IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 21-11210-C

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JOSHUA DIXON,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

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

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ORDER:

Joshua Dixon, proceeding *pro se*, is a Florida prisoner who was sentenced to 60 years' imprisonment after a jury found him guilty of multiple counts under a sexual battery statute. Dixon filed the present 28 U.S.C. § 2254 habeas corpus petition, raising the following claims:

(1) He was deprived of his substantive right of due process when the trial court improperly allowed unsubstantiated collateral crime evidence into trial;

(2) Ineffective assistance of counsel ("IAC") for advising him not to testify at trial;

(3) IAC for not objecting to the prosecutor's "improper bolstering," namely, calling Dixon a liar; and

(4) IAC for not requesting available lesser-included offenses.

The district court denied Dixon's § 2254 petition, a certificate of appealability ("COA"), and leave to proceed *in forma pauperis* ("IFP"). Dixon now moves this Court for a COA and IFP status.

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To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the district court denied a claim for relief on procedural grounds, the movant must show that reasonable jurists would debate (1) whether the motion states a valid claim of the denial of a constitutional right, and (2) whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). If a state court has adjudicated a claim on the merits, a federal court may grant habeas relief only if the decision of the state court (1) was contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or (2) was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d)(1), (2). Where the state court does not explain its reasoning for denying a claim, it is presumed that the claim was denied on the merits, and the court must determine what theories could have supported the state court's decision and then ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with Supreme Court precedent. *Harrington v. Richter*, 562 U.S. 86, 99, 102 (2011). Before bringing a habeas action in federal court, a state petitioner must exhaust all available state-court remedies for challenging his conviction. 28 U.S.C. § 2254(b), (c). A petitioner may overcome a procedural bar by showing either (1) cause for, and actual prejudice, from the default, or (2) a fundamental miscarriage of justice, meaning actual innocence. *Bailey v. Nagle*, 172 F.3d 1299, 1306 (11th Cir. 1999).

To make a successful claim of IAC, a defendant must show both that (1) his counsel's performance was deficient; and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish prosecutorial misconduct, a defendant must show that the complained of remarks (1) were improper and (2) prejudicially affected his substantial rights. *United States v. Eyster*, 948 F.2d 1196, 1206 (11th Cir. 1991). Under Florida



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law, "an attorney is allowed to argue reasonable inferences from the evidence and to argue credibility of witnesses or any other relevant issue so long as the argument is based on the evidence." *Gonzalez v. State*, 136 So. 3d 1125, 1143 (Fla. 2014) (quotation marks omitted). Also, a failure to instruct a jury regarding a lesser-included offense cannot support a determination of prejudice under *Strickland*. *Sanders v. State*, 946 So. 2d 953, 958-60 (Fla. 2006).

Here, because Dixon raised Claim 1 on direct appeal in terms of only Florida law, the district court correctly found it was unexhausted and due to be dismissed. *See* 28 U.S.C. § 2254(b), (c). The court further properly found there was no reason to believe there was cause to excuse Dixon's failure to exhaust. *See Bailey*, 172 F.3d at 1306. The court properly analyzed the rest of the claims under the *Harrington* framework. *See Harrington*, 562 U.S. at 99. As for Claim 2, the court properly found that Dixon did not show that he was prejudiced by his counsel because he never explained how his testimony would have changed the outcome of his trial. *See Strickland*, 466 U.S. at 694. Regarding Claim 3, the court properly determined the theory that could have supported the state courts' denials, namely, that the prosecutor's statement was neither improper nor affected his substantial rights and, instead, was simply a comment on the victim's testimony and Dixon's inculpatory statements. *See Eyster*, 948 F.2d at 1206; *Gonzalez*, 136 So. 3d at 1143. Finally, as to Claim 4, the district court correctly determined that the jury's conviction as charged showed that, legally, the jury would not have convicted Dixon of any lesser-included offenses, and, therefore, Dixon could not have shown prejudice under *Strickland*. *See Strickland*, 466 U.S. at 694; *Sanders*, 946 So. 2d at 958-60. Accordingly, his motion for a COA is DENIED. *See Slack*, 529 U.S. at 484. His motion for leave to proceed IFP on appeal is DENIED AS MOOT.

/s/ Robin S. Rosenbaum
UNITED STATES CIRCUIT JUDGE



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**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**
**FORT LAUDERDALE DIVISION**

**CASE NO. 19-61326-CIV-CANNON**

**JOSHUA DIXON,**

Petitioner,

v.

**MARK S. INCH,**

Respondent.
_____/

**ORDER DISMISSING IN PART AND DENYING IN PART 28 U.S.C. § 2254 PETITION**

**THIS CAUSE** comes before the Court upon a *pro se* Amended Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 ("Amended Petition") [ECF No. 8]. Petitioner Joshua Dixon challenges his conviction and sentence imposed in the State Circuit Court in and for Broward County, Florida, in Case No. 12-3136CF10A [ECF No. 8]. The Court has considered the Amended Petition, Respondent's Response to the Order to Show Cause and Appendix [ECF Nos. 12 & 13], Petitioner's Reply [ECF No. 16], and is otherwise fully advised. For the reasons that follow, the Amended Petition is **DISMISSED** in part and **DENIED** in part.

**PROCEDURAL HISTORY**

In March 2012, the State of Florida charged Petitioner with nine counts of sexual battery on a person twelve years of age or older but less than eighteen years of age while standing in a position of familial or custodial authority, in violation of Fla. Stat. § 794.011(1)(h), (8)(b) [ECF No. 13-1 pp. 6-10 ("Amended Information")]. The charges in the Amended Information related to alleged sexual abuse of a minor (B.C.) in Broward County during the years 2008 and 2009 [ECF No. 13-1 pp. 6-10].

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Prior to trial, the state filed a notice of intent to offer similar fact evidence of other wrongs pursuant to Fla. Stat. § 90.404 [ECF No. 13-1 p. 12]. Specifically, the State sought to introduce testimony and statements from B.C.—the same victim charged in the Amended Information—asserting that Petitioner had sexually abused her as a minor in Miami-Dade County prior to sexually abusing her in Broward County [ECF No. 13-1 pp. 12-160 (attaching complainant's sworn statement and deposition)].

In October 2013, a jury found Petitioner guilty as to Counts 1, 3, 4, 6, 7, and 9 and acquitted him on the three remaining counts [ECF No. 13-1 pp. 161-171]. The trial court then entered its judgment of conviction and sentenced Petitioner to a total term of 60 years' imprisonment (comprised of three consecutive terms of 20 years' imprisonment), followed by a total term of 15 years' probation, and classified him as a sexual predator pursuant to Fla. Stat. § 775.21 *et seq.* [ECF No. 13-1 pp. 173-200].

Petitioner appealed [ECF No. 13-1 p. 202]. The only argument Petitioner raised in his initial brief was a claim that the trial court abused its discretion under Fla. Stat. § 90.404(2)(a) in admitting at trial the similar fact evidence of Petitioner's prior sexual abuse of B.C. in Miami-Dade County [ECF No. 13-1 pp. 204–228 (Direct Appeal Brief); *see* ECF No. 13-1 pp. 235-236 (State's Response Brief)]. Specifically, Petitioner argued that B.C.'s statements about the earlier Miami-Dade abuse (1) were unfairly prejudicial, *see* Fla. Stat. § 90.403; (2) did not meet the standard of relevance requirement for such evidence, *see Heuring v. State*, 513 So. 2d 122 (Fla. 1987); (3) had not been proven by clear and convincing evidence (because B.C. had not reported the misconduct for years and thus was not believable);[1] and (4) were not of such an "unusual

[1] At the time of Petitioner's trial in Broward County, the alleged sexual abuse of B.C. in Miami-Dade County was the subject of a pending case against him in Miami-Dade County [ECF No. 13-1 pp. 13, 240; ECF No. 14-1 pp. 7-8].



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character as to point to appellant alone as the perpetrator" (on the ground that there was nothing uniquely similar between the Miami-Dade abuse and the Broward County abuse) [ECF No. 13-1 pp. 224-226]. Petitioner raised no claim in his direct appeal under either the Florida or United States Constitution [ECF No. 13-1 pp. 204–28].

The State filed a response to Petitioner's brief in which it asserted that no reversible error occurred because (1) the similar fact evidence satisfied the requirements of Fla. Stat. § 90.404 and supporting case law; (2) any resulting prejudice was sufficiently limited by the court's curative instruction and the government's circumscribed use of the evidence during closing argument; and (3) any alleged error in the admission was harmless [ECF No. 13-1 pp. 245-257].[2]

The Florida Fourth District Court of Appeal affirmed Petitioner's conviction in a summary disposition [ECF No. 13-1 p. 260]. *See Dixon v. State*, 187 So. 3d 1255, 2016 WL 823321 (Fla. Dist. Ct. App. 2016).

In March 2017, Petitioner filed a Motion for Post-Conviction Relief pursuant to Fla. R. Crim. P. 3.850 in the State Circuit Court [ECF No. 13-1 pp. 273-282 (Rule 3.850 Motion)].[3] He raised four grounds in his Rule 3.850 Motion—(1) a claim of constitutionally deficient assistance of counsel for advising him not to testify [ECF No. 13-1 pp. 274-275]; (2) another claim of constitutionally deficient assistance of counsel for failing to object to alleged prosecutorial misconduct [ECF No. 13-1 pp. 276-276]; (3) a third claim of ineffective assistance of counsel for failing to request jury instructions on lesser-included offenses [ECF No. 13-1 pp. 277-278]; and

[2] The State also argued that Petitioner waived any objection to the similar crimes evidence because the record did not reveal any defense objection to the admission of the evidence at trial [ECF No. 13-1 p. 250].

[3] Before Petitioner filed his motion for post-conviction relief under Rule 3.850, he also filed an unsuccessful motion to mitigate sentence pursuant to Rule 3.800 [ECF No. 13-1 pp. 265-268].



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(4) a final claim of cumulative error based on counsel's combined alleged deficiencies [ECF No. 13-1 pp. 278-279].

The State filed a Response to Petitioner's Rule 3.850 Motion [ECF No. 13-2 pp. 2-9], after which the State Circuit Court summarily denied the Rule 3.850 Motion [ECF No. 13-3 p. 150 (Order Denying Rule 3.850 Motion)]. Petitioner appealed [ECF No. 13-3 p. 152]. The Fourth District Court of Appeal summarily affirmed again. *See Dixon v. State*, 267 So. 3d 386 (Fla. Dist. Ct. App. 2019).

In May 2019, shortly after the Fourth District Court of Appeal issued its Mandate affirming the denial of Petitioner's Rule 3.850 Motion [ECF No. 13-3 pp. 180-182], Petitioner commenced this proceeding by filing his initial petition pursuant to 28 U.S.C. § 2254 [ECF Nos. 1 & 3]. Petitioner later filed the instant Amended Petition [ECF No. 8], which raises the following four grounds for review: (1) "Petitioner was deprived of his substantive right of due process when the trial court improperly allowed Un-Substantiated (but claimed to be) collateral crime evidence into trial" [ECF No. 8 pp. 2–3, 12–14]; (2) Petitioner's trial counsel was ineffective for advising him not to testify at trial [ECF No. 8 pp. 4, 14–15]; (3) Petitioner's trial counsel was ineffective for not objecting to the prosecutor's "improper bolstering" [ECF No. 8 pp. 16–17]; and (4) Petitioner's trial counsel was ineffective for not requesting available lesser included offenses [ECF No. 8 pp. 18–19].

The State filed its response to the Petition along with an Appendix containing relevant record materials [ECF Nos. 12 & 13], and Petitioner filed a Reply [ECF No. 16]. The Amended Petition is now fully briefed and ripe for review.

## PROCEDURAL REQUIREMENTS

### *A. Timeliness*

"A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." 28 U.S.C. § 2244. That limitations period creates a waivable defense, however, such that the State may waive its application. *See Paez v. Sec'y, Fla. Dep't of Corr.*, 947 F.3d 649, 655 (11th Cir. 2020). Respondent has conceded the issue of timeliness in this case [ECF No. 12 p. 6], and the Court observes no basis to *sua sponte* address this matter further. *See generally Day v. McDonough*, 547 U.S. 198, 209-210 (2006). Accordingly, the Court treats the Amended Petition as timely.

### *B. Exhaustion*

Habeas petitioners must exhaust all state court remedies before presenting them in a federal habeas petition. 28 U.S.C. § 2254(b)–(c); *see Vazquez v. Sec'y, Fla. Dep't of Corr.*, 827 F.3d 964, 966 (11th Cir. 2016). "[T]o properly exhaust a claim, the petitioner must fairly present every issue raised in his federal petition to the state's highest court, either on direct appeal or on collateral review." *Mason v. Allen*, 605 F.3d 1114, 1119 (11th Cir. 2010) (internal quotation marks and brackets omitted). If a petitioner fails to properly present his claim to the state court by giving the state courts "one full opportunity to resolve any constitutional issues," including through the established appellate review process, then 28 U.S.C. § 2254 typically bars a federal court from reviewing the claim. *Id.* In other words, where a petitioner has not "*properly* presented his claims to the state courts," the petitioner will have "procedurally defaulted his claims" in federal court. *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999) (emphasis in original).

Even so, "'States can waive procedural bar defenses in federal habeas proceedings,' including exhaustion." *Vazquez*, 827 F.3d at 966 (quoting *Hills v. Washington*, 441 F.3d 1374,



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1376 (11th Cir. 2006)). But "[a] State shall not be deemed to have waived the exhaustion requirement . . . unless the State, through counsel, *expressly* waive[d] the requirement." 28 U.S.C. § 2254(b)(3) (emphasis added); *see also McNair v. Campbell*, 416 F.3d 1291, 1304 (11th Cir. 2005).

Here, Respondent unambiguously waived any available exhaustion defense as to Grounds Two through Four but not as to Ground One [ECF No. 12 pp. 7–8]. In Ground One, Petitioner alleges that "[t]he trial court legally erred in admitting nine year old (sic) unsubstantiated collateral crime evidence into trial" in violation of the Due Process Clause [ECF No. 8 pp. 2-3, 12-14]. Respondent submits that Petitioner failed to properly exhaust Ground One because, although the factual basis for his claim is similar to the evidentiary claim he raised on direct appeal under Florida's similar acts statute, specifically Fla. Stat. § 90.404(2)(a)-(b), Petitioner never raised any sort of federal constitutional challenge on direct appeal or otherwise alerted the state court of a federal constitutional claim [ECF No. 12 p. 8]. The Court agrees. A claim that a state court erred in admitting evidence in violation of a state evidentiary rule is substantively distinct from a claim of constitutional dimension under the Due Process Clause. Indeed, "not every objection is a constitutional objection," *United States v. Candelario*, 240 F.3d 1300, 1304 (11th Cir. 2001), and Florida law requires criminal defendants to raise claims of trial court error on direct appeal, *see Bruno v. State*, 807 So. 2d 55, 63 (Fla. 2001) ("A claim of trial court error generally can be raised on direct appeal but not in a rule 3.850 motion[.]"). For this reason, Petitioner did not fairly present his current Due Process claim in Ground One to the state court and thus has procedurally defaulted that claim. *See McNair*, 416 F.3d at 1302 ("It is not sufficient merely that the federal habeas petitioner has been through the state courts nor is it sufficient that all the facts necessary to support



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the claim were before the state courts or that a somewhat similar state-law claim was made." (internal quotation marks and ellipses omitted)).

There are two equitable doctrines that petitioners may rely upon to excuse the procedural default of their constitutional claims—"cause and prejudice" and "actual innocence." *See Dretke v. Haley*, 541 U.S. 386, 393 (2004) ("[A] federal court will not entertain a procedurally defaulted constitutional claim in a petition for habeas corpus absent a showing of cause and prejudice to excuse the default. We have recognized a narrow exception to the general rule when the habeas applicant can demonstrate that the alleged constitutional error has resulted in the conviction of one who is actually innocent of the underlying offense."). "[O]vercoming the procedural-default bar requires both cause *and* prejudice, not one or the other." *United States v. Bane*, 948 F.3d 1290, 1297 (11th Cir. 2020) (emphasis in original). The Court need not address both requirements if the Petitioner cannot satisfy one of them. *See, e.g.*, *United States v. Frady*, 456 U.S. 152, 168 (1982).

"Cause for a procedural default exists where something external to the petitioner, something that cannot fairly be attributed to him impeded his efforts to comply with the State's procedural rule." *Maples v. Thomas*, 565 U.S. 266, 280 (2012) (internal quotation marks, ellipses, and emphasis omitted). "To establish prejudice, a petitioner must show that there is at least a reasonable probability that the result of the proceeding would have been different." *Harris v. Comm'r, Ala. Dep't of Corr.*, 874 F.3d 682, 688 (11th Cir. 2017) (internal quotation marks omitted). Petitioner has made no such showing. Nor does the Court identify anything in the record to support the view that Petitioner was prevented from raising a Due Process challenge to the similar acts evidence in his direct appeal.

In light of Petitioner's failure to establish cause to excuse his procedural default on Ground One, the Court need not address the question of actual prejudice. *See Frady*, 456 U.S. at 468. In

any event, for the sake of completeness, Petitioner has not made a requisite showing on that basis either.

Habeas relief is warranted "if a state trial judge erroneously admitted evidence in violation of a state law[,] and the error made the petitioner's trial so fundamentally unfair that the conviction was obtained in violation of the due process clause of the [F]ourteenth [A]mendment." *Thigpen v. Thigpen*, 926 F.2d 1003, 1012 (11th Cir. 1991). Petitioner has not made a showing of fundamental unfairness. He takes issue with the credibility of B.C.'s testimony, claiming that she was "inherently unbelievable" because no one saw or heard the abuse taking place in a small and crowded apartment [ECF No. 8 p. 13]. He also argues generally that the probative value of such evidence was outweighed by its substantial prejudice [ECF No. 8 p. 13]. These contentions fail to support a due process violation. B.C.'s testimony about Petitioner's abuse in Miami-Dade County prior to his abuse of B.C. in Broward County was highly relevant to Petitioner's motive and intent to molest B.C. as charged, and it provided helpful context to the timeline of Petitioner's abuse. *See* Fla. Stat. § 90.404(2)(b) ("In a criminal case in which the defendant is charged with a crime involving child molestation, evidence of the defendant's commission of other crimes, wrongs, or acts of child molestation is admissible and may be considered for its bearing on any matter to which it is relevant."). The jury was permitted to hear the victim's testimony as to all of the abuse (both in Miami-Dade and Broward Counties) and consider it along with the weight of the state's evidence, including Petitioner's own inculpatory statements to law enforcement. The trial court held a pre-trial hearing on the subject, and the record does not appear to contain any defense objection to the Miami-Dade evidence at the time it was admitted [ECF No. 14-3 pp. 335–339, 372]. Indeed, on cross-examination, defense counsel specifically questioned B.C. about the Miami-Dade abuse in an attempt to discredit her testimony and recollection of events [ECF No. 14-

3 pp. 372–378]. Lastly, prior to admission of the testimony, the trial court specifically instructed the jury to consider the similar fact evidence solely in conformity with the delineated purposes in Fla. Stat. § 90.404(2)(a) [ECF No. 14-3 pp. 334–35], and the court then repeated that cautionary instruction before the jury's deliberations [ECF No. 14-3 p. 1014]. So too did the prosecutor in closing argument remind the jury of the limited use of the evidence and the prohibition on convicting Petitioner for uncharged acts [ECF No. 14-3 p. 929]. Beyond that, the jury acquitted Petitioner on several counts—further reflecting the jury's careful consideration of the evidence and adherence to instructions [ECF No. 13-1 pp. 161–69]. For these reasons, Petitioner has not shown how admission of this highly relevant evidence from the same victim rendered his trial fundamentally unfair [ECF No. 8 pp. 13–14; *see* ECF No. 16].

Petitioner also cannot rely on the actual innocence doctrine to excuse his default on Ground One. "[A] credible showing of actual innocence may allow a prisoner to pursue his constitutional claims . . . on the merits notwithstanding the existence of a procedural bar to relief." *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013). This exception, however, "applies to a severely confined category: cases in which new evidence shows 'it is more likely than not that no reasonable juror would have convicted the petitioner.'" *Id.* at 395 (quoting *Schlup v. Delo*, 513 U.S. 298, 329 (1995)). Petitioner has not identified "new evidence" to construct such a showing [ECF Nos. 8 & 16]. Nor did Petitioner invoke either equitable exception after Respondent argued that Petitioner failed to properly exhaust Ground One [ECF No. 16]. Accordingly, this claim is procedurally defaulted from federal habeas review and must be dismissed.

## STANDARDS OF REVIEW

Under 28 U.S.C. § 2254(d), a federal court may grant habeas relief from a state court judgment only if the state court's decision on the merits was (1) "contrary to, or an unreasonable

application of, clearly established federal law, as determined by the Supreme Court of the United States," or (2) 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). Section 2254(d) thus constructs a "highly deferential standard for evaluating state-court rulings." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (internal quotation marks omitted).

"Clearly established federal law" refers to the holdings, as opposed to the dicta, of the Supreme Court's decisions as of the time of the relevant state-court decision. *See Williams v. Taylor*, 529 U.S. 362, 412 (2000). "A state court's decision is 'contrary to' federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts.'" *Consalvo v. Sec'y, Fla. Dep't of Corr.*, 664 F.3d 842, 844 (11th Cir. 2011) (internal quotation marks and brackets omitted). A state court's decision qualifies as an "an unreasonable application of federal law 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 prisoner's case." *Id.*, 664 F.3d at 844 (internal quotation marks omitted).

Furthermore, "an unreasonable application of those holdings must be objectively unreasonable, not merely wrong; even clear error will not suffice." *Woods v. Donald*, 575 U.S. 312, 316 (2015) (internal quotation marks omitted). "To satisfy this high bar, a habeas petitioner is required to show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* (internal quotation marks omitted). Section 2254(d) similarly prohibits federal judges from reevaluating a state court's factual findings unless those findings were "based on an unreasonable determination of the facts in light of the



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evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). "'If this standard [seems] difficult to meet'—and it is—'that is because it was meant to be.'" *Burt v. Titlow*, 571 U.S. 12, 20 (2013) (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011)).

By its own plain terms, § 2254(d)'s deferential standard applies only when a claim "was adjudicated on the merits in State court proceedings[.]" *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) ("If an application includes a claim that has been adjudicated on the merits in State court proceedings, § 2254(d), an additional restriction applies." (internal quotation marks and citation omitted)); *Cone v. Bell*, 556 U.S. 449, 472 (2009).

The summary denial of a claim with no articulated reasons presumptively serves as an adjudication on the merits subjecting the claim to § 2254(d)'s additional restrictions. *See Richter*, 562 U.S. at 100 ("This Court now holds and reconfirms that § 2254(d) does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits.'"). This is because federal courts ordinarily presume that § 2254(d)'s deferential standard applies when a constitutional claim has been presented to a state court and denied in that forum. *See, e.g.*, *id.* at 99 ("When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.").

## DISCUSSION

### *A. Applicable Substantive Law: Ineffective Assistance of Counsel*

The Sixth Amendment affords a criminal defendant the right to "the Assistance of Counsel for his defen[s]e." U.S. Const. amend. VI. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*



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*v. Washington*, 466 U.S. 668, 686 (1984). To prevail on a claim of ineffective assistance of counsel, a habeas litigant must demonstrate "that (1) his counsel's performance was deficient and 'fell below an objective standard of reasonableness,' and (2) the deficient performance prejudiced his defense." *Raleigh v. Sec'y, Fla. Dep't of Corr.*, 827 F.3d 938, 957 (11th Cir. 2016) (quoting *Strickland*, 466 U.S. at 687–88).

Regarding the deficiency prong, "a petitioner must establish that no competent counsel would have taken the action that his counsel did take" during the proceedings. *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000). If "some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial[,]" counsel did not perform deficiently. *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995) (quoting *White v. Singletary*, 972 F.2d 1218, 1220 (11th Cir. 1992)).

As for the prejudice prong, "a defendant is prejudiced by his counsel's deficient performance if 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Porter v. McCollum*, 558 U.S. 30, 40 (2009) (quoting *Strickland*, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. A defendant, though, must show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable[,]" in order to satisfy the prejudice prong. *Strickland*, 466 U.S. at 687.

***B. Ground Two***

In Ground Two, Petitioner claims his attorney "affirmatively misadvised him Not To Testify" [ECF No. 8 p. 4 (capitalization in original)]. To support this contention, Petitioner avers that "he felt it [was] necessary to testify at trial in an effort to contradict" the State's version of events and further asserts that he "informed" counsel about this stance [ECF No. 8 p. 4].



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Petitioner's attorney allegedly advised Petitioner about his right to testify with just one sentence: "[Y]ou do not want to get on the stand and testify" [ECF No. 8 p. 4].

Petitioner raised this claim in his Motion for Post-Conviction Relief pursuant to Fla. R. Crim. P. 3.850 [ECF No. 13-1 pp. 274–75]. The State Circuit Court summarily denied the claim [ECF No. 13-3 p. 150]. The Fourth Circuit Court of Appeals also provided no explanation for its affirmance of the State Circuit Court's denial. *See Dixon v. State*, 267 So. 3d 386, 386 (Fla. Dist. Ct. App. 2019).

The summary denial of a claim with no articulated reasons presumptively serves as an adjudication on the merits, thereby subjecting the claim to § 2254(d)'s additional restrictions. *See Richter*, 562 U.S. at 100. This is because federal courts ordinarily presume that § 2254(d)'s deferential standard applies when a constitutional claim has been presented to a state court and denied in that forum. *Id.* Where there is no decision for a federal court to "look through," federal courts still presume that the claim was adjudicated on the merits but apply a different standard to determine what reasoning is afforded § 2254(d)'s deferential standard. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1195–96 (2018) (discussing *Richter*, 562 U.S. at 96–100).

Under this alternate framework—sometimes called *Richter*'s "could have supported" framework—a federal habeas court must inquire "what arguments or theories supported or . . . *could have supported*, the state court's decision; and then it must ask whether it is possible [that] fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme Court]." *Richter*, 562 U.S. at 102 (emphasis added); *see also Wilson*, 138 S. Ct. at 1195–96 (re-affirming the validity of the *Richter* framework where there is no "reasoned decision by a lower state court" to explain a State appellate court's summary denial). The "presumption [that a claim was adjudicated on the merits] may be overcome when there is



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reason to think some other explanation for the state court's decision is more likely." *Richter*, 562 U.S. at 99–100 (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991)).

Here, because the record shows that the State never raised a procedural defense to this claim in Florida's courts [ECF No. 13-2 pp. 1–10], there is no reason to think that the Fourth District Court of Appeal denied this claim on procedural grounds. *See Richter*, 562 U.S. at 99–100. Thus, § 2254(d) applies.

While in Florida's courts, the State primarily argued that the record "refute[d]" Petitioner's claim, because the trial court "thoroughly discussed with [him the subject of] his right to testify versus remaining silent and [also] advised [Petitioner that] he was the person who could make that decision" [ECF No. 13-2 p. 5]. This is borne out by the trial record. Indeed, as reflected in the following excerpt, the trial court explicitly advised Petitioner of his right to testify:

> THE COURT: And then the second thing is regarding your right to remain silent, to testify, not testify. Now with regard to this, I'm going to ask you some questions about it. But if overnight you change your mind, I want you to tell me again tomorrow what your decision is. Okay? So I don't want you to feel like you talked to me today and tomorrow if you feel like going the opposite way you can't do it. Do you understand?
>
> THE DEFENDANT: I know.
>
> THE COURT: So you have the right to testify. You have the right to remain silent. There are certain rules that apply to that. Okay. Now if you exercise your right not to testify and your lawyer requests it, I'll be reading an instruction to the jurors that basically let's them know that they are not to hold that against you. And you kind of heard me read something similar to that in the initial jury instructions.
>
> On the other hand, if you do testify your testimony will be taken just like any other witness's testimony. Okay. At this point, have you had enough time to speak with Miss Tolley about whether you want to testify or not?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And have you come to a decision?
>
> THE DEFENDANT: Yes.

THE COURT: Okay. What do you choose to do?

THE DEFENDANT: Not to testify.

THE COURT: All right. Do you need anymore time to think about that?

THE DEFENDANT: Can I take more time?

THE COURT: Absolutely. You can sleep on it. Have another conversations with Miss Tolley in the morning. And we'll go through that in the morning. I'll just remind you what we did today and you tell me.

THE DEFENDANT: No problem.

[ECF No. 14-3 pp. 837-838].

On the following day, the trial court again instructed Petitioner that it was "his choice" and "not [his] lawyer's choice [to testify or not to testify at trial] because it's [his] trial" [ECF No. 14-3 p. 845]. Unequivocally, Petitioner again confirmed that he would not testify at trial [ECF No. 14-3 pp. 845] ("I'm not testifying")], and then reaffirmed his decision a third time [ECF No. 14-3 p. 846 ("COURT: So you understand, this is the time where you are making your decision and it's to not testify? THE DEFENDANT: Not testify.")].

"[A] criminal defendant has a fundamental constitutional right to testify in his or her own behalf at trial. This right is personal to the defendant and cannot be waived either by the trial court or by defense counsel." *United States v. Teague*, 953 F.2d 1525, 1532 (11th Cir. 1992).

In this Court, Respondent contends that the trial court's instructions and Petitioner's in-court statements demonstrate that Petitioner "knew it was his right" to testify at trial [ECF No. 12 p. 30]. Respondent further argues that Petitioner "has not alleged any details of how he was prevented from testifying or specifically alleged [how] the misadvice that he received" purportedly influenced his decision not to testify at trial [ECF No. 12 p. 32]. Thus, in Respondent's view, Petitioner submitted "a barebones claim that counsel advised him not to testify." *Id.*



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It is "primarily the responsibility of defense counsel," and not a trial court's, "to advise the defendant of his right to testify and thereby to ensure that the right [to testify] is protected." *Teague*, 953 F.2d at 1534. For that reason, it may be that a one-sentence consultation by an attorney to a defendant that he should not testify—as Petitioner has alleged here [ECF No. 8 p. 4]—is not sufficient to inform most defendants of the implications of a decision not to testify.

But this Court need not resolve the state courts' resolution of the performance prong because Petitioner has not shown prejudice within the meaning of § 2254(d). *See, e.g.*, *Dingle v. Sec'y, Fla. Dep't of Corr.*, 480 F.3d 1092, 1100 (11th Cir. 2007). To begin, while in Florida's courts, Petitioner claimed "he would have emphatically denied the purported victim's allegations" [ECF No. 13-1 p. 275]. But he failed to alert Florida's courts as to *how* his testimony would have accomplished any variance in the outcome beyond merely denying the victim's account [ECF No. 13-1 pp. 274–75; ECF No. 13-3 pp. 165–68]. Put contextually, Petitioner never alerted the state courts as to why only his testimony—and not Counsel's attempts at cross-examining the victim or even the jury's freedom to believe or disbelieve the victim—would have helped the jury find that the victim lied about everything.[4] This pleading deficiency alone could have supported, the state court's decision," and such a decision would not be contrary to—or an unreasonable application of—a Supreme Court holding. *See generally Johnson*, 256 F.3d at 1176 ("The petitioner bears the burden of proof on the 'performance' prong as well as the 'prejudice' prong of

[4] Petitioner listed subjects that he would have testified to within his Amended Petition [ECF No. 8 p. 15], but he never mentioned any of those subjects in his state court filings [ECF No. 13-1 pp. 165-168, 274–75]. Consequently, whatever Petitioner suggests would have formed the basis for his testimony is not before this Court because the state courts never considered (or knew of) Petitioner's proposed testimony in the first place. *See Cullen*, 563 U.S. at 182 ("Limiting § 2254(d)(1) review to the state-court record is consistent with our precedents interpreting that statutory provision. Our cases emphasize that review under § 2254(d)(1) focuses on what a state court knew and did.").



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a *Strickland* claim[.]"); *cf. Borden*, 646 F.3d at 810 (explaining the "heightened pleading requirement" applicable during habeas review).

Further, as already explained, Petitioner confirmed that he did not want to testify *three times on two separate days*. In light of Petitioner's consistent reaffirmation of his decision not to testify, Florida's courts easily could have concluded that Petitioner had no desire to testify and would not have testified at that time—even if Counsel had advised him to do so. And, Petitioner's post hoc allegations to the contrary very likely could have been viewed by Florida's courts as entirely inconsistent with the contemporaneous evidence in the trial record. As Petitioner cannot show that such a decision would have been inconsistent with a Supreme Court decision, he cannot meet his burden under § 2254(d). *See Richter*, 562 U.S. at 102; *Lott v. Att'y Gen., Fla.*, 594 F.3d 1296, 1302–03 (11th Cir. 2010) (rejecting claim that attorney interfered with decision to testify where record amply supported defendant's decision not to testify). This claim must be denied.

***C. Ground Three***

In Ground Three, Petitioner claims that Counsel failed "to recognize and object to prosecutorial misconduct through improper bolstering" when the State called Petitioner "a Liar" [ECF No. 8 pp. 5, 16]. This claim also is due to be denied.

To begin, Petitioner presented this claim in his Rule 3.850 Motion [ECF No. 13-1 pp. 276–77], which the State Circuit Court summarily denied [ECF No. 13-1 p. 150]. The Fourth District Court of Appeal affirmed without an explained decision. *See Dixon v. State*, 267 So. 3d 386 (Fla. Dist. Ct. App. 2019). This Court must, therefore, presume the Fourth District Court of Appeal adjudicated his claim on the merits and that § 2254(d) applies for the same reasons that Ground Two is subject to that standard. *See Richter*, 562 U.S. at 99.



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On the substance of Ground Three, Petitioner misquotes the record and neglects important context.

First, Petitioner omits that the challenged remarks were made during closing arguments. Under Florida law, prosecutors and defense attorneys "are granted wide latitude in closing argument," and mistrials are "appropriate only where a statement is so prejudicial that it vitiates the entire trial." *See, e.g.*, *Ford v. State*, 802 So. 2d 1121, 1128 (Fla. 2011). Likewise, under federal law, a prosecutor's closing arguments are harmless unless the "defendant's substantial rights are prejudiced"; therefore, even if improper closing arguments were made, a defendant must still establish that the improper comments actually "had the effect of . . . [causing] prejudice." *United States v. Sarmiento*, 744 F.2d 755, 763–65 (11th Cir. 1984); *United States v. Stanley*, 495 F. App'x 954, 957 (11th Cir. 2012) ("A defendant's substantial rights are prejudicially affected when a reasonable probability arises that, but for the remarks, the outcome of the trial would have been different." (internal quotation marks omitted)).

Second, contrary to Petitioner's claim, the State did not call Petitioner "a Liar." Rather, the State argued that the only way an acquittal would be warranted would be if the jury discredited *not only* the victim's statements about the abuse *but also* Petitioner's prior inculpatory statements to law enforcement during his post-*Miranda* statement. In pertinent part, the State argued as follows during closing arguments:

> Now[,] what other evidence do you have in addition to what B.C. told you? Well, you have the best possible evidence that you can ever have in the world. And what do I mean by that? If I had DNA, right, what is DNA evidence? DNA evidence is someone else's opinion, an expert witness, but someone else's opinion about what they believe was, for example, inside of B.C.['s] vagina, right? . . . Someone else's opinion. And what did I give you? I gave you [the Defendant's] own words that came out of his mouth. Not someone's opinion. His mouth. And ladies and gentlemen, *the only way that you can possibly acquit him is if you believe that B.C. is a liar and he is a liar* . . . And do you know why I say that [and why B.C. would have to be the luckiest liar on this planet]? . . . [S]he knew what [the Defendant]



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> would confess to . . . [*E*]*ach and every single one of you know that what B.C. said is true because he said it, too.*

[ECF No. 14-3 pp. 936–38 (emphases added)]. And, overlooked by Petitioner, his Counsel challenged the reliability of his out-of-court inculpatory statements during closing arguments [ECF No. 14-3 pp. 975–77]. Counsel also extensively addressed the victim's numerous credibility issues during closing arguments [ECF No. 14-3 pp. 941–75].

While in Florida's courts, the State corrected Petitioner's misquoted interpretation of the record, clarified that the challenged remarks were made during closing arguments, and correctly argued that the challenged remarks were simply "a comment on the evidence" [ECF No. 13-2 p. 8]. This amply could have supported the summary denials at all levels. And, a denial on that basis would not have been contrary to, or an unreasonable application of, *Strickland*'s prejudice prong. Accordingly, this claim must be denied. The Court need not address the performance prong. *See, e.g.*, *Dingle*, 480 F.3d at 1100.[5]

***D. Ground Four***

Petitioner argues in Ground Four his trial counsel failed "to request an available lesser included offense" so that he could obtain a "jury pardon"—one that convicted him only on unpursued lesser included offenses [ECF No. 8 p. 18]. In his view, no competent attorney "would have made the same decision" because Petitioner risked a life sentence [ECF No. 8 p. 18].

[5] Further, courts reviewing *Strickland* prejudice ordinarily presume that juries follow their instructions. *See, e.g.*, *United States v. Roy*, 855 F.3d 1133, 1186–87 (11th Cir. 2017). Here, the trial court instructed the jury on several issues that related directly to the reliability of Petitioner's out-of-court statements and to the credibility of the victim, and the trial court further clarified to the jury that the statements made by an interrogating officer are not evidence that may be considered [ECF No. 14-3 pp. 1014, 1016–18]. There is no reason to suspect that the jury shrugged off its obligation to follow the trial court's instructions. Because Petitioner cannot show *Strickland* prejudice even under *de novo* review, he cannot meet his burden under § 2254(d). *See Dallas v. Warden*, 964 F.3d 1285, 1307–08 (11th Cir. 2020).



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Similar to Grounds Two and Three, Petitioner presented this claim in his Rule 3.850 Motion [ECF No. 13-1 pp. 277–78], which the State Circuit Court summarily denied [ECF No. 13-3 p. 150]. The Fourth District Court of Appeal affirmed without an explained decision. *See Dixon v. State*, 267 So. 3d 386, 386 (Fla. Dist. Ct. App. 2019). This Court thus must presume that the Fourth District Court of Appeal adjudicated his claim on the merits and use *Richter*'s "could have supported" framework when resolving whether Petitioner can meet his burden under § 2254(d). *See Richter*, 562 U.S. at 99, 102.

Under Florida law, a jury is permitted to convict a defendant on a lesser included offense "only if it decides that the main accusation has not been prove[n] beyond a reasonable doubt." *Sanders v. State*, 946 So. 2d 953, 958 (Fla. 2006) (internal quotation marks omitted). Because Ground Four is a claim of ineffective assistance at trial, this Court must presume the jury followed that state law principle in Petitioner's trial. *See Strickland*, 466 U.S. at 694.

Of course, the jury already found the evidence against Petitioner "supported his conviction for the greater offenses on which it was instructed [and of which it actually convicted]; therefore, even if [] lesser-offense instructions had been given, the jury would not have been permitted [under state law] to convict [him] of [] lesser included offenses." *See Santiago v. Sec'y, Fla. Dep't of Corr.*, 472 F. App'x 888, 889 (11th Cir. 2012). Because that theory "could have supported" the state appellate court's resolution of the prejudice prong, and fairminded jurists would not find that decision to be contrary to—or an unreasonable application of—a Supreme Court holding, Petitioner cannot meet his burden under § 2254(d). The Court need not address the performance prong. *See, e.g.*, *Dingle*, 480 F.3d at 1100. This claim, too, must be denied.



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## EVIDENTIARY HEARING

No evidentiary hearing is warranted in this matter. "[W]hen the state-court record 'precludes habeas relief' under the limitations of § 2254(d), a district court is 'not required to hold an evidentiary hearing.'" *Cullen,* 563 U.S. at 183 (quoting *Shriro v. Landrigan*, 550 U.S. 465, 474 (2007)). Because the Court has resolved Grounds Two through Four under § 2254(d)(1), evidentiary development is unwarranted. *See Williams*, 529 U.S. at 444 ("The Court of Appeals rejected this claim on the merits under § 2254(d)(1), so it is unnecessary to reach the question whether § 2254(e)(2) would permit [or restrict] a hearing on the claim."). The Court has further assured itself that Ground One, the unexhausted claim, does not warrant evidentiary development. *See Schriro*, 550 U.S. at 474 ("[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.").

## CERTIFICATE OF APPEALABILITY

After careful consideration of the record in this case, the Court declines to issue a certificate of appealability ("COA"). A habeas petitioner has no absolute entitlement to appeal a district court's final order denying his habeas petition. Rather, to pursue an appeal, a petitioner must obtain a COA. *See* 28 U.S.C. § 2253(c)(1); *Harbison v. Bell*, 556 U.S. 180, 183 (2009).

Issuance of a COA is appropriate only if a litigant makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To do so, litigants must show that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). And, "[w]here a district court has disposed of claims . . . on procedural grounds, a COA will be granted only if the court concludes that 'jurists of reason' would find it debatable both 'whether the petition states a valid claim of the denial of a constitutional right' and 'whether the district court was correct in its procedural ruling.'"



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*Eagle v. Linahan*, 279 F.3d 926, 935 (11th Cir. 2001) (quoting *Franklin v. Hightower*, 215 F.3d 1196, 1199 (11th Cir. 2000)).

Here, reasonable jurists would not find the Court's resolution of Grounds Two through Four debatable or wrong. Nor would reasonable jurists find the Court's procedural ruling incorrect as to Ground One. A COA is therefore denied.

## CONCLUSION

Having carefully reviewed the record in this case, and for the foregoing reasons, it is **ORDERED AND ADJUDGED** as follows:

1. The Amended Petition [ECF No. 8] is **DISMISSED** as to Ground One and **DENIED** as to Grounds Two through Four.
2. No COA is warranted.
3. The Clerk is **INSTRUCTED** to terminate all deadlines and **CLOSE** this case.

**DONE AND ORDERED** in Fort Pierce, Florida, this 22nd day of March 2021.

**AILEEN M. CANNON**
**UNITED STATES DISTRICT JUDGE**

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