trial but for counsel's alleged omissions. Resp. Ex. L at 202; 210-11.

As ground eight, Reinheimer contends that the prosecution was personal and vindictive. He asserts that the prosecutor chose to pursue a conviction despite knowing that Matt Brown had filed a fraudulent affidavit to support the arrest warrant and that the victim was neither credible nor truthful. He asserts that counsel should have moved to have the charges dismissed. Petition at 8. Reinheimer raised this issue as ground six in his amended motion for postconviction relief in state court. The state trial court denied his claim, finding that Reinheimer's allegation failed to demonstrate any specific prejudice as required under Florida state law to disqualify a prosecutor. Accordingly, the state court found that Reinheimer failed to establish deficient performance or that the outcome of the proceedings would have been different absent counsel's alleged omission. Resp. Ex. K at 200.

Although Reinheimer raised these claims in the state circuit court, he failed to include them in the pro se brief he filed in the First DCA. As such, the claims in grounds seven and eight are unexhausted. See 28 U.S.C. § 2254(b)(1); Boerckel, 526

[15] "In his seventh ground for relief, Defendant alleges that he was not provided his Miranda warnings prior to his interview with a private polygraph administrator." Resp. Ex. L at 201-02, n. 1.

U.S. 838 at 845 ("[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process."); Pope, 680 F.3d at 1284 (failure to present every issue to the state's highest court, either on direct appeal or collateral review, constitutes a failure to exhaust state remedies); Doorbal v. Dep't of Corr., 572 F.3d 1222, 1229 (11th Cir. 2009) (failure to appeal the denial of an ineffective-assistance-of-counsel claim constitutes a failure to exhaust state court remedies); see also Baldwin v. Reese, 541 U.S. 27, 29 (2004) (the prisoner must give the state courts the opportunity to correct alleged constitutional violations by presenting his claims in each appropriate state court). Because any future attempts at exhaustion would be futile, Reinheimer's claims are also procedurally barred. See Owen, 568 F.3d at 908 n.9. Thus, federal habeas review is precluded, unless Reinheimer can show either (1) cause for and actual prejudice from the default;[16] or (2) a fundamental miscarriage of justice.[17] See Davila v. Davis, 137 S. Ct. 2058, 2064-65 (2017);

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[16] "To establish 'cause'. . . the prisoner must 'show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.'" Davila, 137 S. Ct. at 2065 (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)). "[T]o show prejudice, a petitioner must demonstrate that 'the errors at trial actually and substantially disadvantaged his defense so that he was denied fundamental fairness.'" Ward, 592 F.3d at 1157 (quoting McCoy v. Newsome, 953 F.2d 1252, 1261 (11th Cir. 1992) (per curiam)).

[17] This exception is "exceedingly narrow in scope as it concerns a petitioner's 'actual' innocence rather than his 'legal' innocence." Johnson v. Alabama, 256 F.3d 1156, 1171 (11th Cir. 2001) (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995), cert. denied, 535 U.S. 926 (2002)). "To meet this standard, a petitioner must 'show that it is more likely than not that no reasonable juror would have convicted him' of the underlying offense." Id. In addition, "'[t]o be credible,' a claim of actual innocence must be based on reliable evidence not presented at trial." Calderon v. Thompson, 523 U.S. 538, 559 (1998) (quoting Schlup, 513 U.S. at 324). With the rarity of such

Coleman, 501 U.S. at 750; Ward, 592 F.3d at 1157.

Reinheimer contends that he relied on a certified law clerk's advice that he could not raise the claims in grounds seven and eight on appeal to the First DCA due to page limitations.[18] Petition at 7-8. Initially, Respondents note that Reinheimer's initial brief on appeal was forty-two pages of text, less than the limit of fifty.[19] Response at 17. Thus, Reinheimer had eight unused pages of text available to him that he could have used to address the claims in grounds seven and eight. Moreover, he never asked the First DCA for permission to exceed any applicable page limit.

Nevertheless, even assuming that Reinheimer relied on erroneous advice from the prison law clerk, it would not serve as cause to excuse his failure to raise these claims on collateral appeal. Reinheimer proceeded pro se in his state collateral appeal to the First DCA; he had no constitutional right to counsel in state postconviction proceedings. See Davila, 137 S. Ct. at 2062, 2065. As such, he had personal responsibility for pursuing his issues on collateral appeal. Cf. Marsh v. Soares, 223 F.3d 1217, 1220 (10th Cir. 2000) ("The fact that an inmate law clerk was assisting in drafting the state petition does not relieve [petitioner] from the personal responsibility of complying with the law.") He cannot rely on the misadvice of a

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evidence, in most cases, allegations of actual innocence are ultimately summarily rejected. Schlup, 513 U.S. at 324.

[18] Reinheimer makes no attempt to assert a fundamental miscarriage of justice.

[19] In his Reply, Reinheimer does not address grounds seven and eight.

prison law clerk to excuse his procedural default.[20] Due to Reinheimer's failure to exhaust these claims and the resulting procedural default, the Court denies the claims raised in grounds seven and eight.

3. Supplemental Petition

Essentially, Reinheimer asserts that he was convicted of a nonexistent offense because the statute was never properly enacted. See Supp. Petition at 1. He contends that he is actually innocent of any charge based on the void statute. Id. at 4. He asserts that the court had no subject matter jurisdiction to punish him. Id. As such, he contends that he can raise this issue at any time, citing Florida law. Id. at 4-5; 8.

Respondents moved to dismiss the supplemental petition. See Supp. Response. The Court agrees with Respondents that Reinheimer's claim is untimely under § 2244(d)(1)(A) and that Reinheimer has neither asserted nor established that he is entitled to equitable tolling. Id. at 2-4. Alternatively, the Court agrees with Respondents that Reinheimer's claim is procedurally defaulted because he failed to exhaust his claim in state court. See id. at 4-5. He also fails to assert or demonstrate cause and prejudice for his procedural default or a fundamental

[20] Although Reinheimer does not assert that Martinez v. Ryan, 566 U.S. 1 (2012) should apply to excuse his procedural default, the narrow exception in Martinez does not apply to Reinheimer's failure to raise his claims on collateral appeal. See id. at 14; Lambrix v. Sec'y, Fla. Dep't of Corr., 851 F.3d 1158, 1164, (11th Cir. 2017) (the Martinez exception applies only where the prisoner failed to properly raise ineffective-assistance-of-trial-counsel claims during the initial collateral proceeding). Alternatively, Reinheimer cannot demonstrate that his underlying claims are substantial. Martinez, 566 U.S. at 14.

miscarriage of justice. As such, the claim in the supplemental petition is denied.

Accordingly it is hereby

ORDERED:

1. Reinheimer's Petition Under § 2254 for Writ of Habeas Corpus (Doc. 1) is **DENIED**, and this action is **DISMISSED WITH PREJUDICE**.
2. The **Clerk of Court** shall enter judgment denying the Petition and dismissing this case with prejudice.
3. If Petitioner appeals the denial of the Petition, the Court denies a certificate of appealability.[21] Because this Court has determined that a certificate of appealability is not warranted, the **Clerk of the Court** shall terminate from the pending motions report any motion to proceed on appeal as a pauper that may be filed in this case. Such termination shall serve as a denial of the motion.

[21] This Court should issue a certificate of appealability only if the Petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make this substantial showing, Petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," Tennard v. Dretke, 542 U.S. 274, 282 (2004) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)), or that "the issues presented were 'adequate to deserve encouragement to proceed further.'" Miller-El v. Cockrell, 537 U.S. 322, 335-36 (2003) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)). Here, after consideration of the record as a whole, a certificate of appealability is not warranted.

4. The **Clerk of the Court** shall close this case.

DONE AND ORDERED in Jacksonville, Florida this 13th day of September 2017.

TIMOTHY J. CORRIGAN
United States District Judge

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Copies to: Counsel of record
Delmar Reinheimer #144366