APPENDIX

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-14857

D.C. Docket No. 5:15-cv-00354-WTH-PRL

LUTHER MCKIVER,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

(March 25, 2021)

Before MARTIN, LUCK, and BRASHER, Circuit Judges.

BRASHER, Circuit Judge:

After a Florida jury convicted Luther McKiver of trafficking oxycodone, a state postconviction court granted McKiver a new trial based on allegations that his

trial counsel was ineffective. But McKiver's success was short-lived. The state appealed, and an appellate court reversed in a one-sentence order. Eventually, McKiver filed a federal habeas petition that argued his trial counsel was ineffective for failing to investigate and present (1) certain witnesses who would cast doubt on the state's case and (2) the criminal history of a key state witness. The district court denied McKiver's petition, and McKiver appealed.

McKiver's appeal requires us to answer two questions. First, we must determine whether the state appellate court unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984), in rejecting the witness-testimony claim. Second, we must decide whether we may excuse McKiver's procedural default of his criminal-history claim under *Martinez v. Ryan*, 566 U.S. 1 (2012). We conclude that the state appellate court did not unreasonably apply *Strickland* in rejecting the witness-testimony claim and that McKiver cannot surmount the procedural default of his criminal-history claim. Accordingly, after careful consideration and with the benefit of oral argument, we affirm the district court's denial of McKiver's petition.

I. BACKGROUND

The factual and procedural history of this case consists of four parts: McKiver's crime, his trial proceedings, his postconviction proceedings, and the parties' subsequent appeals and petitions.

A. McKiver's Crime

One Friday in 2008, John Sneed filled three prescriptions for his back injury, including one for 120 oxycodone pills. The next day, Sneed took six to eight of those pills. He went out of town for the rest of the weekend and left the pill bottle behind in his locked house. When he returned to his house on Sunday, he found that it had been broken into and that his prescriptions were missing. Sneed notified law enforcement of the break-in, and a detective was sent to investigate.

During the investigation, the detective interviewed Luther McKiver, who lived across the street from Sneed. McKiver initially denied breaking into Sneed's house, stealing the prescriptions, and using drugs, except "a little weed every now and then." He also said that he had been away from his house on Saturday and did not return until Sunday evening. He further alleged that the Sneeds were targeting him for being "the only dark-colored skin in the neighborhood." When questioned further about this statement, McKiver started becoming less coherent and possibly angry, and the detective ended the interview.

However, just fifteen minutes later, the detective conducted another interview with McKiver. In this second interview, McKiver confessed that he "lied on the first one because [he] was afraid" and admitted that he had broken into Sneed's house, had stolen the pills, and had a drug-use problem. He specifically admitted that he stole "prescription bottles full of medicine" and consumed the medicine in the bottles. The police never recovered any pill bottles or pills.

McKiver was eventually charged with burglary, grand theft, and trafficking oxycodone in an amount of 28 grams or more. He pleaded guilty to the burglary and grand theft charges but went to trial on the trafficking charge. Under Florida law at the time, unauthorized possession of 28 grams or more of oxycodone was the crime of trafficking and carried a mandatory 25-year term of imprisonment. FLA. STAT. §§ 893.03(2)(a) and 893.135(1)(c). Because McKiver admitted to stealing Sneed's oxycodone pills, the only question at trial was whether there were 28 grams or more of oxycodone in the bottle. And because each pill in the bottle weighed 530 milligrams, the issue became whether McKiver stole 53 pills or more.

B. McKiver's Trial Proceedings

At some point, the parties became aware that Sneed might have a criminal history or may have engaged in criminal conduct, and the state moved the trial court to exclude any evidence of Sneed allegedly selling or trading narcotics as improper character evidence. After conferring with his client off the record, McKiver's trial counsel, Michael Lamberti, consented to the motion as long as the state was not allowed to introduce evidence that McKiver had taken Sneed's pills in the past. The court agreed and excluded that evidence. The court concluded the hearing by asking McKiver directly: "Are you satisfied with [Lamberti's] services thus far?" McKiver replied: "Yes, Your Honor." The court further asked: "Is there anything that he hasn't done that you have asked him to do?" McKiver answered: "No, Your Honor."

At trial, only four witnesses testified: Sneed, the pharmacist who had filled his prescription, the detective, and McKiver. Sneed and the detective testified to the facts described above, and recordings of McKiver's two interviews with the detective were played for the jury. The pharmacist testified that he had carefully counted and filled Sneed's bottle with 120 oxycodone pills two days before the break-in at Sneed's house. When McKiver testified, he "admit[ted] [his] guilt for breaking into the house" and taking Sneed's drugs. Although he recalled seeing pills in Sneed's oxycodone bottle, he could not remember how many he had taken because he was already "too high" at the time.

The jury convicted McKiver of trafficking oxycodone in an amount of 28 grams or more, and the judge sentenced him to a mandatory 25-year term of imprisonment. McKiver appealed his conviction and sentence, which the state appellate court affirmed.

C. McKiver's Postconviction Proceedings

McKiver filed a *pro se* state postconviction petition arguing that his trial counsel, Lamberti, was ineffective for several reasons. As relevant here, McKiver alleged that Lamberti disregarded his request to investigate and call four witnesses who would have testified that Sneed sold drugs, which in turn would cast doubt on whether Sneed's pill bottle was full when McKiver stole it. The state postconviction court appointed counsel for McKiver and ordered an evidentiary hearing. Almost

immediately after being appointed, McKiver's postconviction counsel requested Sneed's criminal history. When the request was made, McKiver still had almost seven months to amend his petition.

At the hearing, three witnesses testified: Lamberti, McKiver, and the prosecutor. Only Lamberti's and McKiver's testimonies are relevant to this appeal.

To begin, Lamberti testified—and his contemporaneous notes confirmed—that McKiver had given him the names of only two witnesses, neither of which were mentioned in McKiver's petition. Lamberti explained that he decided not to investigate those witnesses because McKiver had admitted multiple times that Sneed's oxycodone bottle was "almost full when [McKiver] took" the pills. Indeed, he testified that McKiver told him in the off-the-record conversation at the motion-in-limine hearing that calling witnesses to testify about Sneed's drug-selling history "would be a waste of time" because he had "taken the whole, entire[,] . . . just-about-full bottle of pills." Lamberti also testified that McKiver never told him that the proposed witnesses knew that Sneed had sold oxycodone pills in the 48-hour period between the filling of the prescription and the break-in. Lamberti explained that the trial strategy—which McKiver accepted—was to argue that McKiver took only a small handful of pills before leaving Sneed's house and that someone else may have later entered the open house and taken the remaining pills.

Next, McKiver testified. First, McKiver testified that he had suggested seven

witnesses to Lamberti and that he had told him that four of them would testify that Sneed had sold them oxycodone pills within 48 hours of filling his prescription. But McKiver's petition mentioned only four witnesses—one of whom was Sneed's wife—and never mentioned anyone purchasing oxycodone within the relevant 48-hour timeframe. Second, McKiver answered a series of yes-or-no questions about whether his proposed witnesses would have been available and willing to testify at the time of his trial. He asserted that the witnesses were available and willing to testify that they had purchased pills from Sneed in the days leading up to the break-in. Third, McKiver testified that he had always told Lamberti that the bottle contained very few pills. He also testified that at least one of his suggested witnesses would have been able to tell the jury how many pills were in the bottle.

The postconviction court granted McKiver's petition. It noted that neither the pharmacist nor Sneed could "confirm the exact contents of the bottle." Accordingly, it concluded that "[t]he witnesses contemplated by Defendant would have challenged the testimony of State's witnesses and provided reasonable doubt as to the quantity for trafficking."

D. The Parties' Subsequent Appeals and Petitions

The state appealed the postconviction court's order on the ground that it was not "supported by competent substantial evidence." The state appellate court reversed the postconviction court. In a brief order, it quoted from the standard for an

ineffective assistance claim and wrote "We conclude that [McKiver] failed to meet his burden of establishing either prong under *Strickland* and therefore vacate the order under review and order that the judgment and sentence be reinstated."

About two years later, McKiver filed a second state postconviction petition. The petition asserted that Lamberti had been ineffective for failing to investigate Sneed's criminal history and impeach him with a 35-year-old conviction for selling marijuana and a 26-year-old conviction for issuing worthless checks, both of which were punished with probation. The reviewing court denied the petition because McKiver had not filed it within the two-year statute of limitations. McKiver appealed the denial, which the state appellate court affirmed. *See generally McKiver v. State*, 187 So.3d 1262 (Fla. Dist. Ct. App. 2016).

McKiver then filed a federal habeas petition raising both the witness-testimony claim and the criminal-history claim. McKiver also submitted several affidavits in support of his federal habeas petition that he had not submitted to a state postconviction court. The district court denied the petition. It held that (1) the state appellate court was not unreasonable in rejecting McKiver's witness-testimony claim, and (2) McKiver's procedurally defaulted criminal-history claim was not subject to an exception under *Martinez v. Ryan*, 566 U.S. 1 (2012), and failed on the merits anyway.

We granted a certificate of appealability on two issues: (1) whether the district

court erred in determining that the state appellate court's rejection of the witness-testimony claim was not contrary to, or an unreasonable application of, *Strickland*; and (2) whether the district court erred in determining that McKiver's criminal-history claim was not "substantial" under *Martinez* such that its procedural default could not be excused.

II. STANDARD OF REVIEW

We review *de novo* a district court's denial of a Section 2254 petition for a writ of habeas corpus. *Jenkins v. Comm'r, Ala. Dep't of Corr.*, 963 F.3d 1248, 1262 (11th Cir. 2020). Mixed questions of law and fact are also reviewed *de novo*, but the district court's factual findings are reviewed for clear error. *See Tuomi v. Sec'y, Fla. Dep't of Corr.*, 980 F.3d 787, 794 (11th Cir. 2020) (quoting *Hill v. Humphrey*, 662 F.3d 1335, 1343 n.9 (11th Cir. 2011)). Whether a claim is procedurally defaulted is a mixed question of law and fact and is therefore reviewed *de novo*. *See Harris v. Comm'r, Ala. Dep't of Corr.*, 874 F.3d 682, 688 (11th Cir. 2017).

Although we review the district court's denial *de novo*, we review the underlying state-court decision under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See Jenkins*, 963 F.3d at 1262–63 (quoting *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011)). Under AEDPA, a court cannot grant relief unless the state court's decision on the merits was "contrary to, or involved an unreasonable application of," Supreme Court precedent, or "was based on an

unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)–(2).

A decision is contrary to Supreme Court precedent if the state court applied a rule contradicting the governing law provided by the Supreme Court or reached a different result from the Supreme Court when faced with materially indistinguishable facts. *See Tuomi*, 980 F.3d at 794–95 (quoting *Ward v. Hall*, 592 F.3d 1144, 1155 (11th Cir. 2010)). And a decision involves an unreasonable application of clearly established federal law if the state court correctly identifies the governing legal principle but applies it to the facts of the petitioner's case in an objectively unreasonable manner. *See id.* at 795 (citing *Brown v. Payton*, 544 U.S. 133, 141 (2005)). To be objectively unreasonable, the decision must be more than merely incorrect or erroneous—it must be "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 795 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). For this reason, a state court's determinations are unreasonable only if no fairminded jurist could agree with them. *See Raulerson v. Warden*, 928 F.3d 987, 995 (11th Cir. 2019), *cert. denied*, 140 S.Ct. 2568 (2020).

III. DISCUSSION

McKiver presents two claims for our review: his witness-testimony claim and his criminal-history claim. His witness-testimony claim asserts that his trial counsel,

Lamberti, was ineffective because he failed to investigate and call certain witnesses. His criminal-history claim asserts that Lamberti was ineffective because he failed to investigate Sneed's criminal history and impeach him at trial. We address each claim in turn.

A. The State Appellate Court's Decision to Deny McKiver's Witness-Testimony Claim Did Not Unreasonably Apply Strickland

We begin with McKiver's witness-testimony claim. The state appellate court reversed the state postconviction court and denied McKiver's witness-testimony claim with one substantive sentence: "We conclude that Appellee failed to meet his burden of establishing either prong under *Strickland*." McKiver argues that the state appellate court "identified the correct legal rule"—the rule in *Strickland v. Washington*, 466 U.S. 668 (1984)—"but unreasonably applied that rule to the facts."

As an initial matter, we must decide how to review the state court's one-sentence order. With one quibble,[1] McKiver concedes that the state appellate court denied his claims "on the merits" such that AEDPA applies. *See* 28 U.S.C. § 2254(d).

[1] In his reply brief, McKiver argues that the state appellate court should have treated his witness-testimony claim as two separate claims: a claim about Lamberti's failure to investigate certain witnesses and a claim about his failure to call those witnesses at trial. This argument fails for three reasons. First, arguments raised for the first time in a party's reply brief are waived. *See Haynes v. McCalla Raymer, LLC*, 793 F.3d 1246, 1251 (11th Cir. 2015); *Henry v. Warden, Ga. Diagnostic Prison*, 750 F.3d 1226, 1232 (11th Cir. 2014); *Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008). Second, McKiver framed these issues as a single claim before the state appellate court and cannot fault the state court for doing the same thing. Third, under the facts of this case, there is no meaningful difference in treating these assertions as a single claim because McKiver does not argue that his counsel should have investigated these witnesses for some purpose other than calling them to testify.

We agree. Although the state appellate court's decision was brief, it clearly disposed of the witness-testimony claim on the merits and not on procedural or jurisdictional grounds. Because the state court resolved the claim on the merits, AEDPA governs our review. *See Raulerson*, 928 F.3d at 995 (11th Cir. 2019).

Moreover, we cannot say that the state appellate court's ruling was a summary or unexplained disposition of the claim. Under *Strickland*, a petitioner making an ineffective-assistance-of-counsel claim must show both that (1) his counsel performed deficiently and (2) the deficient performance prejudiced his defense. *See* 466 U.S. at 687. Unlike a summary disposition, which gives no reason for a decision, the state appellate court explained why it reversed the postconviction court's order: McKiver had not met his burden of proof under either prong of the relevant test. In applying AEDPA, we must determine whether any fairminded jurist could agree with that assessment. *See Wilson v. Sellers*, 138 S.Ct. 1188, 1192 (2018) (stating that when a state court explains its decision, "a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable").

We believe that fairminded jurists could agree that McKiver's evidentiary presentation failed to establish that he met *Strickland*'s test, especially with respect to its prejudice prong. Because both prongs of the test must be satisfied, a court need not address one prong if the petitioner cannot satisfy the other. *See Reaves v. Sec'y,*

Fla. Dep't of Corr., 872 F.3d 1137, 1151 (11th Cir. 2017) (quoting *Holladay v. Haley*, 209 F.3d 1243, 1248 (11th Cir. 2000)). Indeed, the Supreme Court has explained that "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which [it] expect[s] will often be so, that course should be followed." *Strickland*, 466 U.S. at 697. To establish prejudice, a petitioner must show that there is a reasonable probability that the result of the proceeding would have been different if his counsel had not performed deficiently—a showing sufficient to undermine confidence in the outcome of the proceeding. *Id.* at 694. "The likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112.

We have explained that this burden is particularly "heavy where the petitioner alleges ineffective assistance in failing to call a witness because often allegations of what a witness would have testified to are largely speculative." *Sullivan v. DeLoach*, 459 F.3d 1097, 1109 (11th Cir. 2006) (internal quotation marks omitted) (quoting *United States v. Guerra*, 628 F.2d 410, 413 (5th Cir. 1980)); *see also Woodfox v. Cain*, 609 F.3d 774, 808 (5th Cir. 2010) ("Claims that counsel failed to call witnesses are not favored on federal habeas review because . . . speculation about what witnesses would have said on the stand is too uncertain."). And, for that reason, we have held that a petitioner's own assertions about whether and how a witness would have testified are usually not enough to establish prejudice from the failure to

interview or call that witness. *See Sullivan,* 459 F.3d at 1109; *Washington v. Watkins*, 655 F.2d 1346, 1364 (5th Cir. 1981) ("All we have is what (the petitioner) says they would have said. . . . [A]ny inadequacy in [the petitioner's] representation that is attributable to his failure to interview [certain nontestifying witnesses] must be deemed completely nonprejudicial . . . given his utter failure to establish at his federal habeas hearing that the nontestifying [witnesses] would have corroborated [his] alibi defense."); *Guerra*, 628 F.2d at 413 (denying an ineffective assistance claim because "[n]one of the alleged witnesses were called at the § 2255 hearing and no one knows what they would have testified to"). Other circuits have come to a similar conclusion. *See Woodfox*, 609 F.3d at 808 (holding that a petitioner must, among other things, demonstrate "that the witness was available to testify and would have done so"); *Sanders v. Trickey*, 875 F.2d 205, 210 (8th Cir. 1989) ("Appellant's claim also must fail because he has not shown how he was prejudiced" because he "produced no affidavit or testimony from [the witness] to the effect that she would have testified at trial that appellant was innocent.").

We cannot say that the state appellate court was unreasonable in concluding that McKiver failed to carry his evidentiary burden to establish prejudice. At his evidentiary hearing before the postconviction court, McKiver—who was represented by counsel—did not call or submit written testimony from any of the witnesses who he argues that Lamberti should have investigated and called at trial.

The only evidence before the state appellate court was McKiver's own conclusory testimony about what the witnesses would have said and whether they would have been available and willing to testify. This testimony is precisely the kind of evidence that we—and other courts—have held to be "simply inadequate to undermine confidence in the outcome" of the proceeding. *Sanders*, 875 F.2d at 210 (internal quotation marks omitted) (quoting *Strickland*, 466 U.S. at 694).

Especially considering the particular facts of this case, a reasonable jurist could conclude that McKiver's testimony alone failed to establish prejudice. McKiver's testimony at the evidentiary hearing was inconsistent with what he had said on the record at the motion-in-limine hearing—that he was satisfied with his counsel's decision not to present evidence about Sneed's alleged criminal conduct. And, because the state needed to prove only that McKiver stole 53 of Sneed's original 120 pills, the missing witnesses had to account for at least half of the bottle's contents to have affected the result. But, for all the state courts knew, McKiver's witnesses might have testified to seeing a high enough number of pills to support the state's case, not undermine it. For example, McKiver said one witness would "testify as to how many pills or approximately how many pills were actually in that oxycodone bottle," but McKiver never said what he expected that number of pills to be. Because these witnesses never testified, the state court did not know what they would have said about the only issue at trial. Under AEDPA, we cannot fault the

state appellate court for rejecting McKiver's witness-testimony claim for failing to meet his burden of proof.

McKiver argues that the state courts were obliged to accept his testimony at the evidentiary hearing because the state did not object to its admissibility. But this argument confuses admissibility with sufficiency. The admissibility of evidence and the sufficiency of that evidence are two different propositions. *See, e.g.*, *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 564–65 (11th Cir. 1998) (holding that courts should avoid "the confusion and conflation of admissibility issues with issues regarding the sufficiency of [a party's] evidence"). The issue here is not the admissibility of McKiver's testimony under the rules of evidence; the issue is the sufficiency of that testimony to meet his burden of proof under *Strickland*. The state argues, and our caselaw establishes, that speculative testimony like McKiver's—about what another person would have said and his or her availability and willingness to say it—may not be sufficient by itself to establish prejudice, regardless of its admissibility.

McKiver also argues that we should consider the affidavits that he submitted to the district court. But we cannot consider evidence that was not presented to the state courts. Under AEDPA, our "review is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 180–81 (2011). It would contravene AEDPA "to allow a petitioner to overcome

an adverse state-court decision with new evidence introduced in a federal habeas court and reviewed by that court in the first instance effectively *de novo*." *Id.* at 182. *See also Pope v. Sec'y, Fla. Dep't of Corrs.*, 752 F.3d 1254, 1263 (11th Cir. 2014). Accordingly, we are limited to reviewing the reasonableness of the state appellate court's decision based on the record that McKiver made in state court.

Although the state appellate court's decision rejecting McKiver's witness-testimony claim was brief, it did not unreasonably apply *Strickland*. Consequently, the district court did not err in denying McKiver's Section 2254 petition with respect to his witness-testimony claim.

Our dissenting colleague sees things differently and makes at least three significant errors in doing so. First, she focuses her review on the state postconviction court instead of the state appellate court. Under AEDPA, we must evaluate the state appellate court's decision, not the decision of the lower court that it reversed and vacated. *See Wilson*, 138 S.Ct. at 1191–92. In another context, we have explained that a vacated opinion is "officially gone" and has "no legal effect whatever," and "[n]one of the statements made [therein] has any remaining force." *United States v. Sigma Int'l, Inc.*, 300 F.3d 1278, 1280 (11th Cir. 2002); *see also United States v. M.C.C. of Fla., Inc.*, 967 F.2d 1559, 1561 (11th Cir. 1992) ("[G]eneral vacation by an appellate court of the lower court's judgment vacates the entire judgment below, divesting the lower court's earlier judgment of its binding

effect"). Second, our dissenting colleague asserts that the state postconviction court found McKiver's testimony to be credible and that the state appellate court adopted that finding. But the state postconviction court never made a credibility determination of any kind and expressly relied on the lawyer's testimony, not McKiver's. *See* Doc. 10-6 at 46 ("Mr. Lamberti testified that although Defendant provided the names of witnesses and their expected testimony he did not investigate or interview the witnesses or seek a continuance to investigate."). For its part, the state appellate court did not adopt—implicitly or expressly—anything that the state postconviction court said or did. The state appealed on the grounds that McKiver had not proven his claims by substantial evidence, and the appellate court reversed because it concluded that McKiver "failed to meet his burden." Third, our dissenting colleague makes much of the implausibility of McKiver "ingest[ing] over 100 oxycodone pills in a 48-hour period and somehow surviv[ing]." But nothing in the state-court record—not even his own testimony at trial or the post-conviction hearing—suggests that McKiver consumed the stolen pills in two days. The police interviewed McKiver ten days after the burglary, at which point he said that he had ingested the pills. Our dissenting colleague's only support for this assertion is a sentence in McKiver's federal habeas petition, which is not evidence of anything and was not before the state courts in any event.

B. McKiver's Criminal-History Claim Was Procedurally Defaulted

We turn now to McKiver's criminal-history claim. McKiver alleges that Lamberti was ineffective because he failed to investigate Sneed's criminal history such that he could impeach Sneed at trial with a 35-year-old conviction for selling marijuana and a 26-year-old conviction for issuing worthless checks. Both parties agree that this claim is procedurally defaulted because McKiver did not timely raise it in the state courts.

Ordinarily, a state procedural default is fatal to a federal habeas claim. *See Martinez v. Ryan*, 566 U.S. 1, 9 (2012) (describing "the doctrine of procedural default, under which a federal court will not review the merits of claims, including constitutional claims, that a state court declined to hear because the prisoner failed to abide by a state procedural rule"). But there is a narrow exception. If a petitioner can show cause for the default and establish prejudice resulting from the alleged violation of federal law, then the default will be excused, and federal courts can hear the claim. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). As relevant here, a petitioner can establish cause for defaulting on a claim of ineffective assistance of trial counsel where four conditions are met: (1) the claim of "ineffective assistance of trial counsel" was a "substantial" claim; (2) the claim was defaulted because the petitioner had "no counsel" or "ineffective" counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the "initial" review

proceeding in respect to the "ineffective-assistance-of-trial-counsel claim"; and (4) state law requires that an ineffective assistance of trial counsel claim be raised in an initial-review collateral proceeding. *Trevino v. Thaler*, 569 U.S. 413, 423, 428 (2013).

McKiver argues that his procedural default may be forgiven under this four-factor test. The state disputes only the first and second factors.

Under the first factor, to show that an underlying ineffective-assistance-of-counsel claim is "substantial," a petitioner must establish that "jurists of reason would find it debatable." *Hittson v. GDCP Warden*, 759 F.3d 1210, 1269–70 (11th Cir. 2014) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Consequently, McKiver must prove that such jurists would find it debatable that (1) Lamberti performed deficiently by failing to investigate Sneed's criminal history and then use it to impeach Sneed and (2) that those failures prejudiced his defense. *See Strickland*, 466 U.S. at 687.

As for the second factor, McKiver must show that his postconviction counsel was ineffective for failing to raise this claim in his postconviction proceeding. Although McKiver filed his first state postconviction petition *pro se*, the postconviction court appointed counsel almost seven months before the deadline for amending his petition and before the evidentiary hearing. In such cases where counsel is appointed while there is still opportunity to include a claim in a state

postconviction petition, counsel exists for purposes of the *Martinez* "cause" analysis, and a petitioner must prove his postconviction counsel's ineffectiveness to excuse a state procedural default. *See Martinez*, 566 U.S. at 14–15. To make that showing, McKiver must prove that his postconviction counsel performed deficiently and that the deficient performance prejudiced his defense. *See Strickland*, 466 U.S. at 687.

Under the facts of this case, both factors come down to a single question: whether there is a substantial likelihood that the result of McKiver's trial would have been different if his trial counsel had raised Sneed's criminal history for the purposes of impeachment? We need not address the adequacy of any lawyer's performance—neither his trial counsel's failure to investigate nor his postconviction counsel's failure to raise the claim—because even assuming that both lawyers performed deficiently, neither lawyer's performance prejudiced McKiver. This is so for three reasons.

First, even if Lamberti had tried to present Sneed's criminal history, the jury would not have been able to hear it, which is a necessary precondition for this kind of ineffective assistance of counsel claim.[2] In Florida, when deciding whether to

[2] *See Kelley v. Sec'y for Dep't of Corr.*, 377 F.3d 1317, 1362 (11th Cir. 2004) (reasoning that the unavailability of certain uninvestigated evidence "could not have affected the result of the case so as to create prejudice" because "[a] reasonable probability of a different result is possible only if the suppressed information is itself admissible evidence or would have led to admissible evidence"); *Gilreath v. Head*, 234 F.3d 547, 551 n.12 (11th Cir. 2000) ("[T]o show prejudice, Petitioner must show that—but for his counsel's supposedly unreasonable conduct—helpful character evidence actually would have been heard by the jury."); *Spaziano v. Singletary*, 36 F.3d 1028, 1044 (11th Cir. 1994) ("The result of Spaziano's trial and sentencing would not have been

admit evidence of past convictions for impeachment purposes, courts must "determine whether the past convictions have a bearing on the present character of the witness." *Trowell v. J.C. Penney Co.*, 813 So.2d 1042, 1044 (Fla. Dist. Ct. App. 2002).[3] A conviction "so remote in time as to have no bearing on the present character of the witness" is inadmissible. *Children's Palace, Inc. v. Johnson*, 609 So.2d 755, 757 (Fla. Dist. Ct. App. 1992) (citing FLA. STAT. § 90.610). "[T]he absence of similar conduct for an extensive period of time might suggest that the conduct is no longer characteristic of the defendant." *Duffey v. State*, 741 So.2d 1192, 1197 (Fla. Dist. Ct. App. 1999). Florida courts have held that older convictions likely do not bear on the witness's present character if there has been a significant period without subsequent convictions. *See, e.g.*, *Trowell*, 813 So.2d at 1044 (finding that "[e]vidence of theft and shoplifting convictions" almost two decades old "with no subsequent convictions would tend to suggest that the witness no longer has a propensity toward dishonesty, and thus such convictions would have little or no bearing on his present character"); *cf. Pryor v. State*, 855 So.2d 134, 137 (Fla. Dist. Ct. App. 2003) (holding that the continued acquisition of felony convictions caused the older ones to "bear[] on his present character" and be "admissible for

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different, because the information in question is not admissible evidence, and it would not have led to any admissible evidence.").

[3] "[I]n the absence of interdistrict conflict, district court decisions bind *all* Florida trial courts." *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992) (emphasis added).

impeachment").

Applying Florida law to the facts in this case, there is no reason to believe that Sneed's criminal history would have been admitted at McKiver's trial. Sneed's criminal history consists of a 35-year-old conviction for selling marijuana and a 26-year-old conviction for issuing worthless checks. Sneed had not been convicted of a felony for 26 years. Consequently, Florida law did not support admitting these convictions for impeachment purposes. In analogous cases, Florida courts have affirmed trial courts' refusal to allow convictions like these to be used for impeachment. *See Jones v. State*, 765 So.2d 767, 767–68 (Fla. Dist. Ct. App. 2000) (affirming the trial court's discretion in refusing to admit a nearly 30-year-old conviction); *City of Miami v. Ross*, 695 So.2d 486, 488 (Fla. Dist. Ct. App. 1997) (concluding that the trial court did not abuse its discretion by refusing to allow impeachment with convictions for writing bad checks from "many years ago").

McKiver cites one Florida case—*Riechmann v. State*, 581 So.2d 133 (Fla. 1991)—in support of his prejudice argument, but that case is clearly distinguishable. In *Reichmann*, the defendant testified and had three potentially admissible prior convictions that were 21-, 14-, and 13-years-old, 581 So.2d at 135, 139, 140, and one of those convictions was for perjury, *id.* at 139. In reviewing the trial court's decision to allow impeachment on the basis of those convictions, the Florida Supreme Court noted that the "remoteness of prior convictions may create a danger

of unfair prejudice substantially outweighing the probative value of the evidence." *Id.* at 140. But in that case, it ultimately concluded that the trial court had not abused its discretion in admitting the impeachment evidence. *Id.* Here, of course, the witness is not the person on trial, his convictions are significantly more remote, and none of them is for perjury. *See Ward v. State*, 343 So.2d 77, 78 (Fla. Dist. Ct. App. 1977) ("[W]e think perjury falls in a special category. Such a conviction has greater weight against the credibility of a witness than any other crime.").

Second, even if the trial court had admitted Sneed's criminal history, there is no reasonable probability that the outcome of the trial would have been different. To begin, if Sneed's criminal history had been admitted, the precise nature of Sneed's crimes would not have been available to the jury. *See Jackson v. State*, 25 So.3d 518, 526 (Fla. 2009) ("This inquiry [into a witness's convictions] is generally restricted to the existence of prior convictions and the number of convictions, unless the witness answers untruthfully."); *Howard v. Risch*, 959 So.2d 308, 313 (Fla. Dist. Ct. App. 2007) ("Although the fact a witness or party was convicted of a crime may be relevant and admissible for impeachment purposes, the nature of the crime or any details about the crime are generally inadmissible."). Hence, the jury would have learned only that Sneed had two prior felonies 35 and 26 years before the trial and perhaps that he received probation for both.

McKiver argues that Sneed's criminal history would have been enough to

affect the outcome of the trial because "[t]here was only a single, unimpeached witness, who testified about the number of pills: Mr. Sneed." He further asserts that if "Mr. Sneed was suddenly a convicted felon" in the eyes of the jurors, the "scales [of credibility] would have been evenly distributed and the jury would have been required to review the evidence more equally." But neither assertion is true. Sneed was not the only witness who testified to the number of oxycodone pills in the bottle: McKiver concedes that the pharmacist also testified to the number of pills. And learning of Sneed's convictions would not have equalized McKiver's and Sneed's credibility in the eyes of the jury. The jury had heard McKiver repeatedly and elaborately lie to the detective in his first interview—which the jury heard him admit at the start of the second interview. McKiver's assertion that the jury would have found him and Sneed to be equally credible if it had learned of Sneed's decades-old convictions is without merit.

Third, only a substantial deviation in the number of pills would have changed the trial's outcome. Sneed testified that he consumed six to eight pills, leaving more than 110 in the bottle. To convict McKiver of trafficking oxycodone, the state simply had to show that the bottle contained at least 53 pills when he took it. To change the result, the jury would have needed to believe that Sneed's estimation of the number of pills left in the bottle was more than double the actual number of pills that he had. But McKiver does not explain how undermining Sneed's credibility with felony

convictions would have helped him show this kind of discrepancy.

For these reasons, there is no reasonable probability that McKiver's trial would have reached a different conclusion if his trial counsel had investigated Sneed's criminal history. Moreover, jurists of reason would not find this conclusion debatable: the cumulative strength of the foregoing reasons is simply too great. We therefore conclude that McKiver cannot establish that his criminal-history claim is "substantial" and that his postconviction counsel was ineffective for not raising it. Under *Martinez*, the procedural default is not excused, and we cannot reach the claim. Consequently, the district court did not err in denying McKiver's Section 2254 petition with respect to his criminal-history claim.

IV. CONCLUSION

For the reasons stated above, we **AFFIRM** the district court's denial of McKiver's Section 2254 petition.

MARTIN, Circuit Judge, concurring in part and dissenting in part:

Luther McKiver is now serving a mandatory 25-year sentence for a crime he committed shortly after he graduated high school. He admitted to stealing oxycodone pills from his neighbor, John Sneed. But Mr. McKiver says, and the state never disputed, that he consumed those oxycodone pills within 48 hours of acquiring them. For this crime, the state of Florida charged Mr. McKiver with the quite serious crime of trafficking oxycodone, which requires a sentence of no less than 25 years in prison. Without that charge, Mr. McKiver would have still served a still serious sentence of almost eight years' imprisonment for the crimes to which he pled guilty. Under Florida's statutory scheme, a person does not actually have to traffic drugs in order to be guilty of trafficking. A person's guilt or innocence of Florida's drug trafficking crime is determined strictly by the weight of the drug attributed to them.[1] And in order for Mr. McKiver to be guilty of trafficking, a jury must have found that he possessed at least 28 grams (1 ounce) of oxycodone between the time he took the pills from Mr. Sneed's home and the time he consumed them. All parties seem to agree that it would take 53 oxycodone pills to meet the weight requirement of 28 grams set by Florida's drug trafficking statute.

Since Mr. McKiver admitted to taking the pills, the only real issue in dispute at his trial was whether the bottle he stole had at least 53 oxycodone pills in it.

[1] See § 893.135(1)(c)(1)(c) (2008).

And this appeal presents the question of whether Mr. McKiver's trial lawyer rendered ineffective assistance to McKiver in defending him on this point. In preparing for trial on this lone issue, Mr. McKiver told his attorney, Michael Lamberti, about several people who would testify (generally) that Mr. Sneed regularly sold the oxycodone Sneed kept in his house and (specifically) that Sneed even sold pills from the very bottle McKiver took before McKiver took it. Despite the obvious effect this testimony would have in undermining the government's claim that Mr. McKiver took at least 53 pills from Mr. Sneed, Mr. Lamberti never even attempted to contact any of the witnesses McKiver identified.

This appeal arises from Mr. McKiver's attempt to get a new trial on the ground that Mr. Lamberti gave ineffective assistance of counsel to him on this important issue of the weight of the drugs he consumed. The state postconviction court that heard Mr. McKiver's claims in this regard agreed with him. Nevertheless, and in a one sentence order, containing no analysis or any reference to the facts, the Florida appellate court vacated the state postconviction court's decision. Upon review here, the majority opinion says this one sentence order from the Florida appellate court is a reasonable application of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). I say it is not, so I respectfully

dissent.[2]

I.

Mr. McKiver became addicted to prescription opioids prescribed for him after he had knee surgery during his high school years. In 2008, shortly after graduating from high school, Mr. McKiver lived with his grandparents across the street from Mr. Sneed. In December of that year, Mr. Sneed filled three prescriptions for opioids, including a bottle of 120 oxycodone pills. Mr. Sneed says he took only six to eight pills per day for personal use. Then, two days after Mr. Sneed filled that oxycodone prescription, Mr. McKiver broke into Mr. Sneed's home, already intoxicated, stole that bottle, and swallowed whatever pills were in it. The police never recovered the bottle or the pills.

At trial, Mr. McKiver confessed to taking the bottle, but testified that he could not recall how many pills were in it because he was high at the time. Mr. Sneed testified that he had only taken out six to eight pills, meaning that there would have been over 100 pills remaining in the bottle.[3] In October 2009, the trial

[2] I agree Mr. McKiver has not made the required showing to overcome his procedurally defaulted claim that he suffered ineffective assistance of counsel when Mr. Lamberti failed to investigate Mr. Sneed's criminal history.

[3] The government never offered any evidence to the contrary and so its theory therefore appears to be that Mr. McKiver ingested over 100 oxycodone pills in a 48-hour period and somehow survived. The majority opinion says Mr. McKiver never claimed that he consumed whatever pills soon after acquiring them, but it overlooks the record in this regard. Maj. Op. at 18. See R. Doc. 1 at 6–7 ("McKiver consumed all of the pills he took from Sneed's house that day in a forty-eight hour period. That there were few pills in the bottle is consistent with McKiver's

jury found Mr. McKiver guilty of trafficking more than 28 grams but less than 30 kilograms of oxycodone. As a result, Mr. McKiver is now serving the 25-year term of imprisonment required by Florida's trafficking statute.

In 2012, Mr. McKiver filed a pro se motion for post-conviction relief in the state trial court. Mr. McKiver argued, in relevant part, that he suffered ineffective assistance of counsel because his attorney, Mr. Lamberti, failed to interview witnesses who would have testified that Mr. Sneed sold his prescription opioids and that his wife, Mrs. Claudia Sneed, also took his drugs. This would have, of course, lessened the number of pills in the bottle at the time Mr. McKiver took it.

The state trial court held an evidentiary hearing which revealed important facts. First, Mr. McKiver provided Mr. Lamberti with the names of at least five witnesses who would have testified to Mr. Sneed's illegal drug activity: Daniel Pulkinan, Tyrone Thomas, Tracy Gates, Corey Denny, and Rodney Jones. Mr. McKiver further testified that two of them would have testified that Mr. Sneed sold oxycodone pills during the 48 hours between the time Sneed filled his prescription and the time McKiver stole the bottle of oxycodone. Second, Mr. Lamberti did not attempt to contact any of the witnesses Mr. McKiver indicated had exculpatory information. And finally, Mr. Lamberti's notes from his pre-trial conversations

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statement that all of the pills were consumed by him in a two day period because one hundred twelve pills of percacet in a two day period would have been lethal.") Mr. McKiver so stated under penalty of perjury.

with Mr. McKiver indicate that McKiver told him he didn't know how many pills were in the bottle when he stole it.

The majority opinion correctly points out that Mr. Lamberti testified that Mr. McKiver told him the oxycodone bottle was almost full when McKiver took it. Maj. Op. at 6. But Mr. Lamberti's self-serving testimony was undermined by two other pieces of evidence. First, Mr. McKiver testified that when he referred to a full bottle of pills, he was talking about the other drugs he had taken from Mr. Sneed's home (and which he subsequently pled guilty to stealing) and that he always said there were very few pills remaining in the oxycodone bottle. Second, Mr. Lamberti's own notes indicate that Mr. McKiver told him he could not remember how many pills were in the bottle. We also know that when the state trial court heard this conflicting evidence it found that Mr. Lamberti's decision to not even try to contact the potential witnesses "cannot be attributed to strategic decision." This seems to be a perfectly reasonable finding based on my read of the evidence.

The state trial court found Mr. Lamberti's performance to be constitutionally deficient because he failed to investigate or interview any of the witnesses Mr. McKiver named. And it found that Mr. McKiver demonstrated prejudice because the "narrow issue at trial was the issue of quantity of drugs contained in the bottle" and the witnesses McKiver identified "would have challenged the testimony of

State's witnesses and provided reasonable doubt as to the quantity for trafficking." On appeal, the Florida Fifth District Court of Appeal vacated the state postconviction court's decision in a one-sentence order simply saying that Mr. McKiver "failed to meet his burden of establishing either prong under Strickland." The state appellate court provided no analysis whatsoever.

In 2015, Mr. McKiver filed a habeas petition in the District Court, seeking to have his conviction vacated because he did not receive effective assistance of counsel. Mr. McKiver again argued Mr. Lamberti was deficient because he failed to interview or call the witnesses with knowledge of Mr. Sneed's illegal drug activity. Mr. McKiver provided the District Court with affidavits from the witnesses he says Mr. Lamberti should have called. Three of those witnesses swore they had personal knowledge that Mr. Sneed sold prescription drugs in the time between filling his prescription and Mr. McKiver stealing the oxycodone bottle. All four said they were available to testify during the trial and would have done so if someone had only asked.

In 2018, the District Court denied the petition. The District Court found that, even if the jury had heard the evidence about Mr. Sneed's drug activity, they still could have found that Mr. McKiver took the minimum number of pills to sustain his trafficking charge.

II.

Upon reviewing a habeas claim previously adjudicated on the merits in state court, federal courts may grant relief only when the state court's decision "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)–(2). But the state court's factual findings are "presumed to be correct," and can only be overcome by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

Mr. McKiver argues the state appellate court unreasonably applied Strickland to the facts of his case. Strickland provides that a criminal defendant has been deprived of their Sixth Amendment right to counsel when: (1) counsel's performance was deficient, meaning their actions were not sound trial strategy and (2) counsel's deficiency prejudiced the defense, meaning there is a reasonable probability that but for the deficiency, the result of the proceeding would have been different. King v. Strickland, 748 F.2d 1462, 1463 (11th Cir. 1984); Strickland, 466 U.S. at 687, 689, 693–94, 104 S. Ct. at 2064, 2065, 2068. "Reasonable probability" is not a stringent standard. It means only a "probability sufficient to undermine confidence in the outcome." King, 748 F.2d at 1463 (quotation marks omitted). It is less than a preponderance of the evidence. Agan v. Singletary, 12 F.3d 1012, 1018 (11th Cir. 1994). Because the state appellate

court ruled that Mr. McKiver failed to establish "either prong under Strickland," I examine each in turn.

Mr. Lamberti's failure to interview the witnesses Mr. McKiver identified was deficient because it could not have been sound trial strategy. At the evidentiary hearing before the state trial court, Mr. Lamberti said he did not seek out these witnesses because Mr. McKiver told him he had ingested the whole bottle of pills and because he did not think the witnesses would admit, on the stand, to illegally purchasing opioids. But we know that Mr. McKiver clarified that when he referred to a full bottle of pills, he was talking about drugs other than the oxycodone that he had taken from Mr. Sneed's home. And Mr. McKiver always maintained there were very few pills remaining in the oxycodone bottle when he took them. Mr. Lamberti admitted Mr. McKiver told him he did not know exactly how many pills were in the bottle at the time, and this fact is also reflected in Lamberti's notes. Thus, even if we credit Mr. Lamberti's statement that Mr. McKiver said he ingested the whole bottle, this should not have ended Lamberti's inquiry.

Florida does not appear to dispute that Mr. Lamberti's decision not to interview the witnesses was deficient. Instead, the state argues that Mr. McKiver failed to establish, before the state court, that the witnesses existed and that they were willing and available to testify during his criminal trial. By this argument,

Florida appears to question Mr. McKiver's credibility. However, the state court found to the contrary that Mr. McKiver was credible.[4] In finding that the witnesses Mr. McKiver identified "would have challenged the testimony of State's witnesses and provided reasonable doubt as to the quantity for trafficking," the state trial court credited Mr. McKiver's testimony that these witnesses existed and that they were available and willing to testify at the time of the trial. This finding appears to have been adopted by the state appellate court. Florida's only argument as to why McKiver's testimony should not be credited on this point is that it was "self-serving." But this is far from the "clear and convincing" evidence necessary to overcome the state court's factual finding. See 28 U.S.C. § 2254(e)(1).[5]

The majority opinion takes the position that we may not look to the decision made by the state postconviction court who heard Mr. McKiver's postconviction

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[4] The majority says the state postconviction court relied on Mr. McKiver's trial counsel's testimony, and not McKiver's testimony, in finding that a new trial was warranted based on deficient performance by trial counsel. Maj. Op. at 18. Not so. The state postconviction court expressly recounted Mr. McKiver's testimony that he had discussed the case with his trial counsel and told him that Mr. Sneed sold pills on the day of the incident, as well as advising him of the names of witnesses who could demonstrate that Sneed sold drugs. The state court's conclusion that the trial counsel's performance was deficient, because "witnesses may have provided" a "reasonable defense to the charges [by] refut[ing] the amount alleged by the State," necessarily relies on this testimony from Mr. McKiver. The majority also says the state postconviction court made no credibility finding. Maj. Op. at 18. But it is difficult to imagine how or why the postconviction court found in Mr. McKiver's favor if it did not credit his testimony.

[5] Of course, the fact that Mr. McKiver was eventually able to provide affidavits from the witnesses he identified only bolsters the state trial court's finding that Mr. McKiver's testimony was credible.

claims. In support of this position, the majority relies on cases in which this Court vacated its own panel decision or recognized generally that a vacation of a judgment by a federal appellate court divests the lower court's earlier judgment of its binding effect. Maj. Op. at 17.

The majority's reliance on those cases doesn't work here, however, because we look to Florida law to determine what (if any) aspects of a Florida state court decision survives state appellate review. This question is not simply resolved by asking whether the state postconviction court's judgment was vacated, but instead, on what grounds. And, under Florida law, a postconviction court's factual findings are deferred to as long as they "are supported by competent, substantial evidence," whereas legal conclusions are reviewed de novo. Brown v. State, 304 So.3d 243, 257 (Fla. 2020). I do not look to the postconviction court's legal conclusions here. I look only to its findings of fact. Given that this state appellate court offered no analysis of the postconviction court's factual findings, I don't think it proper to presume that it had "substitute[d] its judgment for that of the trial court on questions of fact," especially in the face of conflicting testimony. Lowe v. State, 2 So. 3d. 21, 29–30 (Fla. 2008) (quotation marks omitted).

Notably, the Florida Supreme Court has made clear that it is especially reluctant to displace the postconviction court's findings as to "the credibility of the

witnesses as well as the weight to be given the evidence." Id. at 30 (quotation marks omitted).

Furthermore, Mr. McKiver was prejudiced by Mr. Lamberti's deficiency because testimony regarding Mr. Sneed's illegal drug activity would have cast doubt on the only factual dispute at trial. That dispute, of course, goes to the number of pills in the bottle at the time Mr. McKiver stole it. The only evidence that there was a sufficient number of pills in the bottle to support Mr. McKiver's trafficking charge was Mr. Sneed's testimony that only six to eight pills had been removed from the bottle. Testimony from witnesses (saying they had bought oxycodone pills from Mr. Sneed in the past and that they had participated in or witnessed drug transactions with Sneed in the time between when he filled his prescription and when Mr. McKiver stole the bottle) would have cast doubt on Florida's contention that the bottle still had at least 53 pills in it by the time McKiver took it.

The majority reasons that the state appellate court's ruling that Mr. McKiver was not prejudiced could not be unreasonable. This is so, according to the majority, because even if all that testimony had been admitted, and even if the jury believed that Mr. Sneed did sell a number of pills from that bottle, the jury could still believe that at least 53 pills remained. Maj. Op. at 16. But this argument improperly places the burden on Mr. McKiver to prove that he did not meet the

trafficking amount. It is Florida's burden to prove, beyond a reasonable doubt, that Mr. McKiver took at least 53 pills and not one fewer. See In re Winship, 397 U.S. 358, 363, 90 S. Ct. 1068, 1072 (1970) (the government must prove "beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged") (quotation marks omitted). And the prosecution sought to carry its burden here based entirely on circumstantial evidence. Based on the limited evidence heard by the jury, it had no evidentiary basis for believing that Mr. Sneed would have done anything with the pills but take them himself. Had the jury been presented with evidence that Mr. Sneed was a drug dealer and that he sold pills from the very bottle Mr. McKiver stole, I think they would be hard pressed to find, beyond a reasonable doubt, that any specific number of pills were left in the bottle.

Once Mr. McKiver introduced evidence that several people knew some unspecified number of pills had been taken from the bottle, he would have established that no one knew for certain how many remained. It was Florida's burden to show it was all but certain that Mr. McKiver took at least 53 pills. Had the witnesses Mr. McKiver identified testified, I am not convinced Florida could have carried its burden. I certainly think that Mr. McKiver has raised a "reasonable . . . probability sufficient to undermine confidence in the outcome." King, 748 F.2d at 1463 (quotation marks omitted). Therefore, the state appellate court's decision improperly placed the burden on Mr. McKiver to prove he was

innocent. This was an objectively unreasonable application of Strickland, which entitles Mr. McKiver to relief.

This record demonstrates that Mr. McKiver was deprived of his right to effective assistance counsel by Mr. Lamberti's deficient performance. On this record, the Florida appellate court's decision to the contrary was objectively unreasonable.

I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

David J. Smith
Clerk of Court

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March 25, 2021

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 18-14857-HH
Case Style: Luther McKiver v. Secretary, Florida Department, et al
District Court Docket No: 5:15-cv-00354-WTH-PRL

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing, are available at www.ca11.uscourts.gov. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Christopher Bergquist, HH at 404-335-6169.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Djuanna H. Clark
Phone #: 404-335-6151

OPIN-1 Ntc of Issuance of Opinion

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

David J. Smith
Clerk of Court

For rules and forms visit
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May 26, 2021

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 18-14857-HH
Case Style: Luther McKiver v. Secretary, Florida Department, et al
District Court Docket No: 5:15-cv-00354-WTH-PRL

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

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

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Christopher Bergquist, HH/lt
Phone #: 404-335-6169

REHG-1 Ltr Order Petition Rehearing

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-14857-HH

LUTHER MCKIVER,

Petitioner - Appellant,

versus

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

Respondents - Appellees.

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

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: MARTIN, LUCK, and BRASHER, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

ORD-46

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

LUTHER MCKIVER,

Petitioner,

v. **Case No. 5:15-cv-354-Oc-10PRL**

SECRETARY, DEPT. OF CORRECTIONS, et al.,

Respondents.

ORDER

Petitioner, a state prisoner, initiated this case by filing a *pro se* Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (Doc. 1.) Respondents filed a Response and appendices, seeking denial of the Petition. (Docs. 8, 10, 11.) Petitioner, through counsel, filed a Reply and expanded record. (Docs. 43, 46.) Because the Court may resolve the Petition on the basis of the record, an evidentiary hearing is not warranted. See Habeas Rule 8(a). The Petition is denied.

Procedural Background

In October 2009, Petitioner pleaded guilty to two counts of burglary and one count of grand theft; he proceeded to trial on one count of trafficking in oxycodone. (Respondents' Appendix, Doc. 10, Exh. A, pp. 59-60.) (hereafter "Exh.") A Citrus County jury found Petitioner guilty of trafficking more than 28 grams but less than

30 kilograms of oxycodone. (Id.) Petitioner was sentenced on November 23, 2009, to a 25-year mandatory minimum term of imprisonment for trafficking oxycodone. He received a concurrent 91.2 month prison sentence for the charges to which he pleaded guilty. (Exh. A, pp. 82-106.)

The offenses occurred in December 2008, when Petitioner's neighbor reported that someone had broken into his home and had stolen bottles of prescription pills. One of the bottles contained approximately 112-114 oxycodone pills, having been filled with 120 pills approximately two days prior. (Exhs. A, B.) The pills were never recovered, but Petitioner admitted to taking the bottle of pills (although he did not know how many were in the bottle). (Id.)

Petitioner's conviction and sentence were affirmed by the Fifth District Court of Appeal, per curiam without written opinion, on October 19, 2010. (Exh. E); McKiver v. State, 49 So.3d 765 (Fla. 5th DCA 2010).

On September 12, 2011, Petitioner filed a motion to correct illegal sentence pursuant to Rule 3.800 of the Florida Rules of Criminal Procedure. (Exh. I.) He challenged the constitutionality of the Florida drug statute, Fla. Stat. § 893.135. (Id.) The motion was summarily denied and *per curiam* affirmed without written opinion by the Fifth District Court of Appeal. (Exhs. J, N.)

On March 20, 2012, Petitioner filed a *pro se* motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. (Exh. R, pp. 130-50.) Of Petitioner's six grounds for relief, the trial court summarily denied

Grounds 1 and 4 but held an evidentiary hearing on the remaining grounds on January 14, 2013. (Exh. R, pp. 1-129.) Witnesses at the hearing were trial counsel, Petitioner, and the Assistant State Attorney who prosecuted. On January 23, 2013, the trial court granted Petitioner's Rule 3.850 motion as to Grounds 2 and 3, vacating Petitioner's judgment and sentence and ordering a new trial.[1] (Exh. R, pp. 353-54.) Grounds 2 and 3 centered on trial counsel's failure to investigate or otherwise present evidence that the victim engaged in illegal drug activities by selling and trading his prescription pills.

The State appealed, and on December 6, 2013, the Fifth District Court of Appeal reversed the trial court's order and reinstated Petitioner's judgment and sentence, finding that Petitioner had failed to meet his burden of establishing either deficient performance or prejudice under Strickland. (Exh. U); State v. McKiver, 128 So.3d 197 (Fla. 5th DCA 2013).

Petitioner moved for a belated appeal of the denial of his Rule 3.850 motion, which the Fifth District Court of Appeal granted on September 19, 2014, directing that its order "be treated as the notice of appeal from the trial court's January 8, 2013 order denying postconviction relief." (Exh. W.) In his initial brief in this belated appeal, he argued that his claims regarding misadvice as to the plea offer and cumulative error, which were found moot in the trial court's January 23, 2013

[1] The trial court found Grounds 5 (misadvice regarding plea offer) and 6 (cumulative error) moot based on its grant of relief as to Grounds 2 and 3.

order, should be remanded for a decision on the merits. (Exh. X.) The Fifth District Court of Appeal affirmed, *per curiam* and without written opinion, on December 2, 2014. (Exh. Y); McKiver v. State, 155 So.3d 364 (Fla. 5th DCA 2014).

Petitioner then filed a second Rule 3.800 motion on January 8, 2015, arguing again that Fla. Stat. § 893.135 was facially unconstitutional; and that the costs for the prosecution and defense were illegally imposed. (Exh. EE.) The trial court granted as to the costs issues, and an amended costs order was entered April 7, 2015. (Exh. KK.)

Petitioner filed the present, timely, § 2254 petition on July 14, 2015, raising 12 claims. (Doc. 1.) Respondents contend that Ground 2 is unexhausted, procedurally barred, and precluded from federal review; and that the remaining grounds, though exhausted, are without merit. (Doc. 8.) Through counsel, Petitioner has filed a Reply. (Doc. 43.)

Exhaustion and Procedural Default

There are two prerequisites to federal habeas review: (1) "the applicant must have fairly apprised the highest court of his state with the appropriate jurisdiction of the federal rights which allegedly were violated," and (2) "the applicant must have presented his claims in state court in a procedurally correct manner."[2] This means that "a state prisoner seeking federal habeas corpus relief, who fails to raise

[2] Upshaw v. Singletary, 70 F.3d 576, 578-79 (11th Cir. 1995) (citations omitted).

his federal constitution[al] claim in state court, or who attempts to raise it in a manner not permitted by state procedural rules is barred from pursuing the same claim in federal court absent a showing of cause for and actual prejudice from the default."[3]

Ineffective Assistance of Counsel

State court rulings on ineffective assistance of counsel claims are governed by Strickland v. Washington, 466 U.S. 668 (1984). "Ineffective assistance under Strickland is deficient performance by counsel resulting in prejudice . . . with performance being measured against an 'objective standard of reasonableness' under 'prevailing professional norms.'" Rompilla v. Beard, 545 U.S. 374, 380 (2005) (quoting Strickland, 466 U.S. at 688) (internal citations omitted).

Discussion

A. Exhaustion

Respondents argue, and Petitioner concedes, that Ground 2 was not exhausted in the state courts. (Docs. 8, 43.) In Ground 2, Petitioner argues that trial counsel was constitutionally ineffective for failing to investigate the criminal history of the victim; had trial counsel done so, he would have learned that the victim had prior felony convictions, including for the sale and delivery of cannabis. (Doc. 1, pp. 14-16, appendix.) Petitioner argues that the only evidence supporting

[3] Alderman v. Zant, 22 F.3d 1541, 1549 (11th Cir.) cert. denied, 513 U.S. 1061 (1994) (citing Wainwright v. Sykes, 433 U.S. 72, 87 (1977)).

the quantity of pills stolen was the victim's testimony, and this criminal background information would have permitted him to attack the victim's credibility. (Id.)

In Martinez v. Ryan, 566 U.S. 1 (2012), the Supreme Court held that "[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." Martinez, 566 U.S. at 17. Florida's Rule 3.850 proceedings constitute initial-review collateral proceedings.

Petitioner filed his Rule 3.850 motion *pro se* but was later appointed counsel to represent him at the evidentiary hearing. Petitioner alleges that post-conviction counsel filed a "written demand . . . for the State to provide criminal records for the alleged victim" but did not inform the Petitioner of that demand or further present any evidence regarding the victim's criminal history. (Doc. 43, pp. 2-3; Exh. NN, pp. 7-10.) Petitioner did not learn of the victim's criminal history until years later, in 2015, when a friend performed an online background check on the victim and provided a copy to Petitioner. (Doc. 1, Appendix.)

Because Petitioner filed his motion *pro* se and was later represented by counsel, Martinez applies. Ineffective assistance of counsel in Petitioner's Rule 3.850 proceedings may be raised as cause and prejudice excusing the procedural default. The issue is, then, whether the claim is "substantial" so as to merit

consideration under Martinez. To show that his claim is "substantial" (i.e., "some merit" as explained in Martinez), Petitioner must also demonstrate prejudice within the meaning of Strickland. Whether Petitioner's Ground 2 is "substantial" so as to invoke the Martinez exception to the procedural default doctrine is discussed in detail below.

B. Petitioner's Claims

Grounds 1, 2, 3: Failure to investigate and call witnesses to testify about the victim's alleged drug activity; failure to investigate the victim's criminal history

In Grounds 1 and 3, Petitioner alleges that trial counsel was constitutionally deficient for failing to interview or call to testify at trial witnesses who would testify that near the time of the underlying crime, they witnessed the victim participate in drug activity at his home. (Doc. 1.)

The only disputed issue at trial was the quantity of pills Petitioner took; his conviction for trafficking (more than 28 grams) carried a 25-year mandatory minimum prison sentence. The stolen pills were never recovered, and Petitioner testified that he was high at the time of the burglary and could not recall how many pills were in the bottle. The victim testified that there would have been approximately 112-114 pills in the bottle when it was stolen on or around December 7, 2008. The pharmacist for the victim testified that he filled a prescription for 120 oxycodone pills for the victim on December 5, 2008. The pharmacist also testified (and the parties stipulated) that each oxycodone tablet

weighed .53 grams. One-hundred pills would weigh 53 grams; and 52.8 pills would equal 28 grams (the minimum to support a trafficking conviction). (Exh. B, pp. 53-60; 79-87.)

In his *pro se* Rule 3.850 motion, Petitioner argued that trial counsel could have called available witnesses Rodney Jones, Corey Denny, and Tracy Gates, who could have testified that they had personal knowledge of the victims' illegal drug trading and selling. Further, these witnesses were available and would have testified that they had witnessed the victim's wife surreptitiously take the victim's oxycodone pills on various occasions, and that she had unlimited access to the prescription bottles. Petitioner also argued that trial counsel should have interviewed and called the victim's wife to testify. (Exh. R, pp. 166-168.) No evidence was presented directly from these potential witnesses at the evidentiary hearing—Petitioner's counsel in the Reply asserts that Petitioner's testimony regarding the witnesses was unrefuted. (Doc. 43, p. 10.) Petitioner has attached affidavits from some of these potential witnesses to his petition (Doc. 1, Exh. D, E, F, dated December 19, 2014) and submitted updated affidavits from 2015 directly to the Court. (Docs. 20-22.)

In granting Grounds 1 and 2[4] on post-conviction review, the trial court wrote:

> After hearing testimony and argument of the parties, it is the finding of this Court that trial counsel's acts fell outside the broad range of reasonably competent performance under prevailing professional standards. Mr. Lamberti [trial counsel] testified that although

[4] These were presented as Grounds 2 and 3 to the trial court.

> Defendant provided the names of witnesses and their expected testimony he did not investigate or interview the witnesses or seek continuance to investigate. Mr. Lamberti's reasoning for not investigating was that it would have been pointless as Defendant had told him the bottle was almost full. However, the Defendant also advised Mr. Lamberti that he was "wasted" and did not know how many pills were in the oxycodone bottle as there were 3 different prescriptions stolen. This decision cannot be attributed to strategic decision. Under the circumstances the amount of pills contained in the bottle was not determined because the bottle was not recovered. Circumstantial evidence was presented through testimony from the victim and the pharmacist that filled the prescription. Therefore, a reasonable defense to the charges was to refute the amount alleged by the State, which the witnesses may have provided.
>
> Moreover, Defendant has demonstrated that he was prejudiced by the deficiency. The narrow issue at trial was the issue of quantity of drugs contained in the bottle taken by Defendant. The testimony at trial was provided by the alleged victim and pharmacist with a gap of one or two days wherein neither witness observed the contents of the bottle at the time it was stolen. Therefore, neither witness could confirm the exact contents of the bottle. The witnesses contemplated by Defendant would have challenged the testimony of State's witnesses and provided reasonable doubt as to the quantity for trafficking. There is a reasonable probability that the result of Defendant's trial would have been different but for counsel's failure to bring this information to the jury's attention. Accordingly, this Court finds Defendant is entitled to a new trial based on trial counsel's deficient performance.

(Exh. R, pp. 353-54.) In reversing the trial court's ruling, the Fifth District Court of Appeal did not comment on any specific factual or credibility findings of the trial court, but concluded that Petitioner "failed to meet his burden of establishing either prong under Strickland . . ." (Exh. U.)

Petitioner's Ground 2, asserting that trial counsel constitutionally ineffective for failing to investigate the victim's criminal background, which included felony drug convictions, was unexhausted but may be subject to review under Martinez.

Taken together, Grounds 1-3 of the present petition go to the failure of trial counsel to attack the credibility of the victim's testimony, and since this testimony "was the sole source of proof that a trafficking amount of oxycodone was taken and the only evidence that would support a 25-year minimum mandatory sentence" or to adequately present a defense to the quantity charged. (Doc. 43, p. 4.) To have prevailed on the merits of any of these three claims below, Petitioner must have shown that (1) trial counsel was deficient, and (2) that but for counsel's deficient performance, there is a reasonable probability that the jury would have found that the quantity of oxycodone involved less than 28 grams. Strickland, 466 U.S. at 694 ("The 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.")

Petitioner has failed to demonstrate that the state appellate court's rejection of these claims was contrary to, or an unreasonable application of Strickland, or an unreasonable determination of the facts in light of the evidence adduced in state court.[5] The jury could have believed beyond a reasonable doubt that Petitioner took anywhere from 53 pills (the minimum to support a trafficking conviction) to 114 pills (the maximum number of pills that would have been in the bottle based

[5] As to Ground 2, Petitioner has failed to demonstrate that the Martinez exception to the procedural default doctrine applies, because he has not shown that this ground is "substantial"

on the victim's testimony) and still rendered a guilty verdict as to trafficking oxycodone. Stated another way, even if the jury believed 61 of the oxycodone pills were ingested, stolen by someone else, sold, or traded prior to Petitioner taking the bottle, the trafficking verdict would still stand. Accordingly, it would be purely speculative to conclude that but for the introduction of evidence that the victim engaged in illegal drug activity—especially where the specific number of pills removed prior to the burglary was not contemplated in that testimony—the jury would have concluded that Petitioner took less than 28 grams of oxycodone. Petitioner's assertions are simply insufficient to undermine confidence in the outcome of his trial. Grounds 1 and 3 are denied. Ground 2 is unexhausted and not subject to the Martinez procedural default exception; even if it were, it is without merit.

Ground 4: Failure to object to admission of confession

Petitioner alleges that trial counsel was constitutionally deficient for failing to object to the admission of his confession into evidence, because the state failed to establish *corpus delecti*[6] prior to admitting the confession. (Doc. 1, p. 21.) Petitioner confessed to Detective David Gater that he was high on Xanax and broke into the victim's residence and took the prescription bottles and later

[6] Traditional application of the corpus delecti rule requires the state to "'at least show the existence of each element of the crime' to authorize the introduction of a defendants' admission or confession." State v. Colorado, 890 So. 2d 468, 470 (Fla. 2d DCA 2004).

ingested the pills. In summarily rejecting this claim on post-conviction review, the trial court wrote:

> In the instant case, trial counsel had no basis to object to admission of Defendant's statements. The State provided sufficient predicate to introduce the statements. Detective David Gater testified that Defendant was advised of his Miranda rights prior to questioning and he knowingly waived his rights. Additionally, Defendant stipulated to a certain factual basis in his plea to counts II, III and IV thus trial counsel had no basis to object.

(Exh. R, pp. 314-315) (internal citations omitted). As Respondents note, at the time Detective Gater testified as to Petitioner's confession, the jury had already heard testimony from the victim that he had filled his prescription, left the pills at the house, someone broke in his home, and the pills were missing. (Doc. 8, p. 26.)

Petitioner has failed to demonstrate that the state court's rejection of this claim was contrary to, or an unreasonable application of Strickland, or an unreasonable determination of the facts in light of the evidence adduced in state court. Ground 4 is without merit.

Ground 5: Stipulation to three of four elements of trafficking

Petitioner alleges ineffective assistance of counsel for stipulating to three of the four elements of his trafficking offense.[7] (Doc. 1, pp. 26-27.) In rejecting this claim on post-conviction review, the trial court noted that "Defendant stipulated to

[7] In Petitioner's case, the trafficking offense required the following elements of proof: (1) Petitioner knowingly possessed a certain substance; (2) the substance was oxycodone or a mixture containing oxycodone; (3) the oxycodone or mixture containing oxycodone was 28 grams or more; and, (4) Petitioner knew that the substance was oxycodone or a mixture containing oxycodone. Fla. Stat. § 893.135(1)(c) (2008); Exh. A, pp. 64-65.

a certain factual basis in his plea to [the burglary and grand theft charges] thus trial counsel had no basis to object." (Exh. R, pp. 314-15.)

Prior to trial on the trafficking charge, Petitioner had already (1) pleaded guilty to burglary and grand theft, (2) and confessed to law enforcement that he had broken into the victim's residence, took prescription bottles, and ingested pills. The victim and his pharmacist also testified as to the type and quantity of the prescriptions. Even assuming Petitioner could demonstrate deficient performance by his trial counsel, he cannot show prejudice where there was substantial evidence of the elements to which trial counsel stipulated.

Petitioner has failed to demonstrate that the state court's rejection of this claim was contrary to, or an unreasonable application of Strickland, or an unreasonable determination of the facts in light of the evidence adduced in state court. Ground 5 is without merit.

Ground 6: Failure to request jury instruction on use of stipulation evidence

In Ground 6, Petitioner alleges that trial counsel was constitutionally deficient for "failing to move the court to instruct the jury if it had reasonable doubt regarding the stipulated elements, it must find the Defendant not guilty." (Doc. 1, p. 29.) In rejecting this claim on post-conviction review, the trial court found that Petitioner "has failed to demonstrate the jury instructions contained errors and that the 'stipulation instructions' would have led to a different outcome." (Exh. R, p. 315.)

Petitioner does not provide any source of authority for his proposition that such an instruction would have been appropriate; the current Florida Standard Jury Instruction in Criminal Cases regarding stipulations does not recite the standard he proposes.[8] As discussed above in Ground 5, Petitioner cannot show that he was prejudiced by either the stipulations or the failure to request a special jury instruction.

Petitioner has failed to demonstrate that the state court's rejection of this claim was contrary to, or an unreasonable application of Strickland, or an unreasonable determination of the facts in light of the evidence adduced in state court. Ground 6 is without merit.

Ground 7: Misadvice regarding plea offer

Petitioner alleges that trial counsel was constitutionally deficient for advising him to reject a 7-year plea offer by the State. (Doc. 1, p. 32.) Petitioner argues that at the time of the 7-year offer, trial counsel advised Petitioner "that the victim's illegal drug sells could be a mitigating factor at sentencing. This would result in a reductions [sic] of the sentence—something less than 7 years. Based solely on [trial counsel's] advice, McKiver rejected the state's plea offer." (Id.) The 7-year plea offer was preceded by a 10-year offer and followed by a 15-year offer, both

[8] Florida Standard Jury Instructions in Criminal Cases, 2.3 – Stipulations – was not adopted until 2013, after Petitioner's trial, but is still informative: "When [lawyers] [parties] agree that certain facts are true, that is called a stipulation of fact. You must accept stipulated facts as having been proven. However, the significance of these facts, as with all facts, is for you to decide. In this case, the stipulated fact[s] that you must accept as true [is] [are] [insert stipulation[s]]."

of which Petitioner also rejected. (Id.) Trial counsel testified as to this claim during the evidentiary hearing in Petitioner's Rule 3.850 proceedings. Because the trial court granted Rule 3.850 relief on other grounds, it found this claim moot below. The trial court did summarize the testimony in its order granting relief:

> Finally, Mr. Lamberti was re-called to testify as to discussions regarding plea offers. Mr. Lamberti testified that he discussed the plea offer and substantial assistance agreement with the State however based on Defendant's lack of truthfulness in his prior case the State rejected a special assistance agreement. Moreover, Mr. Lamberti strongly advised Defendant to accept each offer due to the impact of minimum mandatory sentence if he is convicted after trial. Mr. Lamberti further testified that Defendant refused each offer.

(Exh. R, p. 352.)

Petitioner was granted a belated appeal in his Rule 3.850 proceedings, but the Fifth District Court of Appeal's order characterized it as a belated appeal from the trial court's January 8, 2013 summary denial of Grounds 1 (failure to object to admission of confession) and 4 (double jeopardy). (Exh. W.) Although Petitioner argued that his claim regarding the plea offer should be remanded and heard on the merits, the Fifth District Court of Appeal's decision was silent on this issue and therefore it appears that this claim was not heard on the merits by the state court. (Exh. X.) Respondents agree. (Doc. 8, p. 30.)

Because this claim was not adjudicated on the merits by the state court, the deference required by 28 U.S.C. § 2254(d) does not apply. "When the evidence leads very clearly to the conclusion that a federal claim was inadvertently overlooked in state court, § 2254(d) entitles the prisoner to an unencumbered

opportunity to make his case before a federal judge." Johnson v. Williams, 568 U.S. 289, 303 (2013). Where § 2254(d) does not apply, the district court must decide the issue *de novo*. Romine v. Head, 253 F.3d 1349, 1365 (11th Cir. 2001); Berghuis v. Thompkins, 560 U.S. 370, 390 (2010) ("Courts can, however, deny writs of habeas corpus under § 2254 by engaging in *de novo* review when it is unclear whether AEDPA deference applies, because a habeas petitioner will not be entitled to a writ of habeas corpus if his or her claim is rejected on *de novo* review.") Here, on *de novo* review, Petitioner has failed to establish a constitutional violation.

At the January 2013 evidentiary hearing in state court, Assistant State Attorney Julia Metts testified that she made three plea offers to Petitioner: 7 years, 10 years, and 15 years, in that order. She testified that she "never" contemplated a substantial assistance agreement with Petitioner "[b]ecause he lies," gave false testimony in another criminal case, and was prosecuted for perjury. A substantial assistance agreement was never an option for Petitioner because Ms. Metts "actually watched [Petitioner] testify falsely in the other trial where he was charged with perjury." (Exh. R, pp. 79-82.)

Trial counsel Mr. Lamberti also testified at the evidentiary hearing regarding the plea offers made to Petitioner. Mr. Lamberti testified that he approached Ms. Metts regarding what Petitioner could do to lower his sentence, and although substantial assistance is often a possibility, Ms. Metts declined. Mr. Lamberti

testified that he and Petitioner "had a number of discussions about the plea offers in the cases" but that Petitioner "always believed the State was bluffing in regard to the [minimum mandatory] situation." Mr. Lamberti further testified that he "strongly" advised Petitioner to accept each offer because Petitioner "was looking at a 25-year minimum mandatory in a trafficking count, and anything better than a 25-year minimum mandatory, in my opinion, was a good result." Petitioner understood if he went to trial, he faced a minimum 25-year sentence, according to Mr. Lamberti. Trial counsel could not recall if he advised Petitioner, when conveying the 7-year offer, that Petitioner's testimony against the victim could be a mitigating factor at sentencing. Mr. Lamberti testified that towards the end of the trial, Petitioner told him he wanted to take the 7-year plea offer. (Exh. R, pp. 85-98.)

Petitioner also testified at the evidentiary hearing, stating that he "rejected the seven-year plea because [he] thought that giving information on Mr. Sneed's drug – drug trading and selling, I could get a better offer." Petitioner stated that he had a conversation with trial counsel at the jail and Mr. Lamberti told him that if he did lose at trial, then the information on the victim's alleged illegal drug activities would be a mitigating factor at sentencing. Later, Mr. Lamberti correctly told Petitioner that actually, if he lost at trial, he would get the 25-year mandatory minimum. (Exh. R, p. 101.) Petitioner testified that the offers came in the order of 10 years, 7 years, and 15 years.

Assuming, *arguendo*, that trial counsel was deficient, Petitioner must still demonstrate that the Strickland prejudice prong. In Lafler v. Cooper, 566 U.S. 156 (2012), the Supreme Court "clarified that the Sixth Amendment right to effective counsel extends specifically 'to the negotiation and consideration of plea offers that lapse or are rejected.'" Osley v. United States, 751 F.3d 1214 (11th Cir. 2014) (quoting In re Perez, 682 F.3d 30, 932 (11th Cir. 2012) (per curiam)). In order to establish prejudice, the defendant must show a reasonable probability that but for counsel's ineffectiveness: (1) "the plea offer would have presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances)"; (2) "the court would have accepted its terms"; and (3) "the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." Lafler, 566 U.S. at 164

Petitioner has failed to satisfy the three-part test set forth in Lafler. First, Petitioner has failed to demonstrate that he would have accepted the plea offer. According to his account of the plea offer progression, he first turned down a 10-year plea offer (substantially less than the 25-year mandatory minimum); then turned down a 7-year offer based on trial counsel's alleged misadvice; and later turned down a 15-year offer. The final offer was made after trial counsel advised Petitioner that the 25-year mandatory minimum applied if he went to trial. It follows then, that he had reasons for rejecting both the 10 and 15-year offers independent

of any misadvice from trial counsel. Petitioner was also obviously aware that the State did not trust his testimony, since it was prosecuting him for perjury in another case. This is consistent with trial counsel's notes (admitted into evidence at the evidentiary hearing) which state that "[Petitioner] knows perjury how impacts case." (Doc. 46.) Petitioner has failed to establish a reasonable probability he would have accepted the 7-year offer since both before and after that offer, he refused to accept plea offers that proposed significantly lower sentences than the 25-year mandatory minimum. See Osley, 751 F.3d at 1223 (finding no Strickland prejudice where trial counsel failed to advise defendant at all of applicable mandatory minimum).

Nor has Petitioner met the remaining two prongs of the Lafler test. To find that he has met either would depend upon mere speculation as to whether the court would have accepted the plea or that Petitioner's sentence would have been less severe. See Missouri v. Frye, 566 U.S. 134, 148 (2012) ("a defendant has no right to be offered a plea, nor a federal right that the judge accept it.")

Petitioner has failed to show Strickland prejudice in connection with his claim that he rejected a favorable plea offer based on trial counsel's misadvice. Ground 7 is without merit.

Ground 8: Cumulative error

Petitioner alleges that the cumulative effect of trial counsel's errors resulted in constitutionally ineffective assistance of counsel. (Doc. 1, p. 35.) The state

post-conviction court ruled this ground moot when it granted relief on other grounds. (Exh. R.) And, as discussed *supra* in Ground 7, there was no adjudication on the merits by the state court as to this claim of cumulative error. Upon *de novo* review of the claim, Petitioner has failed to establish a constitutional violation.

The Eleventh Circuit Court of Appeals "address[es] claims of cumulative error by first considering the validity of each claim individually, and then examining any errors that we find in the aggregate and in light of the trial as whole to determine whether the appellant was afforded a fundamentally fair trial." Morris v. Sec'y, Dept. of Corr., 677 F.3d 1117, 1132 (11th Cir. 2012) (citing United States v. Calderon, 127 F.3d 1314, 1333 (11th Cir. 1997)). Where no individual claims of error have merit, a cumulative error argument is without merit. Id.

Petitioner has not demonstrated any of his trial counsel's alleged errors, considered alone, rose to the level of ineffective assistance. This ground is without merit.

Ground 9: Double jeopardy

Petitioner argues that his convictions for trafficking and grand theft violate the Double Jeopardy Clause because he received multiple punishments for one criminal act. (Doc. 1, pp. 37-38.) Petitioner raised this issue in his *pro se* brief on direct appeal, and the Fifth District Court of Appeal affirmed *per curiam* without written opinion. (Exhs. D, E.)

The state court's ruling is consistent with federal law. "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine where there are two offenses or only one, is whether each provision requires proof of a fact which the other does not . . . 'A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.'" Blockburger v. United States, 284 U.S. 299, 304 (1932) (internal citations and quotations omitted).

In Petitioner's case, the trafficking offense required the following elements of proof: (1) Petitioner knowingly possessed a certain substance; (2) the substance was oxycodone or a mixture containing oxycodone; (3) the oxycodone or mixture containing oxycodone was 28 grams or more; and, (4) Petitioner knew that the substance was oxycodone or a mixture containing oxycodone. Fla. Stat. § 893.135(1)(c) (2008); Exh. A, pp. 64-65.

Petitioner's grand theft offense, to which he pleaded guilty, required the following elements of proof: (1) Petitioner knowingly obtained or used the property of another; and (2) Petitioner did so with the intent to either temporarily or permanently deprive the victim of the property. Fla. Stat. § 812.014(1) (2008).

The offenses of trafficking in oxycodone and grand theft each requires proof of facts that the other does not, thereby satisfying the Blockburger test. Petitioner

has not shown that the state court's rejection of his double jeopardy argument was contrary to or an unreasonable application of clearly established federal law, or that it was based on an unreasonable determination of the facts. Petitioner is not entitled to relief on Ground 9.

Ground 10: Abuse of discretion in precluding evidence

Petitioner argues that the trial court abused its discretion when it granted a motion in limine by the State excluding testimony regarding the victim's selling and/or trading of prescription pills. (Doc. 1, pp. 38-39.) Petitioner states that he "attempted to proffer evidentiary facts/testimony proving that the victim's daily occurrences dealt with a constant flow of selling and trading pills." (Id. at p. 38.) Petitioner raised this issue of trial court error in his *pro se* initial brief on direct appeal. (Exh. D.)

A review of the trial transcript shows that the State moved for a motion in limine to prevent Petitioner from testifying regarding any alleged drug activity by the victim without any other evidence or corroboration. The exchange between Assistant United States Attorney Metts, trial counsel Lamberti, and the court was as follows:

> MS. METTS: Your Honor, I, of course cannot ask whether or not the defendant's going to testify and I wouldn't do that.
>
> But in listening to his jail calls with his parents, or his mom specifically in this situation, I would move that he not be allowed to address any issues with the victim selling his narcotics or trading them or anything like that.

There's been no evidence presented to my office that he has, in fact, in the past sold them or trades his pills or anything like that. And the victim in this case is Mr. Sneed.

Your Honor, it would be improper character evidence. It would be essentially to, you know, assassinate the victim's credibility by some prior bad act that they're not even proving up or anything like that.

And the only reason I say that, Your Honor, is because I've listened to hours upon hours of Mr. McKiver's conversations with his family. And I believe that if he took the stand that's something that he would want to testify to.

But it's definitely inadmissible. There's no evidence of it. There's no corroboration of it. It would be –

THE COURT: Without evidence and corroboration, I agree with you. And I don't what Mr. Lamberti may have or may say. But as far as her motion, Mr. Lamberti, you have any response to that?

MR. LAMBERTI: May I have a moment with my client, Judge?

THE COURT: Yes.

. . . .

MR. LAMBERTI: Judge, after consultation with my client, we don't – we have no objection to the State's motion in limine in regard to the victim –

THE COURT: All right.

MR. LAMBERTI: -- and whether or not he sells or transfers this pills to other people.

(Exh. B, pp. 11-13.)

The trial court did not deny Petitioner the opportunity to present evidence (other than his uncorroborated testimony) regarding the victim's alleged drug activity. Trial counsel never sought to present such evidence (a decision discussed in Grounds 1-3 above). Accordingly, the trial court did not abuse its discretion by declining to permit Petitioner to testify—with no other evidence to support his claims—that the victim sold and traded his prescription pills.

Petitioner has not shown that the state court's rejection of this claim was contrary to or an unreasonable application of clearly established federal law, or that it was based on an unreasonable determination of the facts. Petitioner is not entitled to relief on Ground 10.

Grounds 11, 12: Mandatory minimum sentence violated due process and the Eighth Amendment prohibition of cruel and unusual punishment

Petitioner alleges that the 25-year mandatory minimum sentence he received pursuant to Fla. Stat. § 893.135 violated his due process rights and Eighth Amendment right to be free from cruel and unusual punishment. (Docs. 39-40.) The state court rejected these arguments in Petitioner's second Rule 3.800 proceedings, and that decision was affirmed by the Fifth District Court of Appeal. (Exhs. FF, II.) The state court wrote:

> The Florida Supreme Court has found these statutes are not unconstitutional in State v. Benitez, 395 So. 2d 514 (Fla. 1981). The Florida Supreme Court address[ed] each of the issues raised by Defendant and held section 893.135 did not violate the . . . due process clause and prohibition against cruel and unusual punishment. Id. at 518-20.

(Exh. FF, p. 2.) The state court's ruling on this issue is consistent with federal law. Petitioner's jury found by special verdict that the quantity of the oxycodone was more than 28 grams but less than 30 kilograms. See Alleyne v. United States, 570 U.S. 99 (2013) ("facts that increase mandatory minimum sentences must be submitted to the jury"). Grounds 11 and 12 are without merit.

Conclusion

The Petition (Doc. 1) is **DENIED with prejudice**. The Clerk is directed to enter judgment accordingly. Any of Petitioner's allegations not specifically addressed in this Order have been found to be without merit. The Clerk is directed to terminate any pending motions, and close the file.

IT IS SO ORDERED.

DONE AND ORDERED at Ocala, Florida, this 22nd day of October, 2018.

UNITED STATES DISTRICT JUDGE

Copies: Petitioner, Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

LUTHER MCKIVER,

Petitioner,

v. **Case No: 5:15-cv-354-Oc-10PRL**

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

Respondents.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Pursuant to the Court's order entered on October 22, 2018, the petition is Denied with Prejudice.

ELIZABETH M. WARREN,
CLERK

s/L. Kirkland, Deputy Clerk

CIVIL APPEALS JURISDICTION CHECKLIST

1. **Appealable Orders:** Courts of Appeals have jurisdiction conferred and strictly limited by statute:

   (a) **Appeals from final orders pursuant to 28 U.S.C. Section 1291:** Only final orders and judgments of district courts, or final orders of bankruptcy courts which have been appealed to and fully resolved by a district court under 28 U.S.C. Section 158, generally are appealable. A final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Pitney Bowes, Inc. V. Mestre, 701 F.2d 1365, 1368 (11th Cir. 1983). A magistrate judge's report and recommendation is not final and appealable until judgment thereon is entered by a district court judge. 28 U.S.C. Section 636(c).

   (b) In cases involving multiple parties or multiple claims, a judgment as to fewer than all parties or all claims is not a final, appealable decision unless the district court has certified the judgment for immediate review under Fed.R.Civ.P. 54(b), Williams v. Bishop, 732 F.2d 885, 885-86 (11th Cir. 1984). A judgment which resolves all issues except matters, such as attorneys' fees and costs, that are collateral to the merits, is immediately appealable. Budinich v. Becton Dickinson & Co., 486 U.S. 196, 201, 108 S. Ct. 1717, 1721-22, 100 L.Ed.2d 178 (1988); LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 837 (11th Cir. 1998).

   (c) **Appeals pursuant to 28 U.S.C. Section 1292(a):** Appeals are permitted from orders "granting, continuing, modifying, refusing or dissolving injunctions or refusing to dissolve or modify injunctions..." and from "[i]nterlocutory decrees...determining the rights and liabilities of parties to admiralty cases in which appeals from final decrees are allowed." Interlocutory appeals from orders denying temporary restraining orders are not permitted.

   (d) **Appeals pursuant to 28 U.S.C. Section 1292(b) and Fed.R.App.P.5:** The certification specified in 28 U.S.C. Section 1292(b) must be obtained before a petition for permission to appeal is filed in the Court of Appeals. The district court's denial of a motion for certification is not itself appealable.

   (e) **Appeals pursuant to judicially created exceptions to the finality rule:** Limited exceptions are discussed in cases including, but not limited to: Cohen V. Beneficial Indus. Loan Corp., 337 U.S. 541,546,69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949); Atlantic Fed. Sav. & Loan Ass'n v. Blythe Eastman Paine Webber, Inc., 890 F. 2d 371, 376 (11th Cir. 1989); Gillespie v. United States Steel Corp., 379 U.S. 148, 157, 85 S. Ct. 308, 312, 13 L.Ed.2d 199 (1964).

2. **Time for Filing:** The timely filing of a notice of appeal is mandatory and jurisdictional. Rinaldo v. Corbett, 256 F.3d 1276, 1278 (11th Cir. 2001). In civil cases, Fed.R.App.P.4(a) and (c) set the following time limits:

   (a) **Fed.R.App.P. 4(a)(1):** A notice of appeal in compliance with the requirements set forth in Fed.R.App.P. 3 must be filed in the district court within 30 days after the entry of the order or judgment appealed from. However, if the United States or an officer or agency thereof is a party, the notice of appeal must be filed in the district court within 60 days after such entry. **THE NOTICE MUST BE RECEIVED AND FILED IN THE DISTRICT COURT NO LATER THAN THE LAST DAY OF THE APPEAL PERIOD - no additional days are provided for mailing.** Special filing provisions for inmates are discussed below.

   (b) **Fed.R.App.P. 4(a)(3):** "If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later."

   (c) **Fed.R.App.P.4(a)(4):** If any party makes a timely motion in the district court under the Federal Rules of Civil Procedure of a type specified in this rule, the time for appeal for all parties runs from the date of entry of the order disposing of the last such timely filed motion.

   (d) **Fed.R.App.P.4(a)(5) and 4(a)(6):** Under certain limited circumstances, the district court may extend the time to file a notice of appeal. Under Rule 4(a)(5), the time may be extended if a motion for an extension is filed within 30 days after expiration of the time otherwise provided to file a notice of appeal, upon a showing of excusable neglect or good cause. Under Rule 4(a)(6), the time may be extended if the district court finds upon motion that a party did not timely receive notice of the entry of the judgment or order, and that no party would be prejudiced by an extension.

   (e) **Fed.R.App.P.4(c):** If an inmate confined to an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a declaration in compliance with 28 U.S.C. Section 1746 or a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

3. **Format of the notice of appeal:** Form 1, Appendix of Forms to the Federal Rules of Appellate Procedure, is a suitable format. See also Fed.R.App.P. 3(c). A pro se notice of appeal must be signed by the appellant.

4. **Effect of a notice of appeal:** A district court loses jurisdiction (authority) to act after the filing of a timely notice of appeal, except for actions in aid of appellate jurisdiction or to rule on a timely motion of the type specified in Fed.R.App.P. 4(a)(4).