IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-11848-E

IRVING LISBOA-CUPELY,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

Before: ROSENBAUM and GRANT, Circuit Judges.

BY THE COURT:

Irving Lisboa-Cupely has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's order dated September 8, 2021, denying his motion for a certificate of appealability and denying as moot his motion for leave to proceed on appeal *in forma pauperis*, in his appeal from the district court's denial of his *pro se* 28 U.S.C. § 2254 habeas corpus petition. Because Lisboa-Cupely has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motions, his motion for reconsideration is DENIED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-11848-E

IRVING LISBOA-CUPELY,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

ORDER:

Irving Lisboa-Cupely, a Florida prisoner, moves this Court for a certificate of appealability in order to appeal the District Court's order denying his 28 U.S.C. § 2254 habeas corpus petition. Mr. Lisboa-Cupely also moves for leave to proceed in forma pauperis. Because Mr. Lisboa-Cupely has not made a substantial showing of the denial of a constitutional right, his motion for a certificate of appealability is denied. His motion for in forma pauperis status is denied as moot.

I

In 2015, Mr. Lisboa-Cupely was convicted of a sexual battery offense. Florida's Fifth Circuit Court of Appeal affirmed his conviction and sentence. Mr. Lisboa-Cupely then filed a motion for postconviction relief under Florida Rule of Criminal Procedure 3.850 that raised two claims. First, Mr. Lisboa-Cupely alleged his trial counsel provided ineffective assistance of counsel by failing to properly advise him on the government's plea offer. Second, he alleged his counsel provided ineffective assistance by failing to investigate certain evidence. According to Mr. Lisboa-Cupely, his counsel should have investigated the victim's statements to a neighbor about the sexual abuse.

The Florida postconviction court denied the second claim outright and ordered an evidentiary hearing on the first claim. The postconviction court did not appoint counsel for Mr. Lisboa-Cupely in the evidentiary hearing. After the hearing, the postconviction court also denied the first claim. The Fifth Circuit Court of Appeal affirmed.

In 2019, Mr. Lisboa-Cupely filed his § 2254 petition. As in his state postconviction motion, he raised two claims. First, he alleged his counsel provided ineffective assistance by failing to properly advise him on the government's plea offer when his counsel did not fully inform him about the case. As part of this first claim, Mr. Lisboa-Cupely also alleged the state postconviction court abused its

discretion by not appointing him counsel for the evidentiary hearing. Second, he alleged his counsel provided ineffective assistance by failing to adequately investigate the victim's statements to the neighbor about the sexual abuse.

The District Court denied Mr. Lisboa-Cupely's § 2254 petition on the merits. As for the first claim, the District Court noted that although counsel testified he could not recall the specifics of Mr. Lisboa-Cupely's case, his normal practice was to convey a plea offer and to discuss the pros and cons of taking a plea or going to trial. Counsel further testified that his notes from the case reflect that he discussed the pros and cons of going to trial, the strengths and weaknesses of the case, the anticipated evidence, including the likely testimony of the victim and the doctor, and the possible sentence if Mr. Lisboa-Cupely went to trial. The District Court thus found counsel's testimony established that he provided Mr. Lisboa-Cupely with sufficient information to make an informed decision as to whether to accept the plea offer. The District Court also found Mr. Lisboa-Cupely did not show he would have accepted the plea offer but for the alleged deficient performance, as Lisboa-Cupely believed the evidence was insufficient to convict him. Finally, with respect to Mr. Lisboa-Cupely's separate allegation that the state postconviction court abused its discretion by not appointing him counsel for the evidentiary hearing, the District Court said this claim was not a cognizable federal habeas claim.

As for Mr. Lisboa-Cupely's second claim, the District Court found he did not show what evidence counsel's investigation would have uncovered, let alone that such evidence would have been exculpatory. As such, the District Court said Mr. Lisboa-Cupely could not establish deficient performance or prejudice. And to the extent Mr. Lisboa-Cupely claimed he was actually innocent or the state's evidence was insufficient, the District Court found his claim failed because the victim's testimony supported the conviction.

The District Court denied a certificate of appealability. Mr. Lisboa-Cupely appealed and now moves this Court for a certificate of appealability and for leave to proceed in forma pauperis.

II

In order to obtain a certificate of appealability, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 483–84, 120 S. Ct. 1595, 1603–04 (2000) (quotation marks omitted).

After a state court has adjudicated a claim on the merits, a federal court may grant habeas relief only if the state court's decision was (1) "contrary to, or

involved an unreasonable application of, clearly established Federal law," or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)–(2). So while this Court reviews de novo the District Court's ruling, it reviews the state court's decision with deference. Reed v. Sec'y, Fla. Dep't of Corr., 593 F.3d 1217, 1239 (11th Cir. 2010).

To succeed on a claim of ineffective assistance of counsel, a petitioner must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). Counsel's performance is deficient if it falls below an objective standard of reasonableness. See id. at 688, 104 S. Ct. at 2064. Prejudice occurs when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S. Ct. at 2068. When analyzing an ineffective-assistance claim under § 2254(d), this Court's review is "doubly" deferential. Harrington v. Richter, 562 U.S. 86, 105, 131 S. Ct. 770, 788 (2011). That means "the question is not whether counsel's actions were reasonable," but "whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." Id.

Here, reasonable jurists would not debate the District Court's denial of Mr. Lisboa-Cupely's § 2254 petition. As for his first claim, Mr. Lisboa-Cupely

cannot show that counsel was deficient by failing to properly advise him on the government's plea offer and inform him about the case because his allegation is unsupported by the record. Although counsel did not have an independent recollection of his conversation with Mr. Lisboa-Cupely about the plea offer, counsel's notes and normal practice indicate he discussed the pros and cons of going to trial, the strengths and weaknesses of the case, the anticipated evidence, and the possible sentence. Mr. Lisboa-Cupely thus cannot show that counsel made "errors so serious" that he was "not functioning as the 'counsel' guaranteed" by the Sixth Amendment. See Strickland, 466 U.S. at 687, 104 S. Ct. at 2064.

Mr. Lisboa-Cupely also cannot show he was prejudiced by any alleged deficiency. Mr. Lisboa-Cupely's testimony indicated he believed the evidence was insufficient to convict him, so he cannot demonstrate there was a reasonable probability that he would have pled guilty had counsel further discussed the case and the government's plea offer with him.[1]

As for his second claim, Mr. Lisboa-Cupely cannot establish his counsel was deficient by failing to adequately investigate the victim's statements to the neighbor about the sexual abuse and failing to call the neighbor to testify. Mr.

[1] As part of this first claim, Mr. Lisboa-Cupely alleged that the state postconviction court abused its discretion by not appointing him counsel for the evidentiary hearing. Reasonable jurists would not debate the District Court's resolution of this claim because this Court "has repeatedly held defects in state collateral proceedings do not provide a basis for habeas relief." Carroll v. Sec'y, Dep't of Corr., 574 F.3d 1354, 1365 (11th Cir. 2009).

Lisboa-Cupely did not show what evidence the investigation would have uncovered, and there is no indication any evidence would have been exculpatory. For the same reason, Mr. Lisboa-Cupely cannot demonstrate he was prejudiced by any alleged deficiency. To the extent Mr. Lisboa-Cupely sought to raise an actual-innocence claim or assert the evidence was insufficient to convict him, the victim's testimony that Lisboa-Cupely repeatedly sexually abused her was sufficient to show he committed the offense. See Burgos v. State, 667 So. 2d 1030, 1033 (Fla. 2d DCA 1996) (holding the victim's testimony of sexual abuse was sufficient to prove sexual battery offense).

For these reasons, Mr. Lisboa-Cupely's motion for a certificate of appealability is **DENIED**. His motion for leave to proceed in forma pauperis in this Court is **DENIED AS MOOT**.

Barry D. Martin

UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

IRVING LISBOA-CUPELY,

Petitioner,

v. Case No: 6:19-cv-498-GKS-GJK

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

Respondents.
_____/

ORDER

This case is before the Court on Petitioner Irving Lisboa-Cupely's Petition for Writ of Habeas Corpus ("Petition," Doc. 1) filed pursuant to 28 U.S.C. § 2254 and the Memorandum in Support of Petition ("Memorandum," Doc. 3). Respondents filed a Response to Petition ("Response," Doc. 14) and a Supplemental Response to Petition ("Supplemental Response," Doc. 20) in compliance with this Court's instructions. Petitioner filed a Reply to the Response ("Reply," Doc. 16), but he did not file a Reply to the Supplemental Response.

Petitioner asserts two grounds for relief. For the following reasons, the Petition is denied.

I. PROCEDURAL HISTORY

A jury convicted Petitioner of sexual battery on a person less than twelve

years of age by a person more than eighteen years of age. (Doc. 20-1 at 373.) The state court sentenced Petitioner to life in prison. (*Id.* at 402.) Petitioner appealed, and the Fifth District Court of Appeal of Florida ("Fifth DCA") affirmed *per curiam.* (Doc. 20-2 at 22.)

Petitioner filed a motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure, which he amended. (*Id.* at 63-73.) The state court denied one ground and ordered an evidentiary hearing on the remaining ground. (*Id.* at 97-100.) The state court denied relief after the hearing. (*Id.* at 169-72.) Petitioner appealed, and the Fifth DCA affirmed *per curiam.* (*Id.* at 211.)

II. LEGAL STANDARDS

A. Standard Of Review Under The Antiterrorism Effective Death Penalty Act ("AEDPA")

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

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The phrase "clearly established Federal law," encompasses only the holdings of the Supreme Court of the United States "as of the time of the

relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

A federal habeas court must identify the last state court decision, if any, that adjudicated the claim on the merits. *See Marshall v. Sec'y, Fla. Dep't of Corr.*, 828 F.3d 1277, 1285 (11th Cir. 2016). Where the state court's adjudication on the merits is unaccompanied by an explanation, the habeas court should "look through" any unexplained decision "to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). The presumption may be rebutted by showing that the higher state court's adjudication most likely relied on different grounds than the lower state court's reasoned decision, such as persuasive alternative grounds briefed or argued to the higher court or obvious in the record it reviewed. *Id.* at 1192–93, 1195–96.

For claims adjudicated on the merits, "section 2254(d)(1) provides two separate bases for reviewing state court decisions; the 'contrary to' and 'unreasonable application' clauses articulate independent considerations a federal court must consider." *Maharaj v. Sec'y for Dep't of Corr.*, 432 F.3d 1292, 1308 (11th Cir. 2005).

> Under the "contrary to" clause, a federal court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the United States Supreme Court] on a question of law or if the state court decides a case differently than [the United States Supreme Court] has on a set of materially indistinguishable facts. Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies

> the correct governing legal principle from [the United States Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case.

Parker v. Head, 244 F.3d 831, 835 (11th Cir. 2001). "For a state-court decision to be an 'unreasonable application' of Supreme Court precedent, it must be more than incorrect—it must be 'objectively unreasonable.'" *Thomas v. Sec'y, Dep't of Corr.*, 770 F. App'x 533, 536 (11th Cir. 2019) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)).

Under § 2254(d)(2), a federal court may grant a writ of habeas corpus if the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." A determination of a factual issue made by a state court is presumed correct, and the habeas petitioner must rebut the presumption of correctness by clear and convincing evidence. *See Parker*, 244 F.3d at 835-36; 28 U.S.C. § 2254(e)(1).

Where the state court applied the correct Supreme Court precedent, the federal court must consider whether the state court unreasonably applied that precedent or made an unreasonable determination of the facts. *Whatley v. Warden*, 927 F.3d 1150, 1181 (11th Cir. 2019). "'[A] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision.'" *Id.* at 1175 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). Federal courts may review a claim *de*

novo only if the state court's decision was based on an unreasonable application of Supreme Court precedent or an unreasonable determination of the facts. *Id.*

B. Standard For Ineffective Assistance Of Counsel

In *Strickland v. Washington*, the Supreme Court established a two-part test for determining whether a convicted person is entitled to relief because his counsel provided ineffective assistance. 466 U.S. 668, 687-88 (1984). To prevail under *Strickland*, a petitioner must demonstrate "(1) that his trial 'counsel's performance was deficient' and (2) that it 'prejudiced [his] defense.'" *Whatley*, 927 F.3d at 1175 (quoting *Strickland*, 466 U.S. at 687).

Prejudice "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. That is, "[t]he [petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.*

III. ANALYSIS

A. Ground One

Petitioner asserts counsel was ineffective for improperly advising him

regarding the State's ten-year plea offer.[1] (Doc. 1 at 5.) According to Petitioner, counsel failed to fully inform him about the case.[2] (Doc. 3 at 4.) Specifically, Petitioner complains that counsel failed to explain the strengths and weaknesses of the case, the probable testimony of the witnesses, and that the jury would likely believe the victim's and other witnesses' testimony over his testimony and was likely to convict him. (Doc. 20-2 at 67.)

Petitioner raised this ground in his Rule 3.850 motion. The lower court denied relief after an evidentiary hearing. (Doc. 20-2 at 169-72.) The court summarized the evidence presented at the hearing as follows:

> Defendant testified that he had three lawyers, but none of them explained the difference between a plea and a trial, and if he had known the difference, he would have taken the plea. On cross-examination, he acknowledged that he considered himself innocent, the evidence at trial

[1] Petitioner also asserts that the state court erred by not appointing him counsel for the evidentiary hearing in his post-conviction proceeding. (Doc. 3 at 1, 5-8.) The Eleventh Circuit Court of Appeals "has repeatedly held defects in state collateral proceedings do not provide a basis for habeas relief." *Carroll v. Sec', Dep't of Corr.*, 574 F.3d 1354, 1365 (11th Cir. 2009). Furthermore, there is no constitutional right to post-conviction counsel. *See Coleman v. Thompson*, 501 U.S. 722, 752 (1991), *abrogated in part by Martinez v. Ryan*, 566 U.S. 1 (2012). Therefore, this portion of Ground One is not a cognizable habeas claim. *See, e.g., Spradley v. Dugger*, 825 F.2d 1566, 1567 (11th Cir. 1987) (holding that the state trial court's alleged errors in the Rule 3.850 proceedings did not undermine the validity of the petitioner's conviction; therefore, the claim went to issues unrelated to the cause of the petitioner's detention and did not state a basis for habeas relief). Accordingly, this portion of Ground One is denied.

[2] Petitioner offers virtually no facts in either the Petition or his Memorandum to support this ground. *See* Doc. Nos. 1, 3. Instead, Petitioner outlines defense counsel's testimony at the evidentiary hearing and argues that the post-conviction judge's findings are erroneous in light of counsel's testimony. *See* Doc. 3 at 2-5. Because Petitioner indicates that he raised Ground One in his Rule 3.850 proceeding, the Court relies on Petitioner's allegations in his Rule 3.850 motion to address this ground.

> was a lie, and he believed he would be acquitted. He also acknowledged that his son told him he would be found not guilty, and that another lawyer, who did not represent him, told his son this. He asserted he did not realize he was facing a life sentence or that the charge was capital sexual battery on a child under 12. When asked what information he wanted from his attorney, he replied that counsel did not advise him of the gain time he would receive on the 10-year sentence. He admitted saying he was satisfied with counsel at trial but said that he did so because he did not want counsel to feel bad and now regrets it.
>
> Attorney Michael Morrison, who represented Defendant at trial, testified as follows: He reviewed his notes about this case, which he left with the public defender's office. He did not recall the plea offer but pursuant to his usual practice, the plea would have been conveyed. His notes indicate he discussed the pros and cons of trial with Defendant, along with Defendant's testimony, the depositions, and the probable testimonies of the victim and the doctor. He never tells clients what to do; he just tells them the probable outcomes. He acknowledged that he might say "this would probably be a good option," but makes it clear he cannot make the call and it is the client's decision whether to plea. He would have discussed the plea offer versus a life sentence but could not recall whether Defendant was amenable to an offer. He would have explained the concept of reasonable doubt but would never have told Defendant that he would be acquitted or convicted.

(Doc. 20-2 at 170-71.) The lower court found Petitioner's testimony that he did not know he was facing a life sentence not to be credible. (*Id.* at 171-72.) Conversely, the state court found counsel's testimony was credible that he discussed the depositions and probable testimonies of the witnesses with Petitioner. (*Id.* at 172.) The state court determined that Petitioner's testimony demonstrated that counsel went over the evidence with him and Petitioner thought the evidence was weak and that he would be acquitted. (*Id.*) The state court concluded that counsel's testimony refuted Petitioner's claim that counsel failed to properly convey the plea

offer by fully informing Petitioner about the case. (*Id.*) The Fifth DCA affirmed *per curiam*. (*Id.* at 211.)

The Sixth Amendment right to effective assistance of counsel extends to plea negotiations. *Lafler v. Cooper*, 566 U.S. 156, 162 (2012). Therefore, "[i]f a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it." *Id.* at 168. The two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984) applies to claims that counsel was ineffective during plea negotiations. *See id.* at 163 (recognizing that *Strickland*'s two-part test applies to federal habeas petitioner's claim that counsel was ineffective for advising him to reject a plea offer). With respect to the prejudice inquiry in the context of a foregone guilty plea, defendants must demonstrate:

> a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.

Missouri v. Frye, 566 U.S. 134, 147 (2012).

"Trials are difficult to predict, and advising a criminal defendant whether to accept or reject a plea offer can be a tricky proposition." *United States v. Martini*, 31 F.3d 781, 782 n.1 (9th Cir. 1994). To prevail under *Strickland*, "the advice would

have to fall outside a 'wide range of reasonable professional assistance.'" *Id.* (quoting *Strickland,* 466 U.S. at 689). "'[W]ithout evidence that [counsel] gave incorrect advice or evidence that he failed to give material advice, [a defendant] cannot establish that his lawyer's performance was deficient.'" *Mostowicz v. United States,* 625 F. App'x 489, 494 (11th Cir. 2015) (quoting *Burt v. Titlow,* 571 U.S. 12, 17 (2013)).

Petitioner has not shown that the state courts' denial of this ground is contrary to, or an unreasonable application of, *Lafler* or an unreasonable determination of the facts. "Credibility determinations are factual findings and therefore 'are presumed to be correct absent clear and convincing evidence to the contrary.'" *Guerra v. Sec'y, Dep't of Corr.*, 271 F. App'x 870, 871 (11th Cir. 2008) (quoting *Miller El v. Cockrell,* 537 U.S. 322, 340 (2003)). Petitioner has not established by clear and convincing evidence that the lower court's factual findings are incorrect.

At the evidentiary hearing, trial counsel testified that he could not recall the specifics of Petitioner's case. (Doc. 20-2 at 138.) Nevertheless, counsel said that his normal practice was to convey a plea offer as soon as possible to his client and to discuss the pros and cons of a plea and a trial. (*Id.* at 138.) Counsel testified that his notes from the case reflect that he discussed the pros and cons of a trial and the plea offer with Petitioner and the evidence that was anticipated. (*Id.* at 138, 153-

54.) Counsel further indicated that he would have discussed with Petitioner the probable testimony of the victim and the doctor and the sentence of life to which Petitioner was subject if he went to trial. (*Id.* at 139-40.) Counsel testified that he never tells his clients what the result will be if they proceed to trial, nor does he tell them that they should accept or reject a plea offer. (*Id.* at 139-41.) Instead, counsel said he advises his clients that the decision to enter a plea or proceed to trial is their decision alone. (*Id.* at 140-42.)

Petitioner testified that when he learned he was facing a life sentence, he did not tell his attorney that he wanted to accept the ten-year plea offer, but instead asked counsel what he should do, to which counsel responded that the decision was Petitioner's to make. (Doc. 20-2 at 123.) Petitioner noted that there was no proof, such as DNA evidence, that he committed the offense, and he maintained his innocence and said that he believed he was going to be acquitted based on the opinion of a lawyer with whom his son had spoken before the trial. (Doc. 20-2 at 119-20, 126.) Petitioner, however, testified that if trial counsel had told him that men often lose at trial when a case involves he said/she said evidence, then he would have taken the ten-year plea offer. (*Id.* at 125.) Petitioner admitted that counsel discussed the discovery materials with him, but he denied reviewing the victim's deposition with counsel. Petitioner testified that he did not think the evidence was sufficient to convict him. (*Id.* at 128-29.)

From counsel's testimony, counsel, in accordance with his normal practice, reviewed the evidence with Petitioner and advised him of the pros and cons of proceeding to trial and accepting the plea offer and of the sentence Petitioner faced if he proceeded to trial. Simply because counsel could not predict how the jury would view the evidence does not equate to deficient performance in advising Petitioner about the plea offer. *See, e.g., Turner v. Calderon,* 281 F.3d 851, 881 (9th Cir. 2002) ("Counsel cannot be required to accurately predict what the jury or court might find, but he can be required to give the defendant the tools he needs to make an intelligent decision."). "Trial counsel was not constitutionally defective because he lacked a crystal ball." *Id.* In sum, counsel was not required to tell Petitioner that the jury would most likely believe the victim over him or that he should accept the plea offer. Rather, counsel was required to give Petitioner sufficient information to evaluate his options and make an informed decision, which counsel did from the evidence presented.

Finally, Petitioner has not shown that a reasonable probability exists that he would have accepted the plea offer but for counsel's purported deficient performance. By his own admission, Petitioner did not think the evidence was sufficient to convict him and he maintained his innocence. Accordingly, Ground One is denied pursuant to § 2254(d).

B. Ground Two

Petitioner asserts counsel rendered ineffective assistance by failing to investigate and present a witness at trial. (Doc. 3 at 9-12.) Petitioner complains that counsel should have found the neighbor/friend that the victim said she told that Petitioner sexually abused her when she was nine years old.[3] (*Id.*)

Petitioner raised this ground in his Rule 3.850 motion. The lower court determined that the claim was purely speculative. (Doc. 20-2 at 99-100.) The court reasoned that, as acknowledged by Petitioner, the neighbor/friend could have supported the victim's testimony that she told her about the sexual abuse that occurred when she was nine. (*Id.* at 99.) The Fifth DCA affirmed *per curiam*. (*Id.* at 211.)

The state courts' denial of this ground is not contrary to, or an unreasonable application of, *Strickland*. Petitioner has not offered any evidence demonstrating what testimony the neighbor/friend would have provided. "[E]vidence about the

[3] In the Petition, Petitioner summarily states that counsel failed to investigate and he is actually innocent. (Doc. 1 at 7.) From Petitioner's Memorandum, the crux of Ground Two appears to be that counsel failed to investigate to locate the neighbor/friend whom the victim testified that she confided in. (Doc. 3 at 9-12.) To the extent Petitioner raises any other argument in Ground Two, such as actual innocence or a lack of evidence regarding sexual abuse occurring when the victim was younger than twelve years of age, this ground is denied. The victim testified at trial about the sexual abuse perpetrated by Petitioner when she was between the ages of nine and eleven, as charged in the Information. Petitioner, therefore, has not demonstrated actual innocence or ineffective assistance of counsel in relation to these allegations. Accordingly, this portion of Ground Two, if raised, is denied pursuant to § 2254(d).

testimony of a putative witness must generally be presented in the form of actual testimony by the witness or on affidavit. A defendant cannot simply state that the testimony would have been favorable; self-serving speculation will not sustain an ineffective assistance claim." *United States v. Ashimi*, 932 F.2d 643, 650 (7th Cir. 1991) (footnotes omitted)). As alluded to by the state court, it is equally likely that the neighbor/friend would have provided inculpatory testimony, not exculpatory testimony. Therefore, this ground is completely speculative. *See Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991) (holding that vague, conclusory, or speculative allegations cannot support a claim of ineffective assistance of counsel). Petitioner, therefore, has not established either deficient performance or prejudice. Accordingly, Ground Two is denied pursuant to § 2254(d).

Any of Petitioner's allegations not addressed are without merit.

IV. CERTIFICATE OF APPEALABILITY

This Court should grant an application for certificate of appealability only if the Petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Lamarca v. Sec'y, Dep't of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009). When a district court dismisses a federal habeas petition on procedural grounds

without reaching the underlying constitutional claim, a certificate of appealability should issue only when a petitioner shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*; *Lamarca*, 568 F.3d at 934. However, a prisoner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

Petitioner has not demonstrated that reasonable jurists would find the Court's assessment of the constitutional claims debatable or wrong. Moreover, Petitioner cannot show that jurists of reason would find this Court's procedural rulings debatable. Petitioner has failed to make a substantial showing of the denial of a constitutional right. Thus, the Court will deny Petitioner a certificate of appealability.

For the foregoing reasons, it is **ORDERED AND ADJUDGED** as follows:

1. The Petition for Writ of Habeas Corpus (Doc. 1) is **DENIED**, and this case is **DISMISSED WITH PREJUDICE.**

2. Petitioner is **DENIED** a Certificate of Appealability.

3. The Clerk of the Court is directed to enter judgment accordingly and close this case.

DONE and **ORDERED** in Orlando, Florida on April 27, 2021.

G. KENDALL SHARP
SENIOR UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party