IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 22-10513-E

DAVID PRIESTER,

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:

David Priester'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). His motions for leave to proceed *in forma pauperis* are DENIED AS MOOT.

UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DAVID PRIESTER,

Petitioner,

v. Case No: 6:20-cv-830-RBD-DCI

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

Respondents.
_____/

ORDER

This cause is before the Court on the Petition for Writ of Habeas Corpus ("Petition," Doc. 1) filed by Petitioner under 28 U.S.C. § 2254. Respondents filed a Response to Petition ("Response," Doc. 16) in compliance with this Court's instructions and with the *Rules Governing Section 2254 Cases in the United States District Courts*. Petitioner filed a Reply (Doc. 23) and an Amended Reply (Doc. 26) to the Response. For the following reasons, the Court concludes that Petitioner is not entitled to relief on his claims.

I. PROCEDURAL BACKGROUND

The State Attorney in and for the Eighteenth Judicial Circuit charged Petitioner by amended criminal information in Seminole County, Florida with one

count of grand theft (Count One), one count of criminal use of personal identification (Count Two), one count of unauthorized use of driver's license (Count Three), one count of forgery of a credit card/possession with intent to defraud (Count Four), one count of battery on a law enforcement officer (Count Five), and one count of resisting arrest without violence (Count Six). (Doc. 18-1 at 46-47.) Petitioner proceeded to a bench trial and represented himself. Petitioner did not testify or present witnesses. The trial court found Petitioner guilty of all counts. (*Id.* at 187.)

The trial court adjudicated Petitioner guilty of the offenses and sentenced him to imprisonment for a total term of ten years. (*Id.* at 194-95, 253-57.) Petitioner filed a direct appeal with Florida's Fifth District Court of Appeal ("Fifth DCA"), which affirmed *per curiam*. (*Id.* at 1032.)

During the pendency of the appeal, Petitioner filed a motion for postconviction relief and a petition for writ of habeas, which the trial court denied for lack of jurisdiction. (*Id.* at 378-79.) The United States Supreme Court denied Petitioner's petition for review as untimely. (*Id.* at 1067.)

II. LEGAL STANDARDS

A. Standard of Review Under the Antiterrorism Effective Death Penalty Act ("AEDPA")

Pursuant to 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
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> (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 United States Supreme Court "as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

"[S]ection 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. Secretary for Dep't. of Corr.*, 432 F.3d 1292, 1308 (11th Cir. 2005). The meaning of the clauses was discussed by the Eleventh Circuit Court of Appeals in *Parker v. Head*, 244 F.3d 831, 835 (11th Cir. 2001):

> 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.

Even if the federal court concludes that the state court applied federal law incorrectly, habeas relief is appropriate only if that application was "objectively unreasonable."[1] *Id.*

Finally, 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, however, shall be presumed correct, and the habeas petitioner shall have the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Parker*, 244 F.3d at 835-36.

B. Standard for Ineffective Assistance of Counsel

The United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), established a two-part test for determining whether a convicted person is

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[1] In considering the "unreasonable application" inquiry, the Court must determine "whether the state court's application of clearly established federal law was objectively unreasonable." *Williams*, 529 U.S. at 409. Whether a state court's decision was an unreasonable application of law must be assessed in light of the record before the state court. *Holland v. Jackson*, 542 U.S. 649, 652 (2004) (*per curiam*); *cf. Bell v. Cone*, 535 U.S. 685, 697 n. 4 (2002) (declining to consider evidence not presented to state court in determining whether its decision was contrary to federal law).

entitled to relief on the ground that his counsel rendered ineffective assistance: (1) whether counsel's performance was deficient and "fell below an objective standard of reasonableness"; and (2) whether the deficient performance prejudiced the defense.[2] *Id.* at 687-88. A court must adhere to a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* at 689-90. "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *Gates v. Zant*, 863 F.2d 1492, 1497 (11th Cir. 1989)

As observed by the Eleventh Circuit Court of Appeals, the test for ineffective assistance of counsel:

> has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial. Courts also should at the start presume effectiveness and should always avoid second guessing with the benefit of hindsight. *Strickland* encourages reviewing courts to allow lawyers broad discretion to represent their clients by pursuing their own strategy. We are not interested in

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[2] In *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993), the United States Supreme Court clarified that the prejudice prong of the test does not focus solely on mere outcome determination; rather, to establish prejudice, a criminal defendant must show that counsel's deficient representation rendered the result of the trial fundamentally unfair or unreliable.

> grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.

White v. Singletary, 972 F.2d 1218, 1220-21 (11th Cir. 1992) (citation omitted). Under those rules and presumptions, "the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between." *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994).

III. ANALYSIS

A. Claim One

Petitioner states that he is "actual[ly] innocen[t] of intentional battery" because there was "no material testimony" as to the act being intentional. (Doc. 1 at 9.) Petitioner mentions that "the sequence of the incident failed to show" that he "directed his eyes to the officer" as the deputy entered the bank. (*Id.*) Petitioner appears to have raised this claim on direct appeal, and it was found to be without merit.

The standard of review in a federal habeas corpus proceeding when the claim is that the petitioner has been convicted on insufficient evidence was articulated in *Jackson v. Virginia*, 443 U.S. 307 (1979), and described as follows:

> [W]hether, after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of

> fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.

Id. at 319. Although the facts as they exist in the record may support opposing inferences, a federal habeas court must presume that the jury resolved such conflicts in favor of the prosecution and against the defendant. *See Heath v. Jones*, 863 F.2d 815, 820 (11th Cir. 1989).

Deputy Dana Lang had been given a complete description of Petitioner. (Doc. 18-1 at 680.) Lang was in full uniform and testified that he locked eyes with Petitioner while Petitioner was still standing at the teller counter awaiting the return of the teller. (*Id.* at 681-82, 718.) Petitioner then tried to leave the bank, walking with his head down, and Lang put a hand on his arm to detain him. (*Id.* at 681, 716.) Petitioner "jerked" his arm away and then shoved Lan to the ground. (*Id* at 682, 716.)

At trial, Petitioner presented no evidence contradicting Lang's testimony that he and Petitioner locked eyes and that Petitioner then tried to exit the bank by walking past the deputy. Nor was there any dispute that Lang was acting in his official capacity.[2] The evidence clearly shows that Petitioner struck Lang, that he

[2] In particular, Lang was dispatched to the bank and had Petitioner's description as a "person of interest" to be detained for a felony in progress. (*Id.* at 702-03.)

fled from Lang who was giving chase, and that he disregarded the warning to stop. (*Id.* at 682-83, 685-88, 725).

In light of the evidence presented at trial, the Court concludes that the evidence, when viewed in a light most favorable to the State and after resolving all conflicts in favor of the prosecution, mandates the denial of Petitioner's claim. *See Machin v. Wainwright,* 758 F.2d 1431, 1435 (11th Cir. 1991) (the federal habeas court must presume that conflicting inferences to be drawn from the evidence were resolved by the trier of fact in favor of the prosecution). The Court determines that a rational trier of fact could have found the essential elements of this crime beyond a reasonable doubt. Under the *Jackson* standard, there was sufficient evidence to support the trial court's verdict. Claim One is denied.[3]

B. Claim Two

Petitioner states that he is "actual[ly] innocen[t] of grand theft" because the "witness testimony [did] not claim ownership of bank account or a theft thereof."

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[3] Further, relief must be denied based on section 2254(d). Petitioner has failed to demonstrate that the adjudication of the claim by the state court 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. In addition, Petitioner has not shown that the adjudication of the claim 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.

(Doc. 1 at 11.) Petitioner appears to have raised this claim on direct appeal, and it was found to be without merit.

The trial court found that Petitioner "knowingly and unlawfully . . . endeavored to obtain . . . U.S. currency of Daniel Choquette, and he did so with the intent to either temporarily or permanently deprive Daniel Choquette of his right to the property . . . ." (*Id.* at 854-55.) Grand theft involves an illegal taking or an attempt to illegally take property of another. § 812.014, Fla. Stat. In the present case, Petitioner used a forged driver's license and counterfeit credit card to give the impression that he was the account owner. (Doc. 18-1 at 615, 635-43.) As such, there is ample evidence to prove intent to commit the crime of grand theft.

The Court determines that a rational trier of fact could have found the essential elements of this crime beyond a reasonable doubt. Under the *Jackson* standard, there was sufficient evidence to support the trial court's verdict. Claim Two is denied.[4]

C. Claim Three

Petitioner states that he was denied due process because he did not receive a copy of the video from the bank, sworn affidavits from the victims, and

[4] Further, relief must be denied based on section 2254(d).

"disclosure of the actual source for the officer's probable cause." (Doc. 1 at 13.) He cursorily mentions that he was denied "counsel's assistance with court procedure." (*Id.*) It is not clear whether these matters were raised with the state courts. However, the Court will address the merit of Claim Three.

This claim is without merit. First, the record does not reflect that a bank video was ever entered into evidence or sought in discovery. Petitioner has not cited to any part of the record where he requested a video or moved to compel its production. Moreover, Petitioner has not established that a video of the incident was available and, even if available, would have been exculpatory.

Second, the victim testified during trial that he was not asked by the prosecutor or by a law enforcement officer to make a written statement. (*Id.* at 619-21.) There was no contradictory evidence introduced at trial, and the witness was not impeached. Even if a statement had been given, Petitioner has not shown that he was prejudiced given the victim testified and was subject to cross-examination.

Third, there was probable cause to detain Petitioner. In particular, his driver's license identification was shown to be fraudulent after the bank conducted a black-light analysis.[5] (*Id.* at 640-41, 666-67.)

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[5] In addition, a person is not justified in committing a battery upon a law enforcement officer to resist even an unlawful arrest. *See Meeks v. State*, 369 So.2d 109 (Fla.

Finally, Petitioner represented himself at trial and standby counsel was appointed on his behalf. Petitioner's allegations with regard to this issue are vague and conclusory and are inadequate as a matter of law to raise a cognizable claim of ineffective assistance of counsel. *See United States v. Cranshaw*, 817 F. Supp. 723, 728 (N.D. Ill. 1993). As such, Petitioner's bald assertions are inadequate to overcome the presumption that counsel acted reasonably, and his "failure to specify his allegations does not meet the requirement of *Strickland*." *Id.* at 728; *see also Matura v. United States*, 875 F. Supp. 235, 237 (S.D.N.Y. 1995).

In addition, because there is no constitutional right to standby counsel, a petitioner cannot claim standby counsel was ineffective. *See United States v. Windsor*, 981 F.2d 943, 947 (7th Cir. 1992) (noting "[t]his court knows of no constitutional right to effective assistance of standby counsel."); *Behr v. Bell*, 665 So. 2d 1055, 1056-57 (Fla. 1996) (quoting *Faretta v. California*, 422 U.S. at 835 n.46) (holding "a defendant who represents himself has the entire responsibility or his own defense, even if he has standby counsel. Such a defendant cannot thereafter complain that the quality of his defense was a denial of 'effective assistance of counsel.'").

1st DCA 1979). Thus, even if the attempted detention was unlawful, Petitioner was not entitled to commit battery upon the deputy.

The allegations in Claim Three are without merit. Additionally, Petitioner has failed to demonstrate that the state court's decision rejecting his claim was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. Claim Three is denied.

D. Claim Four

Petitioner states that he was denied "sworn affidavits to challenge [the] right to prosecute," "effective counsel for mental health assistance," and the right to appellate counsel. (Doc. 1 at 15.) It is not clear whether these matters were raised with the state courts. However, the Court will address the merit of Claim Four.

This claim is without merit. Petitioner filed a motion to dismiss on the basis that there was a violation of Florida Rule of Criminal Procedure 3.140(g).[6] Under Florida law, it is only when the State knowingly relies on false information that an information can be dismissed. *See State v. Gonzalez*, 212 So. 3d 1094, 1098 (Fla. 5th

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[6] Rule 3.140(g) provides as follows:

> (g) **Signature, Oath, and Certification; Information**. An information charging the commission of a felony shall be signed by the state attorney, or a designated assistant state attorney, under oath stating his or her good faith in instituting the prosecution and certifying that he or she has received testimony under oath from the material witness or witnesses for the offense .... No objection to an information on the ground that it was not signed or verified, as herein provided, shall be entertained after the defendant pleads to the merits.

DCA 2017) ("Unless the sworn testimony is so lacking that a reasonable prosecutor cannot be said to have acted in good faith, then the challenge should be rejected.").

The trial court held a hearing on the issue. The prosecutor entered into evidence the report by a Sanford Police investigator, a police report from Ventura County, California (the domicile of the victim), and the arrest report from a Seminole County deputy. (Doc. 18-1 at 554.) The contents of the reports were summarized during the hearing. (*Id.* at 558-62, 569-70.) Petitioner later admitted at the hearing that the State had "established good faith" and that he was "not saying they haven't made a good faith decision." (*Id.* at 563, 573.) The trial court then stated, "Okay. Well then that ends your argument." (*Id.* at 573.) As such, the trial court properly denied Petitioner's motion since there was no showing of bad faith. (*Id.* at 575-76.)

Further, although Petitioner claims that he was denied effective counsel for mental health assistance, there is nothing in the record which reveals that Petitioner suffered from any mental issues during the commission of the crimes or throughout the underlying criminal proceedings during which he filed motions, argued in court, and represented himself in a bench trial. There has been no showing of ineffective assistance of counsel.

Finally, Petitioner was appointed appellate counsel on direct appeal. Appellate counsel reviewed the record, obtained three supplemental records, and filed an *Anders* brief.[7] Petitioner filed a *pro se* supplemental brief. This issue is without merit.

The allegations in Claim Four are without merit. Additionally, Petitioner has failed to demonstrate that the state court's decision rejecting his claim was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. Claim Four is denied.[8]

Allegations not specifically addressed herein are without merit.

IV. CERTIFICATE OF APPEALABILITY

This Court should grant an application for a 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 "[t]he petitioner must

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[7] *Anders v. California*, 386 U.S. 738, 744 (1967) ("[I]f [appellate] counsel finds [the defendant's] case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal.").

[8] The Court also finds Petitioner's cursory allegations of being "[d]enied the entire constitution, right of citizenship, and the American Dream" to be without merit. (Doc. 1 at 15).

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). However, the petitioner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

Petitioner fails to demonstrate that reasonable jurists would find the district 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 fails to make a substantial showing of the denial of a constitutional right. Thus, the Court will deny Petitioner a certificate of appealability.

V. CONCLUSION

Accordingly, it is **ORDERED** and **ADJUDGED** as follows:

1. The Petition for Writ of Habeas Corpus (Doc. 1) is **DENIED**.

2. This case is **DISMISSED with prejudice**.

3. Petitioner is **DENIED** a certificate of appealability in this case.

4. The Clerk of the Court is directed to enter judgment in favor of Respondents and to close this case.

DONE and **ORDERED** in Orlando, Florida on January25, 2022.

ROY B. DALTON JR.
United States District Judge

Copies furnished to:

Counsel of Record
Unrepresented Party