IN THE
SUPREME COURT OF THE UNITED STATES

NO. _____

ROBERT EARL ROWLES
Petitioner

v.

STATE OF FLORIDA
Respondent

APPENDIX(S)

A

The opinion and orders of the United States Court of Appeals for the Eleventh Circuit Denying Request for Certificate of Appealability (12-3-21).

B

Order denying petitioner motion to alter and amend judgment filed May 10, 2021.

C

Decision of State Court of Appeal; Second District denying 3.850 motion for post conviction relief.

E

Leshwand McSwain and Doris Jones Sworn Affidavit(s).

Appendix A

CORRECTED

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-11838-D

ROBERT EARL ROWLES,

Petitioner-Appellant,

versus

SECRETARY, DOC,
FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

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

ORDER:

Robert Rowles, a Florida prisoner, seeks a certificate of appealability ("COA") and *in forma pauperis* ("IFP"), to appeal the denial of his 28 U.S.C. § 2254 petition. In his petition, he requested an evidentiary hearing, and asserted that: (1A) the trial court erred in allowing the prosecutor to vouch for the victim's credibility; (1B) counsel failed to renew an objection to the vouching; (2A) the court erred in closing the courtroom to show the victim's interview tape; (2B) counsel failed to object to the closure; (3) counsel failed to call witnesses, who would have testified that the victim was a liar, when the prosecutor urged the jury to consider why the victim would have lied; (4) counsel failed to move for a mistrial when the prosecutor mentioned his decision not to testify; (5) counsel failed to object to the lack of black jurors on the panel; (6) the evidence at trial was insufficient; and (7) the court erred in denying his motion for a mistrial.

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). The movant satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation marks omitted). Where the district court denied a habeas petition on procedural grounds, the movant must show that reasonable jurists would debate (1) whether the petition states a valid claim of the denial of a constitutional right, and (2) whether the district court was correct in its procedural ruling. *Id.*

To establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel's performance is presumed to be reasonable, and thus the defendant must demonstrate that no competent counsel would have taken the action that counsel took. *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000) (*en banc*). Prejudice occurs when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

Here, reasonable jurists would not debate the denial of Mr. Rowles's § 2254 petition. Claims 1A and 2A were procedurally defaulted because the state court rejected them under Florida rules. *See Bailey v. Nagle*, 172 F.3d 1299, 1302-03 (11th Cir. 1999). Claims 6 and 7 were unexhausted when Mr. Rowles did not identify a federal constitutional guarantee as to these claims on direct appeal, and were procedurally defaulted because, when he filed his § 2254 petition, it was obvious that these claims would have been procedurally barred under Florida rules. *See Gray v. Netherland*, 518 U.S. 152, 162-63 (1996); *Bailey*, 172 F.3d at 1302-03; Fla. R. Crim. P. 3.850(h)(2).

As to Claim 1B, the state court reasonably concluded that the prosecutor's initial questions to the victim regarding truthfulness were intended to show that she was competent to testify, and that counsel objected to the prosecutor's later questioning on this point. Further, the prosecutor was permitted to suggest that the victim was truthful in closing argument after defense counsel attacked her credibility. As to Claim 2B, this Court must defer to the state court's determination that the closure of the courtroom was proper. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Further, Mr. Rowles could not establish prejudice based on counsel's failure to object to the closure when it appears that the courtroom remained open during the victim's in-person testimony, and his claim that another witness would have testified, if not for the closure, was conclusory.

As to Claim 3, the state court reasonably concluded that the prosecutor's comments that the victim had no interest in making up her testimony were proper, as the prosecutor was asking the jury to draw logical inferences from the trial testimony. Further, this Court must defer to the state court's conclusion that the purported testimony from the witnesses identified by Mr. Rowles would have been inadmissible and cumulative. *See Estelle*, 502 U.S. at 67-68. As to Claim 4, Mr. Rowles did not show that the prosecutor commented on his decision not to testify, and counsel was not deficient in concluding that a motion for a mistrial would be futile.

As to Claim 5, Mr. Rowles's allegations regarding the absence of black jurors were conclusory, and he did not present evidence showing the systematic exclusion of black jurors. Finally, no evidentiary hearing was warranted because Mr. Rowles's petition was without merit. Accordingly, his COA motion is DENIED. Consequently, his IFP motion is DENIED AS MOOT.

/s/ Jill Pryor
UNITED STATES CIRCUIT JUDGE

Appendix B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

ROBERT EARL ROWLES,

Petitioner,

v. Case No. 2:17-cv-375-FtM-66MRM

SECRETARY, DOC and FLORIDA ATTORNEY GENERAL,

Respondents.

ORDER

This case is before the Court on a Petition for Writ of Habeas Corpus filed under 28 U.S.C. § 2254 by Petitioner Robert Earl Rowles ("Petitioner"). (Doc. 1.) In compliance with this Court's order (Doc. 8), the State of Florida ("Respondent") filed an opposition to the Petition (Doc. 12), and Petitioner filed a reply. (Doc. 17.) After a thorough review of the parties' briefs and the record, and for the reasons set forth below, each of Petitioner's claims will be denied on the merits, dismissed as unexhausted, or dismissed as unexhausted and alternatively denied on the merits.

I. Background

On January 28, 2011, the State of Florida charged Petitioner by information with one count of sexual battery on a child less than twelve years of age, in violation of Florida Statute § 794.011(2). (Doc. 15-2 at 97.) After a two-day trial, the jury found Petitioner guilty as charged. (Doc. 15-3 at 22.) The trial court sentenced him to life in prison as a habitual violent felony offender. (Id. at 153.) Florida's Second District Court of Appeal ("Second DCA") affirmed per curiam. (Doc. 15-4 at 193.)

On November 4, 2014, Petitioner filed a motion for postconviction relief under Rule 3.850 of the Florida Rules of Criminal Procedure ("Rule 3.850 Motion"). (Doc. 15-4 at 198–214.) Petitioner raised the same five claims of ineffective assistance of trial counsel as he raises in this petition. (Id.) The postconviction court summarily denied the Rule 3.850 Motion without a written opinion. (Doc. 15-5 at 97–109.) 9jmk,pFlorida's Second DCA summo9bgvnbarily affirmed per curiam. (Id. at 285.)

Petitioner filed his federal habeas petition on June 29, 2017. (Doc. 1.)

II. Standard of Review

A. The Antiterrorism Effective Death Penalty Act (AEDPA)

Under 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 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)(1)–(2). When reviewing a claim under section 2254(d), a federal court must presume that any "determination of a factual issue made by a State court" *is correct. Id. at § 2254(e). The petitioner bears "the burden of rebutting \ the presumption of correctness by clear and convincing evidence." Id.

The section 2254(d) standard is both mandatory and difficult to meet. To demonstrate entitlement to federal habeas relief, the petitioner must show that the state court's ruling was "so lacking in justification that there was an error well

understood and comprehended in existing law beyond any possibility for fairminded disagreement." White v. Woodall, 134 S. Ct. 1697, 1702 (2014) (quoting Harrington v. Richter, 562 U.S. 86 (2011)).

A state court's summary rejection of a claim, even without explanation, qualifies as an adjudication on the merits—warranting deference. Ferguson v. Culliver, 527 F.3d 1144, 1146 (11th Cir. 2008). Generally, in the case of a silent affirmance, a federal habeas court will presume that the affirmance rests upon the specific reasons given by the last court to provide a reasoned opinion. See Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991); Wilson v. Sellers, 138 S. Ct. 1188 (2018). However, the presumption that the appellate court relied on the same reasoning as the lower court can be rebutted "by evidence of, for instance, an alternative ground that was argued [by the state] or that is clear in the record" showing an alternative likely basis for the silent affirmance. Sellers, 138 S. Ct. at 1196.

"Clearly established federal law" consists of the governing legal principles set forth in the decisions of the Supreme Court of the United States at the time the state court issued its decision. White, 134 S. Ct. at 1702; Carey v. Musladin, 549 U.S. 70, 74 (2006) (citing Williams v. Taylor, 529 U.S. 362, 412 (2000)). Clearly established federal is not found in the dicta of Supreme Court's opinions. Id.

A decision is "contrary to" clearly established federal law if the state court either: (1) applied a rule that contradicts the governing law set forth by Supreme Court case law; or (2) reached a different result from the Supreme Court when faced with materially indistinguishable facts. Ward v. Hall, 592 F.3d 1144, 1155 (11th

Cir. 2010); Mitchell v. Esparza, 540 U.S. 12, 16 (2003).

A state court decision involves an "unreasonable application" of the Supreme Court's precedents if the state court correctly identifies the governing legal principle, but applies it to the facts of the petitioner's case in an objectively unreasonable manner, Brown v. Payton, 544 U.S. 133, 134 (2005), or "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Bottoson v. Moore, 234 F.3d 526, 531 (11th Cir. 2000) (quoting Williams, 529 U.S. at 406).

B. 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 (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 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 v. Titlow, 134 S. Ct. 10, 13 (2013) (citing Cullen v. Pinholster, 131 S. Ct. 1388, 1403 (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. A court must "judge the reasonableness of counsel's challenged 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 (2000) (quoting Strickland, 466 U.S. at 690).

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 is "a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

C. Exhaustion and Procedural Default

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. 28 U.S.C. § 2254(b)(1). 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 (1995) (citing Picard v. Connor, 404 U.S. 270, 275–76 (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). Under the similar doctrine of procedural default, "a federal court will not review the merits of claims, including constitutional claims, that a state court

declined to hear because the prisoner failed to abide by a state procedural rule." Martinez v. Ryan, 566 U.S. 1, 9 (2012).

A petitioner can avoid the application of the exhaustion or procedural default rules by establishing objective cause for failing to properly raise the claim in state court and 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). To show prejudice, a petitioner must demonstrate a reasonable probability the outcome of the proceeding would have differed. 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 v. Carrier, 477 U.S. 478, 479–80 (1986).

III. Discussion

Petitioner raises seven grounds for relief in his petition. The first five grounds allege that attorney Jay Brizel ("Counsel") was constitutionally ineffective at trial (Grounds One through Five). Grounds One and Two also include a claim of trial court error. His last two grounds raise only claims of trial court error (Grounds Six and Seven).

A. Exhaustion of Claims One, Two, Four, Five, Six, and Seven

Respondent argues that only Ground Three of this petition is exhausted. Specifically, Respondent asserts that the ineffective assistance claims raised in Grounds One, Two, Four, and Five are unexhausted because they were not raised in Petitioner's brief on appeal of the postconviction court's denial of his Rule 3.850 Motion. (Doc. 12 at 23–29.) Respondent also asserts that the claims of trial court error raised in Grounds One and Two are barred from consideration because they were dismissed as procedurally barred by the postconviction court. (Id. at 37–38, 40.) Finally, Respondent asserts that the claims of trial court error raised in Grounds Six and Seven are unexhausted because Petitioner raised them only as state court claims in his brief on direct appeal. (Id. at 30–31.) Each of these assertions is addressed in turn.

First, Respondent is correct that, except for Ground Three, Petitioner did not specifically address the postconviction court's denial of his ineffective assistance claims in his Rule 3.850 Motion's appellate brief. Petitioner does not argue otherwise. Instead, he asserts that the Eleventh Circuit allows this Court to consider unexhausted habeas claims. (Doc. 3 at 3–4.) The source of Petitioner's certitude is unclear. However, in Darity v. Sec'y, Dep't of Corr., 244 F. App'x 982, 984 (11th Cir. 2007), the Eleventh Circuit concluded in an unpublished, and therefore non-binding, opinion that a district court erred when it found that Darity's ineffective assistance claims were procedurally barred for failure to specifically raise them in the brief on appeal of his Rule 3.850 motion. Relying on Webb v.

State, 757 So. 2d 608, 609 (Fla. 5th DCA 2000) and Rule 9.141(b)(2)(C) of the Florida Rules of Appellate Procedure, the Eleventh Circuit concluded that "a petitioner who does file a brief in an appeal of the summary denial of a Rule 3.850 motion does not waive any issues not addressed in the brief." Id. at 984. However, Webb is no longer the decisional law of the Fifth DCA. See Ward v. State, 19 So. 3d 1060, 1061 (Fla. 5th DCA 2009) (receding from Webb and noting that the appellant had abandoned issues not addressed in his appellate brief); see also McClarty v. Sec'y, Dep't of Corr., 2016 WL 10703187, at *9 (11th Cir. Sep. 7, 2016) (concluding that the petitioner from Florida's Fifth DCA had abandoned his claim by failing to address it on his initial brief on appeal). To date, Darity has not been overturned by the Eleventh Circuit, and neither the Supreme Court of Florida nor Florida's Second DCA has directly addressed this issue.[1]

That said, the Court need not venture into these waters and decide whether is Petitioner invoked one complete round of the state's established appellate review process when he chose not to include Grounds One, Two, Four, and Five in his appellate brief. This is because none of those claims entitle Petitioner to habeas relief, and pursuant to 28 U.S.C. § 2254(b)(2), "[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to

[1] In Walton v. State, 58 So. 3d 887 (Fla. 2d DCA 2011) the Second DCA recognized that "a pro se postconviction claimant can, by failing to raise such issues in his brief, waive a Spera claim." Although Respondent argues otherwise, it seems that the Walton holding was limited to claims based on Spera v. State, 971 So. 2d 754 (Fla. 2007). Therefore, the Court cannot conclude that Walton is a wholesale adoption of the Fifth DCA's reasoning in Ward.

exhaust the remedies of the State." See discussion infra Grounds One, Two, Four, and Five.

Respondent next urges that the claims of trial court error raised in Grounds One and Two are procedurally barred because they were raised for the first time in Petitioner's Rule 3.850 Motion and rejected on procedural grounds by the postconviction court. (Doc. 12 at 37, 40.) Respondent is correct that a state court's rejection of a federal constitutional claim on procedural grounds precludes federal review if the state procedural ruling rests upon an "independent and adequate" state ground. Judd v. Haley, 250 F.3d 1308, 1313 (11th Cir. 2001). A state court's ruling rests on such grounds if: (1) the last court rendering a judgment clearly and expressly relies on a state procedural rule to resolve the federal claim without reaching the merits; (2) the decision rests solidly on state law grounds; and (3) the state procedural rule is not applied in an "arbitrary or unprecedented fashion" or in a "manifestly unfair manner." Id.

Here, the postconviction court rejected the claims of trial court error raised in Ground One and Ground Two because "claims of trial court error cannot be raised in rule 3.850 motions and should be raised on direct appeal." (Doc. 15-5 at 98, 101) (citing 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[.]"); Jenkins v. State, 794 So. 2d 654 (Fla. 2d DCA 2001)). Because the postconviction court made this finding through the application of Florida law, and Petitioner has not argued—let alone shown—that the postconviction court did so in an arbitrary

fashion, the claims of trial court error raised in Grounds One and Two are procedurally barred and will not be further addressed by this Court.

Finally, Respondent asserts that Petitioner has not exhausted the constitutional dimension of the issues raised in Grounds Six and Seven. (Doc. 12 at 59, 62.) Indeed, in his appellate brief, Petitioner raised the identical arguments he now raises here, but not as constitutional claims. Rather, he cited only Florida state court decisions in the brief, none of which turned on a constitutional question, and he never referred to the Due Process Clause. (See Doc. 15-4 at 157–66). For a habeas petitioner to fairly present a federal claim to state courts, he must present the state courts with the same claim he urges on the federal courts "such that a reasonable reader would understand each claim's particular legal basis and specific factual foundation." McNair v. Campbell, 416 F.3d 1291, 1302 (11th Cir. 2005) (internal quotations and citations omitted). As part of such a showing, the claim presented to the state courts "must include reference to a specific federal constitutional guarantee, as well as a statement of the facts that entitle the petitioner to relief." Reedman v. Thomas, 305 F. App'x 544, 545–46 (11th Cir. 2008) (unpublished) (internal citation omitted).

Because Petitioner did not refer to any "specific federal constitutional guarantee" on direct appeal, the federal challenges raised in Grounds Six and Seven were not fairly presented to the state court. Petitioner does not argue an exception to overcome the procedural default of these grounds. Consequently, Grounds Six and Seven are unexhausted. However, because these claims would not entitle

Petitioner to federal habeas relief even if exhausted, they will be briefly addressed on the merits. See discussion infra Grounds Six and Seven.

B. Ground One

Petitioner asserts that the trial court erred and Counsel was ineffective for failing to renew an objection to the state prosecutor personally vouching for the credibility of a witness during trial. (Doc. 1 at 3). The specific exchanges at issue are as follows:

> **Excerpt One:**
>
> Q. All right. Do you understand that everything we talk about today has to be the truth?
>
> A. Yes.
>
> Q. You're only going to tell me the truth?
>
> **Excerpt Two:**
>
> Q. Okay you know you're not going to get in trouble as you're telling me the truth, right?
>
> A. Yes.
>
> **Excerpt Three (closing argument):**
>
> I want to talk about the ability of this child to distinguish reality from fantasy. She showed you her ability to do that. Showed you the difference between a truth and a lie. That's not an issue here. She came in here and she told you she's going to tell the truth.

(Id. at 3 (citing Doc. 15-1 at 165, 169; Doc. 15-2 at 29).) Petitioner contends that the prosecutor improperly "vouched" for the witness because, even after establishing that the child would tell the truth, the prosecutor kept emphasizing this point. (Doc. 1 at 3; Doc. 17 at 8.)

Petitioner raised this claim in his Rule 3.850 Motion, and the postconviction court first noted that any claim of trial court error "must be dismissed as not cognizable in [a Rule 3.850 motion]." (Doc. 15-5 at 98.) Next, the postconviction court addressed the first two exchanges at issue. The court determined that the first excerpt was from a longer passage designed to discern whether the child knew the difference between a truth and a lie. (Id. at 99.) The court explained that under Florida law, the competency of a child witness is based on the child's intelligence and "sense of obligation to tell the truth." (Id. at 99–100) (citing Fla. Stat. §§ 90.601 and 90.602 (2011); Floyd v. State, 18 So. 3d 435 (Fla. 2009).) The court further explained that it was not error under Florida law to qualify a child in the presence of the jury. (Id. at 100) (citing Herrera v. State, 625 So. 2d 1240, 1240 (Fla. 2d DCA 1993).) Finally, the court concluded:

> [T]he passages Defendant complains of are not instances of the state vouching for the victim's credibility. Instead, they reflect the State's attempt to determine if the child actually was able to distinguish the difference between the truth and a lie, which as detailed in the case law above, is necessary before any testimony can be taken from her. Thus, these statements were proper and counsel would have had no basis upon which to object. Additionally, the record reflects that trial counsel objected to the passage detailed in the second excerpt, alleging that it was improper bolstering, which the trial court overlooked. Trial counsel cannot be deemed ineffective for failing to pursue an objection on which the trial court had already ruled. Teffeteller v. State, 734 So. 2d 1009, 1020 (Fla. 2009) ("Counsel cannot be deemed ineffective for failing to prevail on a meritless issue."). Defendant has failed to demonstrate any entitlement to relief.

(Id. at 100.) The postconviction court separately addressed the third excerpt, which was made during the State's rebuttal closing argument after Counsel had "pointed

out to the jury all the reasons why it should not believe the victim." (Id. at 100–01.) The court explained:

> Specifically, defense counsel argued that the victim was led by the prosecutor and the Child Protective Team interviewer into making the allegation, that the victim was both manipulative in her telling of the facts when she wanted someone to get into trouble and was manipulated by the adults involved, and that the child was not telling the truth. He also argued what the child's interest would be in making up such a story, that the adults were "driving the story," and that the child was consequently saying what the adults wanted her to say. He had gotten the victim to admit on cross-examination that she had told her grandmother her cousins had hit her, even when they actually had not. Additionally, the record reflects that at a sidebar conference, before the argument was made, defense counsel demanded a proffer of the State's argument as to the victim's credibility and wanted to know "what he believed[d] show[ed] honesty in the child." Defense counsel and the trial court were satisfied with the proffer and the State was permitted to proceed along this line of argument.

(Id. (citations to the record omitted).)

Petitioner does not explain how the postconviction court's opinion was contrary to, or based upon an unreasonable application of, federal law.[2] Nor does he provide the grounds on which counsel could have "renewed" his objection to the prosecutor's questions to the child witness. As noted by the postconviction court, "the prime test of testimonial competence of an infant witness is his or her intelligence, rather than his or her age, and, in addition, whether the child

[2] Because the Second DCA silently affirmed the postconviction court's denial of Petitioner's Rule 3.850 Motion (Doc. 15-5 at 285), the Court will "look through" the silent affirmance and rely on the postconviction court's reasoned opinion when considering Grounds One through Five. Ylst, 501 U.S. at 803.

possesses a sense of obligation to tell the truth." Lloyd v. State, 524 So. 2d 396, 400 (Fla. 1988) (citing Bell v. State, 93 So. 2d 575 (Fla. 1957)). Reasonable competent counsel could have concluded that the questions to the child from the prosecutor regarding truthfulness (Excerpt One) were designed to determine whether the child was competent to testify—not to "bolster" her credibility. Moreover, Counsel did object to prosecutor's second question about truthfulness (Excerpt Two). (Doc. 15-1 at 169–70.) Reasonable competent counsel could have decided against further arguing the point, as doing so would have been futile.

As to Counsel's statement during closing argument (Excerpt Three), "an attorney is allowed . . . to argue credibility of witnesses or any other relevant issue so long as the argument is based on the evidence." Miller v. State, 926 So. 2d 1243, 1254–55 (Fla. 2006). In the instant case, the prosecutor was explaining why the jury should believe the child based upon her (the child's) testimony. That is clear from the context in which the prosecutor made the comments.

Moreover, "[a] defendant is not at liberty to complain about a prosecutor's comments in closing argument when the comment is an invited response." Bell v. State, 758 So.2d 1266, 1266 (Fla. 5th DCA 2000) (citing Parker v. State, 641 So.2d 369 (Fla.1994)). In closing arguments, Counsel strenuously argued that: (1) the child-victim ("P.C.") fabricated the story because she was angry at Petitioner (Doc. 15-1 at 892); (2) the "child is not the innocent, as far as manipulation, as the State would have you believe." (Id.); and (3) the evidence was "consistent with the child is not telling the truth and is now stuck with the story." (Doc. 15-2 at 2.) In rebuttal

closing, the prosecutor referred to Counsel's comments to argue that the child was not making up the story. He argued regarding the child's testimony as follows:

> I want to talk about the ability of this child to distinguish reality from fantasy. She showed you her ability to do that. Showed you the difference between a truth and a lie. That's not an issue in here. She came in here and she told you she's going to tell the truth.
>
> A child of eight years old, if she's going to make something up, which is what [defense counsel] said she did, how is she going to make up oral sex? If she wants to get him in trouble, she's going to make up oral sex and describe it as a tongue or a licking of her private, that doesn't make sense because that's not what happened.

(Doc. 15-2 at 29.) Given both that prosecutors are allowed to argue witness credibility in closing and the prosecutor was simply rebutting Counsel's comments, reasonable competent counsel could have decided that the statement in Excerpt Three was an invited response and that an objection would have been futile.

Finally, the Court has reviewed each of the excerpts in context as well as the entire closing argument and concludes that the postconviction court reasonably determined that nothing said by the prosecution was so prejudicial that "confidence in the outcome is undermined." Braddy v. State, 111 So.3d 810, 850 (Fla. 2012). In other words, there is not a reasonable probability of a different verdict had Counsel objected to the prosecutor's comments. The state courts reasonably concluded that this claim fails to satisfy either Strickland prong. Even if exhausted, Ground One would be denied on the merits.

C. Ground Two

In Ground Two, Petitioner argues that the trial court erred and Counsel was ineffective for failing to object when the courtroom was closed to show the child victim's videotaped interview with the Child Protection Team. (Doc. 1 at 4; Doc. 15-1 at 319–20.) Petitioner argues that the "state's proffer was not specific as to whose privacy interests might be infringed, how they would be infringed, what portion of the tapes might infringe them, and what portion of the evidence consisted of the tapes." (Doc. 1 at 5.) In his reply, Petitioner states (for the first time and without further explanation) that he suffered prejudice from the closure because Witness Melvin Powell declined to testify on Petitioner's behalf after the judge closed the courtroom. (Doc. 17 at 11.)

Petitioner raised Ground Two in his Rule 3.850 Motion. The post-conviction court rejected Petitioner's arguments, reasoning that the videotape was a "confidential recording" under Florida Statute § 39.202 "that the jury was permitted to view in order to resolve the issue of fact before it, but which did not warrant further disclosure." [3] (Doc. 15-5 at 293.)

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[3] This statue provides: "In order to protect the rights of the child . . . all records held by the department concerning reports of child abandonment, abuse, or neglect . . . and all records generated as a result of such reports, shall be confidential . . . and shall not be disclosed except as specifically authorized by this chapter." Fla. Stat. § 39.202(1) (2014). The statute further provides that if a court determines that access to such a record is necessary to determine an issue, "such access shall be limited to inspection in camera, unless the court determines that public disclosure of the information contained therein is necessary for the resolution of an issue then pending before it." Id. at § (2)(f).

Petitioner does not demonstrate that the postconviction court's conclusion was objectively unreasonable or even incorrect. Moreover, this Court will not reconsider an issue of state law. Estelle v. McGuire, 502 U.S. 62, 67 (1991) (recognizing that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions").

Even if the temporary courtroom closure was improper and Counsel should have objected (a finding not made by this Court), Petitioner has not demonstrated prejudice from the 45-minute closure. Other than stating in his reply that Melvin Powell would have testified absent the closure, he does not provide an affidavit from Mr. Powell explaining the nature of his testimony nor does he explain how the outcome of his trial would have differed if Counsel had objected to the closure.

In Purvis v. Crosby, 451 F.3d 734 (11th Cir. 2006), the Eleventh Circuit addressed a similar issue as raised in Ground Two. In that case, Mr. Purvis contended that he suffered prejudice from defense counsel's failure to object to the partial closure of the courtroom during a minor victim's testimony regarding sexual abuse. Id. The court concluded that Mr. Purvis's failure to affirmatively demonstrate prejudice was fatal to his ineffective assistance claim:

> Purvis cannot show that an objection from his counsel would have caused the factfinder to have a reasonable doubt about his guilt. If counsel had objected in a timely fashion and had persuaded the trial judge not to partially close the courtroom, there is no reason to believe that would have changed the victim's testimony in a way which would have created a reasonable doubt in the jury's mind. The victim could just as well have been a more sympathetic or credible witness if forced to testify publicly. We do not

> know, and when we do not know the party with the burden loses, and here that party is Purvis.

Id. at 738-39. Likewise, Petitioner's instant argument that Melvin Powell would have testified if the courtroom had remained open is not evidence of prejudice. Rather, it is mere speculation—speculation that Mr. Powell would have testified favorably and that the jury would have reached a different verdict as a result of the favorable testimony. Speculation does not establish prejudice. See Strickland, 466 U.S. at 693 (instructing that a habeas petitioner must "affirmatively prove prejudice"); Bible v. Ryan, 571 F.3d 860, 871 (9th Cir. 2009), (2010) (speculation insufficient to show Strickland prejudice). This Court does not know what would have happened if Mr. Powell had testified, and as noted by the Purvis court, "when we do not know, the party with the burden loses." 451 F. 3d at 739. Accordingly, Petitioner has not met demonstrated Strickland prejudice, and even if exhausted, Ground Two would be denied on the merits.

D. Ground Three

Petitioner contends that Counsel was ineffective for failing to call Doris Jones and Leshawnda McSwain as defense witnesses. (Doc. 1 at 6.) He asserts that Ms. Jones would have testified that she did not believe P.C. because she "is a big liar especially when she do [sic] not get her way. My mother spoils her and let her have her way. I do not believe Robert ever touched her." (Id.) Ms. McSwain would have testified that she asked P.C. whether Petitioner had touched her, and she said, "I don't know." (Id.) Ms. McSwain would have also testified that P.C. was a compulsive liar and that "[i]f she can't get her way, she will lie on you. If she's mad

at you for whatever reason, she'll lie on you just to get you in trouble with Grandma." (Id.) Petitioner argues that it was important for the jury to hear from these witnesses to show that the child victim, P.C., had an interest in making up the story. (Id.)

Petitioner raised this claim in his Rule 3.850 Motion and attached affidavits from the proposed witnesses. (Doc. 15-4 at 205–07, 216, 219.) The postconviction court rejected the claim on both Strickland prongs. First, the court concluded that "the proposed testimony would have been offered to prove the victim's propensity to lie and [such] testimony would not have been admissible." (Doc. 15-5 at 103.) Next, the court determined that the testimony would have been cumulative because the jury heard—through the CPT recording and Counsel's argument—that the "victim may not have been very credible." (Doc. 15-5 at 104.) Finally, relying on the State's response, the court noted that both Ms. Jones and Ms. McSwain were listed as trial witnesses, and a deposition had been scheduled. (Id.). However, Petitioner had demanded a speedy trial and the parties proceeded to trial without the deposition. (Id. at 104.) The postconviction court noted that counsel was specifically asked about witnesses and had stated that "[w]e have decided that we're not going to present witnesses." (Doc. 15-5 at 104; Doc. 15-1 at 368.)

In his reply, Petitioner argues that, because there was no evidentiary hearing, the postconviction court erred by implicitly concluding that Counsel made a strategic decision against calling witnesses. (Doc. 17 at 14.) To the extent Petitioner seeks habeas relief based upon the absence of an evidentiary hearing on

his Rule 3.850 Motion, his argument is unavailing; federal habeas relief does not lie for a prisoner's challenge to the process afforded him in a state post-conviction proceeding. See Anderson v. Sec'y, Dept. of Corr., 462 F.3d 1319, 1330 (11th Cir. 2006)) (denying habeas petition "to the extent it rests on the state court's failure to grant an evidentiary hearing under Florida law"). In addition, no evidentiary hearing was required for the postconviction court to conclude that the witnesses' proposed testimony would have been inadmissible and cumulative—Petitioner attached the witnesses' affidavits to his Rule 3.850 Motion, and the trial court thus knew what they would have said. Counsel is not ineffective for failing to offer cumulative evidence. See, e.g., Routly v. State, 590 So. 2d 397, 401-02 (Fla. 1991) (counsel not ineffective when most of the evidence that defendant claimed should have been presented was already before the judge and jury, albeit in a different form); Lynch v. State, 2 So. 3d 47, 71 (Fla. 2008) ("[T]his Court has held that 'even if alternate witnesses could provide more detailed testimony, trial counsel is not ineffective for failing to present cumulative evidence.'") (citing Darling v. State, 966 So. 2d 366, 377 (Fla. 2007)).

Finally, Petitioner cannot demonstrate prejudice because the state court specifically found that Ms. Jones's and Ms. McSwain's proposed testimony would have been inadmissible. Determinations of state law evidentiary questions will not be second-guessed on habeas review. See Estelle, 502 U.S. at 67–68 (rejecting Court of Appeals' conclusion that evidence was incorrectly admitted under California law

because "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions").

Petitioner does not show that the state courts' rejection of Ground Three was contrary to clearly established federal law or based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Accordingly, Ground Three is denied.

E. Ground Four

Petitioner argues that Counsel should have moved for a mistrial after a comment from the prosecutor regarding Petitioner's right to remain silent. (Doc. 1 at 7.) The prosecutor made the statement during closing argument:

> Not only did everyone say [P.C.] got along well with [Petitioner] prior to the day, but [Petitioner], when he was first confronted by [P.C.'s grandmother] about it, acted like he didn't know what was wrong. I don't know what's wrong. If there had been some dispute, if there was some reason she wanted to get him in trouble, wouldn't [Petitioner] know about that - if they had got in a fight while they were out at the—

(Doc. 1 at 7) (citing Doc. 15-2 at 27.) Counsel immediately objected to this statement, and the trial court held a conference outside of the hearing of the jury:

> Counsel. I'm going to object to that last statement, wouldn't Robert Earl have said this, that or the other. Mr. Rowles has a right to not have spoken in this case. And for the State now to say, well, why didn't he say something, is a burden shifting mechanism and is absolutely improper.
>
> State. I absolutely did not say he should have said something or he didn't say something. What I said was he has the absolute right not to make a statement. He did, however, made a

> statement to Dorothy. I am commenting on the content of that statement and what it was and what it was not.
>
> Counsel. And what he didn't do and that is burden shifting.
>
> Court. Well, I would agree with the defense if he hadn't mentioned what he said to grandma, and I believe that it was proper and I'm going to overrule your objection.

(Doc. 15-2 at 28–29.) Petitioner raised this claim in his Rule 3.850 Motion. (Doc. 15-4 at 208.) The postconviction court concluded that the comment was based on prior testimony from Petitioner's aunt that Petitioner had denied committing the offense, and "[a]s the State was permitted to comment on this, there would not have been any basis on which to object." (Doc. 15-5 at 105.) The court further found that Counsel did, in fact, object and was overruled. The court commented that because the trial court did not find error at the objection level, "it does not appear that it would have found that a mistrial was warranted." (Id. at 292.)

Petitioner argues in reply that the postconviction court focused on what Petitioner said, rather than on what he did not say, and as a result, its conclusion was unreasonable. (Doc. 17 at 16–18.) However, it is clear from the trial transcript that Counsel objected to the prosecutor's statement on the grounds that he mentioned Petitioner's silence, and it is equally clear that the trial court overruled that objection. Accordingly, Counsel's performance was not deficient.

Neither has Petitioner shown prejudice. Under Florida law, "where a timely objection is made to an improper comment concerning defendant's right to remain silent, and the objection is overruled, thus rendering futile a motion for mistrial, the

issue of the admission of such comment is properly preserved for appeal." Simpson v. State, 418 So. 2d 984, 987 (Fla. 1982). Petitioner has failed to show how the state court's adjudication of this claim was contrary to Strickland or based upon an unreasonable determination of the facts. Even if exhausted, Ground Four would be denied on the merits.

F. Ground Five

Petitioner argues that Counsel was constitutionally ineffective for failing to challenge the jury venire. (Doc. 1 at 8.) Specifically, he claims that the jury panel did not represent a fair cross section of Lee County because there were no African American jurors on his panel.[4] (Id.) When Petitioner raised this claim in his Rule 3.850 Motion, the postconviction court distinguished the cases relied upon by Petitioner and noted that "in order to prevail on this type of claim, a defendant must be able to demonstrate a systematic exclusion rather than merely assert one." (Doc. 15-5 at 107 (citing Gordon v. State, 863 So. 3d 1215, 1218 (Fla. 2003).)

The postconviction court reviewed the entire jury selection process to assess whether there had been systematic exclusion of black jurors. (Doc. 15-5 at 108–09.) The court noted that the panel was composed of married and unmarried people, one person who identified as gay, people with children and those without, working people and retired people, long-time residents of the area and recent transplants.

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[4] It is not clear whether Petitioner argues that there were no African American members on the original 40-member jury panel or whether no African American jurors were selected for his jury. The Court takes judicial notice that 9.1% percent of Lee County residents identify as Black or African American. See https://www.census.gov/quickfacts/leecountyflorida .

Some had been victims of crime and some had DUIs. (Id. at 108.) Thus, concluded the court, "the potential jurors represented a cross-section of Lee County residents." (Id.) Next, the court described the jurors who were challenged for cause as those who stated on the record that their ability to be unbiased was affected, or those who believed that children did not lie. (Id.) Others felt that their prior interactions with law enforcement might make them biased. (Id.) Finally, the court listed the jurors who were dismissed by peremptory challenge, concluding that the use of the challenges did "not reflect any improper machinations on the part of either party to deprive Defendant of a trial by his peers comprised of the people of Lee County." (Id. at 108–09.) The court thus ruled as follows:

> Race was not a factor in Defendant's offense and nothing in the record suggests that it had been an issue at trial. Neither is there anything in the record to suggest that black people were systematically excluded from the jury selection process. Defendant's claim therefore is speculative. Consequently, Defendant has failed to demonstrate any entitlement to relief.

(Id. at 109.) Petitioner does not explain how the postconviction court's conclusion was contrary to Strickland or to any other clearly established federal law, nor does the Court's independent review of the record and applicable law support such a finding.

The Sixth Amendment guarantees a criminal defendant the right to be indicted and tried by juries drawn from a fair cross-section of the community. United States v. Grisham, 63 F.3d 1074, 1078 (11th Cir. 1995). But that right is not limitless. While "petit juries must be drawn from a source fairly representative of the community . . . [there is] no requirement that petit juries actually chosen must

mirror the community and reflect the various distinctive groups in the population." Taylor v. Louisiana, 419 U.S. 522, 538 (1975). It follows then that Petitioner is "not entitled to a jury of any particular composition . . . but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." Id. (emphasis added).

Petitioner does not prove systematic exclusion of any group. Rather, he makes the conclusory argument that the absence of any blacks on the jury panel proves that they were systematically excluded from jury service in Petitioner's trial. (Doc. 17 at 20.) Although he claims to have received records from the Florida Department of Highway Safety and Motor Vehicles proving that "certain blacks were excluded [from]areas surrounding the same counties from the Petitioner's jury" (id. at 21), he does not further explain the statement or provide these records to the Court. Without evidence, Petitioner's claim is merely speculative. Reasonable competent trial counsel could have concluded that there was no systematic exclusion of black jurors from Petitioner's jury. Petitioner has not satisfied the first prong of Strickland and even if exhausted, Ground Five would be denied on the merits.

G. Ground Six

Petitioner argues the "evidence was not sufficient to sustain a conviction in this cause." (Doc. 1 at 10.) Specifically, he asserts that the State's proof at trial did not establish that he "plac[ed] his mouth or tongue in contact with [P.C.'s] 'sexual

organ' . . . beyond a reasonable doubt[.]" (Id. at 10.) He points to the lack of objective evidence such as DNA to corroborate P.C.'s testimony and claims that P.C.'s testimony was insufficient to sustain his conviction. (Id.) Petitioner raised this same claim on direct appeal where he argued that the trial court erred when it denied his motion for a judgment of acquittal.[5] (Doc. 15-4 at 158.)

Even assuming that Ground Six is exhausted and raises a federal due process claim (see discussion supra Section III(A)), Petitioner is not entitled to federal habeas corpus relief. The Due Process Clause of the Fourteenth Amendment requires the state to prove each element of the offense charged beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 315 (1979). Under Jackson, federal courts must look to state law for the substantive elements of the offense, but to federal law to determine whether the evidence was sufficient under the Due Process Clause. Coleman v. Johnson, 132 S. Ct. 2060, 2064 (2012). For a federal due process review, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential

[5] Counsel never moved for a judgment of acquittal on the sufficiency-of-the-evidence ground raised here. At the conclusion of the state's case, Counsel moved for a judgment of acquittal based on the state's failure to prove proper venue. (Doc. 15-1 at 360.) The trial court denied that motion. (Id. at 364.) On direct appeal, Petitioner argued that the trial court erred by not granting his motion for a judgment of acquittal because the evidence was insufficient to sustain a conviction in the case. (Doc. 15-4 at 157–58.) The State replied that Petitioner waived this claim because he had not made this argument in his motion for a judgment of acquittal. (Id. at 180.) Nevertheless, Petitioner had raised the issue in his motion for a new trial, and because he was convicted of a capital felony and the evidence was clearly sufficient, the State addressed the issue on the merits. (Id. at 181 n.12.)

elements of the crime beyond a reasonable doubt." Jackson, 443 U.S. at 319.

Under Florida law, sexual battery is defined as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object[.]" Fla. Stat. § 794.011(1)(h) (2014). "Union" is defined in Florida's standard jury instructions as "contact" and was also defined by the trial judge as "contact" when she instructed the jury. Fla. Std. Jury Instr. (crim.) 11.1; (Doc. 15-3 at 33.)

During trial, P.C. testified that Petitioner removed her pants and touched her "private area" with his finger. (Doc. 15-1 at 170–71.) She also said that Petitioner used his mouth to touch her in the area where she "pee out of." (Id. at 172.) The jury also heard P.C.'s interview with Child Protective Services that occurred shortly after the incident. (Doc. 15-1 at 321–49.) In that interview, P.C. told the interviewer that Petitioner had taken her out of his car and pulled down her pants. (Id. at 330.) She told the interviewer that Petitioner had touched her "private" with his tongue. (Id. at 337, 334, 348.)

Viewed in the light most favorable to the prosecution, as the trial court would have been required to do in assessing a defendant's motion for judgment of acquittal, P.C.'s testimony that Petitioner had touched her "private" with his tongue is sufficient evidence for a rational trier of fact to conclude beyond a reasonable doubt that Petitioner committed sexual battery. Jackson, 443 U.S. at 319. Florida law does not require additional "objective" evidence as Petitioner now argues. See Marles v. State, 937 So. 2d 720, 721 (Fla. 5th DCA 2006) (determining that the five-

year-old victim's testimony that the defendant put his finger in her "private" was sufficient to prove sexual battery). In addition to being unexhausted, Ground Six fails on the merits

H. Ground Seven

Petitioner argues that the "trial court abused its discretion in denying his motion for mistrial." (Doc. 1 at 11.) This argument is confusing because it appears to be directed at the prosecutor's comment (discussed in Ground Four) on Petitioner's statement (or lack thereof) to his aunt:

> Petitioner Rowles argues that the trial court erred in denying his Motion for Mistrial [sic]. Trial counsel properly objected and requested a mistrial; a curative instruction was given on the fires [sic] request by [sic] counsel obviously recognized the futility of asking for another regarding the statement commenting on this right to remain silent.

(Doc. 1 at 11) (emphasis added). In his reply, Petitioner reiterates his contention that the trial court erred when it denied his motion for mistrial after the comment:

> Petitioner avers that during closing argument, defense objected three times and moved for a mistrial. The third objection was regarding a statement when the state said "if there had been some dispute, if there was some reason [the victim] wanted to get him in trouble, wouldn't [Petitioner] know about that? If they had got in a fight while they were out at the—[sic].["] The defense objected that this was a comment on the Petitioner's right to remain silent.
>
> After counsel objected to the improper statement by the prosecution the burden switch [sic] to the state to prove beyond a reasonable doubt that there was no reasonable possibility that the error affected the jury verdict.

(Doc. 17 at 24 (emphasis added).) This claim fails from the outset because Counsel never moved for a mistrial arising from what Petitioner characterizes as a comment on his right to remain silent. In fact, Petitioner's argument in Ground Four was that Counsel was ineffective for not seeking a mistrial based on this comment. (See Doc. 1 at 7.)

Counsel did move for a mistrial during the State's rebuttal closing arguments when the prosecutor made the following comment:

> We don't have any physical evidence because Robert Earl took her to a lake where no one was, to commit the crime.
>
> We don't have any physical evidence because saliva is not something that always sticks around. There was evidence that it can be wiped off. This examination was five to eight hours later. Children go to the bathroom, little girls wipe themselves with toilet paper - - after they go to the bathroom.

(Doc. 15-2 at 13.) Counsel objected to the statement regarding "children going to wipe themselves" because it had not been brought out in evidence that P.C. had "wiped herself" before her examination. (Id. at 14–15.) The trial court concluded that, although the evidence at trial showed that P.C. had gone to the bathroom as soon as she returned home, there was no evidence that she had wiped herself. (Id. at 16.) Counsel moved for a mistrial, which the trial court denied. (Id.) Instead the court issued the following curative instruction:

> A statement was made to the jury about little girls wiping themselves when they use the restroom. There has been no testimony that anybody – during the trial that witnesses used the restroom in any manner and that statement is to be ignored by the jury and not to be considered as evidence, and you're to rely only on the testimony you have heard in court as evidence, not statements by lawyers.

(Id. at 17.) The Court will liberally construe Ground Seven as directed at the court's failure to grant a mistrial after this comment. However, Petitioner fares no better under this interpretation of his claim.

For a prosecutor's statement to violate the Due Process Clause of the United States Constitution, the comments must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181 (1986) (quoting Donnelly v. DeChirstoforo, 416 U.S. 637 (1974)). Likewise, under Florida law, for a prosecutor's improper comment to warrant a mistrial, the comments must either: (1) deprive the defendant of a fair and impartial trial; (2) materially contribute to the conviction; (3) be so harmful or fundamentally tainted as to require a new trial; or (4) be so inflammatory that they might have influenced the jury to reach a more severe verdict than it would have otherwise. Spencer v. State, 645 So. 2d 377, 383 (Fla. 1994) (citing Blair v. State, 406 So. 2d 1103, 1107 (Fla. 1981); Lopez v. State, 555 So. 2d 1298, 1299 (Fla. 3d DCA 1990)). The prosecutor's single comment that little girls "wipe themselves" does not meet any of these requirements under the Constitution or state law, and the trial court did not err (and Petitioner's constitutional rights were not violated) when the court denied Counsel's motion for a mistrial. Moreover, the trial court issued a curative statement, which was sufficient to dispel any prejudicial effects of the comment. See Rivera v. State, 745 So. 2d 343, 345 (Fla 4th DCA 1999) ("Generally speaking, the use of a curative instruction to dispel the prejudicial effect

of an objectionable comment is sufficient.") (citing Buenoano v. State, 527 So. 2d 194 (Fla. 1988)).

In addition to being unexhausted, Ground Seven fails on the merits.

IV. Conclusion

For the foregoing reasons, Petitioner has not demonstrated entitlement to federal habeas corpus relief. Any of Petitioner's allegations not specifically addressed have been found to be without merit. Because the petition is resolved on the record, an evidentiary hearing is not warranted. See Schriro v. Landrigan, 550 U.S. 465, 474 (2007).

Accordingly, it is hereby **ORDERED:**

1. Petitioner Robert Earl Rowles' Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 is **DENIED**.
2. The Clerk of Court is **DIRECTED** to enter judgment accordingly, terminate any pending motions, and close the file.

Certificate of Appealability [6]

Petitioner must secure a Certificate of Appealability before appealing the dismissal of his habeas corpus action. 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22(b)(1). A prisoner seeking to appeal a district court's final order denying his petition for writ of habeas corpus has no absolute entitlement to appeal but must obtain a certificate of appealability ("COA"). 28 U.S.C. § 2253(c)(1); Harbison v.

[6] Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts, the "district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Id.

Bell, 556 U.S. 180, 184 (2009). "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 such 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 (2004), or, that "the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 327 (2003) (citations omitted).

Petitioner has not made the requisite showing here and is denied a Certificate of Appealability. Because Petitioner is denied a certificate of appealability, he may not appeal in forma pauperis.

ORDERED at Fort Myers, Florida, on March 9, 2021.

John L. Badalamenti

JOHN L. BADALAMENTI
UNITED STATES DISTRICT JUDGE

c. all parties of record
FTMP-2

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

ROBERT EARL ROWLES,

Petitioner,

v. Case No. 2:17-cv-375-JLB-MRM

SECRETARY, DOC and FLORIDA ATTORNEY GENERAL,

Respondents.

ORDER

Petitioner's Motion to Alter or Amend Judgment is before the Court. (Doc. 30, filed April 5, 2021). Petitioner seeks reconsideration of this Court's March 22, 2021 order denying relief under 28 U.S.C. § 2254. (Doc. 28). He brings the motion under Rules 52(b), 59, and 60 of the Federal Rules of Civil Procedure. (Id.)[1] For the reasons given in this Order, Petitioner's motion is denied.

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[1] Because Petitioner proceeds pro se and filed his motion within 28 days of the final order, the Court will construe the motion as filed under Rule 59(e) of the Federal Rules of Civil Procedure. A Rule 60(b) motion that "attacks the federal court's previous resolution of a claim on the merits" (as this one does) counts as a second or successive habeas application. See Gonzalez v. Crosby, 545 U.S. 524, 532 (2005) (recognizing that a petitioner's argument "alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief."). Petitioner must first receive permission from the Eleventh Circuit before filing a successive habeas petition.

I. Legal Standards

A habeas petitioner may file a motion to alter or amend a judgment within 28 days after the entry of judgment. Fed. R. Civ. P. 59(e). Rule 59(e) gives a district court the chance " 'to rectify its own mistakes in the period immediately following' its decision." Banister v. Davis, 140 S. Ct. 1698, 1703 (2020) (quoting White v. New Hampshire Dep't of Employment Security, 455 U.S. 445, 450 (1982)). However, "courts will not address new arguments or evidence that the moving party could have raised before the decision issued." Banister, 140 S. Ct. at 1703. The decision to reconsider a judgment is committed to the sound discretion of the district court. Drago v. Jenne, 453 F.3d 1301, 1305 (11th Cir. 2006); Lockard v. Equifax, Inc., 163 F.3d 1259, 1267 (11th Cir. 1998).

Notably, a Rule 59(e) motion should not be used to "relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." Michael Linet, Inc. v. Village of Wellington, Fla., 408 F.3d 757, 763 (11th Cir. 2005).

II. Discussion

In his motion, Petitioner merely restates each of the arguments originally made in the petition. While a Court can consider the need to correct clear error, the movant must do more than simply rehash previous arguments, which is what Petitioner does here. Bautista v. Cruise Ships Catering & Service Intern'l, N.V., 350 F. Supp. 2d 987, 992 (S.D. Fla. 2003). If Petitioner believes the legal reasoning underlying any of the Court's conclusions is wrong, he should appeal the ruling, not

seek reconsideration. Jacobs v. Tempur-Pedic International, Inc., 626 F.3d 1327, 1344 (11th Cir. 2010).

II. Conclusion

Petitioner has not demonstrated the existence of any ground for this Court to reconsider its denial of his 28 U.S.C. § 2254 petition. Petitioner's Motion to Alter or Amend Judgment (Doc. 30) is **DENIED**.[2]

DONE AND ORDERED in Fort Myers, Florida on May 10, 2021.

JOHN L. BADALAMENTI
UNITED STATES DISTRICT JUDGE

SA: FTMP-2

Copies furnished to:
Counsel of Record
Unrepresented Parties

[2] Because the denial of a Rule 59(e) motion for reconsideration constitutes a final order in a state habeas proceeding, a certificate of appealability is required before Petitioner will be allowed to appeal this Order. Perez v. Sec'y, Dep't of Corr., 711 F.3d 1263, 64 (11th Cir. 2013). Petitioner has not made a substantial showing of the denial of a constitutional right. Slack v. McDaniel, 529 U.S. 473, 483 (2000) ("To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right[.]") Therefore, Petitioner is denied a certificate of appealability on this Order.

Appendix C

M A N D A T E

from

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

SECOND DISTRICT

THIS CAUSE HAVING BEEN BROUGHT TO THIS COURT BY APPEAL, AND AFTER DUE CONSIDERATION THE COURT HAVING ISSUED ITS OPINION;

YOU ARE HEREBY COMMANDED THAT SUCH FURTHER PROCEEDINGS BE HAD IN SAID CAUSE, IF REQUIRED, IN ACCORDANCE WITH THE OPINION OF THIS COURT ATTACHED HERETO AND INCORPORATED AS PART OF THIS ORDER, AND WITH THE RULES OF PROCEDURE AND LAWS OF THE STATE OF FLORIDA.

WITNESS THE HONORABLE CRAIG C. VILLANTI CHIEF JUDGE OF THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, SECOND DISTRICT, AND THE SEAL OF THE SAID COURT AT LAKELAND, FLORIDA ON THIS DAY.

DATE: March 24, 2017

SECOND DCA CASE NO. 2D16-2217

COUNTY OF ORIGIN: Lee

LOWER TRIBUNAL CASE NO. 11-CF-14131

CASE STYLE: ROBERT ROWLES v. STATE OF FLORIDA

Mary Elizabeth Kuenzel

Mary Elizabeth Kuenzel
Clerk

cc: (Without Attached Opinion)

Attorney General Robert Rowles

mep

Appendix D

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