IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-10859-J

LINAKER CHARLEMAGNE,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

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

Before: WILSON and ROSENBAUM, Circuit Judges.

BY THE COURT:

Linaker Charlemagne has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's July 15, 2021, order denying his motion for a certificate of appealability and denying as moot his motion for leave to proceed on appeal *in forma pauperis*. Upon review, Charlemagne's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

David J. Smith
Clerk of Court

For rules and forms visit
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August 17, 2021

Linaker Charlemagne
Madison CI - Inmate Legal Mail
382 SW MCI WAY
MADISON, FL 32340

Appeal Number: 21-10859-J
Case Style: Linaker Charlemagne v. Secretary, Department of Corr.
District Court Docket No: 1:20-cv-20308-CMA

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing, are available at www.ca11.uscourts.gov.

The enclosed order has been ENTERED. NO FURTHER ACTION WILL BE TAKEN ON THIS APPEAL.

Sincerely,

DAVID J. SMITH, Clerk of Court

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

MOT-2 Notice of Court Action

APPENDIX - F

(Confirmation of Non-Service)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-20308-CIV-ALTONAGA

LINAKER CHARLEMAGNE,

Petitioner,

v.

MARK INCH, *Secretary, Florida Department of Corrections*,

Respondent.
_____/

ORDER

THIS CAUSE is before the Court on *pro se* Petitioner, Linaker Charlemagne's Motion for Rehearing/Rehearing En Banc [ECF No. 38], filed on March 1, 2021.[1] The Court considers Petitioner's Motion under Federal Rule of Civil Procedure 59(e), requesting the Court to alter or amend her February 16, 2021 Final Judgment [ECF No. 23]. (*See* Mot. 1–2). A summary of the procedural history in this case will help put Petitioner's request in context.

On January 19, 2021, Magistrate Judge Lisette M. Reid issued her Report of Magistrate Judge [ECF No. 21], recommending Petitioner's 28 U.S.C. section 2254 Petition [ECF No. 1] be denied. (*See* Report 1). The Court did not receive objections to the Report's findings or conclusions and thus the undersigned reviewed the Report for clear error — accepting and adopting the Report in full. (*See generally* Feb. 16, 2021 Order [ECF No. 22]).

Petitioner explains he never objected to the Report because he never received it. (*See*

[1] "Under the 'prison mailbox rule,' a *pro se* prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing." *Williams v. McNeil*, 557 F.3d 1287, 1290 n.2 (11th Cir. 2009) (citations omitted). Petitioner's Motion was delivered to prison authorities for mailing on March 1, 2021. (*See* Mot. 1).

Mot. 2). This is unfortunate. But Petitioner fails to provide a basis — such as the actual objections Petitioner would have filed, if Petitioner *had* timely received the Report — for the Court to amend or alter her judgment denying the Petition. Without such a basis, the Court must deny Petitioner's Motion.

Accordingly, it is

ORDERED AND ADJUDGED that Petitioner, Linaker Charlemagne's Motion for Rehearing/Rehearing En Banc **[ECF No. 38]** is **DENIED** without prejudice.

DONE AND ORDERED in Miami, Florida, this 21st day of April, 2021.

Cecilia M. Altonaga

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record;

Petitioner, *pro se*
Linaker Charlemagne
M87151
Madison Correctional Institution
Inmate Mail/Parcels
382 SW MCI Way
Madison, FL 32340

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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David J. Smith
Clerk of Court

For rules and forms visit
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July 15, 2021

Clerk - Southern District of Florida
U.S. District Court
400 N MIAMI AVE
MIAMI, FL 33128-1810

Appeal Number: 21-10859-J
Case Style: Linaker Charlemagne v. Secretary, Department of Corr.
District Court Docket No: 1:20-cv-20308-CMA

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

All pending motions are now rendered moot in light of the attached order.

Sincerely,

DAVID J. SMITH, Clerk of Court

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

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-10859-J

LINAKER CHARLEMAGNE,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

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

ORDER:

Linaker Charlemagne moves for a certificate of appealability to appeal the denial of his habeas corpus petition, filed pursuant to 28 U.S.C. § 2254. His motion is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Charlemagne's motion for leave to proceed on appeal *in forma pauperis* is DENIED AS MOOT.

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-20308-CV-ALTONAGA
MAGISTRATE JUDGE REID

LINAKER CHARLEMAGNE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

REPORT OF MAGISTRATE JUDGE

Petitioner has filed a *pro se* Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, attacking his judgment of conviction in the Eleventh Judicial Circuit of Florida, Miami-Dade County in Case No. F09-013518A. [ECF No. 6]. For the reasons discussed below, the Amended Petition should be **DENIED**.

I. Relevant Background

The state charged Petitioner with the premeditated murder of William Jones and the attempted premeditated murder of Cedric Johnson on April 19, 2009. [ECF No. 12-2]. Petitioner's jury trial started on August 12, 2013. [ECF No. 11-1 at 20[1]]. A jury convicted Petitioner of both counts, finding that he possessed and discharged a firearm causing death and great bodily harm. [ECF No. 12-3]. The trial court sentenced Petitioner to life in prison with a 25-year mandatory minimum sentence on each count and ordered the sentences to run concurrently. [ECF No. 12-4].

Petitioner appealed. [ECF No. 13-1]. The Third District Court of Appeals ("Third District") affirmed without discussion because it found "no merit in the points raised . . . on [] appeal." [*Id.*

[1] All citations to ECF entries refer to the page-stamp number at the top, right-hand corner of the page.

at 2]. However, the Third District reversed in part with directions for the trial court to run petitioner's sentences consecutively. [*Id.* at 2-3]. The Florida Supreme Court quashed the Third District's decision regarding reversing the sentences and remanded to the Third District for reconsideration. [ECF No. 13-15]. On remand, the Third District affirmed Petitioner's concurrent life sentences with 25-year mandatory minimums. [ECF No. 13-16].

Petitioner filed an amended motion for postconviction relief pursuant to Fla. R. Crim. P. 3.850. [ECF No. 14-1]. The trial court denied the motion in a written decision. [ECF No. 14-5]. The Third District affirmed. [ECF No. 14-8]. The Florida Supreme Court declined jurisdiction. [ECF No. 14-3].

Petitioner timely filed his § 2254 Petition, [ECF No. 1], which he amended, [ECF No. 6]. Respondent filed a Response and supporting documentation. [ECF Nos. 10-16].[2] Petitioner filed a Reply [ECF No. 17], and this case is now ripe for adjudication.

II. Legal Standard Under 28 U.S.C. § 2254

Title 28 U.S.C. § 2254(d) sets forth the following standards for granting federal habeas corpus relief:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

[2] Respondent's filing of each exhibit as a separate entry and accurate labeling of the exhibits on the docket facilitated the Undersigned's review of the record.

Under § 2254(d)(1)'s "contrary to" clause, courts may grant the writ if the state court: (1) reaches a conclusion on a question of law opposite to that reached by the Supreme Court; or (2) decides a case differently than the Supreme Court has on materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). Under its "unreasonable application" clause, courts may grant the writ if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the case. *Id.* at 413. "[C]learly established Federal law" consists of Supreme Court "precedents as of the time the state court renders its decision." *Greene v. Fisher*, 565 U.S. 34, 38 (2011) (citation and emphasis omitted).

An unreasonable application of federal law differs from an incorrect application of federal law. *See Renico v. Lett*, 559 U.S. 766, 773 (2010) (citation omitted). Under this standard, "a state prisoner must show that the state court's ruling . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

Courts "apply this same standard when evaluating the reasonableness of a state court's decision under § 2254(d)(2)." *Landers v. Warden*, 776 F.3d 1288, 1294 (11th Cir. 2015) (citations omitted). That is, "[a] state court's . . . determination of the facts is unreasonable only if no fairminded jurist could agree with the state court's determination . . . ." *Holsey v. Warden, Ga. Diag. Prison*, 694 F.3d 1230, 1257 (11th Cir. 2012) (citations and internal quotations omitted).

Under § 2254(d), where the decision of the last state court to decide a prisoner's federal claim contains no reasoning, federal courts must "'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale." *Wilson v. Sellers*, 138 S.

Ct. 1188, 1192 (2018). "It should then presume that the unexplained decision adopted the same reasoning." *Id.*

III. Ineffective Assistance of Counsel Principles

To establish a claim of ineffective assistance of counsel, petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficiency, he must show that counsel's performance "fell below an objective standard of reasonableness" as measured by prevailing professional norms. *Id.* at 688. To prove prejudice, he must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

It is "all the more difficult" to prevail on a *Strickland* claim under § 2254(d). *Harrington*, 562 U.S. at 105. As the standards that *Strickland* and § 2254(d) create are both "highly deferential," review is "doubly" so when the two apply in tandem. *Id.* (citations and internal quotation marks omitted). Thus, "[w]hen § 2254(d) applies, the question is not whether counsel's actions were reasonable." *Id.* Rather, "[t]he question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.* Petitioner has the burden of proof on his ineffectiveness claim, *see Holsey*, 694 F.3d at 1256, as well as the burden of proof under § 2254(d). *See Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (citation omitted).

IV. Discussion

A. Claim One

Petitioner contends that counsel ineffectively failed to call expert witnesses to establish that the victims' hands contained gunshot residue. [ECF No. 6 at 3-4]. This testimony allegedly would have cast "doubt . . . on the State's theory of prosecution[] that both victims were unarmed,

and in all likelihood resulted in an acquittal." [*Id.* at 6]. Likewise, this testimony would have "cast doubt on the State's premeditation theory and supported the reasonable hypothesis that the homicide was not premediated." [ECF No. 17 at 2]. Furthermore, this testimony would have damaged Johnson's credibility, "who denied that he and Jones ever had guns." [*Id.*].

Petitioner raised this claim in his amended Rule 3.850 motion. [ECF No. 14-1 at 3]. The trial court rejected it on the grounds that: (1) trial counsel unsuccessfully attempted to elicit such information on cross-examination of another witness; and (2) the Third District rejected a related claim on appeal. [ECF No. 14-5 at 3]. In affirming, the Third District likewise appeared to reason that these issues were decided on direct appeal. [ECF No. 14-8 at 2].

However, the claim that Petitioner raised on direct appeal was analytically distinct, [ECF No. 13-1 at 12, 15-20], and counsel's attempt to elicit such information on cross-examination of the state's witness does not necessarily justify his failure to present witnesses to establish this fact. Therefore, because the state courts appeared to misconstrue this claim, the Undersigned reviews it *de novo*. *Cf. Bester v. Warden*, 836 F.3d 1331, 1337 (11th Cir. 2016) (citation omitted); *Lawrence v. Sec'y, Fla. Dep't of Corr.*, 700 F.3d 464, 481 (11th Cir. 2012) (citation omitted).

In any event, this claim lacks merit. "Which witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that [the Eleventh Circuit] will seldom, if ever, second guess." *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995) (*en banc*). "If the record is not complete regarding counsel's actions, then the courts should presume that . . . what witnesses [defense counsel] presented or did not present[] [was an] act[] that some reasonable lawyer might do." *Jones v. Campbell*, 436 F.3d 1285, 1293 (11th Cir. 2006) (citation omitted).

Here, the record is not complete regarding why counsel did not call experts to establish that the victims' hands contained gunshot residue. This claim fails for this reason alone.

Furthermore, even if had counsel deficiently failed to call these witnesses, Petitioner could not show prejudice. Testimony that the victims had gunshot residue on their hands would not have impelled the inference that they had guns, and Petitioner has not adequately identified any testimony supporting this inference. *See* [ECF No. 17 at 3]. Additionally, the state presented strong evidence of Petitioner's guilt. *See infra*, Part IV(E). This evidence included the testimony of his former codefendant, who was at the scene of the shooting, as well victim Johnson's testimony that Petitioner was the shooter. *See, e.g.*, [ECF No. 10 at 2-4, 7 (citing trial transcript)]. Therefore, Petitioner has not shown a reasonable probability that the experts' testimony would have resulted in a more favorable outcome. In sum, claim one lacks merit and should be denied.

B. Claim Two

Petitioner next argues that counsel ineffectively failed to object to several improper remarks that the prosecutor made during closing argument. [ECF No. 6 at 7-10]. In support, he contends that the prosecutor: (1) exploited excluded evidence regarding whether the victims possessed firearms; (2) touted a finding regarding gunshot residue on Petitioner's shoe as a conclusive finding that Petitioner fired a gun; (3) suggested "additional knowledge of guilt that was not shared with the jury"; (4) suggested "that the jury should trust the State's judgment rather than their own view of the evidence"; (5) vouched for a witness's credibility; (6) attacked a "straw man alibi defense" when Petitioner's "defense was misidentification"; and (7) shifted the burden of proof to Petitioner. [*Id.* at 7-9].

Petitioner raised this claim in his amended Rule 3.850 motion. [ECF No. 14-1 at 20]. The trial rejected it, pertinently finding that "each of the improper comments was raised as an issue on direct appeal" and "dismissed . . . as meritless." [ECF No. 14-5 at 5]. The Third District affirmed, reasoning that Petitioner could not show prejudice because it found on direct appeal that these

remarks were not fundamental error. [ECF No. 14-8 at 2 (citing *Chandler v. State*, 848 So. 2d 1031, 1046 (Fla. 2003))].

However, to show prejudice under *Strickland*, Petitioner must show a reasonable probability of a more favorable outcome absent counsel's deficiency. By contrast, a prosecutor's improper remarks constitute fundamental error where they are "so prejudicial as to vitiate the entire trial." *See Chandler*, 848 So. 2d at 1046. Because this standard appears more challenging than the *Strickland* prejudice standard, the Undersigned reviews this claim *de novo*. *Cf. Owen v. Fla. Dep't of Corr.*, 686 F.3d 1181, 1201 (11th Cir. 2012) (suggesting that courts must review *Strickland* claim *de novo* if test state court applies to resolve claim "imposes a higher burden or contradicts the governing *Strickland* prejudice standard").

Here, in any event, Petitioner has not shown prejudice on this claim. *See generally Garlotte v. Fordice*, 515 U.S. 39, 46 (1995) ("[T]he habeas petitioner generally bears the burden of proof[.]"); *see also Holsey*, 694 F.3d at 1256. Before opening statements, the court instructed the jury that the state had to prove its accusation beyond a reasonable doubt and that the jury's verdict "must be based solely on the evidence, or lack of evidence, and the law." [ECF No. 11-3 at 16]. Likewise, before the jury retired to deliberate, the court instructed it that: (1) it had to follow the law set out in the instructions; (2) the case must be decided upon the evidence and the instructions; (3) its feelings regarding the lawyers should not influence its decision; and (4) its verdict must not be influenced by feelings of prejudice, bias, or sympathy. [ECF No. 16-2 at 23-24]. The jury presumably followed these instructions, *see Weeks v. Angelone*, 528 U.S. 225, 234 (2000), and Petitioner has not meaningfully argued, much less shown, otherwise.

Furthermore, the state presented strong evidence of Petitioner's guilt. *See infra*, Part IV(E). The Third District's ruling on direct appeal that the allegedly improper remarks were not

fundamental error supports this finding. Thus, Petitioner has not met his burden of showing that counsel's allegedly deficient failure to object to the comments prejudiced him and claim two fails.

C. Claim Three

Petitioner next argues that counsel ineffectively failed to "give a valid" basis for counsel's request for an instruction on justifiable use of deadly force. [ECF No. 6 at 11]. Although Petitioner admits that counsel requested such an instruction, he faults counsel for failing to "point[] to evidence to show the applicability of the instruction." [*Id.*]. Petitioner contends that the evidence warranted this instruction because former codefendant Mr. Sastre allegedly testified that "the alleged victims were acting aggressively toward [Petitioner] because they outnumbered him two against one." [*Id.* (citing ECF No. 11-4 at 28-29)].

Petitioner raised this claim in his amended Rule 3.850 motion. [ECF No. 14-1 at 24]. The trial court rejected it because: (1) counsel requested a justifiable use of deadly force instruction; and (2) on direct appeal, the Third District rejected the argument that the trial court reversibly erred in denying this instruction. [ECF No. 14-5 at 5]; *compare* [ECF No. 13-1 at 20-21 (Petitioner's argument on direct appeal)], *with* [ECF No. 13-5 at 2 (rejecting this argument)]. The Third District's affirmance does not contain any relevant reasoning. *See* [ECF No. 14-8 at 2-3].

Here, the trial court reasonably rejected this claim. Counsel asked for an instruction on justifiable use of deadly force, which the court denied because the evidence did not support this theory. [ECF No. 11-6 at 161; ECF No. 11-8 at 129]. Furthermore, contrary to Petitioner's contention, Mr. Sastre did not testify that the alleged victims were acting aggressively toward Petitioner "because they outnumbered him two against one." [ECF No. 6 at 11]. Rather, he testified, without elaboration, that he exited the car because he heard "loud arguing" and "screaming" from an unknown person(s) and that he "didn't know if [the victims] were going to

fight [Petitioner] or jump him." [ECF No. 11-4 at 28-29]. Additionally, this habeas court cannot review the trial court's state-law determination that the evidence did not warrant an instruction on justifiable deadly force. *See, e.g., Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (citation omitted); *Chamblee v. Florida*, 905 F.3d 1192, 1196-98 (11th Cir. 2018). Accordingly, there is a reasonable argument that counsel did not deficiently fail to "give a valid basis" for the instruction at issue.

In sum, the trial court's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law or an unreasonable determination of the facts. Accordingly, this claim should be denied.

D. Claim Four

Petitioner alleges that counsel ineffectively failed to challenge the state's race-neutral reasons for excluding black jurors as pretextual and renew this objection at the end of *voir dire* to preserve it for appeal. [ECF No. 6 at 13-15]. In support, he contends that the state struck four black jurors who "never demonstrated bias" against the state. [*Id.* at 14]. However, he contends that the state did not strike a white juror who "demonstrated bias about" the state's evidence. [*Id.*]. Therefore, he contends that the state's race-neutral reasons to defend these strikes were pretextual. [*Id.* at 13-15].

During *voir dire*, the prosecutor objected to the state's alleged "trend" of "striking all black females." [ECF No. 11-2 at 138]. The state responded that it had "not been striking just [black] females." [*Id.*]. Furthermore, regarding the stricken black juror Ms. Eldridge, the state said that: (1) she failed to disclose a crime; (2) police previously questioned her about a drug offense that she did not commit; and (3) she had a "bad experience" as a schoolteacher that the state did not fully understand. [*Id.* at 138-39]. The court found this reason to be genuine and allowed the strike.

[*Id.* at 139]. After further strikes by the state and counsel, the parties accepted the jury and counsel did not renew the *Batson*[3] objection. [*Id.* at 139-51].

Petitioner raised this claim in his amended Rule 3.850 motion. [ECF No. 14-1 at 8-9]. The trial court rejected it, reasoning that "counsel did raise appropriate challenges that the state was able to overcome. . . . [through] genuine race neutral reasons for their strikes." [ECF No. 14-5 at 6]. Further, the court reasoned that "these issues were preserved and could have been raised on direct appeal." [*Id.*]. The Third District rejected this claim, reasoning that "[a] claim that counsel was ineffective for failing to 'follow-up' on questioning to establish grounds for a for-cause challenge has been held to be legally insufficient because such a claim can be based on nothing more than conjecture by the defendant." [ECF No. 14-8 at 2 (citation omitted)].

Here, the Third District reasonably rejected this claim. The record does not indicate that further questioning or objections by counsel would have revealed that the strikes in question were pretextual. Mr. Papadopoulos, the white juror, initially stated that he could be "bias[ed] about striking a deal [with the state]," though he clarified that the bias would not influence his decision or affect his ability to be fair and impartial. [ECF No. 11-2 at 56-58]. Because the reasons for which the state struck Ms. Eldridge are considerably different than Mr. Papadopoulos's alleged bias, Petitioner has not shown that they were pretextual. *See Walls v. Buss*, 658 F.3d 1274, 1282 (11th Cir. 2011) (rejecting *Batson* claim in part because the petitioner failed to offer "a comparative analysis of jurors who the State accepted and rejected, to show that the State did not attempt to remove similarly situated nonblack jurors").

True, it is not fully clear why the prosecutor struck black juror Ms. Amie. [ECF No. 11-2 at 137]. However, Ms. Amie initially stated that, although she was a nurse, she would not like to

[3] *Batson v. Kentucky*, 476 U.S. 79 (1986).

be "involved in an emergency room or . . . trauma cases" because it would be "too much for [her]." [*Id.* at 95]. She added: "It's too much action for me. It's fast pace[d]." [*Id.*] Because the case involved a shooting causing a death and great bodily harm, it is arguable that the state was concerned about Ms. Amie's ability to be fair and impartial given her expressed disinclination for trauma cases. Petitioner will contend that counsel could have shown that this strike was pretextual had he pressed the point. Again, however, Petitioner has not shown that Ms. Amie was "similarly situated" to Mr. Papadopoulos. *See Walls*, 658 F.3d at 1282. Furthermore, "[this] claim . . . [appears to] be based on nothing more than conjecture by [Petitioner]." *See* [ECF No. 14-8 at 2 (citation omitted)]; *cf. Aldrich v. Wainwright*, 777 F.2d 630, 636 (11th Cir. 1985) ("Speculation is insufficient to carry the burden of a habeas corpus petitioner as to what evidence could have been revealed by further investigation.").[4]

In sum, the Third District's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law or an unreasonable determination of the facts. Accordingly, this claim should be denied.

E. Claim Five

Petitioner contends that he did not receive a fair trial because, on March 1, 2015, victim Johnson signed an affidavit recanting his testimony and declaring that he identified Petitioner only because of a suggestive identification procedure. [ECF No. 6 at 16-18].

Petitioner raised this claim in his amended Rule 3.850 motion. [ECF No. 14-1 at 42-43]. The trial court held a hearing on this claim in which it took testimony from Johnson and defense counsel. [ECF No. 14-4 at 3]. The trial court rejected this claim, finding that the "testimony of []

[4] Petitioner has not explained how the state's strikes of the other two black jurors were pretextual. *See generally* [ECF No. 6 at 13-16; ECF No. 17 at 7-8].

Johnson at the evidentiary hearing was not credible." [ECF No. 14-5 at 7]. Pertinently, the court reasoned:

> [Johnson] is unable to explain his reason for supposedly lying at the time of the incident. He is unable to explain the independent corroboration of [Petitioner] as the shooter and he is unable to explain why he now is changing his story. His demeanor and his manner of answering the questions posed by the lawyers and the Court demonstrated a lack of trustworthiness.
>
> As the record demonstrates and as was further established at the evidentiary hearing, the evidence at trial against [Petitioner] was overwhelming. In addition to the testimony of [] Johnson, [Mr. Sastre] testified and identified [petitioner] as the shooter, there was evidence of jail phone calls between the two defendants discussing the crime, there were contemporaneous statements made to the mother of [] Johnson and police officers identifying [Petitioner] by nickname, and [] Johnson identified [petitioner] in a photo line-up only one day after the incident. In light of all the evidence at trial and in light of the inconsistencies and incredibility of . . . Johnson, . . . this newly discovered evidence, namely his recantation, would be unlikely to produce a different result on retrial.

[*Id.* at 8]; *see also* [ECF No. 10 at 2-9 (citing trial transcript)]. The Third District affirmed but did not explicitly address this claim. [ECF No. 14-8 at 2-3].

This standalone actual innocence claim fails. Eleventh Circuit "precedent forecloses habeas relief based on a prisoner's assertion that he is actually innocent of the crime of conviction absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Raulerson v. Warden*, 928 F.3d 987, 1004 (11th Cir. 2019) (citation and internal quotation marks omitted); *see also Herrera v. Collins*, 506 U.S. 390, 400 (1993) ("Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.").

Here, Petitioner has not shown any independent constitutional violation in the state court proceeding. To the extent he argues that his conviction violated due process because it was fundamentally unfair and/or the evidence was insufficient, the strong evidence of his guilt belies

this argument. Furthermore, the trial court's rejection of this claim turned in large part on its finding that Johnson's testimony was incredible, and, "[i]n the absence of clear and convincing evidence, [courts] have no power on federal habeas review to revisit the state court's credibility determinations." *Bishop v. Warden*, 726 F.3d 1243, 1259 (11th Cir. 2013) (citations omitted). Petitioner's mere disagreement with the trial court's assessment of the strength of the state's evidence does not meet this standard.[5] Thus, claim five fails.

V. Evidentiary Hearing

Petitioner is not entitled to an evidentiary hearing. *See Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) ("[I]f the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing [under § 2254]."); *see also Jones v. Sec'y, Fla. Dep't of Corr.*, 834 F.3d 1299, 1318 (11th Cir. 2016) (petitioner not entitled to evidentiary hearing under § 2254 if fails to allege "enough specific facts that, if they were true, would warrant relief").

VI. Certificate of Appealability

"The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." R. 11(a), Rules Governing § 2254 Cases. "If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22." *Id.* "A timely notice of appeal must be filed even if the district court issues a certificate of appealability." R. 11(b), Rules Governing § 2254 Cases.

"A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district court

[5] Petitioner's contention that there was a "conflict of interest" at the evidentiary hearing on this claim does not inform the analysis. *See generally* [ECF No. 18]. Petitioner has not alleged, much less shown, how this alleged conflict might have influenced the trial court's factual findings.

rejects a petitioner's constitutional claims on the merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Here, the Undersigned denies a certificate of appealability. If Petitioner disagrees, he may so argue in any objections filed with the District Judge.

VII. Recommendations

As discussed above, it is **RECOMMENDED** that the Amended Petition [ECF No. 6] be **DENIED**; that no certificate of appealability issue; that final judgment be entered; and that the case be closed.

Objections to this Report may be filed with the District Judge within fourteen days of receipt of a copy of the Report. Failure to timely file objections will bar a *de novo* determination by the District Judge of anything in this recommendation and shall constitute a waiver of a party's "right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions." *See* 11th Cir. R. 3-1 (2016); *see also* 28 U.S.C. § 636(b)(1)(C); *Harrigan v. Metro-Dade Police Dep't Station #4*, 977 F.3d 1185, 1191-92 (11th Cir. 2020).

SIGNED this 19th day of January, 2021.

UNITED STATES MAGISTRATE JUDGE

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APPENDIX - B

(District Courts Opinion)

B

LINAKER CHARLEMAGNE, Petitioner, v. STATE OF FLORIDA, Respondent.
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA
2021 U.S. Dist. LEXIS 10736
CASE NO. 20-20308-CV-ALTONAGA
January 19, 2021, Decided
January 19, 2021, Entered on Docket

Editorial Information: Prior History

Charlemagne v. State, 77 So. 3d 186, 2011 Fla. App. LEXIS 21162 (Fla. Dist. Ct. App. 3d Dist., Dec. 9, 2011)

Counsel {2021 U.S. Dist. LEXIS 1} **Linaker Charlemagne, Plaintiff, Pro se**, Madison, FL.
For Mark Inch, Defendant: Noticing 2254 SAG Miami-Dade/Monroe, LEAD ATTORNEY; Jeffrey Robert Geldens, Office of the Florida Attorney General, Miami, FL.

Judges: Lisette M. Reid, UNITED STATES MAGISTRATE JUDGE.

Opinion

Opinion by: Lisette M. Reid

Opinion

REPORT OF MAGISTRATE JUDGE

Petitioner has filed a *pro se* Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. 2254, attacking his judgment of conviction in the Eleventh Judicial Circuit of Florida, Miami-Dade County in Case No. F09-013518A. [ECF No. 6]. For the reasons discussed below, the Amended Petition should be DENIED.

I. Relevant Background

The state charged Petitioner with the premeditated murder of William Jones and the attempted premeditated murder of Cedric Johnson on April 19, 2009. [ECF No. 12-2]. Petitioner's jury trial started on August 12, 2013. [ECF No. 11-1 at 201]. A jury convicted Petitioner of both counts, finding that he possessed and discharged a firearm causing death and great bodily harm. [ECF No. 12-3]. The trial court sentenced Petitioner to life in prison with a 25-year mandatory minimum sentence on each count and ordered the sentences to run concurrently. [ECF No. 12-4].

Petitioner appealed. [ECF No.{2021 U.S. Dist. LEXIS 2} 13-1]. The Third District Court of Appeals ("Third District") affirmed without discussion because it found "no merit in the points raised . . . on [] appeal." [*Id.* at 2]. However, the Third District reversed in part with directions for the trial court to run petitioner's sentences consecutively. [*Id.* at 2-3]. The Florida Supreme Court quashed the Third District's decision regarding reversing the sentences and remanded to the Third District for reconsideration. [ECF No. 13-15]. On remand, the Third District affirmed Petitioner's concurrent life sentences with 25-year mandatory minimums. [ECF No. 13-16].

Petitioner filed an amended motion for postconviction relief pursuant to Fla. R. Crim. P. 3.850. [ECF No. 14-1]. The trial court denied the motion in a written decision. [ECF No. 14-5]. The Third District affirmed. [ECF No. 14-8]. The Florida Supreme Court declined jurisdiction. [ECF No. 14-3].

Petitioner timely filed his 2254 Petition, [ECF No. 1], which he amended, [ECF No. 6]. Respondent filed a Response and supporting documentation. [ECF Nos. 10-16].2 Petitioner filed a Reply [ECF No. 17], and this case is now ripe for adjudication.

II. Legal Standard Under 28 U.S.C. 2254

Title 28 U.S.C. 2254(d) sets forth the following standards for granting federal habeas{2021 U.S. Dist. LEXIS 3} corpus relief: An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Under 2254(d)(1)'s "contrary to" clause, courts may grant the writ if the state court: (1) reaches a conclusion on a question of law opposite to that reached by the Supreme Court; or (2) decides a case differently than the Supreme Court has on materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 412-13, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). Under its "unreasonable application" clause, courts may grant the writ if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the case. *Id.* at 413. "[C]learly established Federal law" consists of Supreme Court "precedents{2021 U.S. Dist. LEXIS 4} as of the time the state court renders its decision." *Greene v. Fisher*, 565 U.S. 34, 38, 132 S. Ct. 38, 181 L. Ed. 2d 336 (2011) (citation and emphasis omitted).

An unreasonable application of federal law differs from an incorrect application of federal law. *See Renico v. Lett*, 559 U.S. 766, 773, 130 S. Ct. 1855, 176 L. Ed. 2d 678 (2010) (citation omitted). Under this standard, "a state prisoner must show that the state court's ruling . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011).

Courts "apply this same standard when evaluating the reasonableness of a state court's decision under 2254(d)(2)." *Landers v. Warden*, 776 F.3d 1288, 1294 (11th Cir. 2015) (citations omitted). That is, "[a] state court's . . . determination of the facts is unreasonable only if no fairminded jurist could agree with the state court's determination . . . ." *Holsey v. Warden, Ga. Diag. Prison*, 694 F.3d 1230, 1257 (11th Cir. 2012) (citations and internal quotations omitted).

Under 2254(d), where the decision of the last state court to decide a prisoner's federal claim contains no reasoning, federal courts must "'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192, 200 L. Ed. 2d 530 (2018). "It should then presume that the unexplained decision adopted the same reasoning." *Id.*

III. Ineffective Assistance of Counsel Principles

To establish a claim{2021 U.S. Dist. LEXIS 5} of ineffective assistance of counsel, petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To prove deficiency, he must show that counsel's performance "fell below an objective standard of reasonableness" as measured by prevailing professional norms. *Id.* at 688. To prove prejudice, he must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

It is "all the more difficult" to prevail on a *Strickland* claim under 2254(d). *Harrington*, 562 U.S. at 105. As the standards that *Strickland* and 2254(d) create are both "highly deferential," review is "doubly" so when the two apply in tandem. *Id.* (citations and internal quotation marks omitted). Thus, "[w]hen 2254(d) applies, the question is not whether counsel's actions were reasonable." *Id.* Rather, "[t]he question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.* Petitioner has the burden of proof on his ineffectiveness claim, *see Holsey*, 694 F.3d at 1256, as well as the burden of proof under 2254(d). *See Cullen v. Pinholster*, 563 U.S. 170, 181, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011) (citation omitted).

IV. Discussion

A. Claim One

Petitioner contends that counsel ineffectively failed to call expert witnesses{2021 U.S. Dist. LEXIS 6} to establish that the victims' hands contained gunshot residue. [ECF No. 6 at 3-4]. This testimony allegedly would have cast "doubt . . . on the State's theory of prosecution[] that both victims were unarmed, and in all likelihood resulted in an acquittal." [*Id.* at 6]. Likewise, this testimony would have "cast doubt on the State's premeditation theory and supported the reasonable hypothesis that the homicide was not premediated." [ECF No. 17 at 2]. Furthermore, this testimony would have damaged Johnson's credibility, "who denied that he and Jones ever had guns." [*Id.*].

Petitioner raised this claim in his amended Rule 3.850 motion. [ECF No. 14-1 at 3]. The trial court rejected it on the grounds that: (1) trial counsel unsuccessfully attempted to elicit such information on cross-examination of another witness; and (2) the Third District rejected a related claim on appeal. [ECF No. 14-5 at 3]. In affirming, the Third District likewise appeared to reason that these issues were decided on direct appeal. [ECF No. 14-8 at 2].

However, the claim that Petitioner raised on direct appeal was analytically distinct, [ECF No. 13-1 at 12, 15-20], and counsel's attempt to elicit such information on cross-examination{2021 U.S. Dist. LEXIS 7} of the state's witness does not necessarily justify his failure to present witnesses to establish this fact. Therefore, because the state courts appeared to misconstrue this claim, the Undersigned reviews it *de novo. Cf. Bester v. Warden*, 836 F.3d 1331, 1337 (11th Cir. 2016) (citation omitted); *Lawrence v. Sec'y, Fla. Dep't of Corr.*, 700 F.3d 464, 481 (11th Cir. 2012) (citation omitted).

In any event, this claim lacks merit. "Which witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that [the Eleventh Circuit] will seldom, if ever, second guess." *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995) (*en banc*). "If the record is not complete regarding counsel's actions, then the courts should presume that . . . what witnesses [defense counsel] presented or did not present[] [was an] act[] that some reasonable lawyer might do." *Jones v. Campbell*, 436 F.3d 1285, 1293 (11th Cir. 2006) (citation omitted).

Here, the record is not complete regarding why counsel did not call experts to establish that the victims' hands contained gunshot residue. This claim fails for this reason alone.

Furthermore, even if had counsel deficiently failed to call these witnesses, Petitioner could not show prejudice. Testimony that the victims had gunshot residue on their hands would not have impelled the inference that they had guns, and Petitioner has not adequately identified any testimony{2021 U.S. Dist. LEXIS 8} supporting this inference. *See* [ECF No. 17 at 3]. Additionally, the state presented strong evidence of Petitioner's guilt. *See infra*, Part IV(E). This evidence included the testimony of his former codefendant, who was at the scene of the shooting, as well victim Johnson's testimony that Petitioner was the shooter. *See, e.g.*, [ECF No. 10 at 2-4, 7 (citing trial transcript)]. Therefore, Petitioner has not shown a reasonable probability that the experts' testimony would have resulted in a more favorable outcome. In sum, claim one lacks merit and should be denied.

B. Claim Two

Petitioner next argues that counsel ineffectively failed to object to several improper remarks that the prosecutor made during closing argument. [ECF No. 6 at 7-10]. In support, he contends that the prosecutor: (1) exploited excluded evidence regarding whether the victims possessed firearms; (2) touted a finding regarding gunshot residue on Petitioner's shoe as a conclusive finding that Petitioner fired a gun; (3) suggested "additional knowledge of guilt that was not shared with the jury"; (4) suggested "that the jury should trust the State's judgment rather than their own view of the evidence"; (5) vouched for a witness's{2021 U.S. Dist. LEXIS 9} credibility; (6) attacked a "straw man alibi defense" when Petitioner's "defense was misidentification"; and (7) shifted the burden of proof to Petitioner. [*Id.* at 7-9].

Petitioner raised this claim in his amended Rule 3.850 motion. [ECF No. 14-1 at 20]. The trial rejected it, pertinently finding that "each of the improper comments was raised as an issue on direct appeal" and "dismissed . . . as meritless." [ECF No. 14-5 at 5]. The Third District affirmed, reasoning that Petitioner could not show prejudice because it found on direct appeal that these remarks were not fundamental error. [ECF No. 14-8 at 2 (citing *Chandler v. State*, 848 So. 2d 1031, 1046 (Fla. 2003))].

However, to show prejudice under *Strickland*, Petitioner must show a reasonable probability of a more favorable outcome absent counsel's deficiency. By contrast, a prosecutor's improper remarks constitute fundamental error where they are "so prejudicial as to vitiate the entire trial." *See Chandler*, 848 So. 2d at 1046. Because this standard appears more challenging than the *Strickland* prejudice standard, the Undersigned reviews this claim *de novo. Cf. Owen v. Fla. Dep't of Corr.*, 686 F.3d 1181, 1201 (11th Cir. 2012) (suggesting that courts must review *Strickland* claim *de novo* if test state court applies to resolve claim "imposes a higher burden or contradicts the governing *Strickland* prejudice{2021 U.S. Dist. LEXIS 10} standard").

Here, in any event, Petitioner has not shown prejudice on this claim. *See generally Garlotte v. Fordice*, 515 U.S. 39, 46, 115 S. Ct. 1948, 132 L. Ed. 2d 36 (1995) ("[T]he habeas petitioner generally bears the burden of proof[.]"); *see also Holsey*, 694 F.3d at 1256. Before opening statements, the court instructed the jury that the state had to prove its accusation beyond a reasonable doubt and that the jury's verdict "must be based solely on the evidence, or lack of evidence, and the law." [ECF No. 11-3 at 16]. Likewise, before the jury retired to deliberate, the court instructed it that: (1) it had to follow the law set out in the instructions; (2) the case must be decided upon the evidence and the instructions; (3) its feelings regarding the lawyers should not influence its decision; and (4) its verdict must not be influenced by feelings of prejudice, bias, or sympathy. [ECF No. 16-2 at 23-24]. The jury presumably followed these instructions, *see Weeks v. Angelone*, 528 U.S. 225, 234, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000), and Petitioner has not meaningfully argued, much less shown, otherwise.

Furthermore, the state presented strong evidence of Petitioner's guilt. *See infra*, Part IV(E). The Third District's ruling on direct appeal that the allegedly improper remarks were not fundamental error supports this finding. Thus, Petitioner has not met his{2021 U.S. Dist. LEXIS 11} burden of showing that counsel's allegedly deficient failure to object to the comments prejudiced him and claim two fails.

C. Claim Three

Petitioner next argues that counsel ineffectively failed to "give a valid" basis for counsel's request for an instruction on justifiable use of deadly force. [ECF No. 6 at 11]. Although Petitioner admits that counsel requested such an instruction, he faults counsel for failing to "point[] to evidence to show the applicability of the instruction." [*Id.*]. Petitioner contends that the evidence warranted this instruction because former codefendant Mr. Sastre allegedly testified that "the alleged victims were acting aggressively toward [Petitioner] because they outnumbered him two against one." [*Id.* (citing ECF No. 11-4 at 28-29)].

Petitioner raised this claim in his amended Rule 3.850 motion. [ECF No. 14-1 at 24]. The trial court rejected it because: (1) counsel requested a justifiable use of deadly force instruction; and (2) on direct appeal, the Third District rejected the argument that the trial court reversibly erred in denying this instruction. [ECF No. 14-5 at 5]; *compare* [ECF No. 13-1 at 20-21 (Petitioner's argument on direct appeal)], *with* [ECF No. 13-5 at{2021 U.S. Dist. LEXIS 12} 2 (rejecting this argument)]. The Third District's affirmance does not contain any relevant reasoning. *See* [ECF No. 14-8 at 2-3].

Here, the trial court reasonably rejected this claim. Counsel asked for an instruction on justifiable use of deadly force, which the court denied because the evidence did not support this theory. [ECF No. 11-6 at 161; ECF No. 11-8 at 129]. Furthermore, contrary to Petitioner's contention, Mr. Sastre did not testify that the alleged victims were acting aggressively toward Petitioner "because they outnumbered him two against one." [ECF No. 6 at 11]. Rather, he testified, without elaboration, that he exited the car because he heard "loud arguing" and "screaming" from an unknown person(s) and that he "didn't know if [the victims] were going to fight [Petitioner] or jump him." [ECF No. 11-4 at 28-29]. Additionally, this habeas court cannot review the trial court's state-law determination that the evidence did not warrant an instruction on justifiable deadly force. *See, e.g., Bradshaw v. Richey*, 546 U.S. 74, 76, 126 S. Ct. 602, 163 L. Ed. 2d 407 (2005) (citation omitted); *Chamblee v. Florida*, 905 F.3d 1192, 1196-98 (11th Cir. 2018). Accordingly, there is a reasonable argument that counsel did not deficiently fail to "give a valid basis" for the instruction at issue.

In sum, the trial court's rejection{2021 U.S. Dist. LEXIS 13} of this claim was not contrary to, or an unreasonable application of, clearly established federal law or an unreasonable determination of the facts. Accordingly, this claim should be denied.

D. Claim Four

Petitioner alleges that counsel ineffectively failed to challenge the state's race-neutral reasons for excluding black jurors as pretextual and renew this objection at the end of *voir dire* to preserve it for appeal. [ECF No. 6 at 13-15]. In support, he contends that the state struck four black jurors who "never demonstrated bias" against the state. [*Id.* at 14]. However, he contends that the state did not strike a white juror who "demonstrated bias about" the state's evidence. [*Id.*]. Therefore, he contends that the state's race-neutral reasons to defend these strikes were pretextual. [*Id.* at 13-15].

During *voir dire*, the prosecutor objected to the state's alleged "trend" of "striking all black females." [ECF No. 11-2 at 138]. The state responded that it had "not been striking just [black] females." [*Id.*]. Furthermore, regarding the stricken black juror Ms. Eldridge, the state said that: (1) she failed to disclose a crime; (2) police previously questioned her about a drug offense that she did not commit; and{2021 U.S. Dist. LEXIS 14} (3) she had a "bad experience" as a schoolteacher that the state did not fully understand. [*Id.* at 138-39]. The court found this reason to be genuine and allowed the strike. [*Id.* at 139]. After further strikes by the state and counsel, the parties accepted the jury and counsel did not renew the *Batson*3 objection. [*Id.* at 139-51].

Petitioner raised this claim in his amended Rule 3.850 motion. [ECF No. 14-1 at 8-9]. The trial court rejected it, reasoning that "counsel did raise appropriate challenges that the state was able to overcome. . . . [through] genuine race neutral reasons for their strikes." [ECF No. 14-5 at 6]. Further, the court reasoned that "these issues were preserved and could have been raised on direct appeal." [*Id.*]. The Third District rejected this claim, reasoning that "[a] claim that counsel was ineffective for failing to 'follow-up' on questioning to establish grounds for a for-cause challenge has been held to be legally insufficient because such a claim can be based on nothing more than conjecture by the defendant." [ECF No. 14-8 at 2 (citation omitted)].

Here, the Third District reasonably rejected this claim. The record does not indicate that further questioning or objections by counsel would have revealed that{2021 U.S. Dist. LEXIS 15} the strikes in question were pretextual. Mr. Papadopoulos, the white juror, initially stated that he could be "bias[ed] about striking a deal [with the state]," though he clarified that the bias would not influence his decision or affect his ability to be fair and impartial. [ECF No. 11-2 at 56-58]. Because the reasons for which the state struck Ms. Eldridge are considerably different than Mr. Papadopoulos's alleged bias, Petitioner has not shown that they were pretextual. *See Walls v. Buss*, 658 F.3d 1274, 1282 (11th Cir. 2011) (rejecting *Batson* claim in part because the petitioner failed to offer "a comparative analysis of jurors who the State accepted and rejected, to show that the State did not attempt to remove similarly situated nonblack jurors").

True, it is not fully clear why the prosecutor struck black juror Ms. Amie. [ECF No. 11-2 at 137]. However, Ms. Amie initially stated that, although she was a nurse, she would not like to be "involved in an emergency room or . . . trauma cases" because it would be "too much for [her]." [*Id.* at 95]. She added: "It's too much action for me. It's fast pace[d]." [*Id.*] Because the case involved a shooting causing a death and great bodily harm, it is arguable that the state was concerned about Ms. Amie's{2021 U.S. Dist. LEXIS 16} ability to be fair and impartial given her expressed disinclination for trauma cases. Petitioner will contend that counsel could have shown that this strike was pretextual had he pressed the point. Again, however, Petitioner has not shown that Ms. Amie was "similarly situated" to Mr. Papadopoulos. *See Walls*, 658 F.3d at 1282. Furthermore, "[this] claim . . . [appears to] be based on nothing more than conjecture by [Petitioner]." *See* [ECF No. 14-8 at 2 (citation omitted)]; *cf. Aldrich v. Wainwright*, 777 F.2d 630, 636 (11th Cir. 1985) ("Speculation is insufficient to carry the burden of a habeas corpus petitioner as to what evidence could have been revealed by further investigation.").4

In sum, the Third District's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law or an unreasonable determination of the facts. Accordingly, this claim should be denied.

E. Claim Five

Petitioner contends that he did not receive a fair trial because, on March 1, 2015, victim Johnson signed an affidavit recanting his testimony and declaring that he identified Petitioner only because of a suggestive identification procedure. [ECF No. 6 at 16-18].

Petitioner raised this claim in his amended Rule 3.850 motion. [ECF No. 14-1 at{2021 U.S. Dist. LEXIS 17} 42-43]. The trial court held a hearing on this claim in which it took testimony from Johnson and defense counsel. [ECF No. 14-4 at 3]. The trial court rejected this claim, finding that the "testimony of [] Johnson at the evidentiary hearing was not credible." [ECF No. 14-5 at 7]. Pertinently, the court reasoned:

[Johnson] is unable to explain his reason for supposedly lying at the time of the incident. He is unable to explain the independent corroboration of [Petitioner] as the shooter and he is unable to explain why he now is changing his story. His demeanor and his manner of answering the questions posed by the lawyers and the Court demonstrated a lack of trustworthiness.

As the record demonstrates and as was further established at the evidentiary hearing, the evidence at trial against [Petitioner] was overwhelming. In addition to the testimony of [] Johnson, [Mr. Sastre] testified and identified [petitioner] as the shooter, there was evidence of jail phone calls between the two defendants discussing the crime, there were contemporaneous statements made to the mother of [] Johnson and police officers identifying [Petitioner] by nickname, and [] Johnson identified [petitioner] in a{2021 U.S. Dist. LEXIS 18} photo line-up only one day after the incident. In light of all the evidence at trial and in light of the inconsistencies and incredibility of . . . Johnson, . . . this newly discovered evidence, namely his recantation, would be unlikely to produce a different result on retrial.[*Id.* at 8]; *see also* [ECF No. 10 at 2-9 (citing trial transcript)]. The Third District affirmed but did not explicitly address this claim. [ECF No. 14-8 at 2-3].

This standalone actual innocence claim fails. Eleventh Circuit "precedent forecloses habeas relief based on a prisoner's assertion that he is actually innocent of the crime of conviction absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Raulerson v. Warden*, 928 F.3d 987, 1004 (11th Cir. 2019) (citation and internal quotation marks omitted); *see also Herrera v. Collins*, 506 U.S. 390, 400, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993) ("Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.").

Here, Petitioner has not shown any independent constitutional violation in the state court proceeding. To the extent he argues that his conviction violated due process because it was fundamentally{2021 U.S. Dist. LEXIS 19} unfair and/or the evidence was insufficient, the strong evidence of his guilt belies this argument. Furthermore, the trial court's rejection of this claim turned in large part on its finding that Johnson's testimony was incredible, and, "[i]n the absence of clear and convincing evidence, [courts] have no power on federal habeas review to revisit the state court's credibility determinations." *Bishop v. Warden*, 726 F.3d 1243, 1259 (11th Cir. 2013) (citations omitted). Petitioner's mere disagreement with the trial court's assessment of the strength of the state's evidence does not meet this standard.5 Thus, claim five fails.

V. Evidentiary Hearing

Petitioner is not entitled to an evidentiary hearing. *See Schriro v. Landrigan*, 550 U.S. 465, 474, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007) ("[I]f the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing [under 2254]."); *see also Jones v. Sec'y, Fla. Dep't of Corr.*, 834 F.3d 1299, 1318 (11th Cir. 2016) (petitioner not entitled to evidentiary hearing under 2254 if fails to allege "enough specific facts that, if they were true, would warrant relief").

VI. Certificate of Appealability

"The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." R. 11(a), Rules Governing 2254 Cases. "If the court denies a certificate, the parties{2021 U.S. Dist. LEXIS 20} may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22." *Id.* "A timely notice of appeal must be filed even if the district court issues a certificate of appealability." R. 11(b), Rules Governing 2254 Cases.

"A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). When a district court rejects a petitioner's constitutional claims on the merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).

Here, the Undersigned denies a certificate of appealability. If Petitioner disagrees, he may so argue in any objections filed with the District Judge.

VII. Recommendations

As discussed above, it is RECOMMENDED that the Amended Petition [ECF No. 6] be DENIED; that no certificate of appealability issue; that final judgment be entered; and that the case be closed.

Objections to this Report may be filed with the District Judge within fourteen days of receipt of a copy of the Report. Failure to timely file objections will bar a *de novo* determination by the District Judge of anything in this recommendation and shall constitute{2021 U.S. Dist. LEXIS 21} a waiver of a party's "right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions." *See* 11th Cir. R. 3-1 (2016); *see also* 28 U.S.C. 636(b)(1)(C); *Harrigan v. Metro-Dade Police Dep't Station #4*, 977 F.3d 1185, 1191-92 (11th Cir. 2020).

SIGNED this 19th day of January, 2021
/s/ Lisette M. Reid

UNITED STATES MAGISTRATE JUDGE

Footnotes

1 All citations to ECF entries refer to the page-stamp number at the top, right-hand corner of the page.
2 Respondent's filing of each exhibit as a separate entry and accurate labeling of the exhibits on the docket facilitated the Undersigned's review of the record.
3 *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).
4 Petitioner has not explained how the state's strikes of the other two black jurors were pretextual. *See generally* [ECF No. 6 at 13-16; ECF No. 17 at 7-8].
5 Petitioner's contention that there was a "conflict of interest" at the evidentiary hearing on this claim does not inform the analysis. *See generally* [ECF No. 18]. Petitioner has not alleged, much less shown, how this alleged conflict might have influenced the trial court's factual findings.

APPENDIX - G

(Opinion of the Highest State Court)

Filing # 98715151 E-Filed 11/12/2019 10:37:43 AM

Supreme Court of Florida

TUESDAY, NOVEMBER 12, 2019

CASE NO.: SC19-1655
Lower Tribunal No(s).:
3D18-249;
132009CF013518A000XX

LINAKER CHARLEMAGNE vs. STATE OF FLORIDA

Petitioner(s) Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d)(2).

POLSTON, LABARGA, LAWSON, LAGOA, and MUÑIZ, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

db
Served:

SUSAN S. LERNER
JEFFREY R. GELDENS
GABRIELLE RAEMY CHAREST-TURKEN
HON. MERCEDES M. PRIETO, CLERK
HON. HARVEY RUVIN, CLERK
HON. NUSHIN G. SAYFIE, JUDGE

APPENDIX - H

(Opinion of the District Court of Appeal)

Third District Court of Appeal

State of Florida

Opinion filed September 18, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-249
Lower Tribunal No. 09-13518A

Linaker Charlemagne,
Appellant,

vs.

The State of Florida,
Appellee.

An appeal from the Circuit Court for Miami-Dade County, Nushin G. Sayfie, Judge.

Carlos J. Martinez, Public Defender, and Susan Lerner, Assistant Public Defender, for appellant.

Ashley Moody, Attorney General, and Jeffrey R. Geldens, Assistant Attorney General, for appellee.

Before FERNANDEZ, MILLER, and GORDO, JJ.

PER CURIAM.

Affirmed. See Medina v. State, 573 So. 2d 293, 295 (Fla. 1990) ("Allegations of ineffective assistance cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal.") (citations omitted); Smith v. State, 445 So. 2d 323, 325 (Fla. 1983) ("Issues which either were or could have been litigated . . . upon direct appeal are not cognizable through collateral attack.") (citations omitted); see also State v. Bright, 200 So. 3d 710, 737 (Fla. 2016) ("[A] failure to present cumulative evidence does not establish unconstitutional ineffective assistance of counsel because its omission neither constitutes deficient performance nor results in sufficient prejudice."); Chandler v. State, 848 So. 2d 1031, 1046 (Fla. 2003) (When a defendant cannot "show the comments [made during closing argument by the prosecutor] were fundamental error on direct appeal, he likewise cannot show that trial counsel's failure to object to the comments resulted in prejudice sufficient to undermine the outcome of the case under the prejudice prong of the Strickland[1] test.") (citation omitted); Solorzano v. State, 25 So. 3d 19, 23 (Fla. 2d DCA 2009) ("A claim that counsel was ineffective for failing to 'follow-up' on questioning to establish grounds for a for-cause challenge has been held to be legally insufficient because such a claim can be based on nothing more than conjecture by the defendant.") (citing Reaves v. State, 826 So. 2d 932, 939 (Fla. 2002)); see, e.g., Bradley v. State, 33 So. 3d 664, 684 (Fla. 2010) ("Where . . . the alleged errors urged

[1] Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

for consideration in a cumulative error analysis 'are either meritless, procedurally barred, or do not meet the Strickland standard for ineffective assistance of counsel[,] . . . the contention of cumulative error is similarly without merit.'") (second and third alterations in original) (citation omitted).

M A N D A T E

from

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
THIRD 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 Kevin Emas, Chief Judge of the District Court of Appeal of the State of Florida, Third District, and seal of the said Court at Miami, Florida on this day.

DATE:	October 04, 2019
CASE NO.:	**18-0249**
COUNTY OF ORIGIN:	**Dade**
T.C. CASE NO.:	**09-13518A**

STYLE: **LINAKER CHARLEMAGNE,** **v.** **THE STATE OF FLORIDA,**

A True Copy
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THIRD DISTRICT

ORIGINAL TO: **Miami-Dade Clerk**

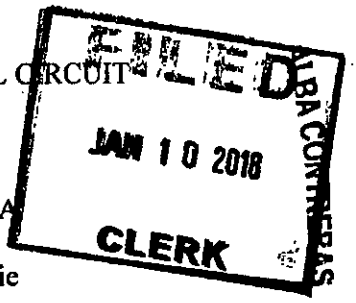
cc: Susan S. Lerner
Office Of Attorney General
Jeffrey R. Geldens
Public Defender Appeals

la

APPENDIX – I

(State Court Hearing)

OBB 878 IC Dist



IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

vs.

LINAKER CHARLEMAGNE,
Defendant.
_____/

Case No. F09-13518A

Judge Nushin G Sayfie

Division F061

ORDER DENYING ON DEFENDANT'S POSTCONVICTION MOTION

THIS CAUSE having come to be heard upon the Motion of Defendant, LINAKER CHARLEMAGNE, for Postconviction Relief filed pursuant to Rule 3.850, Florida Statutes, and THIS COURT, having reviewed and considered the Defendant's Motion, filed October 4, 2016, the Defendant's Amended Motion and all attachments, filed on February 15, 2017, the State's response and all attachments, filed on or about March 9, 2017, the court files and record in this case, and having presided over an evidentiary hearing on December 14, 2017, and heard argument of counsel, makes the following findings of fact and conclusions of law:

1. On August 16, 2013, the Defendant was found guilty after jury trial of one count of First Degree Murder and one count of Attempted First Degree Murder.
2. On October 29, 2013, the Defendant was sentenced to concurrent life sentences on counts 1 & 2 with a *concurrent* twenty-five (25) year minimum mandatory on each.
3. The Defendant's convictions were affirmed by the Third District Court of Appeal. *Charlemagne v. State*, 185 So.3d 540 (3d DCA 2016). The case was remanded for resentencing with a direction to the trial court to sentence the Defendant to *consecutive* minimum mandatory sentences. On May 26, 2017 the Florida Supreme Court quashed the decision of the Third DCA regarding the minimum mandatory sentences. *Charlemagne v. State*, 2017 WL 2298447 (Fla. 2017). On July 5, 2017, the Third DCA affirmed the convictions and the sentences imposed. *Charlemagne v. State*, 2017 WL 2854413 (3d DCA 2017).

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4. In March of 2015 the Court received the affidavit of witness and victim Cedric Johnson, while the direct appeal was still pending and this Court was without jurisdiction.
5. The Defendant subsequently filed this motion raising eighteen claims of ineffective assistance of counsel (Ground 1 (A-Q)) and Ground 3, and one claim (Ground 2) of newly discovered evidence based on the aforementioned affidavit of Cedric Johnson.
6. As to Ground 2 only the Court the granted and conducted an evidentiary hearing based on the Defendant's claim of newly discovered evidence, the post-trial recantation of witness/victim Cedric Johnson.

In order to prevail on a postconviction motion alleging ineffective assistance of counsel, a defendant must demonstrate that trial counsel was deficient and that his/her errors were "so serious that [they were] not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Even assuming deficiency of trial counsel, a defendant must also establish prejudice "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable," and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*; *Souffrant v. State,* 994 So.2d 407, 410 (Fla.3rd DCA 2008). Additionally, there is a strong presumption that trial counsel's conduct "falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland* at 689. And sound trial strategy does not become ineffective assistance of counsel if in hindsight it fails to benefit the defendant. *Souffrant* at 410.

A defendant may raise an issue in a motion for postconviction relief even if the issue has been raised on direct appeal, unless the appellate court specifically addressed the issue. "[U]nless a direct appeal is affirmed with a written opinion that expressly addresses the issue of ineffective assistance of counsel, an affirmance on direct appeal should rarely, if ever, be treated

as a procedural bar to a claim for ineffective assistance of counsel on a postconviction motion." *Corzo v. State*, 806 So. 2d 642, 645 (Fla. 2d DCA 2002). *See also Blandin v. State*, 128 So. 3d 235 (Fla. 2d DCA 2013); *Allen v. State*, 100 So. 3d 747 (Fla. 2d DCA 2012).

In Ground 1(A) the Defendant claims that trial counsel was ineffective because he failed to call a witness to testify that there was gunshot residue found on the victim's hands. Trial counsel attempted to bring this out at trial but was precluded from doing so by the trial court. (See trial transcript, hereinafter "TT" at p. 1047-1057). Moreover, on direct appeal the Defendant raised the issue that he had been precluded from establishing that the gunshot residue found on the victim had come from his hands. (See Appellate brief of Appellant/Defendant at p.7-9). And finally, the Third District Court of Appeal dismissed this claim as meritless, "We find no merit in the points raised by the appellant on his appeal and affirm the conviction without discussion." *Charlemagne v. State,* 185 So.3d 540 3d DCA (2016); reversed for sentencing only, *Charlemagne v. State,* 2017 WL 2298447 (Fla. 2017), *Charlemagne v. State*, 2017 WL 2854413 (3d DCA 2017). Because this issue was raised on direct appeal and found to have no merit, it cannot be raised again now. As such Ground 1(A) is summarily denied.

In Ground 1(B) the Defendant claims that trial counsel was ineffective because he failed to call retired Detective Jim McColman as a witness for the purpose of impeaching Cedric Johnson. As was established at the evidentiary hearing, and further supported by the record (TT at 773-808, 894-1009), because Detective McColman was unavailable as a witness, the trial court allowed trial counsel to establish through Detective Denmark that the surviving victim had in fact made an initial statement to Detective McColman saying that he was unable to identify the shooter. It was also established during the trial when Mr. Johnson testified himself and recounted his statement to

Detective McColman. Therefore the jury was well aware of the statement made to Detective McColman. For these reasons Ground 1(B) is summarily denied.

In Ground 1(C) the Defendant claims that trial counsel was ineffective because he failed to properly question jurors or exercise peremptory challenges. The record does not support the Defendant's claim. Moreover, the Defendant cannot demonstrate any prejudice as a result of the specific jurors he empaneled. As such Ground 1(C) is summarily denied.

In Ground 1(D) the Defendant claims that trial counsel was ineffective because he failed to impeach witness, and codefendant, Anthony Sastre-Vasquez with his prior inconsistent statements. It should be noted that trial counsel's cross-examination of this critical witness was thorough and lengthy and approximately fifty (50) pages of appellate record. (TT at 482-532). It also included impeachment from his prior sworn statement. As such Ground 1(D) is summarily denied.

In Ground 1(E) the Defendant claims that trial counsel was ineffective because he failed to introduce school records to demonstrate that the Defendant and Cedric Johnson did not attend the same school at the same time as Johnson had testified. The Defendant fails to demonstrate how this evidence would have resulted in a more favorable outcome at trial. As such Ground 1(E) is summarily denied.

In Ground 1(F) the Defendant claims that trial counsel was ineffective because he failed to investigate and object to the trial court's ruling on the admissibility of the "non-prosecution" form signed by Cedric Johnson. The Defendant does not give any legal support for this claim. This is because there is no legal support for this claim. This claim has no merit. As such Ground 1(F) is summarily denied.

In Ground 1(G) the Defendant claims that trial counsel was ineffective because he failed to move in limine to exclude the recorded phone calls between the Defendant and the codefendant

after the Defendant had been arrested but prior to the codefendant's arrest. Trial counsel objected to admission of the calls prior to the beginning of the trial and during the trial (TT 473-476, 562-566). The admissibility of the phone calls was certainly argued and preserved. Therefore trial counsel's performance was not deficient. As such Ground 1(G) is summarily denied.

In Ground 1(H) the Defendant claims that trial counsel was ineffective because he failed to object to improper prosecutorial comments made during closing arguments. The Defendant is correct that the trial counsel did not object and should have objected to numerous inappropriate comments made during closing arguments by the prosecutor. However, each of the improper comments was raised as an issue on direct appeal. (See Appellate brief of Defendant at p. 18-21). As previously stated, the Third DCA dismissed all claims raised on appeal as meritless. (See *Charlemagne, supra).* As such Ground 1(H) is denied.

In Ground 1(I) the Defendant claims that trial counsel was ineffective because he failed to "give a basis" for the justifiable use of deadly force instruction. Trial counsel did in fact ask for the self-defense instruction. Based on the facts of the case the trial court denied the request. The Defendant raised the issue on direct appeal and the Third DCA found that it had no merit. (See *Charlemagne, supra).* As such Ground 1(I) is summarily denied.

In Ground 1(J) the Defendant claims that trial counsel was ineffective because he failed to preclude the introduction of evidence of 9mm luger cartridge. Trial counsel did in fact move in limine to exclude this evidence. (TT 29-41). The trial court denied counsel's motion. The Defendant avers that had counsel done further investigation then the trial court would have excluded the evidence. There is no discoverable evidence that the Defendant puts forth that would have undermined the State's ballistic evidence. The Defendant relies on his own theories and conclusions to suggest that he was prejudiced. As such Ground 1(J) is summarily denied.

In Ground 1(K) the Defendant claims that trial counsel was ineffective because he failed to properly raise race based objections to the State's peremptory challenges of jurors. As the Defendant himself notes, his trial counsel did raise appropriate challenges that the state was able to overcome. What the Defendant fails to recognize is that the record demonstrates that the State was able to demonstrate genuine race neutral reasons for their strikes. Moreover, these issues were preserved and could have been raised on direct appeal. As such Ground 1(K) is summarily denied.

In Ground 1(L) the Defendant claims that trial counsel was ineffective because he failed to object to an incomplete jury instruction for Count 2, Attempted Murder. The Defendant is incorrect. The record demonstrates that the court read the standard jury instruction. As such Ground 1(L) is denied.

In Ground 1(M) the Defendant claims that trial counsel was ineffective because he failed to move in limine to exclude testimony of Officer Measel of a statement made by witness Cedric Johnson to now deceased, Curtis Bennet. The statement relayed to Officer Measel by Curtis Bennet was admissible. Therefore trial counsel's failure to object to its admission is not ineffective. As such Ground 1(M) is denied.

In Ground 1(N) the Defendant claims that trial counsel was ineffective because he failed to rebut the state's theory that the cell-site data undermined the Defendant's innocence. In the Defendant's argument he demonstrates that counsel robustly cross-examined the cell-site witness, thereby undermining his own claim. He also fails to establish what prejudice he suffered as a result of counsel's closing argument. As such Ground 1(N) is denied.

In Ground 1(O) the Defendant claims that trial counsel was ineffective because he failed to make an effective first or second motion for judgment of acquittal. Even if this court bypasses the first prong of *Strickland* on this claim, the record demonstrates that there was more than sufficient

evidence to submit the case to the jury. As such there was no prejudice to the Defendant and Ground 1(O) is denied.

In Ground 1(P) the Defendant claims that trial counsel was ineffective because he failed to object to the admission of certain items of evidence that were admitted during the trial. As the Defendant's own trial record excerpts demonstrate, appropriate predicates were laid for the admission of the evidence. As such Ground 1(P) is denied.

In Ground 1(Q) the Defendant claims that trial counsel was ineffective because of the cumulative effect of all the errors alleged in Grounds (A) – (P). For the reasons stated above Ground 1(Q) is denied.

In order to prevail on a postconviction claim based on newly discovered evidence, a defendant must establish (1) that the evidence was unknown at the time of trial and could not have been discovered through the exercise of ordinary diligence, and (2) the newly discovered evidence must be of such nature that it would probably produce an acquittal.

Regarding Ground 2, this Court finds that the recantation/affidavit of witness/victim Cedric Johnson does meet the definition of newly discovered evidence. While Mr. Johnson initially stated to police that he was unable to identify his shooter, this was the first time under oath that he affirmatively stated that the Defendant was NOT the shooter. As such, the Defendant is able to meet the first prong of the test for a successful claim under the rule. However, the Court finds that the testimony of Cedric Johnson at the evidentiary hearing was not credible. Mr. Johnson's statements at the time of the incident, at the time of deposition and at the time of trial consistently identified the Defendant as the shooter in this incident. He also consistently identified the Defendant as having the nickname "Sniper". He also consistently stated that he was familiar with the Defendant from Palmetto Middle School. At the evidentiary

hearing, eight years later, he is now certain that the Defendant is not the shooter. He also denies knowing the Defendant's nickname is Sniper. And he now states that he did not attend the same middle school as the Defendant. He is unable to explain his reason for supposedly lying at the time of the incident. He is unable to explain the independent corroboration of the Defendant as the shooter and he is unable to explain why he now is changing his story. His demeanor and his manner of answering the questions posed by the lawyers and the Court demonstrated a lack of trustworthiness.

As the record demonstrates and as was further established at the evidentiary hearing, the evidence at trial against the Defendant was overwhelming. In addition to the testimony of Cedric Johnson, the codefendant, Anthony Sastre-Vasquez, testified and identified the Defendant as the shooter, there was evidence of jail phone calls between the two defendants discussing the crime, there were contemporaneous statements made to the mother of Cedric Johnson and police officers identifying the Defendant by nickname, and Cedric Johnson identified the Defendant in a photo line-up only one day after the incident. In light of all of the evidence at trial and in light of the inconsistencies and incredibility of witness/victim Cedric Johnson, this Court finds that this newly discovered evidence, namely his recantation, would be unlikely to produce a different result on retrial.

WHEREFORE, IT IS ORDERED AND ADJUDGED that the Defendant's Motion is hereby DENIED.

The Defendant, LINAKER CHARLEMAGNE, is hereby notified that he has the right to appeal this order to the District Court of Appeal of Florida, Third District, within thirty (30) days of the signing and filing of this order.

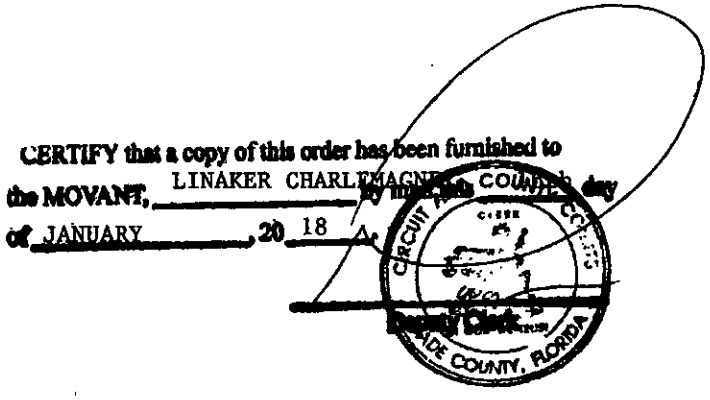
In the event that the Defendant takes an appeal of this order, the Clerk of this Court is hereby ordered to transport, as part of this order, to the appellate court the following:

1. Defendant's Motion filed 10/4/16 and Amended Motion filed 2/15/17 & attachments.
2. The State's Response and all attachments file 3/9/17.
3. Affidavit of Cedric Johnson.
4. Transcript of Trial
5. Deposition of Detective McComb
6. Appellate Brief of Defendant/Appellant

DONE AND ORDERED at Miami-Dade County, Florida, this the 10th day of January, 2018.

NUSHIN G. SAYFIE
CIRCUIT COURT JUDGE

cc: ASA Bill Howell
APD Patrick Thompson & APD Matthew Rogow
Defendant, Linaker Charlemagne



Additional material from this filing is available in the Clerk's Office.