IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-13096-BB

DARWIN J. FIFIELD, SR.,

Petitioner - Appellant,

versus

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

Respondents - Appellees.

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

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

BEFORE: WILSON, MARTIN, and ROSENBAUM, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

ORD-42

DARWIN J. FIFIELD, SR., Petitioner-Appellant, versus SECRETARY, DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL, STATE OF FLORIDA, Respondents-Appellees.
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
2021 U.S. App. LEXIS 6934
No. 19-13096 Non-Argument Calendar
March 10, 2021, Decided

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Prior History

{2021 U.S. App. LEXIS 1}Appeal from the United States District Court for the Middle District of Florida. D.C. Docket No. 5:18-cv-00309-WFJ-PRL.Fifield v. Sec'y, Dep't of Corr., 2019 U.S. Dist. LEXIS 117409, 2019 WL 3083345 (M.D. Fla., July 15, 2019)

Disposition:
AFFIRMED.

Counsel For DARWIN J. FIFIELD, SR., Petitioner - Appellant, Anne Frances Borghetti, Attorney, Law Offices of Anne Borghetti, CLEARWATER, FL; Darwin J. Fifield Sr., Okaloosa CI - Inmate Legal Mail, CRESTVIEW, FL.

For SECRETARY, DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL, STATE OF FLORIDA, Respondent - Appellees: Robin A. Compton, Attorney General's Office, DAYTONA BEACH, FL; Ashley Moody, Attorney General's Office, ORLANDO, FL.

Judges: Before WILSON, MARTIN, and ROSENBAUM, Circuit Judges.

CASE SUMMARY Although petitioner could satisfy part of the Martinez exception to the procedural default bar for certain ineffective assistance of trial counsel claims, he had not shown that he had a substantial ineffective assistance of trial counsel claim, and thus, he could not overcome his procedural default, so his § 2254 petition was properly denied.

OVERVIEW: HOLDINGS: [1]-Although petitioner could satisfy part of the Martinez exception to the procedural default bar for certain ineffective assistance of trial counsel claims, he had not shown that he had a substantial ineffective assistance of trial counsel claim, and thus, he could not overcome his procedural default, so his § 2254 petition was properly denied.

OUTCOME: Judgment affirmed.

LexisNexis Headnotes

Criminal Law & Procedure > Counsel > Effective Assistance > Trials
Criminal Law & Procedure > Habeas Corpus > Review > Specific Claims > Ineffective Assistance
Criminal Law & Procedure > Habeas Corpus > State Grounds > Waiver

Martinez provides a narrow exception to the procedural default bar for certain ineffective assistance of trial counsel claims.

Criminal Law & Procedure > Habeas Corpus > Appeals > Standards of Review > De Novo Review
Criminal Law & Procedure > Habeas Corpus > State Grounds > Waiver

Whether a petitioner has procedurally defaulted a claim is a mixed question of law and fact that the appellate court reviews de novo.

Criminal Law & Procedure > Habeas Corpus > State Grounds > Independent & Adequate Principle
Criminal Law & Procedure > Habeas Corpus > State Grounds > Independent Grounds
Criminal Law & Procedure > Habeas Corpus > Exhaustion of Remedies > Prerequisites
Criminal Law & Procedure > Habeas Corpus > Exhaustion of Remedies > Satisfaction of Exhaustion

Before bringing a § 2254 action in federal court, a petitioner must exhaust all available state court remedies. 28 U.S.C.S. § 2254(b), (c). To exhaust state remedies, a 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. Under the procedural-default doctrine, a state court's rejection of a federal constitutional claim based on adequate and independent state procedural grounds generally precludes subsequent federal habeas review of the claim.

Criminal Law & Procedure > Habeas Corpus > Procedural Default > Actual Innocence & Miscarriage of Justice > Miscarriage of Justice
Criminal Law & Procedure > Habeas Corpus > Procedural Default > Cause & Prejudice Standard > Proof of Cause
Criminal Law & Procedure > Habeas Corpus > Procedural Default > Cause & Prejudice Standard > Exceptions
Criminal Law & Procedure > Habeas Corpus > Procedural Default > Cause & Prejudice Standard > Proof of Prejudice
Criminal Law & Procedure > Habeas Corpus > Procedural Default > Actual Innocence & Miscarriage of Justice > Exceptions to Default

A petitioner who does not exhaust his claim in state court is procedurally barred from pursuing that claim on federal habeas review unless he shows either cause for and actual prejudice from the default or a fundamental miscarriage of justice from applying the default. A petitioner establishes cause by showing that an objective factor external to the defense impeded an effort to properly raise the claim in state court. A petitioner establishes prejudice by showing that there is at least a reasonable probability that the proceeding's result would have been different.

Criminal Law & Procedure > Habeas Corpus > Procedural Default > Cause & Prejudice Standard > Proof of Cause
Criminal Law & Procedure > Habeas Corpus > Procedural Default > Cause & Prejudice Standard > Exceptions
Criminal Law & Procedure > Habeas Corpus > State Grounds > Waiver
Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of

Counsel
Criminal Law & Procedure > Habeas Corpus > Review > Specific Claims > Ineffective Assistance

Generally, lack of an attorney or attorney error in the initial state collateral proceeding does not establish cause to excuse a procedural default. However, Martinez provides a narrow exception: a procedural default will not bar a federal habeas court from hearing a substantial ineffective assistance of trial counsel claim if the claim cannot be heard on direct appeal and, in the state's initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Criminal Law & Procedure > Counsel > Effective Assistance > Trials
Criminal Law & Procedure > Postconviction Proceedings

In Florida, a Rule 3.850 motion is the first proceeding in which a petitioner can bring an ineffective assistance of trial counsel claim. (stating that a claim for ineffective assistance of trial counsel can generally be raised in a Rule 3.850 motion but not on direct appeal). These claims are typically not cognizable on direct review, so lack of counsel in bringing a Rule 3.850 motion can qualify under the Martinez exception. (extending Martinez to when the initial state collateral proceeding is, as a practical matter, the first opportunity to raise an ineffective assistance of trial counsel claim).

Criminal Law & Procedure > Habeas Corpus > Cognizable Issues > Ineffective Assistance
Criminal Law & Procedure > Habeas Corpus > Procedural Default > Cause & Prejudice Standard > Exceptions
Criminal Law & Procedure > Habeas Corpus > Procedural Default > Cause & Prejudice Standard > Proof of Cause
Criminal Law & Procedure > Habeas Corpus > Review > Specific Claims > Ineffective Assistance

To overcome the procedural default, a petitioner must also show that his ineffective assistance of trial counsel claim is substantial, meaning that it must have some merit. (comparing the substantiality requirement to the standard required for a COA). Proof of cause and prejudice does not entitle the prisoner to habeas relief, instead, it merely allows a federal court to consider the merits of a claim that otherwise would have been procedurally defaulted.

Criminal Law & Procedure > Habeas Corpus > Appeals > Certificate of Appealability
Criminal Law & Procedure > Habeas Corpus > Cognizable Issues > Ineffective Assistance
Criminal Law & Procedure > Habeas Corpus > Review > Burdens of Proof
Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel

An ineffective assistance of trial counsel claim can be insubstantial if it is wholly without factual support or if the attorney did not fall below constitutional standards. A substantial showing exists where a petitioner has shown that reasonable jurists would find it debatable whether the petition states a valid claim of the denial of a constitutional right. (holding that a petitioner must show that reasonable jurists could debate whether the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. The court makes this determination after considering the fact-pleading requirement for 28 U.S.C.S. § 2254 petitions, and the standard from Strickland.

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > Ineffective Assistance Claims
Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > Right to Counsel
Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of

Counsel

A claim of ineffective assistance of trial counsel is a mixed question of law and fact, which the appellate court reviews de novo. Where a petitioner proceeded pro se at trial, he cannot later assert ineffective assistance of trial counsel claims. Nevertheless, a petitioner who was represented by counsel during pretrial preparations may still assert ineffective assistance of trial counsel claims regarding trial preparation, where counsel's errors prevented the petitioner from receiving a fair trial.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Criminal Law & Procedure > Counsel > Effective Assistance > Trials

To make a successful ineffective assistance of trial counsel claim, a defendant must show that (1) his counsel's performance was deficient and (2) the deficient performance prejudiced his defense. The court need not address both prongs if a petitioner makes an insufficient showing on one prong.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Criminal Law & Procedure > Counsel > Effective Assistance > Trials
Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel

The proper measure of attorney performance is reasonableness under prevailing professional norms. To show deficient performance, a defendant must demonstrate that no competent counsel would have taken the action that his counsel took. There is a strong presumption that counsel's conduct fell within the range of reasonable performance. If the record is incomplete or unclear about counsel's actions, it is presumed that counsel exercised reasonable professional judgment. Counsel is not incompetent so long as their approach could be considered sound strategy.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Evidence > Procedural Considerations > Burdens of Proof > Allocation

A petitioner claiming ineffective assistance of trial counsel has an affirmative burden to prove prejudice. To prove prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is one sufficient to undermine confidence in the outcome. It is insufficient for a defendant to show that the error had some conceivable effect on the outcome of the proceeding. The court considers the totality of the evidence before the jury in making the prejudice determination.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection

To establish prejudice for failure to raise a Fourth Amendment claim, a defendant must show that the underlying Fourth Amendment issue has merit and there is a reasonable probability that the verdict would have been different had the evidence been excluded.

Criminal Law & Procedure > Interrogation > Miranda Rights > Voluntary Waiver

An individual may waive their Miranda rights, so long as the waiver is knowing, intelligent, and voluntary. A Miranda waiver is not voluntary if it is obtained through intimidation, coercion, or deception.

Criminal Law & Procedure > Counsel > Effective Assistance > Pretrial
Evidence > Procedural Considerations > Burdens of Proof > Allocation

An attorney is under no absolute duty to investigate a particular defense or specific facts. However, an

attorney's choice to investigate or not investigate must fall within a reasonable range of competent assistance. A petitioner's speculation alone is insufficient to carry the burden to establish what evidence could have been revealed and changed the course of the proceedings, had counsel conducted further investigation.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Governments > Courts > Court Records
Evidence > Inferences & Presumptions > Presumptions

If the record is incomplete or unclear about counsel's actions, then it is presumed that counsel exercised reasonable professional judgement.

Criminal Law & Procedure > Counsel > Effective Assistance > Trials
Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel

A petitioner cannot establish ineffective assistance of trial counsel simply by pointing to additional evidence that could have been presented. Instead, the petitioner must show that what the lawyer did in failing to provide that evidence was not in the wide range of reasonable professional assistance. A petitioner's speculation that a missing witness would have been helpful to his defense is also insufficient; a petitioner likely needs to show that the evidence would have directly contradicted or undermined the testimony of a state witness. Additionally, a petitioner cannot establish ineffective assistance of trial counsel simply by identifying additional evidence that is cumulative.

In Florida, the deposition testimony of a witness who dies prior to trial is inadmissible as substantive evidence unless the testimony has been perpetuated pursuant to Fla. R. Crim. P. 3.190(i). Under Rule 3.190(i), after the filing of an indictment, the defendant or the state may apply for an order to perpetuate testimony. Rule 3.190(i)(1)-(2). An application is to be verified or supported by credible affidavits that the prospective witness may be unable to attend trial, that the testimony is material, and that a deposition is necessary to prevent a failure of justice. The trial court has the discretion of whether to grant a motion to perpetuate testimony.

Criminal Law & Procedure > Pretrial Motions > Dismissal

Under the Florida Rules of Criminal Procedure, the trial court may entertain a motion to dismiss at any time if it is based on the ground that there are no issues of material fact and the undisputed facts do not establish a prima facie case of guilt. Fla. R. Crim. P. 3.190(c)(4). This motion will be denied if the government files a traverse that denies the material facts alleged in the motion to dismiss. Rule 3.190(d).

Opinion

PER CURIAM:

Darwin Fifield, Sr., a Florida prisoner, appeals the district court's denial of his 28 U.S.C. § 2254 habeas petition. Fifield is serving a 35-year sentence for two counts of lewd and lascivious molestation of a minor under twelve.1 The district court found Fifield's habeas claims to be unexhausted and procedurally defaulted-which generally bars any review on the merits-and denied the petition.

We granted a certificate of appealability (COA) on one issue: Whether the district court erred by failing to conduct a *Martinez* analysis of Fifield's claims that his trial counsel was ineffective. *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012). *Martinez*{2021 U.S. App. LEXIS 2} provides a narrow exception to the procedural default bar for certain ineffective assistance of trial counsel (IATC) claims. *Id.* at 13-14. Fifield argues that his claims fall into the *Martinez* exception, so the district court erred by dismissing his claims without conducting a *Martinez* analysis.

Fifield claims that his trial counsel was ineffective for a number of reasons: 1) failing to move to suppress the items recovered from his private property and vehicles (claims 4-8); 2) failing to move to suppress the recorded interrogation (claims 10, 12); 3) refusing to allow him to attend his arraignment (claim 13); 4) generally failing to participate in his criminal trial, speak with him, or investigate his claims (claims 15-16); 5) failing to investigate the theft of his credit cards (claim 22); 6) failing to obtain a witness's testimony before she died (claim 24); and 7) failing to move to dismiss the charges against him (claim 25).2

I.

Whether a petitioner has procedurally defaulted a claim is a mixed question of law and fact that we review de novo. *Judd v. Haley*, 250 F.3d 1308, 1313 (11th Cir. 2001).

Before bringing a § 2254 action in federal court, a petitioner must exhaust all available state court remedies. 28 U.S.C. § 2254(b), (c). "[T]o exhaust state remedies, a petitioner must fairly present every issue raised in his federal petition to the state's highest court, either on direct appeal or on collateral{2021 U.S. App. LEXIS 3} review." *Ward v. Hall*, 592 F.3d 1144, 1156 (11th Cir. 2010). Under the procedural-default doctrine, a state court's rejection of a federal constitutional claim based on adequate and independent state procedural grounds generally precludes subsequent federal habeas review of the claim. *Id.*

A petitioner who does not exhaust his claim in state court is procedurally barred from pursuing that claim on federal habeas review "unless he shows either cause for and actual prejudice from the default or a fundamental miscarriage of justice from applying the default." *Lucas v. Sec'y, Dep't of Corr.*, 682 F.3d 1342, 1353 (11th Cir. 2012). A petitioner establishes "cause" by showing that an objective factor external to the defense impeded an effort to properly raise the claim in state court. *Henderson v. Campbell*, 353 F.3d 880, 892 (11th Cir. 2003). A petitioner establishes "prejudice" by showing that there is at least a reasonable probability that the proceeding's result would have been different. *Id.*

Generally, lack of an attorney or attorney error in the initial state collateral proceeding does not establish cause to excuse a procedural default. *Lambrix v. Sec'y, Fla. Dep't of Corr.*, 756 F.3d 1246, 1260 (11th Cir. 2014). However, *Martinez* provides a narrow exception: a procedural default will not bar a federal habeas court from hearing a substantial IATC claim if the claim cannot be heard on direct appeal and, in the state's initial-review collateral{2021 U.S. App. LEXIS 4} proceeding, there was no counsel or counsel in that proceeding was ineffective. *Martinez*, 566 U.S. at 13-14.

In Florida, a Rule 3.850 motion is the first proceeding in which a petitioner can bring an IATC claim. *See Bruno v. State*, 807 So. 2d 55, 63 (Fla. 2001) (per curiam) (stating that a claim for IATC can generally be raised in a Rule 3.850 motion but not on direct appeal). These claims are typically not cognizable on direct review, so lack of counsel in bringing a Rule 3.850 motion can qualify under the *Martinez* exception. *See Trevino v. Thaler*, 569 U.S. 413, 428-29, 133 S. Ct. 1911, 185 L. Ed. 2d 1044 (2013) (extending *Martinez* to when the initial state collateral proceeding is, as a practical matter, the first opportunity to raise an IATC claim).

To overcome the procedural default, a petitioner must also show that his IATC claim is substantial, meaning that it must have "some merit." *Martinez*, 566 U.S. at 13-14 (comparing the substantiality requirement to the standard required for a COA). Proof of "cause and prejudice does not entitle the prisoner to habeas relief," instead, "[i]t merely allows a federal court to consider the merits of a claim that otherwise would have been procedurally defaulted." *Id.* at 17.

An IATC claim can be insubstantial if it is "wholly without factual support" or if the attorney did not fall below constitutional standards. *Id.* at 16. A substantial showing exists where a petitioner**{2021 U.S. App. LEXIS 5}** has shown that reasonable jurists "would find it debatable whether the petition states a valid claim of the denial of a constitutional right." *Hittson v. GDCP Warden*, 759 F.3d 1210, 1269-70 (11th Cir. 2014); *see also Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (holding that a petitioner must "show that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further" (alteration accepted) (internal quotation mark omitted)). We make this determination after considering "the fact-pleading requirement for § 2254 petitions, and the standard from *Strickland*."3 *Hittson*, 759 F.3d at 1270.

II.

Here, we must apply *Martinez* to see whether Fifield can show cause for his procedural default. Fifield's amended Rule 3.850 motion was denied because it failed to meet state procedural rules, and Fifield did not have the opportunity to present his IATC claims on direct appeal. *See Bruno*, 807 So. 2d at 63. He proceeded pro se in his postconviction proceedings. Thus, Fifield meets the first part of the *Martinez* exception. However, he still must show that the IATC claim was "substantial."

A claim of IATC is a mixed question of law and fact, which we review de novo. *Jones v. Campbell*, 436 F.3d 1285, 1292 (11th Cir. 2006). Where a petitioner proceeded pro se at trial, he cannot later assert IATC claims.**{2021 U.S. App. LEXIS 6}** *See Faretta v. California*, 422 U.S. 806, 834 n.46, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). Nevertheless, a petitioner who was represented by counsel during pretrial preparations may still assert IATC claims regarding trial preparation, where counsel's errors prevented the petitioner from receiving a fair trial. *See United States v. Roggio*, 863 F.2d 41, 43 (11th Cir. 1989). Here, Fifield had four different court appointed attorneys before ultimately proceeding pro se at trial and for the four months leading up to trial.

To make a successful IATC claim, a defendant must show that (1) his counsel's performance was deficient and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We need not address both prongs if a petitioner makes an insufficient showing on one prong. *Id.* at 697.

The proper measure of attorney performance is reasonableness under prevailing professional norms. *Id.* at 688. To show deficient performance, a defendant must demonstrate that no competent counsel would have taken the action that his counsel took. *United States v. Freixas*, 332 F.3d 1314, 1319-20 (11th Cir. 2003). There is a strong presumption that counsel's conduct fell within the range of reasonable performance. *Strickland*, 466 U.S. at 689. If the record is incomplete or unclear about counsel's actions, it is presumed that counsel exercised reasonable professional judgment. *Chandler v. United States*, 218 F.3d 1305, 1314 n.15 (11th Cir. 2000) (en banc). Counsel is not incompetent so long as their approach could be considered**{2021 U.S. App. LEXIS 7}** sound strategy. *Id.* at 1314.

Furthermore, a petitioner has an affirmative burden to prove prejudice. *Strickland*, 466 U.S. at 693. To prove prejudice, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.* It is insufficient for

a defendant to show that the error had some conceivable effect on the outcome of the proceeding. *Id.* at 693. We consider the totality of the evidence before the jury in making the prejudice determination. *Id.* at 695.

III.

We discuss the substantiality of each claim in turn.

A. Claims Four Through Eight

To establish prejudice for failure to raise a Fourth Amendment claim, a defendant must show that the underlying Fourth Amendment issue has merit and there is a reasonable probability that the verdict would have been different had the evidence been excluded. *Green v. Nelson*, 595 F.3d 1245, 1251 (11th Cir. 2010).

Fifield claims that his pretrial court appointed attorneys were ineffective for failing to suppress evidence related to an allegedly illegal search and seizure. He alleged that an officer entered his property without legal authority, refused to leave, assaulted him, and broke into four vehicles. From**{2021 U.S. App. LEXIS 8}** the search, the officer discovered a camera, SD card, and a clothed, printed photograph of the victim. No nude photos were found, but Fifield argues that the evidence showed that Fifield had a camera and SD card, as the victim had claimed, thereby lending credence to the victim's story. He argues that there is a reasonable probability that the outcome of his trial would have been different without this evidence.

But Fifield has pointed to no evidence, in the record or otherwise, to support his Fourth Amendment claim. *See Green*, 595 F.3d at 1251. An officer testified at trial that he secured a search warrant before searching Fifield's property. The officer also testified that he recovered the camera, SD card, and printed photograph from Fifield's work vehicle only after obtaining permission from the owner of the vehicle. Fifield does not provide support for his allegations that the officer did not have a warrant, nor does he address the officer claims that he recovered the evidence from his work truck-with permission from the truck's owner. Without more, the underlying claim does not appear to have any merit. As a result, Fifield has failed to establish by a "reasonable probability that, but for counsel's unprofessional errors,**{2021 U.S. App. LEXIS 9}** the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. These claims are not substantial, so Fifield's procedural default is not excused under *Martinez*.

B. Claims Ten and Twelve

Fifield next argues that his counsel was ineffective for failing to move to suppress his recorded interrogation. Fifield was questioned by the police after waiving his *Miranda* rights, and a video of the interrogation was shown at trial. He argues that he waived his *Miranda* rights only after he had been tortured by the officers for an hour-so the statement should be suppressed. He also argues that the officers promised him medical care in exchange for waiving his rights. While Fifield did not admit to abusing the alleged victim during the interrogation, he did admit to writing a letter to the victim's mother and he repeatedly discussed being a sex offender.4

An individual may waive their *Miranda* rights, so long as the waiver is knowing, intelligent, and voluntary. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). A *Miranda* waiver is not voluntary if it is obtained through intimidation, coercion, or deception. *United States v. Barbour*, 70 F.3d 580, 585 (11th Cir. 1995).

Fifield's claims lack support and he is unable to show that the failure to move for suppression was prejudicial. First, the record shows that Fifield's**{2021 U.S. App. LEXIS 10}** *Miranda* rights were explained to him, that he confirmed he understood them, and he signed the *Miranda* waiver without

objection. Further, the information from the statement also came in through other avenues: the victim's mother testified about the letter, the victim from Fifield's earlier sex offense testified, and Fifield himself testified about a substantial portion of the contents of the interrogation, including that he was responsible for the letter and that he had a prior sex offense. Because the information came in through other avenues, the recorded interrogation was not prejudicial. *See Strickland*, 466 U.S. at 694. Fifield's procedural default is not excused under *Martinez*.

C. Claim Thirteen

Fifield also alleges that his counsel was ineffective for refusing to allow him to attend his arraignment, despite his request to be present. He argues that had he been present, he would have put "many vital facts" on the record to prove his innocence. Even if counsel were ineffective in this regard, Fifield cannot show prejudice because he fails to show how his attendance at the arraignment would have altered the proceeding. *See Strickland*, 466 U.S. at 693; *Martinez*, 566 U.S. at 14, 16. Presumably, Fifield still would have pleaded not guilty. And he essentially concedes**{2021 U.S. App. LEXIS 11}** in his brief that "it is unclear if [his] presence at the arraignment would have changed the outcome of the case." Therefore, this claim is not substantial and Fifield's procedural default is not excused under *Martinez*.

D. Claims Fifteen and Sixteen

Fifield next argues that his counsel was ineffective for generally failing to participate in his trial, speak with him, or investigate his claims.

An attorney is under "no absolute duty" to investigate a particular defense or specific facts. *Chandler*, 218 F.3d at 1317. However, an attorney's choice to investigate or not investigate must fall within a reasonable range of competent assistance. *Id.* A petitioner's speculation alone is insufficient to carry the burden to establish what evidence could have been revealed and changed the course of the proceedings, had counsel conducted further investigation. *See Brownlee v. Haley*, 306 F.3d 1043, 1060 (11th Cir. 2002).

Here, Fifield argues that his initial trial counsel failed to speak with him, investigate his case, or preserve evidence-including evidence that he was beaten by the officers. And his second counsel plainly said he would not be investigating and that Fifield should enter a plea. As a result of those interactions, Fifield opted to represent himself at trial. In part,**{2021 U.S. App. LEXIS 12}** these claims are meant to compound claims four through eight, ten, and twelve, which we have found not to be substantial. To the extent this claim is independent, Fifield concedes that it is unclear what evidence would have been discovered and preserved had counsel investigated. However, he contends that had his counsel not been ineffective, he would not have represented himself at trial and this likely would have altered the outcome.

Without allegations about what evidence could have been found with proper investigation, we cannot find that Fifield was prejudiced. Accordingly, Fifield has failed to demonstrate that his IATC claim has some merit, because he has not established, nor even speculated, how the outcome of the proceedings would have been different had counsel investigated. *See Strickland*, 466 U.S. at 693; *Brownlee*, 306 F.3d at 1060. Thus, Fifield's procedural default is not excused under *Martinez*.

E. Claim Twenty-Two

Fifield claims that his counsel was ineffective for failing to investigate the alleged theft of his credit cards by state witnesses. He explains that his defense was, in part, that the victim fabricated her allegations in part to cover up her and her family's fraudulent use of Fifield's credit cards. Specifically,**{2021 U.S. App. LEXIS 13}** he alleges that his bank records would have proven the fraud

and would have been admissible. If introduced, they would have corroborated his allegations and there is a reasonable probability that the outcome at trial would have been different.

However, Fifield's claim is not substantial. The record supports a finding that Fifield's third appointed attorney filed a motion to obtain his credit card records and that those records were produced. So Fifield cannot establish that his counsel's actions were unreasonable. *See Chandler*, 218 F.3d at 1314, 1314 n. 15 (noting that if the record is incomplete or unclear about counsel's actions, then it is presumed that counsel exercised reasonable professional judgement). Also, the state's witnesses admitted during trial that they had owed Fifield money and had fraudulently used his credit cards, so no prejudice is shown. Accordingly, Fifield's claim is without merit, so his procedural default is not excused.

F. Claim Twenty-Four

Fifield argues that his counsel was ineffective for failing to obtain a sworn statement from his mother. Fifield asked his counsel to obtain a sworn statement from his mother or otherwise perpetuate her testimony because she was ill and likely to pass away before**{2021 U.S. App. LEXIS 14}** trial. His mother did pass away before trial and before any testimony or a statement was secured. Had she testified, Fifield argues that she would have provided firsthand knowledge of the other family members' plot to frame Fifield so that they would not have to pay back the money they owed him. Also, his mother would have testified that she observed the victim's mother's boyfriend sexually abusing the victim. He argues that her testimony would have corroborated his account of the events and established a motivation for the state's witnesses to fabricate their testimony, thereby creating a reasonable probability that the outcome of the trial would have been different.

A petitioner cannot establish IATC "simply by pointing to additional evidence that could have been presented." *Hall v. Thomas*, 611 F.3d 1259, 1293 (11th Cir. 2010). Instead, the petitioner must show that what the lawyer did in failing to provide that evidence was not in the "wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. A petitioner's speculation that a missing witness would have been "helpful" to his defense is also insufficient; a petitioner likely needs to show that the evidence would have directly contradicted or undermined the testimony of a state witness. ***{2021 U.S. App. LEXIS 15}****See Johnson v. Alabama*, 256 F.3d 1156, 1186-87 (11th Cir. 2001) (noting that, aside from unsworn statements from the missing witnesses, the petitioner had offered no evidence that any of the alleged witnesses would have testified favorably). Additionally, a petitioner cannot establish IATC simply by identifying additional evidence that is cumulative. *Jennings v. McDonough*, 490 F.3d 1230, 1246 (11th Cir. 2007).

In Florida, the deposition testimony of a witness who dies prior to trial is inadmissible as substantive evidence unless the testimony has been perpetuated pursuant to Fla. R. Crim. P. 3.190(i). *Jones v. State*, 189 So. 3d 853, 854-55 (Fla. Dis. Ct. App. 2015). Under Rule 3.190(i), after the filing of an indictment, the defendant or the state may apply for an order to perpetuate testimony. Fla. R. Crim. P. 3.190(i)(1)-(2). An application is to be verified or supported by credible affidavits that the prospective witness may be unable to attend trial, that the testimony is material, and that a deposition is necessary to prevent a failure of justice. *Id.* The trial court has the discretion of whether to grant a motion to perpetuate testimony. *Cherry v. State*, 781 So. 2d 1040, 1054 (Fla. 2000).

Even assuming Fifield's attorney was deficient for failing to perpetuate the testimony, Fifield cannot establish prejudice. He failed to present evidence, aside from his own speculation, of what his mother would have said, and speculation is insufficient. *See Johnson*, 256 F.3d at 1187. Furthermore, much of the alleged**{2021 U.S. App. LEXIS 16}** testimony was otherwise presented at trial. *See Jennings*, 490 F.3d at 1246. Because of the speculative and cumulative nature of Fifield's mother's alleged testimony, *Martinez* cannot excuse his procedural default.

G. Claim Twenty-Five

Lastly, Fifield argues that his counsel was ineffective for failing to move to dismiss the charges against him for lack of evidence. Under the Florida Rules of Criminal Procedure, the trial court may entertain a motion to dismiss at any time if it is based on the ground that there are no issues of material fact and the undisputed facts do not establish a prima facie case of guilt. Fla. R. Crim. P. 3.190(c)(4). This motion will be denied if the government files a traverse that denies the material facts alleged in the motion to dismiss. Fla. R. Crim. P. 3.190(d).

Here, Fifield's claim is without merit. He concedes on appeal that there was a dispute of facts and that the victim's statement would have been sufficient to deny any motion to dismiss. As a result, he has not shown that counsel was deficient for failing to file the motion, nor that he was prejudiced by it. *See Strickland*, 466 U.S. at 693-94; *Chandler*, 218 F.3d at 1314. Thus, his claim is insubstantial, and *Martinez* does not excuse his procedural default.

IV.

Though Fifield can satisfy part of the *Martinez* exception, he has not shown**{2021 U.S. App. LEXIS 17}** that he has a substantial IATC claim. Therefore, he cannot overcome his procedural default and we affirm the district court's denial of his § 2254 petition.

AFFIRMED.

Footnotes

1

Fifield's grandniece accused him of taking inappropriate photographs of her and touching her inappropriately.

2

Claim numbers correlate to those listed in the COA.

3

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

4

The victim's mother testified that she had received a letter alleging that her boyfriend had sexually assaulted her daughter. The letter alleged that her boyfriend was going to frame Fifield for the sexual assault because he was a sex offender.

DARWIN J. FIFIELD, SR., Petitioner, v. SECRETARY, DEPARTMENT OF CORRECTIONS, et al., Respondents.
UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, OCALA DIVISION
2019 U.S. Dist. LEXIS 117409
CASE NO. 5:18-cv-309-Oc-02PRL
July 15, 2019, Decided
July 15, 2019, Filed

Editorial Information: Subsequent History

Habeas corpus proceeding at, Certificate of appealability granted Fifield v. Sec'y, Dep't of Corr., 2020 U.S. App. LEXIS 9924 (11th Cir. Fla., Mar. 30, 2020)Motion granted by Fifield v. Sec'y, Dep't of Corr., 2020 U.S. App. LEXIS 11200 (11th Cir. Fla., Apr. 8, 2020)

Editorial Information: Prior History

Fifield v. State, 190 So. 3d 647, 2016 Fla. App. LEXIS 5806 (Fla. Dist. Ct. App. 5th Dist., Apr. 12, 2016)

Counsel {2019 U.S. Dist. LEXIS 1}Darwin J. Fifield, Sr., Petitioner, Pro se, Crestview, FL.

For Secretary, Department of Corrections, Florida Attorney General, Respondents: Robin A. Compton, LEAD ATTORNEY, Office of the Attorney General, Daytona Beach, FL.

Judges: WILLIAM F. JUNG, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: WILLIAM F. JUNG

Opinion

ORDER

Petitioner, a Florida prisoner, instituted this action by filing a petition for writ of habeas corpus under 28 U.S.C. § 2254 (Doc. 1) and is proceeding on his amended petition. (Doc. 9). At the Court's direction, Respondents responded to the amended petition and filed relevant portions of the state court record. (Docs. 21, 22). Petitioner filed a reply. (Doc. 30). The Court has reviewed the entire record. Because the Court may resolve the amended petition on the basis of the record, an evidentiary hearing is not warranted. *See* Rules Governing Section 2254 Cases in the United States District Courts, Rule 8(a). Upon consideration, the Court concludes that the petition is due to be dismissed.

I. BACKGROUND

Petitioner was charged by amended information with two counts of lewd or lascivious molestation of a child less than 12 years old by a person 18 years of age or older. (Doc. 22-2 at 34-37). On June 4,

2015, a jury found Petitioner guilty on both counts as charged. (Doc. 22-13 at 64-65). On July 9, 2015,{2019 U.S. Dist. LEXIS 2} Petitioner was sentenced to thirty-five years' incarceration followed by lifetime sex offender probation. (Doc. 22-13 at 114-21). Petitioner appealed. (Doc. 22-13 at 131). On April 12, 2016, Florida's Fifth District Court of Appeal ("Fifth DCA") per *curiam* affirmed the judgment. (Doc. 22-14 at 1163); *see also Fifield v. State*, 190 So. 3d 647 (Fla. 5th DCA2016) (Table). Mandate issued on June 2, 2016 (Doc. 22-15 at 139), and rehearing was denied on June 6, 2016 (Doc. 22-15 at 141). On June 17, 2016, Petitioner filed a motion for a written opinion. (Doc. 22-15 at 144-47). On June 27, 2016, the Fifth DCA struck the motion as unauthorized. (Doc. 22-15 at 149).

On June 17, 2016, Petitioner filed a petition alleging ineffective assistance of appellate counsel in the Fifth DCA. (Docs. 22-15 at 151, 22-16 at 1-28). The State filed a motion to dismiss the petition as facially insufficient. (Doc. 22-16 at 33-37). Petitioner filed a "Respons [sic] to the State Attorney General Petition to Tryin [sic] Stop the Appellant His Due Process of Law" as a reply, (Doc. 22-16 at 39-53), and supplemented his reply with "The Missing Pages" (Doc. 22-16 at 55-76). By Order dated September 6, 2016, the Fifth DCA granted the Respondent's motion to dismiss. (Doc.**{2019 U.S. Dist. LEXIS 3}** 22-17 at 2).

On October 31, 2016, Petitioner filed a *pro se* Rule 3.850 motion for postconviction relief. (Doc. 22-17 at 4-33). On May 8, 2017, Petitioner's claims of ineffective assistance of counsel were dismissed without prejudice to re-file and the remaining claims were denied as procedurally barred. (Doc. 22-17 at 35-72). The postconviction court further noted that Petitioner's oath was improper and thus the motion, in its entirety, was facially insufficient. (Doc. 22-17 at 35). On June 19, 2017, Petitioner filed his amended Rule 3.850 motion. (Doc. 22-17 at 74-133). On July 20, 2017, the postconviction court entered an order denying with prejudice the motion as "facially insufficient in multiple respects." (Doc. 22-17 at 135-253). Petitioner did not appeal.

On October 24, 2017, Petitioner filed a motion for successive 3.850 motion 3.850(h)(2). (Docs. 22-17 at 255-77; 22-18 at 1-31). On December 22, 2017, the motion was denied, pursuant to Florida law, for raising some claims that were previously denied on the merits and for failing to state good cause why he did not raise newly pled grounds in his initial two motions. (Doc. 22-18 at 33-195). On February 1, 2018, Petitioner submitted a handwritten "Judicial**{2019 U.S. Dist. LEXIS 4}** Notice" deemed to be a notice of appeal. (Doc. 22-18 at 197). On February 12, 2018, the Fifth DCA ordered Petitioner to "file a signed, amended Notice of Appeal, within fifteen days of the date hereof, that contains a proper certificate of service reflecting that a copy of the notice was furnished to" the Appellee, and to show cause within fifteen days as to why his untimely appeal should not be dismissed for lack of jurisdiction. (Doc. 22-18 at 199). On February 19, 2018, Petitioner submitted his response to the order to show cause with a filing titled "Order to Show Cause." (Doc. 22-19 at 16-28). On March 23, 2018, the Fifth DCA dismissed the appeal for lack of jurisdiction. (Doc. 22-19 at 30). Petitioner filed a motion for rehearing that the Fifth DCA denied on April 30, 2018. (Doc. 22-19 at 68).

On January 24, 2018, Petitioner filed a motion for extension of time with the Fifth DCA. (Doc. 22-19 at 70-83). On January 31, 2018, the Fifth DCA treated the motion as a petition for belated appeal and directed Petitioner to file an amended petition "that complies with the content requirements of Florida Rule of Appellate Procedure 9.141(c)(4)" within fifteen days. (Doc. 22-19 at 85). Petitioner filed his amended petition on February**{2019 U.S. Dist. LEXIS 5}** 7, 2018. (Doc. 22-19 at 87-97). On February 14, 2018, Petitioner was ordered to submit an amended petition for belated appeal that contains a proper certificate of service. (Doc. 22-19 at 99). On February 20, 2018, Petitioner filed his second amended petition for belated appeal. (Doc. 22-19 at 101-16). On February 27, 2018, the Fifth DCA denied the petition for belated appeal, the amended petition, and the second amended petition. (Doc. 22-19 at 118).

Petitioner filed his initial petition for writ of habeas corpus in this Court on June 15, 2018. (Doc. 1). He filed his amended petition on July 9, 2018. (Doc. 9). Respondents filed a response, arguing that the amended petition should be dismissed with prejudice as unexhausted, in part, and on the merits, in part. (Doc. 21). Petitioner filed a reply. (Doc. 30). Thus, the amended petition is ripe for review.

II. LEGAL STANDARDS

A. Standard of Review Under the Antiterrorism Effective Death Penalty Act ("AEDPA")

Pursuant to the AEDPA, federal habeas relief may not be granted with respect to a claim adjudicated on the merits in state court unless the adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable**{2019 U.S. Dist. LEXIS 6}** 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.28 U.S.C. § 2254(d). The phrase "clearly established Federal law," encompasses only the holdings of the United States Supreme Court "as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).

"[S]ection 2254(d)(1) provides two separate bases for reviewing state court decisions; the 'contrary to' and 'unreasonable application' clauses articulate independent considerations a federal court must consider." *Maharaj v. Sec'y for Dep't of Corr.*, 432 F.3d 1292, 1308 (11th Cir. 2005). The meaning of the clauses was discussed by the Eleventh Circuit Court of Appeals in *Parker v. Head*, 244 F.3d 831, 835 (11th Cir. 2001):

> Under the "contrary to" clause, a federal court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the United States Supreme Court] on a question of law or if the state court decides a case differently that [the United States Supreme Court] has on a set of materially indistinguishable facts. Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing**{2019 U.S. Dist. LEXIS 7}** legal principle from [the United States Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case.Even if the federal court concludes that the state court applied federal law incorrectly, habeas relief is appropriate only if that application was "objectively unreasonable."1 *Id.* Finally, under § 2254(d)(2), a federal court may grant a writ of habeas corpus if the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." A determination of a factual issue made by a state court, however, shall be presumed correct, and the habeas petitioner shall have the burden of rebutting the presumption of correctness by clear and convincing evidence. *See Parker*, 244 F.3d at 835-36; 28 U.S.C. § 2254(e)(1).

B. Standard for Ineffective Assistance of Counsel

In *Strickland v. Washington*, the Supreme Court established a two-part test for determining whether a convicted person is entitled to relief on the ground that his counsel rendered ineffective assistance. 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A petitioner must establish that counsel's performance was deficient and fell below an objective standard of reasonableness and that the deficient performance prejudiced**{2019 U.S. Dist. LEXIS 8}** the defense. *Id.* This is a "doubly deferential" standard of review that gives both the state court and the petitioner's attorney the benefit of the doubt. *Burt*, 134 S. Ct. at 13 (citing *Cullen v. Pinholster*, 563 U.S. 170, 131 S. Ct. 1388, 1403, 179 L. Ed. 2d 557 (2011)).

The focus of inquiry under *Strickland's* performance prong is "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688-89. In reviewing counsel's performance, a court must adhere to a strong presumption that "counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. The petitioner must "prove, by a preponderance of the evidence, that counsel's performance was unreasonable[.]" *Jones v. Campbell*, 436 F.3d 1285, 1293 (11th Cir. 2006). A court must "judge the reasonableness of counsel's conduct on the facts of the particular case, viewed as of the time of counsel's conduct," applying a "highly deferential" level of judicial scrutiny. *Roe v. Flores-Ortega*, 528 U.S. 470, 477, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (quoting *Strickland*, 466 U.S. at 690).

Petitioner's burden to demonstrate *Strickland* prejudice is also high. *Wellington v. Moore*, 314 F.3d 1256, 1260 (11th Cir. 2002). Prejudice "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. That is, "[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." *Id.* at 694. A reasonable probability**{2019 U.S. Dist. LEXIS 9}** is "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

C. Exhaustion

The AEDPA precludes federal courts, absent exceptional circumstances, from granting habeas relief unless a petitioner has exhausted all means of available relief under state law. Exhaustion of state remedies requires that the state prisoner "fairly presen[t] federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights[.]" *Duncan v. Henry*, 513 U.S. 364, 365, 115 S. Ct. 887, 130 L. Ed. 2d 865 (1995) (citing *Picard v. Connor*, 404 U.S. 270, 275-76, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971)). The petitioner must apprise the state court of the federal constitutional issue, not just the underlying facts of the claim or a similar state law claim. *Snowden v. Singletary*, 135 F.3d 732 (11th Cir. 1998). In addition, a federal habeas court is precluded from considering unexhausted claims that would clearly be barred if returned to state court. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991).

If a petitioner attempts to raise a claim in a manner not permitted by state procedural rules, he is barred from pursuing the same claim in federal court. *Alderman v. Zant*, 22 F.3d 1541, 1549 (11th Cir. 1994). Therefore, a federal court must dismiss those claims or portions of claims that have been denied on adequate and independent procedural grounds under state law. *Coleman*, 501 U.S. at 750.

A petitioner can avoid the application of procedural default by establishing:**{2019 U.S. Dist. LEXIS 10}** (1) objective cause for failing to properly raise the claim in state court; and (2) actual prejudice from the alleged constitutional violation. *Spencer v. Sec'y, Dep't of Corr.*, 609 F.3d 1170, 1179-80 (11th Cir. 2010). To show cause, a petitioner "must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in state court." *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999); *Murray v. Carrier*, 477 U.S. 478, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986). To show prejudice, a petitioner must demonstrate there is a reasonable probability the outcome of the proceeding would have been different. *Crawford v. Head*, 311 F.3d 1288, 1327-28 (11th Cir. 2002).

A second exception, known as the fundamental miscarriage of justice, only occurs in an extraordinary case, where a "constitutional violation has probably resulted in the conviction of one who is actually innocent[.]" *Murray*, 477 U.S. at 479-80. Actual innocence means factual innocence, not legal insufficiency. *Bousley v. United States*, 523 U.S. 614, 623, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998). To meet this standard, a petitioner must "show that it is more likely than not that no reasonable juror would have convicted him" of the underlying offense. *Schlup v. Delo*, 513 U.S. 298, 327, 115 S. Ct.

851, 130 L. Ed. 2d 808 (1995). "To be credible, a claim of actual innocence must be based on [new] reliable evidence not presented at trial." *Calderon v. Thompson*, 523 U.S. 538, 559, 118 S. Ct. 1489, 140 L. Ed. 2d 728 (1998) (quoting *Schlup*, 513 U.S. at 324).

III. ANALYSIS

A. Ground One

Ground One is set forth in an unclear manner. Petitioner claims that a State witness testified that the Petitioner sexually abused her cousin, however,**{2019 U.S. Dist. LEXIS 11}** when her cousin was questioned, her cousin denied it and indicated that the State witness was lying. (Doc. 9 at 4). Petitioner claims that this witness was not allowed to testify. *Id.* Petitioner does not name this alleged State witness.

It is not clear if Petitioner ever presented this claim to the state courts, but if he did it was not exhausted. On direct appeal, Petitioner argued that it was error to limit cross-examination of a state witness,2 exclude a defense witness,3 and to limit his argument based on findings that the proposed testimony and argument were irrelevant. *See* Doc. 22-14 at 1106. All of Petitioner's attempts at filing motions for postconviction relief pursuant to Rule 3.850 were dismissed or denied on procedural grounds. *See* Docs. 22-17 at 35-72; 22-17 at 135-253; 22-18 at 33-195. Petitioner's appeal of his successive postconviction motion was dismissed for lack of jurisdiction (Doc. 22-19 at 30) and his petitions for belated appeal were denied (Doc. 22-19 at 118). Accordingly, only the claims presented in the direct appeal were exhausted.4

Because Petitioner did not properly present Ground One to the state court, it is unexhausted. *See, e.g., O'Sullivan v. Boerckel*, 526 U.S. 838, 848, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999) ("[W]e ask not only whether**{2019 U.S. Dist. LEXIS 12}** a prisoner has exhausted his state remedies, but also whether he has *properly* exhausted those remedies, *i.e.*, whether he has fairly presented his claims to the state courts.") (emphasis in original); *Bailey v. Nagle*, 172 F.3d 1299, 1302 (11th Cir. 1999) ("A state habeas corpus petitioner who fails to raise his federal claims properly in state court is procedurally barred from pursuing the same claim in federal court absent a showing of cause for and actual prejudice from the default."). Petitioner has failed to show cause and prejudice for the default, and there is nothing in the record that suggests a fundamental miscarriage of justice would result if the Court does not consider the claim.

Even if this claim was exhausted in the State court, Petitioner is not entitled to relief. Petitioner fails to present a federal question or constitutional violation. He does not indicate what, if any, constitutional violation took place.

B. Ground Two

Petitioner had stand-by counsel but conducted cross-examination. Petitioner claims the trial judge interfered with his ability to cross-examine witnesses by placing a time limit on his cross-examination and stopped him when the time was up. (Doc. 9 at 5-7). Petitioner does not state which witness or witnesses**{2019 U.S. Dist. LEXIS 13}** he was prevented from cross-examining and does not state what questions he was prevented from asking.

This claim is predicated entirely on the assertion that the trial court misinterpreted and/or misapplied Florida law. As such, "it is not the province of a federal habeas court to reexamine state court determinations on state law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). It is "a fundamental principle that state courts are the final arbiters of state law, and federal habeas courts should not second-guess them on such matters." *Herring v. Sec'y, Dep't of Corr.*, 397 F.3d 1338, 1355 (11th Cir. 2005). So, for the purpose of this case, even if the trial court and

the appellate court got it wrong, it is not for a federal habeas court to review that determination. And that is true even though the petition is "couched in terms of ... due process." *Branan v. Booth*, 861 F.2d 1507, 1508 (11th Cir. 1988) (citation omitted).

Petitioner argued in his initial brief that the trial court limited cross-examination of Detective Whiteside based on a finding that the cross-examination concerned irrelevant matters. (Doc. 22-14 at 1124-29). However, the argument was made exclusively on the basis of state law. While a brief mention was made regarding due process, no citation whatsoever was made to any federal decisional authority. See Doc. 22-14 at 1124-29.**{2019 U.S. Dist. LEXIS 14}** As such, the federal claim is unexhausted and procedurally defaulted. *Pearson v. Sec'y, Dep't of Corr.*, 273 F. App'x 847, 849-850 (11th Cir. 2008) and *Cook v. McNeil*, 266 F. App'x 843, 845-846 (11th Cir. 2008) both involved the same flaw as presented here, and the petitions in both cases were dismissed on the grounds of failure to exhaust and procedural default.

Liberally construing Petitioner's claim,5 and assuming *arguendo* that he has overcome the procedural bar, it appears that he is attempting to claim that his Sixth Amendment right to confrontation was violated. "The Confrontation Clause guarantees criminal defendants an opportunity to impeach through cross-examination the testimony of witnesses for the prosecution." *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1370 (11th Cir. 1994). The right to cross-examine is not, however, absolute. *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). Specifically, the Supreme Court has held that "trial judges retain wide latitude ... to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Id.*

Further, the Supreme Court has never decided that the Confrontation Clause affords a defendant the right to cross-examine a witness as to irrelevant matters. Moreover, the Eleventh Circuit has held that the "the Sixth Amendment only protects cross-examination**{2019 U.S. Dist. LEXIS 15}** that is *relevant." Jones v. Goodwin*, 982 F.2d 464, 469 (11th Cir. 1993) (internal quotation marks omitted). For evidence to be relevant for impeachment purposes, it must actually contradict or impeach the witness's testimony at trial or evidence presented in the state's case. *See id.* at 469-70 (providing that, because the jury received no evidence of the victim's pre-rape virginity, the petitioner's desire to impeach the victim's out-of-court virginity statement was of "no constitutional moment;" the petitioner merely sought to establish that the victim had previously told an "out of court lie").

Here, even if Petitioner adequately raised a federal confrontation clause claim in his direct appeal to the Fifth DCA, he has not shown that he is entitled to habeas relief. The questions that Petitioner sought to ask Detective Whiteside were not relevant to whether Petitioner had committed the alleged acts. Although Petitioner asserts that the questions addressed the victim's potential bias or motive to lie, the potential testimony would not reach those conclusions.

During interview between Detective Whiteside and Petitioner, Detective Whiteside asked why *people* would be saying that Petitioner abused Sadie, the victim's step-sister. (Doc. 22-14 at 724-25). Whiteside never said**{2019 U.S. Dist. LEXIS 16}** it was the victim that accused Petitioner of abusing Sadie. *Id.* On cross-examination, Petitioner said that *the victim* accused him of touching Sadie. *Id.* at 761. Petitioner asked Whiteside if he had seen the DVD of Sadie's interview at Kimberly Cottage. *Id.* at 763-64. Whiteside stated that he had. *Id.* at 764. Petitioner then asked Whiteside if Sadie had denied any wrongdoing by Petitioner and the State objected. *Id.* Petitioner had not been charged with any activity involving Sadie and the Court asked him how that information was relevant:

> THE DEFENDANT: Because it shows that I was accused of that too and it wasn't true by the one that's accusing me.

THE COURT: The State opted not to file. I think that case is closed.

THE DEFENDANT: But I'm trying to show where her truthfulness of trying to say I did it with someone else too. And when they investigated it showed that I didn't.

THE COURT: Is Sadie going to be a witness?

MS. HARPER: No, Judge.

THE COURT: Then those questions are irrelevant. Please move on.*Id.* at 764-65. There was no testimony regarding who made the initial accusations involving Sadie. Further, anything involving Sadie would be irrelevant as Sadie was not a State witness, and whatever occurred between the two was not brought**{2019 U.S. Dist. LEXIS 17}** into the trial by the State. Finally, there was no testimony to show that Sadie would have been in a position to know whether the victim was lying regarding the victim's claims as she was never there when the acts took place. Both Petitioner and his stand-by counsel cross-examined the victim. *Id.* at 421-496. Petitioner fails to meet his burden of proving that the state court unreasonably applied controlling Supreme Court precedent or unreasonably determined the facts in rejecting this claim on direct appeal. Ground two warrants no federal habeas corpus relief. *See* 28 U.S.C. § 2254(d)(1), (2).

C. Ground Three

Petitioner claims that the trial court erred by not allowing a defense witness to testify. (Doc. 9 at 7-8). Petitioner states that Brian Mauer was an eye-witness to the "brutal physical torture by the Marion Co. Sheriff against the Petitioner" and an eyewitness "to the Sheriff staff destroying and taking the Petitioner['s] legal work to prevent the Petitioner a chance of a fair trial the police used physical torture severe pain as a 'weapon' to try to force the Petitioner to take a state plea." *Id.* at 7.

On direct appeal, Petitioner argued that it was error to exclude a defense witness because the testimony, and argument regarding**{2019 U.S. Dist. LEXIS 18}** his malicious prosecution theory, were not irrelevant because a theory of the case and a legal defense to the charged crime are not always one and the same. (Doc. 22-14 at 1120-21). In response, the State argued that even if Mauer's testimony was true, it had no bearing on Petitioner's trial and especially whether Petitioner committed the two counts of lewd and lascivious molestation. (Doc. 22-14 at 1142-43). Mauer's testimony would not tend to establish reasonable doubt of Petitioner's guilt. *Id.*

The right to present witnesses in one's own defense in a criminal trial lies at the core of the Fifth and Fourteenth Amendments' guarantee of due process of law. *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). In reviewing the evidentiary determination of a state trial judge, the federal court does not sit as a "'super' state Supreme Court." *Shaw v. Boney*, 695 F.2d 528, 530 (11th Cir. 1983). The general rule is that a federal court will not review a trial court's actions with respect to the admission of evidence. *Id.*; *Nettles v. Wainwright*, 677 F.2d 410, 414 (5th Cir. 1982) (citing *Lisenba v. California*, 314 U.S. 219, 228, 62 S. Ct. 280, 86 L. Ed. 166 (1941)); *see also Nevada v. Jackson*, 569 U.S. 505, 509, 133 S. Ct. 1990, 186 L. Ed. 2d 62 (2013) ("rarely [has the Supreme Court] held that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence."). Before habeas relief may be granted because of a state court's erroneous evidentiary ruling, the violation**{2019 U.S. Dist. LEXIS 19}** must rise to the level of a denial of "fundamental fairness." *Nettles*, 677 F.2d at 414.

Fundamental fairness is violated when the evidence excluded is material in the sense of a crucial, critical, highly significant factor. *Boykins v. Wainwright*, 737 F.2d 1539, 1544 (11th Cir. 1984). Petitioner fails to show that the exclusion of this witness deprived him of a fundamentally fair trial. Petitioner was able to present multiple defense theories to insert reasonable doubt of his guilt: the

victim lied because he took away her computer, a horse, and privileges of riding on a four-wheeler; the victim lied to protect her mother whom Petitioner claims was physically abusive to the victim; the victim lied because her mother wanted Petitioner out of the way because her mother owed him thousands of dollars; that he personally witnessed Dustin, the victim's mother's boyfriend, sexually abuse the victim; and that law enforcement broke his shoulder and didn't provide him medical care.

In sum, the exclusion of Mauer's testimony did not affect the fundamental fairness of Petitioner's trial. Thus, the decisions of the trial court and the Fifth DCA were not contrary to, or an unreasonable application of, clearly established federal law. Accordingly, Ground Three does not warrant federal{**2019 U.S. Dist. LEXIS 20**} habeas relief.

D. Grounds Four through Forty-two

Petitioner raises "39 more ground[s]" that he claims he "raised first in the 5th Cir. Court 3.850 & 3.850(h)(2)." (Doc. 9 at 8, 12-31). As discussed above, all of Petitioner's postconviction motions were dismissed on procedural grounds. Accordingly, each of these 39 grounds are unexhausted and procedurally barred.

IV. CONCLUSION

For the reasons stated above, the Court finds that Petitioner's amended petition for writ of habeas (Doc. 9) is without merit and procedurally barred and, thus, dismisses the petition with prejudice. The Clerk is instructed to enter judgment accordingly, terminate any pending motions, and close the file.

In addition, a certificate of appealability and leave to appeal in forma pauperis are denied. A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253(c)(1). "A [COA] 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). To make a showing, Petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Tennard v. Dretke*, 542 U.S. 274, 282, 124 S. Ct. 2562, 159 L. Ed. 2d 384 (2004) (internal citation{**2019 U.S. Dist. LEXIS 21**} and quotation omitted), or that "the issues presented were adequate to deserve encouragement to proceed further," *Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (internal quotation and citation omitted). Petitioner has not made the requisite showing in these circumstances. Because Petitioner is not entitled to a certificate of appealability, he is not entitled to appeal in forma pauperis at this time.

DONE AND ORDERED at Tampa, Florida, on July 15, 2019.

/s/ William F. Jung

WILLIAM F. JUNG

UNITED STATES DISTRICT JUDGE

Footnotes

1

In considering the "unreasonable application" inquiry, the Court must determine "whether the state court's application of clearly established federal law was objectively unreasonable." *Williams*, 529 U.S. at 409. Whether a state court's decision was an unreasonable application of law must be assessed in light of the record before the state court. *Holland v. Jackson*, 542 U.S. 649, 652, 124 S. Ct. 2736, 159 L. Ed. 2d 683 (2004) (*per curiam*); *cf. Bell v. Cone*, 535 U.S. 685, 697 n. 4, 122 S. Ct. 1843, 152 L. Ed.

2d 914 (2002) (declining to consider evidence not presented to state court in determining whether its decision was contrary to federal law).
2

At trial, the State played the recording of Detective Whiteside's interview of Petitioner. *See* Doc. 22-14 at 650-93, 724-737. During the interview, Detective Whiteside questioned Petitioner about allegations that he took naked pictures of his niece Sadie. *Id.* at 725-26. On cross-examination, Petitioner asked Detective Whiteside about Sadie's interview with the Child Protection Team where Sadie denied being abused by Petitioner. *Id.* at 760-65. Petitioner sought this testimony to suggest that the victim made up the allegations that he abused her because the victim made up the allegations regarding Sadie.
3

The witness, Brian Mauer, would have testified that Petitioner was physically abused in jail and his mail and legal papers were tampered with. (Doc. 22-14 at 1116). This testimony would be presented to argue that Petitioner was falsely accused and the abuse he suffered in jail was intended to get him to enter a plea to an offense he had not committed. *Id.*
4

Petitioner filed a "Motion for Ineffective Assistance of Appellate Counsel" in the state appellate court. (Doc. 22-15 at 131-51; 22-16 at 1-28). Petitioner argued that his appellate counsel failed to argue that a conspiracy existed involving State circuit court judges, the State Attorney's Office, the Sheriff's Office, and his appointed attorneys. The State moved to dismiss the motion as facially insufficient for being improperly sworn under Florida Rule of Appellate Procedure 9.141(d)(4)(F). (Doc. 22-16 at 33-37). The Fifth DCA granted the motion to dismiss. (Doc. 22-17 at 2).
5

The Court must liberally construe a *pro se* Plaintiff's allegations. *Haines v. Kerner*, 404 U.S. 519, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972); *see also Miller v. Stanmore*, 636 F.2d 986, 988 (5th Cir. 1981).