In the
United States Court of Appeals
For the Eleventh Circuit

No. 23-11103

In re: CHARLES M. PORTER,

Petitioner.

On Petition for Writ of Mandamus to the
United States District Court for the
Middle District of Florida
D.C. Docket No. 6:22-cv-01976-RBD-DCI

Before ROSEMBAUM AND BRASHER, Circuit Judges.

BY THE COURT:

Charles Porter, a state prisoner proceeding *pro se*, filed a mandamus petition, asking us to direct the U.S. District Court for the Middle District of Florida to review, hear, and rule on his 28 U.S.C. § 2254 petition. He also moved to proceed *in forma pauperis* ("IFP") as to his mandamus petition. Porter filed the instant mandamus petition on April 7, 2023. On July 11, 2023, the district court denied Porter's § 2254 petition. The district court entered judgment the next day.

Mandamus is available "only in drastic situations, when no other adequate means are available to remedy a clear usurpation of power or abuse of discretion." *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1004 (11th Cir. 1997) (quotation omitted). Mandamus may be used to direct a district court to decide a pending case when there has been unreasonable delay in rendering a decision. *See Johnson v. Rogers*, 917 F.2d 1283, 1284 (10th Cir. 1990) (persuasive authority holding that a 14-month delay in ruling on a 28 U.S.C. § 2241 petition for no reason other than docket congestion was impermissible).

"[A] federal court has no authority to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Zinni v. ER Solutions, Inc.*, 692 F.3d 1162, 1166 (11th Cir. 2012) (quotation marks omitted). "[A]n issue is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief." *Christian Coal. of Fla., Inc. v. United*

States, 662 F.3d 1182, 1189 (11th Cir. 2011) (quotation marks omitted).

In light of the district court's order ruling on Porter's § 2254 petition, his mandamus petition is hereby **DISMISSED** as moot, and his IFP motion is **DENIED** as moot.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CHARLES M. PORTER,

Petitioner,

v. Case No. 6:22-cv-1976-RBD-DCI

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

Respondents.
_____/

ORDER

THIS CAUSE is before the Court on Petitioner Charles M. Porter's Amended Petition for Writ of Habeas Corpus[1] ("Amended Petition," Doc. 3) filed under 28 U.S.C. § 2254 and his Memorandum of Law in Support of the Amended Petition (Doc. 3-1). Respondents filed a Response to the Petition ("Response," Doc. 4) in compliance with this Court's instructions. Petitioner replied to the Response ("Reply," Doc. 7).

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

[1] The Amended Petition is virtually identical to the original Petition for Writ of Habeas Corpus (Doc. 1). *See* Doc. Nos. 1, 3.

I. PROCEDURAL HISTORY

The State charged Petitioner with lewd or lascivious molestation (Count One), attempted sexual battery on a child less than twelve (Count Two), and lewd or lascivious exhibition (Count Three). (Doc. 5-1 at 37-38.) Pursuant to a plea agreement, Petitioner entered a plea of nolo contendere to Counts Two and Three. (*Id.* at 63-66.) In accordance with the plea agreement, the trial court sentenced Petitioner to concurrent ten-year terms of imprisonment to be followed by twenty years of sex offender probation. (*Id.* at 49-51.) The State *nol prossed* Count One. (*Id.* at 97.) Petitioner did not appeal.

Petitioner filed a motion for post-conviction relief and a motion to correct an illegal sentence under Florida Rules of Criminal Procedure 3.850 and 3.800(a). (*Id.* at 67-78, 230-36.) The state court denied one claim in the Rule 3.850 motion, construed the Rule 3.800(a) motion to be a supplement to the Rule 3.850 motion, and granted an evidentiary hearing on two claims. (*Id.* at 130-33, 258-60.) After the hearing, the state court denied the claims. (*Id.* at 331-37.) Petitioner appealed, and the Fifth District Court of Appeal of Florida ("Fifth DCA") affirmed *per curiam*. (*Id.* at 661.)

II. LEGAL STANDARDS

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

Under the AEDPA, federal habeas relief may not be granted regarding a

claim adjudicated on the merits in state court unless the adjudication of the claim:

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

28 U.S.C. § 2254(d). The phrase "clearly established Federal law," encompasses only the holdings of the Supreme Court of the United States "as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

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

For claims adjudicated on the merits, "section 2254(d)(1) provides two

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

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

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

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

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

B. Standard For Ineffective Assistance Of Counsel

To prevail on an ineffectiveness claim, the petitioner must satisfy the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the petitioner must demonstrate that counsel's performance was deficient. To meet this prong, the petitioner must show that counsel made errors so serious that he was not functioning as counsel guaranteed by the Sixth Amendment. *Id.* at 687. There is a strong presumption that counsel's conduct fell within the range of reasonable professional assistance, and, consequently, counsel's performance is deficient only if it falls below the wide range of competence demanded of attorneys in criminal cases. *Id.* at 689. Next, the petitioner must demonstrate that prejudice was suffered because of counsel's performance. *Id.* at 687. Prejudice is

established when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

The prejudice requirement of the *Strickland* inquiry is modified when the claim is a challenge to a guilty plea based on ineffective assistance. *See Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985). To satisfy the prejudice requirement in such claims, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59.

A habeas petitioner claiming ineffective assistance of counsel must carry his burden on both *Strickland* prongs, and a court need not address both prongs if the petitioner has made an insufficient showing on one. *See Strickland*, 466 U.S. at 697; *Johnson v. Alabama*, 256 F.3d 1156, 1176 (11th Cir. 2001). Moreover, "[t]he standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so." *Harrington*, 562 U.S. at 105 (internal quotation marks and citations omitted)

III. ANALYSIS

A. Ground One

Petitioner asserts counsel rendered ineffective assistance by failing to file a

motion to suppress evidence obtained pursuant to an unlawful arrest. (Doc. 3 at 4-5.) To support this ground, Petitioner argues that the trial court found at his initial appearance that there was no probable cause for his arrest for lewd and lascivious exhibition. (*Id.*)

Petitioner raised this ground in his construed Rule 3.850 supplement. The state court denied relief after an evidentiary hearing. (Doc. 5-1 at 335-36.) The state court reasoned that although the trial court indicated on the date of Petitioner's arrest and initial appearance that the arrest affidavit was insufficient to establish probable cause, the trial court gave the State an extension to supplement the arrest affidavit, which it did, and the trial court then found there was probable cause for the arrest. (*Id.* at 335.) The state court agreed with counsel's determination that a motion to suppress would have been frivolous given the trial court's ultimate conclusion that probable cause existed at the time of Petitioner's arrest. (*Id.* at 336.) The state court, therefore, concluded that counsel was not ineffective for failing to file a non-meritorious motion. (*Id.*)

As explained by the Eleventh Circuit,

> [t]o obtain relief where an ineffective assistance claim is based on trial counsel's failure to file a timely motion to suppress, a petitioner must prove (1) that counsel's representation fell below an objective standard of reasonableness, (2) that the Fourth Amendment claim is meritorious, and (3) that there is a reasonable probability that the verdict would have been different absent the excludable evidence.

Zakrzewski v. McDonough, 455 F.3d 1254, 1260 (11th Cir. 2006) (citation omitted).

Here, at Petitioner's initial appearance on April 18, 2018, the trial court expressed concern that the arrest affidavit did not indicate whether any of the children in the room with Petitioner when he was exhibiting his genitals was awake. (Doc. 5-1 at 343, 658-59.) The trial court gave the State twenty-four hours to supplement the arrest affidavit and then conducted a preliminary hearing on April 20, 2018, at Petitioner's request because Petitioner had another court proceeding to attend on April 19, 2018. (*Id.* at 343, 660-62.) The trial court ultimately found that probable cause existed. (*Id.* at 345-46.) Prior to Petitioner entering his plea, defense counsel filed a petition for writ of certiorari, challenging the trial court's allowance of additional time to supplement the probable cause affidavit. (*Id.* at 641-46.) The Fifth DCA denied the petition. (*Id.* at 676.)

At the evidentiary hearing, Petitioner's counsel testified that she considered filing a motion to suppress but chose not to do so. (*Id.* at 493.) Counsel said that she did not believe there was a good faith basis to file a motion to suppress because the trial court gave the State an opportunity to supplement the arrest affidavit and then concluded based on the supplement that probable cause for the arrest existed. (*Id.* at 493-94, 497.) The Fifth DCA affirmed *per curiam*. (*Id.* at 610.)

Petitioner has not shown that counsel's decision not to file a motion to suppress was objectively unreasonable. Within forty-eight hours of Petitioner's arrest for lewd and lascivious exhibition, the State supplemented the arrest

affidavit, and the trial court determined that probable cause existed. (*Id.* at 345-46, 494, 497.) Further, the Fifth DCA denied Petitioner's petition challenging the trial court's action. Counsel, therefore, reasonably could have concluded that no basis existed to move to suppress based on lack of probable cause. Likewise, a reasonable probability does not exist that the outcome of the proceeding would have been different had counsel filed a motion to suppress. Accordingly, Ground One is denied under § 2254(d).

B. Ground Two

Petitioner asserts counsel rendered ineffective assistance by failing to convey a plea offer. (Doc. 3 at 16.) Specifically, Petitioner complains that his attorney did not advise him about a plea offer of ten years of sex-offender probation until after the offer had expired. (*Id.*)

Petitioner raised this ground in his Rule 3.850 motion. The state court denied relief after an evidentiary hearing. (Doc. 5-1 at 333-35.) The state court reasoned that a recording of a jail conversation between Petitioner and his son demonstrated that Petitioner was aware of the plea offer for probation and refuted his contention that he would have taken the offer had counsel advised him of it. (*Id.*) The Fifth DCA affirmed *per curiam*. (*Id.* at 610.)

The Sixth Amendment right to effective assistance of counsel extends to plea negotiations. *Lafler v. Cooper*, 566 U.S. 156, 162 (2012). "[D]efense counsel has

the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Missouri v. Frye*, 566 U.S. 134, 145 (2012). Further, "[i]f a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it." *Lafler*, 566 U.S. at 168. The two-part test enunciated in *Strickland* applies to claims that counsel was ineffective during plea negotiations. *See id.* at 163 (recognizing that *Strickland*'s two-part test applies to federal habeas petitioner's claim that counsel was ineffective for advising him to reject a plea offer).

With respect to the prejudice inquiry in the context of a foregone guilty plea, defendants must demonstrate:

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

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

Here, counsel testified that he called and emailed Petitioner regarding the ten-year probation offer extended on August 1, 2018, but never spoke with Petitioner, who was out on bond, regarding the plea offer. (Doc. 5-1 at 508-09.) According to counsel, the plea offer was unexpectedly revoked on approximately

August 22, 2018, soon after Petitioner's arrest for a new offense. (*Id.* at 511-12.)

Although Petitioner maintained that he was unaware of the plea offer, in a recorded jail conversation on August 21, 2018, between Petitioner and his son, Petitioner told his son that the State made a plea offer for probation. (*Id.* at 538-39.) Petitioner, however, told his son that there was no way he was going to take the plea offer. (*Id.* at 540.) Therefore, Petitioner was aware there was a plea offer for probation. More importantly, considering Petitioner's statement to his son, he had no desire to accept the plea offer. Consequently, Petitioner has not shown a reasonable probability exists that he would have taken the probation plea offer had he spoken with counsel about the offer. Petitioner has not established by clear and convincing evidence that the state court's factual findings are incorrect. Accordingly, Ground Two is denied under § 2254(d).

Any allegations not specifically addressed lack merit.

IV. CERTIFICATE OF APPEALABILITY

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

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

Petitioner has not shown 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 has failed to make a substantial showing of the denial of a constitutional right. Thus, the Court will deny Petitioner a certificate of appealability.

Accordingly, it is hereby **ORDERED** and **ADJUDGED**:

1. The Amended Petition (Doc. 3) is **DENIED**, and this case is **DISMISSED with prejudice**.
2. Petitioner is **DENIED** a Certificate of Appealability.
3. The Clerk of the Court shall enter judgment accordingly and is directed to close this case.

DONE and **ORDERED** in Orlando, Florida on July 11, 2023.

ROY B. DALTON JR.
United States District Judge

Copies furnished to:

Counsel of Record
Unrepresented Party