APPENDIX A "1"
Order Denying Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-12699-JJ

JESUS N. RODRIGUEZ,

Petitioner - Appellant,

versus

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

Respondents - Appellees.

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

BEFORE: JORDAN, NEWSOM, and LUCK, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by Jesus N. Rodriguez is DENIED.

ORD-41

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

David J. Smith
Clerk of Court

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

July 15, 2020

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 18-12699-JJ
Case Style: Jesus Rodriguez v. Attorney General, State of Fl., et al
District Court Docket No: 1:16-cv-23755-KMW

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Tiffany A. Tucker, JJ/lt
Phone #: (404)335-6193

REHG-1 Ltr Order Petition Rehearing

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ATTORNEY GENERAL, STATE OF FLORIDA,
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Appeal from the United States District Court
for the Southern District of Florida

Before: JORDAN, NEWSOM, and LUCK, Circuit Judges.

BY THE COURT:

Appellant's motion for leave to file an out-of-time petition for rehearing, as construed from his motion to accept his motion for reconsideration as timely, is GRANTED.

On its own motion, this Court RECALLS the mandate in this appeal for consideration of Appellant's motion for reconsideration as a petition for rehearing of this Court's May 11, 2020 opinion.

APPENDIX B

Report & Recommendation of Magistrate Denying Relief

APPENDIX B
(Report & Recommendation Denying Habeas Corpus Relief)

JESUS N. RODRIGUEZ vs. JONES, 2017 US Dist LEXIS 2126 (2020)
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA
17 U.S. Dist. LEXIS 2126
CASE NO. 1:16-cv-23755-WILLIAMS
December 22, 2017, Decided
December 27, 2017, Entered on Docket
Editorial Information: Subsequent History
Magistrate's recommendation at, Habeas corpus proceeding at Rodriguez v. Jones, 2018 U.S. Dist. LEXIS 58329 (S.D. Fla., Apr. 4, 2018)Request denied by, Without prejudice In re Rodriguez, 2018 U.S. App. LEXIS 19923 (11th Cir., July 18, 2018)Motion denied by, Without prejudice Rodriguez v. Jones, 2018 U.S. Dist. LEXIS 232360 (S.D. Fla., Aug. 28, 2018)Certificate of appealability denied Rodriguez v. AG, 2019 U.S. App. LEXIS 3807 (11th Cir. Fla., Feb. 6, 2019)
Editorial Information: Prior History
Rodriguez v. State, 27 So. 3d 753, 2010 Fla. App. LEXIS 1337 (Fla. Dist. Ct. App. 3d Dist., Feb. 10, 2010)
Counsel {2017 U.S. Dist. LEXIS 1}Jesus N. Rodriguez, Plaintiff, Pro se, South Bay, FL.

For Attorney General of the State of Florida, Pamela Jo Bondi, Defendant: Noticing 2254 SAG Miami-Dade/Monroe, LEAD ATTORNEY.

For Florida Department of Corrections, Julie L. Jones, Secretary, Defendant: Noticing 2254 SAG Miami-Dade/Monroe, LEAD ATTORNEY; Douglas James Glaid, LEAD ATTORNEY, Attorney General Office, Department of Legal Affairs, Miami, FL.
Judges: Patrick A. White, UNITED STATES MAGISTRATE JUDGE. Opinion
Opinion by: Patrick A. White Opinion
REPORT OF MAGISTRATE JUDGE

I. Introduction

The pro se petitioner, Jesus N. Rodriguez, a convicted state prisoner presently confined at the South Bay Correctional Facility, has filed this petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254, attacking the constitutionality of his state conviction and sentence in the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County case number F02-10536.
This Cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. § 636(b)(1)(B) and Rules 8 and 10 of the Rules Governing Section 2254 Cases in the United States District Courts.
For its consideration of the petition (DE#1), the Court has the State's response (DE#11) to an order to show cause with its appendix; all pertinent portions of the underlying criminal file in the State's case against Petitioner{2017 U.S. Dist. LEXIS

2} and transcripts of the relevant proceedings; and subsequent appellate filings and decisions.

II. Claims

Construing the arguments liberally as afforded pro se litigants pursuant to Haines v. Kerner, 404 U.S. 519, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972), Petitioner raises the following grounds for relief:

1. The post-conviction judge abused his discretion by denying Petitioner's motion for appointment of counsel and investigator. (DE#1:5).
2. The trial judge committed error by allowing post-conviction counsel to abandon seven post-conviction claims without Petitioner's authorization. (DE#1:7).

Petitioner also asks this Court to order a new trial "based on the (27) claims presented herein." (DE#1:15). However, Petitioner does not articulate what those "(27) claims" are.

III. Procedural History

On May 1, 2002, in a four-count Indictment, Petitioner was charged with the first-degree murder of his wife1 (Count 1), in violation of F.S. 782.04(1) and 777.011, a capital crime; (Count 2) kidnapping, in violation of F.S. 787.01(2) and 777.011, a first-degree felony; (Count 3) burglary of a dwelling with an assault or battery, in violation of F.S. 810.02(2)(a) and 777.011, a first-degree felony; and (Count 4) aggravated stalking after the entry of an injunction for protection{2017 U.S. Dist. LEXIS 3} against domestic violence, in violation of 784.048(4) and 777.011, a third-degree felony. (Exh. A; see also Exh. D). Petitioner asserted his right to a trial by jury, which commenced on November 5, 2007, and continued for nearly three weeks. At trial, Petitioner asserted his right to testify on his own behalf. On November 20, 2007, a jury convicted Petitioner on all counts of the Indictment. (Exh. C). On January 25, 2008, the court sentenced Petitioner to life imprisonment without the possibility of parole as to Count 1; life imprisonment as to Count 2 to run consecutive with Count 1; a term of 30 years as to Count 3 to run concurrent with Counts 1 & 2; and a term of five years as to Count 4 to run concurrent with Counts 1, 2, and 3. (Exh. E).

On January 15, 2008, Petitioner timely filed a notice of appeal. (Exh. B). Therein, Petitioner raised two issues: (1) "the trial judge erred in ruling, over the objection of counsel, that defendant during the state's cross examination opened the door to allow the state to impeach defendant with evidence" of his prior criminal history despite the lack of convictions and (2) "the prosecutor committed fundamental error" during closing argument when{2017 U.S. Dist. LEXIS 4} she impermissibly shifted the burden of proof from the State to the defense by stating "the jury had to be convinced beyond a reasonable doubt the victim was still alive." (Exh. F). In a written opinion, the Third District Court of Appeal affirmed Petitioner's conviction. Rodriguez v. State, 27 So. 3d 753 (Fla. 3d DCA2010).2 On February 22, 2010, Petitioner filed a motion for rehearing, which was denied by the appellate court on March 9, 2010. (Exh. H). The mandate was issued on March 26, 2010. (Exh. I).

Next, Petitioner filed a Writ of Habeas Corpus in the Third DCA on October 11, 2010. (Exh. J; Case No. 3D10-2700). Therein, he claimed that appellate counsel was ineffective for failing to raise two matters: (1) denial of a mistrial motion based on an alleged discovery violation during the testimony of Marie Polo, an attorney, and (2) that prosecutor's closing arguments amounted to belittling and ridiculing him, thus depriving him of a fair trial. (Id.). The Third DCA denied the petition without an opinion on January 24, 2011. Rodriguez v. State, 53 So. 3d 234 (Fla. 3d 2011). No mandate was issued.

Thereafter, on February 3, 2011, Petitioner filed a pro se motion for post-conviction relief, pursuant to Fla. Rule 3.850, raising twenty-five claims (Exh. N) and then hired independent counsel{2017 U.S. Dist. LEXIS 5} who filed another pleading adopting and incorporating grounds one through six, eight, 11 through 16, 18, and 22 through 25 as ineffective assistance of trial counsel and abandoned the remaining grounds asserted. (Exh. O). On October 19, 2012, the court issued a twenty-six page order denying all but two claims. The court granted Petitioner an evidentiary hearing for grounds 14 and 15 where he claimed that trial counsel's failure to investigate his assertion that his wife embezzled funds from him and fled jurisdiction to avoid prosecution resulted in counsel's inability to effectively cross-examine Detective Suco.3 (Exh. P). On July 1-and August 26, 2014, the court conducted an evidentiary hearing. Petitioner, his former trial counsel, and his former sister-in-law testified. (Exh. Q). Then, on December 19, 2014, the court issued an order denying all claims and detailed its reasoning for finding Petitioner's claims that his counsel failed to investigate facts that would prove his wife was still alive were "simply untrue." (Exh. R).

On April 3, 2015, Petitioner filed a Motion for a Belated Appeal with the Third DCA (Exh. S), which was granted on May 5, 2015. (Exh. T.). On July 8, 2016, the{2017 U.S. Dist. LEXIS 6} appellate court dismissed Petitioner's appeal for failure to comply with the court's order for him to file his initial brief.4 (Exh. CC). On August 5, 2016, Petitioner's motion for rehearing was denied without opinion. Rodriguez v. State, 210 So. 3d 1293, 2016 Fla. App. LEXIS 12837, 2016 WL 4480269 (Fla. 3d DCA2016).

On August 29, 2016, Petitioner filed the instant petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (DE#1). However, he continued to file various post-conviction appeals with the Third DCA while the instant petition was pending. (See Exhs. EE, FF; Case No. 3D16-2716 (petition for belated appeal denied in Rodriguez v. State, 229 So. 3d 348, 2016 Fla. App. LEXIS 19566 (Fla. 3d DCA2016); Case No. 3D17-973 (petition for belated appeal stricken as unauthorized on July 10, 2017); and Case No. 3D17-1117 affirmed per curiam in Rodriguez v. State, 228 So. 3d 566, 2017 Fla. App. LEXIS 9612, 2017 WL 2859650 (Fla. 3d DCA2017). Responding to an order to show cause, the State filed its response to Petitioner's § 2254 along with its exhibits. (DE#14). Petitioner filed his traverse on March 29, 2017. (DE#24).

IV. Threshold Issues - Timeliness, Exhaustion, and Procedural Bar

A. Timeliness

Parties correctly agree that the instant petition is timely filed.

B. Exhaustion & Procedural Bar

The parties agree that each of Petitioner's claims are exhausted having been appealed to the Third DCA, and are thus ripe for federal habeas review.

V. Standard of Review in § 2254 Cases

Because{2017 U.S. Dist. LEXIS 7} Petitioner filed his federal petition after April 24, 1996, this case is governed by 28 U.S.C. § 2254, as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). See DeBruce v. Comm'r, 758 F.3d 1263, 1265-66 (11th Cir. 2014). The AEDPA imposes a highly-deferential standard for reviewing the state court rulings on the merits of constitutional claims raised by a petitioner. "As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court 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, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). See also Greene v. Fisher, 565 U.S. 34, 39, 132 S. Ct. 38, 181 L. Ed. 2d 336, (2011)(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.")(internal quotation marks omitted).

AEDPA allows federal courts to grant habeas relief only if the state court's resolution of those claims: (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{2017 U.S. Dist. LEXIS 8} that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d).

A state court's decision is "contrary to" clearly established Supreme Court precedent in either of two respects: (1) "if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases," or (2) "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [the Supreme Court's] precedent." Williams v. Taylor, 529 U.S. 362, 405-06, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). To determine whether a state court decision is an "unreasonable application" of clearly established federal law, we are mindful that "an unreasonable application of federal law is different from an incorrect application of federal law." (Id. at 410). As a result, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." (Richter, id. at 786) (quotation marks omitted).

It is noted that the state court is not required to cite, or even have an awareness of, governing Supreme Court precedent "so long as neither the reasoning nor the {2017 U.S. Dist. LEXIS 9} result of [its] decision contradicts them." Early v. Packer, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002); cf. Harrington, 562 U.S. at 98 (reconfirming that "§ 2254(d) does not require a state court to give

reasons before its decision can be deemed to have been 'adjudicated on the merits'" and entitled to deference); see also Mitchell v. Esparza, 540 U.S. 12, 16, 124 S. Ct. 7, 157 L. Ed. 2d 263 (2003).

Thus, state court decisions are afforded a strong presumption of deference even when the state court adjudicates a petitioner's claim summarily without an accompanying statement of reasons. Harrington, 562 U.S. at 91-99 (concluding that the summary nature of a state court's decision does not lessen the deference that it is due); Gill v. Mecusker, 633 F.3d 1272, 1288 (11th Cir. 2011)(acknowledging the well-settled principle that summary affirmances are presumed adjudicated on the merits and warrant deference, citing Harrington, 562 U.S. at 98-99 and Wright v. Sec'y for the Dep't of Corr's., 278 F.3d 1245, 1254 (11th Cir. 2002)). See also Renico v. Lett, 559 U.S. 766, 773, 130 S. Ct. 1855, 176 L. Ed. 2d 678 (2010)("AEDPA ... imposes a highly deferential standard for evaluating state-court rulings ... and demands that state-court decisions be given the benefit of the doubt.")(citations and internal quotation marks omitted).

Furthermore, review under § 2254(d)(1) 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, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011)(holding new evidence introduced in federal habeas court has no bearing on Section 2254(d)(1) review; and, a state court's factual determination is entitled to a presumption of correctness.{2017 U.S. Dist. LEXIS 10} 28 U.S.C. § 2254(e)(1). Under 28 U.S.C. § 2254(e)(1), this Court must presume the state court's factual findings to be correct unless Petitioner rebuts that presumption by clear and convincing evidence. See id. § 2254(e)(1). As recently noted by the Eleventh Circuit in DeBruce, 758 F.3d at 1266, although the Supreme Court has "not defined the precise relationship between § 2254(d)(2) and § 2254(e)(1)," Burt v. Titlow, 571 U.S. 12, 18, 134 S. Ct. 10, 15, 187 L. Ed. 2d 348 (2013), the Supreme Court has emphasized "that a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." Burt, Id. (quoting Wood v. Allen, 558 U.S. 290, 301, 130 S. Ct. 841, 175 L. Ed. 2d 738 (2010)).

VI. Applicable Principles of Law

A. Appointment of Counsel in Post-Conviction Proceedings

The Sixth Amendment affords a criminal defendant the right to "the Assistance of Counsel for his defense." U.S. CONST. amend. VI. However, "there is no constitutional right to an attorney in state post-conviction proceedings." Coleman v. Thompson, 501 U.S. 722, 752-53, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). To the extent that Petitioner relies on Martinez v. Ryan, 566 U.S. 1, 8, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), the Supreme Court made clear that it was not altering Coleman's constitutional ruling that there was no constitutional right to effective post-conviction counsel. Rather, Martinez qualifies Coleman "by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural{2017 U.S. Dist. LEXIS 11} default of a claim of ineffective assistance at trial." Martinez v. Ryan, 566 U.S. at 9. See also Williams v. Sec'y, Fla. Dep't of Corr., 2017 U.S. App. LEXIS 21702

referencing Martinez v. Ryan, 566 U.S. 1, 12-16, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012)(noting that to be a substantial claim of ineffective assistance of trial counsel, "the prisoner must demonstrate that the claim has some merit").

Bare and conclusory allegations of ineffective assistance of counsel which contradict the existing record and are unsupported by affidavits or other indicia of reliability are insufficient to require a hearing or further consideration. See United States v. Robinson, 64 F.3d 403, 405 (8th Cir. 1995); United States v. Ammirato, 670 F.2d 552, 555 n.1 (5th Cir. 1982).

B. Defects in Collateral Proceedings

It is well-settled that "the writ of habeas corpus does not perform the office of a writ of error or an appeal." Ex parte Terry, 128 U.S. 289, 9 S. Ct. 77, 32 L. Ed. 405 (1888). Federal habeas courts do not sit to correct errors of fact but serve to ensure that persons are not imprisoned in violation of the their rights guaranteed by the Constitution. Herrera v. Collins, 506 U.S. 390, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993). Federal habeas relief is available to remedy defects in a defendant's conviction and sentence, but "an alleged defect in a collateral proceeding does not state a basis for habeas relief." Quince v. Crosby, 360 F.3d 1259, 1262 (11th Cir. 2004); see also Carroll v. Sec'y, DOC, 574 F.3d 1354, 1365 (11th Cir. 2009) (collecting cases). "There is a valid reason behind this principle: 'a challenge to a state collateral proceeding does not undermine the legality of the detention or imprisonment -- i.e., the conviction{2017 U.S. Dist. LEXIS 12} itself -- and thus habeas relief is not an appropriate remedy.' Alston v. Dep't of Corr., 610 F.3d 1318, 1325-1326 (11th Cir. 2010) (quoting Carroll, 574 F.3d at 1365). Collateral criminal proceedings in Florida are a state-created right; and a challenge to these proceedings concerns matters of state law that do not provide a basis for federal habeas relief. (Id. at 1326).

VII. Discussion

In claim one, Petitioner claims that the post-conviction judge abused his discretion by denying the motion for (a) the appointment of counsel and (b) the appointment of an investigator following the denial of post-conviction relief. The State asserts that Petitioner's claim is without merit since it presents issues of state law not cognizable in a federal habeas corpus proceeding because a state's interpretation of its own rules or statutes does not raise a federal constitutional issue. Petitioner's claim is not cognizable and is without merit based on the following.

a. Denial of the Appointment of Counsel in a Post-Conviction Proceeding

"There is no constitutional right to an attorney in state post-conviction proceedings." Coleman v. Thompson, 501 U.S. at 752-53. Federal habeas relief is not available as a remedy for defects in state collateral proceedings. Quince v. Crosby, 360 F.3d at 1262. Moreover, in Florida, collateral criminal proceedings are a state-created right;{2017 U.S. Dist. LEXIS 13} and issues of state law are not cognizable claims under Section 2254. See Alston, 610 F.3d at 1326.

Here, Petitioner claims that he needed a court-appointed counsel in order to file a brief to show that his trial counsel committed perjury while providing testimony at

the evidentiary hearing held in consideration of Petitioner's post-conviction motion. He is not entitled to counsel as narrated above. Furthermore, his bare and conclusory allegation (without any specificity) that his trial counsel committed perjury at the evidentiary hearing is insufficient to require a hearing in order to obtain yet another counsel to challenge the prior one. Even if the state court erred in denying Petitioner court-appointed counsel, a federal habeas petition provides no remedy for such a defect. Moreover, the state court's determination on the reliability of trial counsel's testimony (and Petitioner's own) at the evidentiary hearing and the evidence presented at the same is entitled to the presumption of correctness. Petitioner's claim that the post-conviction judge abused his discretion by denying the appointment of counsel should be denied. His claim fails and warrants no relief.

b. Denial of the Appointment of an Investigator in a Post-Conviction{2017 U.S. Dist. LEXIS 14} Proceeding. Similarly, Petitioner's request for the appointment of an investigator sits upon an equally baseless premise. Habeas petitioners are "not entitled to discovery as a matter of ordinary course" but may obtain it based on a showing of good cause, Bracy v. Gramley, 520 U.S. 899, 904, 117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997), to believe that the evidence sought would "raise...sufficient doubt about [his] guilt to undermine confidence in the result of the trial." Arthur v. Allen, 459 F.3d 1310, 1311 (11th Cir. 2006) cert. denied Arthur v. Allen, 549 U.S. 1338, 127 S. Ct. 2033, 167 L. Ed. 2d 763 (2007) referencing Schlup v. Delo, 513 U.S. 298, 317, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995). See also Rule 6(b) of the Rules Governing Section 2254 Cases, "[a] party requesting discovery must provide reasons for the request. The request must also include any proposed interrogatories and requests for admission, and must specify any requested documents."

The appellate court granted Petitioner an evidentiary hearing regarding claims that trial counsel failed to properly investigate his allegations that his wife embezzled monies from the family business and left the jurisdiction; and the court found no evidence supporting his claims. (Exh. R). Not only did the hearing fail to uncover any evidence of ineffective assistance but, based on the testimony presented, it was evident that Petitioner's claim alleging insufficient efforts by counsel to locate his wife or document her continued existence was "simply untrue"{2017 U.S. Dist. LEXIS 15} and amounted to an "Elvis defense." (Id.).

Petitioner, during his own testimony, offered no clues as to where or how any such evidence was to be found; and the court "conclud(ed) that no such evidence ever existed." (Id.). According to the court: we learn[ed] that Mr. Rodriguez instructed [his trial counsel] 'to investigate all the things [his wife] did' but we never learn what those things were...how they would be exculpatory...[h]e simply exhorted his lawyers to 'investigate' in hopes that they would find 'stuff' supporting his claim that his wife might not be dead.(Id.).

The court further determined that: [P]rosecution and defense made Preomethean efforts to find...evidence...of Mrs. Rodriguez's continued existence. None was found...and there is every reason to believe that she is dead, and absolutely no reason to believe that she isn't.(Id.).

Petitioner provides no facts in the instant petition or in his traverse upon which if fully developed would demonstrate he is entitled to relief. Moreover, he fails to explain why any discovery he now seeks is different from that which was available to him in state court as investigated by the prosecution and defense and at his evidentiary hearing in his state post-conviction{2017 U.S. Dist. LEXIS 16} proceedings. Rather, he repeats the same story as asserted in his series of post-conviction motions -- that his wife stole money from the family business and fled the jurisdiction (without providing any specific supporting facts), blames his trial counsel for failing to find proof supporting Petitioner's narrative that his wife is still alive, and, most recently, he broadly accuses his trial counsel of committing perjury at the evidentiary hearing regarding the extent of the investigation. Habeas petitioners cannot use discovery as a fishing expedition nor may they seek it based on pure hypothesis. Arthur v. Allen, 459 F.3d 1310, 1311 (11th Cir. 2006), cert. denied Arthur v. Allen, 549 U.S. 1338, 127 S. Ct. 2033, 167 L. Ed. 2d 763 (2007). Moreover, the record refutes Petitioner's claim.

Petitioner's claim that the state court erred in failing to appoint an investigator is not a cognizable claim as narrated above. Even if the state court erred, a federal habeas petition provides no remedy for such a defect. Petitioner fails to convince this Court that the appointment of an investigator would entitle him to federal habeas relief on any claim. Consequently, there is no good cause to conduct further discovery. Petitioner, in claim one, presents no constitutional issue with regard to his conviction and sentence.{2017 U.S. Dist. LEXIS 17} Petitioner's claim that the post-conviction judge abused his discretion by denying the appointment of an investigator warrants no relief and should be denied.

In claim two, Petitioner claims that the trial judge committed "plain error" by allowing post-conviction counsel to abandon seven post-conviction claims without Petitioner's authorization.

The State asserts there is no right to require post-conviction counsel to raise claims and an assertion of violation of equal protection and due process do not transform state-law issues into federal issues. Petitioner's claim is not cognizable and is without merit based on the following.

Federal habeas relief is not available as a remedy for defects in state collateral proceedings. Quince v. Crosby, 360 F.3d at 1262. Moreover, in Florida, collateral criminal proceedings are a state-created right; and issues of state law are not cognizable claims under Section 2254. See Alston, 610 F.3d at 1326.

Here, Petitioner filed his motion for post-conviction relief pursuant to Rule 3.850, wherein he raised twenty-five claims. (Exh. N) and then, approximately one month later, hired private counsel to file a follow-up motion adopting and incorporating those grounds as claims of ineffective assistance of counsel and abandoning other claims.{2017 U.S. Dist. LEXIS 18} (Exh. O). Still, the state court denied all but two of Petitioner's claims (and asked the State for record citations for a third claim) and granted him an evidentiary hearing. Petitioner's claim that the state court permitted post-conviction counsel (Michael Takiff) to "abandon" several claims without his permission is not a cognizable claim under Section 2254 and presents no

constitutional issue with regard to Petitioner's conviction and sentence. Petitioner's label that the "error" amounts to a violation of equal protection and due process does not turn his state issue into a federal issue.

The state court's decision is not contrary to nor involves an unreasonable application of clearly established Federal law nor was its decision based on an unreasonable determination of the facts in light of the evidence presented. More importantly, because Petitioner presents no cognizable claim, his claim fails on the merits, warrants no relief, and should be denied.

To the extent that Petitioner asks for a new trial "based on the (27) claims presented herein,"(see DE#1:15), **Petitioner only presented two claims in his federal habeas petition. This Court cannot be left to speculate as to what the other twenty-five{2017 U.S. Dist. LEXIS 19} claims might be.5 To that extent, Petitioner fails to state any claims other than the two addressed herein this report. As such, his request for a new trial based on "(27) claims" should be denied.**

VIII. Evidentiary Hearing

Based upon the foregoing, any request by Petitioner for an evidentiary hearing on the merits of any or all of his claims should be denied since the habeas petition can be resolved by reference to the state court record. 28 U.S.C. § 2254(e)(2); Schriro v. Landrigan, 550 U.S. at 474 (holding that if the record refutes the factual allegations in the petition or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing). See also Atwater v. Crosby, 451 F.3d 799, 812 (11th Cir. 2006)(addressing the petitioner's claim that his requests for an evidentiary hearing on the issue of trial counsel's effectiveness during the penalty phase of his trial in both the state and federal courts were improperly denied, the court held that an evidentiary hearing should be denied "if such a hearing would not assist in the resolution of his claim."). Petitioner has failed to satisfy the statutory requirements in that he has not demonstrated the existence of any factual disputes that warrant a federal evidentiary hearing.

IX. Certificate of Appealability

A {2017 U.S. Dist. LEXIS 20} prisoner seeking to appeal a district court's final order denying his petition for writ of habeas corpus has no absolute entitlement to appeal, but must obtain a certificate of appealability ("COA") to do so. 28 U.S.C. § 2253(c)(1); Harbison v. Bell, 556 U.S. 180, 129 S. Ct. 1481, 173 L. Ed. 2d 347 (2009).

This Court should issue a COA only if Petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where a district court has rejected a petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. See Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). Alternatively, when the district court has rejected a claim on procedural grounds, the petitioner must show that ?jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would

find it debatable whether the district court was correct in its procedural ruling." (Id.).

After review of the record, Petitioner is not entitled to a certificate of appealability. Nevertheless, as now provided by the Rules Governing § 2254 Proceedings, Rule 11(a), 28 U.S.C. § 2254: "Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." If there{2017 U.S. Dist. LEXIS 21} is an objection to this recommendation by either party, that party may bring this argument to the attention of the district judge in the objections permitted to this report and recommendation.

X. Recommendations

Based upon the foregoing, it is recommended that this petition for habeas corpus relief be DENIED; that no certificate of appealability issue; that final judgment be entered; and, that the case be closed.

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

SIGNED this 22nd day of December, 2017.

/s/ Patrick A. White

1 Mrs. Rodriguez's body was never found.

2 Petitioner has a lengthy procedural history and is somewhat of a litigious filer. In an effort to vacate the judgment in the underlying criminal case, he filed eight additional appellate cases in the Third DCA, three of which were opened shortly after he filed his Section 2254 Motion with this Court. See Case No. 3D10-2700; Case No. 3D15-819; Case No. 3D15-1165; Case No. 3D15-2427; Case No. 3D16-653; Case No. 3D16-2716; Case No. 3D17-973; and Case No. 3D17-1117.

3 With regard to claim 25, the court ordered the State to supplement its response with the necessary record citations in order to support its claim that the record refuted Petitioner's allegation that his attorney failed to investigate the case.

4 Despite his failure to file his initial brief, Petitioner was able to file multiple motions both for appointment of counsel and for rehearings.

5 Petitioner is cautioned that arguments not raised by Petitioner before the magistrate judge cannot be raised for the first time in objections to the undersigned's Report. See Starks v. United States, 2010 U.S. Dist. LEXIS 110806, 2010 WL 4192875 at *3 (S.D. Fla. 2010); United States v. Cadieux, 324 F.Supp. 2d 168 (D.Me. 2004). "Parties must take before the magistrate, 'not only their best shot but all of the shots.'" Borden v. Sec'y of Health & Human Servs., 836 F.2d 4, 6 (1st Cir. 1987)(quoting Singh v. Superintending Sch. Comm., 593 F.Supp. 1315, 1318 (D.Me. 1984)). Thus, [w]here a party raises an argument for the first time in an objection to a report and recommendation, the district court may exercise its discretion and decline to consider the argument." Daniel v. Chase Bank USA, N.A., 650 F.Supp.2d 1275, 1278 (N.D. Ga. 2009)(citing Williams v. McNeil, 557 F.3d 1287 (11th Cir. 2009). Here, if Petitioner attempts to raise a new claim or argument in support of this § 2254 motion, the court should exercise its discretion and decline to address the newly-raised arguments.

APPENDIX C
Order Adopting Report and Recommendation

APPENDIX C

(Order Adopting Report & Recommendation)

JESUS N. RODRIGUEZ, Petitioner, v. JULIE L. JONES, SEC'Y, FLA. DEP'T OF CORR'S, Respondent.
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA
2018 US Dist LEXIS 2210612018 U.S. Dist. LEXIS 221061
Case No. 16-23755-CIV-WILLIAMS
May 25, 2018, Decided
May 29, 2018, Entered on Docket
Editorial Information: Prior History
Rodriguez v. Jones, 2018 U.S. Dist. LEXIS 58329 (S.D. Fla., Apr. 4, 2018)
Counsel {2018 U.S. Dist. LEXIS 1}Jesus N. Rodriguez, Plaintiff, Pro se, South Bay, FL.

For Attorney General of the State of Florida Pamela Jo Bondi, Defendant: Noticing 2254 SAG, LEAD ATTORNEY.

For Florida Department of Corrections Julie L. Jones, Secretary, Defendant: Noticing 2254 SAG, LEAD ATTORNEY; Douglas James Glaid, LEAD ATTORNEY, Attorney General Office, Department of Legal Affairs, Miami, FL.
Judges: KATHLEEN M. WILLIAMS, UNITED STATES DISTRICT JUDGE.
Opinion by: KATHLEEN M. WILLIAMS
ORDER
THIS MATTER is before the Court on Magistrate Judge White's reports and recommendations. (DE 27; DE 34). In the first Report (DE 27), Judge White recommends that the Court deny Petitioner Jesus Rodriguez's pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, attacking his conviction and sentence entered following a jury verdict in case number F02-10536 in the Eleventh Judicial Circuit Court, in and for Miami-Dade County, Florida. In his second Report (DE 34), Judge White recommends that the Court deny Petitioner's motion to hold in abeyance a ruling on his Petition. Petitioner filed objections to both Reports. (DE 30; DE 35).
As explained in Judge White's Report, Petitioner has failed to demonstrate an entitlement to relief in this proceeding.{2018 U.S. Dist. LEXIS 2} The Court agrees with Judge White that Petitioner's first claim for relief-that the post-conviction judge abused his discretion by denying the motion for (a) the appointment of counsel and (b) the appointment of an investigator following the denial of post-conviction relief-fails because it presents issues of state law not cognizable in a federal habeas corpus proceeding. Petitioner's second claim for relief-that the trial judge erred by allowing post-conviction counsel to abandon seven post-conviction claims without Petitioner's authorization-also fails because it presents no cognizable constitutional issue with regard to Petitioner's conviction and sentence. Accordingly, the Court adopts Judge White's Report (DE 27) recommending that the Petition be denied.

The Court also agrees that, for the reasons identified by Judge White (DE 34 at 4 7), Petitioner's motion to hold in abeyance should be denied.

Accordingly, based on an independent review of the Reports, the record, and applicable case law, it is ORDERED AND ADJUDGED as follows:

1. Judge White's Reports (DE 27; DE 34) are AFFIRMED AND ADOPTED.
2. The Petition (DE 1) is DENIED.
3. Petitioner's motion to hold this action in abeyance{2018 U.S. Dist. LEXIS 3} (DE 31) is DENIED.
4. This action is DISMISSED.
5. No certificate of appealability shall issue.
6. All pending motions are DENIED AS MOOT.
7. The Clerk is directed to CLOSE this case.

DONE AND ORDERED in Chambers in Miami, Florida, this 25 day of May, 2018.

/s/ Kathleen M. Williams

KATHLEEN M. WILLIAMS

UNITED STATES DISTRICT JUDGE2018 U.S. Dist. LEXIS 86703::Peterkin v. United States::May 22, 2018

APPENDIX D

Report & Recommendation Denying To Hold In Abeyance
Or Otherwise Withhold A Ruling On Petition

APPENDIX D

(Report & Recommendation Motion To Hold In Abeyance Or Otherwise Withhold A Ruling On Petition)

JESUS N. RODRIGUEZ vs. JONES,
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA 2018 US Dist LEXIS 583292018 U.S. Dist. LEXIS 58329
CASE NO. 16-CIV-23755-WILLIAMS
April 4, 2018, Decided
Adopted by, Writ of habeas corpus denied, Dismissed by, Motion denied by, As moot, Certificate of appealability denied Rodriguez v. Jones, 2018 U.S. Dist. LEXIS 221061 (S.D. Fla., May 25, 2018)
Rodriguez v. Jones, 2017 U.S. Dist. LEXIS 212620 (S.D. Fla., Dec. 22, 2017)
Counsel {2018 U.S. Dist. LEXIS 1} Jesus N. Rodriguez, Plaintiff, Pro se, South Bay, FL.
For Florida Department of Corrections, Julie L. Jones, Secretary, Defendant: Douglas James Glaid, LEAD ATTORNEY, Attorney General Office, Department of Legal Affairs, Miami, FL.
Judges: Patrick A. White, UNITED STATES MAGISTRATE JUDGE. Opinion
Opinion by: Patrick A. White
Report of Magistrate Judge RE: Petitioner's Motion to Hold in Abeyance or Otherwise Withhold a Ruling on Petition (DE#31)

I. Introduction

The pro se petitioner, Jesus N. Rodriguez, a convicted state prisoner presently confined at the South Bay Correctional Facility, has filed a petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254, (DE#1) attacking the constitutionality of his state conviction and sentence in the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County case number F02-10536. Currently, before this Court is Petitioner's "Motion to Hold in Abeyance or Otherwise Withhold a Ruling on Petition" (DE#31), filed subsequent to the undersigned's Report (DE#27) and Petitioner's own objections (DEs#28, 30) dated January 12, 2018, and January 22, 2018.

This Cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. § 636(b)(1)(B) and Rules 8 and 10 of the Rules Governing Section 2254 Cases in the United States District Courts.

II. Claims

Construing the arguments{2018 U.S. Dist. LEXIS 2} liberally as afforded pro se litigants pursuant to Haines v. Kerner, 404 U.S. 519, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972), Petitioner asks this Court to withhold its ruling on the habeas petition (DE#1), in light of the undersigned's Report (DE#27), because since filing his § 2254 petition in this Court, he subsequently filed three motions for post-conviction relief in the state court raising a total of 14 "newly discovered evidence claims." (DE#31:2). Petitioner asserts that these claims for relief pertain not only to the

underlying criminal case but also to the instant habeas petition (DE#1). He does not articulate what those claims are.

III. Relevant Procedural History

The undersigned prepared a Report for the district judge on December 22, 2017, outlining Petitioner's procedural history. (DE#27). Relevant sections of the procedural history from the Report are repeated below.

On May 1, 2002, a jury convicted Petitioner of the first-degree murder of his wife,1 as well as, first-degree kidnapping, burglary with an assault or battery, and aggravated stalking after the entry of an injunction for protection against domestic violence. (DE#27:2-3). He was sentenced to, inter alia, life in prison without the possibility of parole. (Id. at 3). Petitioner appealed; and the Third{2018 U.S. Dist. LEXIS 3} District Court of Appeal (Third DCA), affirmed his conviction. Rodriguez v. State, 27 So.3d 753 (Fla. 3rd DCA2010).

Petitioner filed numerous motions for post-conviction relief, all of which failed. (Id. at 4-5). Most significant was that following an evidentiary hearing related to claims of ineffective assistance of trial counsel, the state court detailed in its reasoning that Petitioner's claims were "simply untrue." (Id. at 4-5). The Third DCA affirmed without opinion. Rodriguez v. State, 210 So. 3d 1293 (Fla. 3d DCA2016).

As noted in the undersigned's Report (See DE#27:5):

On August 29, 2016, Petitioner filed the instant petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (DE#1). However, he continued to file various post-conviction appeals with the Third DCA while the instant petition was pending. (See Exhs. EE, FF; Case No. 3D16-2716 (petition for belated appeal denied in Rodriguez v. State, 229 So. 3d 348, 2016 Fla. App. LEXIS 19566 (Fla. 3d DCA2016); Case No. 3D17-973 (petition for belated appeal stricken as unauthorized on July 10, 2017); and Case No. 3D17-1117 **affirmed per curiam in Rodriguez v. State, 228 So. 3d 566, 2017 Fla. App. LEXIS 9612, 2017 WL 2859650 (Fla. 3d DCA2017).** Responding to an order to show cause, the State filed its response to Petitioner's § 2254 along with its exhibits. (DE#14). Petitioner filed his traverse on March 29, 2017. (DE#24).

The undersigned submitted the Report to the district judge on December 22, 2017. Then, five days later, on December 27, 2017,{2018 U.S. Dist. LEXIS 4} Petitioner filed Objections/Motion for Belated Appeal to the Eleventh Circuit of Appeals in Atlanta, which was docketed in the instant case as DE#28. Therein, Petitioner complained (1) magistrate judge had not made a ruling suggesting there was an intentional delay a dismissal and (2) that this Court did not reply to his notices of inquiry. (DE#28). Both allegations were false. (See DEs#25, 27). On January 5, 2018, Petitioner submitted a motion for extension of time to file objections. (DE#29). He then filed his objections on January 10, 2018. (DE#30).

Now, Petitioner files the instant motion alerting this Court that he has three additional motions for post-conviction relief in the state court raising a total of 14 "newly discovered evidence claims." (DE#31:2). For that reason, he asks this Court for a stay and abeyance until he exhausts these unidentified claims, instituting a placeholder so that he can then amend his initial federal habeas. (DE#31).

VI. Discussion

Mixed Petitions and Request for a Stay

A "mixed" habeas petition is one that includes both exhausted and unexhausted claims. Pliler v. Ford, 542 U.S. 225, 227, 124 S. Ct. 2441, 159 L. Ed. 2d 338 (2004). In Rose v. Lundy, 455 U.S. 509, 510, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982), the Supreme Court ruled that, when confronted with mixed petitions, the district court must {2018 U.S. Dist. LEXIS 5} dismiss the petition in its entirety, "leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court." In imposing this "total exhaustion rule," the Supreme Court noted that it would have the benefits of "encourag[ing] state prisoners to seek full relief first from the state courts" and "reliev[ing] the district courts of the difficult if not impossible task of deciding when claims are related." Id. at 518-19.

When a district court is confronted with a mixed § 2254 petition, the ordinary disposition is to either dismiss it in its entirety, or grant a stay and abeyance. Ogle v. Johnson, 488 F.3d 1364, 1370 (11th Cir. 2007). However, a petitioner "can always amend the petition to delete the unexhausted claims, rather than returning to state court to exhaust all of his claims." Rose v. Lundy, 455 U.S. at 520. The Supreme Court later held in Rhines v. Weber, 544 U.S. 269, 278, 125 S. Ct. 1528, 161 L. Ed. 2d 440 (2008), that it likely would be an abuse of discretion for a district court to deny a stay and to dismiss a mixed petition if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation{2018 U.S. Dist. LEXIS 6} tactics. In such circumstances, the district court should stay, rather than dismiss, the mixed petition. Moreover, if "the court determines that stay and abeyance is inappropriate, the court should allow the petitioner to delete the unexhausted claims and to proceed with the exhausted claims if dismissal of the entire petition would unreasonably impair the petitioner's right to obtain federal relief." Id. Finally, in Thompson v. Sec'y for the Dep't of Corr., 425 F.3d 1364, 1366 (11th Cir. 2005), the Eleventh Circuit held that the choice of allowing a petitioner to delete the unexhausted claims and proceed with the exhausted claims if dismissal of the entire petition would unreasonably impair his rights to obtain federal relief, "should only be offered if a stay is unwarranted." Thompson points out:

A district court should grant a stay and abeyance if (1) the petitioner had "good cause" for failing to exhaust the claims in state court; (2) the unexhausted claims are "potentially meritorious;" and (3) "there is no indication that the petitioner engaged in intentionally dilatory litigation tactics.Id. at 1365-1366.

The objective of AEDPA is to encourage finality and to streamline federal habeas proceedings. Allowing petitioners a stay to delay the resolution of the federal proceeding{2018 U.S. Dist. LEXIS 7} frustrates the objective and decreases the incentive for petitioners to exhaust claims in state court prior to filing a federal petition. See Duncan v. Walker, 533 U.S. 167, 180, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001). Therefore, "stay and abeyance should be available only in limited circumstances. Because granting a stay effectively excuses a petitioner's failure to

present his claims first to the state courts...[it] is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court. Moreover, even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless." Rhines v. Weber, 544 U.S. 269, 277, 125 S. Ct. 1528, 161 L. Ed. 2d 440 (2005). See 28 U.S.C. § 2254(b)(2)("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State"). Indeed, AEDPA does not promote placeholder petitions. Lugo v. Sec'y, Fla. Dep't of Corr., 750 F.3d 1198, 1214 (11th Cir. 2014) ("District courts are not required to accept [placeholder § 2254 petitions] and stay the federal habeas proceedings, possibly for years, while a state prisoner completes his state collateral proceedings.")

Here, Petitioner did not submit a mixed petition. He filed a petition {2018 U.S. Dist. LEXIS 8} in which parties agreed that each of his claims were exhausted having been appealed to the Third DCA, and were, thus, ripe. The State submitted its response and exhibits thereto (DE#14, 15, 16); and Petitioner submitted his traverse. (DE#24). Finally, the undersigned submitted his Report and Recommendations to the district judge (DE#27); and Petitioner submitted his objections thereto. (DE#30). Petitioner's motion for stay and abeyance comes nearly four months after the Report and one year after the filing of his own traverse. Moreover, when "a petitioner engages in abusive litigation tactics or intentional delay, the district court should not grant him a stay at all." Rhines v. Weber, 544 U.S. at 278 (citations omitted). Consequently, at this late juncture, after a review of the merits on the claims previously before this Court, and a review of the false claims he raised not only in state court but with the Eleventh Circuit, a stay is unwarranted.

Petitioner does not have good cause for his failure to exhaust his remedies - in fact he makes no case whatsoever for his request nor does he provide any insight as to what his claims might be. Petitioner apparently files the instant motion for a stay not only as a request {2018 U.S. Dist. LEXIS 9} to use the initial habeas as a "placeholder" but to reserve permission to "amend his petition after he properly moves to do so." (DE#31:2). This Court is not required to stay the federal habeas proceeding, possibly for years, while Petitioner pursues further state collateral proceedings, which he has conducted, relentlessly, for the past sixteen years.2 A stay and abeyance are inappropriate. Thus, the instant motion requesting a stay and abeyance should be DENIED.

V. Evidentiary Hearing

Based upon the foregoing, any request by Petitioner for an evidentiary hearing on the merits of any or all of his claims should be denied since the habeas petition can be resolved by reference to the state court record. 28 U.S.C. § 2254(e)(2); Schriro v. Landrigan, 550 U.S. at 474 (holding that if the record refutes the factual allegations in the petition or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing). See also Atwater v. Crosby, 451 F.3d 799, 812 (11th

Cir. 2006)(addressing the petitioner's claim that his requests for an evidentiary hearing on the issue of trial counsel's effectiveness during the penalty phase of his trial in both the state and federal courts were improperly denied, the court held that an evidentiary hearing should be denied "if such a{2018 U.S. Dist. LEXIS 10} hearing would not assist in the resolution of his claim."). Petitioner has failed to satisfy the statutory requirements in that he has not demonstrated the existence of any factual disputes that warrant a federal evidentiary hearing.

VI. Certificate of Appealability

A prisoner seeking to appeal a district court's final order denying his petition for writ of habeas corpus has no absolute entitlement to appeal, but must obtain a certificate of appealability ("COA") to do so. 28 U.S.C. § 2253(c)(1); Harbison v. Bell, 556 U.S. 180, 129 S. Ct. 1481, 173 L. Ed. 2d 347 (2009).

This Court should issue a COA only if Petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where a district court has rejected a petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. See Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). Alternatively, when the district court has rejected a claim on procedural grounds, the petitioner must show 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." ({2018 U.S. Dist. LEXIS 11}Id.).

After review of the record, Petitioner is not entitled to a certificate of appealability. Nevertheless, as now provided by the Rules Governing § 2254 Proceedings, Rule 11(a), 28 U.S.C. § 2254: "Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." If there is an objection to this recommendation by either party, that party may bring this argument to the attention of the district judge in the objections permitted to this report and recommendation.

X. Recommendations

Based upon the foregoing, it is recommended that this motion requesting a stay and abeyance be DENIED; that no certificate of appealability issue; that final judgment be entered; and, that the case be closed.

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

SIGNED this 4th day of April, 2018.

/s/ Patrick A. White

UNITED STATES MAGISTRATE JUDGE Footnotes

1 Mrs. Rodriguez's body was never found.

2 See Online Trial Docket for Miami-Dade County Case No. F-02-010536.2018 U.S. Dist. LEXIS 231727::Owens v. Sec'y, Fla. Dep't of Corr. & AG::January 23, 2018

APPENDIX E

Opinion Plenary Appeal

APPENDIX E

(Plenary Appeal)

JESUS RODRIGUEZ V. FLORIDA, 27 So 3d 753 (3rd DCA 2010)

February 10, 2010, Opinion Filed

Released for Publication March 9, 2010 Rehearing denied by Rodriguez v. State, 2010 Fla. App. LEXIS 3307 (Fla. Dist. Ct. App. 3d Dist., Mar. 9, 2010)Writ of habeas corpus denied, Motion granted by Rodriguez v. State, 53 So. 3d 234, 2011 Fla. App. LEXIS 2538 (Fla. Dist. Ct. App. 3d Dist., Jan. 24, 2011)Related proceeding at, Motion denied by Rodriguez v. State, 210 So. 3d 1293, 2016 Fla. App. LEXIS 12837 (Fla. Dist. Ct. App. 3d Dist., Aug. 5, 2016)Related proceeding at, Petition denied by Rodriguez v. State, 229 So. 3d 348, 2016 Fla. App. LEXIS 19566 (Fla. Dist. Ct. App. 3d Dist., Dec. 15, 2016)Related proceeding at Rodriguez v. State, 228 So. 3d 566, 2017 Fla. App. LEXIS 9612 (Fla. Dist. Ct. App. 3d Dist., July 5, 2017)Magistrate's recommendation at, Habeas corpus proceeding at Rodriguez v. Jones, 2017 U.S. Dist. LEXIS 212620 (S.D. Fla., Dec. 22, 2017)

An Appeal from the Circuit Court for Miami-Dade County. Lower Tribunal No. 02-10536. Julio A. Jimenez, Judge.State v. Rodriguez, 910 So. 2d 276, 2005 Fla. App. LEXIS 11967 (Fla. Dist. Ct. App. 3d Dist., July 6, 2005)

Counsel Carlos J. Martinez, Public Defender, and Robert Kalter, Assistant Public Defender, for appellant.

Bill McCollum, Attorney General, and Douglas J. Glaid, Assistant Attorney General, for appellee.

Judges: Before RAMIREZ, C.J., and GERSTEN, and SUAREZ, JJ.

Opinion by: RAMIREZ, C.J.

Jesus Rodriguez appeals his final judgment of conviction and sentence for first-degree murder, kidnapping, burglary of a dwelling and aggravated stalking. Finding neither fundamental error nor an abuse of discretion, we affirm.

I. Facts

The State charged Rodriguez with the murder of his wife. The grand jury indicted him on (1) first-degree murder, (2) kidnapping, (3) burglary with an assault or battery, and (4) aggravated stalking. The evidence against him on the murder charge was mostly circumstantial, as his wife's body was never found.

The charges stem from a domestic dispute dating back to October of 2001, when Rodriguez's wife Isabel petitioned for divorce. She obtained a restraining order against Rodriguez after she received a phone call from him threatening to kill her. Rodriguez was served on November 1, 2001. At trial, two witnesses, including the officer who served the injunction, testified that Rodriguez became very angry

when he was served with the order and that he made threatening remarks to Isabel.

On November 13, 2001, Isabel became missing. Judith Almeida, who was a tenant on Isabel's property, testified that she received a call from Rodriguez asking her if she would be going to work the next morning and that she saw someone hiding behind a car on the property the next morning while taking out the trash. Rodriguez's adult daughter, Rochelle, testified that she and Rodriguez had planned to take her car to his farm on the morning of November 13 for him to work on it. At Rodriguez's farm, Rochelle noticed a fire burning on the property and that Rodriguez had scratches on his nose and was pressure cleaning his Lincoln Continental, which had been seen at Isabel's house earlier in the day. Rodriguez's girlfriend also testified that he did not have scratches on his body before he left the house that day, but did have scratches on his back and nose when he returned in the evening.

On November 15, investigators transported Rodriguez's Lincoln Continental to {27 So. 3d 755} the medical examiner's office for processing. The homicide detective that transported the vehicle testified that immediately upon opening the trunk, he noticed the smell of a decomposed body and the smell of a cleaning agent. The detective also testified that the entire trunk was soaked and was wet from condensation. On November 26, 2001, an investigating officer went to Isabel's home to serve a search warrant and encountered Rodriguez on the property. Rodriguez invited the officer inside the home to show him the property, and told the officer that he need not worry about the restraining order because Isabel would never be coming back. Rodriguez was arrested on April 11, 2002. While the detective was preparing paperwork on the arrest, Rodriguez spontaneously stated that the police were mistaken about his motive for killing Isabel, namely that it was about money and not jealousy.

Rodriguez testified on his own behalf at trial, admitting that he was at Isabel's home on November 13 in violation of the restraining order. The jury found him guilty as charged on all four counts, and he was sentenced to life in prison for the murder and kidnapping counts, thirty years for the burglary count, and five years for the aggravated stalking count.

II. Law

On appeal, Rodriguez first argues that the prosecutor committed fundamental error in closing argument when she impermissibly shifted the burden of proof from the State to the defense by arguing that there was nothing in the jury instructions that required the State to have a body, or proof of how the victim died. The prosecutor stated during closing:

There is nothing that says any of that. All it says in the jury instruction is, we have to prove that she is dead and we have to prove that he did it. Do any of you believe, if any of you believe, beyond a reasonable doubt that she is not dead, well,

you know that I invite you go ahead and acquit him. If you believe beyond a reasonable doubt that she is not dead acquit him. But nobody can look at this evidence as a whole, you're all smart people you all have common sense that's why you're on this jury. You're not like him. He has no common sense. There was no objection to this statement, but Rodriguez argues that this constituted fundamental error. The Florida Supreme Court has stated: [F]ailing to raise a contemporaneous objection when improper closing argument comments are made waives any claim concerning such comments for appellate review. The sole exception to the general rule is where the unobjected-to comments rise to the level of fundamental error, which has been defined as error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error."Mosley v. State, 2009 Fla. LEXIS 1122, 34 Fla. L. Weekly S468 (Fla. July 16, 2009) (quoting Simpson v. State, 3 So. 3d 1135, 1146 (Fla. 2009).

We recognize that the prosecutor misstated the law. In Gore v. State, 719 So. 2d 1197 (Fla. 1998), 1 the Florida Supreme Court recognized that it is error for a prosecutor to attempt to shift the burden of proof from the State to the defense. See also Northard v. State, 675 So. 2d 652, 653 (Fla. 4th DCA1996); Clewis v. State, 605 So. 2d 974, 975 (Fla. 3d DCA1992). {27 So. 3d 756} What she should have said was that "if you do not believe beyond a reasonable doubt that the victim is dead, go ahead and acquit him." There is no suggestion that the prosecution intentionally misstated that law. Furthermore, the misstatement could have been readily corrected with a curative instruction had the defense objected. For example, in Heinz v. State, 615 So. 2d 238, 239 (Fla. 3d DCA1993), we affirmed a conviction after the prosecutor made an improper burden shifting argument where the defense objected and which the trial court immediately sustained with a cautionary instruction. Id.

Nevertheless, Rodriguez argues that the misstatement improperly shifted the burden of proof regarding an essential element of the crime and affected the fairness of the trial, thus constituting fundament error. We disagree.

Rodriguez relies heavily on Murray v. State, 937 So. 2d 277 (Fla. 4th DCA2006) to argue that the error here was fundamental. In Murray, however, the Fourth District Court of Appeal dealt with a judge that gave improper jury instructions that the defense had to prove self-defense beyond a reasonable doubt. Id. at 280. There is no improper jury instruction here. Furthermore, the misstatement of the law here occurred only once, during closing argument, and evidently went unnoticed until after Rodriguez was convicted and the transcript was examined.

Given that the prosecution did not intentionally misstate the law, we view the improper remark in context. The misstatement was preceded by the prosecution stating that "we have to prove that she is dead ?" In her initial closing argument,

the prosecutor argued that "there's not a doubt in the world that Isabel Rodriguez is dead," apparently a higher burden than "reasonable doubt." Later she states that "[t]here is no reasonable doubt that Isabel Rodriguez is dead." In her rebuttal argument, after misstating her burden, she states that she does not have to prove how she died, "I just have to prove that she's dead." Later still, she admits that the defendant "doesn't have to prove anything to you, that burden is mine." She then goes over the jury instructions and states: "[b]efore you can find the defendant guilty of first degree premeditated murder [sic] State must prove the following three elements beyond a reasonable doubt. Number one, that the victim is dead. Generally we do have a body. You don't have a body here. The State would submit to you that we have proved beyond a reasonable doubt that Isabel Rodriguez is dead . . . ." Two pages later in the transcript, the prosecutor repeats that the State must prove beyond a reasonable doubt that the victim is dead. Five pages later, she states: "[a]nd the one thing that is proven beyond a reasonable doubt, and that is a doubt that you can attach a reason to, which has been proven beyond every reasonable doubt, that is he killed her."

During the jury instructions, because they contained lesser-included offenses, the judge charged the jury five different times that the State had to prove beyond a reasonable doubt that Isabel Rodriguez is dead. This was in addition to the standard instruction on reasonable doubt and burden of proof.

Thus, we have a jury that is repeatedly told that the State had the burden to prove that Isabel Rodriguez was dead and one instance where the prosecution inadvertently misstated the State's burden of proof. Consequently, we do not believe that the error here, to quote from Mosley, supra, "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." {27 So. 3d 757} We decline to address the remaining issue raised on appeal as we conclude that it is meritless and/or harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986).

III. Conclusion

We affirm Rodriguez's judgment of conviction and sentence.

Footnotes

1 It should be noted that in Gore, the defendant objected to the prosecutor's improper arguments.