No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JEROD RODRIGUEZ,
Petitioner,

v.

RICKY D. DIXON,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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COUNSEL FOR THE PETITIONER

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-10993-F

JEROD RODRIGUEZ,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

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

ORDER:

Jerod Rodriguez'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).

Britt C. Grant
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 17-14355-CV-MARTINEZ/MAYNARD

JEROD RODRIGUEZ,

Petitioner,

v.

SECRETARY OF THE FLORIDA
DEPARTMENT OF CORRECTIONS,

Respondent.
_____/

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

THE MATTER was referred to the Honorable Shaniek M. Maynard, United States Magistrate Judge, for a Report and Recommendation on the Petition for Writ of Habeas Corpus filed by Jerod Rodriguez pursuant to 28 U.S.C. § 2254 (DE 4). Magistrate Judge Maynard filed a Report and Recommendation ("R&R") concluding that Petitioner's claims are meritless under the deferential standards of AEDPA and recommending that the Petition be denied. (DE 17). Petitioner filed objections (DE 21). However, the objections offer no additional argument and do not address the Magistrate's conclusions concerning Petitioner's inability to overcome the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984) given his highly incriminating recorded conversations. The Court has reviewed the R&R, objections, and the record in this case *de novo*. Accordingly, it is hereby

ORDERED AND ADJUDGED that United States Magistrate Judge Maynard's Report and Recommendation (DE 17) is **AFFIRMED** and **ADOPTED**. The Petition is **DENIED**. No certificate of appealability shall issue. The Clerk is directed to mark this case **CLOSED**.

DONE AND ORDERED in Chambers at Miami, Florida, this 27th day of August, 2020.

JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-14355-CIV-MARTINEZ/MAYNARD

JEROD RODRIGUEZ,

Petitioner,

v.

SECRETARY OF THE FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.
_____/

REPORT AND RECOMMENDATION ON PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY (DE 1)

THIS CAUSE comes before this Court upon an Order of Reference (DE 4) and the above Petition. The record before this Court consists of the Petition and Memorandum (DE 1); the Respondent's Response (DE 8), Appendix (DE 9), and Supplement (DE 16-1); and the Reply (DE 14). This Court recommends denial of habeas relief for reasons set forth below:

BACKGROUND

The charges against Petitioner stem from allegations that in May of 2003 he burglarized the home of Mr. Larry Hopkins ("Hopkins") in Port Saint Lucie, Florida while armed and wearing a mask, and held Hopkins and his son, Christopher, at gunpoint while he robbed Hopkins of a few hundred dollars and a Rolex watch (DE 16-1 at 318-325, 328, 382). Count 1 of the Complaint alleged that he committed robbery with a firearm while wearing a mask (DE 9-1 at 7). Count 2 charged that he committed burglary of a dwelling with an assault while armed and wearing a mask. *Id.*

A. *The Trial*

On December 15, 2004, Judge Burton C. Conner called the criminal case for trial (DE 16-1 at 1, 285-824). The government called eight witnesses: 1) Master Sheriff's Deputy Scott DeMichael (*Id.* at 306); 2) victim Larry Hopkins (*Id.* at 318); 3) victim Christopher Hopkins, sixteen-years old at time of incident and son of Larry Hopkins (*Id.* at 449); 4) Master Sheriff's Deputy James Mullins (*Id.* at 475); 5) Ms. Lacey Coker, eight- to nine- year girlfriend of Petitioner's childhood friend, Johnny Rodriguez (*Id.* at 480); 6) Johnny Rodriguez, Petitioner's friend since they were both ten-years old (*Id.* at 489); 7) Detective Mark Colangelo with the St. Lucie County Sheriff's Office (*Id.* at 549); and 8) Detective Neil Spector with the St. Lucie County Sheriff's Office (*Id.* at 595).

Deputy Scott DeMichael ("DeMichael") responded to Hopkins' 911 call reporting a robbery in the early morning hours of May 31, 2003. *Id.* at 307. Upon arrival at the Hopkins' home, he saw Hopkins and his son, Christopher, sitting in a truck in their driveway. *Id.* at 308. DeMichael noted that they were scared, covered with pepper spray, and that Hopkins had electrical wire wrapped around one of his wrists. *Id.* DeMichael testified that the case was turned over to Detective Mark Colangelo after the preliminary investigation. *Id.* at 309.

Hopkins testified that Petitioner and two others, all wearing masks, broke into his home, held him and his son, Christopher, at gunpoint, sprayed them with pepper spray, robbed him of money and a Rolex watch, and tied him and his son up with speaker wire before leaving. *Id.* at 318-34. Hopkins said that, when Petitioner asked him "where's the money" through gritted teeth, he recognized Petitioner by voice. *Id.* at 322. He did not confront Petitioner because he feared for his life. *Id.* at 323. Hopkins also authenticated the audio tape of the 911 call he made immediately following the burglary, which was published to the jury. *Id.* at 332-33. During that call, Hopkins

reported to the 911 dispatcher that his Rolex watch and some money was taken, and he said he "[had] an idea who it [was]." *Id.* at 335-36. Hopkins gave the 911 dispatcher a phone number telling them to "[c]all this girl, it's her boyfriend that comes down from Orlando." Right after the burglary, Hopkins reported to law enforcement that he was receiving phone calls from the Petitioner, and law enforcement arranged for Hopkins to tape the calls with the goal of getting Petitioner to return Hopkins' Rolex watch to him. *Id.* at 341-71. During these calls, Petitioner denied taking Hopkins' watch multiple times. *Id.* at 350-51, 361. At one point, Petitioner declared, "I have no watch at all." *Id.* at 363. Two other times, in response to Hopkins' repeated requests to get his watch back, Petitioner first said, "I cannot give you nothing I do not have," *Id.* at 366, and then he said, "I don't have nothing." *Id.* at 367. Moreover, Petitioner told Hopkins on one of the calls that he was at Johnny Rodriguez's house at the time of the burglary. *Id.* at 354-55.

Sixteen year old Christopher testified that he was in the living room watching television when three guys wearing masks came into the room through the kitchen. *Id.* at 449-63. Christopher reported that one of the men pointed a gun at him while another sprayed him with mace. *Id.* at 452-55. Although his eyes were burning and he could not see, Christopher recognized Petitioner's voice immediately when he heard Petitioner ask his father "where's the money." *Id.* at 457, 460. He also recognized Petitioner's voice when Petitioner communicated with the other perpetrators. *Id.* at 460-61. The intruders guided Christopher to his father's bedroom where they tied him up and laid him on the floor. *Id.* at 458-59. After the burglars left them, Christopher's father got free of his restraints, untied Christopher, and made the 911 call. *Id.* at 461-62.

Ms. Lacey Coker testified that Petitioner was at her residence on May 30, 2003—the night before the robbery—from around 7:30 p.m. until between 9:30 p.m. and 11:30 p.m. *Id.* at 480-83. The next morning she overheard a phone call Petitioner made to her boyfriend, Johnny Rodriguez

(no relation), at around 8:30 a.m. asking that she and Johnny tell law enforcement that Petitioner was with them later than he actually was with them. *Id.* at 484-85.

Mr. Johnny Rodriguez ("Johnny"), a Saint Lucie County resident, confirmed the testimony of his girlfriend, Lacey Coker, stating that Petitioner, Petitioner's little brother, and another friend were at their residence on the evening of May 30, 2003. *Id.* at 489-92. Johnny testified that all three left around 10 p.m. to 10:30 p.m., and Petitioner was not with him at 12:30 p.m. as Petitioner wanted him to say. *Id.* at 492, 540. Johnny also confirmed that Petitioner called him the next morning around 8:30 a.m. *Id.* at 492. During that call, Petitioner told Johnny that he needed an alibi for the night before because "he was going to be blamed for something." *Id.* Petitioner asked Johnny to say that he was at Johnny's home all night. *Id.* Petitioner also called Johnny from jail the first day of his arrest, and these calls were recorded. *Id.* at 496. An audio tape of one of these calls was played for the jury:

JEROD RODRIGUEZ: And I left your house about 9:00, went to Chris – I went to my girlfriend's house (indiscernible).

JOHN RODRIGUEZ: Yeah.

JEROD RODRIGUEZ: And then I left my girlfriend's house—I got back at your house about 12:15, remember I got to your house at 12:15?

JOHN RODRIGUEZ: Yeah, and you left my house 1:15 – 1:30.

JEROD RODRIGUEZ: Right, exactly. Right, and Lacey knows that, too, right?

JOHN RODRIGUEZ: Yeah.

Id. at 498. Johnny also facilitated a number of three-way calls so that Petitioner could talk to others. *Id.* at 499, 541. On one of those calls, Petitioner directed his father to dig up a plastic bag in their backyard, and to "clean the money off, [because] it probably has a little bit of dirt on it . .

. [but] don't touch it." *Id.* at 514-22. At Petitioner's instruction, Johnny called Petitioner's parents back to explain that they needed to take the watch that was in the plastic bag to victim Hopkins. *Id.* at 536, 539. Petitioner wanted the watch returned because he believed Hopkins would not press charges against him if he returned the watch. *Id.* at 534-36.

Detective Mark Colangelo ("Colangelo") testified that the incident at the Hopkins' home happened at 12:40 a.m. on May 31, 2003, and he arrived on the scene about 1:30 a.m. *Id.* at 550-51. Colangelo further testified that Hopkins immediately identified Petitioner as one of the intruders. As part of his investigation that night, Colangelo called Petitioner's girlfriend, Christy Ferguson, in Port Saint Lucie and called a residential number in Orlando trying to locate Petitioner with no success. *Id.* at 551-52. Colangelo later provided Hopkins with a tape recorder to record phone calls from Petitioner. *Id.* at 553-54. Part of the plan was to get Petitioner to return the watch to Hopkins. *Id.* at 445.

Colangelo additionally testified that he interviewed Petitioner on June 9, 2003. Post *Miranda*, Petitioner said that on the night of the incident he left the home of his girlfriend, Christy, before midnight and drove to Orlando. *Id.* at 554-56. Petitioner said he had problems with the truck he was driving that night and had to drive really slowly to get back to Orlando, which is why the drive took him over four hours to complete and why he did not call victim Hopkins back until 4:00 a.m. that next morning. *Id.* at 555-56. The next day, however, Petitioner changed his story. Petitioner returned to the Sheriff's Office on June 10, 2003 and spoke to law enforcement. *Id.* at 500, 556-57. Petitioner's second story was that he was at Johnny and Lacey's house early in the evening, went to Christy's house for a while and then returned to Johnny's house where he stayed until 2:00 a.m. *Id.* at 557-58. Petitioner told Colangelo that Johnny would provide him with an alibi. *Id.* at 558. Petitioner was then arrested. *Id.* at 559.

According to Colangelo, victim Hopkins received a phone call from Christy on June 10, 2003 (the same day Petitioner was arrested). Hopkins received his watch back that evening. *Id.* at 560-61.

After the government rested (*Id.* at 612), the Defense called three witnesses: 1) Macario Rodriguez, Petitioner's father (*Id.* at 616); 2) Detective Colangelo, who provided expert testimony about the effects of pepper spray (*Id.* at 650-58), and 3) Timothy Hernandez, a four-time convicted felon and several year friend of Petitioner (*Id.* at 671-73).

Petitioner's father testified that he found Hopkins' watch in a plastic bag that he dug up in his backyard per Petitioner's "in code" instructions, that Christy called Hopkins to arrange the return of the watch, and that he drove down from Orlando to return the watch to Hopkins. *Id.* at 616-18; 632-33. He first saw the watch in Petitioner's room a couple days after a birthday party on May 9, 2003. *Id*. at 646-47. He also testified that the truck his son drove to Orlando the night of the incident had catalytic converter issues causing it not to drive over 20 miles per hour. *Id.* at 621-22.

Timothy Hernandez ("Hernandez") testified that he attended a party on or about May 9, 2003 that was also attended by Petitioner and victim Hopkins. *Id.* at 673-674. At the gathering, Hernandez saw Petitioner wearing a Rolex watch. According to Hernadez, Petitioner received the watch from Hopkins after they went into the bathroom together. *Id.* at 673-77. The implication was that Hopkins gave Petitioner the watch at that event as part of a drug deal. *Id.*

The jury found Petitioner guilty of both counts of armed robbery and burglary. *Id.* at 819-20. As a repeat offender, Petitioner was sentenced to life in prison on each count—to be served concurrently. *Id.* at 853-855.

B. *Direct Appeal*

Assistant Public Defender Joseph R. Chloupek represented the Petitioner on the direct appeal that was filed on April 13, 2005 (DE 9-1 at 47-63). On appeal, Petitioner complained that the trial court did not conduct an adequate inquiry into his motion to discharge counsel prior to sentencing. *Id.* at 59. Petitioner contended that trial counsel was ineffective and/or incompetent for failure to provide discovery materials to him and for failure to keep him properly informed regarding the status of his case and the evidence against him. *Id.* Because the trial court did not sufficiently inquire and address this charge, Petitioner argued that his sentences were improper. *Id.* at 58. On December 7, 2005, Florida's Fourth District Court of Appeal ("Fourth DCA") *per curiam* affirmed Petitioner's convictions and sentences without a written opinion[1] (DE 9-1 at 84). *Rodriquez* [*sic*] *v. State*, 916 So. 2d 807 (Fla.4th DCA 2005). The Mandate was issued on December 23, 2005 (DE 9-1 at 86).

C. *3.850 Motions*

On March 6, 2007, Petitioner timely filed a Motion for Postconviction Relief pursuant to Florida Rule of Criminal Procedure 3.850[2] raising ten ineffective assistance of trial counsel claims (DE 9-1 at 88-100). Also, on March 6, 2007, Petitioner filed a Motion for Leave to Amend Defendant's Postconviction Motion because counsel claimed to be in the process of investigating the case and still in the process of obtaining and reviewing public records. *Id.* at 102. The court

[1] "Under Florida law, the Florida Supreme Court lacks jurisdiction to hear an appeal from a per curiam affirmance of a conviction by a lower state appellate court." *Williams v. Sec'y, Fla. Dep't of Corr.*, 674 F. App'x 975, 976 (11th Cir. 2017) (citing *Jenkins v. State*, 385 So.2d 1356, 1359 (Fla. 1980)).

[2] Fla. R. Crim. P. 3.850, entitled Motion to Vacate, Set Aside, or Correct Sentence, provides a vehicle for collateral review of a criminal conviction. *Duncan v. Walker*, 533 U.S. 167, 177 (2001). Florida generally requires defendants to raise ineffective assistance of counsel claims in these postconviction proceedings rather than on direct appeal. *Reynolds v. State*, 99 So.3d 459, 474 (Fla. 2012) ("claims of ineffective assistance of counsel generally are not cognizable on direct appeal and are properly raised in postconviction proceedings").

approved Petitioner's request for a 90-day extension on March 22, 2007 (*Id.* at 106) and a further 90-day extension on June 12, 2007. *Id.* at 113. On September 24, 2007, after another extension request, the court dismissed the original 3.850 motion "with leave to timely file a comprehensive amendment." *Id.* at 119. On December 13, 2007, Petitioner filed an Amended Motion for Postconviction Relief raising twelve ineffective assistance of trial counsel claims, one claim that his sentence was improperly determined and one claim for cumulative error. *Id.* at 16-144. Petitioner was represented by current counsel, Attorney Michael Ufferman. *Id.* at 144. On March 26, 2014, the postconviction court ordered the government to respond. *Id.* at 146-47. Following the government's response, the postconviction court dismissed in part Petitioner's amended 3.850 motion with leave to amend on March 5, 2015. *Id.* at 188-90. Petitioner filed another amended 3.850 motion on May 15, 2015. *Id.* at 193-203. On May 27, 2016, the Honorable Steven J. Levin dismissed in part, denied in part, and granted an evidentiary hearing in part on Petitioner's second amended 3.850 motion.[3] *Id.* at 231-36. The May 27, 2016 order by Judge Levin set a status hearing for August 16, 2016 presumably to establish a date for an evidentiary hearing. *Id.* at 235. The Certificate of Service included in Judge Levin's May 27, 2016 Order indicates that copies were sent to the address of Petitioner's counsel, Michael Ufferman. *Id.* at 236. Petitioner's counsel, however, claims he was not served with notice of the August 16, 2016 status hearing and therefore was not in attendance (DE 1 at 6-7). The postconviction court acknowledged Petitioner's immediate request to reschedule the August 16, 2016 hearing but declined to reschedule based upon its reconsideration of the pleadings. *Id.*

[3] Twelve of Petitioner's fourteen claims that were addressed in this order are the subject of the instant petition (DE 1 at 4; DE 9-1 at 235).

D. *3.850 Ruling and Appeal*

On September 1, 2016, Judge Levin denied Petitioner's 3.850 motion on its merits (DE 9-1 at 238-39). The postconviction court explained that, after reconsidering its findings, it would deny all of Petitioner's outstanding claims based upon the two government responses. *Id.* at 239. On April 11, 2017, Judge Levin denied Petitioner's Motion for Rehearing stating that Petitioner "provide[ed] nothing that [the court] overlooked or misapprehended, or that would cause [it] to change its findings." *Id*. at 246. On July 27, 2017, the Fourth DCA *per curiam* affirmed denial of Petitioner's request for postconviction relief, *Id.* at 309 ("PCA opinion"), and issued a Mandate on October 13, 2017. *See* DE 9-1 at 338; *Rodriguez v. State*, 228 So. 3d 572 (Fla. 4th DCA 2017).

E. *Federal Habeas Petition*

Petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 on October 16, 2017.

TIMELINESS AND EXHAUSTION

Under Title 28 of United States Code Section 2244, a state prisoner's application for a writ of habeas corpus is subject to a one-year period of limitation that runs from the "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). "The time for seeking direct review includes the 90-day window in which the petitioner could have petitioned the Supreme Court of the United States for a writ of certiorari." *Hall v. Sec'y, Dep't of Corr.*, 921 F.3d 983, 986 (11th Cir. 2019) (citation omitted). However, "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. §

2244(d)(2). In other words, the one-year limitations period for filing a § 2254 petition is tolled during the pendency of a properly filed application for state postconviction relief. *Hall v. Sec'y, Dep't of Corr.*, 921 F.3d 983, 986 (11th Cir. 2019). Here, the Fourth DCA *per curiam* affirmed Petitioner's convictions and sentences on December 7, 2005. *Rodriquez* [*sic*] *v. State*, 916 So. 2d 807 (Fla.4th DCA 2005). Petitioner did not petition the Supreme Court of the United States for a writ of certiorari, and his convictions became final for the federal one-year limitation purposes on March 7, 2006. Respondent is correct that Petitioner had until March 7, 2007 to file his federal habeas petition unless tolled. DE 8 at 9; *Hall*, 921 F.3d at 985 (calculating the federal one-year limitation period as exactly one year from the date convictions and sentences become final). Thus, Petitioner's 3.850 motion for postconviction relief that was filed on March 6, 2007 tolled the federal one-year limitation period one day prior to its deadline.

Respondent makes two arguments against the timeliness of Petitioner's federal habeas petition. First, Respondent claims that Petitioner's original 3.850 motion was not properly filed because Petitioner was abusing state procedure by making a shell motion and then filing multiple extension requests for the filing of an amended 3.850 motion. *Id*. Properly filed, however, means that a filing has been made in compliance with governing filing requirements such as "the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee." *Thompson v. Sec'y, Dep't of Corr.*, 595 F.3d 1233, 1236 (11th Cir. 2010) (citation and quotation omitted). Here, there is no indication that Petitioner's original 3.850 motion was deficient in any of these respects. Further, there is nothing in the record demonstrating that Petitioner was abusing state procedure by requesting extensions. Petitioner's counsel explains that he was still in the process of obtaining and reviewing public records and that Petitioner was still sending him correspondence containing possible additional rule 3.850 motion claims. DE 14

at 3. Therefore, Petitioner's original 3.850 motion should be deemed "properly filed" on March 6, 2007.

Second, Respondent contends that the postconviction court's September 24, 2007 dismissal without prejudice caused the clock to run again on the federal habeas one-year limitation period, and that period expired on September 26, 2007 making Petitioner's current petition untimely. DE 8 at 10. This Court disagrees. "[F]or the purposes of tolling under 28 U.S.C. § 2244(d)(2), a petitioner's Rule 3.850 motion is 'pending' until it is denied with prejudice." *Hall v. Sec'y, Dep't of Corr.*, 921 F.3d 983, 990 (11th Cir. 2019). Furthermore, under the "relation back doctrine," an amended 3.850 motion made pursuant to a dismissal with leave to amend relates back to the filing date of the original 3.850 motion. *Bryant v. State*, 901 So. 2d 810, 818 (Fla. 2005) (holding that an amendment "relates back" to the date of an initial motion where that motion is stricken with leave to amend). Here, Petitioner's 3.850 motion was dismissed without prejudice on September 24, 2007 and thus was still pending (DE 9-1 at 119). Pursuant to the court's order, Petitioner then filed a comprehensive amended 3.850 motion on December 13, 2007. *Id.* at 126. Therefore, Petitioner's comprehensive amended 3.850 motion relates back to the original 3.850 motion's filing date of March 6, 2007 with one-day remaining on the federal habeas clock.

Petitioner correctly argues that the entire period between the initial 3.850 motion filing date of March 6, 2007 and when the state appellate court issued its mandate on October 13, 2017 was tolled (DE 14 at 5-6). *See San Martin v. McNeil*, 633 F.3d 1257, 1266 (11th Cir. 2011) (citation omitted). Because October 13, 2017 was a Friday, the next business day was Monday, October 16, 2017. Consequently, the Court concludes that instant petition for writ of habeas corpus filed on October 16, 2017 is timely.

The exhaustion doctrine precludes federal habeas relief before a state prisoner fairly presents his constitutional claims in state court and exhausts remedies available in state court. *O'Sullivan v. Boerckel*, 526 U.S. 838, 842, 844 (1999); Title 28 U.S.C. § 2254(b). Here, Respondent does not challenge that Petitioner has exhausted his claims. Accordingly, this Court finds that Petitioner's claims are exhausted and will be reviewed on the merits.

STANDARDS OF REVIEW

A. *Standard Under the Antiterrorism and Effective Death Penalty Act*

Petitioner's federal habeas petition is governed by 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Title 28 U.S.C. § 2254(a) permits a federal court to issue "a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court" if that custody is "in violation of the Constitution or laws or treaties of the United States." The issuance of a writ is limited, however, by the purpose of AEDPA, which 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." *Greene v. Fisher*, 565 U.S. 34, 38 (2011) (internal quotations and citations omitted). The AEDPA establishes a formidable barrier to state prisoners seeking federal habeas relief because it is based on the principle that "state courts are adequate forums for the vindication of federal rights." *See Downs v. Sec'y, Fla. Dep't of Corrs.*, 738 F.3d 240, 256 (2013).

Section 2254 applies at the end of a greater course of judicial review. Section 2254(d) assumes that the Petitioner already exhausted his claims using the state's postconviction avenues of relief to obtain an adjudication on their merits. The Eleventh Circuit directs the focus of inquiry to the last merits adjudication by the state court. As applied to this case, that is the unwritten PCA opinion that Florida's Fourth DCA rendered to affirm the denial of Petitioner's rule 3.850

postconviction motion (DE 9-1 at 309). Even though the PCA adjudication is unwritten and thus gives no explanatory basis, it still counts as a merits determination, and it still is entitled to deference. *See Reed v. Sec'y, Fla. Dep't of Corrs.*, 767 F.3d 1252, 1261 (11th Cir. 2014).

While the deference remains, the fact that the Fourth DCA offered no reasons for the affirmance does affect the scope of review. In this situation, the reviewing federal court must "look through" to the last adjudication that does provide a relevant rationale. *See Wilson v. Sellers*, 138 S.Ct. 1188, 1192 (2018). As applied here, that means this Court looks through to Circuit Court Judge Levin's Order Denying Second Amended Rule 3.850 Motion that was filed on September 2, 2016, which based its denial on responses provided by the government and an earlier order relative to the denial of two grounds (DE 9-1 at 238-40). This Court assumes that the appellate court adopted Judge Levin's reasoning and rationale. *Wilson*, 138 S.Ct. at 1192.

The next step in the analysis is to identify the legal basis that entitles the Petitioner to habeas corpus relief. That is, to identify the constitutional or federal law that was violated. Section 2254(d)(1) narrows that inquiry down to "clearly established Federal law, as determined by the Supreme Court of the United States." The phrase "clearly established Federal law" refers to the holdings, as opposed to the dicta, of the Supreme Court's opinions in existence when the state court decided the postconviction claims. *See Downs*, 738 F.3d at 256-57 (adding that it includes a binding circuit court decision that says whether the particular point in issue is clearly established Supreme Court precedent). For a claim based on the ineffective assistance of counsel, for example, the governing standard comes from the Supreme Court's seminal *Strickland v. Washington*, 466 U.S. 668 (1984) opinion.

Section 2254(d)(1) asks whether the state court's denial was "contrary to" that clearly established Federal law. The phrase "contrary to" means that the state court decision contradicts

the Supreme Court on a settled question of law or holds differently than the Supreme Court on a set of materially indistinguishable facts. *See Downs*, 738 F.3d at 257. A state court's decision can be contrary to the governing federal legal standard either in its result (the denial of relief) or in its reasoning.

Section 2254(d)(1) also asks the reviewing federal court to determine whether the state court's denial "involved an unreasonable application of" that clearly established federal standard. An unreasonable application of federal law is not the same as a merely incorrect application of federal law. *See Downs*, 738 F.3d at 257. It tests whether the state court's application of the legal principle was objectively unreasonable in light of the record before the state court at the time. An objectively unreasonable application of federal law occurs when the state court identifies the correct legal rule but unreasonably applies, extends, or declines to extend it to the facts of the case. *See Putnam v. Head*, 268 F.3d 1223, 1241 (11th Cir. 2001).

Section 2254(d)(1) tests the legal correctness of the state court's decision, but it does so through a highly deferential lens. The degree of error must be substantial and beyond dispute. The state court's decision survives § 2254(d)(1) review so long as some fair-minded jurists could agree with the state court, even if others might disagree. *See Downs*, 738 F.3d at 257.

While subsection (1) of § 2254(d) tests the legal correctness of the state postconviction court's denial of relief against controlling federal case law, subsection (2) of § 2254(d) sets forth the standard by which a federal court reviews the state postconviction court's findings of fact. Section 2254(d)(2) asks whether the state postconviction court based its denial "on an unreasonable determination of the facts" based on the evidence before it at the time.

As with the § 2254(d)(1) legal analysis, a reviewing federal court is to consider the state court's findings of fact through a deferential lens. The state court's finding of fact is not

unreasonable just because the reviewing federal court would have reached a different finding of fact on its own. So long as reasonable minds might disagree about the finding of fact, the state court's finding stands. *See Downs*, 738 F.3d at 257. Indeed, the state court's fact determinations are presumed to be correct. Section 2254(e)(1) places the burden on the Petitioner to rebut that "presumption of correctness by clear and convincing evidence." Even if the state postconviction court did make a fact error, its decision still should be affirmed if there is some alternative basis sufficient to support it. *See Pineda v. Warden*, 802 F.3d 1198 (11th Cir. 2015).

Obviously then § 2254(d) creates a standard of review that is highly deferential to the state court's denial of the claim. The reviewing federal court must give the state postconviction court the benefit of the doubt and construe its reasoning towards affirmance. *See Lynch v. Sec'y, Fla. Dep't of Corrs.*, 776 F.3d 1209 (11th Cir. 2015). To warrant relief under § 2254(d), 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 fair-minded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). This is the degree of error the Petitioner must show before this Court may override the state postconviction court's decision and overturn the finality of the conviction and sentence.

B. *Ineffective Assistance of Counsel*

AEDPA substantial deference applies to all issues raised in the pending petition. Under *Strickland*, an additional layer of deference applies to Petitioner's claims of ineffective assistance of counsel. *Strickland*, 466 U.S. at 684-85. The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the assistance of counsel during criminal proceedings against them. *Id.* Defendants in state court prosecutions have such right under the Fourteenth Amendment. *Minton v. Sec'y, Dep't of Corrs.*, 271 F. App'x 916, 918 (11th Cir. 2008).

When assessing counsel's performance under *Strickland*, the Court employs a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690. "[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance." *Burt v. Titlow*, 571 U.S. 12, 18 (2013). To prevail on a claim of ineffective assistance of counsel, Petitioner must demonstrate: (1) that his counsel's performance was deficient, i.e., the performance fell below an objective standard of reasonableness; and (2) that he suffered prejudice as a result of that deficient performance. *Strickland*, 466 U.S. at 687-88.

To establish deficient performance, Petitioner must show that, in light of all the circumstances, counsel's performance was outside the wide range of professional competence. *Id.* at 690; *see Cummings v. Sec'y for Dep't of Corrs.*, 588 F.3d 1331, 1356 (11th Cir. 2009) ("To establish deficient performance, a defendant must show that his counsel's representation fell below an objective standard of reasonableness in light of prevailing professional norms at the time the representation took place."). A court's review of counsel's performance should focus on "not what is possible or what is prudent or appropriate but only [on] what is constitutionally compelled." *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000) (*en banc*), *cert. den'd*, 531 U.S. 1204 (2001). There are no absolute rules dictating what is reasonable performance because absolute rules would restrict the wide latitude counsel have in making tactical decisions. *Id.* at 1317. The test for ineffectiveness is not whether counsel could have done more; perfection is not required. Nor is the test whether the best criminal defense attorneys might have done more. *Id.* at 1316. Instead, to overcome the presumption that assistance was adequate, "a petitioner must 'establish that no competent counsel would have taken the action that his counsel did take.'" *Hittson*, 759 F.3d at 1263 (quoting *Chandler*, 218 F.3d 1305 at 1315).

Regarding the prejudice component, the Supreme Court has explained "[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." *Strickland*, 466 U.S. at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.* A court need not address both prongs of *Strickland* if the defendant makes an insufficient showing on one of the prongs. *Id.* at 697. Further, counsel is not ineffective for failing to raise non-meritorious issues. *Chandler v. Moore*, 240 F.3d 907, 917 (11th Cir. 2001). Counsel is also not required to present every non-frivolous argument. *Dell v. United States*, 710 F.3d 1267, 1282 (11th Cir. 2013).

Further, a federal habeas court does not apply *Strickland* de novo, "but rather, through the additional prism of [Section 2254(d)] deference." *Morris v. Sec'y, Dep't of Corr.*, 677 F.3d 1117, 1126 (11th Cir. 2012). "Thus, under this doubly deferential standard, the pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. And if, at a minimum, fairminded jurists could disagree about the correctness of the state court's decision, the state court's application of *Strickland* was not unreasonable and [Section 2254(d)] precludes the grant of habeas relief." *Id.* (internal citation omitted); *but see Evans v. Sec'y, Dep't of Corrs.*, 703 F.3d 1316, 1333-35 (11th Cir. 2013) (*en banc*) (Jordan, J., concurring) (explaining that double deference to a state court's adjudication of a *Strickland* claim applies only to *Strickland's* performance prong, not to the prejudice inquiry). "This 'double deference is doubly difficult for a petitioner to overcome, and it will be a rare case in which an ineffective assistance of counsel claim that was denied on the merits in state court is found to merit relief in a federal habeas proceeding.'" *Id.* (quoting *Evans v. Sec'y, DOC, FL*, 699 F.3d 1249, 1268 (11th Cir. 2012)).

DISCUSSION

Petitioner raises thirteen grounds for relief ("claims"). Twelve claims allege ineffective assistance of trial counsel and one claim alleges trial error. Petitioner's claims raise the following issues:

> **Claim 1:** Whether trial counsel was ineffective by not presenting expert testimony regarding the unreliability of the victims' voice identification of Petitioner (DE 1 at 11);
>
> **Claim 2:** Whether trial counsel was ineffective when he failed to move to suppress Petitioner's June 10, 2003 alibi statements to law enforcement that Petitioner allegedly made in violation of his *Miranda* rights (DE 1 at 16);
>
> **Claim 3:** Whether trial counsel was ineffective for failing to adequately inform Petitioner about his right to testify and prepare Petitioner to testify (DE 1 at 19);
>
> **Claim 4:** Whether trial counsel was ineffective for failing to call a witness to impeach victim Hopkins as to Hopkins' ability to identify Petitioner's voice (DE 1 at 22);
>
> **Claim 5:** Whether trial counsel was ineffective for failing to present three witnesses to impeach Hopkins' motives for testifying against Petitioner and to provide Petitioner with an alibi defense (DE 1 at 25);
>
> **Claim 6:** Whether trial counsel was ineffective for failing to impeach Christopher as to inconsistencies in his statements about his voice recognition of Petitioner during the burglary (DE 1 at 28);
>
> **Claim 7:** Whether trial counsel was ineffective for not ensuring that all of Petitioner's taped jail conversations were played for the jury to demonstrate that Hopkins was concerned that law enforcement would discover he was lying and that Hopkins was in love with Christy Ferguson (DE 1 at 30);
>
> **Claim 8:** Whether trial counsel was ineffective for not objecting when the prosecution violated Petitioner's right of confrontation by playing for the jury taped conversations where Hopkins told Petitioner that Christy believed Petitioner was guilty and where Petitioner's mother told him she did not want to talk to him anymore (DE 1 at 32; DE 16-1 at 351, 521, 781-82, 786);
>
> **Claim 9:** Whether trial counsel was ineffective by failing to ask for a curative instruction and/or failing to move for a mistrial when government witness Johnny

> Rodriguez informed the jury that Petitioner was on probation at the time of the burglary (DE 1 at 36);
>
> **Claim 10:** Whether trial counsel was ineffective for failing to sufficiently investigate whether a juror had improper contact with a government witness (DE 1 at 38);
>
> **Claim 11:** Whether trial counsel was ineffective for not moving for a mistrial when the government shifted the burden of proof by implying that Petitioner's brother, Paul Rodriguez, would have been a better witness to testify as to Hopkins giving Petitioner his Rolex watch at a gathering on or about May 9, 2003 (DE 1 at 40);
>
> **Claim 12:** Whether trial counsel's cumulative errors deprived Petitioner of a fair trial (DE 1 at 42);
>
> **Claim 13:** Whether the trial court erred by failing to adequately inquire into Petitioner's motion to discharge counsel prior to sentencing (DE 1 at 43).

After reviewing the pleadings, for the reasons stated herein, this Court recommends that Petitioners motion be denied because Petitioner is not entitled to relief on the merits.

This Court addresses each claim in turn. In claims 1-12, Petitioner challenges his conviction and sentence collaterally on the basis that his counsel was ineffective in defending him. Consequently, it is the *Strickland* opinion (and its subsequent interpretative case law) that sets forth and defines the actionable federal right at issue with respect to these claims.

A. *Claim 1*

Claim 1 alleges that trial counsel was ineffective for not proffering an expert witness to challenge the reliability of the victims' voice identifications of Petitioner. Their voice identifications is a material point because it links the Petitioner to the crime scene and to the burglary. (DE 1 at 11-12). Petitioner would have argued that the overall circumstances at the scene---"the use of a weapon, the short duration of the contact, multiple perpetrators, and because the identification was a cross-racial/cross-ethnic identification of the Hispanic [Petitioner] by Caucasian victims"---makes the victims' voice identifications unreliable. *Id.* The postconviction

court ultimately relied upon the government's arguments that 1) Petitioner did not demonstrate that the victims' identification would be called into question by such testimony from an unnamed expert, and 2) Petitioner failed to show prejudice because the jury heard both victims' testimony identifying Petitioner by voice and heard other evidence implicating Petitioner (DE 9-1 at 153, 238-39). Indeed, Hopkins testified on direct and on cross that he definitely knew it was Petitioner who robbed him, and he also implicated Petitioner on the 911 call he made immediately after the break-in to his home (DE 16-1 at 336-39, 430). Hopkins further testified on cross that he identified Petitioner by not only his voice but also by "[h]is size, his physique, his muscular build," and his "[v]ery round head." *Id.* at 430. Moreover, while Petitioner asserts that the voice identification was the primary tie between the Petitioner and the crimes, the prosecution identified Hopkins' Rolex watch as "a pretty incriminating piece of evidence." *Id.* at 633. During taped phone conversations heard by the jury, Petitioner first denied multiple times that he took or had Hopkins' Rolex watch and then later instructed his father in coded language on where to dig up the watch in his backyard so his father could return the watch to Hopkins. *Id.* at 341-71, 514-22, 534-36, and 539. Petitioner is merely speculating that an expert's testimony would have changed the jury's reliance on the victims' voice identification and other evidence implicating Petitioner. Therefore, as Petitioner cannot show that the outcome of the proceedings would have changed if counsel had hired an expert witness, this claim should be denied.

B. Claim 2

Claim 2 alleges that trial counsel was ineffective by not moving to suppress Petitioner's June 10, 2003 statements purportedly made involuntarily to law enforcement claiming that Johnny Rodriguez and Lacey Coker would provide him with an alibi (DE 1 at 16). The postconviction court agreed with the government that trial counsel's performance was not deficient under

Strickland because the record refuted Petitioner's claim that the statements were involuntary (DE 9-1 at 154, 238-39). Petitioner argues, however, that he is entitled to an opportunity to prove that the statements were made in violation of his *Miranda* rights (DE 1 at 17-19). Even if Petitioner could prove the statements were made to law enforcement involuntarily, the jury still would have learned about the attempted alibi because both Johnny Rodriguez and Johnny's girlfriend, Lacey Coker, testified that Petitioner had asked them to lie to give him an alibi (DE 16-1 at 484-85, 492, 537). Both Johnny and Lacey were questioned by law enforcement during the burglary's investigation and testified that they refused to provide Petitioner his requested alibi. *Id.* Petitioner also made a recorded phone call to Johnny from jail that was played for the jury where Petitioner confirmed with Johnny that Johnny and Lacey would provide him with an alibi. *Id.* at 496. Furthermore, in another recorded call to Hopkins that was played for the jury, Petitioner told Hopkins that he was at Johnny Rodriguez's house at the time of the burglary. *Id.* at 354-55. In light of the other evidence regarding this alibi, the jury could have reasonably concluded that Petitioner had, in fact, asked Johnny and Lacey to lie in order to provide him with an alibi. Moreover, suppression of the offending statements does not explain or negate the incriminating evidence against Petitioner relative to the Rolex watch. Petitioner denied having Hopkins' watch and then procured the return of the watch to Hopkins. *Id.* at 341-71, 514-22, 534-36, and 539. Petitioner cannot, therefore, show that the trial outcome would have differed if trial counsel had successfully suppressed the subject statements to law enforcement. Because Petitioner cannot establish prejudice under *Strickland*, this Court finds that Claim 2 provides no basis for relief.

C. Claim 3

Petitioner argues that trial counsel was ineffective in claim 3 for the failure to adequately communicate with him about his right to testify and for the failure to prepare him to testify (DE 1

at 19). The postconviction court adopted the government's argument that the record indicated that Petitioner acknowledged to the court his right to testify and informed the court that it was his decision not to testify (DE 9-1 at 155, 205, 238-39). During the trial court's colloquy, Petitioner confirmed that he had discussed with trial counsel the advantages and disadvantages of testifying (DE 16-1 at 668). Petitioner also stated that he understood it was his decision, and not his counsel's decision, as to whether or not he testified. *Id.* Petitioner fully acknowledged that he understood his right to testify and confirmed that it was his decision to not testify. *Id.* at 668-69. Given the record, Petitioner fails to demonstrate that his counsel's performance was defective. Nonetheless, Petitioner contends that his testimony would have changed the trial's outcome because he would have professed his innocence, explained that Hopkins gave him the watch in exchange for drugs, that he was forced with threat of arrest to come up with an alibi, and that Hopkins set him up because Hopkins was in love with Christy Ferguson (DE 1 at 20). As the government argued, however, Petitioner failed to acknowledge that he would have been impeached with three felony convictions for crimes of dishonesty, which would have been highly prejudicial given that his credibility was at issue (DE 16-1 at 155, 205). Petitioner also does not explain why he denied having Hopkins' watch if Hopkins had already given it to him as collateral for a drug deal. *Id.* at 341-71, 514-22, 534-36, and 539. Because Petitioner fails to demonstrate his trial counsel's deficient performance and fails to demonstrate prejudice, this Court finds claim 3 without merit.

D. Claim 4

Claim 4 alleges that trial counsel was ineffective by failing to impeach Hopkins with a witness who say that when Petitioner had called him once, Hopkins had mistaken Petitioner for someone else. That testimony thereby would call into question the ability of Hopkins to identify Petitioner by voice. (DE 1 at 22-25). Even assuming counsel's performance was deficient, however,

Petitioner fails to show prejudice given the record in this case. First, Hopkins testified that he identified Petitioner by means in addition to voice (DE 16-1 at 430). Second, Christopher also testified that he identified Petitioner by voice having had multiple opportunities to do so during the burglary. *Id.* at 460-61. Third, the jury heard Petitioner's recorded statements telling Hopkins he did not take nor have Hopkins' watch, and then the jury heard him give his father coded instructions to dig up the watch and return the watch to Hopkins. *Id.* at 341-71, 514-22, 534-36, and 539. Petitioner does not explain why he denied having the watch nor why he tried to mask his instructions regarding the return of it to Hopkins. Given this additional evidence implicating Petitioner, he does not show that the outcome of the trial would have differed given the impeachment of Hopkins as to his ability to recognize Petitioner's voice. Thus, this Court finds that claim 4 lacks merit.

E. Claim 5

Petitioner alleges in claim 5 trial counsel's ineffectiveness for failing to present three witnesses to impeach Hopkins and to provide Petitioner with an alibi defense (DE 1 at 25-28). Specifically, Petitioner contends that trial counsel should have called to the witness stand: 1) Christy Ferguson (his girlfriend) to testify that Hopkins had offered to help get the charges dropped if she slept with him, 2) Paul Rodriguez (his brother) to testify that Hopkins said "he would do whatever it takes to put [Petitioner] in prison," and 3) Lauren Casooth to testify that Petitioner was with her at the time of the burglary. *Id.* The postconviction court relied upon the government's argument that, *inter alia*, Petitioner failed to show prejudice from the omission of the purported testimony of the three witnesses (DE 9-1 at 156-57, 207, 238-39). Here, the record supports the government's position that Petitioner fails to show prejudice. Showing either that Hopkins had a motive for Petitioner to go to prison or that Petitioner had a female alibi witness whom he would not want his girlfriend,

Christy Ferguson, to know about does not explain why Petitioner denied that he had Hopkins' watch or why he later returned it in a manner that implicated him as guilty of the charges against him (DE 16-1 at 341-71, 514-22, 534-36, 539). Accordingly, this Court finds that Claim 5 provides no basis for relief.

F. Claim 6

Claim 6 alleges that trial counsel was ineffective because he did not impeach Christopher with inconsistencies in the statements he made before and during trial regarding what Petitioner said during the burglary when he recognized Petitioner's voice (DE 1 at 28-30). As Christopher testified at trial, the Petitioner had asked, "where's the money at?" *Id.* at 28. In comparison the investigating deputy wrote in his report that Christopher only heard "where's the". At that time Christopher did not report hearing the full sentence. *Id.* The postconviction court concluded that the government was correct that Petitioner established neither deficient performance nor prejudice with this claim (DE 9-1 at 157, 238-39). As stated previously, under *Strickland*, trial counsel's performance is not deficient for failing to present every non-frivolous argument. *Dell v. United States*, 710 F.3d at 1282. Here, Petitioner fails to show that counsel was incompetent by not challenging Christopher regarding the minor inconsistency. Therefore, Petitioner fails to demonstrate deficient performance. Additionally, Petitioner fails to show prejudice because Christopher testified at trial that he had multiple opportunities to hear Petitioner's voice to identify him during the burglary, and Hopkins testified that he identified Petitioner by voice and by other means (DE 16-1 at 430, 460-61). Based upon the record, the jury could reasonably credit the victims' identifications. Therefore, this Court concludes that claim 6 is meritless.

G. Claim 7

Petitioner alleges in claim 7 that trial counsel was ineffective because the jury did not hear all of the telephone conversations that the jail had taped. The full extent of those conversations would have shown Hopkins' concern about whether law enforcement would discover that he was lying and also would show Hopkins' love for Christy Ferguson (DE 1 at 30). Petitioner argues that in one of his phone conversations, he told Hopkins that the case actually concerned a drug deal and that Hopkins did not deny that characterization and sounded concerned. *Id.* at 31. Petitioner adds that on one of the calls, Hopkins told Petitioner to stay away from Christy Ferguson, which Petitioner claims shows that Hopkins was in love with her and had a motive for setting-up Petitioner to go to prison. *Id.* As the government argued to the postconviction court, Petitioner's trial counsel did explore Hopkins' desire for Christy Ferguson in the cross-examination of Detective Colangelo. The jury thereby heard that information. (DE 9-1 at 156-57, 208). Therefore, trial counsel does not appear incompetent for failing to ensure that the jury heard Hopkins tell Petitioner to stay away from Christy Ferguson. Furthermore, even if the un-played phone calls impeached Hopkins in the manner Petitioner suggests, Petitioner fails to show prejudice because the jury could have reasonably discredited Petitioner's defense theory that Hopkins' accused Petitioner falsely. For example, even if Hopkins had a motive for staging a burglary that implicated Petitioner, the record supports the fact that a burglary actually happened based upon the victims' 911 call and the testimony of the responding law enforcement officers. (DE 16-1 at 307-09, 332-36). Also, the record supports that both Hopkins and his son, Christopher, identified Petitioner as a burglar. *Id.* at 322, 335-36, 430, and 460-61. Moreover, impeachment of Hopkins does not overcome the evidence that the jury heard where Petitioner repeatedly denied having Hopkins' watch and then gave coded instructions to his father to dig up the watch and return it to Hopkins.

Id. at 341-71, 514-22, 534-36, and 539. Because Petitioner fails to show that impeaching Hopkins with the referenced taped conversations would have changed the trial outcome, this Court finds that claim 7 provides no basis for relief.

H. Claim 8

Claim 8 alleges ineffectiveness of trial counsel for failing to object to the proffer of taped conversations where (1) Hopkins said that Christy Ferguson had told him that she believed Petitioner to be guilty and where (2) Petitioner's mother said that she did not want to speak to him anymore (DE 1 at 32; DE 16-1 at 351, 521, 781-82, 786). The postconviction court relied upon the government's arguments that, among other things, Petitioner failed to show prejudice (DE 9-1 at 159-60, 208-09). Petitioner speculates that the trial court would have granted a mistrial if trial counsel had moved for one (DE 1 at 33). Such speculation does not, however, establish trial counsel's deficient performance under *Strickland*. Furthermore, even if the offending statements had been redacted, their absence would not overcome the other evidence before the jury such as Petitioner arranging the return of Hopkins' watch after denying he took it or had it (DE 16-1 at 341-71, 514-22, 534-36, 539). As the government argued, Petitioner does not demonstrate that, but for counsel's failure to object to the playing of these statements for the jury, there is a reasonable probability that the outcome of the proceeding would have been different. Thus, claim 8 is without merit.

I. Claim 9

For Claim 9, Petitioner alleges trial counsel ineffectiveness for not moving for a mistrial or for a curative instruction in response to Johnny Rodriguez' testimony that Petitioner was on probation at the time of the burglary (DE 1 at 36). The government correctly argued that Petitioner would not have been entitled to a mistrial because the witness's statements were reasonable responses to

questions asked by Petitioner's trial counsel (DE 9-1 at 160). *Terry v. State*, 668 So. 2d 954, 962–63 (Fla. 1996). When trial counsel cross-examined Johnny Rodriguez, trial counsel tried to get him to acknowledge how the Petitioner might have used him as an alibi witness (the alibi being that the Petitioner was out cheating on Christy Ferguson on the night of the burglary). That line of inquiry relied on his familiarity with the Petitioner. (DE 16-1 at 542). Johnny Rodriguez attempted to qualify how well he truly knew the Petitioner by saying, "[h]e's only been out for – I only started hanging out with him for a couple of months since he's been out last time – from the period – I've only seen him a couple of times." *Id.* Later in the cross-examination, trial counsel attempted to have Johnny Rodriguez quantify the amount of money buried in the backyard as more than two or three-hundred dollars. *Id.* at 545-46. In response to trial counsel's question about the amount of money needed to bond Petitioner out on a prior gun charge, Johnny answered that there was no bond. *Id.* at 546. Trial counsel then asked, "[a]nd at the time he was arrested, he was held on no bond, is that what you were saying?" *Id.* Johnny then responded, "[y]eah, I believe so, violation of probation." This Court agrees that the responses were reasonable in light of the questions asked. Therefore, Petitioner was not entitled to a mistrial on this basis. Moreover, a curative instruction, as the government argues, could have drawn more attention to these statements and caused more prejudice than simply moving on, as trial counsel did (DE 9-1 at 160). Finally, as this Court has previously noted, the jury heard the Petitioner on tape giving coded instructions to his father to dig up Hopkins' Rolex watch, which Petitioner had buried in his backyard, and to return it to Hopkins (DE 16-1 at 341-71, 514-22, 534-36, 539). Given the evidence in the record against the Petitioner, it is improbable that, but for a curative instruction regarding Johnny Rodriguez's statements about Petitioner's probationary status, the trial's outcome would have been different. Because Petitioner fails to demonstrate prejudice, this Court finds claim 9 should be denied as a basis for relief.

J. Claim 10

Petitioner alleges in Claim 10 that trial counsel was ineffective because he did not sufficiently investigate whether a juror had improper contact with a deputy law enforcement officer who the prosecution was calling as a witness (DE 1 at 38). The postconviction court denied this claim finding no reason to infer that the contact was improper. The contact was limited to the juror asking the deputy where she was supposed to go. (DE 9-1 at 189). The record supports the state postconviction court's conclusion that any impropriety from that contact is too speculative. The trial judge had reported the contact to counsel. During a recess, the trial judge informed counsel that a juror had reported asking the witness whether she was in the right courtroom (DE 16-1 at 383). Petitioner's trial counsel was satisfied that the juror had properly reported the exchange and that nothing more than a confirmation as to whether the juror was in the right place was discussed. *Id.* at 384. The court requested the prosecution to confirm with the deputy that nothing more was discussed. *Id.* at 385. On this record, there is nothing to indicate trial counsel's performance was deficient. Additionally, Petitioner fails to make any showing that the outcome of the trial would have been different if defense counsel had asked the court to further question the juror and the deputy. Accordingly, this Court finds claim 10 meritless.

K. Claim 11

Claim 11 alleges that trial counsel was ineffective for failing to move for a mistrial when the prosecution engaged in burden-shifting. The prosecution implied that Petitioner should have called his brother, Paul Rodriguez, to testify that Hopkins had given Petitioner his Rolex watch in early May of 2003 (DE 1 at 40). The implication arose from prosecution's cross-examination of defense witness Timothy Hernandez. Timothy Hernandez described a watch transaction that took place in a bathroom. Timothy Hernandez did not go into the bathroom, and thus he did not see first-hand

the watch transaction. However he identified Paul Rodriguez as someone who was present to see it take place first-hand. The implication was to fault the Petitioner for not calling that first-hand witness, Paul Rodriguez, to the stand. (DE 16-1 at 683-84). Trial counsel objected, and the Court gave a curative instruction to the jury. *Id.* at 684-85. The postconviction court denied this claim by incorporating the government's responses and adopting the government's reasoning noting that trial counsel objected to the burden-shifting and that the trial court gave a curative instruction that the Petitioner does not bear the burden of proof. (DE 9-1 at 235). The government correctly argued that mistrial would have been properly denied based upon the curative instruction among other reasons. *Id.* at 161 (citing *Thomas v. State*, 726 So. 2d 369, 372 (Fla. 4th DCA 1999)). Additionally, the jury is presumed to have followed the trial court's instructions. *Raulerson v. Wainwright*, 753 F.2d 869, 876 (11th Cir. 1985). Petitioner alleges nothing to overcome that presumption. Therefore, Petitioner shows neither deficient performance nor prejudice. Accordingly, for the reasons stated, Petitioner fails to establish that the allegations in claim 11 provide a basis for relief.

L. Claim 12

Petitioner alleges in Claim 12 that the cumulative errors of trial counsel deprived Petitioner of a fair trial (DE 1 at 42). Claims found to be without merit, however, cannot be aggregated to show denial of a constitutional right. *See Morris v. Sec'y, Dep't of Corr.*, 677 F.3d 1117, 1132 (11th Cir. 2012). Because the Petitioner's ineffective assistance of trial counsel claims individually lack merit, then by extension they lack merit cumulatively. Consequently claim 12 has no merit either.

M. Claim 13

Claim 13 alleges that the trial court erred by failing to conduct a full and complete inquiry into Petitioner's motion to discharge counsel prior to sentencing (DE 1 at 43). Petitioner claims, as he

did on direct appeal, that he is entitled to be resentenced because the trial court did not conduct a *Nelson* inquiry pre-sentencing as to Petitioner's complaint about attorney incompetence (DE 1 at 43-44; DE 9-1 at 59). The government correctly argued in their appellate brief that the trial court did not err because Petitioner did not make an unequivocal request to discharge counsel (DE 9-1 at 77 (citing *Logan v. State*, 846 So.2d 472, 477 (Fla. 2003) (holding that "the requirements of *Nelson* depend upon a clear and unequivocal statement from the criminal defendant that he wishes to discharge counsel"). Here, Petitioner did not make an unequivocal statement that he wished to discharge counsel (DE 1 at 43; DE 9-1 at 74). Accordingly, this Court finds that the allegations in Claim 13 provide no basis for relief.

EVIDENTIARY HEARING

A federal court must consider an evidentiary hearing if such a hearing could enable a habeas petitioner the opportunity to prove factual allegations, which, if true, would confer the right to habeas relief. *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007). This Court begins by considering whether 28 U.S.C. § 2254(e) bars an evidentiary hearing. First, § 2254(e)(2) bars an evidentiary hearing if the Petitioner had failed to develop the factual basis of his claims in the state court proceedings. Here, Petitioner fully developed all but claim 13 in the state courts, and claim 13 was effectively waived due to being untimely filed in the state courts. This Court found the state court record adequate to resolve the remainder of Petitioner's claims on the merits.

This Court considers next the standard that governs the decision of whether to hold an evidentiary hearing when the limitations of § 2254(e) do not apply. The decision whether to grant an evidentiary hearing is left to this Court's discretion. This Court must review the available record and determine whether an evidentiary hearing is warranted. To guide the determination, the Eleventh Circuit directs this Court to consider four factors. First, this Court must consider whether

there are disputed facts concerning the Petitioner's claims for which the Petitioner did not receive a full and fair hearing from the state postconviction court. Second, this Court must consider whether the Petitioner's fact allegations, if he could prove them true, would entitle him to prevail on his Petition. Third, in making that determination of whether the Petitioner can prevail on the merits of his claims, this Court also must keep in mind the deference that § 2254 gives to the state postconviction court's ruling. Fourth, this Court must consider the nature of the Petitioner's fact allegations. If they are merely conclusory and unsupported by specifics, the evidentiary hearing request may be denied. See Boyd v. Allen, 592 F.3d 1274, 1304-05 (11th Cir. 2010). The present record presents no disputes of fact that require resolution. This Court was able to assess Petitioner's claims based on the record as it is without the need to develop it further.

CONCLUSION

The record shows that the Petitioner received the full benefit of a jury trial where he was able to challenge the state's case against him and to proffer conflicting and exonerating evidence. Even if there were ways his trial counsel could have presented his defense better (viewed, of course, with the benefit of hindsight and with knowledge of the jury's decision), the record does not show how any of those potential shortcomings constitute ineffective assistance as Strickland defines it. Even if there were ways that trial counsel could have done a better job, none of those complained-of errors detract from the strength of the state's case-in-chief. Because the Petitioner cannot demonstrate how the complained-of errors would have resulted in a more favorable outcome, he does not prevail on his claims for relief. Moreover the Petitioner does not overcome the deference given to the state court determinations and the deference given to trial counsel to show a meritorious claim of ineffective assistance.

ACCORDINGLY, this Court recommends to the District Court that the Petition for Writ of Habeas Corpus (DE 1) be **DENIED**.

The parties shall have fourteen (14) days from the date of this Report and Recommendation within which to file objections, if any, with the Honorable Jose E. Martinez, the United States District Judge assigned to this case. Failure to file timely objections shall bar the parties from a de novo determination by the District Court of the issues covered in this Report and Recommendation and bar the parties from attacking on appeal the factual findings contained herein. *LoConte v. Dugger*, 847 F.2d 745, 749—50 (11th Cir. 1988), *cert. denied*, 488 U.S. 958 (1988).

DONE AND SUBMITTED in Chambers at Fort Pierce, Florida, this 6th day of November, 2019.

SHANIEK M. MAYNARD
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-14355-CIV-MARTINEZ/MAYNARD

JEROD RODRIGUEZ,

Petitioner,

v.

SECRETARY, FLA. DEPT. OF CORRECTIONS,

Respondent.
_____/

ORDER ON MOTION FOR LEAVE TO EXCEED PAGE LIMIT (DE 3)
and
ORDER DIRECTING RESPONDENT TO FILE A RESPONSE

THIS CAUSE comes before this Court upon an Order of Reference (DE 4) and the Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus (DE 1). The Petition complies with the basic filing requirements of Rule 2 of the Rules Governing § 2254 Cases. It is therefore,

ORDERED AND ADJUDGED that pursuant to Rule 5 of the Rules Governing § 2254 Cases, the Respondent shall respond to the Petition and its incorporated Memorandum. The Respondent shall demonstrate good cause why the Petitioner's requested relief should not be granted. It is further,

ORDERED AND ADJUDGED that pursuant to Rule 5 of the Rules Governing § 2254 Cases, the Respondent also shall file an appendix of relevant documents and records. The Respondent shall file them into the docket sheet in an easy to access manner. The

appendix shall be uploaded to the docket in such a way that each individual document can be accessed separately and directly through its own sub-DE number (e.g., DE 6—2, DE 6—3, etc.) with each sub-entry labeled to identify what document it contains. The appendix shall have a table of contents that shows what documents it contains and where each individual document can be found. This greatly eases judicial review, and this Court appreciates the Respondent taking this additional step. By comparison the bulk uploading of appendix documents into one common docket entry that lacks separately accessible subparts makes it very difficult to find individual documents. It therefore makes judicial review much harder. It is further,

ORDERED AND ADJUDGED that the Respondent shall file the above Response and appendix by **FRIDAY, DECEMBER 22, 2017.** The Petitioner shall have until **FRIDAY, JANUARY 12, 2018** to file his Reply. It is lastly,

ORDERED AND ADJUDGED that the Motion to Exceed Page Limit (DE 3) is **GRANTED.**

DONE AND ORDERED in Chambers at Fort Pierce, Florida, this 19th day of October, 2017.

SHANIEK M. MAYNARD
UNITED STATES MAGISTRATE JUDGE

cc: Michael R. Ufferman, Esq. (via CM/ECF NEF)

Office of the Florida Attorney General
Suite 900
1515 N. Flagler Dr.
West Palm Beach, FL 33401

(This Court sends a copy of this Order by mail to the Florida Attorney General at the above address simply as a means to facilitate notice to the Respondent. This Court does so while noting that no counsel has formally appeared on the Respondent's behalf yet.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-14355-CIV-MARTINEZ
(Magistrate Judge Shaniek M. Maynard)

JEROD RODRIGUEZ,

Petitioner,

v.

SECRETARY, FLA. DEPT. OF CORRECTIONS,

Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS AND SUPPORTING MEMORANDUM OF LAW

Respondent, Julie L. Jones, by and through the undersigned Assistant Attorney General, hereby responds to this Court's Order To Show Cause, dated October 19, 2017 (DE# 5), and requests that this Court **dismiss** Petitioner, Jerod Rodriguez's Petition for Writ of Habeas Corpus, filed pursuant to 28 U.S.C. § 2244, as untimely.

STATEMENT OF THE CASE

1. Course of Proceedings And Disposition In The Trial Court.

On July 10, 2003, Petitioner was charged by Information with robbery with a firearm while wearing a mask (Count 1), and burglary of a dwelling with an assault while armed and wearing a mask (Count 2) (Exh. 2). Petitioner pled not guilty and demanded a jury trial.

Petitioner was convicted as charged on both counts (Exhs. 9 and 11). Petitioner was then sentenced to two concurrent life

sentences as a prison releasee reoffender (Exhs. 10 and 12).

2. Direct Appeal.

Petitioner filed a timely notice of appeal of his convictions and sentences to the Fourth District Court of Appeal (Exh. 13). Petitioner raised one (1) issue on appeal: whether the trial court conducted an adequate Nelson[1] inquiry (Exhs. 14 and 15).

On December 7, 2005, the Fourth District affirmed Petitioner's conviction and sentence per curiam, without a written opinion. Rodriguez v. State, 916 So. 2d 807 (Fla. 4th DCA 2005) (table) (Exh. 16). Mandate issued on December 23, 2005 (Exh. 17).

3. Proceedings On Petitioner's First Motion For Postconviction Relief.

On March 6, 2007, Petitioner, through counsel, filed a "shell" motion for postconviction relief, pursuant to Fla. R. Crim. P. 3.850 (Exh. 18). The motion contained ten (10) grounds for relief (Exh. 18).

At the same time Petitioner filed the 3.850 motion, he also filed a motion to amend the just filed 3.850 motion (Exhs. 19 and 21). In the first motion, Petitioner acknowledged that the two-year time period for filing his 3.850 motion would not expire until

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[1]Under Nelson v. State, 274 So. 2d 256, 258-59 (Fla. 4th CA 1973), once a defendant requests the trial court to discharge his court-appointed attorney because the attorney's representation is allegedly ineffective, the trial court is required to make an independent inquiry into whether there is reasonable cause to believe that the attorney is not providing effective assistance to the defendant.

December 23, 2007 (Exh. 19 at p. 1). Petitioner stated that he was "still in the process of investigating his case . . . [and] of obtaining and reviewing public records" (Exh. 19 at p. 1). Petitioner requested an additional 90 days within which to "amend his postconviction motion after he has completed his investigation motion" (Exh. 19 at p. 2). The trial court granted Petitioner's request for the additional 90 days (Exh. 20).

Nearing the date the additional 90 days was set to expire, Petitioner filed a second motion for leave to amend his 3.850 motion (Exh. 21). Petitioner again acknowledged that the two-year time period for filing his 3.850 motion would not expire until December 23, 2007 (Exh. 21 at p. 1). Petitioner again stated that he was "still in the process of investigating his case . . . [and] of obtaining and reviewing public records" (Exh. 21 at p. 2). Petitioner requested an additional 90 days within which to "amend his postconviction motion after he has completed his investigation motion" (Exh. 21 at p. 2). The trial court granted Petitioner's second request for the additional 90 days (Exh. 22).

On September 24, 2007, nearing the date the second 90-day period was set to expire, Petitioner filed a third motion for leave to amend his 3.850 motion (Exh. 23). Petitioner again acknowledged that the two-year time period for filing his 3.850 motion would not expire until December 23, 2007 (Exh. 23 at p. 1). Petitioner's third request was different in that it contained the following

language:

> The two-year time period set forth in Florida Rule of Criminal Procedure 3.850 does not expire until December 23, 2007 (two years from the date of the Fourth District Court of Appeals direct appeal mandate). **The Defendant respectfully requests the opportunity to amend his postconviction motion up until the two-year deadline. The Defendant will file any amendments prior to that date.**

(Exh. 23 at p. 1) (emphasis added). At this point, it had been six months since Petitioner filed his original 3.850 motion and any promised amendments had yet to be filed.

This time, the trial court ruled differently:

> The Defendant has now filed his second motion for leave to amend his pending postconviction motion up to the two-year filing deadline specified in Rule 3.850. The court finds that dismissal of the original motion with leave to timely file a comprehensive amendment will not prejudice the Defendant and will be a more efficient use of judicial and State Attorney resources.
>
> **The Defendant's motion for postconviction relief is dismissed without prejudice to timely file a comprehensive amended motion**.

(Exh. 24) (emphasis added).

Fifteen days later, Petitioner filed a motion for rehearing (Exh. 25). Petitioner admitted that the original 3.850 motion was merely a "shell" motion filed in an effort to toll the federal limitations period (Exh. 25 at p. 2). Petitioner argued that he would be prejudiced if the trial court dismissed his petition, even without prejudice, because he needed the time to be tolled so his later federal pleading could be considered timely (Exh. 25 at p.

2).

4. Proceedings On Petitioner's "Amended" Motion For Postconviction Relief.

On December 13, 2007, over 9 months after the filing of the first motion for postconviction relief, Petitioner finally filed his "amended" motion for postconviction relief (Exh. 26). Whereas the original motion only contained 10 grounds, Petitioner's "amended" motion contained 14 grounds (Exh. 26).

The State provided a comprehensive response, addressing each of Petitioner's claims (Exh. 28).

The trial court found that claims 3-6 and 8-13 of the "amended" motion were insufficiently pled (Exh. 31). The trial court dismissed those claims, giving Petitioner an opportunity to refile the claims in a sufficiently pled supplemental motion (Exh. 31 at p. 3). Importantly, the trial court's order contained the following language:

> Although the Defendant's motion was previously dismissed, the previous motion was not dismissed as insufficiently pled. Pursuant to Spera v. State, 971 So. 2d 754, 761 (Fla. 2007), the Defendant is allowed an opportunity to supplement his motion in good faith with legally and facially sufficient claims.

(Exh. 31 at p. 3).

Petitioner filed an amendment to his "amended" postconviction motion which only addressed the insufficiently pled claims in compliance with the trial court's order (Exh. 32). In the amendment, Petitioner voluntarily dismissed two of his claims

(claims 3 and 13) (Exh. 32 at pp. 1, 9).

Again, the State provided a comprehensive response to Petitioner's claims (Exh. 33).

The trial court issued an order in which it denied Petitioner any relief on claims 8 and 12 (Exh. 34 at pp. 4, 5). The trial court granted Petitioner an evidentiary hearing on claims 1, 2, 4, 5, 6, 7, 9, 10 and 11 (Exh. 34 at pp. 3-5). The trial court reserved ruling on claim 14 (Exh. 34 at p. 5).

The trial court subsequently sua sponte reconsidered its prior order granting Petitioner an evidentiary hearing (Exh. 35). The trial court summarily denied Petitioner's remaining claims for the reasons stated in the State's two responses (Exh. 35 at p. 2).

Petitioner's motion for rehearing (Exh. 36) was denied (Exh. 37).

a. Direct Appeal.

Petitioner timely appealed the trial court's summary denial of his "amended" 3.850 motion to the Fourth District (Exh. 38). On July 27, 2017, the Fourth District affirmed the trial court's summary denial per curiam, without written opinion (Exh. 40). Rodriguez v. State, 228 So. 3d 572 (Fla. 4th DCA 2017) (table). Mandate issued on October 13, 2017 (Exh. 44).

5. The Present § 2254 Petition.

On October 16, 2017, Petitioner, through counsel, filed the instant petition for writ of habeas corpus, pursuant to 28 U.S.C.

§ 2254 (DE# 1). On October 19, 2017, this Court ordered Respondent to file a response to Petitioner's petition (DE# 5). This timely response follows.

MEMORANDUM OF LAW

In the petition, Petitioner makes a conclusory allegation that his petition is timely:

> Petitioner Rodriguez' convictions and sentences became final on March 7, 2006 -- when the ninety-day period for filing a petition for writ of certiorari in the United States Supreme Court. However, the one-year limitations period was tolled on March 6, 2007, when Petitioner Rodriguez filed his rule 3.850 motion. The rule 3.850 appeal mandate was issued on October 13, 2017.

(DE# 1 at p. 45). Petitioner fails to apprize this Court of the two dismissals of his 3.850 motion and also fails to discuss how those dismissals affect the timeliness of his present petition.

Pursuant to 28 U.S.C. § 2254, as amended on April 24, 1996 (the "AEDPA"), a one-year period of limitation applies to a habeas corpus petition filed pursuant to § 2254. The one-year period runs from the last of four specified events: (1) "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;" (2) "the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;" (3) "the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the

right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review;" or (4) "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(A) through (D). If a motion is filed outside this time limit, it must be dismissed. Additionally. the time during which a "properly filed" application for state postconviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under the statute. 28 U.S.C. § 2244(d)(2). The AEDPA clock resumes running when the state's highest court issues its mandate disposing of the motion for postconviction relief. Lawrence v. Florida, 549 U.S. 327, 331-32 (2007).

Petitioner's conviction became final 90 days after the Fourth District affirmed Petitioner's conviction, which was on December 7, 2005 (Exh. 16). See Gonzalez v. Thaler, ___ U.S. ___ , 132 S.Ct. 641, 653-54 (2012) (holding that conviction becomes final upon expiration of time for seeking direct review); Jimenez v. Quarterman, 555 U.S. 113, 118-21 (2009)(explaining the rules for calculating the one-year period under §2244(d)(1)(A)); Clay v. United States, 537 U.S. 522, 527 (2003) (holding that "[f]inality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or

when the time for filing a certiorari petition expires."); Chavers v. Secretary, Florida Dept. of Corrections, 468 F.3d 1273 (11th Cir. 2006) (holding that one-year statute of limitations established by AEDPA began to run 90 days after Florida appellate court affirmed habeas petitioner's conviction, not 90 days after mandate was issued by that court).

Petitioner's conviction became final 90 days after the Fourth District issued its opinion on direct appeal, or **March 7, 2006.** Therefore, unless the time period was tolled, the instant petition had to be filed on or before **March 7, 2007.** Wainwright, 537 F.3d at 1284; Downs v. McNeil, 520 F.3d 1311, 1317-18 (11th Cir.2008) (applying "anniversary method" to determine expiration of limitations period, citing Ferreira v. Sec'y, Dep't. Of Corr., 494 F.3d 1286, 1289 n. 1 (11th Cir. 2007)).

The federal limitations period ran unchecked for 363 days, from the time his conviction became final on **March 7, 2006**, until **March 6, 2007**, when Petitioner, through counsel, filed his motion for postconviction relief (Exh. 18).

After granting Petitioner numerous opportunities to amend his motion for postconviction relief, the trial court dismissed Petitioner's motion without prejudice:

> The Defendant has now filed his second motion for leave to amend his pending postconviction motion up to the two-year filing deadline specified in Rule 3.850. The court finds that dismissal of the original motion with leave to timely file a comprehensive amendment will

not prejudice the Defendant and will be a more efficient use of judicial and State Attorney resources.

The Defendant's motion for postconviction relief is dismissed without prejudice to timely file a comprehensive amended motion.

(Exh. 24) (emphasis added).

At this point, the clock began running again. Two days later, on September 26, 2007, the one-year limitations period expired, making Petitioner's current petition untimely.

1. Petitioner's Motion for Rehearing was Not an Authorized Pleading and Thus Did Not Toll the Limitations Period.

In a motion for rehearing, Petitioner admitted that the original 3.850 motion was merely a "shell" motion filed in an effort to toll the federal limitations period (Exh. 25 at p. 2). Petitioner argued that he would be prejudiced if the trial court dismissed his petition, even without prejudice, because he needed the time to be tolled so his later federal pleading could be considered timely (Exh. 25 at p. 2).

Petitioner boldly claimed to the State court that the one-year limitations period would remain tolled during the pendency of his motion for rehearing and the potential appeal of the denial of his motion for rehearing. However, such a claim was not supported by well-established Florida law at the time of the filing of the pleading.

At the time Petitioner filed his motion for rehearing, on October 9, 2007, it was well-settled in Florida that a trial

court's order that dismissed a postconviction motion (due to some alleged deficiency) without prejudice to refiling the motion was a non-final, non-appealable order. See Kelly v. State, 969 So. 2d 1159, 1159 (Fla. 4th DCA 2007) (dismissing appeal and stating: "A dismissal of a rule 3.850 motion with leave to amend is non-final and non-appealable."). And because the trial court's order was non-final and non-appealable, Petitioner could not challenge the findings in the order by filing a motion for rehearing. In Quilling v. State, 968 So. 2d 1034, 1034 (Fla. 5th DCA 2007), the Fifth Circuit held the following:

> We reject Appellant's argument that his motion for rehearing was timely filed because **Florida Rule of Criminal Procedure 3.850(g) does not authorize rehearing motions directed to non-final orders dismissing without prejudice rule 3.850 motions**.

The limitations period is only tolled for the time a **properly** filed application for post-conviction relief is pending in the state court. See 28 U.S.C. § 2244(d)(2). To be "properly filed," the application must be **authorized** by, and in compliance with, state law. See Artuz v. Bennett, 531 U.S. 4 (2000). "Artuz cannot be "read . . . to allow defendants to create their own methods of seeking post-conviction relief by availing themselves of a state court's general motion practice.'" Smalls v. Smith, 2009 WL 2902516 (S.D.N.Y. September 10, 2009) (quoting Adeline v. Stinson, 206 F.3d 249, 252 (2d Cir. 2000). Artuz, however, does not apply to Petitioner's motion for rehearing because the motion for

rehearing was not an "application for post-conviction relief." "Were the law otherwise, then so long as the state court were willing to keep its clerk's office door open to a petitioner, he or she could bring successive motions seeking to reinstate a denied petition for leave to appeal indefinitely and thus stave off the running of the AEDPA-proscribed time to file a federal petition for habeas corpus virtually in perpetuity." Adeline v. Stinson, 206 F.3d at 252-53.

Should Petitioner attempt to argue that the motion for rehearing was appropriate, this Court should be aware that petitioner has attempted to use case law regarding **denials** of 3.850 motions to oppose the trial court's order **dismissing** his 3.850 motion. The distinction is important as Florida clearly has made a distinction between how the two types of orders are handled.

Therefore, the attempted motion for rehearing did not qualify as "properly filed" and Petitioner is not entitled to additional tolling of time.

WHEREFORE, Respondent respectfully requests that this Court **dismiss** Petitioner's petition for writ of habeas corpus as untimely.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 9, 2018, I electronically filed the foregoing document and exhibits with the Clerk of the Court using CM/ECF. Participants in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

s/ Heidi L. Bettendorf
HEIDI L. BETTENDORF
Assistant Attorney General

IN THE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

JEROD RODRIGUEZ, Petitioner, v. SECRETARY, FLA. DEPT. OF CORRECTIONS, Respondent.	Case No. 17-14355-CIV-MARTINEZ/MAYNARD

PETITIONER RODRIGUEZ' REPLY TO THE RESPONDENT'S "RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS AND SUPPORTING MEMORANDUM OF LAW"

The Petitioner, JEROD RODRIGUEZ, by and through undersigned counsel, submits the following reply to the Respondent's response (Doc 8) to his federal habeas corpus petition filed pursuant to 28 U.S.C. § 2254. (Doc 1). In her response, the Respondent requests the Court to dismiss Petitioner Rodriguez' § 2254 petition – arguing that the § 2254 petition is "untimely." (Doc 8 - Pg 1). As explained below, the Court should reject the Respondent's request to dismiss the § 2254 petition because, contrary to the Respondent's argument, the § 2254 petition was *not* untimely.

In 2005, Petitioner Rodriguez was convicted of robbery and burglary. (Doc 9-1 - Pg 36). The state trial court sentenced Petitioner Rodriguez to life imprisonment. (Doc 9-1 - Pgs 39, 41). On direct appeal, the Florida Fourth District Court of Appeal affirmed – in a "*per curiam* affirmed" opinion – Petitioner Rodriguez' convictions and sentences (i.e., the state appellate court did not issue

a written opinion).[1] *See Rodriguez v. State*, 916 So. 2d 807 (Fla. 4th DCA 2005). The state appellate court's direct appeal opinion was rendered on December 7, 2005. (Doc 9-1 - Pg 84). Petitioner Rodriguez' convictions and sentences therefore became final on March 7, 2006 – when the ninety-day period for filing a petition for writ of certiorari in the United States Supreme Court expired. *See Williams v. Sec'y, Fla. Dep't of Corr.*, 674 Fed. Appx. 975, 976 (11th Cir. 2017) ("[T]he one-year limitations period does not begin to run until the 90-day window to petition the United States Supreme Court for a writ of certiorari expires.") (citing *Bond v. Moore*, 309 F.3d 770, 774 (11th Cir. 2002)).

On March 6, 2007 – two days before the § 2254 statute of limitations expired[2] – Petitioner Rodriguez submitted a "properly filed" Florida Rule of Criminal Procedure 3.850 state postconviction motion (i.e., the motion was under oath and satisfied all of the pleading requirements of rule 3.850). (Doc 9-1 - Pg 88).[3] Notably, Florida law affords a defendant two years to file a rule 3.850 motion from the date of the appellate court's direct appeal mandate. *See* Fla. R. Crim. P.

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[1] Because the state appellate court did not issue a written opinion, Petitioner Rodriguez was not entitled to seek review in the Florida Supreme Court. *See Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980). *See also Williams v. Sec'y, Fla. Dep't of Corr.*, 674 Fed. Appx. 975, 976 (11th Cir. 2017) ("Under Florida law, the Florida Supreme Court lacks jurisdiction to hear an appeal from a *per curiam* affirmance of a conviction by a lower state appellate court.") (citing *Jenkins*).

[2] *See McCloud v. Hooks*, 560 F.3d 1223, 1229 (11th Cir. 2009) (calculating expiration of § 2254 limitations period as one year from the day *after* the judgment became "final" under § 2244(d)(1): "The final day that McCloud could have petitioned for a writ of habeas corpus was June 7, 1999, *one year from the day after the burglary judgment became final*") (emphasis added). *See also Williams*.

[3] The Respondent refers to Petitioner Rodriguez' rule 3.850 motion as a "shell" motion. (Doc 8 - Pg 2). Contrary to the Respondent's assertion, Petitioner Rodriguez' March 6, 2007, motion contained ten claims – all of which were sufficiently pled.

3.850(b) (2007). Additionally, as explained by the state appellate court in *Kline v. State*, 858 So. 2d 1257, 1257-1258 (Fla. 1st DCA 2003), a rule 3.850 motion that has already been filed may be amended at any time prior to the state postconviction court's final ruling as long as the amended motion is filed within the two-year limitations period prescribed by rule 3.850(b):

> A rule 3.850 motion may be amended at any time prior to the trial court's ruling as long as the amended motion is filed within the two-year limitations period prescribed by rule 3.850(b). *Gaskin v. State*, 737 So. 2d 509, 518 (Fla. 1999). Similarly, when a defendant files a motion requesting leave to amend before the trial court rules and before the limitations period expires, the trial court must allow the amendment prior to ruling on the motion. *Beard v. State*, 827 So. 2d 1021 (Fla. 2d DCA 2002). Accordingly, we reverse the trial court's denial of Appellant's original motion. On remand, Appellant shall be allowed to amend his original motion and the trial court should rule on the amended motion without reference to its previous order.

At the time Petitioner Rodriguez filed his original March 6, 2007, rule 3.850 motion, undersigned counsel was still in the process of obtaining and reviewing public records (pursuant to chapter 119, Florida Statutes) and Petitioner Rodriguez was still sending undersigned counsel letters containing possible claims to add to the rule 3.850 motion. Thus, as any prudent counsel would do – and consistent with *Kline* – undersigned counsel sought leave to further amend Petitioner Rodriguez' rule 3.850 motion once the investigation/public records review was complete.[4] (Doc 9-1 - Pgs 102, 109, 115). Although the state postconviction court initially granted these timely motions (Doc 9-1 - Pgs 106, 113), the state postconviction court subsequently denied one of Petitioner Rodriguez' timely motions for leave to amend and instead – contrary to *Kline* – dismissed Petitioner Rodriguez' pending rule 3.850 motion without prejudice to refile. (Doc 9-1 - Pg 119). The order dismissing the

[4] If the public records disclosure could form the basis of an additional postconviction claim, then prudent counsel would want to keep the door open for the opportunity to add this new claim.

motion was signed and rendered on September 24, 2007 – and notably – the order was served on undersigned counsel *via U.S. mail*.[5] Because the order was sent via U.S. mail, undersigned counsel did not receive a copy of the order until September 28, 2007.[6] After receiving the September 24, 2007, order in the mail, undersigned counsel timely filed (on October 9, 2007) a motion for rehearing pursuant to rule 3.850(g).[7] (Doc 9-1 - Pg 121). In the motion for rehearing, Petitioner Rodriguez argued that the September 24, 2007, order was contrary to *Kline* and Florida law which allowed him to amend his pending rule 3.850 motion up until the two-year deadline set forth in rule 3.850(b). Thereafter, Petitioner Rodriguez timely filed his amended rule 3.850 motion on December 13, 2007 (and the state postconviction court did not rule on Petitioner Rodriguez' motion for rehearing). (Doc 9-1 - Pg 126).[8]

In her response, the Respondent asserts that the § 2254 statute of limitations began to run again on September 24, 2007 (the date of the order dismissing Petitioner Rodriguez' rule 3.850

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[5] The copy of the September 24, 2007, order attached to the Respondent's response (Exhibit 24/Doc 9-1 - Pg 119) *omits* the "Certificate of Service" page of the order. Petitioner Rodriguez is attaching the complete order – including the "Certificate of Service" page – to this reply (Exhibit A).

[6] Undersigned counsel is attaching to this reply an affidavit from his office manager verifying that the September 24, 2007, order was received by undersigned counsel's office on September 28, 2007 (Exhibit B).

[7] Rule 3.850(g) (2007) provided that a defendant "may file a motion for rehearing of any order denying a motion under this rule within 15 days of the date of service of the order."

[8] In her response, the Respondent asserts that in the motion for rehearing, "Petitioner admitted that the original 3.850 motion was merely a 'shell' motion . . . ." (Doc 8 - Pg 4). Contrary to the Respondent's contention, there is no such admission in the motion for rehearing and the word "shell" does not appear in the motion for rehearing. As explained in footnote 3, Petitioner Rodriguez' March 6, 2007, motion was not a "shell" motion.

motion without prejudice to refile), and the Respondent asserts that the statute of limitations expired on September 26, 2007:

> At this point, the clock began running again. Two days later, on September 26, 2007, the one-year limitations period expired, making Petitioner's current petition untimely.

(Doc 8 - Pg 10). For the following reasons, the Respondent's argument is incorrect.

1. The Eleventh Circuit Court of Appeals recently answered the question in this case in *Green v. Sec'y, Fla. Dep't of Corr.*, 877 F.3d 1244 (11th Cir. 2017).

On December 15, 2017, the Eleventh Circuit Court of Appeals held the following:

> *Under Florida law, when a postconviction motion is stricken with leave to amend, the amended motion relates back to the date of the original filing*. *See Bryant v. State*, 901 So. 2d 810, 818 (Fla. 2005); *see also Spera v. State*, 971 So. 2d 754, 761 (Fla. 2007) (holding that when a petitioner's initial Rule 3.850 motion for postconviction relief is determined to be legally insufficient for failure to meet the Rule's requirements, the trial court must allow the defendant at least one opportunity to amend the motion). Here, Mr. Green filed his Rule 3.850 motion on September 27, 2010, and he amended that motion on January 7, 2011. The state postconviction court denied the Rule 3.850 motion with leave to amend, and Mr. Green filed an amended, corrected motion on February 4, 2011. Therefore, under Florida's rule, Mr. Green's corrected Rule 3.850 motion related back to the original filing date – September 27, 2010. This means the entire period between September 27, 2010, and the conclusion of the Rule 3.850 proceedings on March 1, 2013, was tolled. Because Mr. Green's § 2254 petition was filed less than one year later – on February 27, 2014 – his § 2254 petition is timely.

Green v. Sec'y, Fla. Dep't of Corr., 877 F.3d 1244, 1248 (11th Cir. 2017) (emphasis added). Pursuant to *Green*, when the state postconviction court rendered the September 24, 2007, order dismissing – without prejudice to refile – Petitioner Rodriguez' original March 6, 2007, rule 3.850 motion, Petitioner Rodriguez' amended December 13, 2007, rule 3.850 motion related back to the date of the original March 6, 2007, motion. This means the entire period between March 6, 2007, and the conclusion of the rule 3.850 proceedings on October 13, 2017 (when the state appellate court

issued its mandate affirming the denial of the rule 3.850 motion)[9] was tolled. Consistent with *Green*, Petitioner Rodriguez' § 2254 petition is timely and the Respondent's request to dismiss the petition as untimely should be denied.

2. Petitioner Rodriguez' rule 3.850 proceeding remained "pending" until the state appellate court issued its mandate affirming the denial of the rule 3.850 motion.

The Respondent argues that (1) the September 24, 2007, order ended Petitioner Rodriguez' rule 3.850 proceeding, thereby immediately restarting the federal § 2254 clock and (2) Petitioner Rodriguez' motion for rehearing was unauthorized because the September 24, 2007, order was a "non-final" order. (Doc 8 - Pgs 10-11). The Respondent cannot have it both ways. If the September 24, 2007, order was a "non-final" order, then Petitioner Rodriguez' rule 3.850 proceeding remained pending – meaning that the § 2254 clock remained tolled (because if the state postconviction action was *not final*, it – by definition – was still "pending"). Alternatively, if the September 24, 2007, order was a final resolution of the rule 3.850 proceeding, then Petitioner Rodriguez had the right to seek rehearing of the order.

As noted above, because the September 24, 2007, order was mailed to undersigned counsel, undersigned counsel did not receive the order until September 28, 2007. The Respondent argues that Petitioner Rodriguez' right to proceed to federal court expired on September 26, 2007 – *before either Petitioner Rodriguez or undersigned counsel were even put on notice of the state court's order*. It would be patently unfair to conclude that Petitioner Rodriguez' right to proceed with a § 2254

[9] October 13, 2017, was a Friday. Petitioner Rodriguez filed his § 2254 petition on Monday, October 16, 2017 – the next business day.

petition expired – unbeknownst to him or his counsel – while an order was traveling in a mail truck between Ft. Pierce and Tallahassee.

Contrary to the Respondent's argument, the September 24, 2007, order did not become final – and the state postconviction proceeding did not end – until the time for seeking rehearing or appeal of the order expired.[10] Petitioner Rodriguez timely filed a motion for rehearing in this case, as was his right under Florida law.[11] *See Ey v. State*, 960 So. 2d 853 (Fla. 2d DCA 2007) (recognizing right of defendant to file a motion for rehearing if a trial court dismisses the defendant's rule 3.850 motion).[12] Thus, Petitioner Rodriguez' rule 3.850 proceeding remained "pending" during the pendency of the motion for rehearing (and, therefore, Petitioner Rodriguez' rule 3.850 proceeding tolled the § 2254 statute of limitations from March 6, 2007 (when the original rule 3.850 motion was

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[10] In all other contexts, an order that affects a defendant's right does not become final immediately; rather, such an order becomes final only upon expiration of the right to seek review. For example, a judgment of conviction does not become final until the right to pursue an appeal expires. An appellate decision does not become final until the right to seek rehearing expires. And a postconviction decision does not become final until either the right to seek rehearing or the right to appeal expires. *See Carey v. Saffold*, 536 U.S. 214 (2002) (holding that a petitioner's claim is "pending" for the entire term of state court review, including those intervals between one state court's judgment and the filing of an appeal with a higher state court); *Nyland v. Moore*, 216 F.3d 1264, 1267 (11th Cir. 2000) (noting that the statute of limitations was tolled until the mandate issued from the state court of appeals' order denying a rehearing on its affirmance of the state trial court's denial of a motion for postconviction relief).

[11] And as explained in this reply, Petitioner Rodriguez had the right to argue on rehearing that the dismissal order was contrary to Florida law (as articulated in the *Kline* decision).

[12] In her response the Respondent asserts that under Florida law, an order that dismisses without prejudice a rule 3.850 motion "due to some alleged deficiency" is a non-appealable order. (Doc 8 - Pgs 10-11). Petitioner Rodriguez' rule 3.850 motion was *not* dismissed "due to some alleged deficiency" – the rule 3.850 motion was properly submitted under oath and satisfied all of the pleading requirements of rule 3.850. Rather, the motion was improperly dismissed in contravention of well-settled Florida appellate law (and therefore Petitioner Rodriguez had the right to seek further review of the order).

filed), to October 13, 2017 (when the state appellate court mandate was issued affirming the denial of the rule 3.850 motion)).[13]

If the Respondent's position was to be adopted, it would mean that (1) Petitioner Rodriguez' § 2254 rights expired before he was even put on notice of the event that triggered the end of the state postconviction proceeding and (2) Petitioner Rodriguez had no ability or opportunity (either by

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[13] Petitioner Rodriguez relies on *Carey v. Saffold*, 536 U.S. 214 (2002). In that case, the State of California urged the Supreme Court to establish a "uniform national rule" to the effect that an application for state collateral review is not "pending" in the state court during the interval between a lower court's entry of judgment and the timely filing of a notice of appeal (or petition for review) in the next court. The State of California's theory was that, during this period of time the petition is not under court consideration. *See Carey*, 536 U.S. at 219. The Supreme Court rejected this argument:

> California's reading of the word "pending," however, is not consistent with that word's ordinary meaning. The dictionary defines "pending" (when used as an adjective) as "in continuance" or "not yet decided." Webster's Third New International Dictionary 1669 (1993). It similarly defines the term (when used as a preposition) as "through the period of continuance . . . of," "until the . . . completion of." *Ibid.* That definition, applied in the present context, means that an application is pending as long as the ordinary state collateral review process is "in continuance" – i.e., "until the completion of" that process. In other words, until the application has achieved final resolution through the State's post-conviction procedures, by definition it remains "pending."

Id. at 219-220. The Court concluded that a petitioner's claim is "pending" for the entire term of state court review, including those intervals between one state court's judgment and the filing of an appeal with a higher state court. *See id.* at 219-221. A state postconviction application is thus "pending" under 28 U.S.C. § 2244(d)(2), "both when it actually is being considered by the state habeas court and during the gap of time between the state habeas court's initial disposition and the petitioner's timely filing of a petition for review at the next level." *Wade v. Battle*, 379 F.3d 1254, 1262 (11th Cir. 2004). The Supreme Court reaffirmed in *Evans v. Chavis*, 546 U.S. 189 (2006), that "[t]he time that an application for state postconviction review is 'pending' includes the period between (1) a lower court's adverse determination, and (2) the prisoner's filing of a notice of appeal, provided that the filing of the notice of appeal is timely under state law." 546 U.S. at 191 (citing *Carey*, 536 U.S. at 219-220).

rehearing or appeal) to challenge the event that triggered the end of the state postconviction proceeding (even though the order was contrary to Florida law). Such a result/conclusion would be patently unfair.

3. Equitable tolling.

Finally, as an alternative argument, Petitioner Rodriguez asserts that he is entitled to equitable tolling in light of the procedural history of this case (i.e., an order that was not received by Petitioner Rodriguez or his counsel until after the date that the Respondent claims the § 2254 statute of limitations expired and for which the Respondent asserts Petitioner Rodriguez had no right to challenge).

Accordingly, for all of the reasons set forth above, and based on the Eleventh Circuit's recent holding in *Green*, Petitioner Rodriguez prays the Court to deny the Respondent's request to dismiss his § 2254 petition as untimely. Petitioner Rodriguez respectfully requests the Court to direct the Respondent to respond to the merits of the § 2254 petition.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

Assistant Attorney General Heidi L. Bettendorf

by CM/ECF electronic delivery this 25th day of April, 2018.

Respectfully submitted,

/s/ Michael Ufferman
MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227
Email: ufferman@uffermanlaw.com

Counsel for Petitioner **RODRIGUEZ**

EXHIBIT A

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR SAINT LUCIE COUNTY, FLORIDA

STATE OF FLORIDA,

vs.

JEROD RODRIGUEZ,

Defendant.
_____/

FELONY DIVISION
CASE NO. 562003CF002252A

ORDER DISMISSING MOTION FOR POSTCONVICTION RELIEF

THIS CAUSE came before the court in chambers on the Defendant's Motion for Postconviction Relief filed on March 6, 2007, and second Motion for Leave to Amend Defendant's Postconviction Motion filed on September 6, 2007, pursuant to Florida Rule of Criminal Procedure 3.850. The court finds and determines as follows:

The Defendant has now filed his second motion for leave to amend his pending postconviction motion up to the two-year filing deadline specified in Rule 3.850. The court finds that dismissal of the original motion with leave to timely file a comprehensive amendment will not prejudice the Defendant and will be a more efficient use of judicial and State Attorney resources.

The Defendant's motion for postconviction relief is dismissed without prejudice to timely file a comprehensive amended motion.

DONE AND ORDERED in Chambers in Fort Pierce, Florida, on September 24, 2007.

BURTON C. CONNER
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above order, including any attachments referenced in the order, have been sent to the following addressees by U.S. Mail, postage prepaid or by courthouse box delivery where indicated, to the following persons, this 24 day of Sept., 2007.

Copies to:

Michael Ufferman, Esq.
2022-1 Raymond Diehl Road
Tallahassee, FL 32308

Bruce Harrison, ASA
Office of the State Attorney
By Courthouse Box

Edwin M. Fry, Jr.
CLERK OF THE COURT

By: _____
Deputy Clerk

EXHIBIT B

IN THE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

JEROD RODRIGUEZ, Plaintiff, v. SECRETARY, FLA. DEPT. OF CORRECTIONS, Defendant.	Case No. 17-14355-CIV-MARTINEZ/MAYNARD

AFFIDAVIT OF AUDRA BRYAN

STATE OF FLORIDA :

COUNTY OF LEON :

I, AUDRA BRYAN, having been duly sworn, hereby affirm and state the following as true and correct:

1. My name is Audra Bryan. I am over eighteen years of age. I am the office manager for Michael Ufferman Law Firm, P.A.

2. Since I have worked at the law firm, there has been an office policy to track what mail arrives each day. Our current system involves a detailed email that is sent at the end of every day listing the items that were received in the mail that day.

3. Prior to our current system, the office had a policy where an employee of the firm would date stamp each document that was received in the mail that day.

4. I have gone through our file for Mr. Rodriguez and located our copy of the

September 24, 2007, order. This order contains the firm's date received stamp, indicating that it was received by the office on September 28, 2007.

I declare that I have read the above document and that the facts stated therein are true.

Executed on this 25TH day of April, 2018.

AUDRA BRYAN

Sworn to and subscribed before me by AUDRA BRYAN, who is personally known to me or who has produced _____ as identification this 25th day of April, 2018.

Notary Public, State of Florida at Large

My commission expires:

KAREN A. DENNIS
Commission # FF 216648
Expires May 8, 2019
Bonded Thru Troy Fain Insurance 800-385-7019

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR SAINT LUCIE COUNTY, FLORIDA

STATE OF FLORIDA,

vs.

JEROD RODRIGUEZ,

Defendant.
_____/

FELONY DIVISION
CASE NO. 562003CF002252A

ORDER DISMISSING IN PART, DENYING IN PART, AND GRANTING EVIDENTIARY HEARING IN PART ON DEFENDANT'S SECOND AMENDED RULE 3.850 MOTION; AND SETTING STATUS HEARING

THIS CASE came before the court in chambers on the Defendant's Amended Motion for Postconviction Relief filed on December 13, 2007; the State's response filed on June 20, 2014; the Defendant's reply filed on August 26, 2014; the Defendant's amended reply filed on October 2, 2014; the Defendant's second amended motion filed on May 15, 2015; and the State's response to the second amended motion filed on April 8, 2016; pursuant to Florida Rule of Criminal Procedure 3.850. The court finds and orders as follows.

The Defendant was found guilty by jury on robbery with a firearm while wearing a mask, and burglary of a dwelling with an assault while armed and wearing a mask. The Defendant was sentenced to life in prison. The judgment and sentence were affirmed on direct appeal. *Rodriguez v. State*, 916 So. 2d 807 (Fla. 4th DCA 2005).

Defense counsel filed the amended motion in 2007. A copy was not sent to chambers of the predecessor judge. In 2010, as the result of a pro se inquiry, the amended motion was discovered in the court file with no disposition. The court finds the second amended motion timely filed pursuant to the court order entered on March 5, 2015, by the predecessor judge. The court exercises its discretion to deny further amendment. *Oquendo v. State*, 2 So. 3d 1001 (Fla. 4th DCA 2008).

St. Lucie County File Date: 05/27/2016

The Defendant initially sought to challenge his conviction and sentence on the basis of 14 grounds of ineffective assistance of counsel. In his second amended motion, the Defendant voluntarily dismissed grounds 3 and 13. To demonstrate ineffective assistance of trial counsel, the Defendant must meet the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984):

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless, a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. at 687. To satisfy the first prong, the Defendant must show that his attorney's conduct fell outside the wide range of reasonable professional assistance. *Id.* at 689. The second prong requires that the Defendant must show that there is a reasonable probability that, but for the attorney's deficient performance, the outcome of the proceedings would have been different. *Id.* at 694. Further, a mere conclusory allegation that counsel was ineffective is insufficient to require an evidentiary hearing. *Kennedy v. State*, 547 So. 2d 912 (Fla. 1989). The Defendant is entitled to an evidentiary hearing on a postconviction relief motion unless (1) the motion, files, and records in the case conclusively show that the Defendant is entitled to no relief or (2) the motion or a particular claim is legally insufficient or procedurally barred. *Freeman v. State*, 761 So. 2d 1055, 1061 (Fla. 2000).

In ground 1, the Defendant claims that counsel was ineffective for failing to present voice identification expert testimony to challenge the reliability of the identification of the Defendant's voice based on: the use of a weapon, the short duration of the contact, multiple perpetrators, and because the identification was a cross-racial/cross ethnic identification of the Hispanic defendant by Caucasian victims – Larry Hopkins and Christopher Hopkins. Victim trial testimony established that the perpetrators were

"covered from head to toe" and wore masks, so the victims could not make visual identifications. The court finds the State's responses do not conclusively refute this claim, thus an evidentiary hearing is required.

In ground 2, the Defendant claims that counsel was ineffective for failing to move to suppress the Defendant's involuntary June 10, 2003, statements made to law enforcement in violation of his *Miranda* rights. The courts finds the State's responses do not conclusively refute this claim because the trial record does not resolve disputes of fact concerning the alleged circumstances under which the statements were made at the Sheriff's Office. Thus, an evidentiary hearing is required.

Ground 3 is voluntarily dismissed.

In ground 4, the Defendant claims that counsel was ineffective for failing to properly inform the Defendant regarding his right to testify at trial and for failing to prepare the Defendant to testify. The court finds the State's responses do not conclusively refute this claim, thus an evidentiary hearing is required. At the hearing the State will have the opportunity impeach the Defendant's credibility.

In ground 5, the Defendant claims that counsel was ineffective for failing to present witness Nichole Rodriguez to impeach victim Larry Hopkins' in-person identification of the Defendant's voice where Hopkins misidentified the Defendant during a phone conversation after the incident. The court finds the claim legally sufficient to warrant an evidentiary hearing. *Gallo v. State*, 183 So. 3d 1079, 1081 (Fla. 4th DCA 2015). At the hearing the State will have the opportunity to challenge the circumstances and admissibility of Rodriguez' testimony, and to cross examine Rodriguez and the Defendant.

In ground 6, the Defendant claims that counsel was ineffective for failing to present witnesses Kristy Ferguson, Paul Rodriguez, and Lauren Casooth at trial to impeach victim Larry Hopkins and to provide the Defendant an alibi defense. The courts finds the State's responses do not conclusively refute this claim, thus an evidentiary hearing is required. At the hearing the State will have the opportunity to impeach the credibility of these witnesses.

In ground 7, the Defendant claims that counsel was ineffective for failing to properly impeach victim Christopher Hopkins on his prior inconsistent statement concerning what he heard the Defendant say during the robbery. The court finds an evidentiary hearing is required to conclusively refute this claim.

In ground 8, the Defendant claims that counsel was ineffective for failing to further investigate whether a juror had improper contact with State witness, Deputy Scott DeMichael. The Defendant fails to allege facts concerning the contact including the trial judge's colloquy with the juror concerning the contact; but merely requests the opportunity to interview the juror. Consequently, the court finds the claim continues to be legally insufficient to demonstrate deficient performance and prejudice. Therefore, the Defendant is not entitled to relief.

In ground 9, the Defendant claims that counsel was ineffective for failing to ensure that the taped jail conversation referencing Kristy Ferguson was played for the jury. The court finds this claim related to ground 6 consequently an evidentiary hearing is warranted.

In ground 10, the Defendant claims that counsel was ineffective for failing to object to hearsay statements attributed to Kristy Ferguson and the Defendant's mother contained in a taped telephone conversation between victim Larry Hopkins and the Defendant. The State argues that failure to object to the tape may have been a defense trial strategy. Consequently, the court finds that an evidentiary hearing is required to determine the reasonableness of this trial strategy.

In ground 11, the Defendant claims that counsel was ineffective for failing to request a curative instruction or move for mistrial when a State witness informed the jury that the Defendant was on probation at the time of the offense and had recently been released from prison. The State argues that this may have been a defense trial strategy. Consequently, the court finds that an evidentiary hearing is required to determine the reasonableness of this trial strategy.

In ground 12, the Defendant claims that counsel was ineffective for failing to move for mistrial when the State shifted the burden of proof by improperly commenting that Paul

Rodriguez would be a good defense witness and thereby inferring that the defense should have produced Rodriguez. The court incorporates by reference the State's responses and adopts the State's reasoning in finding that the Defendant fails to demonstrate deficient performance and prejudice where defense counsel objected and the court gave a curative instruction informing the jury that the State has the burden of proof. Therefore, the Defendant is not entitled to relief.

Ground 13 is voluntarily dismissed.

Ground 14 – cumulative error, ruling is reserved until after the evidentiary hearing is conducted.

ORDERED THAT:

1. Grounds 3 and 13 are voluntarily dismissed.
2. Grounds 8 and 12 are denied.
3. An evidentiary hearing is granted on grounds 1, 2, 4, 5, 6, 7, 9, 10, and 11.
4. The court reserves ruling on ground 14 until after the evidentiary hearing is conducted.
5. A status hearing is scheduled on August 16, 2016, at 9:15 a.m./p.m., in Courtroom "3a" of the Saint Lucie County Courthouse, 218 South Second Street, Fort Pierce, Florida.
6. The Defendant will not be present at the status hearing unless defense counsel files a proposed order to transport.
7. This is a non-final, non-appealable order. A final order will be entered after the evidentiary hearing is conducted.

DONE AND ORDERED in chambers in Fort Pierce, Florida, on 5/26/16, 2015.

STEVEN J. LEVIN
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above order, including any attachments, has been sent to the following addressees by U.S. Mail, postage prepaid or by courthouse box delivery where indicated, to the following persons, on 5-27, 2016.

Copies to:

Michael Ufferman, Esquire
2022-1 Raymond Diehl Road
Tallahassee, FL 32308

Jeffrey Hendriks, ASA
Office of the State Attorney
By Courthouse Box

Joseph E. Smith
CLERK OF THE COURT

By: D. Miller
Deputy Clerk

FILE DATE: 05/27/2016

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR ST. LUCIE COUNTY, FLORIDA

STATE OF FLORIDA

vs.

JEROD RODRIGUEZ,

Defendant.
_____/

FELONY DIVISION
CASE NO.: 562003CF2252A

ORDER DENYING SECOND AMENDED RULE 3.850 MOTION

THIS CASE came before the Court in chambers on the Defendant's pro se motion dated December 13, 2007 and amended May 15, 2015, pursuant to Florida Rule of Criminal Procedure 3.850. The Court finds and orders as follows.

The Defendant was found guilty by jury on robbery with a firearm while wearing a mask, and burglary of a dwelling with an assault while armed and wearing a mask. The Defendant was sentenced to life in prison. The judgment and sentence were affirmed on direct appeal. *Rodriguez v. State*, 916 So. 2d 807 (Fla. 4th DCA 2005).

In his motion, the Defendant claims that his counsel was ineffective. In order to succeed on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also State v. Dickey*, 928 So. 2d 1193, 1196 (Fla. 2006). A defendant must establish specific acts or omissions of counsel that were "so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. To establish prejudice after the defendant has entered a plea, the prejudice prong will be satisfied by an allegation that there is a reasonable probability that, but for the counsel's error, the defendant would have rejected the plea and proceeded to trial. *Cousino v. State*, 770 So. 2d 1258, 1260 (Fla. 4th DCA 2000).

On August 16, 20016, this Court entered an order dismissing in part, denying in part, and granting an evidentiary hearing in part. (See Order attached as Ex. A). As part of his amended motion, the Defendant requested that the Court dismiss grounds 3 and 13. Additionally, this Court denied grounds 8 and 12. This Court set the following grounds for an evidentiary hearing: 1, 2, 4, 5, 6, 7, 9, 10, and 11. Further, this Court reserved ruling on ground 14.

Having reviewed the motion and amended motion along with the two State responses, this Court has reconsidered its findings and will deny grounds 1, 2, 4, 5, 6, 7, 9, 10, 11, and 14 based on the responses provided by the State. (See State response and supplemental response attached as Ex. B and C respectively).

It is hereby ORDERED that Grounds 1, 2, 4, 5, 6, 7, 9, 10, 11, and 14 of the Defendant's motion are DENIED.

Grounds 3 and 13 remain dismissed and grounds 8 and 12 remain denied as ordered in the prior order.

The Defendant has thirty days to seek appellate review.

DONE AND ORDERED in chambers in Fort Pierce, St. Lucie County, Florida on September 1, 2016.

STEVEN J. LEVIN
CIRCUIT COURT JUDGE

St. Lucie County File Date: 09/02/2016 13:48 PM

Excerpt of December 10, 2007,

Amended Motion for Postconviction

Relief

> If one letter in a continuing correspondence between two individuals is introduced, that letter by itself may be misleading. The entire correspondence is admissible in order to ensure that the jury fairly perceives what has occurred.

Charles W. Ehrhardt, Florida Evidence § 108.1, at 58 (2007 ed.). *See also Johnson v. State*, 653 So. 2d 1074 (Fla. 3d DCA 1995).

Based on the foregoing, counsel was ineffective for failing to ensure that all of the taped jail conversations involving Defendant Rodriguez were played for the jury.[11] Counsel's actions fell below the applicable standard of performance. Counsel's ineffectiveness affected the fairness and reliability of the trial, thereby undermining any confidence in the outcome. *See Johnson*, 921 So. 2d at 511-12. Defendant Rodriguez requests an evidentiary hearing on this claim.

J. Ground 10: Defense counsel rendered ineffective assistance of counsel by failing to object to the violation of Defendant Rodriguez' constitutional right of confrontation.

Supporting FACTS (tell your story briefly without citing cases or law):

Defense counsel rendered ineffective assistance by failing to object to the violation of Defendant Rodriguez' constitutional right of confrontation. As a result, Defendant Rodriguez was denied his right to effective assistance of counsel in violation of the Fourth, Fifth, Sixth, and Eighth Amendments to the United States Constitution and in violation of article I, section 16, of the Florida Constitution.

The Sixth Amendment to the United States Constitution provides in part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." Article I, section 16, of the Florida Constitution similarly provides that "[i]n all criminal prosecutions, the accused shall . . . have the right to . . . confront at trial adverse witnesses . . . .". In *Crawford v. Washington*, 541 U.S. 36, 51-69 (2004), the United States Supreme Court held that when the prosecution offers evidence of out-of-court statements of a declarant who does not testify, and the statements constitute "testimonial hearsay," the Confrontation Clause requires (1) that the declarant be unavailable and (2) a prior opportunity to cross-examine the declarant.

In Defendant Rodriguez' case, the prosecution played for the jury a tape of a telephone conversation between Defendant Rodriguez and Larry Hopkins. During the tape, Mr. Hopkins stated that Kristy Ferguson told him that Ms. Ferguson believed that Defendant Rodriguez participated in the offenses and took Mr. Hopkins' watch: "[S]he told me that she thought you took it." (T-349).[12]

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[11] Defendant Rodriguez continues to rely on the *Strickland* analysis set forth in Ground 1 above, and that analysis is incorporated by reference in support of Ground 9.

[12] Ms. Ferguson's alleged statement was highly prejudicial. There was no evidence linking Defendant Rodriguez to the alleged offenses, other than the victims' unreliable voice identifications. But by allowing the jury to hear Ms. Ferguson's hearsay statement, the State was able to inform the jury that Defendant Rodriguez' own girlfriend believed that he committed the offenses. Defendant Rodriguez was not afforded the opportunity to cross-examine or confront Ms. Ferguson regarding this alleged statement.

In closing argument, the prosecutor relied upon statements by Ms. Ferguson and Defendant Rodriguez' mother (statements that were also introduced by playing tapes for the jury). (T-776-77). Neither Ms. Ferguson nor Defendant Rodriguez' mother testified at trial. As a result, Defendant Rodriguez was denied his right to cross-examine and confront either of these witnesses. The State did not establish that either of these witnesses were unavailable or that Defendant Rodriguez had a prior opportunity to cross-examine either witness. Defense counsel should have objected to all hearsay statements made by Ms. Ferguson and Defendant Rodriguez' mother that were introduced by the State during the trial. Defense counsel should have objected on hearsay grounds and on *Crawford* grounds.

Based on the foregoing, counsel was ineffective for failing to object to the violation of Defendant Rodriguez' constitutional right of confrontation.[13] Counsel's actions fell below the applicable standard of performance. Counsel's ineffectiveness affected the fairness and reliability of the trial, thereby undermining any confidence in the outcome. *See Johnson*, 921 So. 2d at 511-12. Defendant Rodriguez requests an evidentiary hearing on this claim.

K. Ground 11: Defense counsel rendered ineffective assistance of counsel by failing to ask for a curative instruction and/or move for a mistrial when a State witness informed the jury that Defendant Rodriguez was on probation at the time of the alleged offenses and that he had recently been released from prison.

Supporting FACTS (tell your story briefly without citing cases or law):

Defense counsel rendered ineffective assistance by failing to ask for a curative instruction and/or move for a mistrial when a State witness informed the jury that Defendant Rodriguez was on probation at the time of the alleged offenses and that he had recently been released from prison. As a result, Defendant Rodriguez was denied his right to effective assistance of counsel in violation of the Fourth, Fifth, Sixth, and Eighth Amendments to the United States Constitution and in violation of article I, section 16, of the Florida Constitution.

At trial, the State presented the testimony of John Rodriguez. During defense counsel's cross-examination of Mr. Rodriguez, Mr. Rodriguez stated: "[Defendant Rodriguez has] only been out for – I only started hanging out with him for a couple of months since he's been out last time." (T-539). Later, Mr. Rodriguez was asked whether Defendant Rodriguez was held in jail without bail after he was arrested, and Mr. Rodriguez responded: "Yeah, I believe so, violation of probation."

"An accused's right to a fair and impartial jury is violated when a jury is improperly made aware of a defendant's arrest for unrelated crimes during the trial." Singletary v. State, 483 So. 2d 8, 9 (Fla. 2d DCA 1985). "A curative instruction will not necessarily erase the effect of improper testimony from the minds of jurors." *Id.* In *Singletary*, the Second District Court of Appeal reversed a defendant's conviction in part because a witness testified at trial that the defendant was on probation.

In the instant case, when Mr. Rodriguez improperly referred to Defendant Rodriguez' previous imprisonment and probationary status, defense counsel did not request a curative

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[13] Defendant Rodriguez continues to rely on the *Strickland* analysis set forth in Ground 1 above, and that analysis is incorporated by reference in support of Ground 10.

Excerpt of June 19, 2014,

State's Response to Defendant's Motion for

Postconviction Relief

53. As this claim is facially insufficient and fails to meet either prong of Strickland, this claim should be denied.

Ground 10: Failure to object to violation of right to confrontation

54. The defendant claims his attorney should have objected to audio recordings that included statements of people that did not testify.

55. First he complains that a portion of a jail phone call included a statement from the victim that Kristy Ferguson said she thought the defendant took it.

56. The entire exchange was the following:

> MR. RODRIGUEZ: Has - has Christy talked to you about this?
>
> MR. HOPKINS: Yeah, she told me that she thought you took it.
>
> MR. RODRIGUEZ: No, she - you're lying. No, she never said that. Christy never said that. I know she never said that. She told me that she believes I didn't do it and I didn't do it, Larry and Christy believes I didn't do it. Christy knows I'm not going (indiscernible) like that. At first she started wondering - she started thinking, then we started talking and then she told me she believes I wouldn't do nothing –

Transcript 349-350.

57. The exchange is admissible because of the defendant's reaction to the statement. In McWatters v. State the Florida Supreme Court explained:

> The Sixth Amendment's Confrontation Clause 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. In Crawford v. Washington, the Supreme Court held that testimonial hearsay that is introduced against a defendant violates the Confrontation Clause unless the declarant is unavailable and the defendant had a prior meaningful opportunity to cross-examine that witness. 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." Id. at 60 n. 9, 124 S.Ct. 1354 (citing Tennessee v. Street, 471 U.S. 409, 414, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985)).

36 So. 3d 613, 637-38 (Fla. 2010).

58. The defendant's reaction was not, "I didn't do it" or "You loaned me that watch" or

Excerpt of May 15, 2015,

Defendant's Amended Florida Rule of

Criminal Procedure 3.850 Claims Pursuant to the Court's

March 5, 2015, Order

Mr. Hopkins told the Defendant to stay away from Kristy Ferguson (which demonstrated that Mr. Hopkins was attempting to set up the Defendant because Mr. Hopkins was in love with Ms. Ferguson).

Ground 10: Defense counsel rendered ineffective assistance of counsel by failing to object to the violation of the Defendant's constitutional right of confrontation.[9]

The Sixth Amendment to the United States Constitution provides in part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." Article I, section 16, of the Florida Constitution similarly provides that "[i]n all criminal prosecutions, the accused shall . . . have the right to . . . confront at trial adverse witnesses . . . .". In *Crawford v. Washington*, 541 U.S. 36, 51-69 (2004), the United States Supreme Court held that when the prosecution offers evidence of out-of-court statements of a declarant who does not testify, and the statements constitute "testimonial hearsay," the Confrontation Clause requires (1) that the declarant be unavailable and (2) a prior opportunity to cross-examine the declarant.

In the Defendant's case, the prosecution played for the jury a tape of a telephone conversation between the Defendant and Larry Hopkins. During the tape, Mr. Hopkins stated that Kristy Ferguson told him that Ms. Ferguson believed that the Defendant participated in the offenses and took Mr. Hopkins' watch: "[S]he told me that she thought you took it." (T-349).[10] In closing argument, the prosecutor relied upon statements by Ms. Ferguson and the Defendant's mother (statements that were also introduced by playing tapes for the jury). (T-776-77). Neither Ms. Ferguson nor the

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[9] In the Court's March 5, 2015, order, the Court stated: "In grounds ten through twelve, the Defendant does not specifically assert how the comments would have affected the outcome of the trial, including whether there was a reasonable probability that a motion for mistrial would have been granted where applicable."

[10] Ms. Ferguson's alleged statement was highly prejudicial.

Defendant's mother testified at trial. As a result, the Defendant was denied his right to cross-examine and confront either of these witnesses. The State did not establish that either of these witnesses were unavailable or that the Defendant had a prior opportunity to cross-examine either witness. Defense counsel should have objected to all hearsay statements made by Ms. Ferguson and the Defendant's mother that were introduced by the State during the trial. Defense counsel should have objected on hearsay grounds and on *Crawford* grounds.

The improper hearsay statements affected the outcome of the trial – it was highly prejudicial for the jury to hear that Ms. Ferguson allegedly stated that she thought that the Defendant engaged in the criminal conduct – especially since the prosecutor relied on Ms. Ferguson's alleged statement during closing arguments. There was no evidence linking the Defendant to the alleged offenses other than Mr. Hopkins' unreliable voice identification. But by allowing the jury to hear Ms. Ferguson's hearsay statement, the State was able to inform the jury that the Defendant's own girlfriend believed that he committed the offenses. The Defendant was not afforded the opportunity to cross-examine or confront Ms. Ferguson regarding this alleged statement. Pursuant to *Crawford*, there is a reasonable probability that a motion for mistrial would have been granted had defense counsel properly moved for a mistrial.

Ground 11: Defense counsel rendered ineffective assistance of counsel by failing to ask for a curative instruction and/or move for a mistrial when a State witness informed the jury that the Defendant was on probation at the time of the alleged offenses and that he had recently been released from prison.[11]

At trial, the State presented the testimony of John Rodriguez. During defense counsel's

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[11] In the Court's March 5, 2015, order, the Court stated: "In grounds ten through twelve, the Defendant does not specifically assert how the comments would have affected the outcome of the trial, including whether there was a reasonable probability that a motion for mistrial would have been granted where applicable."

Excerpt of April 7, 2016,

State's Response to Defendant's Amended

Motion for Post Conviction Relief as ordered February 4, 2016

26. The State is making mention of this in particular because while the defendant feels that it may be *highly prejudicial* for a jury to have heard what Mr. Hopkins said in a jail call, common sense may dictate that the defendant (or a defense attorney) may have **wanted** a jury to hear the defendant deny any and all accusations, numerous times. All of this without the threat of having the defendant cross examined and the number of the defendant's prior felony convictions being displayed for a jury.

27. For the above reasons, coupled with the State's initial Response, the State is requesting this Ground be denied.

Ground 11

28. As it pertains to Ground 11, the State will be relying fully on its Response dated June 19, 2014.

Ground 12

29. In Ground 12, the defendant is alleging that his defense counsel was ineffective for failing to move for a mistrial.

30. What is particular about this Ground surrounds the overall claim of ineffectiveness of counsel. Here, the defendant is claiming his defense attorney was inefficient, yet, we have record evidence of the defense counsel making an appropriate and timely objection during the prosecutor's cross examination of the witness, Mr. Hernandez. Additionally, we have the Court agreeing with (sustaining) that objection. Finally, we have the Court making a curative instructive (arguably, siding with the defense attorney, yet again) which has been affirmed as the appropriate response. See State's Response of June 19, 2014, Ground 12, paragraph #72.

31. In the defendant's amended motion, he explains that the "prosecutor's comment was improper [and it] affected the outcome of the trial because it improperly/erroneously told the jury that the defendant had the burden to present a witness." Yet, this is exactly and precisely what the Court told the jury, immediately, in its curative instruction:

> THE COURT: Members of the jury, again, I remind you that the State has the burden of proof in this case. The defense does not have to prove anything.