APPENDIX
A

11TH CIRCUIT COURT OF APPEALS
DENIAL OF MOTION FOR RECONSIDERATION

(1 page)

App A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-11466-J

CASH WALLACE PAWLEY, SR.,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

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

Before: MARTIN and BRANCH, Circuit Judges.

BY THE COURT:

Cash Wallace Pawley, Sr., has filed a motion for reconsideration, pursuant to 11th Cir. R. 27-2 and 22-1(c), of this Court's January 21, 2021, order denying a certificate of appealability. Upon review, Pawley's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

APPENDIX
B

11TH CIRCUIT COURT OF APPEALS
DENIAL OF APPLICATION FOR
CERTIFICATE OF APPEALABILITY

(2 Pages)

App. B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-11466-J

CASH WALLACE PAWLEY, SR.,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

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

ORDER:

To merit a certificate of appealability, Cash Wallace Pawley,Sr. must show that reasonable jurists would find debatable both: (I) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel,* 529 U.S. 473, 478, 120 S. Ct. 1595, 1600-01, 146 L. Ed. 2d 542 (2000). Because he has failed to make the requisite showing, the motion for a certificate of appealability is DENIED.

/s/ Elizabeth L. Branch
UNITED STATES CIRCUIT JUDGE

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

January 21, 2021

Cash Wallace Pawley Sr.
Okeechobee CI - Inmate Legal Mail
3420 NE 168TH ST
OKEECHOBEE, FL 34972

Appeal Number: 20-11466-J
Case Style: Cash Pawley, Sr. v. Secretary, Florida Department
District Court Docket No: 4:17-cv-10027-KMM

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

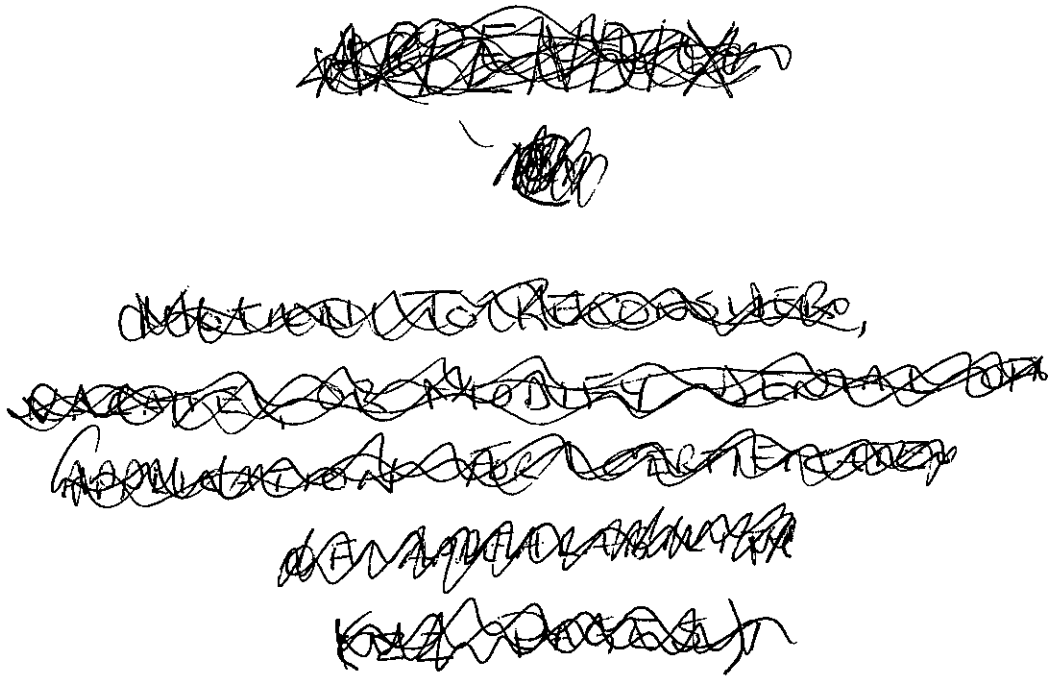
Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Davina C Burney-Smith, J
Phone #: (404) 335-6183

Enclosure(s)

DIS-4 Multi-purpose dismissal letter



APPENDIX
E

UNITED STATES DISTRICT COURT'S DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS § 2254

(14 Pages)

App. E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 4:17-cv-10027-KMM

CASH WALLACE PAWLEY,

Petitioner,

v.

MARK S. INCH,

Respondent.

_____/

ORDER ON REPORT AND RECOMMENDATION

THIS CAUSE came before the Court upon Petitioner Cash Wallace Pawley's Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. ("Am. Pet.") (ECF No. 12). The Court referred the matter to the Honorable Lisette M. Reid, United States Magistrate Judge, who issued a Report and Recommendation recommending that the Petition be DISMISSED. ("R&R") (ECF No. 68). Petitioner filed objections. ("Objs.") (ECF No. 77). The matter is now ripe for review. As set forth below, the Court ADOPTS the R&R IN PART.[1]

[1] The Court adopts Magistrate Judge Reid's R&R with the following modifications: page one, footnote one should read: "Federal Rule of Civil Procedure 25(d)."; the citation on page two, lines fifteen to sixteen should read: "[DE 35-13] at 3."; the citation on page two, line twenty should read: "*Id.* at 39, 41."; the citation on page three, line one should read: "*Id.* at 52."; the citation on page three, line three should read: "*Id.* at 53."; the citation on page three, line five should read: "[DE 35-13] at 103-04"; page ten, lines ten through twelve should be in quotation marks and read as follows: "A state's interpretation of its own laws or rules is no basis for federal habeas corpus relief, since no constitutional question is involved."; page eleven, lines seven through eight should read: "must 'exhaust[ ] the remedies available in the courts of the State.' 28 U.S.C. § 2254(b)(1)."; page twelve, line seventeen should read: "established." *Smith v. Jones*, 256 F.3d 1135, 1138 (11th Cir. 2001) (citation omitted)."; the citation on page thirteen, line one should read: "*Biggs v. McNeil*, No. 08-60428-CIV, 2008 WL 5054342, at *4 (S.D. Fla. Nov. 26, 2008); *see also Lambrix v. Singletary*, 520 U.S. 518, 524-25 (1997)"; the pin cite in the citation on page fourteen, line sixteen should be 100; page fifteen, lines thirteen through fifteen should read: "As recently noted by the Supreme Court, 'adherence to these principles serves important interests of federalism and

The Court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3). The Court "must determine *de novo* any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3). A *de novo* review is therefore required if a party files "a proper, specific objection" to a factual finding contained in the report. *Macort v. Prem, Inc.*, 208 F. App'x 781, 784 (11th Cir. 2006). "It is critical that the objection be sufficiently specific and not a general objection to the report" to warrant *de novo* review. *Id.* (citation omitted).

In the Amended Petition, Petitioner attacks the constitutionality of his conviction and sentence for attempted-first degree murder, aggravated assault with a weapon, and battery in the Sixteenth Judicial Circuit Court, in and for Monroe County. *See generally* Am. Pet. Petitioner

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comity.' *Woods v. Donald*, 575 U.S. 312, 316 (2015)."; the citation on page sixteen, lines six to seven should read: "*Burt v. Titlow*, 571 U.S. 12, 18 (2013)."; on page seventeen, the second citation as to claim 2 and claim 21 should be "DE 34-60"; the second sentence in footnote four on page nineteen should be in quotations; the citation on page twenty-three line fifteen should read: "[DE 34-62]."; the citation on page twenty-seven, line four should read: "*Id.* at 103."; the citation on page twenty-eight, line ten should read: "*Obando v. Jones*, No. 14-CIV-21606-MORENO, 2015 WL 4112087, at *16 n.21 (S.D. Fla. June 16, 2015) (citing *Barclay v. Florida*, 463 U.S. at 958-59)."; the citation on page thirty, line six should have a pin cite of 1110; the quotation on page thirty-one, line four should read "last related state-court decision that does not provide"; the quotation on page thirty-one, lines thirteen to fourteen should read: "the alleged offense and assist the [d]efendant in the preparation of such a defense."; the citation on page thirty-two, line one should read: "*Strickland*, 466 U.S. at 694"; the citation on page thirty-seven, line seventeen should read: "*Harrington*, 562 U.S. at 98."; and the citation on page thirty-seven, line twenty should read: "*Waldon*, 363 F.3d at 1110." Moreover, the Court does not adopt citations in the R&R that do not conform to The Bluebook: A Uniform System of Citation (Columbia Law Review Ass'n et al. eds., 20th ed. 2015). Finally, the Court declines to adopt the first paragraph of Part II (Procedural History) to the extent that it implies that the Third District Court of Appeal barred Petitioner from further filings in Monroe County Circuit Court unless signed by a member of the Florida Bar, as the order in *Pawley v. State*, 217 So.3d 128, 130 (Fla. Dist. Ct. App. 2017) merely required Petitioner to show cause why he should not be prohibited from further filings. *See* R&R at 3-4.

proceeded *pro se* during the guilt phase of the trial (ECF No. 35–5), but he was represented by counsel at sentencing (ECF No. 34–5). He was also represented by counsel during the direct appeal of his conviction and sentence, both of which were affirmed. (ECF Nos. 33, 34–44). In addition to his direct appeal, Petitioner has filed multiple postconviction motions, and writs of mandamus. *See* R&R at 5. Now, Petitioner asserts 27 claims for federal habeas relief, including claims related to trial court misconduct, prosecutorial misconduct, and ineffective assistance of counsel. *See id.* at 5–8.[2]

In the R&R, Magistrate Judge Reid finds that certain of Petitioner's claims are unexhausted, others are procedurally barred, and the remaining claims are meritless. *See generally id.* The Court addresses Magistrate Judge Reid's findings as to the claims in each of these categories in turn.

A. Exhaustion of Claims

First, Magistrate Judge Reid finds that claims 2–17 and claim 19 were not property exhausted in state court. *Id.* at 18–21. Specifically, Magistrate Judge Reid finds that the claims were not exhausted because they were only referenced in a postconviction motion alleging that Petitioner's counsel was ineffective because he failed to raise these claims on direct appeal. *Id.* at 19–20. Because these claims were not raised as substantive claims in state court, Magistrate Judge Reid finds that Petitioner failed to fully exhaust these claims. *Id.* This Court agrees. Indeed, "it is inappropriate to use a different argument to relitigate the same issue," and "[a]llegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal." *Green v. State*, 975 So. 2d 1090, 1105 (Fla. 2008) (citations omitted).

[2] In the R&R, Magistrate Judge Reid quotes Petitioner's 27 claims verbatim from the Amended Petition. *See* R&R at 5-8. The Court refers to each of the claims by the number associated with each such claim in both the Amended Petition and the R&R.

Further, the Court agrees with Magistrate Judge Reid that even if these claims were not exhausted and procedurally barred, the claims fail to state an ineffective assistance of counsel claim under *Strickland v. Washington*, 466 U.S. 668 (1984).

In his Objections, Petitioner argues that his ineffective assistance of counsel claim satisfies the cause exception for failing to raise these claims on direct appeal. Objs. at 14 (citation omitted). "Ineffective assistance of counsel may satisfy the cause exception to a procedural bar." *United States v. Nyhuis*, 211 F.3d 1340, 1344 (11th Cir. 2000) (citation omitted). However, to establish this exception, Petitioner must not only show cause but also prejudice. *Murray v. Carrier*, 477 U.S. 478, 493–94 (1986); *Greene v. United States*, 880 F.2d 1299, 1305 (11th Cir. 1989); *see also Nyhuis*, 211 F.3d at 1344 (holding that the "claim of ineffective assistance must have merit" in order to satisfy the cause exception to procedural bar.") Here, Petitioner's conclusory objection that a claim of ineffective assistance of counsel may satisfy the cause exception is not sufficient to demonstrate that Petitioner's claim has merit, and therefore, that he was prejudiced by counsel's failure to raise these claims. *Murray*, 477 U.S. at 494; *Nyhuis*, 211 F.3d at 1344. Notably, counsel was "not ineffective for failing to raise claims 'reasonably considered to be without merit.'" *Nyhuis*, 211 F.3d at 1344. Indeed, the state court already determined his appellate counsel was not ineffective for failing to raise these claims. R&R at 30. Therefore, the Court finds that the cause exception does not apply, as Petitioner's ineffective assistance of counsel claim is without merit. Accordingly, this Court agrees with Magistrate Judge Reid that claims 3–17 and claim 19 were unexhausted in state court and thus now procedurally barred.

As to claim 2, Petitioner argues that Magistrate Judge Reid incorrectly concluded that this claim was not exhausted because he raised this claim in his Rule 3.800 motion to correct illegal

sentence, in his habeas petition alleging ineffective assistance of appellate counsel, on direct appeal, in his motion for postconviction relief, and in a writ of certiorari to the United States Supreme Court. Objs. at 12. Upon review, Petitioner raised a variation of claim 2 in several state court proceedings, including in his Rule 3.800 motion to correct illegal sentence, *see* (ECF No. 34–62), habeas corpus petition alleging ineffective assistance of appellate counsel (ECF No. 34–88), and motion for postconviction relief (ECF No. 34–101). Nonetheless, even if exhausted, the Court finds that the claim is procedurally barred as it does not present a federal constitutional question. *See* 28 U.S.C. § 2254(a) ("The Supreme Court, . . . a circuit judge, or a district court shall entertain an application for a writ of habeas corpus . . . only on the ground that [the petitioner] is in [state] custody in violation of the Constitution or laws or treaties of the United States."). In claim 2, Petitioner argues that the charging document was insufficient and thus the Court lacked jurisdiction to hear the claim. Am. Pet. at 8. The sufficiency of a charging document and the state court's jurisdiction to hear a claim involve a state's determination of state law issues do not provide a basis for federal habeas corpus relief. *See Branan v. Booth*, 861 F.2d 1507, 1508 (11th Cir. 1988) ("Were this Court to undertake a review of the instant petition, we would have to conduct an examination of Florida case law and of the Florida Rules of Criminal Procedure. This we will not and cannot do."); *Chandler v. Armontrout*, 940 F.2d 363, 366 (8th Cir. 1991) (citation omitted) ("The adequacy of an information is primarily a question of state law and we are bound by a state court's conclusion respecting jurisdiction."); *Jones v. Sec'y, Fla. Dep't of Corr.*, No. 1:11-CV-00269-MP-GRJ, 2014 WL 505093, at *6 (N.D. Fla. Feb. 7, 2014) (citations omitted) ("A state court's jurisdiction to convict and sentence a defendant are quintessential state law matters this Court cannot review in a federal collateral proceeding."). Therefore, even if Petitioner properly exhausted state court remedies as claim 2, the claim is procedurally barred.

Accordingly, this Court agrees with Magistrate Judge Reid that that Petitioner failed to exhaust available state court remedies as to claims 3–17 and claim 19. Further, the Court finds that claim 2 is procedurally barred.

B. Procedurally Barred Claims

Second, Magistrate Judge Reid finds that claims 20–21 and claim 25, which were exhausted in the state courts, are procedurally barred. R&R at 21–25. In claim 20, Petitioner alleges that the trial and state intermediate appellate courts erred in denying his postconviction motion, including by not providing him with the opportunity to amend his motion or holding a hearing on the matter. Am. Pet. at 18. In claim 21, Petitioner argues that he received a sentence that was more than the maximum permitted under Florida law. *Id.* at 19. Magistrate Judge Reid finds that these claims are procedurally barred because they do not present federal constitutional questions. R&R at 22–24.

In the Objections, Petitioner argues that Magistrate Judge Reid erred in finding that claims 20–21 do not present a federal constitutional question, arguing that "[a] state's failure to abide by its own laws . . . may violate due process if the failure cause a deprivation of liberty." Objs. At 16–17 (quoting *Cranford v. Lockhart*, 975 F.2d 1347, 1349 (8th Cir. 1992)). Here, however, Petitioner asks the Court to "reexamine state-court determinations on state-law questions," which this Court cannot do. *Estelle v. McGuire*, 502 U.S. 62, 68 (1991); *Branan*, 861 F.2d at 1508 ("In the area of state sentencing guidelines in particular, we consistently have held that federal courts can not review a state's alleged failure to adhere to its own sentencing procedures."). Therefore, this Court agrees with Magistrate Judge Reid that these claims are procedurally barred.

In claim 25, Petitioner asserts a claim under *Brady v. Maryland*, 373 U.S. 83 (1963). Am. Pet. at 23–25. Magistrate Judge Reid recommends that this Court find that this claim is

procedurally barred because the postconviction court "'clearly and expressly' states that its judgment rests on a procedural bar." R&R at 24. Specifically, the postconviction court found that "[w]ithholding *Brady* material is an issue which could have been a matter for direct appeal" and thus was not properly raised in Petitioner's Rule 3.800 motion. *Id.*

In the Objections, Petitioner argues that the state court was incorrect in finding that he was procedurally barred from raising his *Brady* violation claim in his Rule 3.850 motion. Objs. at 18. In support, Petitioner cites to a case where the court found that a "postconviction court incorrectly concluded that a *Brady* violation is a trial court error that cannot be raised in a motion for postconviction relief." *Felder v. State*, 198 So. 3d 951, 953 (Fla. Dist. Ct. App. 2016).

Although a *Brady* violation claim "is cognizable in a rule 3.850 motion," *id.* (citation omitted), a postconviction motion is not a means by which a petitioner may seek the "review[] [of] ordinary trial errors which are cognizable on direct appeal." *Ratliff v. State*, 256 So.2d 262, 264 (Fla. Dist. Ct. App. 1972). Indeed, claims "which were or could have been raised on direct appeal and are thus foreclosed from consideration under post-conviction relief." *Smith v. State*, 453 So. 2d 388, 389 (Fla. 1984) (citation omitted); *see* Fla. R. Crim. P. 3.850(c) ("This rule does not authorize relief based on grounds that could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence."). Here, the state court found that Petitioner was procedurally barred from raising his *Brady* violation claim in his Rule 3.850 motion because he could and should have raised it on direct appeal. (ECF No. 34–106) at 9. And, as set forth in the R&R, because the state court found that the claim was procedurally barred, this Court may not consider the claim on federal habeas review. R&R at 24. Therefore, Petitioner's objection as to this claim is without merit and claim 25 fails.

C. Merits Analysis

Third, Magistrate Judge Reid finds that claim 1, claim 18, claims 22–24, and claims 26–27 fail on the merits. *Id.* at 25–37. In claim 1, Petitioner asserts the trial court violated his rights to compulsory process and due process when he was provided with "faulty and incorrect" subpoenas that did not include a place for him to fill in a date and time. Am. Pet. at 6. He alleges that the subpoenas were never served—and thus he was unable to call any witnesses at trial—as a result of the clerk's error. *Id.* As set forth in the R&R, Magistrate Judge Reid finds that there was no constitutional violation, as the trial court did not prevent Petitioner from calling witnesses in his own defense. R&R at 27–28. Therefore, Magistrate Judge Reid recommends that the Court dismiss the claim, as the state courts did not unreasonably apply clearly established federal law in denying relief as to this claim. *Id.* at 28.

In the Objections, Petitioner argues that Magistrate Judge Reid "completely misconstrues the claim," as he does not allege a constitutional violation by the clerk of court for providing incorrect subpoenas, but rather asserts that the trial court judge, who was told weeks prior to trial that the subpoenas were deficient, did not "vindicate the constitutional rights of [Petitioner]." Objs. at 19–20. As an initial matter, Petitioner takes issue with the statement in the R&R that he waited until the Friday before the Monday trial date to seek to issue the subpoenas. *Id.* at 20–21. Petitioner argues that he sought to issue the subpoenas three weeks before trial—on August 29, 2013. *Id.* at 21.

Upon review of the record, it appears that Petitioner requested that the clerk of the court send him 36 blank subpoenas on August 29, 2013.[3] (ECF No. 34–118). During trial, the trial

[3] There are two dates and two signatures on the request. One date is August 29, 2013 and the other is September 9, 2013. (ECF No. 34-118).

judge stated that he was contacted on the Friday afternoon before trial by the clerk's office stating that "they received a large volume of subpoenas from [Petitioner]" and that they "were very concerned about it being extremely late." (ECF No. 35–16) at 939. The trial judge stated that he "instructed them to follow their usual procedure." *Id.* The clerk's office provided a report during the trial, indicating that they followed their usual procedure as instructed and issued the subpoenas that day. *Id.* at 939–40. However, the sheriff's office indicated that they would not be able to process the subpoenas on Monday "because they did not have any date, time, or place on them." *Id.* at 940. Therefore, the record does not reflect the facts as Petitioner portrays them in the Objections. Further, Petitioner's only challenge to Magistrate Judge Reid's merits determination as to this claim is that "[a]nyone reading this claim could easily discern that there was absolutely no reasonable basis for the State Court to deny relief." Objs. at 21 (alteration and internal quotation marks omitted). This is not a proper objection that requires *de novo* review, but rather amounts to disagreement with the finding in the R&R. *See Macort*, 208 F. App'x at 784 (finding *de novo* review only necessary when the objection is "sufficiently specific and not a general objection to the report"). This Court agrees with Magistrate Judge Reid that claim 1 fails on the merits.

In claim 18, Petitioner alleges that his appellate counsel was ineffective because his counsel failed to raise the 25 issues he identified in his state habeas petition. Am. Pet. at 17. He claims that these errors considered "cumulatively" violated his Sixth Amendment right to effective assistance of counsel. *Id.* As set forth in the R&R, Magistrate Judge Reid finds that because "the state court has found no singular error, it was not unreasonable for the state court to reject a cumulative effect claim." R&R at 30 (citation omitted).

In the Objections, Petitioner argues that there "need not be even a single error by counsel that rises to the constitutional level of ineffective assistance of counsel . . . for there to be

cumulative error found." Objs. at 23. Although there are circumstances where there can be cumulative error even where individual failure of counsel may be insufficient to find that the counsel's performance was constitutionally deficient, the question before the Court is whether the state court was unreasonable in rejecting Petitioner's cumulative effect claim—not whether a cumulative effect claim is cognizable absent a finding of singular error, as Petitioner suggests. *Id.* And, the Court agrees with Magistrate Judge Reid that the state court's determination that there was no cumulative error was not unreasonable because there was no singular error. *See* R&R at 30. Therefore, claim 18 fails on the merits.

In claim 22, Petitioner alleges that his trial counsel (prior to him deciding to proceed *pro se*) was ineffective because counsel incorrectly advised him that there was no "involuntary intoxication" defense under Florida law and failed to investigate the defense despite the evidence demonstrating its applicability. Am. Pet. at 20. In the R&R, Magistrate Judge Reid finds that it was not unreasonable for the state court to determine that Petitioner failed to demonstrate any prejudice as to this claim, as he successfully moved to change his plea to not guilty by reason of insanity and moved for the appointment of an expert related to this defense while proceeding *pro se*. R&R 31–32. Petitioner objects to this finding on the grounds that he was not able to successfully move to change his plea or move for the appointment of an expert. Objs. at 23–25. However, the record shows that Petitioner, while proceeding *pro se*, filed a Notice of Intent to Rely on Insanity Defense, which is required to present evidence of this defense at trial. (ECF No. 34–106) at 14; *see* Fla. R. Crim. P. 3.216(b). Moreover, Petitioner filed a Motion for an Appointment of Expert, which the state court granted. (ECF No. 34–106) at 16. Therefore, as Magistrate Judge Reid finds, it was not unreasonable for the state court to determine that Petitioner has not shown he was prejudiced by his counsel's failure to inform him of this defense because Petitioner, while

proceeding *pro se*, took the steps necessary to present this defense at trial. Accordingly, claim 22 fails.

In claim 23, Petitioner alleges that his trial counsel was ineffective because his counsel did not move to suppress documents seized during an unlawful search of Petitioner's pre-trial jail cell. Am. Pet. at 21. The state court found that Petitioner did not show ineffective assistance or prejudice as to this claim because trial counsel moved for the documents to be inspected in camera and any privileged documents were returned to him. (ECF No. 34–106) at 6–7. Further, the state court found that Petitioner could have filed a motion to suppress these documents while acting *pro se*. *Id.* at 7. In the R&R, Magistrate Judge Reid finds that the state court's reasoning was not unreasonable in determining "that counsel's motion for in camera inspection [was] the equivalent of a suppression motion." R&R at 33.

In the Objections, Petitioner argues that the state court did not determine that the motion for in camera inspection was equivalent to a suppression Motion. Objs. At 25–26. Although the Court agrees with Magistrate Judge Reid that the state court's decision as to this claim does not warrant habeas relief, the Court notes that the state court did not explicitly find that the motion for in camera inspection and a motion to suppress are "equivalent," as set forth in the R&R. R&R at 33. Rather, the state court's determination turned on the following factual determinations taken together: (1) defense counsel immediately moved for in camera inspection and the privileged documents were returned, (2) Petitioner could have filed a motion to suppress while proceeding *pro se*, and (3) the state's alleged failure to provide all documents to the state court during the *in camera* inspection is conduct that would be attributed to the state, and not defense counsel, and should have been raised on direct appeal. (ECF No. 34–106) at 6–7. The Court finds that this was

not an unreasonable determination of the facts and that Petitioner's remaining objections as to this claim are without merit. *See* Objs at 25–26. Therefore, claim 23 fails.

In claim 24, Petitioner alleges that his counsel was ineffective for failing to present evidence of four mitigating factors at sentencing. Am. Pet. at 22. As to the first three mitigating factors, the state court found that they would not have been received during sentencing because they are "not cognizable at a sentencing for a non-capital offense," and therefore Petitioner's ineffective assistance of counsel was without merit. R&R at 34 (citation omitted). Because this is an interpretation of state law, Magistrate Judge Reid recommends that the Court defer to the state court's finding. *Id.* Additionally, as to the fourth mitigating factor, Magistrate Judge Reid finds that the state court's determination that Petitioner had not shown remorse was not an unreasonable determination of the facts. *Id.* at 25. This Court agrees, and finds that Petitioner's objections are without merit. *See* Objs. at 26–27. Therefore, claim 24 fails.

In claim 26, Petitioner alleges that his counsel was ineffective for failing to locate and depose the two victims in the case. Am. Pet. at 25–26. However, the state court found that the record reflected that the victims could not be located for depositions, and Petitioner did not make the requisite showing that they were available to be deposed. R&R at 36. Further, the state court noted that Petitioner could have deposed these individuals when representing himself but did not do so. *Id.* Magistrate Judge Reid finds that these factual determinations were not unreasonable. *Id.* at 36–37.

Petitioner objects arguing that the deposition subpoenas were not returned unserved, but rather were served upon the State's Attorney's office. Objs. at 28. However, regardless of whether the victims were served with the deposition subpoenas, the Court agrees with Magistrate Judge Reid that the state court's determination was not unreasonable in light of defense counsel's attempt

to serve and depose the victims and the fact that Petitioner could have later deposed the victims while proceeding *pro se*. Therefore, claim 26 fails.

In claim 27, Petitioner alleges that trial counsel, appellate counsel, the court, and the State collectively violated his right to a fair trial. Am. Pet. at 26. Magistrate Judge Reid finds that the state court's determination that there was "no accumulation of errors" was not unreasonable. R&R at 37. This Court agrees. Therefore, claim 27 fails.

D. Petitioner's Remaining Objections

As an initial matter, many of Petitioner's objections do not identify the specific reasons why the Court should decline to adopt the R&R other than expressing disagreement with the conclusion. *See, e.g.*, Objs. at 16 ("The Magistrate . . . erred in stating that Claims 20, 21, and 25 are [p]rocedurally [b]arred. Each presents a clear U.S. Constitutional Violation Claim, and are not State Claims couched in Federal Claims."). The Court need not address these arguments, as they do not constitute specific objections requiring a *de novo* review. *See Macort*, 208 F. App'x at 784.

Further, many of the remaining arguments that Petitioner makes in the Objections relate to his allegation that Magistrate Judge Reid "overlooked" certain arguments that he asserted in his Reply. *See, e.g.*, Objs. at 6 ("It is clear that the Magistrate overlooked these arguments in the Traverse/Reply."); 16–17; 23 ("[T]he [P]etitioner defers to the argument in his Traverse/Reply . . . that was obviously not considered by the Magistrate."); 29. This is not a proper objection. First, simply because Magistrate Judge Reid did not cite the Reply in the R&R does not mean she did not consider the arguments made therein. Second, Petitioner may not reassert those arguments already made within the Reply as objections. *See Marlite, Inc. v. Eckenrod*, No. 10-23641-CIV, 2012 WL 3614212, at *2 (S.D. Fla. Aug. 21, 2012) (noting that "[i]t is improper for an objecting party to" file objections to a report and recommendation "which are nothing more than a rehashing

of the same arguments and positions taken in the original papers submitted to the Magistrate Judge" because "parties are not to be afforded a second bite at the apple when they file objections to [an] R & R") (citation and internal quotation marks omitted).

Finally, the Court finds that Petitioner's remaining objections, including those related to the "condensed format" of the factual background, Objs. at 7, to the procedural mechanism used to appeal certain claims, *id.* at 8–9, and reference to the supporting memorandum of law, reference to the Petition as "unwieldy", *id.* at 11, are meritless or otherwise relate to characterizations or statements in the R&R which are not relevant to the adjudication of the underlying claims. Therefore, the Court declines to address Petitioner's remaining objections.

Accordingly, UPON CONSIDERATION of the Amended Petition, the R&R, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that Magistrate Judge Reid's R&R is ADOPTED IN PART. The Amended Petition is DENIED and no certificate of appealability shall issue.[4] The Clerk of Court is instructed to CLOSE this case. All pending motions, if any, are denied as MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 30th day of March, 2020.

K. M. Moore

K. MICHAEL MOORE
UNITED STATES CHIEF DISTRICT JUDGE

c: All counsel of record

[4] *See Brown v. Sec'y, Fla. Dep't of Corr.*, No. 5:17-CV-29-MCR-GRJ, 2018 WL 1802567, at *1–2 (N.D. Fla. Mar. 19, 2018) (recommending denial of a certificate of appealability because there was "no substantial showing of the denial of a constitutional right" where the petition was mooted after the petitioner's release from custody) (citing 28 U.S.C. § 2253(c)(2)), *report and recommendation adopted*, No. 5:17-CV-29-MCR-GRJ, 2018 WL 1802555 (N.D. Fla. Apr. 16, 2018).

APPENDIX F

PETITIONER'S OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION

(30 Pages)

App. F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
KEY WEST DIVISION

CASH WALLACE PAWLEY
Petitioner,

v.

MARK S. INCH
Respondent

_____/

Case No: 17-10027-CIV-MOORE
MAGISTRATE JUDGE REID
OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION

-EVIDENTIARY HEARING REQUESTED-

INTRODUCTION

On July 12th, 2019, the Magistrate in this matter filed a "Report and Recommendation" which recommended that petitioner's application for Writ of Habeas Corpus be denied.

The notice at the conclusion of the Report and Recommendation provided that within 14 days after the date of service, any party could file written objections with the court and serve a copy on all parties. The petitioner immediately filed a Motion for Extension of Time to File Objections within the 14 days.

Petitioner timely files and serves these objections to the Magistrate's Report and Recommendation.

OBJECTIONS

I.

DENIAL OF PRELIMINARY MOTIONS

1. **The Magistrate (White) erred in denying leave to file Motion for Summary Judgment, the Motion for Summary Judgment (White), and the Motion for Reconsideration of Order Denying Summary Judgment (Reid).**

On or about October 3rd, 2017, petitioner filed a Motion for Summary Judgment (DE #47) with a Motion for Leave to file a Motion for Summary Judgment (DE #46). In those, petitioner specifically requested the Court wait until it could review petitioner's Traverse/Reply (DE #50) that was also in the mail, but may take longer to arrive, due to its size. The Magistrate (White) did not wait for the Traverse/Reply (as is necessary to properly determine a Motion for Summary Judgment on the merits), but instead, on the same day as its arrival (October 3rd, 2017) issued an Order Denying Leave to file Motion for Summary Judgment (DE #48) and a Order denying the Motion for Summary Judgment (DE #49). This, of course, is a procedural oddity in and of itself (denying the Motion for Summary Judgment after denying leave to even file it), but the larger issue is that this would naturally lead any prudent person to believe that the Motion for Summary Judgment was not denied on its merits, as it is most likely that it was never even read. This is why petitioner filed a Motion for Leave to File Motion to Reconsider

the [denial of] Motion for Summary Judgment (DE #64) and a Motion for Reconsideration of [denial of] Motion for Summary Judgment (DE #65) and (DE #66?), which Magistrate Judge (Reid) denied as moot (DE #73), once again never considering its merits. Due process would required that the Motion for Summary Judgment be heard and ruled on its merits. (Customarily before disposition of the Petition for Writ of Habeas Corpus). A *de novo* review of (DE #49) is warranted.

2. **The Magistrate (White) erred in denying (DE #42) petitioner's Motion for Mandatory Evidentiary Hearing (DE #38), although in this case he granted leave to file (DE #41).**

On or about September 18th, 2017, Magistrate (White) denied petitioner's Motion for Mandatory Evidentiary Hearing (DE #38), stating only that "at this time it does not appear as though a hearing is warranted". This denial was made before the court had a opportunity to consider petitioner's Traverse/Reply (DE #50).

Magistrate (Reid) then denied a Motion for Reconsideration (DE #72) of Motion for Mandatory Evidentiary Hearing (DE #38), under the flawed principle that she believes that the Supreme Court's decision in Cullen v. Pinholster, 563 U.S. 170 (2011) precludes a federal habeas court from ever holding such a hearing. This is not what Pinholster inferred at all. Based upon the arguments made in

petitioner's Motion for Mandatory Evidentiary Hearing (DE #38), an evidentiary hearing, in this case, notwithstanding the granting of Summary Judgment, is warranted and requested. A *de novo* review of (DE #38) is warranted.

3. **The Magistrate (Reid) erred in denying as moot (DE #69) petitioner's Motion for Bond (Release on Bail by Release on Personal Recognizance...) (DE #67).**

On or about July 15th, 2019, Magistrate (Reid) denied as moot petitioner's Motion for Release on Bail by Release on Personal Recognizance (DE #67), or in the alternative, Motion to Hear and Rule.

Although technically, upon Magistrate's ruling (R&R) on (DE #50), a Motion of this sort would become moot, in the instant case, the Motion for Release on Bail by Release on Personal Recognizance should be reviewed *de novo* by the District Judge base upon these objections necessitating the need for a *de novo* review of DE #'s 38, 47, and 50. Release on Petitioner's own Recognizance can still occur pending final resolution.

II.

UNEXHAUSTED CLAIMS

1. The Magistrate (Reid) erred in its determination that there are unexhausted claims.

On page 18, the Magistrate incorrectly assets that "claims 2 - 17 & Claim 19 are unexhausted". The petitioner clearly showed in his Traverse/Reply that he met the Rose v. Lundy, 455 U.S. 509, 518 "cause" requirement by presenting his independent [ineffective assistance of appellate counsel] claims to the State Court in his 9.141 State Habeas. See, Murray v. Carrier, 477 U.S. 478, 489; and (DE #50) at pages 1 - 24 where it is explained that all claims were properly exhausted per State laws and procedures, and sufficiently pled. (Petitioner combined all procedural bars arguments to defeat the State's assertions that procedural bars existed, into the beginning section of his Traverse/Reply, so as not to be redundant in repeating it for each claim). The Magistrate appears to have overlooked this argument as it specifically shows that absolutely no procedural bars exist in this case. A *de novo* review of this argument should be conducted regarding alleged "unexhausted" claims.

III.

PROCEDURALLY BARRED CLAIMS

1. The Magistrate (Reid) erred in its determination that there are procedurally barred claims.

On page 21, the Magistrate incorrectly asserts that Claims 20 - 21 and 25, although exhausted, "are otherwise barred from federal habeas review because they present no federal constitutional question".

Petitioner's Traverse/Reply specifically addresses this issue in each of the corresponding claims, and clearly shows that these three claims raise a federal constitutional violation(s) that is much more than "Petitioner attempt[ing] to create a federal constitutional claim from what is clearly a state law issue by simply invoking the broad principle of due process".

It is clear that the Magistrate overlooked these arguments in the Traverse/Reply. Thus, a *de novo* review of these claims should be conducted by the district judge.

IV.

OTHER ERRORS BY PAGE NUMBER

Page 2: The Factual Background, as written, in it's condensed format, does not accurately portray the events (Like the Traverse/Reply does), and thus creates a horribly inaccurate contextual layout of the events.

Page 3: The Magistrate's reference to petitioner being "a "prolific" *pro se* filer who has been barred by both the State Circuit Court and intermediate (sic) state appellate courts..." is irrelevant to any of the claims set before this court for review, and can easily be construed - by its mere existence in this Report and Recommendation - as bias. Furthermore Pawley v. State, 217 So.3d 128 (Fla. 3rd DCA 2017) is only a "show cause" order, not an order barring any future *pro se* filings.

Petitioner is well aware that the federal courts do not adhere to the age-old adage "if at first you don't succeed, try, try again", as it may be good advice in many matters, but in the judicial system, the principle of finality requires parties to bring whatever claims are available against their adversary **or risk losing them**. Bennett v. OcWen Loan Servicing, LLC, 2016 U.S. Dist. LEXIS 195158 (N.D. GA. 2016). Here, the petitioner did not, as many *pro se* filers do, re-raise the same claims over and over again in multiple motions, petitions or appeals. What he **did**

do, so as not to "risk losing them", was to raise multiple claims in limited motions and petitions (e.g. - 11 claims in his postconviction 3.850 motion, 25 claims of ineffective assistance of counsel in his 9.141(d) habeas corpus petition and approximately 10 claims in his Rule 3.800(a) motions to Correct Illegal Sentence. This was the extent of his "full round of postconviction remedies". However, because petitioner was also involved in many civil issues stemming from this one arrest (Domestic Violence Injunction, Lawsuit against petitioner by landlord for remainder of annual lease, theft of petitioner's entire business equipment by a competitor, civil rights violations against petitioner while in custody, etc.), it appears that petitioner is a "prolific *pro se* filer". He is not. (Note: No action was taken by the Florida Dep't of Corrections regarding any disciplinary action).

Page 5: Contrary to the Magistrate's Report, the petitioner did not file a Petition for Writ of Certiorari to the U.S. Supreme Court **instead** of filing an appeal to the Florida Supreme Court, because contrary to Magistrate's statement earlier that the District Courts of Appeal in Florida are "intermediate" courts, they are not. In the late 1950's due to population growth resulting in a mass influx of criminal and civil appeals, the Florida Supreme Court - whom handled all appeals in the State prior to that - created the Five (5) District Courts of Appeal as **arms of the Supreme Court**, to take the burden off of the Supreme Court. The actual Supreme Court then took on different roles (such as an Arbitration Court if two DCAs decisions

conflict, or to hear Death Penalty Appeals). However they are not a "higher" court than the DCAs. And, as such, Fla. R. App. Proc. 9.030(a)(2)(A) only allows a defendant to petition the FL. Supreme Court to hear his case if he received a written opinion by a DCA that directly conflicts with another DCA's decision/opinion on an identical issue, Wells v. State, 132 So.3d 1110 (Fla. 2014), or to certify a question of great public importance. And since petitioner did not receive a written opinion at all in Pawley v. State, 166 So.3d 292 (Fla. 3rd DCA 2015), on direct review, he could not petition the Florida Supreme Court for review. That would have been frivolous and an abuse of the judicial process. Thus, his only option was to Petition the United States Supreme Court on Certiorari - which he did.

Page 15: Cullen v. Pinholster, 563 U.S. 170, 181 - 185 (2011) does not apply here for claims 2 - 17 and 19, that were the "underlying" claims of constitutional violations brought before the State court in petitioner's State Habeas Corpus Petition under Rule 9.141(d), because the petitioner, through that very filing of ineffective assistance of appellate counsel, properly, per State Rules (9.141) presented the "underlying" claims for consideration by the same Appellate Court that heard his original direct appeal. See, Scott v. Dugger, 636 F. Supp. 1488 (S. D. Fla. 1988), and therefore petitioner gave "cause" for any procedural default (if any exists). See, Williams, 529 U.S. at 444; F.H.C.P.P., Part VII, Vol. 2, §32.3.

This also applies to all the other claims too (#'s 1, 18, 20 - 27). And because State Rule 3.850(f) requires an evidentiary hearing if the claim on 3.850 is not conclusively refuted by the record; Padron v. State, 827 So.2d 393 (Fla. 2nd DCA 2002); Ciambrone v. State, 128 So.3d 227 (Fla. 2nd DCA 2013); Filipkowski v. State, 252 So.3d 278 (Fla. 2nd DCA 2018); Tompkins v. State, 872 So.2d 230 (Fla. Sup. Ct. 2003) ("when the trial court denies relief without conducting an evidentiary hearing, "this court must accept [the defendant's] factual allegations as true to the extent they are not refuted by the record".); Rose v. State, 774 So.2d 629, 632 (FL. Sup. Ct. 2000); Valle v. State, 705 So.2d 1331, `1333 (FL. Sup. Ct. 1997) ("Under Rule 3.850, a movant is entitled to an evidentiary hearing unless the motion and record conclusively show that the movant is entitled to no relief".); Harich v. State, 484 So.2d 1239, 1240 (Fl. Sup. Ct. 1986) ("Thus we must treat the allegations as true except to the extent they are rebutted conclusively by the record") Id. at 1241; the State Court's decision is not based upon the full panoply of rights to present such evidence - since the State Court refused to allow the petitioner to bring such evidence in an Evidentiary Hearing. Thus, the federal court should hold an Evidentiary Hearing, as the State did not afford the petitioner such an opportunity to present evidence at one. Pinholster, in no way precludes this federal court from holding an Evidentiary Hearing. It only precludes the federal court from relying on new evidence presented that would "Fundamentally

Change" the petitioner's claim. The purpose is to eliminate review of claims that the petitioner did not develop, or raise [in the State Court] until he filed his federal habeas corpus petition. This is not the case here. The 11th Circuit, post-Pinholster, stated in Hammonds v. Allen, 849 F.Supp.2d 1262 (11th Cir. 2012) that the legal standard for holding an Evidentiary Hearing has not changed. Id at 1300. That 28 U.S.C. §2254 (e)(2) has [an] exception: Indeed, a district court can hold an evidentiary hearing if the petitioner shows: (A) the claim relies on -, (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for Constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense (due to Involuntary Intoxication in the instant case). See, F.H.C.P.P. §3.2; Mandatory Hearings §3.5[b]. See also, generally, Motion for Mandatory Evidentiary Hearing, (DE #38), *passim*. An Evidentiary Hearing is requested.

Page 16: The Magistrate claims the "Amended Petition is **unwieldy**". However, @pg. 2 the Court states that it has "reviewed the amended petition, as supplemented and supporting memorandum of law (collectively "Amended Petition")". However, see generally DE #16 where Magistrate (White) - her predecessor - struck the "Memorandum", so it should not have been considered. The "Amended Petition" (DE #12) was far from "unwieldy" (even with 27 claims), as it was neatly packaged into just twenty-nine (29) total pages. The State's

response, however, was 140 - pages, and so chock-full-of errors, it necessitated a 270-page (handwritten) Traverse/Reply by the petitioner to clearly rebut the State's errors in facts and law (DE #50). So, it appears that the "collective" Amended Petition the Magistrate refers to was improperly considered (the Memorandum attached to it). Thus, she did not have an accurate picture of the claims presented, and procedurally erred, requiring a *de novo* review of the entire petition (including the most important document of all - the Traverse/Reply, which obviously was not considered at all). See Traverse/Reply, (DE #50).

Page 17: CLAIMS HISTORY - The Magistrate erred in stating that Claim 2 of (DE #12) was [only] exhausted in petitioner's 3.800 Motion to Correct Illegal Sentence. It was also exhausted in his Ineffective Assistance of Appellate Counsel (Rule 9.141(d)) Petition, (as Appellate Counsel should have raised this meritorious claim), the appeal (1D16 - 2097) and on postconviction, as a no jurisdiction claim. It was also raised on Certiorari to the United States Supreme Court (16 - 5611).

Page 18: The Magistrate erred in claiming that claims 2 - 17 and 19 were not exhausted (Note: Claim 2 should not be grouped into this set of claims as stated in the last section/paragraph). All of the "Underlying" claims of Constitutional violations that gave rise to the ineffective appellate counsel claims in petitioner's state habeas corpus petition brought under Rule 9.141(d) - the correct procedure

for doing so - became "exhausted" when presented. See, generally, Traverse/Reply (pages 1 - 24) for full argument.

Of first note, the Magistrate does not cite to any authority (Case law, Statute, or Rule) that supports or mandates that underlying claims raised as predicates to ineffective assistance of appellate counsel claims properly raised under State Procedural Rule (in this case Fla. R. App. Proc. 9.141(d)) are unexhausted. Rule 9.141 is not a "collateral" attack procedure in the trial court, but rather is a remedy sought in the Appellate Court that heard the [direct review] appeal, to bring before the court those very claims that should have been raised by appellate counsel. Smith v. State, 400 So.2d 956, 960 (Fla. 1981). (Note: Florida does not allow a defendant to brief his own direct appeal - unless of course appellate counsel files an "Anders" brief, which was not done here). Contrary to the Magistrate, it is not an "attempt[ ], pro se, to "resurrect" them [knowing the claims were otherwise procedurally barred under review under Florida Law"]. Although, the Magistrate is correct that they are procedurally barred in other vehicles, thus supporting that appellate counsel is ineffective for not raising them on direct review. This is why Rule 9.141(d) exists - to specifically provide for such remedy (an opportunity to present claims to the D.C.A. that should have been presented initially by counsel). Thus, no procedural default occurs once the petitioner uses 9.141(d) to raise the underlying claims. See, Scott v. Dugger, 686 F. Supp. 1488 (S. D. Fla. 1988)

("The original petition raised 29 discrete issues and the recent amendment added two others. The respondent had moved to dismiss the amended petition on the grounds that it presented a mixed petition containing both exhausted and unexhausted claims under Rose v. Lundy, 455 U.S. 509, 102 S.Ct. 1198 (1982). The Court rejected this motion on August 29th, 1983, holding that Scott had exhausted all claims in his amended petition, including certain claims which he had raised in his Florida habeas petition as forming the basis of his claim of ineffective assistance of appellate counsel.") In other words, the "underlying" claims became exhausted in Scott, just as they should be considered exhausted in the instant petition. See also, Sims v. United States, 71 F.Supp.2d 874, 877, (N. D. Ill. 1999); United States v. Nyhuis, 211 F.2d 1340, 1344 (11th Cir. 2000).

Furthermore, "Ineffective Assistance of [appellate] Counsel may satisfy the cause exception to a procedural bar if the claim of Ineffective Assistance has merit". U.S. v. Nyhuis, supra, at 1344; Holden v. United States, 2018 U.S. App. LEXIS 26829 (11th Cir. 2018); Martinez v. Ryan, 566 U.S. 1, 11 - 14, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012) ("Ineffective assistance of counsel may constitute cause if the underlying claim is "substantial", meaning that it "has **some** merit"); Trevino v. Thaler, 569 U.S. 413 (2013). Id at 422 ("Second, ineffective assistance of counsel on direct appellate review could amount to "cause", excusing a defendant's failure to raise (and thus procedurally defaulting) a constitutional

claim"). See, generally, pages 1 - 24 of Traverse/Reply (DE #50) for further legal argument applicable to the instant case. **This** procedure is the only way to raise such claims in the State.

Also, contrary to the Magistrates report, at pg. 20, petitioner throughout his Traverse/Reply has clearly shown evidence is available (that was also available to the State court), but was not presented at trial (due to the trial judge's violation of petitioner's 6th Amendment right to Compulsory Process) - See, instant Claim One - of "actual innocence" as contemplated in Murray v. Carrier, 477 U.S. 478 (1986). See, generally, Traverse/Reply, (DE #50) pages 1 - 24. Also, they **are** ultimately "sufficiently pled" as Strickland claims in Claim #18. (Combination of all claims that was raised as Claim #25 in his State Habeas).

The Rule 9.141(d) filing serves also as a showing of "cause and prejudice" under Carrier @489. See, Jeune v. Jones, 2017 U.S. Dist. LEXIS 138853 (S. D. Fla. 2017) (even when a claim has been procedurally defaulted in the State Courts, a federal court may still consider the claim if a State Habeas petitioner can show ether (1) cause for and actual prejudice from the default; or (2) a fundamental miscarriage of justice. Maples v. Thomas, 565 U.S. 266, 132 S.Ct. 912, 922 (2012); In Re Davis, 565 F.3d 810, 821 (11th Cir. 2009)). For a petitioner to establish cause, the procedural default "must result from some objective factor external to the defense that prevented [him] from raising the claim and which

cannot be fairly attributable to his own conduct". McCoy v. Newsome, 953 F.2d 1252, 1258 (11th Cir. 1992) (quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639). To establish prejudice, a petitioner must show that "the errors at trial actually and substantially disadvantaged his defense so that he was denied fundamental fairness". Id. at 1261 (quoting, Carrier, 477 U.S. at 494, 106 S.Ct. 2639), or in absence of cause and prejudice, the miscarriage of justice exception. Petitioner has shown both in his Traverse/Reply, (DE #50), at pgs. 1 - 24. See also, Foster v. Thaler, 369 Fed. Appx. 598 (5th Cir. 2010). Id at 601, 603. A *de novo* review is warranted.

Page 21: The Magistrate (Reid) erred in stating that Claims 20, 21, and 25 are Procedurally Barred. See, generally, Argument on each claim at (DE #50). Each presents a clear U.S. Constitutional Violation Claim, and are not State Claims couched in Federal Claims. A *de novo* review is warranted.

Page 22: The Magistrate erred in her analysis that petitioner's claim was not truly a violation of due process under the U.S. Constitution (5th and 14th Amendments), stating incorrectly that "Petitioner attempts to create a federal constitutional claim from what is clearly a state law issue by simply invoking the broad principle of due process". Anything other than a cursory review of this claim (and Claims 21 and 25), especially the arguments made in the Traverse/Reply (DE #50) for each of

these claims, will show that this is far from what the petitioner did. However, to see this, one must actually read, evaluate, and consider the Traverse/Reply (DE #50). See also, Crawford v. Lockhart, 975 F.2d 1347 (8th Cir. 1992) (A State's failure to abide by its own laws, however, may violate due process if the failure causes a deprivation of liberty) - which it does/did here. See also, Hicks v. Oklahoma, 447 U.S. 343, 346, 100 S.Ct. 2227 (1979). Petitioner satisfied Picard v. Connor, 404 U.S. 270, 275 (1971) in his Traverse by "includ[ing] [references] to a specific constitutional guarantee, as well as a statement of the facts the petitioner believes entitle him to relief". See, generally, Claims 20, 21, and 25 in Traverse/Reply (DE #50). A *de novo* review is warranted.

Page 23: The Magistrate erred in stating in response to Claim 21 that "This claim challenges the State Court's application of its sentencing laws, and as a result, is not cognizable on federal habeas review". This is not a claim that the State "failed to adhere to its own sentencing procedure", but is a specific claim that the State, in order to satisfy due process under the 5th and 14th Amendments, and not run afoul of an 8th Amendment violation, must adhere to its own laws and Rules. See, Crawford v. Lockhart, 975 F.2d 1347 (8th Cir. 1992); Traverse/Reply (DE #50), Claim 21. A *de novo* review is warranted.

Page 24: The Magistrate (Reid) erred in her determination that agreed with the trial court judge's incorrect determination that Brady violations "could be a matter for direct appeal" as a procedural bar. The Florida Supreme Court clearly disagrees with this erroneous assertion in Felder v. State, 198 So.3d 951, 953 (FL. Sup.Ct. 2016). Where it opined, "We observe that the postconviction court incorrectly concluded that a ***Brady*** violation is a trial court error that cannot be raised in a motion for postconviction relief", quoting Wickham, 124 So.3d 841, 851 - 52 (Fla. 2013), and "This, Court has explicitly recognized that a *Brady* violation "is cognizable in a rule 3.850 motion", quoting Gay v. State, 995 So.2d 541, 543 (Fla. 2nd DCA 2008).

Therefore, the State trial court's determination was clearly an "unreasonable determination of the facts [and law]", as there is no such procedural bar for *Brady* claims. Therefore, in his Traverse/Reply, the petitioner demonstrated "objective cause for his [alleged] failure to properly raise the claim in the State Forum and actual prejudice resulting from the error". See, Traverse/Reply (DE #50) at Claim 25. It must be note that this issue was also first exhausted in Petitioner's post-trial "Motion for New Trial' and in his Rule 9.141(d) Petition for Writ of Habeas Corpus alleging that appellate counsel should/could have raised it on direct appeal. Thus, it was fully exhausted, contrary to the Magistrate's statement, "nor has he explained why his *Brady* claim, the failure of the prosecution to provide him with

the court-appointed psychologist's report prior to trial, could not have been made on direct appeal". It **was** fully explained in the Traverse/Reply (DE #50) at Claim 25.

The Magistrate's statement, at pg. 25, "Therefore, the issue **could** have been made on direct appeal [and in compliance with State law]" is partly true, in that appellate counsel "could" have raised it on direct appeal, but that is not a bar to raising it on postconviction. See, Felder v. State, supra. The prejudice suffered is/was fully laid out in petitioner's Traverse/Reply (DE #50) at Claim 25. A *de novo* review is warranted.

Page 25: Claim One (pg. 26) - The Magistrate completely misconstrues the claim that was raised on petitioner's Direct Appeal (@Claim II; Direct Review Brief). The Magistrate states "Petitioner's first claim for relief is that the trial court violated his right to compulsory process and due process when it provided "faulty and incorrect (civil) subpoenas to the defendant, pro se, in the jail which did not have any place to put the trial date (or 'standby') on them". This is not even remotely similar to the claim presented, thus, the review and recommendation on this claim is not on point at all. Again, the Magistrate here simply regurgitates the State's argument (on postconviction and in their Answer to this habeas petition), rather than independently responding by reviewing the "actual" facts in the original

Direct Appeal Brief on Appeal, the Motion for Rehearing, **and** in the Traverse/Reply (DE #50) at Claim One.

The claim is not that the Clerk of Court provided the wrong subpoenas (civil ones) that did, in fact, have absolutely no place to write in a date or time (to appear) on them. This is just what "sparked" the entire issue of the judge's violation of compulsory process, and is the defense to the State's ridiculous assertion that it was "invited error" (by the petitioner). The claim is clearly that the Clerk went to the judge (Mark H. Jones) personally (*ex parte*) and told the judge about the "missing dates and times", weeks (not days) before the trial and asked him what "she" should do about "her" error (in not providing the petitioner with the correct criminal trial subpoenas and not providing a space anywhere on the subpoenas for the petitioner to be able to insert a trial date and time). The judge was required at this point to vindicate the constitutional rights of the petitioner, specifically to compulsory process under the 6th Amendment (which is not the right to subpoena witnesses, but the right "to have witnesses appear and testify in his defense"). The judge is the one that then told the Clerk of Court "to do what she would normally do" and "if the subpoenas don't get served, that is the defendant's fault because he decided to go *pro se*". Rather than send the 68 copies (34 total subpoenas) back to the petitioner in the county jail (or actually send the correct criminal subpoenas to him) to have the petitioner write "standby" somewhere on

the subpoenas (as it would have been impossible to put an exact date (to appear) on them since the State listed forty (40) "Category - A" witnesses on their list, the Clerk simply "certified" them (which means she is stating they are correct) and then filed them away, rather than returning them to the petitioner at the county jail or even returning them to the petitioner in open court the 4 - 5 times he appeared in court after this occurred, but before trial. The Magistrate incorrectly adopts the State's falsity that the petitioner waited until (3) days before trial to attempt to serve the subpoenas. If the facts in the Traverse - pointing to the proof in the record - had been considered here, the Magistrate would have easily seen that it was not (3) days before trial, but actually (3) weeks before trial (which is plenty of time for service). The trial was on September 18th, 2013. The subpoena request was made on August 29th, 2013 (21 days earlier). This is all clearly laid out in the Traverse/Reply (DE #50) at Claim One. It even points the Magistrate to the request and the faulty subpoenas (in the record). Anyone reading this claim could easily discern that there "was [absolutely] no reasonable basis for the State Court to deny relief". Contrary to the Magistrate's assertion, she could not have "reviewed the record", as all of the facts presented in the Traverse/Reply would have been clearly revealed. Rather, by her continued references to DE #34, but not to DE #50, it is obvious that she has simply adopted all of the errors (by the State and Court) without review of the Traverse/Reply that clearly and irrefutably refutes all

the facts with references to the exact portion(s) of the record that prove each and every fact.

The petitioner's references to the Clerk's errors (wrong subpoenas issued and sent to petitioner, no place to put a date/time or "standby", failure/refusal to return them to the petitioner to correct **her** errors, and **her** refusal/failure to have them served by the Sheriff's Office - as Florida Law does not allow a *pro se* litigant to "certify" or "serve" his own subpoenas because he's not an officer of the court) are only used to clarify how it all began and ended, but is not the claim itself. The judge had the opportunity weeks before trial to make sure that petitioner's U.S. Constitutional rights were vindicated, but chose not to. Instead, remaining silent - never informing petitioner of the errors that the judge now knew about along with the Clerk and Prosecutor. Therefore he had knowledge weeks in advance that it would not be a fair trial, but rather a "Kangaroo Court" - (Black's Law Dictionary - A spurious legal proceeding where the outcome is predetermined).

This is a far cry from the Magistrate's skewed take on the claim (that it was solely a claim about improper assistance from the Clerk). A *de novo* review is warranted.

Page 28: Claim 18. This Claim ties Claims 2 - 17 and 19 together also, as it is the last claim made in petitioner's State Habeas Corpus. (Ineffective Assistance of Appellate Counsel) as a "Cumulative" argument.

The Magistrate (Reid) erred in her incorrect legal standard, principle and/or standard of review, regarding "Cumulative" error. There need not be even a single error by counsel that rises to the constitutional level of ineffective assistance of counsel [under the 6th Amendment] for there to be cumulative error found.

See, DeShields v. Shannon, 338 Fed. Appx. 120, 2009 U.S. App. LEXIS 15410 (3rd Cir. 2009) ("Cumulative effect of counsel's failures" amounted to ineffective assistance even if failures "[t]aken individually, "would" perhaps be insufficient for us to conclude that his performance was constitutionally deficient").

Petitioner further contends that a *de novo* review of Claims 2 - 17 and 19 will clearly show that Appellate Counsel was deficient/ineffective in not raising any one or more of the individual claims as well as deficient "Cumulatively". A *de novo* review is warranted.

Page 30: In regards to the Magistrate's multiple errors regarding Claim 22. So as not to be redundant and "unwieldy" in his objection, rather than attack each individual error again (because they are the same errors the State made in their Answer), the petitioner defers to the argument in his Traverse/Reply (DE #50), Claim 22, that was obviously not considered by the Magistrate.

However, it needs to be addressed that contrary to the Magistrate's Report @ pg. 30, the petitioner actually was not able to "successfully change [ ] his plea".

Although he filed a 'Notice of Intent to Rely on Insanity", the court failed to hold a hearing on the change of plea, failed to instruct the jury that the petitioner has pled "Not guilty by reason of insanity", and actually incorrectly told the jury that the [defendant] has pled "not guilty" - not giving the option even for the jury to find petitioner "Not guilty by reason of [temporary] insanity", (by involuntary intoxication) (in the erroneous jury instructions and erroneous verdict form). See, instant Claim #6. Petitioner also never "moved for an order [ ] appointing experts (sic) to conduct a mental examination". That was required to be *sua sponte* (Rule 3.216 and Ake v. Oklahoma) by the court upon the only requirement of filing the 'Notice of Intent to Reply upon Insanity Defense' filed by the Petitioner. The Court appointed one for the State, but never appointed one (or two) for the petitioner until one day before trial, and only after the petitioner filed a 'Notice of Court's Failure to Appoint [Mental Health] Expert(s). The only reason that petitioner was unable to present that defense at trial was because of the late appointment of the defense expert (although the court appointed a State Expert weeks before trial), and because the court then violated petitioner's 6th Amendment right to Compulsory Process (Claim #1); thus noone appeared (out of 34 witnesses subpoenaed) to testify on behalf of the petitioner at trial (including the Experts). And to say that a person "cannot be prejudiced by the claimed failure of counsel to [investigate the applicability of and] prepare/present a defense" [because the] "Petitioner failed to

assert [that defense] when given a chance [*pro se*] to do so", is nothing short of ludicrous. Counsel's deficiencies are not dependent solely on whether a defendant can correct those deficiencies himself later. See Traverse, (DE #50), Claim 22. Petty v. McCotter, 779 F.2d 299, 301 - 302 (5th Cir. 1986). A *de novo* review is warranted.

Page 32: Contrary to the Magistrates Report, it was not "over 50 pages". It was over 500 (five-hundred) pages of legal documents taken by the State prosecutor. Again, as clearly laid out in the Traverse (DE #50), Claim 23, the "Emergency Motion for In-Camera Inspection" was immediately withdrawn by defense counsel (at the hearing on the day of the illegal search and seizure), thus the Court never "granted the motion for in-camera inspection". Also, at no time did the Court "[find] that this action was the functional equivalent of a suppression motion" (sic). Whether petitioner later, after three (3) different lawyers all failed to file a motion to suppress, "could have filed for a motion to suppress" is irrelevant and does not negate counsel's ineffectiveness (for not doing so for over 6½ months). However, although petitioner, *pro se*, did not file a motion to suppress (in the criminal case), he did, in the alternative, file a 'Motion To Dismiss' on the same grounds (illegal/unconstitutional search of petitioner's pre-trial jail cell and seizure of over 500 pages of documents including Attorney-client-privilege material - including Discovery, Discovery Notes, Litigation Strategies, Letters to and from Attorney,

etc.). The Court refused to hear that motion. See, Claim Four. Whether the State withheld most of the documents from "inspection" is not even remotely the claim raised. That is only a factor within the 4th and 6th Amendment Claim. A *de novo* review is warranted.

Page 33: Contrary to the Magistrate's Report, the postconviction court did not apply any State law to resolve the first three (3) mitigating factors. There is no such State law, State Rule or State Case Law that provides that these mitigators are "not cognizable at a sentencing for a non-capital offense", and the State Court provided no such authorit[ies] because this was simply a self-serving "fictitious"reason for the State Court to deny relief on this claim. And this was not a State Law Claim; it was a 6th Amendment ineffective assistance of counsel claim - plain and simple.

As for the "final" factor (4th mitigator), the Magistrate's determination that petitioner had/has not shown remorse is again a determination made without reviewing the Traverse/Reply (DE #50), Claim 24, where the Petitioner clearly shows the Court in the record where he **has** shown remorse **for the accident** that occurred as a direct result of the victim's felonious actions (surreptitiously giving the petitioner a 6-times overdose of Zolpidem-Tartrate, trade named "Ambien").

The Magistrate's references here are misplaced:

1. Petitioner refers to the victim(s) as "alleged" because this was a case of "Involuntary Intoxication" resulting in an accident. Involuntary Intoxication means there was no *mens rea* (FLCRIMSUB. §45 and FL. MODEL PENAL CODE §4.01), therefore it is/was not a crime (without "intent") under Florida Law. There are no "victims" in accidents.

2. "Kangaroo Court" was used by Petitioner to describe his trial, not the "victims" and hardly constitutes some sort of lack of remorse, because petitioner feels that his trial was an unfair one. See, Black's Law Dictionary - "Kangaroo Court": A spurious legal proceeding where the outcome is predetermined (because none of petitioner's 34 subpoenas were served, and everyone except the petitioner knew long before trial that it was not going to be a fair trial).

3. Since there was no "crime" committed (only an accident), referring to the incident as "a minor scuffle of some sort" (which is all it truly was), is an accurate depiction of the event, and plays no role in whether a person can be remorseful to the fact that the love of his life was injured during that accident. See, generally, full argument in Traverse/Reply (DE #50), Claim 24. A *de novo* review is warranted.

Page 35: Because in Claim 26, the Magistrate's reasoning is only based on the State's incorrect assertions and facts - apparently because the Traverse/Reply (DE #50) was not read and considered - there are several crucial facts that are in error:

As stated clearly in the Traverse/Reply -

1. Petitioner was not required to show/prove that the "victims" were available for deposition because they **were** properly served summons to appear.

2. Contrary to the Magistrate's report, the subpoenas were not returned "unserved" - they, were, in fact, returned "SERVED" (upon the State Attorney's Office, signed as received by Julie Norwold) just as the Asst. State Attorney (Val Winter) had instructed the defense to do to serve the two "victims". See, full argument and references to the actual subpoenas/summons in the record, in the Travers/Reply (DE #50), Claim 26.

It was not the "victims" that were "unavailable" for the depositions, it was defense counsel (Kuypers) whom failed to appear at those scheduled depositions (that he himself scheduled and served subpoenas for). Instead, on the very same day the depositions were to occur, defense counsel filed a 'Motion to Withdraw as Counsel' (which was also granted that same day). See, Traverse/Reply (DE #50), Claim 26, for references to the record showing the "served" subpoenas, the 'Motion

to Withdraw' and the 'Motion Granting the Withdrawal'. Counsel had no intent to show up to the depositions.

Furthermore, per State Law, the *pro se* petitioner (defendant) is not permitted to "move for depositions" of victims (victims confrontation law) - and shouldn't have to anyhow, because counsel fails to.

Also, contrary to the Magistrate's Report @ page 37, the petitioner **did** "rebut [ ] the factual determination of the State Court by showing that Counsel **was** able to procure the victims' attendance at deposition but did not do so". See, Traverse, Claim 26. Counsel just failed to attend his own scheduled depositions, instead, on that very same day, dropping petitioner as a client. A *de novo* review is warranted.

Page 37: Again, as for a cumulative argument (regarding ineffective assistance of counsel), see, DeShields v. Shannon, 338 Fed. Appx. 120, 2009 U.S. App. LEXIS 15410 (3rd Cir. 2009).

However, this is **not** a "cumulative ineffective counsel" claim. This is an overall, *in toto*, cumulative claim of **all** errors and unconstitutional violations by the Court, the State (Prosecutor) and the three (3) different counsels. Therefore, the standard of review is different, and is cognizable on Federal Habeas Corpus. See, Full Argument in Claim 27 of Traverse/Reply (DE #50). The Magistrate clearly erred. A *de novo* review is warranted.

CONCLUSION

Based on the forgoing, the Court should reject the Magistrate's Recommendations, Order an Evidentiary Hearing on one or more of the claims raised by Petitioner, grant the petition, and order any other appropriate relief.

Dated: August 5th, 2019

Respectfully Submitted,

Cash W. Pawley, SR.

Cash Wallace Pawley

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Objections To Magistrate's Report and Recommendation have been provided to the Office of the Attorney General, Eric J. Eves, One S.E. 3rd Avenue #900, Miami, Fla. 33131, by placing it into the hands of prison officials for mailing via U.S. Postal Service on this 12TH day of AUGUST, 2019.

Cash W. Pawley SR.

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APPENDIX G

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION ON PETITION FOR WRIT OF HABEAS CORPUS § 2254 (39 Pages)

[App. G]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-10027-CIV-MOORE
MAGISTRATE JUDGE REID

CASH WALLACE PAWLEY

Petitioner,

v.

MARK S. INCH[1]

Respondent.

_____/

REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

Petitioner, Cash Wallace Pawley, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C.§ 2254 brought by a person in state custody. Petitioner is attacking the constitutionality of his conviction and sentence for attempted first-degree murder, aggravated assault with a weapon, and battery in the Sixteenth Judicial Circuit Court, in and for Monroe County, Case No. 2012-CF-818-AKW.

This Cause has been referred to the undersigned for consideration and report

[1] Julie L. Jones is no longer the Secretary of the Department of Corrections. Mark S. Inch is now the proper respondent in this proceeding. Inch should, therefore, "automatically" be substituted as a party under Federal Rule of Civil Procedure 25(d)(1). The Clerk is directed to docket and change the designation of the Respondent.

pursuant to 28 U.S.C. § 636(b)(1)(B) and Rules 8 and 10 of the Rules Governing Section 2254 Cases in the United States District Courts.

The Court has reviewed the amended petition, as supplemented, and supporting memorandum of law (collectively "Amended Petition") [DE 12], the State's response with supporting exhibits [DE 33], all pertinent portions of the underlying criminal file, and Petitioner's Reply. [DE 50]. For the reasons that follow, the undersigned recommends that the Amended Petition be denied.

I. FACTUAL BACKGROUND

The Information identified Janice Marie as the victim of attempted first-degree murder with a weapon, and Lisa Badini as the victim of aggravated assault with a deadly weapon and battery. ([DE 34-3] at 2). At one point, Ms. Marie had a romantic relationship with Petitioner and lived with him, but she eventually required him to move out of her home. ([DE 35-12] at 15). Ms. Marie and Ms. Badini were friends. *Id.* at 12. The record reflects that both victims, Ms. Marie and Ms. Badini, testified and recounted the events that led to the charges at issue here. *Id.* at 3; [DE 35-13].

Ms. Marie testified that on the night in question, she went out with Ms. Badini and returned home to find Petitioner sleeping in her backyard on a lounge chair. ([DE 35-12] at 38). Ms. Marie allowed him to sleep inside the home on the couch but refused to let him in her bed despite his insistence. *Id.* at 39. In the morning,

Petitioner motioned to Ms. Marie as if he would hug her. *Id.* at 53. Instead of hugging her, Petitioner pulled out a knife, placed the point of it on her neck as she screamed, and cut from just under her ear to her collarbone. *Id.* Ms. Badini explained that, while she attempted to intervene and help Ms. Marie, Petitioner grabbed her by the wrist and pointed the knife at her. ([DE 35-13] at 103). Both victims testified that they fled from Petitioner. ([DE 35-12] at 56); ([DE 35-13] at 106).

At trial, the Petitioner represented himself during the guilt phase. [DE 35-5]. The jury ultimately found Petitioner guilty as charged. [DE 34-4]. The trial court sentenced Petitioner to thirty-five years imprisonment on Count I followed by ten years of probation, five years imprisonment on Count II, and one-year imprisonment on Count III. The sentence for Count I is consecutive to Count II, and the sentence for Count III is concurrent with the sentence for Count II. [DE 34-5]. At sentencing, Petitioner was represented by counsel; unlike at trial where he appeared *pro se*. On October 29, 2013, the trial court entered the judgment and sentence. *Id.* Appellate counsel filed a direct appeal of Petitioner's conviction and sentence. ([DE 33] at 2-3). The conviction and sentence were affirmed. [DE 34-44].

II. PROCEDURAL HISTORY

To begin, the Court should note that the Petitioner is a prolific *pro se* filer who has been barred by both the state circuit court and the intermediate state appellate courts from filing "any further motions, pleadings or other documents in Monroe

County Circuit Court case number 2012–CFR–818–K unless signed by a member in good standing of the Florida Bar." *Pawley v. State*, 217 So.3d 128, 130 (3d DCA 2017). The court concluded that there comes a point when "enough is enough." *Id.* Further, the Third District Court of Appeal "direct[ed] that such order be forwarded to the Florida Department of Corrections for its consideration of disciplinary action, including the forfeiture of gain time. *See* § 944.279(1), Fla. Stat. (2015)." *Id.* Given the long and complex history of the Petitioner's filings in the state court system[2], the Court will only recount the historically relevant pleadings here.

Following the guilty verdict, Petitioner timely appealed his judgment and sentence in the Third District Court of Appeals, Case No. 3D13-2992. He argued two claims for relief. [DE 34-46]. Petitioner was represented by appellate counsel. The issues were as follows:

1) The trial judge denied defendant his Sixth Amendment right to counsel when the court allowed defendant to represent himself without conducting an adequate *Faretta* hearing during which the court could have explained to defendant all the disadvantages of representing himself including, but not limited to, the importance of having an attorney to preserve issues for appellate review.

2) The trial judge denied defendant his Sixth Amendment right to call witnesses on his own behalf, despite the fact that defendant had initiated his right to call witnesses by filing numerous subpoenas prior to trial.

[2] The opinion of the Third District cited the following cases: "3D16–2758 (the instant case); 3D16–2286; 3D16–2120; 3D16–1460; 3D16–1287; 3D16–1039; 3D16–005; 3D15–2952; 3D15–2623; 3D14–2999; 3D14–2535; 3D14–1596; 3D14–1080; 3D14–268; and 3D13–3137." *Id.* at 130, n.1.

On May 6, 2015, the Third District Court of Appeal *per curiam* affirmed the judgment and sentence without a written opinion. [DE 34-44]. Mandate issued on July 15, 2015. *Id.* Petitioner did not appeal to the Florida Supreme Court. Instead, on July 30, 2015, he filed a petition for writ of certiorari in the United States Supreme Court. [DE 34-49]. On October 13, 2015, the Court denied the petition. *Id.*

In the weeks following the denial of certiorari at the United States Supreme Court, the Petitioner filed various postconviction motions pursuant to Rule 3.800. *See* [DE 34]. When relief was denied, the decisions were appealed to the State's intermediate and supreme court. *Id.* This ligation was followed by multiple petitions for writs of mandamus and Rule 3.850 motions for postconviction relief. *Id.* On March 8, 2017, the instant Amended Petition was filed. The Petitioner argues 27 claims for federal habeas relief.

III. CLAIMS PRESENTED

The Petitioner argues the following 27 claims. They are quoted *verbatim* for clarity's sake to correspond directly with the Amended Petition.

1. Court violated defendant's right to compulsory process and due process.
2. The State of Florida violated Petitioner's 4th, 5th, 6th, 8th, and 14th Amendment rights by charging him, trying him, convicting him, sentencing him, and committing him to the Dept. of Corrections without having jurisdiction.
3. The State violated the 4th, 5th, 6th, and 14th Amendment rights guaranteed to petitioner by illegally acquiring and illegally and unconstitutionally executing a search warrant and seizures from defendant's pre-trial jail cell.

4. The trial court violated petitioner's right to due process (5th and 14th Amendments) by failing/refusing to rule upon pending pre-trial motions including Motion to Dismiss.

5. The trial judge violated petitioner's 5th, 6th, and 14th Amendment rights when he allowed a "private" lawyer to prosecute defendant.

6. Trial court failed to hold a change of plea hearing after defendant filed a "Notice of Insanity" defense, violating due process under 5th & 14th Amendments.

7. The trial judge failed to provide a mental health expert for the defense in violation of the 5th & 14th Amendments.

8. The trial judge erred in not holding a [*Richardson*] hearing to determine a [*Brady*] violation of Amends. 5 &14.

9. The trial judge delivered erroneous and fundamentally flawed verbal and written jury instructions in violation of Amends. 5 & 14.

10. The trial court erred in denying the defense motion to sequester the Witnesses' [Const. Amend. 5, 14].

11. The prosecutor knowingly allowed false testimony, failed to step forward and make it known, and exploited it. [Amends 5, 14].

12. The trial judge relied upon materially false information at trial and at sentencing when determining punishment [Amends. 5, 14, 6, 8].

13. The prosecutor misrepresented the law and the State's burden of proof to the Jury [U.S.C.A. Amends. 5, 14].

14. The trial court violated defendant's 6th Amendment right to effective assistance of counsel.

15. Trial court violated defendant's constitutional 6th Amend. right to a speedy trial with demand when it failed to bring the defendant to trial within 60 days of demand.

16. The trial court erred in not granting defense motion for judgment of acquittal in violation of due process.

17. The trial court erred in not granting petitioner's Motion for New Trial pursuant to Rule 3.600, and Const. Amends. 5, 6, 14.

18. Appellate Counsel's Acts/Omissions on Direct Appeal, when cumulatively considered violated petitioner's 6th Amendment right to effective assistance of counsel.

19. The trial judge denied inclusion of lesser included offenses and left out the instructions, those that were approved.

20. The trial court and appeal [sic] court both violated due process under U.S.C.A. Amends. 5, 14 by failing to properly review petitioner's postconviction motion.

21. The trial court sentenced the petitioner to a term of imprisonment that exceeds the statutory maximum.

22. Defense counsel was ineffective for erroneously informing him that the law did not recognize an involuntary intoxication defense, and that in fact there were no defenses available to the defendant.

23. Defense counsels (Sarah Maya, William Kuypers, and Anthony Barrows) all provided ineffective assistance of counsel by failing to file a motion to suppress the illegally seized documents (including undisputed attorney-client privileged material) obtained in the illegal search of petitioner's pre-trial jail cell, while he was awaiting trial.

24. Defense Counsel (Anthony Barrows) failed to present mitigation evidence in the penalty phase (sentencing) of the trial, which resulted in an extremely harsh sentence more than 5-times the "recommended" sentence by legislature – a (50) year disproportionate sentence for an accident caused directly by the victim.

25. Conviction was obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

26. Defense Counsel was ineffective by failing to locate and depose either of the alleged victims in the case.

27. Trial Counsel's, Appellate Counsel's Court's and State Prosecutor's errors, intentional acts and omissions, misconduct and constitutional violations were all egregious enough on their own; however, when considered in toto, the cumulative effect was highly prejudicial and most certainly changed the outcome of the proceeding.

([DE 12] at 5-26).

IV. STANDARDS OF REVIEW

Federal habeas litigation is replete with procedural rules and requirements. Indeed, on occasion, those requirements have been described "as a thicket of complex state and federal habeas procedural rules to deny habeas petitioners the opportunity to have their substantive constitutional claims heard by a federal court. *Howell v. Sec'y, Fla. Dep't of Corr.*, 730 F.3d 1257, 1262 (11th Cir. 2013) (J. Barkett, concurring). The process is not as simple as asserting a claim for relief from a constitutional violation and having your claim reviewed on the merits. A federal habeas petitioner must: (1) timely present his claims, (2) the claims must be of a federal constitutional nature, and (3) the claim must be exhausted in the state courts. Should a petitioner fail to do so, the actual merits of his claim may never be heard.

A. Statute of Limitations

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposed a one-year limitations period for the filing of an application for relief under § 2254. Accordingly, 28 U.S.C. § 2244(d) provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State postconviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

In most cases, including the present case, the limitation period begins to run pursuant to § 2244(d)(1)(A). The Eleventh Circuit has decided that the judgment becomes "final" within the meaning of § 2244(d)(1)(A) as follows: (1) "if the prisoner files a timely petition for certiorari, the judgment becomes 'final' on the date on which the Supreme Court issues a decision on the merits or denies certiorari, or (2) the judgment becomes 'final' on the date on which the defendant's time for

filing such a petition expires." *Bond v. Moore*, 309 F.3d 770, 773-74 (11th Cir. 2002). The State has not argued that the petition is time-barred. The Court proceeds to the remaining procedural requirements: exhaustion and statutory procedural bars and, ultimately, the merits.

B. Federal Constitutional Violation

Federal habeas relief is available to correct only constitutional injury. 28 U.S.C. § 2254(a); *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991). Federal habeas petitions may be entertained only on the ground that a petitioner is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a). A state's interpretation of its own laws or rules provides no basis for federal habeas corpus relief, since no question of a constitutional nature is involved. *Bronstein v. Wainwright*, 646 F.2d 1048, 1050 (5th Cir. Unit B June 1981). State courts are the ultimate expositors of their own laws, and federal courts entertaining petitions for writs of habeas corpus are bound by the construction placed on a state's criminal statutes by the courts of the state except in extreme cases. *Mendiola v. Estelle*, 635 F.2d 487, 489 (5th Cir. Unit A 1981).

"[H]abeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement." *Preiser v. Rodriguez*, 411 U.S. 475, 490 (1973). 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). 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 itself-and thus habeas relief is not an appropriate remedy." *Carroll*, 574 F.3d at 1365.

C. Exhaustion and Procedural Bar

Before seeking habeas relief under § 2254, however, a petitioner "must exhaust all state court remedies available for challenging his conviction." *See* 28 U.S.C. § 2254(b)(1). A claim must be presented to the highest court of the state to satisfy the exhaustion of state court remedies requirement. *O'Sullivan v. Boerckel*, 526 U.S. 838, 847 (1999); *Lucas v. Sec'y, Dep't of Corr.*, 682 F.3d 1342, 1351 (11th Cir. 2012). A petitioner is required to present his claims to the state courts so that the state courts can address the petitioner's constitutional claim and have an "opportunity to apply controlling legal principles to the facts bearing upon [his] constitutional claim." *Picard v. Connor*, 404 U.S. 270, 277 (1971). "[T]o exhaust state remedies fully[,] the petitioner must make the state court aware that the claims asserted present federal constitutional issues." *Jimenez v. Fla. Dep't of Corr.*, 481 F.3d 1337, 1342 (11th Cir. 2007) (per curiam) (quotation omitted).

As is relevant in this case, in Florida, exhaustion is ordinarily accomplished on direct appeal. If not, it may be accomplished by the filing of a Rule 3.850 motion.

Leonard v. Wainwright, 601 F.2d 807, 808 (5th Cir. 1979). Claims of ineffective assistance of trial counsel are generally not reviewable on direct appeal but are properly raised in a motion for postconviction relief. *See Bruno v. State*, 807 So.2d 55, 63 (Fla. 2001). In Florida, exhaustion of claims raised in a Rule 3.850 motion includes an appeal from the denial of the motion. *See Leonard*, 601 F.2d at 808 (holding that Florida state remedies are exhausted after appeal to the district court of appeal from denial of a collateral attack upon a conviction).

A procedural-default bar in federal court can arise in two ways: (1) when a petitioner raises a claim in state court and the state court correctly applies a procedural default principle of state law; or (2) when the petitioner never raised the claim in state court, and it is obvious that the unexhausted claim would now be procedurally barred in state court. *Kirksey v. Sec'y, Dep't of Corr.*, No. 17-13369-A, 2018 WL 7139263, *6 (11th Cir. Nov. 15, 2018). Pursuant to this doctrine, "[i]f 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 applicable." *Id., citing, O'Sullivan,* 526 U.S. at 845-46.

While the procedural default issue should ordinarily be resolved first, "judicial economy sometimes dictates reaching the merits of [a claim or claims] if the merits are easily resolvable against a petitioner while the procedural bar issues are

complicated." *See Lambrix v. Singletary*, 520 U.S. 518, 524-25 (1997) (noting that procedural default issue should ordinarily be resolved first but denying habeas relief on a different basis because resolution of the default issue would require remand and further judicial proceedings).

D. Merits Consideration

Under AEDPA, a federal court may grant habeas relief only when a state court's decision on the merits was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" decisions from this Court, or was "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d).

The standard is highly deferential. "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 fair-minded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011); *see also Greene v. Fisher*, 565 U.S. 34, 37 (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).

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 (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." *Harrington*, 562 U.S. at 101.

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 result of [its] decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8 (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); *Mitchell v. Esparza*, 540 U.S. 12, 16 (2003) ("[A] state court's decision is not 'contrary to ... clearly established Federal law' simply because the court did not cite [Supreme Court] opinions.... [A] state court

need not even be aware of [Supreme Court] precedents, 'so long as neither the reasoning nor the result of the state-court decision contradicts them.'") (*quoting Early*, 537 U.S. at 7-8).

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); *see also Renico v. Lett*, 559 U.S. 766, 773 (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). As recently noted by the Supreme Court, adherence to these principles serves important interests of federalism and comity. *Woods v. Donald,* 135 S. Ct. 1372, 1376 (2015). "AEDPA's requirements reflect a 'presumption that state courts know and follow the law.'" *Id., quoting, Woodford v. Visciotti,* 537 U.S. 19, 24 (2002) (per curiam).

It is critical to note that 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, 181-85 (2011) (holding new evidence introduced in

federal habeas court has no bearing on Section 2254(d)(1) review). Further, a state court's factual determination is entitled to a presumption of correctness. 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 the petitioner rebuts that presumption by clear and convincing evidence. *See id.* § 2254(e)(1). Although the Supreme Court has "not defined the precise relationship between § 2254(d)(2) and § 2254(e)(1)," *Burt v. Titlow*, 568 U.S. 1191 (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 (2010)). Given this backdrop, the Court proceeds to the Petitioner's claims.

V. ANALYSIS

On its face, the Amended Petition is unwieldy. The Petitioner asserts 27 claims for relief. However, certain of the claims are unexhausted, others are procedurally barred, and the remaining claims are meritless. For ease of reference and judicial economy, the Court will adjudicate the claims in those respective categories.

To make the Amended Petition manageable, the Court identifies the individual claim, then identifies where the Petitioner asserted that claim in the state court system[3], and the result of the judicial proceeding.

Claims History

Claim 1 – Direct Appeal [DE 34-46]. Case No. 3D13-2992, affirmed per curiam without written opinion. [DE 34-44].

Claim 2 – Rule 3.800 Motion to Correct Illegal Sentence. Trial court denied relief. [DE 34-62]. Appeal. Case No. 3D16-5, affirmed without written opinion. [DE 64-60].

Claim 3 – State Petition for Writ of Habeas Corpus. Case No. 3D16-1460, [DE 34-88] denied. [DE 34-87].

Claims 4 – 19: State Petition for Writ of Habeas Corpus. Case No. 3D16-1460, [DE 34-88] denied. [DE 34-87].

Claim 20 – Rule 3.850 Motion for Postconviction Relief. [DE 34-101]. Appeal. Case No. 3D16-2286, affirmed per curiam without written opinion. [DE 34-104].

Claim 21 - Rule 3.800 Motion to Correct Illegal Sentence. Trial court denied relief. [DE 34-62]. Appeal. Case No. 3D16-5, affirmed without written opinion. [DE 64-60].

Claims 22 – 27 Rule 3.850 Motion for Postconviction Relief. [DE 34-101] Appeal. Case No. 3D16-2286, affirmed per curiam without written opinion. [DE 34-104]

[3] This is not to suggest that the Petitioner "properly" exhausted the claim; rather, it simply identifies the state court pleadings where a claim, similar in substance, was made.

Unexhausted claims

Claims 2-17 & Claim 19 are unexhausted. While, Petitioner asserts these 17 claims as individual substantive claims for federal habeas relief, in the state courts he asserted these same 17 substantive claims, not as freestanding claims, but purely as the underlying factual basis for claims of appellate counsel's ineffectiveness. In fact, the title of his Initial Brief at the Third District Court of Appeal was "Petition Alleging Ineffective Assistance of Appellate Counsel." Here, he makes no such allegations. In other words, Petitioner is now arguing different constitutional claims with different applicable standards of review from the claims raised in state court. This he cannot do.

When denying Petitioner state habeas relief, the court categorized Petitioner's claims as "alleging ineffective assistance of appellate counsel." *Pawley v. State*, 210 So.3d 1293 (3d DCA 2016). Here, however, Petitioner only vaguely referenced appellate counsel. The Petitioner has not made a single reference to *Strickland v. Washington*, 466 U.S. 668 (1984), nor has he attempted to argue here that he was prejudiced by any perceived deficiency of appellate counsel. Before this Court, the Petitioner argues these claims as trial error or prosecutorial misconduct without discussing appellate counsel's deficient performance and ensuing prejudice. This is fatal to his claim.

Moreover, Petitioner does not address why the state court's denial of his claims was an unreasonable application of clearly established federal law. The Court surmises that the Petitioner, represented by counsel on direct appeal, declined to raise these substantive claims and later attempted, *pro se,* to resurrect them (knowing the claims were otherwise procedurally barred from review under Florida law) by asserting them as claims of ineffective assistance of appellate counsel. Ineffective assistance of appellate counsel can be raised in a state habeas petition in Florida, but trial court error cannot. Yet, here, Petitioner reverts to the substantive claims he was unable to raise in state court because of a state procedural bar. Because the state courts have not considered the claims on their merits, neither can this Court.

The Court must deny relief as opposed to dismissing the claims to allow Petitioner to return to state court. Dismissing an unexhausted claim to permit a petitioner to exhaust available state remedies is not warranted where further efforts to exhaust it in the state forum would be futile. Exhaustion would be futile when no state corrective process remains available: the claim would be procedurally barred in state courts if presented there. [4]

[4] The claim would be procedurally barred in state court if the motion or other application for relief would be untimely pursuant to state procedural rules. Florida law states that "[i]ssues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack." *Smith v. State*, 445 So.2d 323, 325 (Fla. 1983). A successive motion for postconviction relief can be denied on the ground that it is an abuse of process if there is no reason

Moreover, unexhausted claims that would be procedurally barred if presented to the state court are also procedurally defaulted for purposes of federal habeas relief. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991). To overcome such a procedural bar in federal court, a petitioner would have to show objective cause for his failure to properly raise the claim in the state forum and actual prejudice resulting from the error or establish the kind of fundamental miscarriage of justice occasioned by a constitutional violation that resulted in the conviction of a defendant who was "actually innocent," as contemplated in *Murray v. Carrier*, 477 U.S. 478 (1986).

To establish actual innocence, "a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 327 (1995). For such a claim to be credible, it must be supported with "new reliable evidence–whether it be exculpatory scientific evidence, trustworthy eyewitness accounts or critical physical evidence–that was not presented at trial." *Id.* at 324. The Petitioner has offered no such evidence.

Finally, even if these claims were not procedurally barred, they are insufficiently pled as *Strickland* claims. Here, Petitioner has not only failed to show

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for failing to raise the issues in the previous motion. *Moore v. State*, 820 So.2d 199, 205 (Fla. 2002).

either one of the *Strickland* components, he has failed to even discuss them. "Federal courts are authorized to dismiss summarily any habeas petition that appears legally insufficient on its face, *see* 28 U.S.C. § 2254 Rule 4." *McFarland v. Scott*, 512 U.S. 849, 856 (1994). Claims 2-17 and Claim 19 should be denied.

A. Procedurally Barred Claims

Petitioner has also asserted three claims, Claims 20-21 & 25, which were exhausted in the state courts, however, these claims are otherwise barred from federal habeas review because they present no federal constitutional question. Federal law requires that the claim raise an issue of federal constitutional dimension and not simply an issue of state law. Federal habeas relief for a person in custody pursuant to the judgment of a state court is available *only* on the ground that the custody violates the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2254(a); *Jones v. Goodwin*, 982 F.2d 464, 471 (11th Cir.1993) (emphasis added).

Further, a state's interpretation of its own laws or rules provides no basis for federal habeas corpus relief, because no federal constitutional question is presented. 28 U.S.C. § 2254(a); *Estelle*, 502 U.S. at 67. ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). These prohibitions stand as a barrier to a merits determination of Claims 20-21 & Claim 25.

i. Federal Constitutional Violation

Claim 20

In Claim 20, Petitioner raises various errors made by the trial and state intermediate appellate courts that reviewed his postconviction motion. These alleged errors were made, not during trial, but rather during his state postconviction proceedings. ([DE 12] at 18). Specifically, the Petitioner argues that the postconviction court failed to allow him to amend his state postconviction motion even though state law provides for amendment to any claims deemed "legally insufficient." *Id.* He further argues that the postconviction court failed to hold an evidentiary hearing. The Petitioner attempts to create a federal constitutional claim from what is clearly a state law issue by simply invoking the broad principle of due process. This is prohibited.

General appeals to broad constitutional principles, such as due process, equal protection, and the right to a fair trial, are insufficient to establish exhaustion. *See Gray v. Netherland*, 518 U.S. 152, 162-63 (1996); s*ee also Picard v. Connor*, 404 U.S. 270, 275 (1971)(holding that for purposes of exhausting state court remedies, a claim for habeas corpus relief must include a reference to a specific constitutional guarantee, as well as a statement of the facts the petitioner believes entitle him to relief).

In his initial brief at the Third District Court of Appeal, Petitioner argued that the postconviction court was not in compliance with state law or the state rules of

criminal procedure regarding amendments and evidentiary hearings. *See* [DE 34-108]. Petitioner did not raise any federal constitutional concerns such that this Court could consider the decision of the state court for a reasonableness analysis under 28 U.S.C. § 2254. This claim should be denied.

Claim 21

In Claim 21, the Petitioner argued in a motion to correct illegal sentence, pursuant to Fla. R. Crim. P. 3.800, that he received a prison term and probationary period that was more than three times the statutory maximum allowed by Florida law. ([DE 12] at 19). He asserts that his crime was only an "attempt" and was not "completed" such that he should not have received an enhanced penalty. While the appellate court affirmed the denial of relief without opinion, the postconviction court issued a written order denying relief. Relevant here, the court found that "the crime of Attempted First Degree Murder is a level 10 crime when a weapon is used to effectuate the murder and the use of the weapon is not essential element of the underlying crime." *Id.* at 3.

This claim challenges the state court's application of its sentencing laws and, as a result, is not cognizable on federal habeas review. *See* 28 U.S.C. § 2254(a); *Engle*, 456 U.S. at 120–21; *Branan*, 861 F.2d at 1508 ("[F]ederal courts cannot review a state's alleged failure to adhere to its own sentencing procedures."). Petitioner couches his sentencing claim in terms of due process and Eighth

Amendment violations, but the substance of his claim is state court error in the application of its own sentencing laws. *Estelle*, 502 U.S. at 67 ("[s]uch an inquiry, however, is no part of a federal court's habeas review of a state conviction. We have stated many times that "federal habeas corpus relief does not lie for errors of state law.'"). Federal habeas relief cannot be granted here.

ii. State Procedural Bar

Claim 25

Likewise, Claim 25, a claimed violation of *Brady v. Maryland*, 373 U.S. 83 (1963), suffers a similar procedural fate. The Petitioner first raised this claim in his Rule 3.850 motion. [DE 34-101]. The postconviction court denied relief finding that "[w]ithholding *Brady* material is an issue which could have been a matter for direct appeal. *Smith v. State*, 457 So.2d 388 (Fla. 1984)." ([DE 34-106] at 9). A state procedural default precludes consideration of an issue on federal habeas review when the last state court rendering a judgment on the issue in question "clearly and expressly" states that its judgment rests on a procedural bar. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991). To overcome a procedural bar, a petitioner must demonstrate objective cause for his failure to properly raise the claim in the state forum and actual prejudice resulting from the identified error. *See United States v. Frady*, 456 U.S. 152, 168 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977).

Here, Petitioner did not attempt to overcome the procedural bar, nor has he explained why his *Brady* claim, the failure of the prosecution to provide him with the court-appointed psychologist's report prior to trial, could not have been made on direct appeal. By his own admission, he was aware of and repeatedly requested the report, but it was never provided to him. ([DE 12] at 24). Therefore, this issue "could" have been made on direct appeal and in compliance with state law. Since the Petitioner has not alleged, let alone established, cause to excuse his default, it need not be determined whether he suffered actual prejudice. *Weeks v. Jones*, 26 F.3d 1030, 1046 (11th Cir. 1994). The Court is unable to consider the merits of this claim.

B. Merits Determination

Seven federal habeas claims remain for consideration on their actual merit. They fall into three distinct categories: trial court error (Claim 1), ineffective assistance of appellate counsel (Claim 18), and ineffective assistance of trial counsel (Claims 22-24 & 26-27). Each of these claims were properly exhausted and reviewed by the state courts. Under AEDPA, if a claim was adjudicated on the merits in state court, habeas corpus relief can only be granted if the state court's adjudication "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 "resulted in a decision that was based on an unreasonable

determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(1)-(2). For the reasons that follow, habeas relief should be denied as to all of the remaining claims.

i. Trial Court Error

Claim 1

Petitioner's first claim for relief is that the trial court violated his right to compulsory and due process when it provided "faulty and incorrect (civil) subpoenas to the defendant, *pro se*, in the jail which did not have any place to put the trial date (or 'standby') on them." ([DE 12] at 6). The Petitioner alleges that the clerk's office filed the subpoenas without serving them. *Id.* The State responds that, if error occurred, "it was invited error" because the Petitioner was warned regarding the pitfalls of representing oneself and the danger in making a speedy trial demand. ([DE 33] at 30). The State contends that the Petitioner knew of his Monday trial date but did not attempt to issue subpoenas until the Friday before and that the subpoenas, as drafted, were incomplete. *Id.* at 31. The Third District Court of Appeal considered this claim on direct appeal but denied it *per curiam* without written opinion. [DE 34-44]. In other words, the parties and this Court have no way of knowing the rationale behind the state court's denial of relief. Nonetheless, this Court is required to apply AEDPA deference. *See Harrington*, 562 U.S. at 98.

Generally, absent the Court finding 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," federal habeas relief must be denied. *Id.* at 786. Similarly, "where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Id.* at 98.

The Court has reviewed the record. The Petitioner chose to represent himself at trial. ([DE 34-46] at 26). After full disclosure and being cautioned by the court, he made a speedy trial demand. On the Friday before the Monday trial date, he sought to issue subpoenas to defense witnesses. However, he did not properly complete the subpoenas such that the sheriff could serve them. They were, by his own admission, incomplete; lacking the date and time that the witness was to appear to testify. *Id.* at 27. When no one appeared, the trial proceeded without those witnesses testifying. Now, Petitioner asserts that his constitutional right to be confronted with the witnesses against him was violated.

However, the claim is not that his constitutional rights under the Confrontation Clause was violated. Rather, the substance of his claim is that the clerk's office failed to complete, correct, and serve the subpoenas he chose to issue the Friday before trial started. This failure resulted in his not having secured the

presence of the witnesses he sought to confront. However, the trial court did not preclude or deny the Petitioner the right to call witnesses in his own defense. The Petitioner did not procure those witnesses attendance for trial. This distinction makes this federal habeas claim a very different claim from a Confrontation Clause claim.

Even if the clerk of the court should have "assisted" the Petitioner, failure on the part of the clerk's office to assist a *pro se* litigant with subpoenas to secure witness attendance is not one that is cognizable in a federal habeas petition. "A violation of a state rule of procedure or of a state law is not itself a violation of the federal constitution." *See Barclay v. Florida*, 463 U.S. at 958–659.

Moreover, it was not an unreasonable application of clearly established federal law to deny relief on this claim in the state courts. The Court is unaware of any federal law that would require the clerk's office to assist a *pro se* litigant in this fashion.

ii. Ineffective Assistance of Appellate Counsel

Claim 18

Petitioner's eighteenth claim for federal habeas relief is that his Sixth Amendment right to the effective assistance of counsel was violated because his appellate counsel was ineffective. ([DE 12] at 17). The alleged deficiency is the cumulative effect of appellate counsel's errors. As the basis for this claim, the

Petitioner cites to the 25 ineffective assistance of appellate counsel claims he asserted in his state habeas petition. *Id.* The State responded that it remains an open question in this Circuit as to whether cumulative error claims are cognizable on federal habeas review. ([DE 33] at 101). Specifically, the State argues that "[t]his uncertainty cannot provide 'clearly established federal law' for purposes of the AEDPA." *Id.* at 102.

However, while true, the State's argument misses the mark. The "clearly established federal law" standard applies to the decisions of the state courts and the reasonableness of those decisions. Here, the state court was not asked to determine if there were federally cognizable habeas claims for cumulative effect of error; rather, the state court was tasked with considering the substance of each individual claim as raised and applied in the state court *and* whether those cumulative errors could constitute ineffective assistance of counsel when viewed as a whole. Therefore, the "clearly established federal law" standard is not applicable to whether or not federal law recognizes a cumulative error claim on federal habeas review but, instead, is applicable to the state court determination that there was no cumulative effect of errors that resulted in a constitutional violation.

While *this Court*, when reviewing *this claim,* can find that there is no legal basis for a cumulative error claim on federal habeas review, the Court need not do so because, even if the claim was cognizable, it fails on the merits. The crux of the

underlying claim is ineffective assistance of appellate counsel based on the cumulative effect of failing to raise certain claims on direct appeal. However, the state court denied all the underlying ineffective assistance of appellate counsel claims on the merits. As the state court has found no singular error, it was not unreasonable for the state court to reject a cumulative effect claim. *See United States v. Waldon*, 363 F.3d 1103 (11th Cir. 2004) (citing *United States v. Allen*, 269 F.3d 842, 847 (7th Cir. 2001) ("If there are no errors or a single error, there can be no cumulative error")).

iii. Ineffective Assistance of Trial Counsel

Claim 22

Petitioner's twenty-second claim for federal habeas relief is that trial counsel was ineffective for erroneously informing him that Florida did not recognize "involuntary intoxication" as a defense. ([DE 12] at 20). Further, Petitioner argues that counsel did not investigate this defense even in the face of overwhelming evidence that he was "highly affected by the extreme overdose" of Ambien. *Id.*

Petitioner first raised this claim in his state postconviction motion. It was rejected because "[e]ven assuming the initial defense attorney performed as the Defendant alleges, he has not shown prejudice." ([DE 34-106] at 5). The court found that he failed to show prejudice because Petitioner was acting as his own attorney and "he successfully changed his plea" and "moved for an order[] appointing experts

to conduct a mental examination." *Id.* The state intermediate appellate court affirmed without written opinion.

Here, there was an opinion from the trial court, so the Court must "'look through' the unexplained decision to the last related state court that does provide a relevant rationale" when considering the reasonableness of the state court decision. *Wilson v. Sellers*, 138 S.Ct. 1188, 1192 (2018). After "looking through," the Court must "presume that the unexplained decision [from the highest court] adopted the same reasoning." *Id.* The State may rebut this presumption "by showing that the unexplained affirmance relied or most likely did rely on different grounds than the lower state court's decision." *Id.*

The record reflects that, while acting *pro se*, the Petitioner made a request for the appointment of an expert witness. ([DE 34-106] at 16). The court granted the request and an expert was appointed to assess the defendant's "sanity at the time of the offense and assist the defendant in preparation of such a defense." *Id.* For whatever reason, the Petitioner did not pursue this defense at trial. The Petitioner cannot be prejudiced by the claimed failure of counsel to present a defense that the Petitioner failed to assert when given a chance to do so.

The Court does not find the prejudice determination of the postconviction court to be unreasonable. To establish *Strickland* prejudice, the Petitioner must show that there is a reasonable probability, but for counsel's unprofessional errors, the

result of the proceeding would have been different." *Id.* at 694. The Court defines a "reasonable probability" as one "sufficient to undermine confidence in the outcome." *Id.*

Even if his defense attorney had incorrectly advised him regarding the defense, the Petitioner ultimately represented himself at trial, obtained an expert witness yet failed to raise the defense. He did not pursue the defense when given the chance; therefore, it was not unreasonable to find that the Petitioner failed to show prejudice.

Claim 23

Petitioner's twenty-third claim for federal habeas relief is that trial counsel provided ineffective assistance of counsel in violation of the Sixth Amendment when he failed to "file a motion to suppress the illegally seized documents . . . obtained in the illegal search of petitioner's pre-trial jail cell." ([DE 12] at 21). Petitioner asserts that over 50 pages of attorney-client privileged materials were seized from his jail cell by the prosecutor's office. This seizure gave the State an "unfair 'tactical' and 'strategic' advantage" at trial. *Id.* Petitioner also contends that the State withheld some of the documents from the judge's *in camera* inspection which resulted in Petitioner not being able to fully prepare for trial.

Petitioner raised this claim in his state postconviction motion. The court denied this claim finding that Petitioner showed neither "ineffective assistance or

prejudice." ([DE 34-106] at 6). The court pointed out that while counsel didn't move to suppress the documents, he did file an emergency motion for *in camera* inspection of the seized papers. The court granted the motion for inspection and reviewed the documents *in camera.* Privileged documents were returned to Petitioner with the remaining unprivileged documents provided to the State. *Id.* at 7. The court found that this action was the functional equivalent of a suppression motion. Moreover, Petitioner acted as his own attorney and could have formally moved to suppress the documents. The court concluded that even if the State had withheld documents from the court's inspection, that claim cannot be attributed to defense counsel; rather, it should have been raised on direct appeal. *Id.* This finding should not be disturbed.

When the state courts have already answered the question of how an issue would have been resolved under that state's law had defense counsel done what the Petitioner argues he should have done, "federal habeas courts should not second-guess them on such matters" because "it is a fundamental principle that state courts are the final arbiters of state law." *Callahan v. Campbell*, 427 F.3d 897, 932 (11th Cir. 2005) (quotation marks omitted). Having found that counsel's motion for *in camera* inspection to be the equivalent of a suppression motion, it was not unreasonable to determine that counsel was not ineffective. Relief should be denied.

Claim 24

Petitioner's twenty-fourth claim for federal habeas relief is that defense counsel was ineffective for failing to present mitigation evidence at sentencing. ([DE 12] at 22). Petitioner contends that there were four main areas of mitigation that counsel failed to present at sentencing: (1) the capacity of the defendant to appreciate the criminal nature of the conduct, (2) the victim was the initiator, (3) the defendant acted under extreme duress, and (4) the offense was committed in an unsophisticated manner and defendant has shown remorse. *Id.* at 23.

The postconviction court rejected these arguments for two primary reasons. The first three enumerated mitigation factors were "not cognizable at a sentencing for a non-capital offense" in Florida. ([DE 34-106] at 8). The final factor, the defendant has shown remorse, the court rejected as "flawed and incredible." *Id.* The court referenced certain pleadings filed *pro se* by Petitioner which "den[y] responsibility and continue[] to exhibit no remorse." *Id.* Accordingly, the court found that Petitioner failed to show prejudice.

As the postconviction court applied state law to resolve the first three mitigating factors by determining that they are not cognizable in a non-capital sentencing proceeding in Florida, the Court should not disturb that finding. This determination is an issue of state law for which state courts are the arbiters. *See Estelle*, 502 U.S. at 69. ("it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.).

As to the final factor, the Court has reviewed the record and finds that the determination that Petitioner did not establish that he showed remorse for his crimes at sentencing was not an unreasonable determination of facts. Indeed, in the instant Amended Petition, Petitioner refers to the victim as "alleged" and argues that both victims gave false statements and testimony. ([DE 12] at 18-33). Petitioner referred to his trial as a "kangaroo court" and the crime as "a minor scuffle of some sort." *Id.* at 22. Given these statements, the Court cannot find that the state court's determinations of the facts was unreasonable. A federal habeas court must presume that findings of fact by a state court are correct; and, a habeas petitioner must rebut that presumption by clear and convincing evidence. *See Hunter v. Sec'y, Dep't. of Corr.*, 395 F.3d 1196, 1200 (11th Cir. 2005). The Petitioner, having failed to show that the state court's factual determinations were unreasonable, habeas relief should be denied.

Claim 26

Petitioner's twenty-sixth claim for federal habeas relief is that defense counsel was ineffective for failing to locate and depose either of the victims in the case. ([DE 12] at 25). Petitioner argues that because the State's case was based solely on the eyewitness accounts of the two victims, their testimony was crucial to the defense. He asserts that effective assistance of counsel required proper preparation and

counsel should have conducted discovery to gain impeachment evidence for trial. *Id.*

The postconviction court denied this claim because when the entire record is considered, the claim is wholly without merit. The court found that Petitioner failed to show that the victims were available for deposition. In fact, the Public Defender's office "attempted to serve victims Lisa Badini and Janice Marie with subpoenas for deposition; they were returned unserved." ([DE 34-106] at 12). The court concluded that counsel cannot be found deficient for failing to depose witnesses who were unavailable. Moreover, the court noted that Petitioner represented himself during the guilt phase of trial "and could have moved for depositions" but did not do so. *Id.*

The Court has reviewed the record and does not find the determination unreasonable. While it may have been reasonable to find that trial counsel deficiently failed to vigorously locate and depose the victims, it is also not unreasonable to have concluded otherwise. "When evaluating whether a state court's decision 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding' under § 2254(d)(2), '[w]e may not characterize ... state-court factual determinations as unreasonable 'merely because [we] would have reached a different conclusion in the first instance.'" *Daniel v. Comm'r, Ala. Dep't of Corr.*, 822 F.3d 1248, 1259 (11th Cir. 2016) (citations omitted).

The Petitioner has not rebutted the factual determination of the state court by showing that counsel was able to procure the victims' attendance at deposition but did not do so. If the victims were unavailable for deposition, counsel cannot be deficient for failing to depose them. *See Owen v. Sec'y for Dep't of Corr.*, 568 F.3d 894, 915 (11th Cir. 2009). Further, the Petitioner has not shown that he, when representing himself, sought to depose the victims before trial

Claim 27

Petitioner's final claim for federal habeas relief is that trial counsel, appellate counsel, the court, and the State collectively violated his right to a fair trial under the Sixth Amendment. ([DE 12] at 26). In other words, he alleges cumulative error. The postconviction court denied this claim because it found "no accumulation of errors." ([DE 34-106] at 12). This determination was not an unreasonable application of clearly established law nor was it an unreasonable determination of the facts.

Under these circumstances, Petitioner can satisfy the "unreasonable application" prong of § 2254(d)(1) only by showing that "there was no reasonable basis" for the state court's decision. *Harrington*, 562 U.S. at 99. More importantly, even if the Court were not tasked with applying the restrictive analysis of the AEDPA, as this Court has not found a single error, there can be no cumulative error. *See Waldon*, 363 F.3d at 1103. Petitioner's claim must be denied.

Accordingly, after due consideration, it is

RECOMMENDED that Petitioner, Cash Wallace Pawley's, Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 be **DENIED**. All pending motions should be **DENIED** as moot. Additionally, a Certificate of Appealability should be **DENIED.**

Objections to this Report may be filed with the District Court within fourteen days of receipt of a copy of the report. Failure to file timely objections shall bar Plaintiff from a *de novo* determination by the District Court Judge of an issue covered in this report and shall bar the parties from attacking on appeal factual findings accepted or adopted by the District Court Judge except upon grounds of plain error or manifest injustice. *See* 28 U.S.C. §636(b)(1). *See also Thomas v. Arn*, 474 U.S. 140, 149 (1985). *See also RTC v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir. 1993).

SIGNED at Miami, Florida on this 12th day of July, 2019.

UNITED STATES MAGISTRATE JUDGE

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