APPENDIX

A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-12451-G

TERRY DARNELL ANDERSON,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

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

Before: JORDAN and NEWSOM, Circuit Judges.

BY THE COURT:

Terry Anderson has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's February 12, 2021, order denying a certificate of appealability and leave to proceed in forma pauperis in his appeal from the denial of his 28 U.S.C. § 2254 habeas corpus petition. Upon review, Anderson's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

General Docket
United States Court of Appeals for the Eleventh Circuit

Court of Appeals Docket #: 20-12451 **Docketed:** 06/30/2020
Nature of Suit: 3530 Habeas Corpus **Termed:** 02/12/2021
Terry Anderson v. Secretary, Florida Department
Appeal From: Southern District of Florida
Fee Status: Fee Not Paid

Case Type Information:
1) Private Civil - Prisoner
2) State Habeas Corpus
3) -

Originating Court Information:
District: 113C-2 : 2:18-cv-14288-RLR
Civil Proceeding: Robin Lee Rosenberg, U.S. District Judge
Secondary Judge: Lisette Marie Reid, U.S. Magistrate Judge
Date Filed: 07/24/2018
Date NOA Filed:
06/30/2020

Prior Cases:
None

Current Cases:
None

TERRY DARNELL ANDERSON (State Prisoner: 284760) Appellant	Petitioner -	Terry Darnell Anderson [NTC Pro Se] Marion CI - Inmate Legal Mail PO BOX 158 LOWELL, FL 32663-0158
versus		
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS Appellee	Respondent -	Marc Hernandez Direct: 561-837-5016 [COR LD NTC Government] Attorney General's Office Firm: 561-837-5000 1515 N FLAGLER DR STE 900 WEST PALM BEACH, FL 33401 Ashley Moody [NTC Government] Attorney General's Office

Firm: 561-837-5000
1515 N FLAGLER DR STE 900
WEST PALM BEACH, FL 33401

TERRY DARNELL ANDERSON,

Petitioner - Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent - Appellee.

03/31/2021		ORDER: Motion for reconsideration of single judge's order filed by Appellant Terry Darnell Anderson is DENIED. [9331552-2] AJ and KCN (See attached order for complete text) [Entered: 03/31/2021 09:42 AM]
03/09/2021		*MOTION for reconsideration of single judge's order entered on 02/12/2021 filed by Appellant Terry Darnell Anderson. Opposition to Motion is Unknown [9331552-1]* [Entered: 03/12/2021 11:31 AM]
02/12/2021		ORDER: Motion for certificate of appealability construed from the notice of appeal filed by Appellant Terry Darnell Anderson is DENIED. [9189560-2]; Motion to proceed in forma pauperis filed by Appellant Terry Darnell Anderson is DENIED as MOOT. [9189547-2] AJ (See attached order for complete text) [Entered: 02/12/2021 07:06 PM]
09/21/2020		*Supplemental to Motion for certificate of appealability construed from the notice of appeal [9189560-2] filed by Appellant Terry Darnell Anderson.* [Entered: 10/02/2020 01:20 PM]
09/16/2020		*MOTION for certificate of appealability construed from the notice of appeal filed by Appellant Terry Darnell Anderson. Opposition to Motion is Unknown [9189560-1]* [Entered: 09/16/2020 03:11 PM]
09/14/2020		*MOTION to proceed IFP filed by Appellant Terry Darnell Anderson. Opposition to Motion is Unknown [9189547-1]* [Entered: 09/16/2020 03:03 PM]
08/21/2020		USDC order denying IFP as to Appellant Terry Darnell Anderson was filed on 08/04/2020. Docket Entry 32. [Entered: 08/21/2020 08:40 PM]
07/31/2020		Notice of receipt: Copy of Appellant's CIP as to Appellant Terry Darnell Anderson. [Entered: 08/04/2020 09:14 AM]
07/23/2020		Certificate of Interested Persons and Corporate Disclosure Statement filed by Attorney Marc Hernandez for Appellee Secretary, Florida Department of Corrections. On the same day the CIP is served, the party filing it must also complete the court's web-based stock ticker symbol certificate at the link here http://www.ca11.uscourts.gov/web-based-cip or on the court's website. See 11th

		Cir. R. 26.1-2(b). [20-12451] (ECF: Marc Hernandez) [Entered: 07/23/2020 11:05 AM]
07/22/2020		Paperless USDC order: Extension to File Application for Leave to Proceed in Forma Pauperis on Appeal is granted and IFP will be due August 13, 2020 as to Appellant Terry Darnell Anderson. Order was filed on 07/20/2020. Docket Entry 29. [Entered: 07/22/2020 03:48 PM]
07/20/2020		TRANSCRIPT INFORMATION form filed by Party Terry Darnell Anderson. No transcript is required for appeal purposes. [Entered: 07/22/2020 03:50 PM]
07/20/2020		NO ACTION WILL BE TAKEN The court is in receipt of your Request for leave to file a Motion for Certificate of Appealability. Upon receipt of the District Court's Order concerning whether this appeal will be allowed to proceed in forma pauperis, we will advise you regarding further requirements. Notice of receipt: Request for leave to file motion for Certificate of Appealability as to Appellant Terry Darnell Anderson. [Entered: 07/22/2020 03:27 PM]
07/20/2020		Notice of receipt: Copy of Appellant's motion for an extension of time to file application for leave to proceed in forma pauperis on appeal as to Appellant Terry Darnell Anderson. [Entered: 07/22/2020 03:21 PM]
07/20/2020		Appellant's Certificate of Interested Persons and Corporate Disclosure Statement filed by Appellant Terry Darnell Anderson. [Entered: 07/22/2020 03:09 PM]
07/15/2020		NOTICE OF CIP FILING DEFICIENCY to Terry Darnell Anderson. You are receiving this notice because you have not completed the Certificate of Interested Persons (CIP). Failure to comply with 11th Cir. Rules 26.1-1 through 26.1-4 may result in dismissal of the case or appeal under 11th Cir. R. 42-1(b), return of deficient documents without action, or other sanctions on counsel, the party, or both. [Entered: 07/15/2020 06:47 PM]
07/13/2020		APPEARANCE of Counsel Form filed by Marc B. Hernandez for Secretary, Florida Department of Corrections [20-12451] (ECF: Marc Hernandez) [Entered: 07/13/2020 09:21 AM]
06/30/2020		USDC order denying COA as to Appellant Terry Darnell Anderson was filed on 06/05/2020. Docket Entry 24. [Entered: 07/02/2020 09:29 AM]
06/30/2020		HABEAS APPEAL DOCKETED. Notice of appeal filed by Appellant Terry Darnell Anderson on 06/30/2020. Fee Status: Fee Not Paid. No hearings to be transcribed. [Entered: 07/02/2020 09:27 AM]

APPENDIX

B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-12451-G

TERRY DARNELL ANDERSON,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

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

ORDER:

Terry Anderson, a Florida prisoner serving a life sentence for cocaine trafficking and unlawful use of a two-way device, seeks a certificate of appealability ("COA") and *in forma pauperis* ("IFP") status to appeal the district court's denial of his *pro se* 28 U.S.C. § 2254 petition. To obtain a COA, Anderson must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). He satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation marks omitted). Anderson has failed to make the requisite showing.

In Claim 1, Anderson argued that the trial court violated his Sixth and Fourteenth Amendment rights by denying his motion for mistrial, where a state's witness referred to his prior uncharged acts, in violation of the court's ruling to exclude those references. Reasonable jurists

would not debate the district court's determination that this claim is procedurally defaulted. When Anderson raised this claim in state court, he did not mention the Sixth and Fourteenth Amendments, and consequently, has not raised his federal constitutional claim to the state court. *See McNair v. Campbell*, 416 F.3d 1291, 1302 (11th Cir. 2005). Anderson cannot now return to state court and exhaust this claim and has not shown cause and prejudice or actual innocence to excuse his default. *See Henderson v. Campbell*, 353 F.3d 880, 892 (11th Cir. 2003).

In Claim 2, Anderson argued that counsel failed to seek an expert to dispute the authenticity of the video recordings of the instant drug transaction. Reasonable jurists would not debate the state court's rejection of this claim under *Strickland v. Washington*, 466 U.S. 668 (1984). The record is clear that counsel did not seek an expert because he did not believe that the video recordings had been altered. Moreover, as the state court concluded, this claim is too bare and conclusory to warrant relief, as Anderson failed to articulate what parts of the video were inaccurate or how he believed that the videos had been altered.

In Claim 3, Anderson argued that counsel failed to impeach the confidential informant with inconsistent statements from his deposition. But Anderson's codefendant's counsel impeached the confidential informant with several inconsistencies in his deposition testimony, and there was no need for the jury to hear this testimony for a second time. As a result, reasonable jurists would not debate the state court's rejection of this claim under *Strickland*.

In Claims 4 and 5, Anderson argued that counsel failed to present an entrapment defense and gave an inadequate closing argument. Reasonable jurists would not debate the state court's rejection of this claim. Under *Strickland*, the state court reasonably concluded that the entrapment defense likely would have been unsuccessful. To rebut the entrapment defense, the state would have been able to introduce evidence of Anderson's prior criminal activities, including his prior

felony convictions and multiple attempts to set up a drug deal. *See Jones v. State*, 114 So.3d 1123, 1126 (Fla. Dist. Ct. App. 2013). With this evidence, the state could have shown that Anderson "readily availed himself of the opportunity to perpetrate the crime." *See id.* As to Claim 5, counsel did not argue an entrapment theory in closing argument, but focused on the confidential informant's credibility and motives to lie.

In Claim 6, Anderson argued that he received ineffective assistance based on the cumulative effect of trial and appellate counsels' errors. "Under the cumulative-error doctrine, a sufficient agglomeration of otherwise harmless or nonreversible errors can warrant reversal if their aggregate effect is to deprive the defendant of a fair trial." *Insignares v. Sec'y, Fla. Dept. of Corr.*, 755 F.3d 1273, 1288 (11th Cir. 2014). Because there are no errors to accumulate, Anderson cannot satisfy the COA standard on his cumulative-error claim. *See id.*

In Claim 7, Anderson argued that appellate counsel failed to challenge the trial court's "principal" instruction, as well as its failure to give an entrapment instruction and instruct the jury on the *mens rea* requirement for cocaine trafficking. Reasonable jurists would not debate the district court's denial of this claim because: (1) the "principal" instruction was supported by the evidence; (2) trial counsel did not request the entrapment instruction because it was not supported by the evidence; and (3) the trial court did, in fact, instruct the jury on the *mens rea* requirement.

In Claim 8, Anderson argued that appellate counsel failed to argue that he received ineffective assistance of trial counsel. Reasonable jurists would not debate the district court's denial of this claim because Anderson has not shown that trial counsel was ineffective.

In Claim 9, Anderson argued that appellate counsel failed to raise an issue regarding the use of unauthenticated transcripts as demonstrative aids. Reasonable jurists would not debate the district court's denial of this claim because the confidential informant vouched for the accuracy of

the transcripts based on his personal knowledge of the events depicted in the recordings, and the trial court: (1) listened to the recordings and compared them to the transcripts; (2) informed the jury that the recordings, rather than the transcripts, were the evidence that they were to consider; and (3) retrieved the copies of the transcripts after the playback of the recordings had ended.

In Claim 10, Anderson argued that appellate counsel failed to challenge improper prosecutorial remarks in closing argument and the incorrect verdict form. Reasonable jurists would not debate the district court's denial of this claim because the state's closing remarks were not improper and have been taken out of context. The verdict form also was not incorrect. The information charged Anderson with cocaine trafficking of 400 grams or more, which is a first-degree felony, and he was convicted and sentenced for that crime.

Accordingly, Anderson's COA motion is DENIED, and his IFP motion is DENIED AS MOOT.

/s/ Adalberto Jordan
UNITED STATES CIRCUIT JUDGE

APPENDIX

C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 2:18-CV-14288-ROSENBERG/REID

TERRY DARNELL ANDERSON,

Petitioner,

v.

SECRETARY, FLORIDA
DEPARTMENT OF CORRECTIONS,

Respondent.
_____/

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION, DENYING PETITION FOR A WRIT OF HABEAS CORPUS, AND CLOSING CASE

This matter is before the Court upon Petitioner's Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254. DE 7. The Court previously referred this case to Magistrate Judge Lisette M. Reid for a ruling on all pre-trial, non-dispositive matters and for a Report and Recommendation on all dispositive matters.

Judge Reid issued a Report and Recommendation in which she recommended that the Petition be denied. DE 17. Petitioner subsequently submitted Objections to the Report and Recommendation. DE 22.

The Court has conducted a *de novo* review of the Report and Recommendation, Petitioner's Objections thereto, and the entire record and is otherwise fully advised in the premises. The Court agrees with the Report and Recommendation and finds Judge Reid's recommendation to be well reasoned and correct.

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. Petitioner's Motion [DE 23] for leave to file Objections in excess of the page limitation is **GRANTED**. The Court accepts Petitioner's Objections filed at DE 22.
2. Petitioner's Objections [DE 22] are **OVERRULED**.
3. Magistrate Judge Reid's Report and Recommendation [DE 17] is **ADOPTED** as the Order of the Court.
4. Petitioner's Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254 [DE 7] is **DENIED**.
5. A Certificate of Appealability **SHALL NOT ISSUE**.
6. The Clerk of the Court is instructed to **CLOSE THIS CASE**. All deadlines are **TERMINATED**, all hearings are **CANCELLED**, and all motions are **DENIED AS MOOT**.

DONE AND ORDERED in Chambers, West Palm Beach, Florida, this 5th day of June, 2020.

ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Petitioner
Counsel of Record

APPENDIX

D

TERRY DARNELL ANDERSON, Petitioner, v. MARK S. INCH,1 Respondent.
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA
2020 U.S. Dist. LEXIS 48833
CASE NO. 18-CV-14288
March 18, 2020, Decided
March 18, 2020, Entered on Docket

Editorial Information: Prior History

Anderson v. State, 105 So. 3d 536, 2013 Fla. App. LEXIS 537 (Fla. Dist. Ct. App. 4th Dist., Jan. 16, 2013)

Terry Darnell Anderson, Plaintiff, Pro se, Lowell, FL.

For Florida Department of Corrections, Secretary, Defendant: Noticing 2254 SAG Broward and North,LEAD ATTORNEY; Marc Brandon Hernandez, LEAD ATTORNEY, Florida Office of the Attorney General, West Palm Beach, FL.

Judges: ROBIN L. ROSENBERG, UNITED STATES MAGISTRATE JUDGE.

Opinion

Opinion by: ROBIN L. ROSENBERG

REPORT OF MAGISTRATE JUDGE

I. Introduction

The Petitioner, Terry Anderson, has filed this *pro se* petition for writ of habeas corpus, pursuant to 28 U.S.C. 2254, challenging the constitutionality of his convictions for trafficking in cocaine and unlawful use of a two-way device, entered following a jury verdict in St. Lucie County Circuit Court, Case No. 562009CF001510A. For the reasons detailed below, the Petitioner is not entitled to habeas corpus relief.

This cause has been referred to the undersigned for consideration and report, pursuant to 28 U.S.C. 636(b)(1)(B), (C); and S.D. Fla. Admin. Order 2019-02. [ECF 2; 16].

For its consideration of the amended petition [ECF 7] and supporting memorandum of law [ECF 8], the court has the Respondent's response to this Court's order to show cause [ECF 11], along with its supporting appendix [ECF 12; 13], containing copies of relevant state court pleadings,{2020 U.S. Dist. LEXIS 2} including hearing and trial transcripts.

II. Claims

Construing the arguments liberally as afforded *pro se* litigants, pursuant to *Haines v. Kerner*, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972), the Petitioner raises the following grounds for relief:

1. The trial court erred by denying his motion for mistrial. [ECF 7, p. 5].

2. He received ineffective assistance of counsel when his lawyer failed to investigate and seek an expert to authenticate video of the drug transaction. [ECF 7, p. 7].

3. He received ineffective assistance of counsel when his lawyer failed to impeach a state witness during cross-examination. [ECF 7, p. 8].

4. He received ineffective assistance of counsel when his lawyer failed to present an entrapment defense during trial. [ECF 7, p. 10].

5. He received ineffective assistance of counsel when his lawyer gave an inadequate closing argument. [ECF 7, p. 12].

6. He received ineffective assistance of counsel based on the cumulative effect of counsel's errors. [ECF 7, p. 12].

7. He received ineffective assistance of appellate counsel when his lawyer failed to raise an issue of improper jury instructions on appeal. [ECF 7, p. 12].

8. He received ineffective assistance of appellate counsel when his lawyer failed to argue on direct appeal that{2020 U.S. Dist. LEXIS 3} he received ineffective assistance of trial counsel. [ECF 7, p. 12].

9. He received ineffective assistance of appellate counsel when his lawyer failed to raise an issue regarding the use of unauthenticated transcripts. [ECF 7, p. 12].

10. He received ineffective assistance of appellate counsel when his lawyer failed to raise an issue of prosecutorial misconduct on direct appeal. [ECF 7, p. 12].

III. Procedural History

Petitioner was charged, along with co-defendant Artez Anderson, with trafficking in cocaine (400 grams or more) (count 1), conspiracy to sell or deliver cocaine (count 2), and unlawful use of a two-way communications device (count 3). [ECF 12-1, Ex. 1]. The State dropped count 2 prior to trial. [Vol. 1, T. 25-26]. At trial, the jury found Petitioner guilty of the remaining counts. [ECF 12-1, Ex. 8]. Petitioner was sentenced as a habitual felony offender to life in prison as to the trafficking conviction, and ten years' imprisonment as to the unlawful use of a device. [*Id.*, Ex. 11].

Petitioner prosecuted a direct appeal raising one claim: the trial court erred by denying his motion for mistrial where the state's confidential informant suggested he engaged in collateral crimes.{2020 U.S. Dist. LEXIS 4} [ECF 12-1, Ex. 13]. After briefing from both parties, the Fourth District Court of Appeal ("Fourth DCA") *per curiam* affirmed Petitioner's judgment of conviction without written opinion. [*Id.*, Exs. 14, 15]; *see also Anderson v. State*, 105 So.3d 536 (Fla. 4th DCA2013). The mandate issued on February 15, 2013. [*Id.*, Ex. 16].

Shortly after, Petitioner filed a state petition for writ of habeas corpus alleging ineffective assistance of appellate counsel. [ECF 12-1, Exs. 17; 18]. In his petition, he raised the following claims: (1) appellate counsel was ineffective for failing to raise an issue regarding improper jury instructions; (2) appellate counsel was ineffective for failing to raise an issue regarding trial counsel's ineffectiveness; (3) appellate counsel was ineffective for failing to raise an issue regarding the use of unauthenticated transcripts; and (4) appellate counsel was ineffective for failing to raise an issue of prosecutorial misconduct; (5) appellate counsel was ineffective for failing to argue that the officer wearing his uniform in court inflamed the jury; and, (6) appellate counsel was ineffective for failing to argue that the cumulative effect of these errors rendered his trial unfair. [*Id.*, Ex. 18]. The Fourth DCA denied{2020 U.S. Dist. LEXIS 5} the petition without comment. [*Id.*, Ex. 20].

Petitioner next filed a motion for postconviction relief pursuant to Fla. R. Crim. P. 3.850, where he raised the following grounds for relief: (1) trial counsel was ineffective for failing to have the video of the drug transaction analyzed by an expert; (2) counsel was ineffective for failing to impeach the state's confidential informant; (3) counsel was ineffective for failing to present an entrapment defense; (4) counsel was ineffective for giving an inadequate closing argument; and (5) the cumulative effect of counsel's errors rendered his trial unfair. [ECF 12-1, Ex. 21]. After a response from the state, the trial court denied the motion in a written, detailed order. [*Id.*, Exs. 24-25]. Petitioner appealed, and on June 7, 2018, the Fourth DCA issued its *per curiam* affirmance of the order denying relief. [*Id.*, Ex. 27]; *see also Anderson v. State*, 248 So.3d 105 (Fla. 4th DCA2018) (table). The mandate issued on August 17, 2018. [ECF 9-1, Ex. 30].

Prior to the issuance of the mandate above, Petitioner came to this Court, filing his initial habeas petition pursuant to 28 U.S.C. 2254 on July 24, 2018. [ECF 1]. Petitioner filed an amended petition pursuant to the Court's order on August 17, 2018. [ECF 7].

IV. Threshold Issues

A. {2020 U.S. Dist. LEXIS 6}Timeliness

Careful review of the procedural history of this case confirms that less than one year of un-tolled time expired after the Petitioner's judgment became final and the filing of this federal habeas petition. Therefore, as the Respondent correctly concedes [ECF 11, p. 6], the petition is timely filed under 28 U.S.C. 2244(d).

B. Exhaustion

Next, the Respondent argues that Petitioner's claim 1, which involves trial court error, is unexhausted and procedurally defaulted from federal habeas review because it was never presented to the state court in federal constitutional terms. [ECF 11, p. 8]. In addressing the issue of exhaustion and procedural default, the Court must determine whether the claims raised here were raised in the state court proceedings, and whether the state courts were alerted to the federal nature of the claims.

Before bringing a 2254 habeas action in federal court, a petitioner must exhaust all available state court remedies. See 28 U.S.C. 2254(b), (c). To properly exhaust state remedies, the petitioner must fairly present every issue raised in his federal petition to the state's highest court, either on direct appeal or on collateral review. *Castille v. Peoples*, 489 U.S. 346, 351, 109 S. Ct. 1056, 103 L. Ed. 2d 380 (1989); *Preston v. Sec'y, Fla. Dep't of Corr.*, 785 F.3d 449, 456-59 (11th Cir. 2015).

Exhaustion is not satisfied "merely" if the petitioner presents{2020 U.S. Dist. LEXIS 7} the state court with "all the facts necessary to support the claim" or even if a "somewhat similar state-law claim was made." *Kelley v. Sec'y for Dept. of Corr.*, 377 F.3d 1317, 1344-45 (11th Cir. 2004) (citation omitted). A petitioner must instead "present his claims to the state courts such that they are permitted the 'opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim.'" *Id.* For example, "a litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state court petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim 'federal.'" *Baldwin*, 541 U.S. at 32; *McNair v. Campbell*, 416 F.3d 1291, 1302-1303 (11th Cir. 2005).

To circumvent the exhaustion requirement, Petitioner must establish that there is an "absence of available state corrective process" or that "circumstances exist that render such process ineffective to protect [his] rights." 28 U.S.C. 2254(b)(1)(B); *see Duckworth v. Serrano*, 454 U.S. 1, 3, 102 S. Ct. 18, 70 L. Ed. 2d 1 (1981).

Here, the Respondent asserts that claim 1 of Petitioner's petition is unexhausted because he failed to raise the federal constitutional terms presented here in state court. [ECF 11, p. 8]. Review of the record reveals that on direct appeal, Petitioner raised claim 1{2020 U.S. Dist. LEXIS 8} only as an issue of state

law, supported only by citation to Florida cases and rules. Accordingly, claim 1 is unexhausted. *See Duncan v. Henry*, 513 U.S. 364, 366, 115 S. Ct. 887, 130 L. Ed. 2d 865 (1995) (claim of evidentiary error not exhausted for purposes of federal review where presented to the state courts only as a violation of state law, and not expressly as a violation of due process guaranteed by the Fourteenth Amendment).

C. Procedural Default

It must next be determined whether Petitioner's failure to exhaust claim 1 results in a procedural default in federal court. Here, Petitioner's unexhausted claim would now be procedurally barred if raised in the state forum because he has already completed a direct appeal and his Rule 3.850 motion. *Bailey v. Nagle*, 172 F.3d 1299, 1302-03 (11th Cir. 1999). In this case, a future attempt to exhaust state remedies would be futile under the state's procedural default doctrine. *Id.* at 1303.

However, a procedurally defaulted claim may still be considered if the federal petitioner can demonstrate: (1) objective cause for the failure to properly present the claim and actual prejudice from the alleged constitutional violation; or, (2) a fundamental miscarriage of justice. *See Wainwright v. Sykes*, 433 U.S. 72, 87, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977); *Tharpe v. Warden*, 898 F.3d 1342, 1344-47 (11th Cir. 2018). The Petitioner can show cause by alleging that some objective factor, external to the defense, impeded his effort to raise the claim properly{2020 U.S. Dist. LEXIS 9} in the state court. *See Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397, (1986); *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999). To show prejudice, a petitioner must demonstrate that the the errors at trial actually and substantially disadvantaged his defense so that he was denied fundamental fairness." *See McCoy v. Newsome*, 953 F.2d 1252, 1261 (11th Cir. 1992) (*quoting Murray*, 477 U.S. at 494). The allegations of cause and prejudice must be factually specific, not conclusory. *Harris v. Comm'r, Ala. Dep't of Corr.*, 874 F.3d 682, 691 (11th Cir. 2017).

Here, Petitioner fails to make any showing of cause and prejudice to excuse the procedural default of claim 1 in this habeas petition, nor does he make any showing of actual innocence. To the extent that Petitioner suggests, in objections or otherwise, that he is entitled to excuse the procedural default of his claim on the basis of the Supreme Court's decision in *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), such a claim is without merit because *Martinez* applies to collateral review proceedings, and not to direct appeal claims. *See Lambrix v. Sec'y, Fla. Dep't of Corr.*, 756 F.3d 1246, 1261, n.31 (11th Cir. 2014).

Likewise, if Petitioner means to excuse the procedural default of these claims by asserting that appellate counsel was ineffective because they failed to raise the federal constitutional issue associated with this claim on direct appeal, that claim is also without merit. Claims of ineffective assistance of appellate counsel must be raised by petition for writ of habeas corpus in the appropriate{2020 U.S. Dist. LEXIS 10} district court of appeal. *See State v. Dist. Ct. of Appeal, First Dist.*, 569 So. 2d. 439, 442 n.1 (Fla. 1990) (superseded on other grounds by *Baker v. State*, 878 So.2d 1236 (Fla. 2004). There is no record of Petitioner raising such a claim of ineffective assistance of appellate counsel in the Fourth DCA.

Accordingly, Petitioner's claim 1 is defaulted from federal habeas review and should not be considered on the merits. However, the Respondent concedes that claims 2 through 10 are exhausted and ripe for habeas review. [ECF 11, p. 8].

V. Statement of Facts2

Joshua Peto from the Port St. Lucie Police Department testified that he worked as a narcotics detective in May 2009 [Vol. 2, T. 243-44]. Detective Peto explained that he used a confidential informant named Kenneth Pyle ("CI") to investigate Petitioner and his co-defendant. [*Id.*, T. 249-50, 252-53]. Beginning in April 2009, Detective Peto recorded phone calls between the CI, Petitioner, and his co-defendant. [*Id.*, T. 252-53]. Although Detective Peto was not able to record every phone call between the CI and the defendants, he did record four calls, which were admitted into evidence. [*Id.*, T. 254-56].

Detective Peto explained that the drug transaction in this case occurred in a parking lot on May 7, 2009. [*Id.*, T. 256, 269]. Before the transaction, Detective{2020 U.S. Dist. LEXIS 11} Peto made sure that the CI did not have any drugs or money on his person or car. [*Id.*, T. 257-58, 270-71]. Detective Peto explained that he provided the CI with one kilogram of cocaine for purposes of the transaction. [*Id.*, T. 258]. The cocaine was packaged in a brown paper bag and placed into the glove box of the CI's car. [*Id.*, T. 258-59]. After the transaction was completed, Detective Peto recovered the same package of cocaine and placed it into evidence. [*Id.*, T. 263]. The same package of cocaine was shown to the jury in open court. [*Id.*, T. 263-64].

Detective Peto testified that the transaction between the CI and the defendants was recorded by two cameras in the CI's car. [*Id.*, T. 264]. The video from the cameras was introduced without objection. [*Id.*, T. 265]. In addition to using the video recording to corroborate what happened after the fact, a listening device was placed in the CI's car so Detective Peto could monitor what was being said in real time. [*Id.*, T. 272]. Detective Peto also followed the CI in an unmarked car and maintained a constant visual. [*Id.*, T. 270-71].

From his vantage point, Detective Peto saw Petitioner and the co-defendant pull up to the CI's car in their{2020 U.S. Dist. LEXIS 12} own car. [*Id.*, T. 273]. Both Petitioner and the co-defendant got out of their car and entered the CI's car. [*Id.*]. The co-defendant, who had been wearing a white-collared shirt, entered the CI's car first and entered the back seat. [*Id.*, T. 273-74]. Detective Peto noted that the co-defendant had a black backpack with him. [*Id.*, T. 275]. Petitioner, who had been wearing a blue-collared shirt, entered the front passenger seat of the CI's car. [*Id.*, T. 273-74].

Detective Peto could not see any hand-to-hand exchange inside the CI's car, so he relied on the video, which showed the CI removing the cocaine from the glove box and handing the cocaine to Petitioner, who then handed the cocaine to his co-defendant. [*Id.*, T. 314-16]. When Detective Peto and other officers finally moved in on the CI's car, the detective saw the co-defendant holding the package of cocaine. [*Id.*, T. 276-78]. Petitioner did not have anything in his hands. [*Id.*, T. 277].

Detective Peto explained that he arrested both men and searched the CI's car. [*Id.*, T. 277-78]. In addition to seizing the cocaine and the black backpack, Detective Peto found a shoebox filed with $23,480 in cash. [*Id.*, T. 279, 282, 285-86, 301]. Detective{2020 U.S. Dist. LEXIS 13} Peto also searched both defendants and recovered three cell phones. [*Id.*, T. 293-94, 296-98]. No "boat motors" were recovered. [*Id.*, T. 305].

The CI, Kenneth Pyle, testified that he used to work as an informant for the Port St. Lucie Police Department with Detective Peto. [*Id.*, T. 320-21]. The CI explained that he was paid for his work; he was not working off any charges. [*Id.*, T. 321]. However, the CI did acknowledge that he had two prior felony convictions and one conviction for a crime of dishonesty. [*Id.*, T. 320].

Regarding this case, the CI testified that he had recorded phone conversations with Petitioner and his co-defendant about selling them a kilogram of cocaine; these conversations began in April 2009. [*Id.*, T. 321]. The CI explained that Petitioner initiated the drug deal with him. [*Id.*, T. 321-22]. The CI had known Petitioner for about two years. [*Id.*, T. 321-22]. The CI did not know Petitioner's co-defendant initially, and the CI thought the co-defendant's name was Hank. [*Id.*, T. 322]. Because the CI came to know both Petitioner and his co-defendant, the CI could distinguish between their voices on the recorded calls. [*Id.*, T. 324, 357, 367]. In total, four phone calls{2020 U.S. Dist. LEXIS 14} were admitted into evidence and played for the jury.

The first phone call, which occurred on April 23, 2009, was a conversation between the CI and Petitioner only. [*Id.*, T. 367-72]. On the call, both men exchange pleasantries until the CI asks Petitioner if he has "21 thousand cash on you?" [*Id.*, T. 370]. Petitioner responds by saying "Yeah," and adds, "I told him 24." [*Id.*]. At that point, the CI says he wants "21 for me [and] I don't care about your 3." [*Id.*, T. 371]. The call ends after the CI tells Petitioner to let him know when he has the "21 grand." [*Id.*].

The second phone call, which occurred four days later on April 27, 2009, was a conversation between the CI and Petitioner's co-defendant. [*Id.*, T. 372-81]. On the call, the CI asks the co-defendant when he wants to meet because "I just picked up some motors down here, actual engines, not, ya' know not boat motors that we talk about, but engines." [*Id.*, T. 376-77]. The CI goes on to say that he understands the co-defendant "wanted to only go with the one engine for now because you wanna check things out and make sure everything righteous." [*Id.*, T. 377]. The CI says he will get a "high performance motor" for the co-defendant{2020 U.S. Dist. LEXIS 15} if he has $23,500 "like we agreed." [*Id.*, T. 378]. The CI offers to provide two more motors if the co-defendant checks out the first motor and finds that it "runs good." [*Id.*]. The co-defendant answers by saying he "definitely [is] gonna get that one motor" and will see how "this turn[s] out." [*Id.*, T. 379]. The conversation ends after the CI asks the co-defendant to give him 24 hours' notice of the meeting time. [*Id.*, T. 380-81].

When the playback of this call concluded, the CI explained to the jury that "[b]oat motors" was a code term they used to refer to a kilogram of cocaine. [*Id.*, T. 381-82].

The third phone call, which also occurred on April 27, 2009, was a conversation between the CI and Petitioner. [*Id.*, T. 383-89]. On this call, the CI tells Petitioner that he just got off the phone with "Hank," and that Hank was "coming to pick up a boat motor for 23 thousand, 5 hundred, a high performance engine." [*Id.*, T. 385-86]. Because Petitioner was his "friend," the CI says that he will give Petitioner a $2500 "commission on the deal for the engine." [*Id.*, T. 386]. The CI also says that he wants Petitioner there during the transaction, and Petitioner agrees. [*Id.*, T. 386-87]. Petitioner{2020 U.S. Dist. LEXIS 16} also tells the CI that "Hank" is not his co-defendant's real name. [*Id.*, T. 388].

After the playback of this call ended, the CI explained to the jury that he offered to pay Petitioner a commission because Petitioner had brokered the drug transaction between him and the co-defendant. [*Id.*, T. 390]. The CI further explained that he met the co-defendant in person a few days after the April 27 phone call. [*Id.*, T. 391]. The CI testified that no drug transaction took place at this meeting, but the co-defendant did show the CI that he had money. [*Id.*].

The fourth phone call, which occurred on May 6, 2009 (the day before the drug deal), was a conversation between the CI and the co-defendant. [*Id.*, T. 392-99]. The CI tells the co-defendant that "business will be taken care of tomorrow" if he brings $23,500. [*Id.*, T. 395]. The co-defendant agrees and says he may be interested in another set of boat motors if he likes the performance of the first. [*Id.*]. After the CI and the co-defendant agree on a time to meet, the call ends. [*Id.*, T. 396-98].

Once his testimony resumed, the CI explained what happened next. He testified that he met with Detective Peto early the next day, and the detective provided{2020 U.S. Dist. LEXIS 17} him with a kilogram of cocaine. [*Id.*, T. 399]. The CI then drove a rental car to a location where the detective told him to park it. [*Id.*, T. 400]. The CI explained that Petitioner and the co-defendant eventually met him in the parking lot. [Vol. 3, T. 401-02]. The CI said that the co-defendant got into the back seat of his car and that Petitioner got into the front seat. [*Id.*, T. 402]. The CI identified Petitioner in open court. [*Id.*, T. 402-03].

Two videos were taken from different angles inside the CI's car, and both videos were admitted into evidence. [*Id.*, T. 433-41]. The videos did not show the actual hand-to-hand transaction, but they did capture both defendants talking with the CI during the transaction. [Vol. 1, T. 18-19; T. Vol. 3, T. 436-41]. In addition, the CI testified as to what transpired in the car.

The CI explained that the co-defendant had the money in a shoebox. [Vol. 3, T. 403]. The CI handed the package of cocaine to Petitioner who then passed the cocaine to the co-defendant. [*Id.*, T. 403-06]. The co-defendant opened the package of cocaine and looked inside. [*Id.*, T. 404]. Soon after this exchange, police officers swarmed the CI's car and arrested everyone, including{2020 U.S. Dist. LEXIS 18} the CI in order to preserve his cover. [*Id.*, T. 404-05]. Although the CI admitted that he made a living working on boat and boat motors, the CI made clear that he was not trying to sell an actual boat motor to Petitioner and his co-defendant. [*Id.*, T. 406, 409]. He used the term boat motors to refer to cocaine. [Vol. 2, T. 381-82].

The State's last witness was Babu Thomas, an analyst at the Indian River Crime Lab. [Vol. 3, T. 446-47]. Mr. Thomas testified that he analyzed the brown package seized from the CI's car. [*Id.*, T. 451-52]. Based on his testing, Mr. Thomas determined that the substance in the package was cocaine. [*Id.*, T. 453]. The weight of the cocaine, excluding the packaging material, was 1007.1 grams or just over one kilogram. [*Id.*, T. 455].

Petitioner did not testify, and he rested without calling any witnesses. [*Id.*, T. 460, 464].

VI. Governing Legal Principles

A. Standard of Review

The court's review of a state prisoner's federal habeas corpus petition is governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *See Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246, 127 S. Ct. 1654, 167 L. Ed. 2d 585 (2007); *Ledford v. Warden, Ga. Diagnostic & Classification Prison*, 818 F.3d 600, 642 (11th Cir. 2016), *cert. den'd*, 137 S. Ct. 1432, 197 L. Ed. 2d 650 (2017). AEDPA ensures that federal habeas corpus relief works to "guard against extreme malfunctions in the state criminal justice{2020 U.S. Dist. LEXIS 19} systems, and not as a means of error correction." *See Greene v. Fisher*, 565 U.S. 34, 38, 132 S. Ct. 38, 181 L. Ed. 2d 336 (2011). This standard is both mandatory and difficult to meet. *White v. Woodall*, 572 U.S. 415, 420, 134 S. Ct. 1697, 188 L. Ed. 2d 698 (2014).

Deferential review under 2254(d) is generally limited to the record that was before the state court that adjudicated the claim on the merits. *See Cullen v. Pinholster*, 563 U.S. 170, 182, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011); *Gill v. Mecusker*, 633 F.3d 1272, 1288 (11th Cir. 2011). To review a federal habeas corpus claim, the district court must first identify the last state court decision, if any, that adjudicated the merits of the claim. *See Marshall v. Sec'y, Fla. Dep't of Corr.*, 828 F.3d 1277, 1285 (11th Cir. 2016). The state court is not required to issue an opinion explaining its rationale, because even the summary rejection of a claim, without explanation, qualifies as an adjudication on the merits that warrants deference. *See Harrington v. Richter*, 562 U.S. 86, 100, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011); *Ferguson v. Culliver*, 527 F.3d 1144, 1146 (11th Cir. 2008). Where the state court's adjudication on the merits is unaccompanied by an explanation, federal courts must "look through the unexplained decision to the last related state-court decision that does provide a rationale" and, "then presume that the unexplained decision adopted the same reasoning." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192, 200 L. Ed. 2d 530 (2018). Thus, if the relevant state-court decision on the merits is not accompanied by a reasoned opinion, because it was summarily affirmed or denied, a federal court should 'look through' the unexplained decision to the last state-court decision that does provide{2020 U.S. Dist. LEXIS 20} a relevant rationale." *Id.*

Where the claim was adjudicated on the merits," in the state forum, 2254(d) prohibits re-litigation of the claim unless the state court's decision was (1) contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or, (2) based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. 2254(d); *Harrington v. Richter*, 562 U.S. at 97-98.

A state court decision is "contrary to" established Supreme Court precedent when it (1) applies a rule that contradicts the governing law set forth by the Supreme Court; or (2) confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from Supreme Court precedent. *Williams v. Taylor*, 529 U.S. 362, 405-06, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). An "unreasonable application" of clearly established federal law is different from an incorrect application of federal law. *Williams v. Taylor*, 529 U.S. at 410. Consequently, "[a] state court's determination that a claim lacks merit precludes federal habeas corpus relief so long as fair-minded jurists could disagree on the correctness of the state court's decision." *Mitchell v. Esparza*, 540 U.S. 12, 16, 124 S. Ct. 7, 157 L. Ed. 2d 263 (2003); *Tharpe v. Warden*, 834 F.3d 1323, 1337 (11th Cir. 2016), *cert. den'd*, 137 S. Ct. 2298, 198 L. Ed. 2d 732 (2017) (accord). In other words, if the last{2020 U.S. Dist. LEXIS 21} state court to decide a prisoner's federal claim provides an explanation for its merits-based decision in

a reasoned opinion, a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." *Wilson v. Sellers*, 138 S. Ct. at 1192. As applied here, to the extent Petitioner's claims were adjudicated on the merits in the state courts, they must be evaluated under 2254(d).

B. Ineffective Assistance of Counsel Standard

Here, Petitioner raises multiple claims challenging counsel's effectiveness. The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the assistance of counsel during criminal proceedings against them. *Strickland v. Washington*, 466 U.S. 668, 684-85, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). When assessing counsel's performance under *Strickland*, the court employs a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. A 2254 Petitioner must provide factual support for his contentions regarding counsel's performance. *Smith v. White*, 815 F.2d 1401, 1406-7 (11th Cir. 1987). Bare, conclusory allegations of ineffective assistance are insufficient to satisfy the *Strickland* test. *See Boyd v. Comm'r, Ala. Dep't of Corr.*, 697 F.3d 1320, 1333-34 (11th Cir. 2012).

"[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance." *Burt v. Titlow*, 571 U.S. 12, 20, 134 S. Ct. 10, 187 L. Ed. 2d 348 (2013). "Where the highly{2020 U.S. Dist. LEXIS 22} deferential standards mandated by *Strickland* and the AEDPA both apply, they combine to produce a doubly deferential form of review that asks only 'whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.'" *Gissendaner v. Seaboldt*, 735 F.3d 1311, 1323 (11th Cir. 2013).

To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate that: (1) his counsel's performance was deficient, falling below an objective standard of reasonableness; and, (2) he suffered prejudice resulting from that deficiency. *Strickland*, 466 U.S. at 687-88. Strategic choices made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable. *Strickland* at 690-91. To uphold a lawyer's strategy, a court need not attempt to divine the lawyer's mental processes underlying the strategy, because there are "countless ways to provide effective assistance in any given case." *Strickland*, 466 U.S. at 689.

To establish deficient performance, the movant must show that, in light of all circumstances, counsel's performance was outside the wide range of professional competence. *Strickland, supra. See also Cummings v. Sec'y for Dep't of Corr.*, 588 F.3d 1331, 1356 (11th Cir. 2009). The Court's review of counsel's performance should focus on "not what is possible or what is prudent or appropriate but only [on] what is constitutionally compelled."{2020 U.S. Dist. LEXIS 23} *Chandler v. United States*, 218 F.3d at 1313; *Burger v. Kemp*, 483 U.S. 776, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987). Counsel is not ineffective for failing to raise non-meritorious issues. *Chandler v. Moore*, 240 F.3d 907, 917 (11th Cir. 2001). Counsel is also not required to present every non-frivolous argument. *Dell v. United States*, 710 F.3d 1267, 1282 (11th Cir. 2013).

Regarding the prejudice component, the Supreme Court has explained "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. A court need not address both prongs of *Strickland* if the defendant makes an insufficient showing on one of the prongs. *Strickland*, 466 U.S. at 697. *See also Brown v. United States*, 720 F.3d 1316, 1326 (11th Cir. 2013).

VII. Discussion

In claim 2, Petitioner argues he received ineffective assistance of counsel when his lawyer failed to seek an expert to dispute the authenticity of the video of the drug transaction. [ECF 7, p. 7]. He claims that after seeing the video for the first time, he immediately told his lawyer that the tape had been altered, but his lawyer refused to investigate the issue further. [*Id.*]. When Petitioner raised this claim in his Rule 3.850, the trial court noted the following:

The Defendant claims that Trial Counsel was ineffective for failing to have recorded video authenticated prior{2020 U.S. Dist. LEXIS 24} to trial. The Defendant alleges that he believes that the video recording had been tampered with and does not show the true events within the car during the alleged cocaine transaction. The Defendant claims that he never had possession of the cocaine as reflected in the video recording.

First, this claim is insufficiently pled. The Defendant does not state what the video would have reflected or specifically how he believes that it was tampered with. Further, the Defendant fails to specially assert how the suppression of the video recording would have resulted in a different outcome.

Second, this Court agrees with the State that there is sufficient record evidence to refute the Defendant's claim. (See State response attached as A). The issue of the Defendant's request to have the video recording authenticated was raised prior trial. (See transcript pages 15-24 attached as part of Ex. A).1 During this time, Trial Counsel advised the Court that he did not believe that there was any evidence or reason to believe that the video had been tampered with. (See transcript page 18 attached as part of Ex. A).

Even if the video recording was to be suppressed, there was sufficient evidence presented{2020 U.S. Dist. LEXIS 25} by the State at trial that the outcome of the trial would not have been different. The State presented several recorded phone conversations between the Defendant or co-Defendant and the confidential informant (CI) attempting to set up the transaction. (See transcript pages 369-372; 376-381; 385-389; and 394-399 attached as part of Ex. A). Further, the testimony of Officer Joshua Peto and the CI Kenneth Pyle demonstrate that the outcome would not be different. (See transcript pages 243-260; 263-275; 282; 301; 305-324; and 367-410 attached as part of Ex. A). As part of his testimony, Mr. Pyle testified that he opened his glove compartment retrieved the kilo of cocaine and handed it to the Defendant who then handed to his co-Defendant in the back seat. (See transcript pages 402-404 attached as part of Ex. A). As pointed out above, there was sufficient evidence presented by the State that even had the video recording not been played for the jury, the outcome of the Defendant's trial would not have been different. The Defendant's claim is refuted by the record.[ECF 12-1, Ex. 25, pp. 260-61].

Effective assistance of counsel, of course, embraces adequate pretrial investigation. *See Strickland*, 466 U.S. at 691 (1984). The correct{2020 U.S. Dist. LEXIS 26} approach toward investigation, however, "reflects the reality that lawyers do not enjoy the benefit of endless time, energy or financial resources." *Rogers v. Zant*, 13 F.3d 384, 387 (11th Cir. 1994). To be effective, an attorney is not required to "pursue every path until it bears fruit or until all hope withers." *Williams v. Head*, 185 F.3d 1223, 1237 (11th Cir. 1999) (citation omitted). "The question is whether...ending an investigation short of exhaustion, was a reasonable tactical decision. If counsel's actions were reasonable, tactical decisions, such a choice must be given a strong presumption of correctness, and the inquiry is generally at an end." *Mills v. Singletary*, 63 F.3d 999, 1024 (11th Cir. 1995) (citation omitted).

As an initial matter, Petitioner fails to allege what portions of the video were altered, nor does he allege any facts to demonstrate how the video inaccurately depicted what occurred on the date of the crime. Such bare and conclusory allegations are insufficient to satisfy the Strickland test. *See Boyd*, 697 F.3d at 1333-34.

Moreover, Petitioner fails to allege any facts to suggest that the state court's resolution of this claim was an unreasonable determination of the facts or an unreasonable application of federal law. Rather, the record shows that counsel failed to investigate the authenticity of the videotape because he believed that{2020 U.S. Dist. LEXIS 27} there was nothing to suggest that the video had been tampered with or altered in any way. [Vol. 1, p. 19]. This was a reasonable, tactical decision that counsel made after reviewing the video and discussing it with Petitioner. Accordingly, counsel's failure to investigate the videotape does not amount to deficient performance under the first prong of *Strickland*. The state court's resolution of this claim is, therefore, entitled to deference under 2254(d). Claim 2 should be denied.

In claim 3, Petitioner alleges that trial counsel was ineffective for failing to impeach the CI with inconsistent statements from his deposition. [ECF 7, p. 8]. In his memorandum, he further explains that contrary to his testimony at trial, the CI stated in deposition that the cocaine was not placed in the glove box, but in the backseat of the car. [ECF 8, p. 7]. He claims that if counsel had properly impeached the CI, "it would have shown the jury that [he] did not possess any cocaine and that he was not involved with the drug transaction." [*Id.*].

When Petitioner raised this claim in his Rule 3.850 Motion, the trial court stated the following:

The Defendant alleges that Trial Counsel was ineffective for failing to impeach Kenneth{2020 U.S. Dist. LEXIS 28} Pyle regarding inconsistent statements that he made.

This Court agrees and adopts the well-reasoned response put forth by the State. (See State response attached as Ex. A). As the State points out, the Defendant admits that co-Defendant's attorney impeached Mr. Pyle with these inconsistent statements. However, the Defendant incorrectly asserts that this impeachment could not be used in his case. The jury heard the impeachment of Mr. Pyle. There was no need for Trial Counsel to impeach Mr. Pyle for a second time. As the State points out, this would have allowed Mr. Pyle to again provide an explanation for the inconsistent statements. The Defendant has not demonstrated that Trial Counsel was ineffective. The Defendant's claim is refuted by the record and without merit.[ECF 12-1, Ex. 25, p. 261-62].

The decision to cross-examine a witness and the manner in which it is conducted are tactical decisions "well within the discretion of a defense attorney." *Fugate v. Head*, 261 F.3d 1206, 1219 (11th Cir. 2001) (quoting *Messer v. Kemp*, 760 F.2d 1080, 1090 (11th Cir. 1985)). In order to establish prejudice, a habeas petitioner must show at least one "specific instance where cross-examination arguably could have affected the outcome . . . of the trial." *Id.* (quoting *Messer*, 760 F.2d at 1090).

Here, review of the record reveals{2020 U.S. Dist. LEXIS 29} that counsel cross-examined the CI about his boat motor business, his employment by the police department, and his prior felony convictions, which included a crime of dishonesty. [Vol. 3, T. 406-09]. Co-defendant's counsel then cross-examined the CI on certain inconsistencies in his testimony, including the fact that he stated in his deposition that (1) Petitioner and his co-defendant arrived to the planned transaction in Petitioner's truck, and not a Chevy Malibu, as he had testified to on direct examination, and (2) the cocaine was in the backseat of the car, and not in the glove compartment, as he had testified to on direct examination. [Vol. 3, pp. 422, 429]. In response, the CI explained that his testimony at the deposition was mistaken because "every time, well every other time," he met with Petitioner, "he was in his truck," and that he recalled saying that the cocaine was in the backseat, but "that was not actually what happened." [*Id.*, T. 422, 431]. Counsel capitalized on these inconsistencies during closing argument, when he argued that the CI was not a credible witness. [*Id.*, T. 501-02].

Thus, even if counsel had cross-examined the CI about these inconsistencies, there is{2020 U.S. Dist. LEXIS 30} no reasonable probability that the outcome at trial would have been difference because the jury heard the inconsistencies through Petitioner's co-defendant's counsel cross-examination and through counsel's closing argument. Still, the jury was unpersuaded and found Petitioner guilty in light of the overwhelming evidence against him. Accordingly, Petitioner fails to demonstrate any prejudice resulting from counsel's alleged deficient performance under *Strickland*. The state court's resolution of this claim should, therefore, be left undisturbed. *Williams v. Taylor, supra*. Claim 3 should be denied.

In claim 4, Petitioner alleges that his lawyer was ineffective for failing to present an entrapment defense at trial. [ECF 7, p. 10]. He claims that his lawyer told him that such a defense was not available to him because of his lengthy criminal history. [*Id.*]. When Petitioner raised this claim in his Rule 3.850 Motion, the trial court stated the following:

The Defendant claims that Trial Counsel was ineffective for not pursuing a defense of subjective entrapment. The Defendant asserts that they discussed such a defense but that Trial Counsel would not pursue it.

This Court again agrees and adopts the well-reasoned response put{2020 U.S. Dist. LEXIS 31} forth by the State. First, this defense would be contrary to the Defendant's position that he was not involved with the trafficking. Second, the State would have been able to introduce evidence of other attempts to conduct drug transactions. The State gave notice that it was seeking to introduce such evidence at trial. (See notice of intent to introduce evidence of other crimes Ex. 1 of Ex. A). The Court granted the Defendant's motion *in limine* to prohibit the introduction of such evidence. (See transcript page 214 attached as part of Ex. A). However, this evidence would have been relevant and admissible had the Defendant pursued the entrapment defense.

It is readily evident that the trial Counsel did not pursue the entrapment defense as a strategy to prevent evidence of other attempts at making drug transactions. Further, this Court does not find that there was a reasonable probability that an entrapment defense would have been successful. This claim is refuted by the record and without merit.[ECF 12-1, Ex. 25, p. 262].

In Florida, entrapment is an affirmative defense, and Petitioner would have had the burden of proof at trial. *See Cardenas v. State*, 867 So.2d 384, 392 (Fla. 2004). The entrapment defense applies when: (1) the defendant{2020 U.S. Dist. LEXIS 32} is not a person "ready to commit" the crime, but is induced or encouraged to commit the crime; (2) the criminal conduct is the direct result of the inducement; (3) the person inducing him to commit the crime is a law enforcement officer; and, (4) the officer used methods likely to persuade a person not readily disposed to commit the crime to do so. *See Florida Standard Jury instructions in Criminal Cases*, 3.6(j) Entrapment (emphasis added).

However, Florida law permits the state the opportunity to rebut the defense. *See Davis v. State*, 937 So.2d 300, 303 (Fla. 4th DCA2006). The State may "prove predisposition with evidence of the defendant's prior criminal activities, his reputation for such activities, reasonable suspicion of his involvement in such activity, or his ready acquiescence in the commission of the crime." *Blanco v. State*, 218 So.3d 939, 944 (Fla. 3d DCA2017) (citing *Jones v. State*, 114 So.3d 1123, 1126 (Fla. 1st DCA2013)).

Here, review of the record reveals that prior to trial, the state gave notice of its intent to introduce evidence of Petitioner's prior bad acts in order to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, in accordance with Fla. Stat. 90.404(2)(c)(1). [ECF 12-1, Ex. 3]. Counsel filed an objection to this notice, arguing that the proposed evidence would show mere propensity{2020 U.S. Dist. LEXIS 33} for criminal activity. [*Id.*, Ex. 4]. Prior to jury selection, the state clarified that it filed the notice based on its anticipation that Petitioner would present an entrapment defense. [Vol. 1, p. 5]. Then, after jury selection, counsel moved *in limine* to exclude any testimony regarding Petitioner's prior, unsuccessful attempts to set up a transaction with the CI. [Vol. 2, T. 213-14].

Based on the record, it is clear that counsel was concerned with the possibility of the state introducing evidence of other crimes because such evidence would have been damaging to the defense. As the Respondent asserts [ECF 11, p. 27], counsel likely made a strategic decision not to pursue an entrapment defense because (1) Petitioner likely would have had to testify to establish the defense, which would have opened the door to evidence of Petitioner's seven prior felony convictions [ECF 12-1, Exs. 9-10]. This would have been prejudicial to Petitioner's defense. Accordingly, Petitioner cannot demonstrate deficient performance under *Strickland* for failing to pursue an entrapment defense at trial. The rejection of this claim must therefore stand. *Williams v. Taylor, supra.*

In claim 5, Petitioner asserts that counsel was ineffective{2020 U.S. Dist. LEXIS 34} when he gave an inadequate closing argument. [ECF 7, p. 12]. Particularly, Petitioner submits that the closing argument centered on a theory of entrapment when there was no evidence presented to support such a defense at trial. [*Id.*]. When Petitioner raised this claim in his Rule 3.850 Motion, the trial court analyzed it along with

claim 4, finding that it was reasonable for counsel not to pursue an entrapment defense. [ECF 12-1, Ex. 25, p. 262].

Petitioner's claim is belied by the record, which reveals that counsel argued fervently during closing argument that the CI was an untrustworthy witness with a motive to lie, to create evidence, and to "insert[]" Petitioner into the drug transaction. [Vol. 3, T. 505-06]. He further argued that the CI was creating this evidence because he "gets paid by how well he does." [*Id.*, T. 506]. As discussed above, testimony regarding the CI's financial motive to lie was elicited during cross-examination. Thus, the argument made by counsel was that Petitioner was framed, and had no knowledge or involvement in the drug transaction. This is a materially different theory of defense than a defense of entrapment, where Petitioner would have had to admit to participating{2020 U.S. Dist. LEXIS 35} in the drug deal through inducement.

There is, therefore nothing to suggest that counsel's statements during closing argument were unsupported by the evidence presented at trial. Contrary to Petitioner's representations here, the statements made during closing argument did not center on an entrapment defense. Accordingly, claim 5 should be denied.

In claim 6, Petitioner alleges that he received ineffective assistance of counsel based on the cumulative effect of counsel's errors. [ECF 7, p. 12]. In his memorandum, he appears to claim that this "cumulative effect" was caused by both his appellate counsel and his trial counsel. [ECF 8, p. 12].

Here, when viewing the evidence in this case in its entirety, the alleged errors raised in this collateral proceeding by both appellate counsel3 and trial counsel, neither individually nor cumulatively, infused the proceedings with unfairness as to deny the movant a fundamentally fair trial and due process of law. Petitioner therefore is not entitled to habeas corpus relief. *See Fuller v. Roe*, 182 F.3d 699, 704 (9th Cir. 1999)(holding in federal habeas corpus proceeding that where there is no single constitutional error existing, nothing can accumulate to the level of a constitutional violation),{2020 U.S. Dist. LEXIS 36} *overruled on other grounds, Slack v. McDaniel*, 529 U.S. 473, 482, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). *See also United States v. Rivera*, 900 F.2d 1462, 1470 (10th Cir. 1990) (stating that "a cumulative-error analysis aggregates only actual errors to determine their cumulative effect."). Contrary to Petitioner's apparent assertions, the result of the proceedings were not fundamentally unfair or unreliable. *See Lockhart v. Fretwell*, 506 U.S. 364, 369-70, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993). Accordingly, the state court's resolution of this claim during Petitioner's state habeas proceedings are entitled to deference under 2254(d). Claim 6 should be denied.

In claim 7, Petitioner alleges that he received ineffective assistance of appellate counsel when his lawyer failed to argue on appeal that the trial court erred by failing to instruct the jury on entrapment. [ECF 7, p. 12]. He claims that "[w]henever the principle instruction is given, it is proper to give the entrapment instruction where there is a preponderance of evidence that the defendant may have been entrapped into committing the charged offense." [ECF 8, p. 13]. He further asserts that the court failed to instruct the jury as to the knowledge element of trafficking. [*Id.* p. 14].

Review of the record reveals that during the charge conference, counsel objected to a proposed principals instruction, but the court denied it, finding that the state was entitled{2020 U.S. Dist. LEXIS 37} to it "under the facts of [the] case." [Vol. 3, T. 479-80]. When the court instructed the jury, it informed them, in accordance with the standard jury instruction,4 that "[i]f the defendant helped another person or persons commit a crime the defendant is a principle and must be treated as if he had done all the other things the other person or persons did..." [Vol. 3, T. 537].

Under Florida law, "[j]ury instructions requested by the State "must relate to issues concerning evidence received at trial." *Butler v. State*, 493 So.2d 451, 452 (Fla. 1986). However, when there is no evidence to support an aiding and abetting theory of guilt, a principals instruction is inappropriate. *See Lewis v. State*, 693 So.2d 1055, 1057 (Fla. 4th DCA1997). Under federal law, however, a jury instruction that "was allegedly incorrect under state law is not a basis for habeas relief." *Estelle v. McGuire*, 502 U.S. 62, 67, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1990) (internal citations omitted). Upon federal habeas review, a jury

instruction is not judged in isolation but must be considered in the context of the instructions as a whole and the trial record. *See Estelle*, 502 U.S. at 72. A defective jury charge raises an issue of constitutional dimension only if it renders the entire trial fundamentally unfair. *See Carrizales v. Wainwright*, 699 F.2d 1053, 1055 (11th Cir. 1983).

Here, the evidence at trial showed that Petitioner arranged a drug deal between his co-defendant,{2020 U.S. Dist. LEXIS 38} Artez Anderson, and the CI, Kenneth Pyle. In pertinent part, the CI testified that he arranged to give Petitioner a commission for brokering the deal. [Vol. 2, T. 386]. On the date of the arranged transaction, Petitioner went with his co-defendant to meet with the CI, and sat in the CI's car as the transaction occurred. [Vol. 3, T. 402]. The CI explained what transpired in the car: the co-defendant had the money in a shoebox, and the CI handed the package of cocaine to Petitioner who then passed the cocaine to the co-defendant. [Vol. 3, T. 403-06]. The co-defendant opened the package of cocaine and looked inside. [Vol. 3, T. 404]. Police officers then swarmed the CI's car and arrested everyone, including the CI in order to preserve his cover. [Vol. 3, T. 404-05].

Based on these facts, even if the jury did not believe that Petitioner himself trafficked in cocaine, it could find that he aided and abetted his co-defendant in trafficking the cocaine. Accordingly, the principals instruction was supported by the evidence presented at trial.

Further, to the extent that Petitioner argues that the trial court erred by failing to give the jury an entrapment instruction, such a claim is without{2020 U.S. Dist. LEXIS 39} merit. Petitioner's counsel did not request an entrapment instruction, nor was there any evidence presented at trial to support such an instruction. Petitioner fails to demonstrate that the failure to give an entrapment instruction rendered his trial fundamentally unfair. *See Carrizales v. Wainwright*, 699 F.2d at 1055. Therefore, appellate counsel cannot be faulted for failing to raise this meritless issue on appeal. Claim 7 should be denied. *See* 2254(d).5

In claim 8, Petitioner alleges that appellate counsel was ineffective for failing to argue that trial counsel was ineffective. [ECF 7, p. 13]. This claim is entirely without merit. As discussed above, trial counsel was not ineffective based on any of the grounds raised in this habeas petition. There is, therefore, nothing to suggest that counsel's alleged ineffectiveness was "apparent on the face of the record" as required by Florida law to raise an ineffectiveness claim on direct appeal. *See Mansfield v. State*, 758 So.2d 636, 642 (Fla. 2000). Accordingly, appellate counsel cannot be faulted for failing to raise this meritless issue on direct appeal. *See Chandler v. Moore*, 240 F.3d at 917. As such, the state court's resolution of this claim is entitled to deference under 2254(d). Claim 8 should be denied.

In claim 9, Petitioner alleges that he received ineffective assistance{2020 U.S. Dist. LEXIS 40} of appellate counsel when his lawyer failed to argue that the trial court erred by allowing the use of un-authenticated transcripts at trial. [ECF 7, p. 13]. Specifically, he claims that his lawyer was not given prior notice of the transcripts, and they were not part of the trial court's files or records. [*Id.*]. In his memorandum, he explains that his voice on the phone calls was not properly authenticated, and therefore his identity should not have been included on the transcripts. [ECF 8, pp. 17-18].

Review of the record reveals that during trial, the state asked to distribute transcripts of the recorded phone calls to the jury as a demonstrative aide. [Vol. 2, T. 326]. Counsel objected to the transcripts arguing that the jury should decide who was speaking during the phone calls and that the alleged identities of the speakers should not be included in the transcripts. [Vol. 2, T. 355]. After listening to argument from both parties outside the presence of the jury, the Court found that the transcripts were sufficiently fair and accurate "to allow the jury to consider them as aides in understanding what are on the tapes." [Vol. 2, T. 360]. The CI then testified that he was speaking{2020 U.S. Dist. LEXIS 41} with Petitioner during the phone calls and that was accurately reflected in the transcripts. [Vol. 2, T. 367]. When the recordings themselves were entered into evidence, they, along with the transcripts, were published to the jury, who was instructed that the transcripts were "provided...only as a guide to help" the jurors follow along. [Vol. 2, T. 369]. The court also told the jury that the transcripts were not evidence of what was actually said or who said it, and that if there were any differences between the recording and the transcripts, the jury was to rely on what was in the recording. [*Id.*].

Here, there is plainly nothing in the record to suggest that the use of these transcripts as a demonstrative aide during trial violated Petitioner's constitutional rights. The CI testified as to his personal knowledge of the speakers on the phone calls, and the transcripts closely tracked the recorded conversations played to the jury. The court also instructed the jury that the transcripts were not evidence of the identity of the speakers during the phone calls. Accordingly counsel cannot be faulted for failing to raise this meritless issue on appeal. The state court's resolution of this{2020 U.S. Dist. LEXIS 42} claim is, therefore, entitled to deference under 2254(d). Claim 9 should be denied.

In claim 10, Petitioner argues that appellate counsel was ineffective for failing to argue that the prosecutor's closing argument was misleading. [ECF 7, p. 13]. He also claims that he was convicted and sentenced based on an erroneous verdict form and jury instructions. [*Id.*]. Particularly, he claims he was charged with a second-degree felony, but was convicted and sentenced for a first-degree felony punishable by life. [ECF 8, p. 19].

The standard for federal habeas corpus review of a claim of prosecutorial misconduct is whether the alleged actions rendered the entire trial fundamentally unfair. *Donnelly v. DeChristoforo*, 416 U.S. 637, 642-45, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974); *Hall v. Wainwright*, 733 F.2d 766, 773 (11th Cir. 1984). In assessing whether the fundamental fairness of the trial has been compromised, the circumstances are to be considered in the context of the entire trial, *Davis v. Zant*, 36 F.3d 1538, 1551 (11th Cir. 1983); and "[s]uch a determination depends on whether there is a reasonable probability that, in the absence of the improper remarks, the outcome of the trial would have been different." *Williams v. Weldon*, 826 F.2d 1018, 1023 (11th Cir. 1988).

First, review of the information reveals that Petitioner was charged with trafficking 400 grams or more of cocaine, in violation of Fla. Stat. 893.135(1)(b)1,c. [ECF 12-1, Ex. 1]. The applicable statute{2020 U.S. Dist. LEXIS 43} expressly states that a violation of this subsection is a felony in the first degree. Fla. Stat. 893.135(1)(b)1 (2009). Accordingly, contrary to Petitioner's representations here, he was charged with and convicted of a first-degree felony, and sentenced to life imprisonment as a habitual felony offender. [Vol. 3, T. 571-72]; see also Fla. Stat. 775.084(1)(a)1.

The record also shows that during closing argument, the prosecutor discussed the jury instructions and argued that the lesser included offenses of trafficking in cocaine did not apply because the state had proven that Petitioner committed the offenses as charged. [Vol. 3, T. 491-92]. Counsel objected, arguing that the prosecutor was stating her personal opinion, rather than arguing what the evidence showed. [*Id.*, T. 493]. The court overruled the objection. [*Id.*, T. 494].

Here, appellate counsel was not ineffective for failing to challenge this ruling on appeal because nothing about the prosecutor's statements was improper or an attempt to mislead the jury. Rather, her statements properly related to her argument that the state had satisfied its burden of proof. *United States v. Hall*, 47 F.3d 1091, 1098 (11th Cir. 1995) ("Claims of prosecutorial misconduct are fact specific inquiries which must be conducted against the backdrop of the{2020 U.S. Dist. LEXIS 44} entire record.") (citations omitted).

Considering the foregoing, Petitioner fails to demonstrate that the prosecutor's comments during closing argument were improper, rather than reasonable inferences from the evidence presented at trial. In context, the evidence at trial, through the testimony of the CI and the forensic analyst, established that the package sold to Petitioner contained over 1000 grams of cocaine. [Vol. 3, T. 455, 491-92]. Accordingly, it was not improper for the prosecutor to argue that the evidence did not support a conviction for the lesser included offenses. The state court's resolution of this claim is therefore entitled to deference under 2254(d). Claim 10 should be denied.

VIII. Evidentiary Hearing

In a habeas corpus proceeding, the burden is on the Petitioner to establish the need for a federal evidentiary hearing. *See Chavez v. Sec'y, Fla. Dep't of Corr.*, 647 F.3d 1057, 1060 (11th Cir. 2011). To determine whether an evidentiary hearing is needed, the question is whether the alleged facts, when taken as true, are not refuted by the record and may entitle a petitioner to relief. *Schriro v. Landrigan*, 550 U.S. 465, 474, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007); *Jones v. Sec'y, Fla. Dep't of Corr.*, 834 F.3d 1299, 1318-19 (11th Cir. 2016), *cert. den'd*, 137 S. Ct. 2245, 198 L. Ed. 2d 683 (2017). The pertinent facts of this case are fully developed in the record before the Court. Because this Court can "adequately assess [petitioner's] claim[s]{2020 U.S. Dist. LEXIS 45} without further factual development," *Turner v. Crosby*, 339 F.3d 1247, 1275 (11th Cir. 2003), an evidentiary hearing is not warranted here.

IX. Certificate of Appealability

A prisoner seeking to appeal a district court's final order denying his petition for writ of habeas corpus has no absolute entitlement to appeal but must obtain a certificate of appealability (COA"). *See* 28 U.S.C. 2253(c)(1); *Harbison v. Bell*, 556 U.S. 180, 183, 129 S. Ct. 1481, 173 L. Ed. 2d 347 (2009). This Court should issue a certificate of appealability only if the petitioner makes a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. 2253(c)(2). Where a district court has rejected a petitioner's constitutional claims on the merits, the Petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). However, when the district court has rejected a claim on procedural grounds, the Petitioner must show that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* Upon consideration of the record, this court should deny a certificate of appealability. Notwithstanding, if Petitioner does{2020 U.S. Dist. LEXIS 46} not agree, he may bring this argument to the attention of the District Judge in objections.

X. Conclusion

Based upon the foregoing, it is recommended that this petition for writ of habeas corpus be denied, that no Certificate of Appealability issue and the case be closed.

Any party who objects to this recommendation or anything in it must, within fourteen days of the date of service of this document, file specific written objections with the court. Failure to do so will bar a *de novo* determination by the District Judge of anything in the recommendation and will bar an attack, on appeal, of the factual findings of the Magistrate Judge. *See* 28 U.S.C. 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 149, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985).

SIGNED this 18th day of March, 2020.

/s/ Robin L. Rosenberg

UNITED STATES MAGISTRATE JUDGE

Footnotes

1 Pursuant to Fed. R. Civ. P. 25(d), since Mark S. Inch has replaced Julie Jones as the Secretary of the Florida Department of Corrections, he is substituted as the proper respondent in this case.

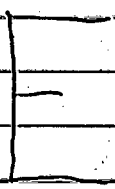
2 For purposes of this Report, when referring to the trial transcript, the Court uses the numbering system used by the Respondent in its response. [ECF 11]. This statement of facts is taken from the Respondent's summary of the facts in its response to the Court's order to show cause. [ECF 11, pp. 9-16].

3 The merits of Petitioner's appellate counsel claims are addressed below.

4 The standard jury instruction for principals is Fla. Std. Jury. Instr. 3.5(a).

5 Similarly, appellate counsel cannot be faulted for failing to argue that the trial court failed to instruct the jury as to the knowledge element of trafficking because such a claim is meritless. The record shows that the court specifically instructed the jury that in order to find Petitioner guilty of trafficking, it must find that Petitioner "knew that the substance [involved] was cocaine or a mixture containing cocaine." [Vol. 3, T. 530].

APPENDIX



DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

TERRY DARNELL ANDERSON,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D18-281

[June 7, 2018]

Appeal of order denying rule 3.850 from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; Gary L. Sweet, Judge; L.T. Case No. 56-2009-CF-001510 A.

Terry Darnell Anderson, Lowell, pro se.

No appearance required for appellee.

PER CURIAM.

Affirmed.

LEVINE, CONNER and KUNTZ, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, 110 SOUTH TAMARIND AVENUE, WEST PALM BEACH, FL 33401

July 27, 2018

CASE NO.: 4D18-0281
L.T. No.: 562009CF001510A

TERRY DARNELL ANDERSON v. STATE OF FLORIDA

Appellant / Petitioner(s) Appellee / Respondent(s)

BY ORDER OF THE COURT:

ORDERED that appellant's *pro se* motion filed June 19, 2018 for rehearing, clarification or certification and motion for rehearing en banc is denied.

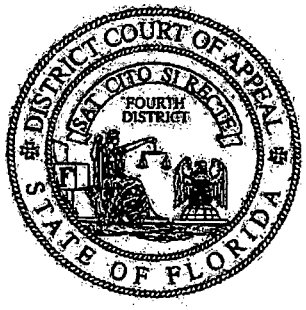
Served:

cc: Attorney General-W.P.B. Sharon Lee Stedman Terry Darnell Anderson

ll

Lonn Weissblum

LONN WEISSBLUM, Clerk
Fourth District Court of Appeal



M A N D A T E

from

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

This cause having been brought to the Court by appeal, and after due consideration the Court having issued its opinion;

YOU ARE HEREBY COMMANDED that such further proceedings be had in said cause as may be in accordance with the opinion of this Court, and with the rules of procedure and laws of the State of Florida.

WITNESS the Honorable Jonathan D. Gerber, Chief Judge of the District Court of Appeal of the State of Florida, Fourth District, and seal of the said Court at West Palm Beach, Florida on this day.

DATE:	**August 17, 2018**
CASE NO.:	**18-0281**
COUNTY OF ORIGIN:	**St. Lucie**
T.C. CASE NO.:	**562009CF001510A**

STYLE: **TERRY DARNELL ANDERSON** **v.** **STATE OF FLORIDA**

Lonn Weissblum

LONN WEISSBLUM, Clerk
Fourth District Court of Appeal

Served:

cc: Attorney General-W.P.B.
State Attorney-S.L.
Sharon Lee Stedman
Clerk St. Lucie
Terry Darnell Anderson

ll

APPENDIX

F

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR ST. LUCIE COUNTY, FLORIDA

STATE OF FLORIDA

vs.

TERRY DARNELL ANDERSON,

Defendant.
_____/

FELONY DIVISION
CASE NO.: 562009CF1510A

ORDER DENYING MOTION FOR POSTCONVICTION RELIEF

THIS CASE came before the Court in chambers on the Defendant's pro se motion dated December 16, 2013, pursuant to Florida Rule of Criminal Procedure 3.850. The Court finds and orders as follows.

On September 29, 2010, the Defendant was found guilty by a jury of trafficking in cocaine in an amount of 400 grams or more (count 1) and unlawful use of a two-way communications device (count 3). On November 18, 2010, the Defendant was sentenced to life in prison as a habitual felony offender with a minimum mandatory of fifteen years in prison on count 1 and ten years in prison on count 3. The Defendant's judgment and sentence were affirmed on appeal with a mandate issued February 15, 2013. *Anderson v. State*, 105 So. 3d 536 (Fla. 4th DCA 2013).

In his motion, the Defendant claims that his counsel was ineffective. In order to succeed on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also State v. Dickey*, 928 So. 2d 1193, 1196 (Fla. 2006). A defendant must establish specific acts or omissions of counsel that were "so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. In demonstrating prejudice, a defendant must show that there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. A reasonable probability is one sufficient to undermine confidence in the outcome of the case that is, that absent counsel's errors, the fact finder would have had a reasonable doubt respecting guilt. *Bowman v. State*, 748 So. 2d 1082, 1085 (Fla. 4th DCA 2000). It is unnecessary to address both prongs if one or the other is not met. *See Atkins v. Dugger*, 541 So. 2d 1165, 1166 (Fla. 1989).

Ground One

The Defendant claims that Trial Counsel was ineffective for failing to have recorded video authenticated prior to trial. The Defendant alleges that he believes that the video recording had been tampered with and does not show the true events within the car during the alleged cocaine transaction. The Defendant claims that he never had possession of the cocaine as reflected in the video recording.

First, this claim is insufficiently pled. The Defendant does not state what the video would have reflected or specifically how he believes that it was tampered with. Further, the Defendant fails to specially assert how the suppression of the video recording would have resulted in a different outcome.

Second, this Court agrees with the State that there is sufficient record evidence to refute the Defendant's claim. (See State response attached as A). The issue of the Defendant's request to have the video recording authenticated was raised prior trial. (See transcript pages 15-24 attached as part of Ex. A).[1] During this time, Trial Counsel advised the Court that he did not believe that there was any evidence or reason to believe that the video had been tampered with. (See transcript page 18 attached as

[1] This Court notes that it has supplemented the portion of the transcript provided by the State in Ex. A with pages it finds relevant).

part of Ex. A).

Even if the video recording was to be suppressed, there was sufficient evidence presented by the State at trial that the outcome of the trial would not have been different. The State presented several recorded phone conversations between the Defendant or co-Defendant and the confidential informant (CI) attempting to set up the transaction. (See transcript pages 369-372; 376-381; 385-389; and 394-399 attached as part of Ex. A). Further, the testimony of Officer Joshua Peto and the CI Kenneth Pyle demonstrate that the outcome would not be different. (See transcript pages 243-260; 263-275; 282; 301; 305-324; and 367-410 attached as part of Ex. A). As part of his testimony, Mr. Pyle testified that he opened his glove compartment retrieved the kilo of cocaine and handed it to the Defendant who then handed to his co-Defendant in the back seat. (See transcript pages 402-404 attached as part of Ex. A). As pointed out above, there was sufficient evidence presented by the State that even had the video recording not been played for the jury, the outcome of the Defendant's trial would not have been different. The Defendant's claim is refuted by the record.

Ground Two

The Defendant alleges that Trial Counsel was ineffective for failing to impeach Kenneth Pyle regarding inconsistent statements that he made.

This Court agrees and adopts the well-reasoned response put forth by the State. (See State response attached as Ex. A). As the State points out, the Defendant admits that co-Defendant's attorney impeached Mr. Pyle with these inconsistent statements. However, the Defendant incorrectly asserts that this impeachment could not be used in his case. The jury heard the impeachment of Mr. Pyle. There was no need for Trial Counsel to impeach Mr. Pyle for a second time. As the State points out, this would have allowed Mr. Pyle to again provide an explanation for the inconsistent statements.

The Defendant has not demonstrated that Trial Counsel was ineffective. The Defendant's claim is refuted by the record and without merit.

Ground Three and Four

The Defendant claims that Trial Counsel was ineffective for not pursuing a defense of subjective entrapment. The Defendant asserts that they discussed such a defense but that Trial Counsel would not pursue it.

This Court again agrees and adopts the well-reasoned response put forth by the State. First, this defense would be contrary to the Defendant's position that he was not involved with the trafficking. Second, the State would have been able to introduce evidence of other attempts to conduct drug transactions. The State gave notice that it was seeking to introduce such evidence at trial. (See notice of intent to introduce evidence of other crimes Ex. 1 of Ex. A). The Court granted the Defendant's motion *in limine* to prohibit the introduction of such evidence. (See transcript page 214 attached as part of Ex. A). However, this evidence would have been relevant and admissible had the Defendant pursued the entrapment defense.

It is readily evident that the trial Counsel did not pursue the entrapment defense as a strategy to prevent evidence of other attempts at making drug transactions. Further, this Court does not find that there was a reasonable probability that an entrapment defense would have been successful. This claim is refuted by the record and without merit.

Ground Five

The Defendant claims that the cumulative effect of Trial Counsel's errors entitled him to relief.

Having found no merit in the previous four claims individually or in combination, this Court does not find that there was cumulative error that would entitle the Defendant

to relief.

It is hereby ORDERED that the Defendant's motion is DENIED.

The Defendant has thirty days to seek appellate review.

DONE AND ORDERED in chambers in Fort Pierce, St. Lucie County, Florida on 12/6, 2017.

GARY L. SWEET
CIRCUIT COURT JUDGE

Certificate of Service

I hereby certify that a true and correct copy of the above order, including any attachments, has been sent to the following addressees by U.S. Mail, postage prepaid or e-portal, to the following persons, on December 7th, 2017.

Sharon Lee Stedman
Counsel for the Defendant
3015 Albert Street
Orlando, Florida 32806-6115

Bruce Harrison
Assistant State Attorney
Office of the State Attorney

JOSEPH E. SMITH
CLERK OF THE COURT

By: _____
Deputy Clerk

St. Lucie County File Date: 12/07/2017 15:10 PM

APPENDIX

G

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, 1525 PALM BEACH LAKES BLVD., WEST PALM BEACH, FL 33401

September 06, 2013

CASE NO.: 4D13-2471
L.T. No.: 562009CF001510A

TERRY ANDERSON v. STATE OF FLORIDA

Appellant / Petitioner(s) Appellee / Respondent(s)

BY ORDER OF THE COURT:

ORDERED that Petitioner's July 11, 2013 petition for writ of habeas corpus alleging ineffectiveness of appellate counsel is denied on the merits; further,

ORDERED that, to the extent the petition raises issues of ineffectiveness of trial counsel, and without passing on the merits of such claims, the denial is without prejudice to petitioner's right to raise these issues in a timely filed postconviction motion, should that be appropriate. *See* Fla. R. Crim. P. 3.850.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

cc: Attorney General-W.P.B. Terry Darnell Anderson

lc

Marilyn Beuttenmuller
MARILYN BEUTTENMULLER, Clerk
Fourth District Court of Appeal

APPENDIX

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2013

TERRY DARNELL ANDERSON,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D10-5011

[January 16, 2013]

PER CURIAM.

Affirmed.

WARNER, CIKLIN and LEVINE, JJ., concur.

* * *

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; Dan Vaughn, Judge; L.T. Case No. 562009CF001510A.

Carey Haughwout, Public Defender, and Susan D. Cline, Assistant Public Defender, West Palm Beach, for appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Joseph A. Tringali, Assistant Attorney General, West Palm Beach, for appellee.

Not final until disposition of timely filed motion for rehearing.

M A N D A T E

from

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

This cause having been brought to the Court by appeal, and after due consideration the Court having issued its opinion;

YOU ARE HEREBY COMMANDED that such further proceedings be had in said cause as may be in accordance with the opinion of this Court, and with the rules of procedure and laws of the State of Florida.

WITNESS the Honorable Melanie G. May, Chief Judge of the District Court of Appeal of the State of Florida, Fourth District, and seal of the said Court at West Palm Beach, Florida on this day.

DATE: February 15, 2013

CASE NO.: 4D10-5011

APPEALS
FEB 20 2013

COUNTY OF ORIGIN: St. Lucie

T.C. CASE NO.: 562009CF001510A

STYLE: TERRY DARNELL ANDERSON v. STATE OF FLORIDA

DISTRICT COURT OF APPEAL * FOURTH DISTRICT * SAT CITO SI RECTE * STATE OF FLORIDA

Marilyn Beuttenmuller
MARILYN BEUTTENMULLER, Clerk
Fourth District Court of Appeal

ORIGINAL TO: Joseph E. Smith, Clerk
cc:
Public Defender-P.B.
Attorney General-W.P.B.

sp