IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-11549-C

WILLIAM GARRIDO,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

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

Before: WILSON and LUCK, Circuit Judges.

BY THE COURT:

William Garrido has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's order dated August 26, 2021, denying his motion for a certificate of appealability and denying as moot his motion for leave to proceed on appeal *in forma pauperis*, in his appeal from the district court's denial of his *pro se* 28 U.S.C. § 2254 habeas corpus petition. Because Garrido has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motions, his motion for reconsideration is DENIED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-11549-C

WILLIAM GARRIDO,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

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

ORDER:

William Garrido's motion for a certificate of appealability is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). Accordingly, his motion for leave to proceed on appeal *in forma pauperis* is DENIED AS MOOT.

/s/ Robert J. Luck
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 1:19-cv-21566-GAYLES/REID

WILLIAM GARRIDO,

Petitioner,

v.

MARK S. INCH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.
_____/

AMENDED ORDER AFFIRMING AND ADOPTING REPORT OF MAGISTRATE JUDGE

THIS CAUSE comes before the Court on Magistrate Judge Lisette M. Reid's Report and Recommendation (the "Report") [ECF No. 21]. On April 24, 2019, Petitioner William Garrido filed a *pro se* petition pursuant to 28 U.S.C. § 2254, attacking the constitutionality of his conviction and sentence following a jury verdict in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Case No. F08024373. [ECF No. 1]. This action was referred to Judge Reid pursuant to 28 U.S.C. § 636(b)(1)(B) for a ruling on all pre-trial, non-dispositive matters and for a report and recommendation on any dispositive matters. [ECF No. 2].

On July 1, 2020, Judge Reid filed her Report, recommending that the Petition be denied. Plaintiff filed a motion for extension of time to file objections to the Report on July 27, 2020. [ECF No. 22]. In error, an Order adopting the Report was entered on July 28, 2020. [ECF No. 23]. On July 29, 2020, Petitioner's motion for an extension to file objections was granted. [ECF No. 24]. On March 19, 2021, Petitioner timely filed a Statement of Objections ("Objections"). [ECF No. 30].

A district court may accept, reject, or modify a magistrate judge's report and recommendation. 28 U.S.C. § 636(b)(1). Those portions of the report and recommendation to which objection is made are accorded *de novo* review, if those objections "pinpoint the specific findings that the party disagrees with." *United States v. Schultz*, 565 F.3d 1353, 1360 (11th Cir. 2009); *see also* Fed. R. Civ. P. 72(b)(3). Any portions of the report and recommendation to which *no* specific objection is made are reviewed only for clear error. *Liberty Am. Ins. Grp., Inc. v. WestPoint Underwriters, L.L.C.*, 199 F. Supp. 2d 1271, 1276 (M.D. Fla. 2001); *accord Macort v. Prem, Inc.*, 208 F. App'x 781, 784 (11th Cir. 2006).

In his Petition, Petitioner raised one claim alleging that the trial court erred in a second trial by admitting prior "unreliable read back testimony from a crucial witness" in violation of his Sixth Amendment right to confront the witnesses against him. [ECF No. 1 at 5–7]. After a merits-review of Petitioner's sole claim, Judge Reid concluded that Petitioner was not entitled to relief under § 2254. *See* [ECF No. 21]. In his Objections, Petitioner argues that the Report fails to consider the unreliability of the state witness's read back testimony from Petitioner's first trial. [ECF No. 30 at 1].

The Court notes that the Petitioner's Objections are merely restatements of his Petition rather than arguments as to specific findings in the Report. After review of the Report, Objections, and the record as a whole, the Court finds that the reasoning in the Report is accurate and thorough. The admission of the state witness's testimony from the first trial did not violate Petitioner's Sixth Amendment rights to confrontation because the statements were testimonial, the witness was unavailable at the second trial, and the Petitioner had an opportunity to cross-examine the witness at the first trial. *See* [ECF No. 21 at 14–15] (citing *Crawford v. Washington*, 541 U.S. 36, 61 (2004); Fla. Stat. § 90.804(2)(a)). Additionally, the Petitioner failed to make "a substantial

showing of the denial of a constitutional right" sufficient to support the issuance of a Certificate of Appealability. *See* 28 U.S.C. § 2253.

Accordingly, it is **ORDERED AND ADJUDGED** that:

1. Magistrate Judge Lisette M. Reid's Report and Recommendation, [ECF No. 21], is **AFFIRMED AND ADOPTED** and incorporated into this Order by reference.
2. Petitioner's Petition, [ECF No. 1], is **DENIED**.
3. A certificate of appealability is **DENIED**.
4. This case is **CLOSED**.

DONE AND ORDERED in Chambers at Miami, Florida, this 6th day of April, 2021.

DARRIN P. GAYLES
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 19-21566-CV-GAYLES
MAGISTRATE JUDGE REID

WILLIAM GARRIDO,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____/

REPORT OF MAGISTRATE JUDGE

I. Introduction

The *pro se* Petitioner, **William Garrido**, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, attacking his conviction and sentence entered following a jury verdict in Miami-Dade County Circuit Court, Case No. **F08024373**.

This Cause has been referred to the Undersigned for consideration and report, pursuant to 28 U.S.C. § 636(b)(1)(B), (c); S.D. Fla. Local Rule 1(e) governing Magistrate Judges; S.D. Fla. Admin. Order 2019-02; and the Rules Governing Habeas Corpus Petitions in the United States District Courts.

For its consideration of the petition [ECF No. 1]; the Court has received the state's response to this Court's order to show cause [ECF No. 11], along with a supporting appendix [ECF Nos. 12, 13, 16, 17, 18].

Construing the arguments liberally as afforded *pro se* litigants, pursuant to *Haines v. Kerner*, 404 U.S. 519, 520 (1972), Petitioner raises the following ground:

> The trial court erred in admitting unreliable testimony from a crucial witness in violation of the confrontation clause.

[ECF No. 1 at 5].

After reviewing the pleadings, for the reasons stated in this Report, the Undersigned recommends that the petition be denied because Petitioner is not entitled to relief on the merits.

II. Factual and Procedural History

Charges/First Trial

On July 24, 2008, the state charged Petitioner with murder in the second degree with a deadly weapon (a firearm), in violation of Fla. Stat. §§ 782.04(2) and 775.087, for a murder that occurred on July 3, 2008 in a Miami Beach parking lot. [ECF No. 13-1]. Petitioner was convicted after a jury trial and the verdict was affirmed on appeal by the Third District Court of Appeal ("Third DCA") in *Garrido v. State*, 76 So. 3d 378 (Fla. 3d DCA 2011). The Florida Supreme Court subsequently reversed the conviction, based on a jury instruction error, in *Garrido v. State*, 160 So. 3d 894 (Fla. 2014). On March 3, 2015, the state trial court vacated the judgement and sentence and ordered a new trial. [ECF No. 13-2].

Pre-Trial Motions

Before the second trial, the state filed a motion to admit the prior testimony

of Garrick Brook, who had become unavailable. [ECF No. 13-3]. The motion chronicled the following facts in support of using the earlier trial testimony at the new trial: on December 9, 2009, Brook testified and was fully cross-examined by defense counsel; the prosecutor and police department's efforts to locate him had failed, despite a nationwide database search, subpoenas, a neighborhood canvas of all available addresses, a search for registered vehicles, a search of NCIC law enforcement records, an internet search for any business address, and phone calls. [*Id.* at 1]. The state requested that the court admit Brook's testimony during the state's case, pursuant to Florida's hearsay exception for prior testimony in Fla. Stat. § 90.804. [*Id.* at 2]. By stipulation, the testimony was admitted. [*Id.* at 1].

The trial court also permitted admission of the transcript of a second witness's testimony, Char Rodriguez, since he was absent due to injuries from military service that had occurred after the first trial. [*Id.* at 4]. Petitioner does not take issue with the introduction of this testimony.

Second Trial

The state presented the following evidence during its case in chief. [ECF No. 12, Trial Transcripts]. Garrick Brook, a passenger in a nearby car, witnessed the incident and testified regarding his observations at the time of the shooting. [T. 351]. As noted above, his testimony was read at the second trial. Brook heard "around four shots," and after the first shot, he "saw a [car] window explode" and then he ducked.

[T. 352]. The driver of his car then put the car in reverse to leave the area. [T. 353]. As he looked up, Brook "saw a gentleman running toward [him]" who "seemed like he was running for his life." [T. 354]. He observed another person, from about thirty yards away, with his hands in a "[s]hooting stance like police officers." [T. 356]. Once the shooting stopped, he and his companion "waited for the gentleman who was doing the shooting to exit the parking lot [and they] then followed him." [T. 361]. The shooter was driving a taxicab. [*Id.*]. Brook's vehicle followed the taxi for a distance, after which they were able to alert a public safety officer of the incident and the cab driver's involvement [T. 362]. Brook also called 911 [T. 365].

Public Safety Officer Rodriguez was parked nearby and heard sounds that he believed were gunshots.[1] [T. 381]. Officer Rodriguez was driving toward the sounds when he encountered Brook's vehicle. [T. 383]. Brook yelled "that guy just shot that guy" and pointed to Mr. Reyes (who was on the ground) and to Petitioner's departing taxicab. [T. 384]. He followed Petitioner and narrated his progress on the radio. [T. 386]. He stopped pursuit upon encountering Officer Metzger's patrol vehicle. [*Id.*].

Officer Metzger was on patrol on the date of shooting and heard about the shooting on his police radio. [T. 392-93]. He observed "one yellow colored cab . . . at a high rate of speed going northbound in front of" his vehicle. [T. 393]. Officer

[1] Because Officer Rodriguez was unable to testify at the second trial, the prosecutor read Rodriguez's testimony from the first trial to the jury. [T. 380]. Petitioner does not object to this testimony.

Metzger and his partner pursued the cab. [T. 394]. Officer Metzger recalled that during the drive they encountered Officer Rodriguez, who "indicated . . . by a hand gesture" that the cab they were following was the subject of the radio communications. [*Id.*]. They followed the vehicle, and upon confirming that the cab was involved in the shooting, they used the necessary tactics to detain Petitioner. [T. 399-400]. After they took Petitioner out of the car and secured him, Petitioner "indicated that the firearm was in the vehicle." [T. 404].

Sergeant Bennet, who also heard the call over the radio, assisted in the pursuit and joined Officer Metzger once Petitioner stopped his vehicle. [T. 412]. He commanded Petitioner to exit the taxicab. [T. 413]. He was the ranking supervisor present, so he took control of securing the scene. [T. 414]. Upon encountering Petitioner, Sergeant Bennett inquired of his physical condition, and during that discussion, Petitioner stated "he was alone, it was just me, I shot." [T. 416]. Sergeant Bennett informed Petitioner "that he needed to stop talking to me about the incident [and] that a detective would be out to give him an opportunity to speak but that he didn't need to say anything further." [*Id.*]. Sergeant Bennett requested that gunshot residue tests be administered to Petitioner's hands. [T. 418].

Officer Socarras administered the gunshot residue (GSR) test and photographed Petitioner's hands. [T. 443]. Crime Scene Investigator Officer Bruder took photographs and observed drops of blood on the sidewalk near the deceased,

Mr. Reyes. [T. 464]. There were twenty blood drops which ran along the sidewalk for "about fifty feet." [T. 467, 471]. A vehicle with two shattered windows was "the last vehicle next to the sidewalk where the blood was collected." [T. 476]. No weapons were found near the victim's body. [T. 479].

Criminalist Alan Klein conducted an analysis of the GSR test. [T. 506-07]. The test for Petitioner's hands was positive. [T. 515-16]. The victim had GSR residue "on both hands" which could be "consistent with him touching a wound as he was running." [T. 518]. On cross-examination, Mr. Klein admitted that firing "with both hands wrapped around . . .shooter stance" would leave particles on the left hand as well as the right, but only Petitioner's right hand tested positive for particles. [T. 525]. He also confirmed that a person "would have to be fairly close, within a few feet of the discharge of the primer, to get a significant amount" of residue on that person. [T. 526].

Medical Examiner Dr. Lew examined the victim's body. [T. 532-34]. She found four gunshot wounds. [T. 535]. None of the wounds displayed stippling, which occurs when "pieces of gunpowder are within a distance where they can strike the skin and cause little red marks." [T. 555]. She stated that "for handguns it's usually within a range of two to three feet." [*Id.*]. She believed that "the end of the gun was beyond a distance of two to three feet when Mr. Reyes was shot." [T. 556].

Defense Case

Petitioner testified as follows in his own defense. On the day in question, Petitioner went to pick up a fare and encountered Mr. Reyes, another cab driver, who did not work for his cab company. [T. 594]. Reyes took the fare and confronted Petitioner verbally, but Mr. Reyes also "pushed [Petitioner] against the ground." [T. 595]. Petitioner left, and as he drove away he looked in the mirror and saw Reyes following him, although Reyes did not have a customer in his cab. [T. 596]. Petitioner chose to enter a parking lot because he "was scared that something bad was going to happen" based on an earlier encounter when Reyes had slapped him at a local cafeteria. [T. 597-98]. According to Petitioner, from the first day he met Reyes, the threats began, including "I'm going to cut your face one of these days." [T. 599]. Petitioner took the threats seriously because he is "a serious man." [T. 600]. Petitioner admitted that he intended to handle Reyes's threats on his own and he never believed police intervention would be necessary. [T. 619, 627, 629].

After Petitioner pulled into the parking lot, he decided to "take my revolver and put it on my waist" but that "nobody saw it." [T. 601]. Once he exited the car, Reyes ran towards him and then jumped at him, at which point, he "started to shoot and . . . didn't stop shooting until [he] thought that it was no longer a danger." [T. 603]. After the shots, Reyes ran away. [T. 603-04]. Petitioner returned to his cab and drove away "to clear [his] mind." [*Id.*]. Petitioner pulled over when he noticed the police were pursuing him with lights activated. [*Id.*].

On cross-examination, Petitioner admitted that he was not blocked in by Reyes's vehicle [T. 649]; that although he was safely in his vehicle, he armed himself and exited the car to confront Reyes [T. 639]; and that he shot a Reyes while Reyes was running away [T. 649]. Petitioner explained that he intended to talk to Reyes, but he "didn't have time to talk" because Reyes ran towards Petitioner in order to hit Petitioner, which required that he shoot in self-defense. [T. 639]. Petitioner claimed he did not aim at Reyes but knew how to use his weapon, knew that his shots would hit Reyes, and that the initial shot had hit Reyes, but continued to shoot him. [T. 650].

State's Rebuttal Case

The State presented Miami Beach Police Department Sergeant Garcia who questioned Petitioner in an interview at the station after the shooting. [T. 682-83]. Sergeant Garcia confirmed that he witnessed Petitioner sign a *Miranda* waiver form. [T. 683-84]. He also recalled Petitioner confirming he could understand and read English [T. 687]. Petitioner did not appear to be under the influence of any substance. [T. 688].

After Sergeant Garcia authenticated the tape, the jury heard the tape of Petitioner's interview. [T. 692]. Petitioner answered questions under oath. [T. 692-93]. During his statement, Petitioner confirmed that on July 5, 2008 he responded to a call from his dispatcher and encountered Reyes at the site; according to Petitioner,

Reyes, who does not work for his cab company, had been bothering him and jumping ahead of him for pick-ups. [T. 697-98]. Petitioner told Sergeant Garcia that two weeks earlier Reyes "pushed [him] in front everybody" at a local eatery. [T. 698]. On the day of the shooting, according to Petitioner, after the quarrel over the customer, he attempted to return to his stand and again encountered Reyes, and as a result, Petitioner resolved "this is enough . . . I am ready for anything" in relation to Reyes [T. 699].

During his narrative to Sergeant Garcia, Petitioner explained that when he encountered Reyes in the parking lot, he "shot the guy in the front and he was running" and that he shot "two times, maybe three" as Reyes was running away from him. [T. 700, 707]. Petitioner confirmed that he exited his vehicle to confront Reyes, and that he took his gun with him [T. 701-02]. He also admitted that he could have driven away before confronting Reyes but, he did not leave because he wanted to confront Reyes and end their dispute [T. 702-03; Tr. at 705]. Running away would make him "feel like [an] animal" who was powerless to react to the abuse. [T. 727]. He pulled into the parking lot because he thought Reyes was following him. [T. 729-31].

During further discussion, Petitioner stated that he "fe[lt] terrible" and "very bad" and that he "became a criminal and [he] deserve[d] punishment." [T. 711-13]. He told Sergeant Garcia that during the time since the incident he became "so sorry,

sorry for everything." [T. 724]. He also stated he was "out of control" during the incident, and that "this was like the last straw to the last degree." [T. 714-15]. He said that in hindsight he would "do it differently" and would have "run away" rather than shoot Reyes. [T. 716]. Petitioner confirmed that Reyes's actions toward him led him to believe Reyes "is not a nice guy because he is against me[,] follow[ing] me, [and] saying things against me." [T. 719]. He never mentioned his troubles with Reyes to anyone else at work. [T. 719-20, 723].

Judgment/Sentence

The jury found Petitioner guilty of second-degree murder. [ECF No. 13-5]. The trial judge sentenced Petitioner to forty years in state prison with a twenty-five year minimum mandatory sentence. [ECF No. 13-6 at 14].

Direct Appeal

Petitioner filed a notice of appeal in Florida's Third District Court of Appeal ("Third DCA"). [ECF No. 13-6]. On September 28, 2016, the Third DCA *per curiam* affirmed without written opinion in *Garrido v. State*, 208 So. 3d 713 (Fla. 3d DCA 2016). On October 20, 2016, the Third DCA denied Petitioner's motion for rehearing. [ECF No. 13-9]. Mandate issued November 14, 2016. [ECF No. 13-10]. Petitioner appealed to the Florida Supreme Court, which issued a brief written opinion dismissing the appeal due to lack of "jurisdiction to review an unelaborated decision from a district court of appeal that is issued without opinion or explanation

or that merely cites to an authority that is not a case pending review in, or reversed or quashed by, this Court." *Garrido v. State*, 2016 WL 6538715, *1 (Fla. Nov. 3, 2016).

Rule 3.800 Motion to Correct Illegal Sentence

On March 23, 2017, Petitioner filed a Rule 3.800(c) motion to reduce or modify his sentence in the trial court. [ECF No. 11-1]. The trial court denied the motion as time-barred and successive. [ECF No. 11-3]. Petitioner did not appeal.

On May 15, 2017, Petitioner filed another Rule 3.800 motion in the trial court [ECF No. 17-1], which Petitioner subsequently abandoned. [ECF No. 1 at 9].

Post-Conviction Rule 3.850 Motion

On September 21, 2017, Petitioner filed a Rule 3.850 motion with the trial court which alleged under claim 1 that the trial court erred in admitting unreliable testimony from a crucial witness in violation of the confrontation clause. [EC-F No. 18-1]. The trial court denied the motion and Petitioner's motion for rehearing. [ECF Nos. 18-3, 18-5].

Petitioner appealed. [ECF No. 18-6]. The Third DCA *per curiam* affirmed without written opinion in *Garrido v. State*, 273 So. 3d 993 (Fla. 3d DCA 2019). Mandate issued April 25, 2019. [ECF No. 18-8].

28 U.S.C. § 2254 Petition

Petitioner next came to this court filing a § 2254 petition on April 24, 2019.

[ECF No. 1]. The state filed a response to this court's order to show cause, with supporting exhibits. [ECF Nos. 11, 12, 13, 16, 17, 18]. The state concedes that the petition is timely, concedes that Petitioner raised the claim his in Rule 3.850 motion, and addresses the merits of the claim. [*Id.*].

III. Governing Legal Principles

This Court's review of a state prisoner's federal petition for habeas corpus is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996). "The purpose of [the] AEDPA is to ensure that federal habeas relief functions as a guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction." *Ledford v. Warden, GDCP*, 818 F.3d 600, 642 (11th Cir. 2016) (quoting *Greene v. Fisher*, 565 U.S. 34, 38 (2011)). In fact, federal habeas corpus review of final state court decisions is "'greatly circumscribed' and 'highly deferential.'" *Id.* at 642 (quoting *Hill v. Humphrey*, 662 F.3d 1335, 1343 (11th Cir. 2011)), and is generally limited to the record that was before the state court that adjudicated the claim on the merits. *See Cullen v. Pinholster*, 563 U.S. 170, 182 (2011).

The federal habeas court is first tasked with identifying the last state court decision, if any, that adjudicated the claim on the merits. *See Marshall v. Sec'y, Fla. Dep't of Corr.*, 828 F.3d 1277, 1285 (11th Cir. 2016). The state court is not required to issue an opinion explaining its rationale, because even the summary rejection of

a claim, without explanation, qualifies as an adjudication on the merits which warrants deference. *See Harrington v. Richter*, 562 U.S. 86, 100 (2011); *Ferguson v. Culliver*, 527 F.3d 1144, 1146 (11th Cir. 2008). *See also Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018); *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2558 (2018).

Where the claim was "adjudicated on the merits" in the state forum, § 2254(d) prohibits relitigation of the claim unless the state court's decision was (1) "**contrary to**, or involved **an unreasonable application of**, clearly established Federal law,[2] as determined by the Supreme Court of the United States;" or, (2) "based on an **unreasonable determination** of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d); *Harrington*, 562 U.S. at 97-98. *See also Williams v. Taylor*, 529 U.S. 362, 413 (2000). When relying on § 2254(d)(2), a federal court can grant relief if the state court rendered an **erroneous factual determination**. *Tharpe v. Warden*, 834 F.3d 1323, 1337 (11th Cir. 2016).

Because the "AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court," *Burt v. Titlow*, 571 U.S. 12, 20 (2013), federal courts may "grant habeas relief only when a state court blundered in a manner so 'well understood and comprehended in existing law' and

[2]"Clearly established Federal law" consists of the governing legal principles, rather than the dicta, set forth in the decisions of the Supreme Court at the time the state court issues its decision. *White v. Woodall*, 572 U.S. 415, 419 (2014); *Carey v. Musladin*, 549 U.S. 70, 74 (2006) (citing *Williams v. Taylor*, 529 U.S. 362, 412 (2000)).

'was so lacking in justification' that 'there is no possibility fairminded jurists could disagree.'" *Tharpe*, 834 F.3d at 1338 (11th Cir. 2016) (quoting *Harrington*, 562 U.S. at 102). This standard is intentionally difficult to meet. *Harrington*, 562 U.S. at 102.

IV. Discussion

Petitioner argues that the trial court erred in admitting unreliable testimony from a crucial witness in violation of the confrontation clause. [ECF No. 1 at 5-7].

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. CONST. amend. VI. Under federal law, the admission of a hearsay statement made by a declarant who does not testify at trial violates the Sixth Amendment if (1) the statement is testimonial, (2) the declarant is unavailable, and (3) the defendant lacked a prior opportunity for cross-examination of the declarant. *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

The state court admitted the testimony pursuant to Fla. Stat. § 90.804 which provides a hearsay exception where the declarant is unavailable as a witness and has provided testimony at a prior trial:

> Testimony given as a witness at another hearing of the same or a different proceeding . . . if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Fla. Stat. § 90.804(2)(a). *See also Happ v. Moore*, 784 So. 2d 1091, 1101 (Fla. 2001) ("At the second trial, Miller's entire trial testimony, including cross-examination,

was read to the jury" and "[t]herefore . . . there does not appear to be a patent confrontation clause violation and the trial court did not abuse its discretion in allowing Miller's former testimony to be read to the jury")

Here, Mr. Brook's testimony from the first trial was clearly testimonial. Furthermore, the record reveals that Mr. Brook was unavailable to testify at the second trial. The state's motion to admit Mr. Brook's prior testimony included a detailed description of the futile efforts of the state to track down the witness. *See* [ECF No. 13-3 at 1-2]. Petitioner had an opportunity to cross examine Mr. Brook at the first trial. [*Id.*]. As a result, the introduction of the testimony did not violate Petitioner's confrontation clause rights or the Supreme Court's holding *Crawford* or applicable Florida law.

In light of the foregoing, the state courts' rejection of Petitioner's confrontation clause argument is not contrary to or an unreasonable application of federal constitutional principles. As such, it should not be disturbed here. *See Williams*, 529 U.S. at 413.

VI. Cautionary Instruction Re *Clisby* Rule

Finally, this Court has considered all of Petitioner's claims for relief, and arguments in support. *See Dupree v. Warden*, 715 F.3d 1295, 1298 (11th Cir. 2013) (citing *Clisby v. Jones*, 960 F.2d 925 (11th Cir. 1992)). For all of his claims, Petitioner has failed to demonstrate how the state courts' denial of the claims, to the

extent they were considered on the merits in the state forum, were contrary to, or the product of an unreasonable application of, clearly established federal law. To the extent they were not considered in the state forum, as discussed in this Report, none of the claims individually, nor the claims cumulatively, warrant relief. Thus, to the extent a precise argument, subsumed within any of the foregoing grounds for relief, was not specifically addressed here or in the state forum, all arguments and claims were considered and found to be devoid of merit, even if not discussed in detail here.

VII. Evidentiary Hearing

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

VIII. Certificate of Appealability

A prisoner seeking to appeal a district court's final order denying his or her

petition for writ of habeas corpus has no absolute entitlement to appeal but must obtain a certificate of appealability ("COA"). *See* 28 U.S.C. § 2253(c)(1); *Harbison v. Bell*, 556 U.S. 180, 183 (2009). This Court should issue a certificate of appealability only if the petitioner makes "a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2). Where a district court has rejected a petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Upon consideration of the record, this court should deny a certificate of appealability. Notwithstanding, if petitioner does not agree, Petitioner may bring this argument to the attention of the district judge in objections.

IX. Conclusion

Based upon the foregoing, it is recommended that:

1. the federal habeas petition be DENIED;
2. a certificate of appealability be DENIED; and,
3. the case CLOSED.

Objections to this report may be filed with the District Court Judge within fourteen days of receipt of a copy of the report. Failure to file timely objections shall bar petitioner from a *de novo* determination by the District Court Judge of an issue covered in this report and shall bar the parties from attacking on appeal factual

findings accepted or adopted by the District Court Judge, except upon grounds of plain error or manifest injustice. *See* 28 U.S.C. § 636(b)(1); *RTC v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir. 1993).

SIGNED this 1st day of July, 2020.

UNITED STATES MAGISTRATE JUDGE

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