IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-13250-G

JAMES LAPOINT,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee,

STATE OF FLORIDA,

Respondent.

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

ORDER:

James LaPoint moves for a certificate of appealability in order to appeal the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition. To merit a certificate of appealability, LaPoint must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). LaPoint's motion for a certificate of appealability is DENIED because he failed to make the requisite showing.

UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

April 26, 2022

Clerk - Middle District of Florida
U.S. District Court
U.S. Courthouse and Federal Building
2110 1ST ST
FORT MYERS, FL 33901

Appeal Number: 21-13250-G
Case Style: James LaPoint v. Secretary, Florida Department of Corrections
District Court Docket No: 2:19-cv-00858-SPC-MRM

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Any pending motions are now rendered moot in light of the attached order.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Lee Aaron, G
Phone #: 404-335-6172

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

JAMES LAPOINT,

Petitioner,

v. Case No: 2:19-cv-858-SPC-MRM

SECRETARY, DOC,

Respondent.
_____/

OPINION AND ORDER[1]

Before the Court is James LaPoint's Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (Doc. 8).

Background

The State of Florida charged LaPoint with sexual activity with a child and lewd or lascivious molestation, stemming from a sexual relationship between LaPoint and his daughter. (Doc. 12-2 at 52). Attorney Erin Casey—assisted by Ryan Downey—represented LaPoint at trial and sentencing. A jury found LaPoint guilty of both counts. (*Id.* at 61-62). The trial court

[1] Disclaimer: Documents hyperlinked to CM/ECF are subject to PACER fees. By using hyperlinks, the Court does not endorse, recommend, approve, or guarantee any third parties or the services or products they provide, nor does it have any agreements with them. The Court is also not responsible for a hyperlink's availability and functionality, and a failed hyperlink does not affect this Order.

sentenced LaPoint to 45 years in prison, the maximum statutory sentence. (*Id.* at 117-19).

LaPoint appealed, represented by attorneys Brooke Elvington and Howard Dimmig. They presented one issue: the trial court erred by excluding evidence of an unrelated arrest. (Doc. 12-3 at 3-17). The 2nd DCA affirmed LaPoint's conviction without a written opinion. (*Id.* at 64). LaPoint filed a Petition Alleging Ineffective Assistance of Appellate Counsel. (*Id.* at 68-109). The 2nd DCA denied the petition after reviewing the appellate record. (*Id.* at 187).

LaPoint filed a Motion for Postconviction Relief under Florida Rule of Criminal Procedure 3.850, asserting ten grounds. (Doc. 12-4 at 13-44). The postconviction court summarily denied some grounds and dismissed the others with leave to amend. (Doc. 12-5 at 2-24). LaPoint filed an amended Rule 3.850 motion. (*Id.* at 248-87). The postconviction court summarily denied it. (*Id.* at 305). The 2nd DCA affirmed on appeal without a written opinion. (Doc. 12-6 at 167). LaPoint's federal habeas Petition timely followed.

Applicable Habeas Law

A. AEPDA

The Antiterrorism Effective Death Penalty Act (AEDPA) governs a state prisoner's petition for habeas corpus relief. 28 U.S.C. § 2254. Relief may only

be granted on a claim adjudicated on the merits in state court if the adjudication:

> (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). This standard is both mandatory and difficult to meet. *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014). A state court's violation of state law is not enough to show that a petitioner is in custody in violation of the "Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); *Wilson v. Corcoran*, 562 U.S. 1, 16 (2010).

"Clearly established federal law" consists of the governing legal principles set forth in the decisions of the United States Supreme Court when the state court issued its decision. *White*, 134 S. Ct. at 1702; *Casey v. Musladin*, 549 U.S. 70, 74 (2006) (citing *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). Habeas relief is appropriate only if the state court decision was "contrary to, or an unreasonable application of," that federal law. 28 U.S.C. § 2254(d)(1). A decision is "contrary to" clearly established federal law if the state court either: (1) applied a rule that contradicts the governing law set forth by Supreme Court case law; or (2) reached a different result from the Supreme Court when

faced with materially indistinguishable facts. *Ward v. Hall*, 592 F.3d 1144, 1155 (11th Cir. 2010); *Mitchell v. Esparza*, 540 U.S. 12, 16 (2003).

A state court decision involves an "unreasonable application" of Supreme Court precedent if the state court correctly identifies the governing legal principle, but applies it to the facts of the petitioner's case in an objectively unreasonable manner, *Brown v. Payton*, 544 U.S. 133, 134 (2005); *Bottoson v. Moore*, 234 F.3d 526, 531 (11th Cir. 2000), or "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Bottoson*, 234 F.3d at 531 (quoting *Williams*, 529 U.S. at 406). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fair-minded jurists could disagree on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). "[T]his standard is difficult to meet because it was meant to be." *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2558 (2018).

Finally, when reviewing a claim under 28 U.S.C. § 2254(d), a federal court must remember that any "determination of a factual issue made by a State court shall be presumed to be correct[,]" and the petitioner bears "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *Burt v. Titlow*, 134 S. Ct. 10, 15 (2013) ("[A] state-court factual determination is not unreasonable merely because the

federal habeas court would have reached a different conclusion in the first instance.").

B. Exhaustion and Procedural Default

AEDPA precludes federal courts, absent exceptional circumstances, from granting habeas relief unless a petitioner has exhausted all means of relief available under state law. Failure to exhaust occurs "when a petitioner has not 'fairly presented' every issue raised in his federal petition to the state's highest court, either on direct appeal or on collateral review." *Pope v. Sec'y for Dep't. of Corr.*, 680 F.3d 1271, 1284 (11th Cir. 2012) (quoting *Mason v. Allen*, 605 F.3d 1114, 1119 (11th Cir. 2010)). The petitioner must apprise the state court of the federal constitutional issue, not just the underlying facts of the claim or a similar state law claim. *Snowden v. Singletary*, 135 F.3d 732, 735 (11th Cir. 1998).

Procedural defaults generally arise in two ways:

> (1) where the state court correctly applies a procedural default principle of state law to arrive at the conclusion that the petitioner's federal claims are barred; or (2) where the petitioner never raised the claim in state court, and it is obvious that the state court would hold it to be procedurally barred if it were raised now.

Cortes v. Gladish, 216 F. App'x 897, 899 (11th Cir. 2007). A federal habeas court may consider a procedurally barred claim if (1) petitioner shows "adequate cause and actual prejudice," or (2) if "the failure to consider the claim

would result in a fundamental miscarriage of justice." *Id.* (citing *Coleman v. Thompson*, 501 U.S. 722, 749-50 (1991)). Another gateway through a procedural bar exists for claims of ineffective assistance of trial counsel. If the state court did not appoint counsel in the collateral proceeding, or if collateral-review counsel was ineffective, a petitioner may overcome procedural default by "demonstrat[ing] that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Martinez v. Ryan*, 566 U.S. 1, 13 (2012).

C. Ineffective Assistance of Counsel

In *Strickland v. Washington*, the Supreme Court established a two-part test for determining whether a convicted person may have relief for ineffective assistance of counsel. 466 U.S. 668, 687-88 (1984). A petitioner must establish: (1) counsel's performance was deficient and fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced the defense. *Id.* This is a "doubly deferential" standard of review that gives both the state court and the petitioner's attorney the benefit of the doubt. *Burt*, 134 S. Ct. at 13 (citing *Cullen v. Pinholster*, 131 S. Ct. 1388, 1403 (2011)).

When considering the first prong, "courts must 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Sealey v. Warden*, 954 F.3d 1338, 1354 (11th Cir. 2020) (quoting *Strickland*, 466 U.S. at 689). And "[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." *Franks v. GDCP Warden*, 975 F.3d 1165, 1176 (11th Cir. 2020) (quoting *Harrington*, 562 U.S. at 101). Thus, a habeas petitioner must "show that no reasonable jurist could find that his counsel's performance fell within the wide range of reasonable professional conduct." *Id.*

The second prong requires the petitioner to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Sealey*, 954 F.3d at 1355 (quoting *Strickand*, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* The critical question on federal habeas review is not whether this Court can see a substantial likelihood of a different result had defense counsel taken a different approach. *Mays v. Hines*, 141 S. Ct. 1145, 1149 (2021). All that matters is whether the state court, "notwithstanding its substantial 'latitude to reasonably determine that a defendant has not [shown prejudice],' still managed to blunder so badly that every fairminded jurist would disagree." *Id.* (quoting *Knowles v. Mirazayance*, 556 U.S. 111, 123 (2009)).

"An ineffective-assistance claim can be decided on either the deficiency or prejudice prong." *Sealey*, 954 F.3d at 1355. And "[w]hile the *Strickland* standard is itself hard to meet, 'establishing that a state court's application of

Strickland was unreasonable under § 2254(d) is all the more difficult.'" *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 105 (2011)).

Discussion

A. Ground 1: The trial court erred by trying LaPoint without holding a competency hearing.

LaPoint claims that after the first day of trial, the court ordered his placement in direct observation—a type of confinement meant to ensure an inmate cannot hurt himself. At the sentencing hearing, LaPoint urged the court not to put him back in direct observation, stating, "And mental health cleared me as soon as they came in and talked to me. They know I don't have any desire to hurt myself." (Doc. 12-2 at 568). The trial court then explained its earlier decision:

> THE COURT: I had you placed in direct observation because you were showing, in the courtroom, a mental state that I was very concerned about.
>
> THE DEFENDANT: Your Honor, that's the first time I got to see my daughter since these accusations were made. It was an emotional time for me.
>
> THE COURT: I'm just telling you, sir, I observed something that concerned me as to whether or not you were going to do something to yourself or others.

(*Id.* at 569-70).

LaPoint argues the trial court violated his due process rights because it did not order a competency hearing after placing him in direct observation.

LaPoint did not raise this issue in his direct appeal or his state postconviction challenges. It is thus unexhausted and procedurally barred. *See Raheem v. GDCP Warden*, 995 F.3d 895, 928 (11th Cir. 2021).

A substantive incompetency claim generally cannot be procedurally barred. *Id.* at 929. LaPoint explicitly stated in his Reply, "the nature of this claim is procedural versus substantive." (Doc. 18 at 12). Even so, the Court finds that LaPoint has not established any violation of his substantive due process rights. "The substantive test for competency is whether a defendant has, at the time of trial, sufficient ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *Id.* (cleaned up). The trial court's concern of potential self-harm is not evidence of LaPoint's incompetence to stand trial. And LaPoint's trial testimony demonstrates that he understood the charges and was able to communicate with his counsel.

As a procedural due process claim, Ground 1 is unexhausted and barred. To the extent Ground 1 raises a substantive due process argument, the Court denies it on the merits because LaPoint presents no evidence that he was incompetent.

B. Ground 2: Trial counsel failed to request a competency hearing.

LaPoint next claims Casey's failure to request a competency hearing amounted to ineffective assistance of counsel. LaPoint raised this ground in his Rule 3.850 motion, and the postconviction court denied it:

> First, the allegations of mental health issues made by Defendant are, at best, vague and speculative. Defendant makes no specific claims to what type of issue he may have had, and in fact alleges only that he was "possibly being mentally unstable" during the trial. Counsel cannot be deemed to have been ineffective for not raising an issue that is merely speculative. Also, Defendant, as a postconviction movant, is presumed to have been competent at trial. Defendant has not, in the instant motion, demonstrated otherwise. The record reflects that the Defendant was coherent, lucid, and appropriate during trial, and Defendant has not demonstrated a reasonable probability that had his counsel moved for a competency hearing, such a hearing and evaluation would have resulted in Defendant being found incompetent to stand trial. Next, if Defendant wishes to establish prejudice in this context, he must show clear and convincing circumstances that raise a "real, substantial and legitimate doubt" as to his competency. As stated above, Defendant has not spelled out any facts that could conceivably lead the Court to find that he was not competent, only claims of vague "mental health issues." Based on the record, Defendant cannot make a reasonable argument that he was not competent during his testimony at trial, and therefore his counsel cannot be deemed to have been ineffective for raising an issue that did not exist at trial.

(Doc. 12-5 at 20 (citations omitted)).

LaPoint claims two parts of the record refute the postconviction court's ruling. First, LaPoint argues his trial testimony demonstrated his incompetence because his answers "were going off in tangents and not making any sense." (Doc. 18 at 14). But a careful review of LaPoint's testimony shows that while he did frequently raise matters that were tangential to the question

posed, he was coherent and lucid. LaPoint clearly understood the charges against him and was able to communicate with his attorney. Second, LaPoint points to the trial court's concerns about his mental state after the first day of trial. But, as noted above, the trial court was concerned that LaPoint might hurt himself, not that he was incompetent to stand trial.

The postconviction court's denial of this ground was a reasonable application of *Strickland*. The record shows that LaPoint understood the charges against him and was able to communicate with his counsel. There was no reason for Casey to request a competency hearing. She thus cannot be deemed deficient for not raising the issue, and LaPoint suffered no prejudice. Ground 2 is denied.

C. Ground 3: Appellate counsel failed to make a competency argument

LaPoint argues Elvington and Dimmig provided constitutionally deficient representation because they did not make a competency argument in the direct appeal. LaPoint exhausted this ground by raising it in his Petition Alleging Ineffective Assistance of Appellate Counsel (*see* Doc. 12-3 at 105-08), which the 2nd DCA denied.

LaPoint fails to satisfy either *Strickland* prong. As explained above, the trial record demonstrates that LaPoint understood the charges against him and was able to communicate with his trial counsel. A competency argument

on appeal would have been meritless. And even if the argument did have merit, it was not preserved for appellate review. *See Morrison v. State*, 818 So. 2d 432, 446 (Fla. 2002) ("In order to preserve the issue for appellate review, a party must have made the same argument to the trial court that it raises on appeal."). Elvington and Dimmig cannot be deemed deficient for not raising a meritless, foreclosed argument on appeal, and LaPoint was not prejudiced by its omission. Ground 3 is denied.

D. Ground 4: Appellate counsel failed to supplement the record on appeal.

The State moved to dismiss LaPoint's direct appeal because some trial exhibits were omitted from the record: nine letters between LaPoint and the victim, the victim's notebook, and the recording of a jail phone call (but not the transcript). (Doc. 12-2 at 51-55). The State argued the omitted evidence would help show that any error was harmless. Elvington and Dimmig argued the exhibits were unnecessary considering the issue on appeal—whether the trial court erred by excluding evidence of LaPoint's unrelated arrest. (Doc. 12-3 at 57-60). LaPoint was incarcerated in New York when police began investigating his relationship with his daughter. LaPoint wanted to explain to the jury why he had been arrested, but the trial judge excluded the details as irrelevant.

The Second District Court of Appeal of Florida (2nd DCA) denied the motion to dismiss the appeal "without prejudice for the appellee to file a motion to supplement the record." (*Id.* at 62). Neither side moved to supplement.[2]

LaPoint asserts the result of his appeal would have been different if his appellate counsel had supplemented the record. But that assertion is conclusory. LaPoint's sole argument on appeal was that his arrest and incarceration hurt his credibility in the eyes of the jury and that an explanation could have mitigated that harm. He does not explain how the omitted exhibits might have impacted the 2nd DCA's decision on that point. According to the briefing filed with the 2nd DCA, attorneys for both sides apparently believed the omitted exhibits would only help the State. And indeed, the State used them at trial to help prove that LaPoint had a sexual relationship with his daughter.

LaPoint has not satisfied either prong of *Strickland*. Elvington and Dimmig's argument that the exhibits were irrelevant to the issue raised on appeal was reasonable. In fact, the 2nd DCA apparently agreed. Their decision to omit the exhibits was well within the bounds of reasonable

[2] LaPoint claims he filed a *pro se* motion to supplement, but it is not included in the record before this Court. It appears the 2nd DCA struck it, presumably because LaPoint could not appear on his own behalf while represented by counsel. (*See* Doc. 12-3 at 48).

professional judgment. And there is no reasonable probability the exhibits could have helped LaPoint on appeal. Ground 4 is denied.

E. Ground 5: Trial counsel failed to present sentencing arguments in writing.

At LaPoint's sentencing hearing, Casey made two arguments: the court should depart downward because the victim was a willing participant; and the court should not depart upwards because of factors already considered in the sentencing guidelines score. The trial court sentenced LaPoint to consecutive sentences of 30 years and 15 years, the statutory maximum. LaPoint argues Casey should have submitted her arguments in writing.

LaPoint did not present this ground to the state court. He invokes *Martinez* to excuse his failure to exhaust and avoid a procedural bar. The *Martinez* exception only applies to claims that are substantial—that is, claims that have some merit. *Martinez*, 566 U.S. at 13. This ground is not substantial. Presenting sentencing arguments verbally instead of in writing is reasonable—in fact, it is common in state court. Casey provided the court hard copies of cases supporting her arguments. (Doc. 12-2 at 92-97). And noting in the record suggests an additional written submission would have been more successful than a verbal argument. This ground is procedurally barred.

F. Ground 6: Appellate counsel failed to file a motion to correct sentencing error.

This ground is based on LaPoint's conclusory assertion that a motion to correct would have resulted in resentencing and a downward departure. This ground is unexhausted and procedurally barred. LaPoint did not raise it in state court, and *Martinez* does not apply to claims of ineffective assistance of appellate counsel. *See Luciano v. Sec'y, Dep't of Corr.*, 701 F. App'x 792, 794 (11th Cir. 2017).

Even if this ground was not procedurally barred, it lacks merit. LaPoint does not identify any error in sentencing, and the Court's review of the record reveals none. The trial court imposed a sentence within the statutory range. A motion to correct would have been meritless. Even so, LaPoint can object to his sentence at any time, so he has not suffered any conceivable prejudice. *See* Fla. R. Crim. P. 3.800(a)(1) ("A court may at any time correct an illegal sentence impose by it..."). Ground 6 is denied.

DENIAL OF CERTIFICATE OF APPEALABILITY

A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253(c)(1). Rather, a district court must first issue a certificate of appealability (COA). "A [COA] may issue...only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, a petitioner must demonstrate that "reasonable jurists would find the district

court's assessment of the constitutional claims debatable or wrong," *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (*quoting Slack v. McDaniel*, 529 U.S. 473, 484 (2000)), or that "the issues presented were adequate to deserve encouragement to proceed further," *Miller–El v. Cockrell*, 537 U.S. 322, 335–36 (2003) (citations omitted). LaPoint has not made the requisite showing here and may not have a certificate of appealability on any ground of his Petition.

Accordingly, it is now

ORDERED:

James LaPoint's Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (Doc. 8) is **DENIED**. The Clerk is **DIRECTED** to terminate all deadlines and motions, enter judgment, and close the case.

DONE and **ORDERED** in Fort Myers, Florida on August 23, 2021.

SHERI POLSTER CHAPPELL
UNITED STATES DISTRICT JUDGE

SA: FTMP-1

Copies: All Parties of Record

James R. Lapoint, Appellant / Petitioner(s), v. State Of Florida, Appellee / Respondent(s).
COURT OF APPEAL OF FLORIDA, SECOND DISTRICT
229 So. 3d 334; 2016 Fla. App. LEXIS 18556
CASE NO.: 2D16-3606
November 18, 2016, Decided

Notice:

DECISION WITHOUT PUBLISHED OPINION

Editorial Information: Prior History

L.T. No.: 13-CF-254.

Judges: LaROSE, MORRIS, and BLACK, JJ., Concur.

Opinion

BY ORDER OF THE COURT:

Petitioner's petition alleging ineffective assistance of appellate counsel is denied. The appellate record is still on file in this court and was consulted in reviewing petitioner's petition.

LaROSE, MORRIS, and BLACK, JJ., Concur.

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