BBB –

ORDER DENYING MOTION TO EXPAND THE RECORD
AND MOTION FOR RECONSIDERATION
CASE # 20-62252-CV-AHS

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-14087-E

TAJ COLLIER,

Petitioner-Appellant,

versus

FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

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

ORDER:

Taj Collier first moves to file an out-of-time motion for a certificate of appealability ("COA"). That motion is GRANTED. His next motion, dependent on the first, is for a COA to appeal the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition. Collier'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. *See* 28 U.S.C. § 2253(c)(2).

/s/ Britt C. Grant
UNITED STATES CIRCUIT JUDGE

NNN –

ORDER DENYING RECONSIDERATION CASE # 21-14087

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-14087-E

TAJ COLLIER,

Petitioner-Appellant,

versus

FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

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

Before: ROSENBAUM and GRANT, Circuit Judges.

BY THE COURT:

Taj Collier has filed two amended motions for reconsideration of this Court's May 2, 2022, order denying a certificate of appealability on appeal from the denial of his 28 U.S.C. § 2254 motion and subsequent motion for reconsideration. Upon review, Collier's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

WW –

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS
CASE # 20-62252-CV-AHS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 20-62252-CIV-SINGHAL

TAJ COLLIER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ORDER

THIS CAUSE is before the Court on *pro se* Petitioner Taj Collier's Motion to Expand the record (DE [18]) and Motion to Alter Judgment (DE [22]). Petitioner filed a 28 U.S.C. § 2254 Petition for Writ of Habeas Corpus ("Petition") (DE [1]), challenging the constitutionality of his conviction and sentence entered following a jury trial in the Seventeenth Judicial Circuit, Broward County, Case No. 06-4699CF10D. (DE [1]). The Court previously issued an order denying the Petition. (DE [15]).

Petitioner now requests that the Court expand the record to include a copy of his motion for rehearing following the state court's order on his postconviction motion and the state court's order denying the motion for rehearing. (DE [18]). He argues that these documents provide additional support for the third claim raised in these proceedings, namely, that trial counsel was ineffective in failing to tailor the motion to suppress to the facts of Petitioner's arrest. *See generally id.* The state concedes that it failed to include these documents in the state court record it provided to this Court but argues that the

documents are not relevant to these proceedings. (DE [20]). The state has now filed a copy of these two documents. *See* (DE [21]).

District courts have discretion to decide whether to expand the record in a habeas case. *See Bishop v. Burnett*, 312 Fed. Appx. 252, 254 n.2 (11th Cir. 2009). *See also* Rule 7 of the Rules Governing Section 2254 Cases. In the Court's order denying the Petition, the Court denied Claim 3 on the merits, noting that Petitioner was challenging a strategic decision made by his defense counsel. *See* (DE [15] at 19) (holding that "[s]trategic choices made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable") (citing *Strickland v. Washington*, 466 U.S. 668, 690–91 (1984)). Nothing contained in the documents Petitioner now seeks to make part of the record alter the Court's conclusion that Claim 3 lacks merit.

Petitioner also seeks to alter the judgment (DE [22]), which the Court construes as a motion for reconsideration. "Reconsideration is an extraordinary remedy to be employed sparingly." *Holland v. Florida*, 2007 WL 9705926, at *1 (S.D. Fla. June 26, 2007) (citation and internal quotation marks omitted). "The only grounds for granting a motion for reconsideration 'are newly-discovered evidence or manifest errors of law or fact.'" *United States v. Dean*, 2020 WL 7655426, at *2 (11th Cir. Dec. 23, 2020) (quoting *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007) (per curiam)). A motion for reconsideration should raise new issues, not merely address issues litigated previously. *Socialist Workers Party v. Leahy*, 957 F. Supp. 1262, 1263 (S.D. Fla. 1997). "A party's disagreement with the court's decision, absent a showing of manifest error, is not sufficient to demonstrate entitlement to relief." *Dean*, 2020 WL 7655426, at *2 (citing *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1344 (11th Cir. 2010)). Here, Petitioner

reiterates many of the arguments he made in his original Petition. *See generally* (ECF No. 22). However, Petitioner fails to point to any newly discovered evidence or manifest errors of law or fact. *See Dean*, 2020 WL 7655426, at *2. He is not entitled to relief on his motion for reconsideration. Accordingly, it is hereby

ORDERED AND ADJUDGED that Petitioner's Motion to Expand the Record (DE [18]) is **DENIED** and Petitioner's Motion for Reconsideration (DE [22]) is **DENIED**.

DONE AND ORDERED in Chambers, Fort Lauderdale, Florida, this 5th day of November 2021.

RAAG SINGHAL
UNITED STATES DISTRICT JUDGE

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HHH –

MOTION DENYING CERTIFICATE OF APPEALABILITY
CASE # 21-14087

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 20-62252-CIV-SINGHAL

TAJ COLLIER,

Petitioner,

v.

MARK S. INCH,

Respondent.
_____/

ORDER DENYING
PETITION FOR WRIT OF *HABEAS CORPUS*

I. INTRODUCTION

Taj Collier, presently confined at the Cross City Correctional Institution, has filed this *pro se* Petition for writ of *habeas corpus* pursuant to 28 U.S.C. § 2254, challenging the constitutionality of his conviction and sentence entered following a jury trial in the Seventeenth Judicial Circuit, Broward County, Case No. 06-4699CF10D. (DE [1]).

In consideration of the Petition (DE [1]), the Court has received the state's response (DE [8]) to this Court's order to show cause along with its supporting appendix and state court transcripts (DE [9], [10]).

The instant petition presents the following claims for relief:

1. The state trial court erred in denying Petitioner's motion to suppress.
2. Appellate counsel was ineffective in failing to argue on direct appeal that the trial court erred in denying the motion to suppress.
3. Trial counsel was ineffective in failing to tailor the motion to suppress to the facts of Petitioner's arrest.
4. Trial counsel was ineffective in failing to secure Petitioner's Due Process rights.

5. Florida's Fourth District Court of Appeal erred in rejecting Petitioner's ineffective assistance of appellate counsel argument in his petition for writ of habeas corpus.

After reviewing the pleadings, for the reasons stated in this order, the Petition is DENIED because Petitioner is not entitled to relief on the merits.

II. FACTUAL AND PROCEDURAL HISTORY

The state charged Petitioner with conspiracy to traffic in oxycodone (Count 2), trafficking in oxycodone (Count 3), and possession of over 20 grams of cannabis (Count 6). (DE [9-1] at 12-14). Petitioner filed a pre-trial motion to suppress the evidence. (DE [9-1] at 16–21). Part of the evidence the state presented at the suppression hearing follows. *See generally* (DE [10-1], Suppression Hearing Transcript, at 38–9, 81). In 2006, Broward County Sheriff's Office ("BSO") Detectives Olson and Schwartz began investigating an organized scheme to obtain controlled substances with fraudulent prescriptions. *Id. at* 38–9, 81. The Detectives learned that a group of Black men and women would go to pharmacies and pay cash for controlled substances using fraudulent prescriptions. *Id. at* 39. BSO set up surveillance at one of the pharmacies the people involved frequented, identifying a number of suspects involved in the scheme. *Id.*

On January 9, 2006, officers observed a Buick registered to Petitioner's co-defendant, Evelyn Saffold, drop two Black men and one Black woman off at a pharmacy. (DE [10-1] at 39). On January 16, 2006, two Black men, including Petitioner, went to the same pharmacy with prescriptions from the same doctor that signed the prescriptions turned over on January 9, 2006. *Id. at* 39–40. The two men left their IDs at the pharmacy. *Id. at* 40).

On January 18, 2006, officers arrested five individuals who attempted to obtain controlled substances with fraudulent prescriptions. (DE [10-1] at 40). The people

responded and detained Hankerson. *Id. at* 9-13, 38). Officer Jackson called Detective Schwartz and learned more about the ongoing investigation and that there could be other individuals involved in a vehicle nearby. *Id. at* 11, 38.

Hankerson told Officer Jackson that she received the prescription from an accomplice who was waiting in a nearby parking lot in a car described by Hankerson. (DE [10-1] at 12). HBPD Officer Keating found Evelyn Saffold in a car outside matching the one Hankerson described. *Id.* After Saffold and Hankerson were detained in the parking lot, Detectives Olson and Schwartz arrived. *Id. at* 25, 44-45, 80-81. Schwartz recognized Saffold on sight and Olson recognized her name as someone involved in the prescription scheme. *Id. at* 49, 83.

While Olson was speaking with Saffold, a green Cadillac drove past them, eastbound on Hallandale Beach Blvd. (DE [10-1] at 84). Saffold gestured toward the Cadillac and said, "If you want the man in charge, that's him right there." *Id. at* 49, 84. Olson looked up and saw only one vehicle. *Id. at* 84. The vehicle made a U-turn and began traveling westbound. *Id. at* 85. The windows were down, and the car moved unusually slowly. *Id. at* 49, 70, 85. The driver, later identified as Petitioner, was staring at the police activity and Olson immediately recognized the driver as one of the people he arrested on February 27, 2006. *Id. at* 49–50, 85.

Schwartz got into Officer Keating's vehicle to help effectuate a stop of the Cadillac. (DE [10-1] at 25, 50). Schwartz wanted to stop the car to determine Petitioner's involvement in the offense under investigation that day at Pillstore Pharmacy. *Id. at* 55–6, 73). According to Schwartz's sworn testimony:

> In all my training and experience and doing this type of investigation, from the previous contacts, the previous arrests,

arrested were in the Buick registered to Saffold. *Id. at* 40, 87. The officers obtained information from the arrest which led to a hotel where officers believed the people behind the scheme were staying. *Id.* at 40. Police officers recovered a Florida ID card in the hotel room bearing Petitioner's name. *Id.* at 40–41. A pharmacy in Pembroke Pines gave officers photocopies of fake prescriptions filled there. *Id.* at 87. Petitioner's name was listed as the patient on these fake prescriptions. *Id.*

On February 27, 2006, the detectives received a call from a pharmacy in Oakland Park where a suspected fraudulent prescription was being filled. (DE [10-1] at 41). Detectives responded to the scene and subsequently detained and arrested two individuals, including Petitioner, for attempting to fill a fraudulent prescription. *Id.* at 41, 55, 68. Police located the vehicle Petitioner used to travel to the pharmacy and found prescription paper and notebooks of blank prescription forms. *Id.* at 41. The prescription Petitioner attempted to fill at the pharmacy was consistent with the paper found in the car as well as with the paper recovered throughout the investigation. *Id.*

During the investigation, detectives subpoenaed Pillstore Pharmacy in Hallandale Beach, where pharmacist, David Rabini, worked. (DE [10-1] at 13–4, 37). On March 20, 2006, Rabini grew suspicious when Petitioner's co-defendant, Lashawn Hankerson, attempted to fill a prescription which looked like the prescriptions officers subpoenaed earlier and identified as fraudulent. *Id. at* 9–10, 37. When Rabini attempted to contact the doctor listed on the prescription, the person who answered could not pronounce the doctor's name and refused to allow Rabini to speak with the doctor. *Id.*

Rabini contacted Detectives Olson and Schwartz, who told him to contact the Hallandale Beach Police Department ("HBPD"). (DE [10-1] at 10). HBPD Officer Jackson

> and all the information and evidence that we recovered, it would lead me to believe that there's in my mind no doubt that [Petitioner] was involved in that prescription that was being filled that day.

Id. at 56–7. Furthermore, the prescription Hankerson attempted to fill was similar to the prescriptions recovered from Petitioner's car during his February 27, 2006 arrest. *Id.* at 41, 63, 76.

After officers stopped the Cadillac, they removed Petitioner and two passengers from the car to question all three. (DE [10-1] at 52, 64). Once police detained Petitioner, he was not free to leave. *Id.* at 64, 73. Passenger and co-defendant James Willis said Petitioner had picked him up earlier, given him prescriptions, and asked him to try to fill them. *Id.* at 53. Willis successfully filled one in Miami and gave the medication to Petitioner. *Id.* Police arrested Petitioner and then searched the vehicle. *Id.* at 56. Officers found a prescription bottle containing Oxycontin with the name "James Willis" and a prescription receipt for Oxycontin in James Willis's name. *Id.* Documentation in the car identified Petitioner as the vehicle's owner. *Id.*

Petitioner argued at the suppression hearing that Saffold's tip was uncorroborated and did not provide a valid basis for the subsequent investigatory stop of Petitioner's vehicle. (DE [9-1] at 16). Following the evidentiary hearing, the state trial court denied the motion. *Id.* at 23–9. The court ruled that Saffold's tip, made during a face-to-face conversation with detectives, had a raised level of credibility and other information within the detectives' knowledge, such as recognizing Saffold's name as being connected to Petitioner, Petitioner's arrest on similar charges, and his presence at the scene, helped corroborate the tip. *Id.* The state court concluded that given the totality of the

circumstances, police had a well-founded, articulable suspicion to perform an investigatory stop on Petitioner's vehicle. *Id.*

Petitioner proceeded to trial. (DE [10-2], Trial Transcript). The jury ultimately found him guilty of Counts 2 and 3 and not guilty of Count 6. (DE [9-1] at 31-33). The trial court adjudicated Petitioner guilty of Counts 2 and 3. *Id. at* 35-46). The trial court sentenced Petitioner to 30 years with a 25-year mandatory minimum as to Count 2 and sentenced him to 30 years with a 15-year mandatory minimum as to Count 3, to run consecutively to the sentence imposed under Count 2. *Id.*

Petitioner filed a direct appeal in Florida's Fourth District Court of Appeal ("Fourth DCA"). (DE [9-1] at 48). The Fourth DCA affirmed the conviction and sentence. *See Collier v. State*, 114 So. 3d 949 (4th DCA 2013).

Petitioner next filed a petition for writ of habeas corpus in the Fourth DCA arguing that his appellate counsel was ineffective in failing to assert that the trial court erred in denying the motion to suppress. (DE [9-1] at 128-44). After the state filed a response, the Fourth DCA denied the petition. *Id.* at 170–78. Petitioner filed a motion for rehearing, which the Fourth DCA denied. *Id.* at 180–85. Petitioner filed a second petition for writ of habeas corpus wherein he raised the same argument. *Id.* at 189–207. The Fourth DCA dismissed the petition as improperly successive. *Id.* at 209. Petitioner appealed in the Florida Supreme Court which declined to exercise discretionary jurisdiction. *Id.* at 214–49.

Petitioner also filed a petition for writ of habeas corpus in the state trial court alleging that the trial court denied the motion to suppress based on a factual mistake. (DE [9-1] at 251-58). The state trial court denied the petition as an improper successive filing

and noted that the Fourth DCA had already addressed and rejected the Petitioner's argument. *Id.* at 261. Petitioner appealed. *Id.* at 263. The Fourth DCA *per curiam* affirmed the denial in *Collier v. State*, 214 So. 3d 686 (Fla. 4th DCA 2017) (citing *Kuehl v. Bradshaw*, 954 So. 2d 653, 655 (Fla. 4th DCA 2007)). The Fourth DCA denied Petitioner's motion for rehearing. (DE [9-2] at 1-13).

Petitioner next filed a motion and amended motion for post-conviction relief in the state trial court pursuant to Fla. R. Crim. P. 3.850. (DE [9-2] at 15-49, 53-88). Petitioner argued under claims 1 and 2 that trial counsel was ineffective in failing to prepare and present an adequate motion to suppress the unlawful search and seizure of the items in his vehicle and in failing to move to sever the suppression motion from the motions to suppress filed by Petitioner's co-defendants. *Id.* at 18-23, 56-61. The state filed a response. *Id.* at 92-128. The trial court issued an order summarily denying all but the third claim. *Id.* at 212-16. Following an evidentiary hearing on claim 3 (DE [9-4] Rule 3.850 Evidentiary Hearing Transcript), the trial court issued an order denying the motion. (DE [9-2] at 220–25).

On appeal, the Fourth DCA affirmed the denial of the motion for post-conviction relief. *Collier v. State*, 295 So. 3d 768 (Fla. 4th DCA 2020). Petitioner filed a motion for rehearing, which the Fourth DCA denied on June 8, 2020. (DE [9-2] at 231). The Mandate issued June 26, 2020. *Id.*

III. STATUTE OF LIMITATIONS AND EXHAUSTION

The state properly concedes that the petition was filed timely. (DE [8] at 12). The state, citing *Stone v. Powell*, 428 U.S 465, 469 (1976), argues that Petitioner's first claim is not cognizable in this proceeding because a federal court may not consider a claim that a state court denied a motion to suppress under the Fourth Amendment where a petitioner fully litigated the claim in state court. (DE [8] at 19).

In his first claim, Petitioner contends that the state trial court erred in denying his motion to suppress. (DE [1] at 5–11). According to Petitioner, the police stop of his vehicle constituted an arrest instead of an investigatory stop, and police did not have probable cause to arrest him at that time. *Id.*

Petitioner's claim is barred by the Supreme Court's decision in *Stone* where the Court held that federal courts have no authority to review a state court's application of Fourth Amendment principles in habeas corpus proceedings unless the petitioner was denied a full and fair opportunity to litigate his claims in state court. *See Peoples v. Campbell*, 377 F.3d 1208, 1224–26 (11th Cir. 2004) (holding that *Stone* precluded consideration on habeas review of claim alleging arrest lacked probable cause); *See also Bradley v. Nagle*, 212 F.3d 559, 564 (11th Cir. 2000) (holding that *Stone* precluded consideration of a claim alleging an invalid search).

Here, counsel challenged the validity of the stop and all evidence flowing from it. (DE [9-1] at 16-21). The trial court conducted an evidentiary hearing on the Fourth Amendment issues raised by counsel. (DE [10-1]). The trial court denied the motion. (DE [9-1] at 23-29). Furthermore, the appellate court rejected this claim when Petitioner unsuccessfully argued in his petition for writ of habeas corpus that appellate counsel was

ineffective in failing to challenge the trial court's ruling on the suppression motion. *Id.* at 128-44, 170-78.

In sum, Petitioner was not deprived of a full and fair opportunity to litigate this claim in state court. Moreover, there is no indication that the state court's determination was based on erroneous factors. Accordingly, the Court may not review this claim. *See Stone*, 428 U.S. at 494.

Petitioner's claim is also unexhausted because he did not raise the same underlying argument in his motion to suppress that he raises here. In the state court proceedings, Petitioner argued that police lacked a well-founded, reasonable articulable suspicion to conduct an investigatory stop of his vehicle. In this court, he argues that the evidence in his car should have been suppressed because his arrest was illegal.

An applicant's federal writ of habeas corpus will not be granted unless the applicant exhausted his state court remedies. 28 U.S.C. § 2254(b), (c). A claim must be presented to the highest court of the state to satisfy the exhaustion requirement. *See O'Sullivan v. Boerckel*, 526 U.S. 838 (1999); *Richardson v. Procunier*, 762 F.2d 429, 430 (5th Cir. 1985). In a Florida non-capital case, this means the applicant must have presented his claims in a district court of appeal. *See Upshaw v. Singletary*, 70 F.3d 576, 579 (11th Cir. 1995). The claims must be presented in State court in a procedurally correct manner. *Id.*

Moreover, the habeas applicant must have presented the state courts with the same federal constitutional claim that is being asserted in the habeas petition. "It is not sufficient merely that the federal habeas petitioner has been through the state courts . . . nor is it sufficient that all the facts necessary to support the claim were before the state courts or that a somewhat similar state-law claim was made." *Kelley v. Sec'y, Dep't of*

Corr., 377 F.3d 1317 (11th Cir. 2004) (citing *Picard v. Connor*, 404 U.S. 270, 275-76 (1971); *Anderson v. Harless*, 459 U.S. 4, 6 (1982)). A petitioner is required to present his claims to the state courts such that the courts have the "opportunity to apply controlling legal principles to the facts bearing upon [his] constitutional claim." *Picard* at 275–77. To satisfy this requirement, "[a] petitioner must alert state courts to any federal claims to allow the state courts an opportunity to review and correct the claimed violations of his federal rights." *Jimenez v. Fla. Dep't of Corr.*, 481 F.3d 1337 (11th Cir. 2007) (citing *Duncan v. Henry*, 513 U.S. 364, 365 (1995)). "Thus, to exhaust state remedies fully the petitioner must make the state court aware that the claims asserted present federal constitutional issues." *Snowden v. Singletary*, 135 F.3d 732, 735 (11th Cir. 1998).

Unexhausted claims may be treated "as procedurally defaulted, even absent a state court determination to that effect, if it is clear from state law that any future attempts at exhaustion would be futile." *Bailey v. Nagle*, 172 F.3d 1299, 1305 (11th Cir. 1999). A procedural-default bar in federal court can arise in two ways: (1) when a petitioner raises a claim in state court and the state court correctly applies a procedural default principle of state law; or (2) when the petitioner never raised the federal claim in state court, and it is obvious that the unexhausted claim would now be procedurally barred in state court. *Id.* at 1302-03.

As noted above, although Petitioner could have challenged his arrest in the motion to suppress, he did not. Instead, he took issue with the tip which lead to an investigatory stop. Because Petitioner did not present this same claim in state court, he has failed to exhaust this claim and is not entitled to federal habeas relief.

Dismissal is the appropriate disposition of the unexhausted claim because it is now procedurally defaulted. Petitioner never raised the federal claim in state court, and it is obvious that the unexhausted claim would now be procedurally barred in state court. *See Bailey*, 172 F.3d at 1302-03. It is evident that if Petitioner were to return to the state courts, his claim would be treated as procedurally defaulted. *See Mills v. Dugger*, 574 So. 2d 63, 65 (Fla. 1990) (***Habeas corpus is not to be used for obtaining additional appeals of issues which were raised, or should have been raised, on direct appeal or which were waived at trial or which could have, should have, or have been, raised in prior postconviction filings***)(emphasis added).

Petitioner could avoid the application of this procedural bar by establishing objective cause for his failure to properly raise the claim in state court and actual prejudice from the alleged constitutional violation or that failure to consider the claim will result in a fundamental miscarriage of justice. *See Spencer v. Sec'y, Dep't of Corr.*, 609 F.3d 1170, 1179-80 (11th Cir. 2010); *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). However, Petitioner neither acknowledges that he failed to raise this issue in state court nor alleges objective cause and prejudice or a fundamental miscarriage of justice.

To establish cause to overcome a procedural default, Petitioner would have to show that some objective factor external to the defense impeded the effort to raise the claim properly in state court. *See Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999). He can make no such showing here. Petitioner was aware of the facts before he moved to suppress. He was not prevented from arguing, as he does here, that the stop of his vehicle constituted an arrest which lacked probable cause.

And, even assuming that trial counsel's failure to raise the issue in the motion to suppress constitutes cause sufficient to excuse the procedural bar, the procedural default would still apply because of the absence of prejudice. To show prejudice, a petitioner must demonstrate there is a reasonable probability the outcome of the proceeding would have been different. *See Crawford v. Head*, 311 F.3d 1288, 1327–28 (11th Cir. 2002). Here, the results of the proceeding would not have been different if trial counsel had sought suppression on this basis because his claim that the police stop of his vehicle was an arrest instead of an investigatory stop is not supported by the record.

Petitioner argues that the stop constituted an arrest because police surrounded his vehicle in the middle of the road and ordered him out of the vehicle at gunpoint. (DE [1] at 7). There is no "bright-line test for determining what police action is permissible in an investigatory stop." *Reynolds v. State*, 592 So. 2d 1082, 1084 (Fla. 1992) (citing *United States v. Sharpe*, 105 S. Ct. 1568, 1575 (1985)). The analysis is specific to the particular facts. *Id.* Courts determine whether the actions of the officers were reasonable under the circumstances by conducting "a twofold inquiry—whether the action was justified at its inception and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* (citations omitted).

When making an investigatory stop, officers make take steps that are "reasonably necessary to protect their personal safety and to maintain the status quo during the course of a stop." *United States v. Hensley*, 469 U.S. 221, 235 (1985). This includes blocking a suspect's vehicle, *see United States v. Perea*, 986 F.2d 633, 644 (2d Cir. 1993) ("The fact that agents have used their cars to block a vehicle does not necessarily mean that, instead of a *Terry* stop, there was a de facto arrest."); approaching a stopped vehicle with

weapons drawn, *see id.* ("[T]he fact that the officers approached a stopped car with guns drawn in order to protect themselves and bystanders on the street [does not] necessarily transmute a *Terry* stop into an arrest.") and *United States v. Alexander*, 907 F.2d 269, 272 (2d Cir. 1990) ("[A] law enforcement agent, faced with the possibility of danger, has a right to take reasonable steps to protect himself and an obligation to ensure the safety of innocent bystanders, regardless of whether probable cause to arrest exists[.]").

Here, the actions of the officers were proper within the context of an investigatory stop. *See* (DE [10-1]). They pulled over a suspect in an ongoing criminal enterprise to obtain controlled substances with fraudulent prescriptions. *Id.* at 41, 56-57, 63, 76. Petitioner had been arrested a month earlier for the same offense. *Id.* at 41, 55, 68. Petitioner drove slowly past the officers when they were questioning another individual involved in the scheme. *Id.* at 49, 84. When stopping Petitioner's vehicle, police had an incentive to surround the car and ensure they were able to prevent him from leaving the scene. Given the nature of the offense, it was not unreasonable for police to draw their weapons when they approached the vehicle or to remove everyone from the vehicle. The officers were entitled to take the actions they deemed necessary to protect themselves and the public. Officers also had a reason to maintain the status quo and preserve any evidence in the vehicle in case the officers developed a valid legal basis to conduct a search of the car. There is no basis to conclude that the conduct of the officers fell outside the bounds of a permissible investigatory stop.

Because of the foregoing, Petitioner cannot establish that applying the procedural bar will result in prejudice or that a fundamental miscarriage of justice will occur if this Court does not review this claim. Contrary to Petitioner's argument, officers searched his

car after detaining him during an investigatory stop, rather than in connection to his arrest. Accordingly, there is no basis to excuse the procedural bar and he is not entitled to a review of the merits of this claim in these proceedings.

IV. STANDARD OF REVIEW

This Court's review of a state prisoner's federal petition for habeas corpus is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA"), Pub. L. No. 104B132, 110 Stat. 1214 (1996). "The purpose of [the] AEDPA is to ensure that federal habeas relief functions as a guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction." *Ledford v. Warden, GDCP*, 818 F.3d 600, 642 (11th Cir. 2016) (quoting *Greene v. Fisher*, 565 U.S. 34, 38 (2011)). In fact, federal habeas corpus review of final state court decisions is "'greatly circumscribed' and 'highly deferential'" *Id.* at 642 (quoting *Hill v. Humphrey*, 662 F.3d 1335, 1343 (11th Cir. 2011)), and is generally limited to the record that was before the state court that adjudicated the claim on the merits. *See Cullen v. Pinholster*, 563 U.S. 170, 182 (2011).

The federal habeas court is first tasked with identifying the last state court decision, if any, that adjudicated the claim on the merits. *See Marshall v. Sec'y, Fla. Dep't of Corr.*, 828 F.3d 1277, 1285 (11th Cir. 2016). The state court is not required to issue an opinion explaining its rationale, because even the summary rejection of a claim, without explanation, qualifies as an adjudication on the merits which warrants deference. *See Harrington v. Richter*, 562 U.S. 86, 100 (2011); *Ferguson v. Culliver*, 527 F.3d 1144, 1146 (11th Cir. 2008); *see also Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018); *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2558 (2018).

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

Because the "AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court," *Burt v. Titlow*, 571 U.S. 12, 20 (2013), federal courts may "grant habeas relief only when a state court blundered in a manner so 'well understood and comprehended in existing law' and 'was so lacking in justification' that 'there is no possibility fairminded jurists could disagree.'" *Tharpe*, 834 F.3d at 1338 (11th Cir. 2016) (quoting *Harrington*, 562 U.S. at 102). This standard is intentionally difficult to meet. *Harrington*, 562 U.S. at 102.

Petitioner alleges **ineffective assistance of counsel**. The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the assistance of counsel during criminal proceedings against them. *Strickland v. Washington*, 466 U.S. 668, 684–85 (1984). When assessing counsel's performance under *Strickland*, the court employs a strong presumption that counsel "rendered adequate assistance and made all

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

significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. To prevail on a claim of ineffective assistance of counsel, Petitioner must demonstrate that: (1) his or her counsel's **performance was deficient**, having fallen below an objective standard of reasonableness; and, (2) he or she suffered **prejudice** as a result of that deficiency. *Strickland*, 466 U.S. at 687-88.

To establish **deficient performance**, Petitioner must show that, given all the circumstances, counsel's performance was outside the wide range of professional competence. *See supra Strickland,* 466 U.S. at 687; *see also Cummings v. Sec'y for Dep't of Corr.*, 588 F.3d 1331, 1356 (11th Cir. 2009). The 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*) (quoting *Burger v. Kemp*, 483 U.S. 776, 794 (1987)).

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 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*, 240 F.3d at 917. Nor is counsel required to present every non-frivolous argument. *Dell v. United States*, 710 F.3d 1267, 1282 (11th Cir. 2013).

Furthermore, a § 2254 Petitioner must provide factual support for his or her contentions regarding counsel's performance. *Smith v. White*, 815 F.2d 1401, 1406–07 (11th Cir.1987). Bare, conclusory allegations of ineffective assistance are insufficient to

satisfy the *Strickland* test. *See Boyd v. Comm'r, Ala. Dep't of Corr.*, 697 F.3d 1320, 1333–34 (11th Cir. 2012).

V. DISCUSSION

To establish ineffective assistance of *appellate* counsel, the petitioner must show "(1) appellate counsel's performance was deficient, and (2) but for counsel's deficient performance he would have prevailed on appeal." *Shere v. Sec'y, Fla. Dep't of Corr.*, 537 F.3d 1304, 1310 (11th Cir. 2008) (citing *Smith v. Robbins*, 528 U.S. 259, 285-86 (2000); *Strickland*, 466 U.S. 668 (1984)). Under **claim 2**, Petitioner asserts that appellate counsel was ineffective in failing to argue on direct appeal that the trial court erred in denying the motion to suppress. (DE [1] at 13). In the state court proceedings, this claim was raised by Petitioner and rejected by the Fourth DCA in a petition for writ of habeas corpus. (DE [9-1] at 128–44). Under **claim 5**, Petitioner challenges the Fourth DCA's decision to reject the claim that appellate counsel was ineffective in failing to challenge the trial court's denial of the motion to suppress on direct appeal. (DE [1] at 20).

As to the performance prong, it is well-settled that "[a]ppellate counsel has no duty to raise every non-frivolous issue and may reasonably weed out weaker (albeit meritorious) arguments." *Overstreet v. Warden*, 811 F.3d 1283, 1287 (11th Cir. 2016) (citing *Philmore*, 575 F.3d at 1264). "Generally, only when ignored issues are clearly stronger than those presented will the presumption of effective assistance of counsel be overcome." *Smith*, 528 U.S. at 288; *see also Davila v. Davis*, 137 S. Ct. 2058, 2067 (2017) ("Declining to raise a claim on appeal . . . is not deficient performance unless that claim was plainly stronger than those actually presented to the appellate court." (citation omitted)).

Here, the issue of the denial of the motion to suppress was not "clearly stronger" than the arguments appellate counsel made. Appellate counsel challenged rulings made during the trial itself. (DE [9-1] at 56). The basis of Petitioner's motion to suppress in the trial court was that police lacked a well-founded, reasonable articulable suspicion to conduct an investigatory stop of his vehicle. *Id. at* 19). The facts, as established at the evidentiary hearing on the motion and described in detail in the facts section above, belied this claim. *See* (DE [10-1]). It is reasonable if not certain that the Fourth DCA would have agreed with the trial court's decision to deny the motion to suppress. Counsel's performance cannot be deemed deficient for failing to raise a non-meritorious issue. *See Shere v. Sec'y, Fla. Dep't of Corr.*, 537 F.3d 1304, 1311 (11th Cir. 2008) ("[Petitioner]'s appellate counsel did not have a meritorious issue to raise on appeal, so his failure to address the issue did not constitute deficient performance.").

Petitioner also fails to establish prejudice where the argument omitted by appellate counsel lacked merit. *See Joiner v. United States*, 103 F.3d 961, 963 (11th Cir. 1997) ("To determine prejudice, [the court] must review the merits of an omitted claim. If [the court] find[s] that the omitted claim would have had a reasonable probability of success on appeal, then counsel's performance necessarily resulted in prejudice.").

Because there is no merit to the arguments raised under claims 2 and 5, the rejection of the claim in the state forum was neither contrary to nor an unreasonable application of Strickland and should not be disturbed here. *See, e.g., Danylchuk v. Dowling*, 803 Fed. Appx. 194, 197-98 (10th Cir. 2020) (finding petitioner's ineffective assistance of appellate counsel claim unexhausted and procedurally barred and affirming district court's denial of relief on the claim).

Under **claim 3**, Petitioner argues that trial counsel was ineffective in failing to tailor the motion to suppress to the facts involving Petitioner. (DE [1] at 15–16). Specifically, Petitioner takes issue with his counsel's decision to join the motions to suppress filed by his co-defendants. *Id.* He argues that she should have filed a separate motion based on facts applicable only to him. *Id.* Petitioner raised a similar argument under claims 1 and 2 of his Rule 3.850 motions. (DE [9-2] at 15–49, 53–88). The trial court denied the motion and the Fourth DCA affirmed. *Id. at* 212–16, 220–25, 230–31.

The state charged Petitioner, Saffold, Willis, and Hankerson under the same information. *See* (DE [9-1] at 12). The facts related to the motion to suppress of each co-defendant were inextricably intertwined because they stemmed from the same investigation and the same conduct. *Id.* The crimes involved a complicated scheme related to fraudulent prescriptions. As a result, the state had to establish the basis for the seizure and search of Petitioner by presenting evidence related to the involvement of co-defendants like Hankerson and Saffold.

Counsel's decision to adopt the arguments put forth by Petitioner's co-defendants constitutes a strategic decision. It is well settled that "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Patton v. State*, 878 So. 2d 368, 373 (Fla. 2004) (*quoting Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000)). Strategic choices made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable. *Strickland*, 466 U.S. at 690-91. Because counsel made a reasonable strategic decision to join with the co-

defendants during the suppression proceedings, Petitioner has failed to establish that counsel's performance was deficient.

In addition, Petitioner cannot establish prejudice. As is explained in detail above, one set of facts applied to all four defendants. Petitioner's argument that a special set of facts applied to him is refuted by the record. Regardless of what arguments Petitioner put forward, the state would not have been prevented from introducing the evidence it did in fact introduce at the suppression hearing. *See generally* (DE [10-1]). Specifically, the common evidence included (1) that while officers detained and questioned Hankerson and Saffold, Petitioner drove slowly by and stared at the police activity; (2) Detectives recognized Petitioner as a man previously arrested in connection with the same scheme to fill fraudulent prescriptions; (3) as a result, officers stopped the car to conduct an investigation. This evidence supported the trial court's conclusion that the conduct of the officers was within the bounds of a permissible investigatory stop. *See Reynolds*, 592 So. 2d at 1084 (citing *Sharpe*, 105 S. Ct. at 1575); *Hensley*, 469 U.S. at 235; *Perea*, 986 F.2d at 644; *Alexander*, 907 F.2d at 272. Petitioner fails to point to any argument omitted by his counsel which would have changed the outcome of the proceeding. The trial court's rejection of this claim, affirmed by the appellate court, is neither contrary to nor an unreasonable application of federal constitutional principles and should not be disturbed here. *See Williams*, 529 U.S. at 413.

Under **claim 4**, Petitioner argues that trial counsel was ineffective in failing to secure Petitioner's Due Process rights. (DE [1] at 18). Petitioner's argument in its entirety provides:

> The Petitioner was deprived of his 6th and 14th U.S.C.A rights by Petitioner's counsel's failure to adequately object to and

> contest the State court's erroneous order in which the findings was (sic) based on unsubstantiated matters as evidence in light of the proceedings, which resulted in an incompetent unreasonable application of law leaving the Petitioner unable to obtain relief in the State courts. Counsel failed to make court aware of manifest error even after Petitioner informed counsel of it.

Id.

When filing a petition for writ of habeas corpus, the petitioner "shall specify all grounds for relief which are available to the petitioner" and "shall set forth in summary form the facts supporting each of the grounds thus specified." *See* Rules Governing § 2254 Proceedings, Rule 2(c), 28 U.S.C. foll. § 2254. Petitioner fails to comply with this rule. He does not specify which state court ruling his counsel should have challenged. It is impossible for this Court to review his claim where he failed to provide this crucial information.

Petitioner alleges that he raised this claim in his Rule 3.850 proceedings which suggests his argument takes issue with counsel's alleged failure to effectively litigate the motion to suppress. *See* (DE [1] at 18-19). As explained above, counsel did not provide deficient performance in connection with the suppression issue and Petitioner cannot establish prejudice. Assuming this is the argument Petitioner again attempts to raise, he is not entitled to relief.

VI. CERTIFICATE OF APPEALABILITY

As amended effective December 1, 2009, § 2254 Rule 11(a) provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." A timely

notice of appeal must still be filed, even if the court issues a certificate of appealability. *See* Rules Governing § 2254 Proceedings, Rule 11(b), 28 U.S.C. foll. § 2254.

After review of the record, Petitioner is not entitled to a certificate of appealability. "A certificate of appealability 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 merit a certificate of appealability, Petitioner must show that reasonable jurists would find debatable both (1) the merits of the underlying claims and (2) the procedural issues he seeks to raise. *Slack v. McDaniel*, 529 U.S. 473, 478 (2000); *see also Eagle v. Linahan*, 279 F.3d 926, 935 (11th Cir. 2001). Because the claims raised are clearly without merit, Petitioner cannot satisfy the *Slack* test.

Having considered the petition, the record and being fully advised, it is hereby

ORDERED AND ADJUDGED that:

1. This petition for *habeas corpus* (DE [1]) is **DENIED**.
2. No certificate of appealability shall issue.
3. The Clerk of Court is directed to **CLOSE** this case and **DENY AS MOOT** any pending motions.

DONE AND ORDERED in Chambers, Fort Lauderdale, Florida, this 31st day of July 2021.

RAAG SINGHAL
UNITED STATES DISTRICT JUDGE

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