No.

IN THE

SUPREME COURT OF THE UNITED STATES

STEVEN THOR HATTON,
Petitioner,
v.

MARK S. INCH,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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COUNSEL FOR THE PETITIONER

TABLE OF CONTENTS

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-12165-E

STEVEN THOR HATTON,

Petitioner - Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,

Respondent - Appellee.

Appeal from the United States District Court

for the Southern District of Florida

ORDER:

Steven Thor Hatton, a Florida prisoner serving a 15-year sentence for lewd or lascivious molestation of

a minor, filed a counseled 28 U.S.C. § 2254 petition, arguing that his trial counsel was ineffective because:

(1) counsel told the jury to find him guilty during opening statements and failed to correct that mistake;

(2) counsel failed to move in limine or otherwise seek to exclude his statement to law enforcement; and

(3) counsel impeached the victim with a damaging prior statement.[1]

A Magistrate Judge recommended denying Mr. Hatton's § 2254 petition. The District Court adopted the magistrate's recommendation and denied the § 2254 petition and a COA. Mr. Hatton now moves for a COA.

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1 Although Mr. Hatton raised 10 claims in his § 2254 petition, his counseled motion for a COA argues only 3 claims.

I.

As background, Mr. Hatton was arrested for the lewd and lascivious molestation of his 14-year-old stepdaughter, J.S. The arrest report included a written statement from J.S. describing several acts of inappropriate touching. Notably, she wrote that he had "humped" her in her bedroom while stating that he "wishe(d] he could really stick his penis inside of [her]." The state subsequently charged Mr. Hatton with three counts of lewd or lascivious molestation of J.S.

At the outset of trial, the court told the jury that it should not consider opening statements as evidence in the case. Defense counsel then delivered his opening statement, stating that Mr. Hatton was presumed innocent, he had pied not guilty, and the state would not be able to prove his guilt. He concluded with:

We believe firmly, you know, and with

> confidence that after you hear all of the evidence in this case, you will return a verdict of not guilty.
>
> The State cannot prove this case beyond a reasonable doubt. Hatton didn't touch this girl in any manner sexually or otherwise, and he is not guilty. And again, keep an open mind, hold the State to their burden. I don't have to prove or disprove anything and that we feel confident that at the end of this case you will, in fact, find Hatton guilty on all counts. Thank you. (emphasis added).

J.S. testified that she had been living with her mom and Mr. Hatton when she was 14 years old. She and Mr. Hatton were really close. One morning, she went into Mr. Hatton's room, he was laying down on

his back, and she laid on top of him. He then stuck his hand down the back of her pants, so that his bare hand was touching her skin, but then pulled it out. J.S. walked away, did not say anything about it.[2]

J.S. further testified that, on a prior occasion, she had been in her family's pool with Mr. Hatton, and he asked if she had ever seen a penis. He then pulled down his pants, grabbed her hand, made her touch him, and kissed her. She then described a third incident in which Mr. Hatton had inappropriately touched her. She recalled that her mother was working late, and while she was lying in bed and fully clothed, Mr. Hatton came into her room, got on top of her, and started "humping" her. She could feel him rubbing his penis on her pelvic bone. She testified that he did not say anything, but eventually got up and left.

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2 K.S., her cousin, witnessed this incident and testified at trial.

On cross-examination, counsel impeached J.S. with her prior written statement to the police, in which she had stated that, while Mr. Hatton was humping her, he told her that he wished that he could stick his penis inside her. She testified that she remembered writing that in her statement but did not remember if he said anything to her during the incident.

The state then introduced a recorded interview of Mr. Hatton through Detective Shane Altman, who testified that he had interviewed Hatton after interviewing J.S. The interview was played to the jury. In the interview, Mr. Hatton described J.S. as a "very good kid" and "reliable." He stated that nothing out of the ordinary had happened recently, but he admitted that: (1) there had been times where he had walked into the bathroom while she was in the shower; (2) she had sat on his lap; (3) he had discussed male and

female anatomy with her; (4) she likely had seen him naked because they lived in a small house; (5) they had laid in bed together several times, either talking, saying goodnight, watching television, or wrestling; (6) he had told her that she was "very attractive;" (7) they had slept in the same bed on vacation; and (8) he had touched, but not fondled, her breasts in the past, but did not remember the circumstances. He denied ever having sex with her or inappropriately touching her but stated that she was "boy crazy" and hungry for male attention, including attention from him. He said she was slender and "wellendowed" for her age and had been prancing around the house showing too much.

In closing argument, defense counsel argued that the government had not met its burden of proof. Counsel also noted several inconsistencies in J.S.'s testimony as evidence that she was not credible.

Significantly, counsel argued that J.S. had changed her story about the statements that Mr. Hatton made while he was allegedly humping her, highlighting that she previously said Hatton stated that he wanted to put his penis inside her but testified at trial that he said nothing. Counsel stressed that Mr. Hatton was not guilty and asked the jury to return a not guilty verdict. The jury found Mr. Hatton guilty, and the trial court sentenced him to 180 months' imprisonment.

After an unsuccessful direct appeal, Mr. Hatton filed a Fla. R. Crim. P. 3.850 motion, raising Claims 1 through 3. At an evidentiary hearing, trial counsel Jack Fleischman testified that he misspoke when he asked the jury to find Mr. Hatton guilty during his opening statement, and that he did not recall Hatton or Hatton's mother bringing the mistake to his attention. He testified that he could not recall his

conversation with Mr. Hatton about the recorded interview but did recall that "the tape was fairly thorough in denying the allegations" and wanted the entire interview to come in so the jury could hear Hatton's denials without him having to testify and be subject to cross-examination. Mr. Fleischman also wanted the whole interview to come in because Mr. Hatton behaved in a manner that was favorable, as he politely described J.S.'s negative attributes. Mr. Fleischman further testified that he impeached the victim with Mr. Hatton's statement-that he wished that he could put his penis inside the victim-because it was inconsistent from her statement on direct examination, although he admitted that it "sounds bad."

Mr. Hatton's mother testified that she recalled counsel's mistake, and as soon as he said it, she

observed the jurors looking at each other, like "Did I hear what I think I heard." During the morning recess, she told counsel what she had heard and observed. Mr. Hatton testified that, when counsel made the statement, the trial judge looked up from his papers, directly at Hatton, and the jurors looked at him with a puzzled look on their faces.

Chuck Shafer was admitted as an expert in criminal defense trial strategy. He opined that Mr. Fleischman's misstatement during opening statement infected the entire trial proceeding and said he would have asked for a mistrial. As to the recorded police interview, Mr. Shafer testified that he did not see any tactical reason for counsel not to move to exclude Mr. Hatton's statements that the victim was a "good kid" and "reliable," as well as his statement about having touched her breasts. Mr. Shafer testified that he

understood that counsel had attempted to impeach the victim's credibility with her prior inconsistent statement, but that the statement was "extremely inflammatory" and made matters worse.

The state court denied the Rule 3.850 motion, and the Fourth District Court of Appeal affirmed. Mr. Hatton then filed the instant § 2254 petition.

II.

To obtain a COA, Mr. Hatton must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). He does so by demonstrating that "reasonable jurists would find the District Court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484, l 20 S. Ct. 1595, 1603-04 (2000) (quotation marks omitted). If a state court has

adjudicated a claim on the merits, a federal court may grant habeas relief only if the state court's decision was (l) contrary to, or involved an unreasonable application of, clearly established federal law, or (2) 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)(l), (2).

To make a successful claim of ineffective assistance of counsel, Mr. Hatton must show that (l) his counsel's performance was deficient; and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). Counsel's performance was deficient only if it fell below the wide range of competence demanded of attorneys in criminal cases. *Id.* at 688. Prejudice occurs when there is a reasonable probability that, but for counsel's unprofessional errors, the result

of the proceeding would have been different. *Id.* at 694. When analyzing a claim of ineffective assistance under § 2254(d), this Court's review is "doubly" deferential to counsel's performance. *Harrington v. Richter*, 562 U.S. 86, l 05, 131 S. Ct. 770, 788 (2011). Under § 2254(d), "the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Id.*

III.

Claim I

In his Rule 3.850 motion, Mr. Hatton argued that counsel told the jury to find him guilty and failed to correct the mistake. Mr. Hatton noted that both he and his mother brought the mistake to counsel's attention, but counsel did not do anything about it, and had offered no strategic reason for failing to act. The

state court noted that counsel had made a "simple human misstatement," and the jury likely knew that it was an inadvertent mistake, given that counsel argued for Mr. Hatton's innocence in the rest of his opening statement. Further, the state court noted that the jury was instructed that the attorneys' statements were not evidence. The District Court determined that Mr. Hatton had not shown deficient performance or prejudice, as counsel advocated for a not guilty verdict throughout the trial, it was unreasonable to believe that counsel's slip-of-the-tongue infected the entire trial, and the jury was instructed that counsel's statement was not evidence.

Reasonable jurists would not debate the District Court's denial of this claim, as Mr. Hatton cannot show any prejudice. Although counsel certainly erred, Mr. Hatton cannot show that counsel's comment

contributed to the guilty verdict, as the statement did not make sense in the context of the entire opening statement, counsel's position during trial, and his arguments in closing. Counsel maintained Mr. Hatton's innocence in his opening statement and asserted that the state would not be able to prove his guilt. Only a few sentences before he misspoke, counsel had asked the jury to find Mr. Hatton not guilty and assured the jury that Hatton had not inappropriately touched the victim. During the state's case-in-chief, counsel maintained his position that Mr. Hatton was innocent and cross-examined each of the state's witnesses. In closing argument, counsel also argued for Mr. Hatton's innocence and asked the jury to find him not guilty.

Counsel's misstatement was clearly a mistake, and counsel testified at the evidentiary hearing that he

did not recall Mr. Hatton or his mother bringing the mistake to his attention. Finally, the trial court warned the jury that the attorneys' statements were not evidence, and despite Mr. Hatton's post-conviction testimony that the jurors gave him puzzled looks, the jurors were presumed to follow the court's instructions. *See Sutton v. State*, 718 So. 2d 215, 216 (Fla. Dist. Ct. App. 1998). Accordingly, no COA is warranted.

Claim 2

Mr. Hatton argued that counsel failed to move in limine or otherwise seek to exclude portions of his interview with law enforcement, specifically where he stated that: (1) the victim was a "good kid" and "reliable;" (2) he had touched her breasts; (3) the victim had sat on his lap several times; (4) the victim had seen him naked; (5) they had laid in bed together before; (6) they slept in the same bed on vacation; and

(7) he had been in the bathroom while she was in the shower. He further argued that his comments about the victim's reliability were improper character evidence, the remaining statements were evidence of prior bad acts or wrongs, and the prejudicial effect of all the statements outweighed their probative value.

The state court ruled that any motion to exclude the statements would have been denied, as the statements were admissible as statements against interest, and their probative value outweighed their prejudicial effect. The District Court agreed with the state court regarding the futility of a motion to exclude and added that a redacted version of the interview might not have been beneficial to the defense, as it would have left the jury free to assume that the gaps in the statements were more prejudicial than they were. Further, counsel used the entire statement to place Mr.

Hatton in a positive light, as he argued in closing argument that Mr. Hatton voluntarily spoke with the police.

Under Florida law, relevant, out-of-court statements of a party opponent are admissible in evidence pursuant to Fla. Stat. § 90.803(18) and are thus an exception to the hearsay rule. Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. *Id.* § 90.403.

Reasonable jurists would not debate the District Court's denial of this claim. As an initial matter, defense counsel testified that he wanted the entire interview admitted because it allowed the jury to hear Mr. Hatton deny the allegations without requiring him to take the stand and be subject to cross-examination. And counsel testified that he thought Mr. Hatton's

behavior during the interview was favorable to him. Thus, allowing the entire interview to be admitted was a strategic decision that is "virtually unchallengeable." *Provenzano v. Singletary*, 148 F.3d 1327, 1332 (11th Cir. 1998).

Beyond that, a motion in limine likely would not have been granted. Because the state offered the statements against Mr. Hatton at trial-not to bolster J.S.'s credibility-the statements were admissible as admissions of a party opponent, and, as the state court noted, their probative value outweighed their prejudicial effect. *See* Fla. Stat. § 90.803(18). Therefore, even if counsel had moved to exclude these statements, the motion likely would have been denied.

Claim 3

Mr. Hatton argued that counsel was ineffective for impeaching the victim with a harmful prior

inconsistent statement-specifically, that Hatton had stated, while humping her, that he wished to put his penis inside her. The state court ruled that counsel made a strategic decision to impeach the victim's credibility, and counsel's impeachment was not so unreasonable that he was not acting as counsel at all. The District Court acknowledged that counsel's impeachment allowed a relatively worse statement to come into the record but concluded that it was not so wholly unreasonable to rise to the level of deficient performance, as counsel thought it was important to bring to the jury's attention discrepancies in her version of events.

Reasonable jurists would not debate the District Court's denial of this claim, as counsel's strategic impeachment decision does not rise to the level of deficient performance. Counsel made a strategic

decision to impeach the victim with her prior inconsistent statement. The victim had stated on direct examination that Mr. Hatton did not say anything while humping her, which contradicted her earlier statements that he said he wished that he could put his penis inside her. This decision was not wholly unreasonable given the circumstances of the case. Because there were no eyewitnesses for two of the three counts against Mr. Hatton, the competing testimony as to those two counts came down to credibility. In that situation, raising inconsistencies in the victim's version of events and thus calling her credibility into question was one of the only options available to defense counsel. Counsel made the decision to pursue that line of questioning and even argued that point in closing argument. Thus, Mr. Hatton has not shown that no competent counsel would

have made such a choice.

IV.

Because Mr. Hatton has failed to make the requisite showing, his COA motion is DENIED.

[signature of Beverly B. Martin]

UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 18-cv-14337-MIDDLEBROOKS/Maynard

STEVEN THOR HATTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____/

ORDER ADOPTING REPORT AND RECOMMENDATION

THIS CAUSE comes before the Court upon Magistrate Judge Shaniek M. Maynard's Report and Recommendation on Petition for Writ of Habeas Corpus ("Report"), issued on December 2, 2020. (DE 17). The Report recommends denial of the Petition,

which seeks relief under 28 U.S.C. § 2254. Petitioner filed objections on January 15, 2020. (DE 20).The Government did not respond to Petitioner's objections.

Petitioner objects to the Report's findings on several grounds. I note that many of Petitioner's objections are merely restatements of his position, rather than an argument as to the Report's specific findings. In this Order, I address only those arguments in which Petitioner substantively disputes a particular finding in the Report. In all other respects, I have conducted a de novo review of the record, and I agree with the Report and the recommendations therein in their entirety.

First, Petitioner argues that the Report erred by finding that counsel's misstatement as to Petitioner's guilt during closing arguments was not outcome determinative.

Specifically, Petitioner cites *Clark v. State* to support his argument that but for counsel's misstatement, the jury would have found him guilty. 690 So. 2d 1280, 1283 (Fla. 1997). However, *Clark* involved an attorney that repeatedly stated that his client was a bad person and deserving of punishment. In this case, I agree with the Report's finding that this was merely an unfortunate slip of the tongue and substantial other evidence supports the jury's verdict. Accordingly, *Clark* does not effectively undermine the Report's findings.

Next, Petitioner argues that the Report incorrectly concluded that counsel did not act in a "wholly unreasonable" manner in introducing a prior inconsistent statement. *Strickland v. Washington*, 466 U.S. 668 (1984). More specifically, Petitioner argues that the Report overlooked evidence that during the state court postconviction evidentiary hearing, counsel

stated "I can't tell you why now" when asked why he played the entire tape of the interrogation in which the prior inconsistent statement was made. However, the Report points to statements from the same hearing in which counsel justified his introduction of the statement. Therefore, it appears that counsel did not know why he presented the statement in tape format but *did* have a strategic reason for presenting the statement itself. Accordingly, I agree with the Report's findings and overrule Petitioner's objection.

After a careful *de novo* review of Judge Maynard's Report and the record in this case, I agree that this petition should be denied. I also find that Petitioner has failed to make "a substantial showing of the denial of a constitutional right" sufficient to support the award of a Certificate of Appealability. 28 U.S.C. § 2253. Accordingly, it is hereby

ORDERED AND ADJUDGED that

(1) The Report (DE 17) is **RATIFIED, ADOPTED, AND APPROVED** in its entirety.

(2) Petitioner Steven Thor Hatton's Verified Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (DE 1) is **DENIED.**

(3) A Certificate of Appealability is **DENIED.**

(4) The Clerk of Court is directed to **CLOSE THIS CASE.**

(5) All pending motions are **DENIED AS MOOT**.

SIGNED in Chambers at West Palm Beach, Florida, this 14th day of May, 2020.

[signature of Donald M. Middlebrooks]

DONALD M. MIDDLEBROOKS

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

CASE NO. 18-14337-CIV-MIDDLEBROOKS/

MAYNARD

STEVEN THOR HATTON,

Petitioner,

v.

JULIE L. JONES,

FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

_____/

REPORT AND RECOMMENDATION ON PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY (DE 1)

THIS CAUSE comes before this Court upon an Order of Reference (DE 4) and the above Petition. The

record before this Court consists of the Petition, Response (DE 10), Appendix (DE 11), Reply (DE 14), and Supplemental Appendix (DE 16). Having reviewed the record, this Court recommends as follows:

BACKGROUND

The criminal charges against Petitioner stem from allegations that he sexually molested his fourteen-year-old stepdaughter, J.S., on three occasions. The charging document on which he went to trial was the Second Amended Information. (DE 11-1 at 97). Count I thereof alleged that he committed lewd and lascivious molestation of J.S. while they were in their swimming pool. That incident was alleged to have occurred between December 20, 2003 and September 26, 2004. Count 2 charged that he committed lewd and lascivious molestation of J.S. when he lay on top of her in her bed and "humped" her. The incident was alleged

to have occurred between September 27, 2004 and June 13, 2005. Count 3 charged that he committed lewd and lascivious molestation of J.S. on June 14, 2005 by putting his hands down her pants while she was on top of him.

A. *The Trial*

On September 10, 2007, Judge Sherwood Bauer called the criminal case for trial. The trial transcript begins at page 204 of DE 11-1. The State called four witnesses: J.S. (the victim), K.S. (the victim's thirteen-year-old cousin), Ms. Huntley (the mother of K.S.), and Detective Richard Shane Altman of the Okeechobee County Sheriff's Office.

K.S. was a witness to the third alleged molestation incident. He saw Petitioner put his hand down the back of the victim's pants while she lay on top of the Petitioner. That occurred on June 14, 2005

as they prepared to leave for a family trip to Marco Island. When they returned from the trip, K.S. told his mother what he saw. His mother, Ms. Huntley, then talked to the victim. Thereafter Petitioner's conduct was reported to the police.

The victim testified that that incident was not the first time that Petitioner had touched her sexually. She said Petitioner had previously exposed himself to her while at their swimming pool. On that occasion, Petitioner "French-kissed" her and made her touch his penis, she alleged. On another occasion, Petitioner came into her bedroom, laid himself on top of her with his penis against her pelvic bone, and "humped" her through their clothing.

The jury found Petitioner guilty of all three counts of lewd and lascivious molestation by an offender over the age of eighteen on a victim of between

twelve to sixteen years of age (DE 11-1 at 638-40). Petitioner was sentenced to fifteen years in prison on each count—to be served concurrently (DE 11-1 at 159-61). Jack Fleischman, Esq., represented Petitioner at the pre-trial and trial-level stages of the criminal prosecution.

B. *Direct Appeal*

Ralph A. Hagans, Esq., represented the Petitioner on the direct appeal. In the direct appeal, which was filed on November 13, 2007 (DE 11-1 at 150-51), Petitioner challenged several of the trial court's rulings: (1) instructing the jury on lewd and lascivious conduct under Fla. Stat. § 800.04(6) as a lesser included offense of lewd and lascivious molestation under Fla. Stat. § 800.04(5), (2) not allowing Petitioner to call certain witnesses, (3) not giving the jury written instructions, and (4) not

entering a directed verdict as to Counts 1 and 2 (DE 11-2). Petitioner also argued that the prosecution failed to prove Count 3 beyond a reasonable doubt. *Id*. On November 26, 2008, Florida's Fourth District Court of Appeal affirmed Petitioner's conviction and sentence per curiam and without a written opinion [1] (DE 11-5). *Hatton v. State*, 996 So. 2d 865 (Fla. 4th DCA 2008). The Mandate issued on January 30, 2009 (DE 14-1 at 9 and DE 11-7).

C. *Rule 3.850 Motions*

On January 28, 2010, Petitioner timely filed a Motion for Post-Conviction Relief pursuant to Florida

1 "Under Florida law, the Florida Supreme Court lacks jurisdiction to hear an appeal from a *per curiam* affirmance of a conviction by a lower state appellate court." *Williams v. Sec'y, Fla. Dep't of Corr.*, 674 F. App'x 975, 976 (11th Cir. 2017) (citing *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980)).

Rule of Criminal Procedure 3.850[2] raising four ineffective assistance of trial counsel claims (DE 11-8). Petitioner now was represented by Andrea M. Norgard, Esq., and Robert A. Norgard, Esq. (DE 11-8 at 17). The state post-conviction court dismissed the Rule 3.850 Motion as insufficiently pleaded on April 20, 2010 and denied the motion for rehearing on May 18, 2010. However the court gave the Petitioner an opportunity to amend (as the court recalled in a later order found at DE 11-11). On June 25, 2010, following appeal to Florida's Fourth DCA, the postconviction court allowed the Norgards to withdraw their representation of the

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2 Fla. R. Crim. P. 3.850, entitled Motion to Vacate, Set Aside, or Correct Sentence, provides a vehicle for collateral review of a criminal conviction. *Duncan v. Walker*, 533 U.S. 167, 177 (2001). Florida generally requires defendants to raise ineffective assistance of counsel claims in these postconviction proceedings rather than on direct appeal. *Reynolds v. State*, 99 So. 3d 459, 474 (Fla. 2012) ("claims of ineffective assistance of counsel generally are not cognizable on direct appeal and are properly raised in postconviction proceedings").

Petitioner.

Petitioner raised the following four claims in the January 28, 2010 Rule 3.850 Motion. They are that: 1) trial counsel was ineffective for not seeking to exclude from evidence the portions of Petitioner's recorded statement to law enforcement where he said the victim is reliable and that he had previously touched her breast and lay in bed with her; (2) trial counsel was ineffective for inadvertently telling the jury in his opening statement that it would find his client guilty instead of not guilty and for not correcting his misstatement or moving for a mistrial; (3) trial counsel was ineffective for impeaching the victim with a prior inconsistent statement that instead provided further evidence of criminal intent against the Petitioner; and (4) trial counsel was ineffective for not objecting to Ms. Huntley's testimony that the victim had seen a

counselor before going to the police[3] (DE 11-8).

On January 28, 2011, two days before the deadline for filing additional Rule 3.850 claims[4] (DE 14 at 9), Petitioner filed a *pro se* Rule 3.850 motion containing fourteen ineffective assistance of trial counsel claims[5] (DE 16-1). On March 30, 2011, the

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3 Petitioner argued that Ms. Huntley's testimony that they took the victim to a counselor improperly bolstered the victim's credibility by implying that a children's counselor believed her and thereby prompted the need for a criminal investigation.

4 Under Fla. R. Crim. P. 3.850(b), a Rule 3.850 Motion must be filed within two years after the judgment and sentence become final. Here, the judgment and sentence became final on January 30, 2009 when Florida's Fourth DCA issued its mandate.

5 These claims are that his trial counsel was ineffective for: (1) failing to timely file post-trial motions; (2) failing to present the defense's private investigator as a witness; (3) failing to properly advise Petitioner regarding the prosecutor's pre-trial plea offer; (4) failing to assist in preparing the verdict form; (5) failing to object when the jury received an exhibit that was not meant to be published; (6) failing to present two particular expert witnesses during trial; (7) failing to present mitigating evidence pertaining to Petitioner's statement to law enforcement officials; (8) failing to properly impeach the alleged victim with her prior

state post-conviction court dismissed Petitioner's *pro se* motion as insufficiently pleaded. That dismissal was "without prejudice to refile a comprehensive sufficiently pled" motion, however. The court gave him the "opportunity to file a new motion raising sufficiently pled claims" pursuant to *Spera v. State*, 971 So. 2d 754, 761 (Fla. 2007). The court gave him until May 5, 2011 to do so. The court specifically instructed Petitioner to re-plead only those claims already raised in his January 28, 2011 motion and not to assert any new claims. Moreover, of the claims he already had raised, the court instructed Petitioner to

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inconsistent statements; (9) failing to present a witness to verify a particular character trait of the alleged victim; (10) failing to properly question a State witness who was the alleged victim's cousin; (11) failing to present evidence regarding a sexual relationship between the alleged victim and another male; (12) not striking a particular juror during voir dire; (13) not informing the jurors during voir dire of the maiden name of Petitioner's former wife; and (14) failing to properly question two jurors regarding their potential bias.

replead only those that he could assert in good faith. Beyond that, the state post-conviction court gave no instruction or guidance. It did not explain what the pleading deficiency was or what needed to be corrected. (That dismissal order is found in the record at DE 16-2.)

Petitioner retained Michael Ufferman, Esq., on April 25, 2011 to represent him, and Mr. Ufferman has remained his post-conviction counsel ever since. On April 29, 2011 Mr. Ufferman requested on Petitioner's behalf a 30 day extension of time to obtain the underlying record and to amend the Rule 3.850 Motion. On May 5, 2011, the state post-conviction court denied that request. Petitioner recounts this facet of the procedural history in his Amended Initial Brief dated January 11, 2013 (and found in the record at DE 14-1). As Petitioner recounts at footnote 9 thereof, the state

post-conviction court characterized its March 30, 2011 order as creating a "second opportunity" to amend.[6] Petitioner argued to the Fourth DCA that that characterization was incorrect. Because the claims that he had raised in his pro se Rule 3.850 Motion were all new claims, it would have been their first, not second, amendment. Petitioner argued further that the state post-conviction court violated Florida appellate court precedent when it denied his newly retained counsel (Mr. Ufferman) additional time to amend the claims he previously had raised in his pro se Rule 3.850 Motion (and also let the clock run out on his ability to amend). Even if he had sufficient time to amend them,

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6 The state post-conviction court now was denying Petitioner the opportunity to re-plead the claims that he had raised in his pro se motion contrary to its previous ruling that gave him leave to do just that, this Court observes. However it does not appear that Petitioner included this particular point---regarding the consistency of the state postconviction court's rulings regarding leave to amend---in his appeal to the Fourth DCA, this Court adds.

Petitioner argued that the state post-conviction court acted contrary to the spirit of *Spera* because it gave him no guidance as to what the pleading defects were and how they needed to be amended.

By this point the state post-conviction proceeding had developed to a confusing procedural posture with two different Rule 3.850 Motions at issue and two different appeals pending. The Fourth DCA consolidated the two appeals. Then on August 13, 2014 the Fourth DCA held that the original Rule 3.850 Motion (the one that the Norgards filed on Petitioner's behalf on January 28, 2010) was sufficiently pleaded and should not have been dismissed. The Fourth DCA therefore remanded that motion back to the state post-conviction court for a merits ruling. *See Hatton v. State*, 143 So. 3d 1181 (Fla. 4th DCA Aug. 13, 2014). (Also found at DE 11-9). Next the Fourth DCA

addressed Mr. Ufferman's request for additional time, and it affirmed the state postconviction court's denial of that relief but without explanation.

The Fourth DCA issued the mandate on its remand opinion on August 29, 2014. (DE 11-9). That restarted the post-conviction proceeding, and the parties resumed litigating the four claims from the initial Rule 3.850 Motion dated January 20, 2010. On January 12, 2015 the State filed its Response thereto (DE 11-10). In that Response[7] the State stipulated to the need for a hearing "on all grounds" based on its "review of the trial transcript" and "the tortured history of this case". Id. The state post-conviction court scheduled an evidentiary hearing on all four ineffective

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7 Even though it was the Petitioner's originally filed motion, the State curiously referred to it as his "Belated Motion for Post Conviction Relief"; moreover the State mailed a copy of its Response to Andrea Norgard, Esq., even though Ms. Norgard had not represented the Petitioner for quite some time by this point.

assistance of counsel claims that the Petitioner had raised in his initial Rule 3.850 Motion filed on January 28, 2010.

Rule 3.850 Hearing

An evidentiary hearing was held on March 9, 2016 before Circuit Judge Dan L. Vaughn (DE 11-24 at 1-109). Michael Ufferman, Esq., and Donald A. Pumphrey, Jr., Esq., represented Petitioner at the evidentiary hearing. Assistant State Attorney Ashley Albright, the prosecutor who tried the case, appeared on behalf of the State. *Id.* Petitioner called three witnesses: Jack Fleischman, Esq., Peggy Ann McElhenny, and Theodore Charles Shafer, Esq. The Petitioner testified, too.

1. Mr. Fleischman's Rule 3.850 Testimony

The first witness to testify at the Rule 3.850 evidentiary hearing was Mr. Fleischman who had

represented Petitioner at trial. *Id.* at 10. He had been a criminal defense attorney for twenty years and had tried approximately 200 jury trials and several sex crime cases. *Id.* at 23-26. Petitioner's claims of ineffective assistance concern Mr. Fleischman's representation of him and how he presented his defense.

Regarding Petitioner's first claim, Mr. Fleischman explained that he did not object to the State's proffer of the entire recorded statement that Petitioner had given to law enforcement because that full statement was overall beneficial to the defense. *Id.* at 13-20, 26-29. It gave the jury information about Petitioner's positive relationship with the victim and about issues she was having in the home without Petitioner having to take the stand to testify about that same information where he would be subject to

cross-examination. *Id.* at 13-16. It allowed the defense to portray the victim as a good person who nevertheless made up the allegations because "she wanted attention, maybe was boy crazy, and was unhappy being in the home." *Id*. at 14. Mr. Fleischman was not bothered by the Petitioner's statements that the victim was reliable and that he had accidentally touched her breasts before. *Id.* at 13-20, 26-29. Mr. Fleischman made the strategic decision to allow the full recording to enter the record because Petitioner contemporaneously and consistently denied the allegations against him throughout the interview. Mr. Fleischman believed the full interview cast Petitioner in an overall good light. *Id*. at 13-16.

Regarding the second claim, Mr. Fleischman acknowledged that he had misspoke at the end of his opening statement to the jury when he said: "I don't

have to prove or disprove anything and we feel confident that at the end of this case you will, in fact, find [Petitioner] guilty on all counts." *Id.* at 12-13, 30-32. (emphasis added). He did not realize that he had made that mistake at the time, and he does not remember Petitioner or Petitioner's mother mentioning it to him during the break. *Id.* at 12-13. Mr. Fleischman otherwise consistently argued throughout the trial that Petitioner was not guilty. *Id.* at 30-32.

Regarding claim three, Mr. Fleischman believed it was a reasonable strategy for him to cross-examine the victim about her inconsistent statements over whether Petitioner had said anything during the "humping" incident. On direct examination the victim testified from the witness stand that Petitioner had said nothing during that incident. *Id.* at 20-23, 32. Mr. Fleischman pointed to her prior written statement

where she said that Petitioner did say something to her during that incident: that he wanted to put his penis inside of her. *Id.* at 20-23, 32. Mr. Fleischman pointed out an additional such discrepancy from her deposition. Mr. Fleischman sought to highlight those inconsistencies. *Id.* at 20-23, 32. According to Mr. Fleischman, if he had not done so, "we'd be here because the defendant would say, 'well, she made a statement different than what she testified in court, you didn't cross examine her on it.'" *Id.* at 22-23.

As to claim number four, Mr. Fleischman said it was "significantly relevant" that the alleged victim's mother had sought guidance from a counselor rather than go directly to law enforcement. *Id.* at 32-34. He stated that, "if your daughter has been improperly touched . . . you go to the police." *Id.* at 33-34. The implication is that a parent who believes her child's

molestation claim goes directly to law enforcement rather than to a counselor. Mr. Fleischman said that he had emphasized that same point in prior cases with success. *Id.* at 34.

2. Peggy Ann McElhenny Rule 3.850 Testimony

The next witness was Petitioner's mother, Peggy Ann McElhenny (DE 11-24 at 35). She was present during the entire trial against her son. Id. at 37. She heard his trial counsel, Mr. Fleischman, tell the jury during his opening argument that it should find Petitioner guilty. *Id.* at 37-38. When he said that, she saw the jurors "looking at each other" as if they were asking themselves, "did I hear what I think I heard?" *Id.* at 38. She unsuccessfully tried to get Mr. Fleischman's attention to let him know what he had said. *Id.* at 39. Afterwards, during the morning break,

she told Mr. Fleischman he had said her son was "guilty". *Id.* at 39-41. He denied it. *Id.* She wanted to suggest to Mr. Fleischman that he ask the court reporter to read it back to him, but she refrained because she was unsure whether that was allowed. *Id.* at 40. On cross-examination, Ms. McElhenny acknowledged that other than that one misstatement, Mr. Fleischman spent the rest of the trial trying to prove and argue that her son was not guilty. *Id.* at 42,

3. Petitioner Hatton's Rule 3.850 Testimony

Petitioner took the stand (DE 11-24 at 47). He said that he also heard Mr. Fleischman tell the jury that it will find him "guilty" on all counts, to which the jurors gave him "the most puzzling look." *Id.* at 48-50. One of the jurors furrowed his brow and looked as though he were thinking, "why would he say that if

he's the defense attorney." *Id.* at 50. Another juror looked as though she could not believe what she was hearing. *Id.* Petitioner and his mother confronted Mr. Fleischman about the misstatement at the next break. *Id.* at 51-52. In response, Mr. Fleischman "kind of sucked his teeth" and said, "no, I didn't say that." *Id.* at 52-53. They insisted that he indeed had said it, but the issue was addressed no further. *Id*. On cross-examination, Petitioner acknowledged that Mr. Fleischman's misstatement was "probably … accidental," and was out of context with everything else Mr. Fleischman had said. *Id.* at 54-55.

4. Attorney Shafer's Rule 3.850 Testimony

Theodore Shafer, Esq., was retained by Petitioner's Rule 3.850 counsel to evaluate and opine about Mr. Fleischman's conduct and the quality of his representation (DE 11-24 at 61). Mr. Shafer has

practiced law since 1987, and he has done primarily criminal defense work since 1991. *Id.* at 58-59. He has tried approximately 80 jury trials. *Id.* at 75. Based on his credentials and without objection from Respondent, Mr. Shafer was admitted as an expert in the field of criminal defense. *Id.* at 61.

In Mr. Shafer's opinion, Mr. Fleischman should have sought to redact Petitioner's comments that the victim was reliable and that he previously had touched her breast from the police interview that was proffered to the jury. *Id.* at 66-71, 96-99. Redacting his voucher of the victim's reliability would have been a reasonable course of action since the victim's credibility was critical to the State's ability to prove all three counts. *Id.* at 66-71, 96-99. Excluding Petitioner's concession of having touched her breast also was advisable since the case involved lewd and lascivious acts on her. *Id.* at

69-71. Mr. Shafer would have moved under Rule 404(b) to redact that concession as an uncharged prior bad act of the Petitioner. *Id.* at 70. Mr. Shafer saw no benefit to the Petitioner's defense from allowing the jury to hear that statement. *Id.* at 71.

Mr. Shafer furthered that Mr. Fleischman should have asked the court reporter to read back the transcript, and once he confirmed his misstatement about finding the Petitioner "guilty", he should have moved for a mistrial. *Id.* at 64-65. Jurors who hear the defense attorney say in the opening argument that his client is "guilty" will consider the rest of the trial evidence with that in mind, Mr. Shafer opined. *Id*. The misstatement thereby would have prejudiced the entire trial proceeding. *Id.*

Nor did Mr. Shafer believe that impeaching the victim with her prior inconsistent statements over

whether or not Petitioner had spoken during the humping incident was a reasonably beneficial strategy. *Id*. at 72-73. To the contrary, it was a "huge backfire", "fell flat", and was "extremely inflammatory", Mr. Shafer opined. *Id*. at 73.

D. *The Rule 3.850 Ruling and Appeal*

That evidentiary hearing took place on March 9, 2016 (the transcript for which is at DE 11-24). On May 19, 2016 Petitioner filed his Post-Evidentiary Hearing Memorandum of Law and Fact in Support of His Motion for Postconviction Relief (DE 11-12). A Response (DE 11-13) and Reply (DE 11-14) were filed thereby completing the briefing on the four claims from his initial Rule 3.850 Motion. The state post-conviction court rendered its merits ruling on September 1, 2016 (DE 11-15). Petitioner's later ineffective assistance of counsel claims---the ones that he raised after his initial

motion---and their procedural history were not discussed in this round of briefing. On April 12, 2018 (DE 11-20) the Fourth DCA affirmed the state post-conviction court's ruling on his four initial claims for relief per curiam and without a written opinion. *See Hatton v. State*, 244 So. 3d 271 (Fla. 4th DCA 2018). (Also found in the record at DE 11-20.)

E. *Federal Habeas Petition*

Petitioner filed the instant petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 on August 21, 2018.

TIMELINESS

Both parties agree that the petition now pending before this Court is timely. This Court therefore accepts the § 2254 Petition as timely filed.

EXHAUSTION

The exhaustion doctrine precludes a state

prisoner from seeking federal habeas relief before he has fairly presented his constitutional claims in state court and exhausted available state court remedies. *O'Sullivan v. Boerckel*, 526 U.S. 838, 842, 844 (1999); Title 28 U.S.C. § 2254(b). Both the factual substance of a claim and the federal constitutional issue, itself, must have been expressly presented to the state court to achieve exhaustion for purposes of federal habeas corpus review. *Baldwin v. Reese*, 541 U.S. 27 (2004). A claim must be presented to the highest court of the state to satisfy the exhaustion requirement. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). In a Florida non-capital case, this means the applicant must have presented his claims in a district court of appeal. *Upshaw v. Singletary*, 70 F.3d 576, 579 (11th Cir. 1995). Exhaustion may be accomplished on direct appeal. If not, in Florida, it may be accomplished by

the pursuit of a Rule 3.850 motion and the appeal of its denial. *Leonard v. Wainwright*, 601 F.2d 807, 808 (5th Cir. 1979).

The doctrine of procedural default is closely related to the doctrine of state-court exhaustion. Both doctrines are rooted by the same principles of comity requiring federal courts to show deference to state courts' authority. *See Coleman v. Thompson*, 501 U.S. 722, 731 (1991), overruled in part on other grounds by *Martinez v. Ryan*, 566 U.S. 1 (2012). Whereas the exhaustion inquiry asks whether any state remedies remain available, the procedural default inquiry asks whether the petitioner followed the state's rules to properly exhaust the claims. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999). A petitioner's claims may be barred from federal habeas review for failure to meet the state's procedural requirements for

presenting his federal claims in state court. *Coleman*, 501 U.S. at 750. To bar federal habeas review of a state-defaulted claim, the state procedural rule must be an adequate and independent state ground for denying relief. *Id.*

The procedural default doctrine has exceptions. *Id*. Federal habeas review of a defaulted claim is available if a petitioner shows either (1) cause for and prejudice from the procedural default or (2) "that failure to consider his claims will result in a fundamental miscarriage of justice" (where actual innocence is shown). *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999) (citing *Coleman*, 501 U.S. at 750). Also, a narrow, non-constitutional and equitable exception exists allowing a petitioner to establish cause for excusing a procedural default of ineffective assistance of counsel claims under certain

circumstances. Where, as in Florida, ineffective assistance claims typically must be raised in post-conviction proceedings, *see Smith v. State*, 998 So. 2d 516, 522-23 (Fla. 2008), a procedural default will not bar habeas review of ineffective assistance claims if, in that proceeding, there was ineffective counsel or no counsel. *Martinez*, 566 U.S. at 16-17. Additionally, Martinez adopted the constitutional standard from *Strickland* for determining whether postconviction counsel's conduct should excuse a procedural default and permit habeas review of ineffective assistance of trial counsel claims. *Hittson*, 759 F.3d at 1262-63 (citing *Strickland*, 466 U.S. at 687-88).

Respondent argues that Claims 4, 5 and 6 have not been exhausted because they were not part of Petitioner's initial Rule 3.850 motion filed on January 28, 2010. Instead Petitioner raised Claims 4, 5 and 6

later in his pro se Rule 3.850 Motion that he filed on January 28, 2011. The state post-conviction court dismissed the *pro se* Rule 3.850 motion as insufficiently pleaded, and those particular claims were not re-asserted. (DE 10 at 18). As the above procedural history shows, Petitioner did try to raise them, and he advocated his right to do so to the Fourth DCA. Ultimately, however, the state court denied him that opportunity. Despite initially giving him leave to amend under *Spera* (DE 16-2), the state post-conviction court later denied his newly-retained counsel, Mr. Ufferman, additional time to do so (DE 14-1 at n.9) which the Fourth DCA then affirmed (DE 11-9). In a technical sense at least Petitioner did not exhaust these particular claims for relief. However the Respondent gives short shrift to Petitioner's efforts to obtain a merits ruling on them.

Assuming that this situation constitutes a procedural default---even if only in the technical sense---Petitioner asks this Court nevertheless to consider Claims 4, 5 and 6 on their merits under an exception to the procedural default rule. Citing *Martinez v. Ryan*, 132 S.Ct. 1309, 1320 (2012), Petitioner argues that the procedural default should be excused because his initially retained counsel (the Norgards) were ineffective for not including them in the initial Rule 3.850 Motion. The Respondent argues that Petitioner does not qualify for such relief.

Whether Petitioner is entitled to the *Martinez* exception, this Court need not decide. This is because this Court finds that the subject claims were exhausted in the substantive sense. A Florida post-conviction court's dismissal of a claim for facial insufficiency is a ruling on the merits for purposes of the procedural

default analysis. *Pope v. Sec'y for Dep't of Corr.*, 680 F.3d 1271, 1286, 1298 n. 8 (11th Cir. 2012). Here, the Florida post-conviction court dismissed Petitioner's *pro se* Rule 3.850 Motion, which included Claims 4 through 6, for facial insufficiency (DE 14 at 10). Therefore, these claims were subject to a ruling on the merits and are not barred from federal habeas review. Ultimately, however, the procedural bar question is moot because as this Court explains below Petitioner would not prevail on their merits anyway. *Loggins v. Thomas*, 654 F.3d 1204, 1215 (11th Cir. 2011) (holding that a federal habeas court may "skip over" the procedural default issues and deny a claim on the merits).

STANDARDS OF REVIEW

A. *Standard Under Antiterrorism and Effective Death Penalty Act*

Petitioner's federal habeas petition is governed

by 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Title 28 U.S.C. § 2254(a) permits a federal court to issue "a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court" if that custody is "in violation of the Constitution or laws or treaties of the United States." The issuance of a writ is limited, however, by the purpose of AEDPA, which 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." *Greene v. Fisher*, 565 U.S. 34, 38 (2011) (internal quotations and citations omitted). The AEDPA establishes a formidable barrier to state prisoners seeking federal habeas relief because it is based on the principle that "state courts are adequate forums for the vindication of federal rights." *See Downs*

v. Sec'y, Fla. Dep't of Corrs., 738 F.3d 240, 256 (2013).

Section 2254 applies at the end of a greater course of judicial review. Section 2254(d) assumes that the Petitioner already exhausted his claims using the state's postconviction avenues of relief to obtain an adjudication on their merits. The Eleventh Circuit directs the focus of inquiry to the last merits adjudication by the state court. As applied to this case, that is the unwritten PCA opinion that Florida's Fourth DCA rendered to affirm the denial of Petitioner's rule 3.850 postconviction motion (DE 11-20). Even though the PCA adjudication is unwritten and thus gives no explanatory basis, it still counts as a merits determination, and it still is entitled to deference. *See Reed v. Sec'y, Fla. Dep't of Corrs.*, 767 F.3d 1252, 1261 (11th Cir. 2014).

While the deference remains, the fact that the

Fourth DCA offered no reasons for the affirmance does affect the scope of review. In this situation, the reviewing federal court must "look through" to the last adjudication that does provide a relevant rationale. *See Wilson v. Sellers*, 138 S.Ct. 1188, 1192 (2018). As applied here, that means this Court looks through to Circuit Court Judge Vaughn's Order Denying Defendant's Fla. R. Crim. P. 3.850 Motion dated September 1, 2016 (DE 11-15). This Court assumes that the appellate court adopted Judge Vaughn's reasoning and rationale. *Id.*

The next step in the analysis is to identify the legal basis that entitles the Petitioner to habeas corpus relief. That is, to identify the constitutional or federal law that was violated. Section 2254(d)(1) narrows that inquiry down to "clearly established Federal law, as determined by the Supreme Court of the United

States." The phrase "clearly established Federal law" refers to the holdings, as opposed to the dicta, of the Supreme Court's opinions in existence when the state court decided the postconviction claims. *See Downs*, 738 F.3d at 256-57 (adding that it includes a binding circuit court decision that says whether the particular point in issue is clearly established Supreme Court precedent). For a claim based on the ineffective assistance of counsel, for example, the governing standard comes from the Supreme Court's seminal *Strickland v. Washington*, 466 U.S. 668 (1984) opinion.

Section 2254(d)(1) asks whether the state court's denial was "contrary to" that clearly established Federal law. The phrase "contrary to" means that the state court decision contradicts the Supreme Court on a settled question of law or holds differently than the Supreme Court on a set of materially indistinguishable

facts. *See Downs*, 738 F.3d at 257. A state court's decision can be contrary to the governing federal legal standard either in its result (the denial of relief) or in its reasoning.

Section 2254(d)(1) also asks the reviewing federal court to determine whether the state court's denial "involved an unreasonable application of" that clearly established federal standard. An unreasonable application of federal law is not the same as a merely incorrect application of federal law. *See Downs*, 738 F.3d at 257. It tests whether the state court's application of the legal principle was objectively unreasonable in light of the record before the state court at the time. An objectively unreasonable application of federal law occurs when the state court identifies the correct legal rule but unreasonably applies, extends, or declines to extend it to the facts of

the case. *See Putnam v. Head*, 268 F.3d 1223, 1241 (11th Cir. 2001).

Section 2254(d)(1) tests the legal correctness of the state court's decision, but it does so through a highly deferential lens. The degree of error must be substantial and beyond dispute. The state court's decision survives § 2254(d)(1) review so long as some fair-minded jurists could agree with the state court, even if others might disagree. *See Downs*, 738 F.3d at 257.

While subsection (1) of § 2254(d) tests the legal correctness of the state postconviction court's denial of relief against controlling federal case law, subsection (2) of § 2254(d) sets forth the standard by which a federal court reviews the state postconviction court's findings of fact. Section 2254(d)(2) asks whether the state postconviction court based its denial "on an

unreasonable determination of the facts" based on the evidence before it at the time.

As with the § 2254(d)(1) legal analysis, a reviewing federal court is to consider the state court's findings of fact through a deferential lens. The state court's finding of fact is not unreasonable just because the reviewing federal court would have reached a different finding of fact on its own. So long as reasonable minds might disagree about the finding of fact, the state court's finding stands. *See Downs*, 738 F.3d at 257. Indeed, the state court's fact determinations are presumed to be correct. Section 2254(e)(1) places the burden on the Petitioner to rebut that "presumption of correctness by clear and convincing evidence." Even if the state postconviction court did make a fact error, its decision still should be affirmed if there is some alternative basis sufficient to

support it. *See Pineda v. Warden*, 802 F.3d 1198 (11th Cir. 2015).

Obviously then § 2254(d) creates a standard of review that is highly deferential to the state court's denial of the claim. The reviewing federal court must give the state postconviction court the benefit of the doubt and construe its reasoning towards affirmance. *See Lynch v. Sec'y, Fla. Dep't of Corrs.*, 776 F.3d 1209 (11th Cir. 2015). To warrant relief under § 2254(d), the Petitioner must show that the state court's ruling was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). This is the degree of error the Petitioner must show before this Court may override the state postconviction court's decision and overturn the finality of the conviction and

sentence.

B. ***Ineffective Assistance of Counsel***

To prevail, Petitioner must overcome the substantial deference and presumption of correctness that the underlying record enjoys. Under *Strickland,* an additional layer of deference applies to Petitioner's claims of ineffective assistance of counsel. *Strickland,* 466 U.S. at 684-85. The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the assistance of counsel during criminal proceedings against them. *Id.* Defendants in state court prosecutions have such right under the Fourteenth Amendment. *Minton v. Sec'y, Dep't of Corrs.*, 271 F. App'x 916, 918 (11th Cir. 2008). When assessing counsel's performance under *Strickland*, the Court employs a strong presumption that counsel "rendered adequate assistance and made all significant

decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690. "[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance." *Burt v. Titlow*, 571 U.S. 12, 18 (2013). To prevail on a claim of ineffective assistance of counsel, Petitioner must demonstrate: (1) that his counsel's performance was deficient, i.e., the performance fell below an objective standard of reasonableness; and (2) that he suffered prejudice as a result of that deficient performance. *Strickland*, 466 U.S. at 687-88.

To establish deficient performance, Petitioner must show that, in light of all the circumstances, counsel's performance was outside the wide range of professional competence. *Id.* at 690*; see Cummings v. Sec'y for Dep't of Corrs.*, 588 F.3d 1331, 1356 (11th Cir. 2009) ("To establish deficient performance, a defendant

must show that his counsel's representation fell below an objective standard of reasonableness in light of prevailing professional norms at the time the representation took place."). A court's review of counsel's performance should focus on "not what is possible or what is prudent or appropriate but only [on] what is constitutionally compelled." *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000) (*en banc*), *cert. den'd*, 531 U.S. 1204 (2001). There are no absolute rules dictating what is reasonable performance because absolute rules would restrict the wide latitude counsel have in making tactical decisions. *Id.* at 1317. The test for ineffectiveness is not whether counsel could have done more; perfection is not required. Nor is the test whether the best criminal defense attorneys might have done more. *Id.* at 1316. Instead, to overcome the presumption that assistance was adequate, "a

petitioner must 'establish that no competent counsel would have taken the action that his counsel did take.'" *Hittson v. GDCP Warden*, 759 F.3d 1210, 1263 (11th Cir. 2014) (quoting *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000) (en banc)).

Regarding the prejudice component, the Supreme Court has explained "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.* A court need not address both prongs of *Strickland* if the defendant makes an insufficient showing on one of the prongs. *Id.* at 697. Further, counsel is not ineffective for failing to raise non-meritorious issues. *Chandler v. Moore*, 240 F.3d 907, 917 (11th Cir. 2001).

Counsel is also not required to present every non-frivolous argument. *Dell v. United States*, 710 F.3d 1267, 1282 (11th Cir. 2013).

Further, a federal habeas court does not apply Strickland de novo, "but rather, through the additional prism of [Section 2254(d)] deference." *Morris v. Sec'y, Dep't of Corr.*, 677 F.3d 1117, 1126 (11th Cir. 2012). "Thus, under this doubly deferential standard, the pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. And if, at a minimum, fairminded jurists could disagree about the correctness of the state court's decision, the state court's application of *Strickland* was not unreasonable and [Section 2254(d)] precludes the grant of habeas relief." *Id.* (internal citation omitted); *but see Evans v. Sec'y, Dep't of Corrs.*, 703 F.3d 1316, 1333-35 (11th Cir. 2013) (*en banc*) (Jordan, J.,

concurring) (explaining that double deference to a state court's adjudication of a *Strickland* claim applies only to *Strickland's* performance prong, not to the prejudice inquiry). "This 'double deference is doubly difficult for a petitioner to overcome, and it will be a rare case in which an ineffective assistance of counsel claim that was denied on the merits in state court is found to merit relief in a federal habeas proceeding.'" *Id.* (quoting *Evans v. Sec'y, DOC, FL*, 699 F.3d 1249, 1268 (11th Cir. 2012)).

DISCUSSION

In total, Petitioner raises ten claims for habeas corpus relief. They are:

Claim 1: Whether trial counsel was ineffective when he inadvertently told the jury during opening statements that they would find Petitioner guilty instead of not guilty and failed to correct this

statement or move for a mistrial (DE 1 at 12);

Claim 2: Whether trial counsel was ineffective for failing to file a motion in limine to exclude portions of Petitioner's videotaped statement to law enforcement (DE 1 at 16);

Claim 3: Whether trial counsel was ineffective when he impeached the victim with a prior inconsistent statement that was potentially even more incriminating (DE 1 at 23);

Claim 4: Whether trial counsel was ineffective for failing to call a private investigator as a witness to impeach the Respondent's eye witness regarding what the witness alleged he saw (DE 1 at 26);

Claim 5: Whether trial counsel was ineffective for not objecting when the victim's affidavit (introduced for identification only as State's Exhibit 1) was inadvertently given to the jurors for consideration

during deliberations (DE 1 at 28);

Claim 6: Whether trial counsel was ineffective for failing to call Petitioner's stepbrother, Leo Gauthier, as a witness to testify about the victim's character trait of jumping innocently on top of other men (DE 1 at 30);

Claim 7: Whether trial counsel's cumulative errors deprived Petitioner of a fair trial (DE 1 at 31);

Claim 8: Whether the trial court erred by denying Petitioner's request to call defense witnesses who would have testified that the victim acted promiscuously in front of other boys and possibly had a sexual relationship with the Respondent's eye witness (DE 1 at 33-35);

Claim 9: Whether the trial court erred by denying Petitioner's motion for judgment of acquittal (DE 1 at 36);

Claim 10: Whether the trial court erred by not

sending the written instructions back with the jury during deliberations in order to clarify and correct, due to misstatement by the trial court, the time frames for each alleged count (DE 1 at 40). This Court recommends that the Petition be denied as to all claims. Petitioner is not entitled to relief on the merits.

Claim 1

There are the three claims of ineffective assistance of trial counsel that the state postconviction court denied after an evidentiary hearing (the Merits-Reviewed Ineffective Assistance of Trial Counsel Claims) **(Claims 1-3)**.

In Claims 1-3, Petitioner challenges his conviction and sentence collaterally on the basis that Mr. Fleischman was ineffective in defending him at trial. The *Strickland* opinion (and its subsequent interpretative case law) that sets forth and defines the

actionable federal right at issue with respect to these claims.

Claim 1 alleges that Mr. Fleischman was ineffective because he inadvertently told the jury that it would find Petitioner "guilty" (instead of not guilty) when he was concluding his opening argument: "I don't have to prove or disprove anything and that we feel confident that at the end of this case you will, in fact, find Hatton guilty on all counts" (DE 11-1 at 355) (emphasis added). Petitioner argues further that Mr. Fleischman was ineffective for not seeking to correct that misstatement or to move for a mistrial. At the later Rule 3.850 hearing Mr. Fleischman acknowledged the slip of the tongue in retrospect, but he did not realize at the time (DE 11-15 at 3, 13). Despite that one misstatement, however, Mr. Fleischman otherwise and consistently advocated throughout the entire rest

of the trial for a "not guilty" verdict. He stated just prior to the misstatement, for example, that: "Hatton didn't touch this girl in any manner sexually or otherwise, and he is not guilty." *Id.* (emphasis added). During his cross-examination of the victim, Mr. Fleischman contended that she had motive to fabricate the charges because she did not want to move to a new location as Petitioner and her mother were planning. *Id.* at 387-88. In his closing argument, Mr. Fleischman again unequivocally told the jury that Petitioner was not guilty. *Id.* at 559. The jury was left to consider the evidence and decide Petitioner's guilt or innocence. It is unreasonable to believe that an isolated misstatement, made in the context of an opening argument advocating for Petitioner's innocence, so infected the trial as to deem the otherwise obvious slip of the tongue as the ineffective assistance of counsel.

See, e.g., United States v. Weston, 708 F.2d 302, 307 (7th Cir.), *cert. denied*, 464 U.S. 962 (1983) (finding that "a slip of the lip by counsel during the pressures of trial" did not constitute ineffective assistance of counsel). Moreover, in its final instructions the trial court informed the jury that "[anything] the lawyers say is not evidence" and instructed jurors not to consider the lawyers' comments as evidence in deciding the case (DE 11-1 at 344). For the foregoing reasons, Petitioner cannot show that if his counsel had not made the misstatement, the outcome of the case would have been different. Because Petitioner can establish neither deficient performance nor prejudice under *Strickland*, Claim 1 provides no basis for relief.

Claim 2

In Claim 2, Petitioner argues that trial counsel was ineffective for failing to file a motion *in limine* to

exclude portions of Petitioner's videotaped statement to law enforcement (DE 1 at 16-22). Specifically, Petitioner argues that his statements on the tape about the victim being reliable and a good kid is inadmissible character evidence that bolstered her credibility. *Id.* He furthers that his additional statements about previously touching her breast were inadmissible evidence of a prior bad act and substantially more prejudicial than probative. *Id.*

The post-conviction court rejected this claim for two reasons. First, a motion in limine to exclude these portions of the tape would likely have been unsuccessful because these statements were admissions against interest, and Respondent was therefore entitled to present them to the jury (DE 11-15 at 13). Second, allowing the whole statement in evidence was a reasonable strategy that enabled

Petitioner to proffer his own competing version about what happened to the jury without having to take the stand where he would be subject to cross-examination. *Id.* A federal habeas court will not disturb a state-court denial of an ineffective assistance of trial counsel claim unless the state court's determination under *Strickland* was unreasonable. *Hittson,* 759 F.3d at 1248.

This Court examines the post-conviction court's determinations in turn. First, Fla. Stat. § 90.803(18)(a) permits as evidence an otherwise hearsay statement by the party that is the party's admission against his own interests. This Court agrees with the post-conviction court regarding the futility of a motion in limine to exclude Petitioner's statements. Petitioner fails to persuade this Court that his counsel's decision was unsound or that there was a meritorious objection to

make. *See Denson v. United States*, 804 F.3d 1339, 1342 (11th Cir. 1994) (explaining that the failure to raise a meritless objection is not deficient performance); *Bolender v. Singletary*, 16 F.3d 1547, 1573 (11th Cir. 1994) (failure to raise non-meritorious issues does not constitute ineffective assistance of counsel). *Murray v. Maggio*, 736 F.2d 279, 283 (5th Cir. 1984) ("Counsel is not required to engage in the filing of futile motions.").

The record shows Mr. Fleischman's strategic decision not to file a motion in limine was reasonable, moreover. Under *Strickland*, Petitioner must establish the incompetence of counsel to overcome the presumption of adequate assistance. *Hittson*, 759 F.3d at 1248. Mr. Fleischmann explained the benefits of proffering Petitioner's police statement to the jury at the post-conviction hearing (DE 11-24 at 26-28). It was

true that Petitioner vouched for the victim but the negative effect of those concessions on his defense were minor. They were outweighed by the countervailing theme of his interview of how he got along well with Petitioner, his disbelief over why she would make up the allegations, and his denial of the allegations' truth. Indeed, it may have been beneficial for the jury to hear Petitioner speak of the victim in a positive way, this Court adds. Mr. Fleischman also noted the delicate balance between reminding the jury that children and youth can be prone to make stories up but without doing so in a way that comes across as aggressive toward the accuser. This Court adds that a redacted version of the police statement may not have been beneficial necessarily (assuming that the trial court would have granted such relief over what this Court only can assume would be the State's strong

opposition). It would have left the jury free to assume that the gaps in the statement were more prejudicial than what the redacted comments really were. Mr. Fleischman also used the admission of the entire statement to place Petitioner in a favorable light: in his closing argument he emphasized how Petitioner was not holding anything back and how he voluntarily and without counsel had spoken to law enforcement (DE 11-24 at 26-28; DE 11-l at 549-50). On this record, Petitioner fails to establish how counsel's performance was deficient.

The state post-conviction court determined first that Petitioner's statements – including his comments about the victim being reliable and having touched her breast accidently – were admissible as statements against interest under § 90.803(18), Fla. Stat. Second, it did not regard the strategic decision to allow the

entire statement in (rather than to seek a redacted version through a motion in limine) as unreasonable (DE 11-15 at 13). This Court finds its determination entitled to deference. Because Petitioner does not establish how the state post-conviction court's adverse decision is incorrect or unreasonable, he does not establish entitlement to § 2254 relief on this claim.

Claim 3

In Claim 3, Petitioner contends that Mr. Fleischman was ineffective because he impeached the victim with an inconsistent statement she made prior to trial about a particular detail of the "humping" incident that was more incriminating to Petitioner than what the victim stated on direct examination during the trial. On direct examination, the victim testified: "I was laying in my bed. I was going to sleep and Mr. Hatton came in my room and he got on top of

me. Both of us had our clothes on and he started humping me." The prosecutor asked her whether Petitioner said anything to her while humping her, and she answered, "No, sir." (DE 11-1 at p. 370). Mr. Fleischman attempted to impeach her on that point because she said something different on two prior occasions. In her written statement to the police dated June 21, 2005, she claimed Petitioner said "he wished he could really stick his penis inside of me" (and thus going beyond just humping through clothing). The second prior inconsistent statement came from her deposition on December 27, 2005. At her deposition, she said Petitioner told her "it's going to be okay. It's all right" during the humping incident. (DE 11-1 at p. 383). When Mr. Fleischman asked her to explain the discrepancy between her present trial testimony and prior statements, she answered, "I don't really

remember". (DE 11-1 at p. 381).

The ineffective assistance of counsel argument concerns the victim's written statement to police where she claimed Petitioner said "he wished he could really stick his penis inside of me". Petitioner argues that introducing this statement to impeach her was overly prejudicial because it was worse for him than her testimony on direct examination that Petitioner had not said anything. Petitioner argues that this statement provided the jury with the evidence it needed to decide the intent element of Count 2 in the prosecution's favor. Petitioner points out how at the postconviction hearing Mr. Fleischman even conceded that the statement "sounds bad". (DE 11-24 at p. 22). Petitioner's expert witness, Mr. Shafer, went further. He opined that impeaching the victim's trial testimony (that Petitioner said nothing during the humping

incident) with what she told the police Petitioner said "makes it even worse." Mr. Shafer described the impeachment attempt as a huge backfire that fell flat. Mr. Shafer opined that it was not a reasonable strategy to present it as impeachment evidence. (DE 11-24 at p. 73).

While it is true that impeaching the victim allowed a relatively worse statement to come into the record, this Court disagrees that the impeachment strategy was so wholly unreasonable as to rise to the level of deficient performance under *Strickland*. First, as Mr. Shafer, himself, stressed, the issue did not arise by itself in a vacuum but in the context of other ancillary issues. Mr. Fleischman was not impeaching the victim on that particular point alone but also on the differing timeframes the victim was asserting. Moreover Mr. Fleischman saw need to bring the jury's

attention to discrepancies in the victim's versions of what happened so that the jury had a basis to consider her credibility and reliability. Indeed, at the post-conviction hearing, although conceding that the police statement sounded bad, Mr. Fleischman's greater point was that it would have been worse had he not brought her credibility into question at all. As he explained it at the postconviction court hearing:

> I don't care what [is] said if it's different from what she said in trial then it's a prior inconsistent statement. I'm allowed to confront the witness that in the past she's given a statement different than she gave in court. The jury's instructed on that at the conclusion of the trial. They can take that into account. I hear what you're saying because, you know, it

> sounds bad, but the point is she didn't bring it up. If I didn't do that we'd be here because the defendant would say, "Well, she made a statement different than what she testified in court, you didn't cross examine her on it." So I understand it is an issue to raise, but I disagree, you know, I in normal course cross examine alleged victims or even a witness, police officer, on prior inconsistent statements and that's why I did it.

Although it may have been an awkward statement to highlight, this Court sees no *Strickland*-level prejudice. Petitioner was pursuing a defense of fabrication – that is, that the victim was lying. Emphasizing her inconsistent statements was a reasonable means of demonstrating this. In his closing

argument, Mr. Fleischman stressed to the jury how the victim could not remember basic details of what happened because she was alleging incidents that "never occurred" (DE 11-1 at 554). It is also important to note that allegations of sexual molestation already were at issue, and the State was prosecuting them to their fullest extent. The jury had additional evidence from which to determine Petitioner's intent other than what the victim stated to the police. That would not have changed even if Mr. Fleischman had not highlighted her inconsistent statement.

Of course, the governing standard of review does not ask this Court to make its own de nova determination. Instead it asks this Court to consider the post-conviction court's determination through a deferential lens. The post-conviction court considered Mr. Fleischman's use of the inconsistent statement for

impeachment purposes to be an effective and appropriate method to discredit the victim's testimony (DE 11-15 at 14). The post-conviction court explained that:

> impeaching a witness, especially an alleged victim or eyewitness, with a prior inconsistent statement is a very effective and appropriate way to discredit testimony. Mr. Fleischman's goal was to show to the jury [that] the alleged victim was unable to recall an important detail on direct examination. While Mr. Shafer opined this was not a reasonable strategy given the evidence, Mr. Fleischman testified had he not impeached the victim with a prior inconsistent statement he would be criticized for being ineffective

for not doing so.

Because reasonable and experienced counsel can disagree on the matter, Petitioner fails to show Mr. Fleischman's action was so deficient that it was tantamount to having no counsel at all, the post-conviction court concluded. (DE 11-15 at p. 14-15). This Court agrees. Petitioner fails to show how trial counsel's tactic here is "so patently unreasonable that no competent attorney would have chosen it." *Dingle*, 480 F.3d at 1099. Because Petitioner has not carried his burden to show trial counsel's performance was deficient or caused prejudice to the degree *Strickland* requires, Claim 3 should be denied.

Claim 4

In Claim 4, Petitioner argues that his trial counsel, Mr. Fleischman, was ineffective for not proffering his private investigator (Jim Mueller) to

impeach the prosecution's witness, K.S. K.S. was the victim's thirteen-year-old cousin who reported seeing Petitioner's hand down the back of the victim's pants when the victim lay on top of Petitioner in his bed. (DE 11-1 at 427-31). The private investigator believed that from where K.S. was standing, he could not have seen what he reported, Petitioner argues at page 26 of his Petition (DE 1).

While he may not have called the private investigator to the stand, Mr. Fleischman raised that same point to the jury nonetheless. Mr. Fleischman used his cross-examination of Detective Altman to challenge the reliability of K.S.'s report in several respects. Mr. Fleischman clarified for the record that the detective had not viewed the physical lay-out himself or otherwise obtained a description of it. Mr. Fleischman clarified for the record that the detective

did not verify whether K.S. actually could have seen what he reported from where K.S. says he was standing. Instead the detective simply assumed as true that K.S. could have observed what he reported from where K.S. says his vantage point was (standing in the hallway 14 ft. away). That cross-examination runs from page 490 to 493 of DE 11-1. Mr. Fleischman argued that point again in his closing argument. He emphasized the detective's reliance on K.S.'s statement that he was standing 14 ft. or more away and the several issues with it:

> First of all, uh, the first one that should jump out at you is that it's different [than] his version that he gave in court in regards to his position. Secondly, Detective Altman in this case failed to go to the scene to see if, in fact, from

> fourteen to fifteen feet you can even see into the bedroom. In other words, maybe you can see the door, but there's no evidence in this case that you can actually see the location where she claims this occurred from fourteen or fifteen feet.

(DE 11-1 at p. 548).

Petitioner establishes neither deficient performance nor prejudice under *Strickland* on this point. Whether or not to call a witness "is the epitome of a strategic decision" that a federal habeas court "will seldom, if ever, second guess." *Conklin v. Schofield*, 366 F.3d 1191, 1204 (11th Cir.2004). Indeed, calling a witness to impeach K.S. as to his conflicting statements about what he could see and from where might not have been as beneficial as Petitioner portrays. For one, there was not that much in K.S.'s

trial testimony to impeach in the first place. As far as the trial testimony of K.S., he said only that he had approached the master bedroom from the hallway when he saw the victim on top of Petitioner and Petitioner's hand partly down the back of her pants. (DE 11-1 at p. 430). No further information about the physical lay-out of the space or the witness's distance from the victim was given. The claim that K.S. was 14 feet away from the victim comes from K.S.' statements during his police interview, as summarized in the arrest affidavit. (DE 11-1 at p. 19). At trial, the prosecutor did not elicit any testimony from K.S. about his vantage point. That lessened the need of Mr. Fleischman to make a direct counter-attack. Instead Mr. Fleischman used his cross examination of the detective to bring to the jury's attention issues over the K.S.' vantage point and to create doubt in the jurors'

minds about what K.S. could have seen. This strategy made sense because attempting to impeach K.S. directly could have backfired. It could have placed the witness, who still was a minor when he testified, in a sympathetic light. It could also have brought attention to this particular point in a way that caused the prosecution to address it affirmatively, and possibly prove that K.S. actually did have a good vantage point, after all. The prosecutor could have done that either by recalling K.S. to the stand or by cross-examining the private investigator to test whether a person standing in the hallway looking into the bedroom would have a sufficient line of sight to observe what K.S. reported. That would have undermined Mr. Fleischman's ability to create the kind of doubt needed as to this particular count.

Moreover, as the fact-finder, the jury was free to

resolve this particular dispute in the State's favor and to find K.S.'s testimony credible and reliable. Federal habeas courts presume that the jury resolves conflicting inferences from the factual record in favor of the government and defer to the jury's judgment as to witness credibility and the weight to be given to the evidence. *Johnson v. Alabama*, 256 F.3d 1156, 1172 (11th Cir. 2001). Here, K.S. testified about what he observed and that it concerned him enough to report it to his mother. (D.E. 11-1 at 431-33). The jury was free to believe him even though Petitioner's counsel raised doubts over his ability to observe what he said he saw. Because Petitioner has established neither deficient performance nor prejudice, this Court finds Claim 4 to be without merit.

Claim 5

Claim 5 alleges that Mr. Fleischman was

ineffective for not taking corrective action when the victim's written statement to the police was inadvertently given to the jury during jury deliberations. The record before this Court does not contain that written statement. Presumably it is the one the victim wrote on June 21, 2005 and gave to Detective Palmer (the same written statement that is subject of Claim 3 above). As this Court discusses above with respect to Claim 3, the victim's written statement became a trial issue when Mr. Fleischman used it to impeach her. (DE 11-1 at p. 383). That prompted the prosecutor to move to introduce the written statement into evidence. Mr. Fleischman objected on the basis that his cross examination was limited to very narrow aspects of the statement and admitting it in its entirety would greatly exceed the scope of his questions. Mr. Fleischman also argued that

the written statement referred to additional collateral acts that exceeded the scope of the criminal charges. The prosecutor, Mr. Fleischman, and the trial court discussed the issue at length. The trial court resolved the issue by admitting the statement as State's Exhibit 1 but without publishing it to the jury. (DE 11-1 at p. 422). That compromise solution remained in effect at the end of the trial. When the subject of the written statement arose again, the prosecutor expressed his agreement with the correctness of the ruling and withdrew his request to place it into evidence for the jury. The trial court re-iterated its prior ruling that while the written statement was admitted into evidence for the practical purpose of letting "the record reflect[] what we are talking about . . . the jury will not view [it]." (DE 11-1 at p. 497-98).

During its deliberation, the jury sent several

questions to the trial court. Its questions included a request for "a list of exhibits entered into evidence." The reason behind that request was unclear. Counsel agreed that if it was some sort of inquiry about the victim's written statement, the trial court could answer that it had been marked as an exhibit but was not evidence for the jury's consideration. When the jury was brought into the courtroom, the trial court saw no need to address the non-published written statement, however. The trial court answered the request by simply instructing the jury that "the only evidence that has been entered for your review is the, uh, is the taped recording between Detective Altman and Mr. Hatton." (DE 11-1 at pp. 607-10). The jury asked no follow-up questions and was dismissed to resume its deliberations. (DE 11-1 at p. 636). On direct appeal, no issue was raised concerning the manner in which the

written statement was admitted or whether it somehow made it back to the jury deliberation room accidently. (DE 11-2).

In his pro se Rule 3.850 Motion, Petitioner reasoned that the written statement must have made it back to the jury deliberation or else why would the jury have asked for a list of exhibits entered into evidence? Because it contains highly prejudicial information, Petitioner argued that the jury's possession of the written statement constitutes both "fundamental error on behalf of the court as well as ineffectiveness by trial counsel." (DE 16-1 at p. 6). Notably the Petitioner attached no evidence to his pro se Rule 3.850 Motion to show that the jury actually had possession of the victim's written statement. His assertion that they possessed the document was based on his assumption about the reason behind the jury's

request for an exhibit list.

Now, at pages 28-29 of the instant Petition filed in this case, Petitioner asserts an additional reason for why he believes the jury was given the victim's written statement. Petitioner now claims that:

> at the conclusion of the trial, when the jury retired to deliberate, ([his] wife---who was present in the courtroom) observed State's Exhibit 1 go back to the deliberation room. Mrs. Hatton informed defense counsel of this error but defense counsel refused to address the issue with the state trial court or otherwise move for a mistrial in light of the fact that the jury was exposed to State's Exhibit 1.

In other words, the Petition pending before this Court goes beyond the Rule 3.850 Motion's supposition and

makes a direct assertion that Petitioner's wife saw the written statement go back to the jury deliberation room. Petitioner still proffers no direct evidence to substantiate this claim, however. Namely, Petitioner does not proffer an affidavit from his wife wherein she attests to the same. Without some evidence that (1) the victim's written statement actually did go back to the jury deliberation room despite the trial court's express and repeat rulings to the contrary, (2) Mr. Fleischman actually knew that fact, and (3) Mr. Fleischman nevertheless sought no corrective relief and otherwise ignored this occurrence, Petitioner's contention that Mr. Fleischman "was ineffective for failing to object when the jurors were exposed to [the] improper collateral act evidence" contained within it is purely speculative.

"Bare and conclusory allegations of ineffective

assistance of counsel which contradict the existing record and are unsupported by affidavits or other indicia of reliability, are insufficient to require a hearing or further consideration." *Cauley v. United States*, No. 03-20294-CR-LENARD, 2008 WL 4716961, at *7 (S.D. Fla. Oct. 23, 2008), *aff'd*, 406 F. App'x 386 (11th Cir. 2010) (stating also that habeas relief is unavailable for allegations that on the face of the record are wholly incredible). Here, not only is Petitioner's allegation unsupported, but it actually conflicts with what the record suggests. The trial transcript shows that Mr. Fleischman argued at length—and successfully so—to keep the victim's written statement from being published to the jury. (DE 11-1 at 390-423). Therefore, it is doubtful that he would have simply ignored the issue of what was going back to the jury at the critical deliberation phase. On

the face of the record, then, this Court finds Petitioner's allegation insufficient as a basis for relief. In addition, even if the exhibit did go back to the jury inadvertently, that does not mean that the jury in fact reviewed and considered it. The jury asked about the "[l]ist of exhibits entered into evidence" and the trial court instructed the jury that the only evidence that had been entered for its review was the videotaped recording between law enforcement and Petitioner. *Id.* at 610. Jurors are presumed to have followed instructions given by the trial court. *Raulerson v. Wainwright*, 753 F.2d 869, 876 (11th Cir. 1985). Petitioner alleges nothing to overcome this presumption. Thus, Claim 5 should be denied.

Claim 6

Petitioner alleges in Claim 6 that Mr. Fleischman was ineffective for failing to call

Petitioner's step-brother as a witness to testify about the victim's propensity to jump on top of other men and lie on top of them. His step-brother would have testified that the victim did the same to him, even when she first met him. She did so in the presence of several others, and she lay on top of him while he was reclined in a reclining chair. Petitioner would have proffered this testimony to counter the prosecution's contention that the same conduct with him was unlawful (DE 1 at 30). A federal habeas court is reluctant to question a trial counsel's strategic decision over whether or when to call a witness, *see Conklin*, 366 F.3d at 1204), and a federal habeas court likewise is unlikely to ever question trial counsel's decision to refrain from proffering irrelevant testimony. Specifically, Petitioner complains that his inability to present this testimony was prejudicial because it was

testimony from a third party that attributed that action to the victim's behavior (rather than to an unlawful intent by him). *Id.* The allegations against Petitioner, however, were not that the victim's jumping on him were illegal. The Count 3 charge against Petitioner stems from the fact that after the victim "jumped on" Petitioner, he then put his hands down the back of her pants and touched her buttocks with an unlawful intent (DE 365-66 & 375-76). That the victim may have, even with some frequency, "jumped on" men in a playful manner is not a defense nor is it relevant to the act with which Petitioner is charged. Nor can Petitioner demonstrate that the trial court would have admitted such testimony into the record. The trial court already had excluded a range of additional such evidence on relevance grounds. Therefore, Mr. Fleischman's performance cannot be deficient for

failing to call such a witness to testify, and Petitioner cannot establish prejudice from the inability to proffer irrelevant testimony. Thus, this Court concludes there is no rational basis on which Claim 6 could succeed.

Claim 7

In Claim 7, Petitioner argues that trial counsel's cumulative errors (as set forth in Claims 1 through 6) deprived him of a fair trial. As Respondent correctly argues, if there were no errors, there can be no cumulative error (DE 10 at 21). A "cumulative error claim clearly fails in light of the absence of any individual errors to accumulate." *Morris v. Sec'y, Dep't of Corr.*, 677 F.3d 1117, 1132 (11th Cir. 2012) Claims found to be without merit cannot be aggregated to show denial of a constitutional right. Here, this Court finds that none of Petitioner's ineffective assistance of counsel claims have merit. Accordingly, Claim 7 should

be denied.

Claim 8

Claim 8 alleges that the trial court erred when it denied Petitioner's request to call three witnesses who would testify that the victim has acted out sexually in front of other males and may have had a sexual relationship with her cousin, K.S., (who also was a State witness). (DE 1 at 33-35). Petitioner argued that this information was relevant to its defense of "fabrication," that is, that the victim was lying about the molestation acts and was motivated to lie to stop her family's planned move away from the area. Moreover, this information showed the victim had independent personal knowledge and experience sufficient to enable her to make up false molestation accusations, Petitioner claimed. Petitioner argues that the trial court's ruling prohibiting testimony about the

victim's sexual behavior and the appellate court's affirmance denied him due process (DE 1 at 32).

A federal habeas court generally does not review a state trial court's evidentiary ruling collaterally. *Taylor v. Sec'y, Fla. Dep't of Corr.*, 760 F.3d 1284, 1295 (11th Cir. 2014). When a federal habeas court does do so, its collateral review of the state court's evidentiary ruling is limited to whether it rises to a level of unfairness that denies a petitioner due process of law. *Id.* The state trial court has discretion, but that discretion is subject to the right of the accused defendant to a fair opportunity to defend against the charges. *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973).

Mr. Fleischman gave the trial court a synopsis of the testimony the witnesses would proffer in support of his defense of fabrication. (DE 11-1 at 441-49). The

first witness was a juvenile, J.R., who met the victim and the victim's cousin, K.S., for the first time at the Cattleman's Convention on Marco Island. That was soon after the molestation incident subject of the third criminal count. J.R. would have testified that the victim:

> while with K.S. at the pool, was acting in a, he calls it a come on manner. She was strutting around, acting out somewhat sexually. And then she later that evening called him up to her room. He went up to her room with himself and another friend and she was throwing herself on the lap of his friend and grabbing his friend's groin.

(DE 11-1 at 441). Mr. Fleischman told the trial court that he wanted to proffer that testimony to show how

the victim was not naive but rather was able to describe the acts she accused Petitioner of committing. *Id.* at 442. The trial court declined to admit this evidence because it lacked relevance. The victim, who was 14 at the time, was not claiming a lack of knowledge or naivety. Moreover, her description of the acts Petitioner committed upon her were generalized and limited in scope to "the touching of the buttocks, the touching of a penis, and a French kiss and a humping of a hip." *Id.* at 445. These were not acts that required any particular sophistication or naivete on the victim's part. The court denied counsel's request to permit J.R. to testify about any prior independent "bad acts" by the victim. *Id.* at 446.

The second witness Mr. Fleischman proffered was Petitioner's son. Petitioner's son would testify that on one occasion---he believes it was on Fathers' Day

2003---"he found [the victim] and K.S. alone in a darkened bathroom lying next to each other and he startled them and when he confronted them about what they were doing they wouldn't answer." *Id*. at 447. Petitioner's son would testify that it was not uncommon for the victim to throw herself on members of the family and that she "tried on numerous occasions to get in bed with him, but he didn't allow it." *Id*. at 447-48. In barring the son's testimony, the trial court made "the same ruling from the same basis" as it had done for the first witness, J.R., discussed above. *Id.* at 448.

The third witness, C.J., would testify that while at the Petitioner's property, he happened to see the victim run out of a barn wearing only her underwear. When he approached the barn to investigate, he saw a young man run out of the barn in the opposite

direction. *Id.* at 449. The trial court barred that testimony on the same grounds as the first two prospective witnesses. Indeed, the trial court found C.J.'s testimony to have even less relevance to the Petitioner's fabrication defense theory. *Id*. at 449.

The trial court's decision to preclude the proposed defense witnesses' testimony did not rise to the level of denying due process to Petitioner. Petitioner sought to discredit the victim with potential prior "bad acts" that implied her independent personal familiarity and experience. The witnesses would have proffered testimony that could only establish the possibility of a prior sexual history between the victim and others. The trial court reasonably found this entire line of questioning irrelevant because the nature of the allegations did not require the victim to have previous sexual experience to be able to describe the conduct of

Petitioner that was at issue: touching of buttocks and penis, humping, and a French kiss. Petitioner does not meet his burden to show how fair-minded jurists would disagree with the trial court's ruling. Consequently, Petitioner does not show how his trial was rendered fundamentally unfair. Claim 8 therefore should be denied.

Claim 9

In Claim 9, Petitioner alleges that the trial court erred by denying his motion for judgment of acquittal on Counts 1 and 2. He argues further that insufficient evidence existed to prove the respective timeframes that had been charged as a required element of the two offenses. For a petitioner to succeed on a sufficiency-of-the-evidence claim in a federal habeas proceeding, he must show that no rational trier of fact could have found the elements of the crime beyond a

reasonable doubt. *Holley v. Sec'y, Fla. Dep't of Corr.*, 719 F. App'x 962, 966–67 (11th Cir. 2017) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) and explaining that the evidence is viewed in the light most favorable to the prosecution). For a federal court to overturn a state court's rejection of such a claim, the state court decision must be objectively unreasonable. *Id.* (citing *Parker v. Matthews*, 567 U.S. 37, 43 (2012)). Additionally, where "the record contains facts supporting conflicting inferences, the jury is presumed to have resolved those conflicts in favor of [Respondent] and against the [Petitioner]." *Id.* (citing *Johnson v. Alabama*, 256 F.3d 1156, 1172 (11th Cir. 2001)). Federal courts, therefore, defer to the judgment of the jury in matters concerning witness credibility and weight of the evidence. *Id.*

At trial and on direct appeal, Petitioner argued

that the State had failed to prove that the illegal conduct charged in Counts 1 and 2 occurred during the timeframes as specifically charged, thereby warranting acquittals (DE 1 at 36-39). Petitioner argued that the State failed to prove Count 3 beyond a reasonable doubt, too (DE 11-4 at 10; DE 1 at 36-39). Petitioner argued that because the victim had given different timeframes as to Counts 1 and Count 2, and could not explain the discrepancies, the findings of guilt were unreasonable. *Id.* Relevant to Count 1, the victim testified at trial that before the hurricanes in September 2004, Petitioner grabbed her hand while they were in their swimming pool to make her touch his penis (DE 11-1 at 368-70). This occurred during the timeframe of December 20, 2003 through September 26, 2004, the prosecution charged. *Id*. at 638. The jury found Petitioner guilty of that molestation. As to count

2, the victim testified that Petitioner had rubbed his genitals against her pelvic bone---or "humped her"—and that she thought it probably took place before the pool incident. *Id.* at 369-71. She also testified that she did not know the date of the incident except that it was at night and probably on a Monday or Tuesday when her mother worked late. *Id*. at 369-70, 380. On cross-examination she testified that the humping incident occurred three months before she gave her written statement to law enforcement of June 21, 2005. *Id.* at 383-84. The jury found Petitioner guilty of the conduct charged during the timeframe of September 27, 2004 through June 13, 2005. *Id.* at 638. Count 3 charged Petitioner with placing his hands down the back of the victim's pants to touch her bare buttocks while on Petitioner's bed on June 14, 2005 just prior to a trip to Marco Island. *Id.* at 365- 66, 638.

The victim testified that this touching incident occurred after she playfully jumped on Petitioner and laid on top of him. *Id.* at 373-76. That was the incident when the victim's thirteen-year-old cousin, K.S., observed Petitioner's hand partly down the back of the victim's pants and was concerned enough to tell his mother. That ultimately led to the victim giving a statement to law enforcement on June 21, 2005. *Id.* at 430-33, 454, 455, 460-61. Viewing the testimony and facts in the light most favorable to Respondent, it is not inconceivable that a rational trier of fact could find Petitioner guilty as charged on all three counts. This Court presumes that in reaching its findings of guilt, the jury resolved evidentiary conflicts in favor of the State and made reasonable fact determinations on the evidence presented. Accordingly, this Court finds that Claim 9 provides no basis for relief.

Claim 10

Claim 10 alleges that the trial court erred by not giving written instructions to the jury to take back with them during deliberations. As a result, Petitioner contends, he was denied his Sixth Amendment right to have the jury determine the respective timeframe for each count charged as a required element of the offense (DE 1 at 40-41). The basis for this claim is that the trial court verbally misstated the timeframe as to count 1[8] during the jury instructions that it read orally and then corrected that misstatement by amending the jury verdict form with the correct timeframes. *Id.* Habeas relief is not available for a jury instruction that is incorrect under state law; the only question a federal habeas court may examine is whether the erroneous

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8 The trial court orally misstated the timeframe for count I as December 20, 2003 through December 26, 2004 (DE 11-1 at 595) rather than the correct timeframe of December 20, 2003 through September 26, 2004 (DE 11-1 at 602).

instruction "so infected the entire trial that the resulting conviction violates due process." *Trice v. Sec'y, Fla. Dep't of Corr.,* 766 F. App'x 840, 850 (11th Cir. 2019) (citing *Estelle v. McGuire*, 502 U.S. 62, 71–72 (1991)). A federal habeas court looks at the trial record and the context of the instructions in total when making this determination. *Id.*

The Respondent points out how at the time Fla. R. Crim. P. 3.400 (2005) gave the trial court the discretion to decide whether to provide written jury instructions to the jury for its deliberations. The rule states in relevant part:

> (a) Discretionary Materials. The court may permit the jury, upon retiring for deliberation, to take to the jury room:
>
> > (1) a copy of the charges against the defendant;

> (2) forms of verdict approved by the court, after being first submitted to counsel;
>
> (3) in noncapital cases, any instructions given, but if any instructions is taken all the instructions shall be taken;

Fla. R. Crim. P. 3.400 (2005). The trial judge explained that he did not provide written instructions to the jury because they were not requested until the time when deliberations were to begin and by that point the judge had written on his copy (DE 11-1 at 603-05). Instead the trial judge informed the jury of the correct dates for each charge on the verdict form and gave the jury the option of sending him a note should it later have questions about the instructions. If so prompted, he

then would re-read orally the pertinent instructions to the jury. *Id.* Here, the trial court's misstatement during the oral presentation of the jury instructions cannot be said to have infected the entire trial because the court provided the jury with the correct dates for each charge in writing on an amended verdict form. Also, the court told the jury they could ask questions about the instructions and have the jury instructions re-read to them. Under these circumstances, the lack of written jury instructions cannot be said to have made the trial so fundamentally unfair as to deny Petitioner due process. The jury had the correct dates during their deliberations, they were read the jury instructions, they had the opportunity to have the jury instructions re-read to them, and they had the ability to have the court answer questions about the instructions. Therefore, this Court finds Claim 10 lacks

merit.

This Court adds that the issues concerning the timeframes as alleged in the offense counts and the way that information was conveyed to the jury was discussed at the trial and appellate levels of review in depth. In its Answer Brief the State set forth arguments for why no reversible error occurred and why the record contained evidence to reasonably support the three guilty verdicts. The state appellate court affirmed the conviction. Petitioner makes no persuasive argument for an error of constitutional proportion that would justify habeas corpus relief on those matters that the state appellate court affirmed.

EVIDENTIARY HEARING

Lastly this Court considers whether an evidentiary hearing should be held. This Court begins by considering whether 28 U.S.C. § 2254(e) bars this

Court from holding a hearing. Section 2254(e)(2) bars an evidentiary hearing if the Petitioner failed to develop the factual basis of his claims in the state court proceedings. Here, Petitioner fully developed all but Claims 4, 5 and 6 in the state post-conviction court. While the state court dismissed Claims 4, 5 and 6 as insufficiently pleaded, the state court record is adequate to permit this Court to resolve them on their merits.

Next, this Court considers the standard that governs the decision of whether to hold an evidentiary hearing when the limitations of § 2254(e) do not apply. The decision whether to grant an evidentiary hearing is left to this Court's sound discretion. This Court must review the available record and determine whether an evidentiary hearing is warranted. To guide the determination the Eleventh Circuit directs this Court

to consider several factors. First, this Court must consider whether there are disputed facts concerning the Petitioner's claims for which the Petitioner did not receive a full and fair hearing from the state postconviction court. Second, this Court must consider whether the Petitioner's fact allegations, if he could prove them true, would entitle him to prevail on his Petition. Third, in making that determination of whether the Petitioner can prevail on the merits of his claims, this Court also must keep in mind the deference that § 2254 gives to the state postconviction court's ruling. Fourth, this Court must consider the nature of the Petitioner's fact allegations. If they are merely conclusory and unsupported by specifics, the evidentiary hearing request may be denied. *See Boyd v. Allen*, 592 F.3d 1274, 1304-05 (11th Cir. 2010).

The present record presents no disputes of fact

per se that require resolution. Only Claim 5--regarding whether Mr. Fleischman ignored the jury's receipt of the victim's written statement during deliberations --raises a potential evidentiary conflict (in the sense that the existing record does not show that it happened). Given the length to which Mr. Fleischman went at trial to prevent the written statement from becoming an exhibit at all, it seems highly doubtful that he suddenly would be so indifferent about it as to let it inadvertently go back into the jury room during deliberations. In any event Petitioner offers no evidence to corroborate this claim and makes only unsupported allegations and suppositions. Claim 5 is therefore properly denied without an evidentiary hearing. This Court is able to assess Petitioner's other claims without the need to further develop the record. Thus, an evidentiary

hearing is not warranted.

CONCLUSION

Based upon the foregoing, it is recommended that this Petition for Writ of Habeas Corpus (DE 1) be **DENIED**.

The parties shall have fourteen (14) days from the date of this Report and Recommendation within which to file objections, if any, with the Honorable Donald M. Middlebrooks, the United States District Judge assigned to this case. Failure to file timely objections shall bar the parties from a de novo determination by the District Court of the issues covered in this Report and Recommendation and bar the parties from attacking on appeal the factual findings contained herein. *LoConte v. Dugger*, 847 F.2d 745, 749—50 (11th Cir. 1988), *cert. denied*, 488 U.S. 958 (1988).

DONE AND SUBMITTED in Chambers at Fort Pierce, Florida, this 2nd day of December, 2019.

[signature of Shaniek M. Maynard]

SHANIEK M. MAYNARD

UNITED STATES MAGISTRATE JUDGE

Excerpt from the trial transcript, pages 146 & 151:

MR. FLEISCHMAN [defense counsel]: Good morning. I want to start where I believe I started jury selection and that is reminding everyone that Mr. Hatton is presumed innocent.

. . . .

The State cannot prove this case beyond a reasonable doubt. Hatton didn't touch this girl in any manner sexually or otherwise, and he is not guilty. And again, keep an open mind, hold the State to their burden. I don't have to prove or disprove anything and that we feel confident that at the end of this case you will, in fact, find Hatton guilty (sic) on all counts. Thank you.

THE COURT: Okay.

Excerpt from the postconviction evidentiary hearing transcript, pages 61-64, 67-69, 71-72:

[Mr. Pumphrey, defense counsel]: Q Okay. And so I want to start with this, and I'm again quoting from the transcript. At the end of the closing statement and I'll – I'll read you this last sentence.

[Expert witness, Mr. Shafer]: A Yes sir.

Q It's page one fifty-one. "I don't have to prove or disprove anything and that we feel confident that at the end of this case you will, in fact, find Hatton guilty on all counts."

A Was that the closing?

Q That was the opening statement.

A Opening statement, yes sir.

Q Now having – having worked in criminal defense you're familiar with the importance of – of trial and the timing of what you're imparting as a representative of your client to a jury.

A Absolutely.

Q And usually the last thing, or – or is it, and you – you tell me, but is the last thing you leave with the jury before you emphasize and there's that pause before the proceedings start, is that an important component of the opening statement?

A Well, it's the – I've always ascribed to the theory of priv – primacy and recency. And recency is generally the thought is that individuals will remember the first things that are said to them and the last things that are said to them. And the last thing in that particular section of the trial was as – as you've just read it what the defense attorney had said to that jury. Uh huh.

Q And – and as the defense attorney or as any attorney we're all human.

A. Absolutely.

Q But let's talk a minute about that. You as a criminal defense attorney if you misspoke at – at that phase what would be your action with the court in – in

trying to make sure that your client received a fair trial?

A Well, I mean that – that question presupposes that I recognized that I had misspoken while discussing the case in front of that jury, is that accurate?

Q That – that is accurate.

A Okay. The – at that stage of the proceedings there's been jury selection and opening statements and I think that a course of action would be to at least ask the court to approach the bench and tell the judge, the presiding judge, that I think I have misspoken and certainly misspoken gravely. And that I would ask the court to at a minimum to either have the court reporter

read back what – what has been transcribed or – and/or if there were audiotapes, have the audio listened to to make sure that – that, in fact, I had if I had some thought that that had occurred. And if so I would have at that point I would – I would think an attorney in a case such as this with the stakes being what they were, would have asked that a mistrial be declared.

Q Now if the jurors are paying attention and doing their duty. Is there any tactical reason to tell a jury, as a defense attorney to find we're confident or – or and I'm paraphrasing so I'll refer to the actual transcript. "– you will, in fact, find Hatton guilty on all counts."

A As a trial strategy making that statement? I

cannot imagine a scenario. I just can't.

Q So is there – is there – is there a danger, a grave danger that that bell, like some of the bells that are sometimes rung in trials, not purposely, but unintentionally, is there any way you can see to unring that bell?

A You know, I – I read through the – the various documents and I've been rolling that around in my head and I think this type of a case with – I don't think there would be a way to unring the bell, put the cow back in the barn, whatever the metaphor might be. I think that it would be incumbent upon the attorney to – to move for a mistrial, at least to protect the record. It's – it's the – there's no way of knowing how that was – how that was consumed, if you will, by the

jury. And if – if the jury sees and hears the defense counsel making that type of a statement as early as opening statement as to, you know, how they looked at the rest of the evidence in the trial and the – and the – the questioning and the arguments that the attorney made subsequent to making that statement. I think that was it was not something a reasonable attorney would do.

Q And as a defense attorney based on your training and your experience can you opine as your concern just having that statement be made even accidentally or – but especially at the end of the opening statement?

A Well, just a few minutes ago we discussed briefly primacy and recency and there are different

schools of thought, trial strategy as to winning a case. You win – some I ascribe to the strategy that you win a case in jury selection and opening statement. I don't know if I ascribe to that. But I certainly know that you can lose a case on opening statement and certainly by making a statement as – as important as that, I just think it would have infected the – the entire trial proceeding.

. . . .

Q Is there any tactical reason to leave that statement in and allow that to be played for the jury that the victim making the allegation is reliable?

A Certainly not that particular statement and certainly not with the – with the case setting as it's set,

and at least two of the counts, and it affects all three, affects all three, but certainly the two counts that don't have any eye – other eyewitness testimony besides the – the victims I would think that the reasonable course of action would have been to move in Limine to keep that part of the statement out, to redact that statement.

Q Could that in any way pretrial out of the presence of the jury have any appearance of attacking the victim by asking that those certain statements made by Mr. Hatton be redacted?

A Out of the presence of the jury?

Q Yes sir.

A In pretrial or during trial? I – I cannot see how that would be some – in some form or fashion a thought that it would have attacked the victim in the case.

Q In this case concerning Mr. Hatton is there any tactical reason as a criminal defense attorney with your experience, is there any tactical reason you would allow, and I'll – I'll go through these – these statements that were allowed, that the – talking about the victim. "Okay. Would you categorize her as a kid? Is she a good kid?" "Mr. Hatton: A very good kid." "Okay. Is she pretty reliable?" "Oh, I would say reliable, yes." And then finally not dealing with credibility is there any tactical reason to allow the I jury to hear, not introduced into evidence by anyone except through this. "Have you – " This is Detective

Altman, this is page two seventy-four, line eight. "Have you ever touched her breasts with your hands?" Line ten, Mr. Hatton says, "Yes, I have, yes sir." Any tactical reason to allow that that you can think of?

A I think that – that statement as I read it also talked something about while she was dressing. If that's the section that – that you're referring to counsel. And –

Q It – it – it is.

A And –

Q It's line fifteen.

A Honestly, the only thing that I can think of

tactically that would be available would be some form of, "Yes, I have innocuously touched this individual." But the fact that we're dealing with lewd and lascivious acts on the same particular individual, I think that the reasonable strategy would have been to redact it as – an uncharged prior bad – prior conduct of – of the accused or a 404(b) objection. I think that would have been the reasonable course of action, knowing the – with the facts set out the way they are, and with the fact that – with the statement that was said in the opening, that – that even com – compounds the idea that – that there are – that the defense counsel is less than engaged in defense of his client.

. . . .

Q But is that a reasonable tactical strategy given that the jury has never heard that statement and

now that statement is being brought out by defense counsel who has misspoken in opening statement and is now bringing something new to the jury attached to his client stating, "I would really like to stick my penis in you." Or –

A Well, and to answer that question let me just say that the issues that are being raised did not hap – they don't happen in a vacuum. When the – when the state introduces the defendant's statement and we have a statement now that he is saying that the victim is a reliable person. And now we have the defense counsel questioning the victim. And she, if I recall correctly, she says that she doesn't remember making such a statement. And then he impeaches her with that statement I think that that makes it even worse. I – I – I believe the strategy was to impeach her and

show that she is in some way being less than credible. And I think it was hugely, it's a huge backfire. And I don't think it was reasonable considering everything that had gone before it. With the idea that the jury could have certainly assumed that because Mr. Hatton was saying that this young lady was, in fact, reliable when she says she doesn't remember and then it's for impeachment to show that she's less than credible just – just doesn't – it just falls flat. And – and – and I think it – it's extremely inflammatory.

Q So in your expert opinion would you opine that this was not a reasonable tactical strategy to impeach upon this issue.

A I think with this case with the evidence that has the jury has before it. I think that the tactical

decision that was made was unreasonable to present that as impeachment evidence. That's what I think.