IN THE SUPREME COURT OF THE UNITED STATES

PROVIDED TO TOMOKA CORRECTIONAL INSTITUTION ON 11/19/24 FOR MAILING BY

PATRICK W. WHAREN. SR
PETITIONER

VS.

CASE NO: _____
(To Be Assigned)

STATE OF FLORIDA
RESPONDENT

_____/

APPENDIX

APPENDIX (A). APPELLATE COURT ORDER DENYING C.O.A.

APPENDIX (B). ORDER DENYING FEDERAL HABEAS CORPUS.

APPENDIX (C). ORDER DENYING MOTION TO REHEAR / RECONSIDER.

APPENDIX (D). APPLICATION FOR CERTIFICATE OF APPEALABILITY.

APPENDIX (E). MOTION TO REHEAR / RECONSIDER.

APPENDIX (F). TRIAL TRANSCRIPTS

RESPECTFULLY SUBMITTED

/S/ Patrick Wharen

PATRICT WHAREN, DC# C06442
TOMOKA CORRECTIONAL INSTITUTION
3950 TIGER BAY RD.
DAYTONA BEACH, FL. 32124.

EXHIBIT (A)

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-12851

PATRICK W. WHAREN, SR.,

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
D.C. Docket No. 6:19-cv-01999-GKS-LHP

ORDER:

Exhibit (A)

Patrick Wharen, Sr., a Florida prisoner serving life imprisonment for two counts of premediated murder, seeks a certificate of appealability to appeal the district court's denial of his *pro se* 28 U.S.C. § 2254 habeas corpus petition. He also moves for leave to proceed *in forma pauperis* ("IFP") on appeal and for leave to file an out-of-time COA motion exceeding the page limit.

In his petition, Mr. Wharen raised, in relevant part, the following grounds for relief: (1) the trial court violated his right to a fair trial by excluding testimony regarding the contents of a text message from his wife, who was one of the victims; (2) the trial court violated his right to a fair trial by denying his motion for a judgment of acquittal; (7) the trial court violated his right to a fair trial by denying his motion for a mistrial after the prosecutor made a statement that the jury could have interpreted as a comment on his failure to testify; (8) the trial court violated his right to remain silent by denying his motion for a mistrial after it gave an instruction that was susceptible to being interpreted by the jury as a comment on his failure to testify; (23) his counsel was ineffective for failing to call a psychiatrist as an expert witness to testify regarding his mental state as it related to his heat-of-passion defense; and (29) his counsel was ineffective for failing to lay the foundation for Kim Schlough's testimony by failing to produce her cell phone records and her transcribed deposition.[1]

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[1]Mr. Wharen initially raised 29 grounds in his § 2254 petition, but only 6 of those grounds are discussed in his COA motion, and he specifically requests a COA "as to [e]ach [i]ssue raised []in" the instant motion. Accordingly, his

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right" by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted).

In determining whether a COA is warranted, we do not "decid[e] the case on the merits;" we instead limit our examination "'to a threshold inquiry into the underlying merit of [the] claims,' and ask' only if the [d]istrict [c]ourt's decision was debatable.'" *Buck v. Davis*, 580 U.S. 100, 116 (2017) (citation omitted).

Where the district court denied a habeas petition on procedural grounds, the petitioner must show that reasonable jurists would debate (1) whether the petition states a valid claim of the denial of a constitutional right, and (2) whether the district court was correct in its procedural ruling. *See Slack*, 529 U.S. at 484. If a state court has adjudicated a claim on the merits, a federal court may grant habeas relief only if the decision of the state court (1) "was contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court," or (2) "was based on an unreasonable determination of the

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remaining claims have been abandoned. *See Jones v. Sec'y, Dep't of Corr.*, 607 F.3d 1346, 1353-54 (11th Cir. 2010) (stating that a COA will not be granted on an issue where the petitioner "does not provide facts, legal arguments, or citations of authority that explain why he is entitled to a certificate").

facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d)(1), (2).

As set out below, reasonable jurists would not debate the district court's denial of Mr. Wharen's § 2254 petition.

1. Reasonable jurists would not debate the denial of Ground 1. Even assuming, *arguendo*, that the trial court erred in excluding the text message from Mr. Wharen's wife, any error was harmless. The jury heard evidence of the text message's effect on Mr. Wharen's state of mind, and as a result the court's exclusion of the text message did not have a "substantial and injurious effect or influence in determining the jury's verdict." *See Sims v. Singletary*, 155 F.3d 1297, 1312 (11th Cir. 1998) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)).

2. Reasonable jurists would not debate the denial of Ground 2. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that Mr. Whalen acted with premeditation. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979). For example, Mr. Wharen had threatened to kill the victims, and he shot and killed the victims after having been restrained by his son.

3. Reasonable jurists would not debate the denial of Ground 7. The prosecutor's statement was, at most, a comment on Mr. Wharen's "*counsel's* failure to counter or explain the damaging evidence," which is permissible. *See Isaacs v. Head*, 300 F.3d 1232, 1270-71 (11th Cir. 2002) (emphasis in original and brackets omitted).

4. Reasonable jurists would not debate the denial of Ground 8. The trial court simply explained the order of the parties' closing arguments, and this did not suggest that the jury could treat Mr. Wharen's silence as evidence of his guilt. *See Griffin v. California*, 380 U.S. 609, 615 (1965); *Baxter v. Palmigiano*, 425 U.S. 308, 319 (1976).

5. Reasonable jurists would not debate the denial of Ground 23. The state court found that counsel—who called a psychologist as a witness—made a strategic decision to not call a psychiatrist to testify, and Mr. Wharen has not offered any clear and convincing evidence to rebut that finding. *See Dingle v. Sec'y, Dep't of Corr.*, 480 F.3d 1092, 1099 (11th Cir. 2007). *Conklin v. Schofield*, 366 F.3d 1191, 1204 (11th Cir. 2004).

6. Reasonable jurists would not debate the denial of Ground 29. The state court applied an independent and adequate state ground to conclude that Ground 29 was procedurally defaulted, and Mr. Wharen cannot overcome that default. *See LeCroy v. Sec'y, Fla. Dep't of Corr.*, 421 F.3d 1237, 1260 n.25 (11th Cir. 2005); *Martinez v. Ryan*, 566 U.S. 1, 14 (2012); *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013).

Accordingly, Mr. Wharen's motion for a COA is DENIED, and his motion for leave to proceed IFP is DENIED AS MOOT. However, his motion for leave to file an out-of-time COA motion exceeding the page limit is GRANTED to the extent that the entirety of his motion was considered.

UNITED STATES CIRCUIT JUDGE

EXHIBIT (B)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

PATRICK W. WHAREN, SR.,

Petitioner,

v. Case No. 6:19-cv-1999-GKS-LHP

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

Respondents.
_____/

ORDER

This case is before the Court on Petitioner Patrick W. Wharen, Sr.'s, Petition for Writ of Habeas Corpus ("Petition," Doc. 1) filed pursuant to 28 U.S.C. § 2254 and his Amended Motion to Compel Respondents to Supplement the Record with Kim Slough's Deposition Transcript ("Motion to Compel," Doc. 23). Respondents filed a Response to the Petition ("Response," Doc. 8) and a Supplemental Response to the Petition ("Supplemental Response," Doc. 13) in compliance with this Court's instructions. Petitioner filed a Reply to the Response ("Reply I," Doc. 11) and a Reply to the Supplemental Response ("Reply II," Doc. 14).

Petitioner asserts twenty-nine grounds. For the following reasons, the Petition and Motion to Compel are denied.

Exhibit (B)

I. PROCEDURAL HISTORY[1]

The State charged Petitioner with two counts of first-degree murder with a firearm (Counts One and Two). (Doc. 10-5 at 2200-01.) A jury found Petitioner guilty as charged. (Doc. 10-27 at 6-7.) The trial court sentenced Petitioner to consecutive terms of life imprisonment.[2] (Doc. 10-5 at 2210-11.) Petitioner appealed, and the Fifth District Court of Appeal of Florida ("Fifth DCA") affirmed *per curiam*. (*Id.* at 2163.) The Fifth DCA denied Petitioner's motion for rehearing on May 5, 2014. (*Id.* at 2182.)

Petitioner filed a state habeas petition on April 16, 2015. (Doc. 10-7 at 26-48.) The Fifth DCA denied the petition. (Doc. 10-8 at 74.) The Fifth DCA denied Petitioner's motion for rehearing on July 1, 2015. (Doc. 10-9 at 8.) Petitioner filed a second state habeas petition on July 20, 2015. (*Id.* at 10-17; Doc. 10-10 at 1-17.) The Fifth DCA dismissed the petition and denied Petitioner's motion for rehearing on October 5, 2015. (Doc. 10-10 at 36, 45.)

Petitioner filed a motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure on August 27, 2015. (Doc. Nos. 10-17 at 15-41; 10-18 at 1-22.) On October 23, 2017, the state court denied relief after an

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[1] The Procedural History does not include any collateral proceedings that are irrelevant to the grounds raised in the Petition.

[2] The State sought the death penalty. The jury, however, returned an advisory sentence of life in prison. (Doc. 10-27 at 8.)

evidentiary hearing. (Doc. Nos. 10-26 at 1-11; 10-27 at 1-3.) On February 7, 2018, Petitioner requested to know the status of his Rule 3.850 motion. (Doc. 15 at 9.) In response, the clerk of court mailed Petitioner a copy of the order on February 14, 2018. (*Id.* at 20.) It appears that the order was mailed to Petitioner when it was entered but was returned as undeliverable. (Doc. 10-30 at 15-16.) When Petitioner subsequently received the order, he filed a motion for rehearing and an appeal. (Doc. Nos. 14 at 3; 15-1 at 22.) The Fifth DCA dismissed the appeal on April 13, 2018, for lack of jurisdiction without prejudice for Petitioner to file a petition for belated appeal. (Doc. 13-1 at 8.)

On April 20, 2018, Petitioner filed a petition for belated appeal, which the State did not oppose. (*Id.* at 10-27.) The Fifth DCA granted the petition on June 1, 2018. (*Id.* at 30.) The Fifth DCA affirmed the denial of the Rule 3.850 motion *per curiam*. (Doc. 10-56 at 93.) Mandate was issued on August 19, 2019. (*Id.* at 95.)

On February 7, 2018, Petitioner filed a successive Rule 3.850 motion. (Doc. Nos. 10-33 at 21-29; 10-34 at 1-10.) The state court denied the motion as untimely and successive. (Doc. 10-16 at 10-14.) Petitioner appealed, and the Fifth DCA affirmed *per curiam*. (Doc. 10-17 at 2.) Mandate was issued on July 24, 2018. (*Id.* at 17.)

II. LEGAL STANDARDS

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

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

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

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

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

persuasive alternative grounds briefed or argued to the higher court or obvious in the record it reviewed. *Id.* at 1192–93, 1195–96.

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

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

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

Under § 2254(d)(2), a federal court may grant a writ of habeas corpus if the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." A determination of

a factual issue made by a state court is presumed correct, and the habeas petitioner must rebut the presumption of correctness by clear and convincing evidence. *See Parker*, 244 F.3d at 835-36; 28 U.S.C. § 2254(e)(1).

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

B. Standard For Ineffective Assistance Of Counsel

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

Prejudice "requires showing that counsel's errors were so serious as to

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

III. ANALYSIS[3]

A. Ground One

Petitioner asserts the trial court violated his right to due process by not allowing his sister, Kim Slough ("Slough"), to testify about the contents of a text sent from Petitioner's wife, one of the victims, to Petitioner. (Doc. 1 at 17.) According to Petitioner, this testimony was relevant to show the effect his wife's text had on him. (*Id.*)

Petitioner raised this ground on direct appeal. The Fifth DCA affirmed *per curiam*. (Doc. 10-5 at 2163.)

The state court's denial of this ground is not contrary to, or an unreasonable application of, clearly established federal law. Federal courts "will not grant federal habeas corpus relief based on an evidentiary ruling unless the ruling affects the fundamental fairness of the trial." *Sims v. Singletary*, 155 F.3d 1297, 1312 (11th

[3] Respondents argue that the Petition is untimely. The Court finds that Petitioner is entitled to equitable tolling through the date he filed his petition for belated appeal of the denial of his first Rule 3.850 motion. Accordingly, the Petition was timely filed.

Cir. 1998).

The record reflects that Slough testified that approximately a week prior to the offenses Petitioner was crying and extremely upset after he received a message on his cellular phone. (Doc. 10-5 at 1784-85.) Thus, the jury heard testimony related to Petitioner's state of mind upon receiving the message. More importantly, the jury heard evidence from which it could have concluded that Petitioner believed his wife was having an affair with the other victim, was emotionally distraught, and killed them in the heat of passion. Consequently, even assuming the trial court erred in not allowing Slough to testify about the content of the message, the error was harmless because it did not have substantial and injurious effect on the verdict. *See Fry v. Pliler*, 551 U.S. 112, 116, 127 (2007). Accordingly, Ground One is denied under § 2254(d).

B. Ground Two

Petitioner complains the trial court erred by denying his motion for judgment of acquittal. (Doc. 1 at 19.) To support this ground, Petitioner argues that the evidence proved he committed the offenses in the heat of passion and without premeditation. (*Id.*)

Petitioner raised this ground on direct appeal. The Fifth DCA affirmed *per curiam*. (Doc. 10-5 at 2163.)

In considering a claim of insufficient evidence, "the relevant question is

whether, after viewing 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." *Jackson v. Virginia,* 443 U.S. 307, 319 (1979); *Johnson v. Alabama,* 256 F.3d 1156, 1172 (11th Cir. 2001). Federal courts may not reweigh the evidence. *Jackson,* 443 U.S. at 319.

At trial, witnesses testified that Petitioner threatened to kill the victims several times in the weeks before he committed the murders. (Doc. 10-5 at 1252, 1290, 1292, 1297-98, 1367.) Furthermore, Petitioner purchased a handgun a few weeks before the shooting, chased the victims into their trailer after being restrained by one of his children, and shot the victims multiple times with the recently purchased handgun. (*Id.* at 1256-57, 1262, 1508, 1518, 1590-91.) Viewing this evidence in the light most favorable to the prosecution, the Court concludes that a rational trier of fact could have found Petitioner acted with premeditation. Accordingly, Ground Two is denied under § 2254(d).

C. Ground Three

Petitioner maintains that the trial court violated his constitutional rights by giving a reasonable doubt instruction during *voir dire* that minimized the State's burden. (Doc. 1 at 20.) Petitioner raised this ground on direct appeal. The Fifth DCA affirmed *per curiam.* (Doc. 10-5 at 2163.)

The state court's denial of this ground is not contrary to, or an unreasonable

application of, clearly established federal law. Even assuming the trial court improperly stated the reasonable doubt standard during voir dire, the jury was properly instructed on reasonable doubt at the conclusion of trial. *See* Doc. 10-5 at 1995-96. Therefore, Petitioner has not shown a reasonable possibility exists that the erroneous instruction contributed to his convictions. *See Burns v. Sec'y, Fla. Dep't of Corr.*, 720 F.3d 1296, 1305 (11th Cir. 2013) ("'To show prejudice under *Brecht*, there must be more than a reasonable possibility that the error contributed to the conviction or sentence.'"). Accordingly, Ground Three is denied under § 2254(d).

D. Ground Four

Petitioner asserts the trial court violated his constitutional rights by limiting *voir dire*. (Doc. 1 at 24.) Specifically, Petitioner complains the trial court did not allow the defense to question the venire regarding the internet sites the potential jurors visited, their view of psychological and mental health issues, "any type of treatment they agree or disagree with," and psychological state of mind. (*Id.*)

Petitioner raised this ground on direct appeal. The Fifth DCA affirmed *per curiam*. (Doc. 10-5 at 2163.)

The state court's denial of this ground is not contrary to, or an unreasonable application of, clearly established Supreme Court precedent. Trial courts retain "great latitude in deciding what questions should be asked on voir dire." *Mu'Min v. Virginia*, 500 U.S. 415, 424 (1991). For questions "[t]o be constitutionally

compelled. . . , it is not enough that such questions might be helpful. Rather, the trial court's failure to ask these questions must render the defendant's trial fundamentally unfair." *Id.* at 425-26.

The record reflects that defense counsel was permitted to ask sufficient questions and was given adequate latitude to determine the impartiality of the venire. *See* Doc. 10-5 at 28-1066. Moreover, there is no indication that any of the seated jurors were biased. Consequently, the trial court's limitation of voir dire did not render Petitioner's trial fundamentally unfair, and thus, was harmless even assuming it was error. Accordingly, Ground Four is denied under § 2254(d).

E. Ground Five

Petitioner maintains that the trial court violated his constitutional rights by admitting a receipt into evidence. (Doc. 1 at 24.) To support this ground, Petitioner argues that the trial court erred in allowing the State to introduce the receipt for the handgun used to shoot the victims into evidence without the proper foundation for its admission under the business records exception. (*Id.*)

Petitioner raised this ground on appeal. The Fifth DCA affirmed *per curiam.* (Doc. 10-5 at 2163.)

The state court's denial of this ground is not contrary to, or an unreasonable application of, clearly established federal law. The state court found the receipt was admissible under state law. Even if the trial court improperly admitted the

receipt without a proper foundation, the error was harmless. *See Mansfield v. Sec'y, Dep't of Corr.*, 679 F.3d 1301, 1313 (11th Cir. 2012) ("[T]he erroneous admission of evidence is likely to be harmless under the *Brecht* standard where there is significant corroborating evidence or where other evidence of guilt is overwhelming[.]") (citations omitted). The evidence of Petitioner's guilt was overwhelming even without the gun receipt. Accordingly, Ground Five is denied under § 2254(d).

F. Ground Six

Petitioner contends the trial court violated his right to due process by denying his motion for mistrial. (Doc. 1 at 24.) Petitioner argues that the judge should have granted his motion for mistrial after a police officer made a comment from which the jury could infer that the officer knew Petitioner from prior criminal contact. (*Id.*)

Petitioner raised this ground on direct appeal. The Fifth DCA affirmed *per curiam*. (Doc. 10-5 at 2163.)

The state court's denial of this ground is not contrary to, or an unreasonable application of, clearly established federal law. At trial, when asked who and what he saw at the scene, an officer answered that Petitioner's neighbors pointed him out, and the officer continued to state, "I know the Defendant from pre - ". (Doc.

10-5 at 1190.) The prosecution cut off the officer's statement with a question about the location of the individuals at the scene. (*Id.*)

It is purely speculative that the jury inferred that the officer's uncompleted statement indicated that he knew Petitioner from a prior criminal encounter. The jury just as easily could have thought that the officer was indicating he knew Petitioner from a previous meeting at church, a store, *etc.* Furthermore, the statement did not have substantial and injurious effect on the verdict given the overwhelming evidence of Petitioner's guilt. Accordingly, Ground Six is denied under § 2254(d).

G. Ground Seven

Petitioner asserts the trial court violated his constitutional rights by denying his motion for mistrial after the prosecutor made a statement in closing argument that could be interpreted as a comment on his failure to testify. (Doc. 1 at 25.) According to Petitioner, the prosecutor said, "[T]here is no explanation for the time the defendant had for reflection." (*Id.*)

Petitioner raised this ground on direct appeal. The Fifth DCA affirmed *per curiam*. (Doc. 10-5 at 2163.)

Petitioner has not demonstrated that the state court's denial of this ground is erroneous. Under Florida law, "an attorney is allowed to argue reasonable inferences from the evidence and to argue credibility of witnesses or any other

relevant issue so long as the argument is based on the evidence." *Miller v. State*, 926 So. 2d 1243, 1254 55 (Fla. 2006) (citing *Craig v. State*, 510 So. 2d 857, 865 (Fla. 1987)). Here, after detailing the evidence the State maintained proved that Petitioner acted with premeditation, the prosecutor argued, "There is no explanation for that other than first degree - - , ". (Doc. 10-5 at 1973.) Clearly the prosecutor was not commenting on Petitioner's failure to testify. Rather he was arguing that it was reasonable to infer from the evidence that premeditation was proven. Accordingly, Ground Seven is denied under § 2254(d).

H. Ground Eight

Petitioner maintains the trial court erred by denying his motion for mistrial after it gave an instruction that was susceptible to being interpreted by the jury as a comment on his failure to testify. (Doc. 1 at 25-26.) Petitioner raised this ground on direct appeal. The Fifth DCA affirmed *per curiam*. (Doc. 10-5 at 2163.)

The state court's denial of this ground is not erroneous. The instruction Petitioner complains about was related to closing arguments and the order of those arguments. (Doc. 10-5 at 1906.) Specifically, after noting that the parties had rested and that it was time for closing arguments, the trial court stated, "Each side will have equal time, but the State is entitled to divide this time between an opening argument and a rebuttal argument after the Defendant has spoken." (*Id.*) Although unartful, the instruction in context clearly referenced the defense's closing

argument. Thus, any error in the instruction was harmless. Accordingly, Ground Eight is denied pursuant to § 2254(d).

I. Grounds Nine through Fourteen

In Grounds Nine through Fourteen, Petitioner alleges appellate counsel rendered ineffective assistance. (Doc. 1 at 27-29.) Specifically, Petitioner asserts appellate counsel failed (1) to ensure the completeness of the appellate record by not including photographs, competency reports, or lists of medications (Ground Nine), (2) to raise on appeal the issues that were asserted in the motion for new trial (Ground Ten), (3) to argue that the State presented evidence of an uncharged crime (Ground Eleven), (4) to argue that the trial judge was biased (Ground Twelve), and (5) to argue that the standard jury instruction on "heat of passion" had changed (Ground Thirteen). Petitioner also raises a ground of cumulative error based on appellate counsel's deficient performance (Ground Fourteen). (*Id.*)

Petitioner raised these grounds in his state habeas petition. (Doc. 10-7 at 25-55.) The Fifth DCA summarily denied the petition. (Doc. 10-8 at 74.)

Petitioner has not demonstrated that the state court's denial of these grounds is contrary to, or an unreasonable application of, *Strickland*. Petitioner does not explain how counsel's failure to ensure that the appellate record included the photographs admitted into evidence at trial, his competency reports, or his medication list resulted in prejudice. In addition, many of the issues raised in his

motion for new trial were raised on direct appeal, and Petitioner does not indicate how the remaining issues would have warranted appellate relief. *See* Doc. Nos. 10-5 at 2026-90; 10-7 at 51-52.)

As to Ground Eleven, after freeing himself from his son's restraint and unintentionally shooting his son, Petitioner chased his wife into her trailer and shot her and another person multiple times. Florida law permits the admission of evidence of uncharged crimes "when it is impossible to give a complete or intelligent account of the charged crime without reference to uncharged crimes[.]" *Rolle v. State*, 93 So. 3d 1230, 1231 (Fla. 2d DCA 2012) (citing *Wright v. State*, 19 So. 3d 277, 292 (Fla. 2009)). Here, to give a complete account of the incident, it was necessary to introduce evidence that Petitioner accidentally shot his son, who was attempting to restrain Petitioner from attacking his wife (one of the victims). This evidence was relevant and necessary to show the circumstances surrounding the murders. Thus, it was admissible.

Regarding Ground Twelve, the defense did not move to recuse or disqualify the judge during the trial. Consequently, under Florida law, the issue was not preserved for appellate review and could only be considered on appeal if it constituted fundamental error. *See Jackson v. State*, 983 So. 2d 562, 568 (Fla. 2008) ("Errors that have not been preserved by contemporaneous objection can be considered on direct appeal only if the error is fundamental."). Appellate counsel

is not deficient for failing to raise issues that are procedurally barred and do not present a question of fundamental error. *See Downs v. Moore*, 801 So. 2d 906, 910 (Fla. 2001). Petitioner's claim of judicial bias was premised on an adverse ruling, which is not a sufficient basis for disqualification. Further, there is no indication that the trial judge was biased or was not impartial. Thus, appellate counsel was not deficient for failing to raise this ground nor did prejudice result.

Likewise, as to Ground Thirteen, the defense did not object to the reading of the heat of passion instruction. Petitioner has not demonstrated that the instruction resulted in fundamental error. Moreover, the Supreme Court of Florida indicated that the change in the heat of passion instruction became effective on the date the opinion became final, which was after the conclusion of Petitioner's trial. *See In re Standard Jury Instructions In Crim. Cases--Rep. No. 2013-02*, 137 So. 3d 995, 997 (Fla. 2014). Consequently, appellate counsel was not deficient for failing to raise this issue nor did prejudice result from counsel's failure to do so.

In sum, Petitioner has not demonstrated counsel was deficient as alleged in Grounds Nine through Thirteen. In addition, a reasonable probability does not exist that the outcome of the appeal would have been different had counsel raised these issues. Because appellate counsel was not ineffective, there is no cumulative error based on appellate counsel's performance as asserted in Ground Fourteen. Accordingly, Grounds Nine through Fourteen are denied pursuant to § 2254(d).

J. Grounds Fifteen through Twenty-Nine

Petitioner asserts fifteen grounds of ineffective assistance of trial counsel. Petitioner raised Grounds Fifteen through Twenty-Seven in his first Rule 3.850 motion. The state court denied these grounds on the merits. (Doc. Nos. 10-26 at 2-11; 10-27 at 1-3.) The Fifth DCA affirmed *per curiam*. (Doc. 10-56 at 93.) Petitioner raised Grounds Twenty-Eight and Twenty-Nine in his second Rule 3.850 motion. The state court denied the grounds as untimely, successive, and on the merits. (Doc. Nos. 10-36 at 16-18; 10-37 at 1-2.) The Fifth DCA affirmed *per curiam*. (Doc. 10-17 at 2.)

As discussed *infra*, the state courts' denial of Grounds Fifteen through Twenty-Seven is not contrary to, or an unreasonable application of, *Strickland*. Likewise, Grounds Twenty-Eight and Twenty-Nine are procedurally barred.

i. Ground Fifteen

Petitioner asserts counsel rendered ineffective assistance by failing to "prepare and present extenuating circumstances for additional peremtory [sic] challenges. . . ." (Doc. 1 at 31.) Petitioner complains that counsel failed to tell the court that a potential juror, Deshotel, was the head of security at Lockheed Martin and was the person his wife (the victim) "would deal with at her job". (*Id.*) As a result, Petitioner argues the defense's cause challenge, which was based on

have been restored because he was not taking his medication and the sealing of the record prevented the submission of a complete appellate record. (*Id.*) Similarly, in Ground Twenty-Six, Petitioner contends counsel was ineffective for failing to ensure the appellate record was complete. (*Id.* at 38-39.)

The state court denied Ground Sixteen after an evidentiary hearing. (Doc. 10-26 at 11.) The state court credited counsel's testimony that Petitioner did not exhibit any symptoms of incompetence upon his return from the state hospital and that had Petitioner behaved in a manner that caused concern, counsel would have requested a re-evaluation. (*Id.*) With respect to Ground Twenty-Six, the court concluded that counsel was not deficient because trial counsel was not responsible for preparing the appellate record and trial counsel testified that he would have assisted appellate counsel had he been contacted. (Doc. 10-27 at 2.)

The record reflects that counsel testified at the evidentiary hearing that he believed Petitioner was competent after he returned from the state hospital based on their interaction. (Doc. Nos. 10-45 at 14-16; 10-46 at 1-5, 12.) Counsel indicated that after reviewing the report from the state hospital and discussing the matter with Petitioner, the defense made a strategic decision not to have Petitioner's competency reevaluated. (Doc. 10-46 at 1-5.) Finally, counsel testified that the sealing of the competency materials was standard practice by the court to protect

Petitioner's personal information and that appellate counsel and the clerk were responsible for preparing the appellate record. (*Id.* at 4-5; Doc. 10-49 at 15-17.)

There is no indication from the record that at the time of trial Petitioner was unable to consult with his attorneys with a reasonable degree of rational understanding or did not have a rational and factual understanding of the proceedings against him. *See Adams v. Wainwright*, 764 F.2d 1356, 1360 (11th Cir. 1985) ("The legal test for mental competency is whether. . . the petitioner had 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and whether he had 'a rational as well as factual understanding of the proceedings against him.'").

Furthermore, trial counsel had no duty to prepare/supplement the appellate record where they were not representing Petitioner on appeal. Moreover, Petitioner has not shown that the purported missing portions of the record prejudiced his appeal. Consequently, Petitioner has not demonstrated either deficient performance or prejudice in relation to these grounds. *See, e.g., Lawrence v. Sec'y, Fla. Dep't of Corr.*, 700 F.3d 464, 479 (11th Cir. 2012) (explaining that to show prejudice based on counsel's failure to seek a competency evaluation, the petitioner must demonstrate that "there was a reasonable probability that he would have received a competency hearing *and* been found incompetent had

counsel requested the hearing.") (emphasis in original). Therefore, Grounds Sixteen and Twenty-Six are denied.

iii. Ground Seventeen

Petitioner asserts counsel was ineffective for failing to move to recuse the trial judge. (Doc. 1 at 32.) To support this ground, Petitioner argues that prior to trial, the trial judge presided over a dependency case stemming from Petitioner's criminal charges and made biased comments. (*Id.*)

The state court denied this ground after an evidentiary hearing, finding no deficient performance or prejudice. (Doc. 10-26 at 7.) The state court reasoned that defense counsel chose to take a "wait and see" approach regarding recusal because they did not think the judge's single statement warranted recusal. (*Id.*) The state court credited counsel's testimony that nothing happened thereafter that triggered a recusal motion. Rather, counsel testified that the trial judge made favorable rulings for the defense. (*Id.*)

The record supports the state courts' denial of this ground. Counsel made a reasoned decision to take a "wait and see" approach to the recusal issue. (Doc. 10-46 at 9-10.) Per counsel's testimony, the trial judge made rulings favorable to the defense and no basis existed to move for recusal. (*Id.* at 10; Doc. 10-48 at 9.) There is no indication that the trial judge was biased or partial. Counsel, therefore, was

not deficient for failing to move for recusal nor did prejudice result from counsel's failure to do so.

iv. Ground Eighteen

Petitioner maintains counsel was ineffective for failing to properly advise him about his options before he rejected the plea offer and for failing to make a counteroffer. (Doc. 1 at 33.)

The state court denied this ground, reasoning that when Petitioner rejected the plea offer, he knew he faced a mandatory life sentence if convicted as charged. (Doc. 10-26 at 7-18.) The state court further found that it was purely speculative that a counteroffer would have been entertained. (*Id.* at 8.)

From Petitioner's sworn representations, he understood the plea offer, had an opportunity to discuss it with counsel, and knew he was subject to a life sentence if convicted of the charges. (Doc. Nos. 10-28 at 8; 10-29 at 1.) Petitioner, however, chose to reject the plea offer. Moreover, it is purely speculation that the prosecution would have been amenable to a counteroffer. Petitioner, therefore, has not demonstrated deficient performance or prejudice. Thus, this ground is denied.

v. Grounds Nineteen and Twenty

In Ground Nineteen, Petitioner contends counsel rendered ineffective assistance by failing to inform the jury that he was prescribed medication for a

mental and emotional disorder. (Doc. 1 at 33.) Similarly, in Ground Twenty, Petitioner complains counsel was ineffective for failing to present an insanity and battered spouse defense. (*Id.* at 33-34.)

The state court denied these grounds after an evidentiary hearing. (Doc. 10-26 at 8-9.) The state court reasoned that counsel made a reasonable strategic decision not to inform the jury that Petitioner was on medication for a mental and emotional disorder. (*Id.* at 8.) The state court further determined that counsel was not deficient for failing to present an insanity or battered spouse defense because there was no evidence to support either defense. (*Id.* at 9.)

The state courts' denial of these grounds is supported by the record. Counsel testified that the defense considered requesting an instruction advising the jury that Petitioner was taking medication for a mental condition. (Doc. 10-46 at 11.) Counsel, however, did not do so because they were concerned the jury would view the information negatively. (*Id.* at 15-18.) Likewise, counsel testified it considered the insanity defense but did not think the evidence supported it. (Doc. Nos. 10-46 at 18; 10-47 at 1-5.) Similarly, counsel indicated that he did not believe there was a strong basis for a battered spouse defense and did not think it would have been successful given the evidence. (Doc. 10-47 at 7-9.)

In light of the evidence, counsel made reasonable strategic decisions not to pursue these matters. Moreover, a reasonable probability does not exist that the

outcome of the trial would have been different had counsel done so. Thus, Grounds Nineteen and Twenty are denied.

vi. Ground Twenty-One

Petitioner asserts counsel was ineffective for conceding guilt without his permission. (Doc. 1 at 35.) In denying this ground, the state court determined after an evidentiary hearing that counsel discussed with Petitioner, prior to trial, that the defense was heat of passion and the decision to argue heat of passion showed at most that Petitioner committed manslaughter. (Doc. 10-26 at 10.) The state court further found that even if Petitioner did not agree to concede guilt to manslaughter, prejudice did not result from counsel's concession based on the overwhelming evidence of Petitioner's guilt. (*Id.*)

The record reflects that counsel testified that they discussed with Petitioner that the defense was heat of passion and that this defense necessitated a concession to a lesser offense than murder. (Doc. 10-47 at 12, 15-16.) Counsel said that Petitioner agreed with the decision to concede that the shootings constituted a lesser offense than murder. (*Id.* at 15-16.) Moreover, the evidence of Petitioner 's guilt was substantial. Thus, counsel was not deficient for conceding guilt to manslaughter and a reasonable probability does not exist that the outcome of the trial would have been different had counsel done so. Accordingly, this ground is

denied.

vii. Ground Twenty-Two

Petitioner contends counsel was ineffective for failing to object to the admission of photographs of Patrick Wharen, Jr.'s, injuries. (Doc. 1 at 36.) In denying relief, the state court reasoned that counsel objected to the admission of the photographs and the photographs were properly admitted. (Doc. 10-26 at 11.)

As discussed *supra* in Ground Eleven, evidence regarding the shooting of Petitioner's son was inextricably intertwined with the circumstances surrounding the offenses. Therefore, photographs of his injuries were admissible. Counsel, therefore, was not deficient. Moreover, a reasonable probability does not exist that the outcome of the trial would have been different but for the admission of the photographs. Thus, this ground is denied.

vii. Ground Twenty-Three

Petitioner asserts counsel rendered ineffective assistance by failing to call a mental health expert to testify about Petitioner's state of mind to support the heat of passion defense. (Doc. 1 at 37.) The state court denied this ground after an evidentiary hearing. (Doc. 10-27 at 1.)

The state court noted that at trial, the defense called Dr. Martin, who counseled Petitioner and his wife, as a witness. (*Id.*) Dr. Martin testified she had recommended that Petitioner get a prescription for medication, but he was unable

to do so. (*Id.*) Defense counsel testified at the evidentiary hearing that he did not think it was necessary to call a psychiatrist to testify because he believed the evidence, including Dr. Martin's testimony, supported the heat of passion defense. (*Id.*) The state court concluded that counsel made a reasonable strategic not to call a psychiatrist to testify about Petitioner's mental state and that prejudice did not result from counsel's determination. (*Id.*)

From the record, counsel did not believe it was necessary to call a psychiatrist to support the heat of passion defense. (Doc. 10-48 at 5.) Counsel thought that the evidence presented supported the defense. (*Id.*) Evidence was admitted at trial from which the jury could have found Petitioner acted in the heat of passion. Thus, counsel made a reasonable strategic decision not to call a psychiatrist to testify. Finally, given the evidence presented, a reasonable probability does not exist that the outcome of the trial would have been different had counsel called a psychiatrist to testify. Ground Twenty-Three, therefore, is denied.

viii. Ground Twenty-Four

Petitioner maintains counsel rendered ineffective assistance by advising him not to testify. (Doc. 1 at 36-37.) Petitioner argues that it would not have been detrimental for him to testify regarding his state of mind to support the heat of passion defense. (*Id.*)

The state court denied this ground after an evidentiary hearing, concluding counsel was not deficient. (Doc. 10-27 at 1-2.) The state court reasoned that counsel did not want Petitioner to testify because they were concerned that Petitioner's testimony would be detrimental to the heat of passion defense and could cause the jury to recommend a death sentence. (*Id.*) The state court further noted that defense counsel believed Petitioner's testimony was not necessary because the evidence presented support the heat of passion defense. (*Id.*) Finally, the state court credited counsel's testimony that had Petitioner disagreed with counsel's advice not to testify, the defense would have had to recess to regroup. (*Id.*)

At the evidentiary hearing, counsel testified they were concerned that Petitioner would be a "loose cannon" on the stand and that his testimony would be detrimental to the heat of passion defense. (Doc. 10-48 at 12-13.) Counsel was also concerned that Petitioner's testimony could result in the imposition of the death penalty. (Doc. Nos. 10-48 at 12-17; 10-52 at 2-3.) Consequently, counsel advised Petitioner not to testify.

Petitioner has not shown that counsel's advice was unreasonable or erroneous. Counsel had legitimate reasons for advising Petitioner not to testify. Counsel, therefore, was not deficient, and this ground is denied.

ix. Ground Twenty-Five

Petitioner asserts counsel rendered ineffective assistance by failing to

explain "heat of passion" to the jury. (Doc. 1 at 38.) The state court denied this ground. (Doc. 10-27 at 2.) The state court reasoned that counsel provided a proposed "heat of passion" instruction, but the trial court refused to give it, choosing instead to give its own heat of passion instruction. (*Id.*) The state court concluded that counsel was not deficient for failing to offer another instruction. (*Id.*)

The record establishes that defense counsel drafted a proposed heat of passion instruction. The trial court, however, refused to give the instruction and crafted and used its own instruction. (Doc. 10-5 at 1904-05, 1985-86, 1994.) Moreover, counsel argued in closing that the evidence demonstrated that Petitioner acted in the heat of passion. (*Id.* at 1950-66.) Counsel, therefore, was not deficient, nor did prejudice result from counsel's performance. Accordingly, this ground is denied.

x. Ground Twenty-Seven

Petitioner argues that the cumulative effect of counsel's errors resulted in ineffective assistance. (Doc. 1 at 39-40.) The state court denied this ground, concluding that there was no deficient performance or prejudice and no errors that cumulatively prejudiced Petitioner. (*Id.*)

"The Supreme Court has not directly addressed the applicability of the cumulative error doctrine in the context of an ineffective assistance of counsel

claim." *Forrest v. Fla. Dep't of Corr.*, 342 F. App'x 560, 564 (11th Cir. 2009). The Supreme Court has held, however, in relation to a claim of ineffective assistance of counsel, that "'there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt.'" *Id.* (quoting *United States v. Cronic*, 466 U.S. 648, 659 n. 26 (1984)).

Here, Petitioner has not demonstrated that trial counsel rendered ineffective assistance in any of his grounds. Consequently, Petitioner's claim of cumulative error fails. *See, e.g., Borden v. Allen*, 646 F.3d 785, 823 (11th Cir. 2011) ("Because Borden has not sufficiently pled facts that would establish prejudice—cumulative or otherwise—we decline to elaborate further on [a cumulative-effect ineffective assistance of counsel claim] for fear of issuing an advisory opinion on a hypothetical issue."). Accordingly, Ground Twenty-Seven is denied.

xi. Grounds Twenty-Eight and Twenty-Nine

In Ground Twenty-Eight, Petitioner contends counsel rendered ineffective assistance by failing to call exculpatory witnesses. (Doc. 1 at 42.) Petitioner complains in Ground Twenty-Nine that counsel was ineffective for failing to produce Slough's cell phone records to lay the foundation for her testimony and

for not having her testimony transcribed.[6] (*Id.*) The state court denied these grounds as untimely and successive. (Doc. 10-16 at 12-14.)

Federal courts must dismiss those claims or portions of claims that have been denied on adequate and independent procedural grounds under state law. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991), *holding modified by Martinez v. Ryan*, 566 U.S. 1 (2012). *See Preston v. Sec'y, Fla. Dep't of Corr.*, 785 F.3d 449 (11th Cir. 2015). Consequently, these grounds are procedurally barred, absent an exception to the procedural default bar, because they were denied as untimely and successive.

Procedural default will be excused only in two narrow circumstances. First, a petitioner may obtain federal review of a procedurally defaulted claim if he can show both "cause" for the default and actual "prejudice" resulting from the default. *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999). "To establish 'cause' for procedural default, a petitioner must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in the state court." *Id.* To establish the requisite "prejudice" to warrant review of a procedurally defaulted claim, a petitioner must show that there is at least a reasonable probability that the result of the proceeding would have been different. *Henderson v. Campbell*, 353 F.3d 880, 892 (11th Cir. 2003) (citations omitted). The

[6] Although Petitioner does not specify, the Court assumes that he is referring to counsel's failure to have Slough's deposition testimony transcribed.

second exception to the procedural default bar, known as the "fundamental miscarriage of justice," only occurs in an extraordinary case, in which a "constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

Petitioner has not demonstrated cause and prejudice to overcome his procedural default of these grounds. Likewise, he has not established that he is actually innocent. Therefore, Grounds Twenty-Eight and Twenty-Nine are procedurally barred and denied.

Any allegations not specifically addressed are without merit.

IV. CERTIFICATE OF APPEALABILITY

This Court should grant an application for certificate of appealability only if the Petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Lamarca v. Sec'y, Dep't of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009). When a district court dismisses a federal habeas petition on procedural grounds without reaching the underlying constitutional claim, a certificate of appealability should issue only when a petitioner shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional

right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*; *Lamarca*, 568 F.3d at 934. However, a prisoner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

Petitioner has not demonstrated that reasonable jurists would find the 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 Petition (Doc. 1) is **DENIED**, and this case is **DISMISSED with prejudice**.
2. Petitioner's Motion to Compel Respondents to Supplement the Record with Kim Slough's Deposition Transcript (Doc. 20) is **DENIED** as **MOOT**. Petitioner's Motion to Strike Motion to Compel and File Amended Motion to Compel (Doc. 22) is **GRANTED**.
3. Petitioner's Amended Motion to Compel Respondents to Supplement the Record with Kim Slough's Deposition Transcript (Doc. 23) is **DENIED**. Petitioner has not demonstrated that the deposition was part

of the record used by the state court in adjudicating Petitioner's claims. *See Cullen v. Pinholster*, 563 U.S. 170, 181–82 (2011) ("review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. . . . It follows that the record under review is limited to the record in existence at that same time *i.e.*, the record before the state court."). Moreover, Slough's deposition testimony is not relevant to Petitioner's claims and would not impact the disposition of this action.

4. Petitioner is **DENIED** a Certificate of Appealability.
5. The Clerk of the Court shall enter judgment accordingly and is directed to close this case.

DONE and **ORDERED** in Orlando, Florida on March 29, 2022.

ROY B. DALTON JR.
United States District Judge

Copies furnished to:
Unrepresented Party
Counsel of Record

EXHIBIT (C)

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-12851

PATRICK W. WHAREN, SR.,

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
D.C. Docket No. 6:19-cv-01999-GKS-LHP

Exhibit (c)

Before JORDAN and JILL PRYOR, Circuit Judges.

BY THE COURT:

Patrick Wharen, Sr., has filed the following motions in his appeal of the denial of his 28 U.S.C. § 2254 petition: (1) leave to file a motion for reconsideration out of time (2) leave to file a motion for reconsideration exceeding the page limit; (3) plenary review by a panel of this Court; and (4) reconsideration of this Court's order denying his motions for a certificate of appealability and leave to proceed *in forma pauperis*.

Wharen's motions requesting leave to file a motion for reconsideration out of time and in excess of the page limit are GRANTED. Upon review, however, Wharen's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief. His motion for plenary review is DENIED as moot.

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