No.

IN THE SUPREME COURT OF THE UNITED STATES

GREGORY TOLLIVER,

*Petitioner*,

v.

ATTORNEY GENERAL, STATE OF FLORIDA, SECRETARY, FLORIDA DEPARTMETN OF CORRECTIONS,

*Respondent*.

On Petition for a Writ of Certiorari
to the Eleventh Circuit Court of Appeals

# PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether a single circuit court judge may deny a motion for certificate of appealability under Fed. R. App. P. 27(c)?

## PARTIES TO THE PROCEEDING

Parties to the proceeding include Gregory Tolliver (Appellant/Petitioner), Dane K. Chase, Esquire (Appellant/Petitioner's Counsel), and Ashley Moody, Esquire (Attorney General, State of Florida).

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## PETITION FOR WRIT OF CERTIORARI

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## OPINION BELOW

The decision of the Eleventh Circuit Court of Appeal, *infra*, is attached as Appendix A.

## JURISDICTION

The Judgment of the Eleventh Circuit Court of Appeal was entered on July 31, 2024. A Motion for Reconsideration was timely filed and denied on August 14, 2024. This Court's jurisdiction is invoked under Title 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

> (c) Power of a Single Judge to Entertain a Motion. A circuit judge may act alone on any motion, but may not dismiss or otherwise determine an appeal or other proceeding. A court of appeals may provide by rule or by order in a particular case that only the court may act on any motion or class of motions. The court may review the action of a single judge.

Fed. R. App. P. 27(c).

## STATEMENT OF FACTS

On May 17, 2021, Mr. Tolliver filed a Petition for Writ of Habeas Corpus under 28 U.S.C. Section 2254, which he thereafter amended on June 7, 2021. The state filed a response on September 8, 2021, and Mr. Tolliver filed a Reply on December 27, 2021. The district court ultimately entered an order denying the Petition on January 31, 2024, and likewise denied Mr. Tolliver a certificate of appealability.

Mr. Tolliver subsequently filed a Notice of Appeal, and a Motion for Certificate of Appealability in the Eleventh Circuit Court of Appeal. A single judge from the Eleventh Circuit denied Mr. Tolliver's Motion. Thereafter, Mr. Tolliver filed a Motion for Reconsideration, arguing that under Fed. R. App. P. 27(c) a single circuit judge could not deny his Motion for Certificate of Appealability, as by doing so the judge was single handedly determining his proceeding in direct contravention of Rule 27(c). The Motion for Reconsideration was denied.

This Petition follows.

## REASONS FOR GRANTING THE PETITION

### I. THIS COURT SHOULD GRANT REVIEW TO ESTABLISH THAT A SINGLE CIRCUIT JUDGE MAY NOT DENY A MOTION FOR CERTIFICATE OF APPEALABILITY, AS A SINGLE CIRCUIT JUDGE IS NOT PERMITTED TO DISPOSE OF AN APPELLATE PROCEEDING UNDER FED. R. APP. P. 27(C).

At issue in this Petition is whether a single circuit judge may deny a Motion for Certificate of Appealability. For the reasons that follow, this Court should establish that a Motion for Certificate of Appealability cannot be denied by a single circuit judge.

Fed. R. App. P. 22(b)(2) states that a request for a certificate of appealability "addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes." However, Fed. R. App. P. 27(c) states that "A circuit judge may act alone on any motion, but may not dismiss or otherwise determine an appeal or other proceeding." A plain and ordinary reading of Fed. R. App. P. 22(b)(2) and Fed. R. App. P. 27(c) makes clear that while a single judge may *consider* a motion for certificate of appealability, a single judge may not deny a motion for certificate of appealability, as by doing so the judge is dismissing or otherwise determining the appeal/proceeding, which a single judge is precluded from doing under Fed. R. App. P. 27(c). Read together, it is clear a single judge may consider a motion for certificate of appealability and grant the motion, but may not alone deny the motion. Given that a single judge may grant a certificate of appealibility under 28 U.S.C. § 2253, but the statute says nothing of a single judge's ability to deny such a motion, the rules likewise comport with the relevant statutory provisions.

The committee notes for Rule 27(c) further demonstrate this point. The committee notes for Rule 27(c) state, in relevant part:

> This subdivision empowers a single circuit judge to act upon virtually all requests for intermediate relief which may be made during the course of an appeal or other proceeding. By its terms he may entertain and act upon any motion other than a motion to dismiss or otherwise determine an appeal or other proceeding. But the relief sought must be "relief which under these rules may properly be sought by motion."

Fed. R. App. P. 27, Advisory Committee Notes, Subdivision (c). A motion for a certificate of appealability cannot plausibly be said to be a request for "intermediate relief," instead, it ***is*** the relief requested in the proceeding. Accordingly, a single circuit court justice simply may not deny such a motion. *See*, *Id.*

The circuit courts are split on whether a single circuit judge may deny a motion for certificate of appealability. The Third, Fourth, and Eighth Circuits require three judge panels to hear such motions by rule. *See*, 3rd Cir. R. 22.3; 4th Cir. R. 22(a); 8th Cir. R. 27A(a)-(c). In practice, the First, Second, Seventh, Tenth, and D.C. Circuits likewise decide such motions in three judge panels, while the Ninth Circuit decides them in panels of two. *See*, *e.g.*, *Rasberry v. United States*, No. 19-1966, 2019 WL 8329732 (1st Cir. Nov. 4, 2019); *Moore v. New York State Off. of Att'y Gen.*, No. 19-2618, 2020 WL 768668 (2d Cir. Jan. 15, 2020); *Foster v. Smith*, No. 17-1908, 2017 WL 5197490 (7th Cir. Sept. 29, 2017); *United States v. Cash*, 822 F. App'x 824, 831 (10th Cir. 2020); *Miles v. Paul*, No. 21-5078, 2021 WL 3719346 (D.C. Cir. Aug. 9, 2021); *Due v. Bd. of Parole Hearings*, No. 17-56559, 2018 WL 5018513 (9th Cir. May 31, 2018). The Fifth, Sixth, and Eleventh Circuits permit a

single circuit judge to decide such motions. *See*, 5th Cir. R. 27.2; *Figura v. United States*, No. 21-1352, 2021 WL 8082964 (6th Cir. Oct. 15, 2021); 11th Cir. R. 22-1(c). As explained *supra*, the approaches taken by the Fifth, Sixth, and Eleventh Circuits are in direct contravention of Fed. R. App. P. 27(c). Accordingly, this Court should grant review and establish that under Fed. R. App. P. 27(c) a single circuit judge may not deny a motion for certificate of appealability, so that all habeas petitioners may enjoy the same right to panel review afforded by Rule 27, regardless of the circuit their petition originates from.

Additionally, Mr. Tolliver's case is the ideal vehicle for addressing this issue, as the record is fully developed and presents a clean opportunity to address this important question. This Court is not tasked with sifting through the record and determining whether Mr. Tolliver should be granted a certificate of appealability – that task will be for a panel of the Eleventh Circuit to decide on remand. Instead, the question to be resolved is straightforward – is a single circuit judge permitted to deny a motion for certificate of appealability? Under a plain and ordinary reading of the Federal Rules of Appellate Procedure the answer is no. *See*, Fed. R. App. P. 27(c).

Consequently, for the reasons set forth above, this Court should grant Mr. Tolliver's Petition, and establish that a single circuit court judge may not deny a motion for certificate of appealability under Fed. R. App. P. 27(c), and grant relief accordingly.

## CONCLUSION

For the reasons stated above, this Court should grant Mr. Tolliver's Petition for Writ of Certiorari, establish that a single circuit court judge may not deny a motion for certificate of appealability under Fed. R. App. P. 27(c), reverse the order denying his Motion for Certificate of Appealability, and order review of his motion by a panel of judges of the Eleventh Circuit.

Respectfully Submitted,

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# APPENDIX A

In the

# United States Court of Appeals

## For the Eleventh Circuit

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No. 24-10643

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GREGORY A. TOLLIVER,

Petitioner-Appellant,

*versus*

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

Respondents-Appellees.

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Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 5:21-cv-00264-KKM-PRL

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ORDER:

Gregory Tolliver is a Florida prisoner serving a 15-year sentence following a guilty plea for multiple counts of burglary and grand theft. He moves this Court, through counsel, for a certificate of appealability ("COA") to challenge the district court's determination that Ground Nine of his *pro se* 28 U.S.C. § 2254 petition was procedurally defaulted. He also moves for leave to proceed *in forma pauperis* ("IFP"). In Ground Nine, Tolliver alleged that his counsel was ineffective for failing to present sufficient argument during a suppression hearing.

To merit a COA, Tolliver must show that reasonable jurists would debate (1) whether the petition states a valid claim of the denial of a constitutional right, or the issues deserve encouragement to proceed further, and (2) whether the district court was correct in its procedural ruling. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Here, Tolliver has failed to do so.

First, Ground Nine was unexhausted and procedurally defaulted, as Tolliver had not raised this particular ineffective-assistance claim before the state court, and he would be barred from raising it in the future. *See Bailey v. Nagle*, 172 F.3d 1299, 1302-03 (11th Cir. 1999); Fla. R. Crim. P. 3.850(b), (h). Further, Tolliver failed to establish any excuse to his procedural default.

Ground Nine was not substantial under *Martinez v. Ryan*, 566 U.S. 1, 13-14 (2012), as counsel presented the complained about argument at the suppression hearing, and Tolliver indicated that he was pleased with counsel's representation. *See Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991); *Jones v. White*, 992 F.2d 1548, 1556

(11th Cir. 1993). Tolliver likewise failed to sufficiently demonstrate how counsel's alleged errors prejudiced the proceedings. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). He also did not point to any evidence of his actual innocence. *See McKay v. United States*, 657 F.3d 1190, 1196 (11th Cir. 2011).

Accordingly, Tolliver's COA motion is DENIED. His IFP motion is DENIED AS MOOT.

/s/ Adalberto Jordan

UNITED STATES CIRCUIT JUDGE

# APPENDIX B

In the

# United States Court of Appeals

## For the Eleventh Circuit

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No. 24-10643

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GREGORY A. TOLLIVER,

Petitioner-Appellant,

*versus*

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

Respondents-Appellees.

---

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 5:21-cv-00264-KKM-PRL

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Before JORDAN and JILL PRYOR, Circuit Judges.

BY THE COURT:

Pursuant to 11th Cir. R. 22-1(c) and 27-2, Gregory Tolliver, through counsel, has filed a motion for reconsideration of this Court's July 31, 2024, order denying him a certificate of appealability and leave to proceed *in forma pauperis,* on appeal from the denial of his 28 U.S.C. § 2254 petition. Upon review, Tolliver's motion is DENIED because he offers no new evidence or meritorious arguments as to why this Court should reconsider its previous order.

# APPENDIX C

**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**OCALA DIVISION**

GREGORY A. TOLLIVER,
Petitioner,

v. Case No. 5:21-cv-264-KKM-PRL

FLORIDA ATTORNEY GENERAL, SECRETARY, DEPARTMENT OF CORRECTIONS,
Respondents.

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**ORDER**

Gregory A. Tolliver, a Florida prisoner, timely filed an Amended Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254.[1] (Doc. 4.) Tolliver moves for disposition of the amended petition. (Doc. 19.) Having considered the amended petition, (Doc. 4), the response opposing the amended petition, (Doc. 9), and the amended reply, (Doc. 17), the amended petition is denied. Because reasonable jurists would not disagree, Tolliver is not entitled to a certificate of appealability.

## I. BACKGROUND

[1] A state prisoner has one year from the date his judgment becomes final to file a § 2254 petition. *See* 28 U.S.C. § 2244(d)(1). If a habeas petitioner's conviction is reviewed by an appellate court, their judgment becomes final ninety days after entry of judgment, the time window during which they "could have petitioned the Supreme Court of the United States for a writ of certiorari." *Hall v. Sec'y, Dep't of Corr.*, 921 F.3d 983, 986 (11th Cir. 2019) (citing *Bond v. Moore*, 309 F.3d 770, 774 (11th Cir. 2002)); *see Chavers v. Sec'y, Fla. Dep't of Corr.*, 468 F.3d 1273, 1275 (11th Cir. 2006) ("the entry of judgment, and not the issuance of the mandate, is the event that starts the running of time[]"). The one-year limitation period is tolled during the pendency of properly filed state motions seeking collateral relief. *See* 28 U.S.C. § 2244(d)(2). Tolliver's conviction became final on July 25, 2016, 90 days after the Fifth DCA issued the judgment affirming his conviction. (Doc. 9-1, Ex. 16.) After 363 days passed, Tolliver moved for postconviction relief under Florida Rule of Criminal Procedure 3.850. (*Id.*, Ex. 18.) The motion remained pending until May 4, 2021, when the Florida Supreme Court declined to accept jurisdiction over the denial of Tolliver's Rule 3.850 motion. (*Id.*, Ex. 35.) On May 3, 2021, Tolliver signed the instant petition. *See Daniels v. United States*, 809 F.3d 588, 589 (11th Cir. 2015) (citations omitted) (under the mailbox rule "a pro se prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing[,]" which is presumed to be the date the prisoner signed the petition). Therefore, Tolliver's § 2254 petition is timely.

**A. Factual Background**

In November 2012, Tolliver was hired to pressure wash the outside of Keith and Shirley VonQualen's rental property. (Doc. 9-1, Ex. 3, p. 22; Ex. 8, p. 298.) While Tolliver was pressure washing their property, the VonQualens asked Tolliver to help them move a piece of furniture inside. (*Id.*, Ex. 8, pp. 298–99.) The VonQualens then left the property while Tolliver was still pressure washing, but when they returned, Tolliver and the VonQualens' new television were both gone and the pressure washing work was incomplete. (*Id.*, p. 299.)

On December 2, 2012, Martin Smallwood went to his property, where he kept a firearm collection, and found some of his firearms missing. (*Id.*, Ex. 20, p. 566.) Smallwood called the Marion County Sheriff's Office to report the theft and then called his employee Glenn Gough to ask him to drive by Tolliver's residence because he suspected Tolliver was involved.[2] (*Id.*, pp. 570–73, 575.) Smallwood claimed that Tolliver knew Smallwood kept firearms at the property. (*Id.*, p. 568.)

Gough drove by Tolliver's residence and saw Tolliver's black pickup truck backed into the driveway up to the garage as if someone was unloading something into the garage. (*Id.*, pp. 570–71.) After Gough reported what he saw to Smallwood, Smallwood called Detective Art King of the Marion County Sheriff's Office and told Detective King that Gough saw Tolliver unloading the firearms from his truck into his garage, a fact that was later discovered to be untrue. (*Id.*, Ex. 3, pp. 21, 24; Ex. 4, pp. 84, 112, 136–37; Ex. 5, p. 254.)

[2] Prior to the burglary, Tolliver was friends with Smallwood's son Chase. (Doc. 9-1, Ex. 20, p. 561.) Smallwood also owned a pressure washing business that Tolliver worked for. (*Id.*) After one of Tolliver's arrests, Smallwood did not want Tolliver around his son or his business because he knew Tolliver was a thief. (*Id.*, pp. 563–64, 591.)

Detective King called Detective Ronald Michaud of the Lady Lake Police Department and apprised Detective Michaud of the information he received from Smallwood. (*Id.*, Ex. 3, p. 21; Ex. 4, pp. 69, 116, 153; Ex. 5, p. 254.) Detective Michaud, Detective Stuart Perdue, and Sergeant Robert Tempesta responded to Tolliver's residence. (*Id.*, Ex. 3, pp. 21–22; Ex. 4, pp. 69–70, 116, 145; Ex. 5, p. 255.) Tolliver lived with his cousin, Danielle Moore, and her daughter who were not present when the officers arrived.[3] (*Id.*, Ex. 4, pp. 85, 163, 223–24; Ex. 5, p. 255.)

When the officers arrived, they saw the black pickup truck described by Detective King, but did not observe any activity outside. (*Id.*, Ex. 3, p. 22; Ex. 4, p. 71; Ex. 5, p. 255.) The officers knocked on the door and after a few minutes Zach Adams, who identified himself as Moore's boyfriend, answered the door. (*Id.*, Ex. 3, p. 22; Ex. 4, pp. 72–74, 96, 117, 119, 128–30, 148, 156; Ex. 5, p. 255.) Adams answered the door looking disheveled with his shorts inside out and no shirt as if he just woke up. (*Id.*, Ex. 3, p. 22; Ex. 4, pp. 73, 95, 128, 156.) Officers asked Adams for his identification and entered the residence to conduct a protective sweep to look for Tolliver. (*Id.*, Ex. 3, p. 22; Ex. 4, pp. 75, 99, 120, 131; Ex. 5, p. 255.)

During the protective sweep, Officer Perdue found Smallwood's firearms hidden under a blanket in Tolliver's garage, and Sergeant Tempesta found the VonQualens' television and Tolliver in his bedroom (*Id.*, Ex. 3, p. 22; Ex. 4, pp. 110–11, 136, 150, 161; Ex. 5, p. 255.) The officers arrested Tolliver. (*Id.*, Ex. 5, p. 255.) Moore was summoned to the residence after Tolliver was arrested. (*Id.*, Ex. 4, pp. 102–03, 122–23, 133.) When she arrived, Moore gave officers her consent to enter the property and seize the stolen items. (*Id.*, Ex. 5, pp. 255–56.)

[3] Moore was the property's lessee. (Doc. 9-1, Ex. 20, p. 630.)

**B. Procedural Background**

The State charged Tolliver with burglary and grand theft in case 2012-CF-003824-A-X (the television case), and burglary with a firearm and grand theft in case 2012-CF-004012-A-X (the firearms case). (*Id.*, Ex. 1, 2.) In both cases, Tolliver moved to suppress the television and firearms seized from his residence. (*Id.*, Ex. 3.) The trial court held a suppression hearing and granted the motion regarding the television but denied the motion regarding the firearms. (*Id.*, Ex. 4, 5.)

On the morning of jury selection in the television case, Tolliver filed a motion to suppress his confession. (*Id.*, Ex. 6.) The trial court heard counsels' arguments on the motion and orally denied it.[4] (*Id.*, Ex. 7, 8.) On the same day, Tolliver entered a negotiated plea to the charges as filed in both cases. (*Id.*, Ex. 9.) The trial court sentenced Tolliver to fifteen years in each case to run concurrent to each other. (*Id.*, Ex. 10, 11.)

Tolliver filed a notice of appeal raising the denial of his two motions to suppress. (*Id.*, Ex. 12, 13.) The appellate court per curiam affirmed without a written opinion. (*Id.*, Ex. 16, 17); *Tolliver v. State*, 215 So. 3d 601 (Fla. 5th DCA 2016).

Tolliver moved for postconviction relief under Florida Rule of Criminal Procedure 3.850 in both cases. (*Id.*, Ex. 18, 19.) The postconviction court held an evidentiary hearing on Tolliver's Rule 3.850 motion and then denied it. (*Id.*, Ex. 22; 23, pp. 765–74.) Tolliver appealed and the appellate court issued an opinion affirming the denial. (*Id.*, Ex. 24, 25, 28.) Tolliver filed a motion for rehearing that the appellate court denied. (*Id.*, Ex. 29, pp. 1322–30; Ex. 30.) Tolliver

[4] Three days later, the trial court issued a written order summarizing its findings and denying the motion. (Doc. 9-1, Ex. 7.)

filed a notice to invoke the Florida Supreme Court's discretionary jurisdiction. (*Id.*, Ex. 32, pp. 1349–51; Ex. 33.) The Florida Supreme Court declined to accept jurisdiction. (*Id.*, Ex. 35.) On May 3, 2021, Tolliver filed this § 2254 petition. (Doc. 1.)

## II. STANDARD OF REVIEW UNDER SECTION 2254

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) governs this proceeding. *Carroll v. Sec'y, DOC*, 574 F.3d 1354, 1364 (11th Cir. 2009). Habeas relief under the AEDPA can be granted only if a petitioner is in custody "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). "The power of the federal courts to grant a writ of habeas corpus setting aside a state prisoner's conviction on a claim that his conviction was obtained in violation of the United States Constitution is strictly circumscribed." *Green v. Sec'y, Dep't of Corr.*, 28 F.4th 1089, 1093 (11th Cir. 2022).

Section 2254(d) provides that federal habeas relief cannot be granted on a claim adjudicated on the merits in state court unless the state court's adjudication:

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

For purposes of § 2254(d)(1), the phrase "clearly established Federal law" encompasses the holdings only of the United States Supreme Court "as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). This section "defines two categories of cases in which a state prisoner may obtain federal habeas relief with respect to a claim adjudicated on the merits in state court." *Id.* at 404. First, a decision is "contrary to" clearly established federal law

"if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Id*. at 413.

Second, a decision involves an "unreasonable application" of clearly established federal law "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* The AEDPA was meant "to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002). Accordingly, "[t]he focus . . . is on whether the state court's application of clearly established federal law is objectively unreasonable, and . . . an unreasonable application is different from an incorrect one." *Id.* at 694. As a result, to obtain relief under § 2254(d)(1), "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011); *see also Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) (stating that "[t]he state court's application of clearly established federal law must be objectively unreasonable" for a federal habeas petitioner to prevail and that the state court's "clear error" is insufficient).

When the last state court to decide a federal claim explains its decision in a reasoned opinion, a federal habeas court reviews the specific reasons as stated in the opinion and defers to those reasons if they are reasonable. *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). But the habeas court is "not limited by the particular

justifications the state court provided for its reasons, and [it] may consider additional rationales that support the state court's determination." *Jennings v. Sec'y, Fla. Dep't of Corr.*, 55 F.4th 1277, 1292 (11th Cir. 2022). When the relevant state-court decision is not accompanied with reasons for the decision—such as a summary affirmance without discussion—the federal court "should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale [and] presume that the unexplained decision adopted the same reasoning." *Wilson*, 138 S. Ct. at 1192. The state may "rebut the presumption by showing that the unexplained affirmance relied or most likely did rely on different grounds than the lower state court's decision[.]" *Id.*

For purposes of § 2254(d)(2), "it is not enough to show that 'reasonable minds reviewing the record might disagree about the finding in question.'" *Brown v. Davenport*, 596 U.S. 118, 135 (2022) (quotations omitted). "An unreasonable determination of the facts occurs when the direction of the evidence, viewed cumulatively, was too powerful to conclude anything but the petitioner[']s factual claim." *Teasley v. Warden, Macon State Prison*, 978 F.3d 1349, 1355 (11th Cir. 2020) (internal quotation marks and alterations omitted). A state court's findings of fact are presumed correct, and a petitioner can rebut the presumption of correctness afforded to a state court's factual findings only by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Even when a petitioner succeeds in rebutting the presumption, he must show that the state court's decision is "based on" the incorrect factual determination. *Pye v. Warden, Ga. Diagnostic Prison*, 50 F.4th 1025, 1035 (11th Cir. 2022). This is because a state court decision may still be reasonable "even if some

of the state court's individual factual findings were erroneous—so long as the decision, taken as a whole, doesn't constitute an 'unreasonable determination of the facts' and isn't 'based on' any such determination." *Id*. (quoting *Hayes v. Sec'y, Fla. Dep't of Corr.*, 10 F.4th 1203, 1224–25 (11th Cir. 2021) (Newsom, J., concurring)).

## III. PROCEDURAL DEFAULT

A federal habeas petitioner must present his federal claims by raising them in state court before bringing them in a federal petition. *See* 28 U.S.C. § 2254(b)(1)(A); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999) ("[T]he state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition."). A petitioner satisfies this requirement if he fairly presents the claim in each appropriate state court and alerts that court to the federal nature of the claim. *Ward v. Hall*, 592 F.3d 1144, 1156 (11th Cir. 2010). "When the [petitioner] has failed to do so, and the state court would dismiss the claim on that basis, the claim is 'procedurally defaulted.'" *Shinn v. Ramirez*, 596 U.S. 366, 371 (2022).

"To overcome procedural default, the prisoner must demonstrate 'cause' to excuse the procedural defect and 'actual prejudice' if the federal court were to decline to hear his claim. *Id.* (citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)). A petitioner shows cause for a procedural default when he demonstrates "that some objective factor external to the defense impeded the effort to raise the claim properly in the state court." *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999). A petitioner demonstrates prejudice by showing that "there is at least a reasonable probability that the result of the proceeding would have been different" absent the constitutional violation. *Henderson v. Campbell*, 353 F.3d 880, 892 (11th Cir. 2003).

A petitioner may also overcome a procedural default by establishing the fundamental miscarriage of justice exception. *Id.* (citing *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986)). "A 'fundamental miscarriage of justice' occurs in an extraordinary case, where a constitutional violation has resulted in the conviction of someone who is actually innocent." *Id.*

## IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Tolliver brings several claims for ineffective assistance of counsel under the Sixth Amendment. In *Strickland v. Washington*, the Supreme Court established a two-part test for determining whether a convicted person may have relief because his counsel rendered ineffective assistance. 466 U.S. 668, 687–88 (1984). A petitioner must establish that counsel's performance was deficient and fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense. *Id.* This is a "doubly deferential" standard of review that gives both the state court and the petitioner's attorney the benefit of the doubt. *Burt v. Titlow*, 571 U.S. 12, 13 (2013) (citing *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011)).

The focus of inquiry under *Strickland's* performance prong is "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688–89. When reviewing counsel's performance, a court must adhere to a strong presumption that "counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. A court must "judge the reasonableness of counsel's conduct on the facts of the particular case, viewed as of the time of counsel's conduct," applying a "highly deferential" level of judicial scrutiny. *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000) (quoting *Strickland*, 466 U.S. at 690). The

petitioner must "prove, by a preponderance of the evidence, that counsel's performance was unreasonable[.]" *Jones v. Campbell*, 436 F.3d 1285, 1293 (11th Cir. 2006).

A petitioner's burden to show *Strickland* prejudice is also high. *Wellington v. Moore*, 314 F.3d 1256, 1260 (11th Cir. 2002). 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. "The 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." *Id.* at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.*

"The question [on federal habeas review of an ineffective assistance claim] 'is not whether a federal court believes the state court's determination' under the *Strickland* standard 'was incorrect but whether that determination was unreasonable—a substantially higher threshold.'" *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009) (quoting *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007)). Federal habeas petitioners rarely prevail on claims of ineffective assistance of counsel because "[t]he standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so." *Richter*, 562 U.S. at 105 (quotation and citations omitted).

## V. ANALYSIS

Tolliver raises nine grounds for relief. (Doc. 4.) In Grounds One and Two, Tolliver argues that the trial court erred in denying his motions to suppress. (*Id.*, pp. 3–6.) These claims were raised and rejected on direct appeal. (Doc. 9-1,

Ex. 13, 16.) In Grounds Three, Four, Five, and Six Tolliver argues that his trial counsel was ineffective for various reasons related to his motions to suppress. (Doc. 4, pp. 7–13.) These claims were raised and rejected in the postconviction proceedings. (Doc. 9-1, Ex. 19, 23.) In Grounds Seven, Eight, and Nine Tolliver argues that his trial counsel was ineffective for various reasons related to his motion to suppress evidence, but these claims were not raised in the postconviction proceedings and thus he further asserts his postconviction counsel was ineffective for failing to raise them. (Doc. 4, pp. 13–18.)

**A. Grounds One and Two**

In Ground One, Tolliver asserts that the trial court deprived him of his Fourth Amendment right when it partially denied his motion to suppress illegally obtained evidence. (*Id.*, p. 3.) In Ground Two, Tolliver similarly argues that the trial court deprived him of his Fourth Amendment right when it denied his motion to suppress admissions that were the product of officer coercion and references to evidence obtained in an unlawful seizure. (*Id.*, p. 6.) Respondent argues that Tolliver is not entitled to relief on these claims because the trial court already provided Tolliver an opportunity to litigate the claims fully and fairly. (Doc. 9, p. 22.) In his amended reply, Tolliver requests "an examination of whether the [s]tate court review of th[e] claim meets the requirements necessary to be considered a full and fair litigation[.]" (Doc. 17, pp. 8–10.)

"[W]here the [s]tate has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief" based on claims of Fourth Amendment violations. *Stone v. Powell*, 428 U.S. 465, 494 (1976). *See also Burrows v. Sec'y, Dep't of Corr.*, No. 20-14481-J, 2021

WL 2195172, at *1 (11th Cir. Apr. 20, 2021) (explaining that Fourth Amendment claims that are fully and fairly litigated are "not cognizable on federal habeas review"). A federal court may not review a Fourth Amendment claim that was fully and fairly litigated in the state court "despite a state court error in deciding the merits of a defendant's fourth amendment claim." *Williams v. Brown*, 609 F.2d 216, 220 (5th Cir. 1980) (citing *Swicegood v. Alabama*, 577 F.2d 1322, 1324-25 (5th Cir. 1978)). "'[F]ull and fair consideration' in the context of the Fourth Amendment includes 'at least one evidentiary hearing in a trial court and the availability of meaningful appellate review when there are facts in dispute, and full consideration by an appellate court when the facts are not in dispute.'" *Bradley v. Nagle*, 212 F.3d 559, 565 (11th Cir. 2000) (citing *Caver v. Alabama*, 577 F.2d 1188, 1191 (5th Cir. 1978)). A Fourth Amendment claim is not fully considered when "the trial court's findings which are essential to the disposition of the [] claim are unclear and the state appellate court writes no opinion[.]" *Tukes v. Dugger*, 911 F.2d 508, 514 (11th Cir. 1990).

I begin with the litigation of Ground One. Tolliver filed a motion to suppress a television and firearms seized from his residence because (1) they were obtained by a warrantless search, (2) the person who consented to the search did not have authority to do so, and (3) the search exceeded its permissible scope by going outside of a common area of the property. (Doc. 9-1, Ex. 3, pp. 10–11.) The trial court held an evidentiary hearing on the motion to suppress during which it heard testimony from five witnesses. (*Id.*, Ex. 4.) The trial court issued an order suppressing the television and admitting the weapons. (*Id.*, Ex. 5.) In the order, the

trial court made extensive factual findings and rendered legal conclusions on each issue raised by Tolliver. (*Id.*)

Regarding the officer's warrantless search, the trial court found there was an exception to the warrant requirement: Adams's voluntary and uncoerced consent. (*Id.*, pp. 263–64.) The trial court made this finding based on testimony it heard at the suppression hearing.[5] (*Id.*) During the hearing, Adams testified that he did not give the officers permission to enter, and instead told the officers that he did not live at the residence and did not have the right to consent to a search. (*Id.*, Ex. 4, pp. 184–86, 189.) Adams also testified that there were six or seven officers on the scene, the officers were hostile towards him, the officers had their guns drawn, he was in fear for his life, and he was under the impression that if he did not let the officers inside, they were coming in anyway. (*Id.*, pp. 180–82, 188–89, 196, 199, 206.)

The State used Adams's contradictory deposition testimony and sworn statement to impeach him during the suppression hearing. (*Id.*, pp. 199–205, 238.) During his deposition, Adams testified that the officers were nice to him and he gave them permission to enter the residence. (*Id.*, Ex. 20, p. 656.) In his earlier testimony at the deposition, Adams did not mention the officers pointing their guns at him or feeling coerced to allow their entry.[6] (*Id.*, pp. 645–66.) Adams's deposition testimony was consistent with officer testimony during the suppression hearing that only the three of them were on the scene, they had no

[5] During the evidentiary hearing, the trial court heard testimony from Tolliver, Adams, Detective Michaud, Detective Perdue, and Sergeant Tempesta. (Doc. 9-1, Ex. 4.)
[6] During the deposition Adams testified that he called Moore and she gave him permission to let the officers in the house, but this fact was not mentioned again in Moore's deposition, the suppression proceedings, or the Rule 3.850 motion proceedings. (*Id.*, Ex. 20, p. 656.)

weapons drawn, they did not convey that they would make a forceable entry, Adams gave them permission to enter, and they felt he had the authority to consent. (*Id.*, Ex. 4, pp. 74–77, 93–95, 98, 120, 131, 147–48, 150–52, 156–59.)

The trial court found Adams's suppression hearing testimony not credible and found the officers' testimony credible and consistent with Adams's deposition testimony and Adams's sworn statement. (*Id.*, Ex. 5, pp. 263–64.) The trial court concluded that Adams gave the officers consent to search the residence, there was no officer misconduct in obtaining that consent, and the consent allowed officers to look for the defendant in the common areas of the residence. (*Id.*)

Regarding Adams's authority to consent, the trial court concluded that officers reasonably believed that Adams had the apparent authority to consent to a search of the common areas as Moore, the lessee, left Adams at her home after he spent the night, he answered the door looking as if he just woke up, and he said he was dating Moore. (*Id.*, p. 265.) The trial court also stated that, "Whether or not the officers [were] ultimately factually correct in their belief is not the standard[,] [a]t the time of the search the officers had no reason to think otherwise." (*Id.*)

Regarding the scope of the search, the trial court found the garage was a public area covered by Adams's consent because Tolliver had no special expectation of privacy in it. (*Id.*) The trial court found the plain view doctrine did not allow admission of the firearms because they were covered by a blanket,[7] but that the inevitable discovery doctrine allowed admission of the firearms because

[7] During the suppression hearing, Detective Perdue testified that he found the firearms in the garage during the search. (Doc. 9-1, Ex. 4, p. 120.) When Perdue went into the garage, he saw a large blanket draped over a counter and thought it was concealing a person who could pose a threat to him. (*Id.*, pp. 120–22, 132.) Perdue got into a defensive position, flipped the blanket, and discovered the firearms instead. (*Id.*)

Moore ultimately gave her uncoerced consent for officers to enter the residence and seize them.[8] (*Id.*, pp. 269–71.) Conversely, the trial court suppressed the television, finding that only Tolliver had the ability to consent to the search of his bedroom and therefore the plain view, inevitable discovery, and independent source doctrines did not apply.[9] (*Id.*, pp. 271–73.) Tolliver appealed and the appellate court summarily affirmed the trial court's findings. (*Id.*, Ex. 12, 13, 16.)

As the trial court made explicit findings on each issue presented to it and the appellate court summarily affirmed after full briefing, Ground One was fully and fairly litigated by the state trial court. *See Hearn v. Fla.*, 326 F. App'x 519, 522 (11th Cir. 2009) (the trial court's denial of a motion to suppress, after a hearing during which the defendant introduced evidence, and the appellate court's summary affirmance constituted a full and fair litigation); *Agee v. White*, 809 F.2d 1487, 1490 (11th Cir. 1987) (litigation of one statement was full and fair because the trial court admitted it after a full evidentiary hearing and on appeal the appellate court found its admission was harmless; conversely, litigation of a second statement was not full and fair because the appellate court ignored it in its written opinion); *Vil v. Sec'y, Dep't of Corr.*, No. 6:06-CV-1126ORL18GJK, 2008 WL 1733397, at *6 (M.D. Fla. Apr. 14, 2008) (the trial court's suppression hearing and the appellate court's review of the trial court's conclusions was a full and fair litigation); *but see Tukes*, 911 F.2d at 514 (although the trial court gave a full and fair evidentiary hearing, it did not make explicit factual findings on all the essential

[8] This section of the trial court's order also addressed another argument asserted by Tolliver: that Moore's consent after the fact did not untaint the search. (*Id.*, Ex. 5, p. 269.)

[9] During the suppression hearing, Sergeant Tempesta testified that he found the television and Tolliver himself in Tolliver's bedroom during the search. (Doc. 9-1, Ex. 4, pp. 110, 136, 150.)

issues presented and the appellate court only issued a summary affirmance and thus litigation was not full and fair).

I move next to the litigation of Ground Two. On the morning of jury selection in the television case Tolliver filed a motion to suppress an illegal confession. (*Id.*, Ex. 6; Ex. 8, pp. 287–89.) Tolliver argued that the interviewing detective's references to the television—that the trial court suppressed—in his post-*Miranda* interview, tainted his confession.[10] (*Id.*, Ex. 6.) When trial counsel brought the issue to the trial court's attention, counsel stated that no testimony needed to be taken as the motion asserted a legal argument. (*Id.*, Ex. 8, pp. 294–95.) Consequently, the trial court did not hold a separate evidentiary hearing; however, the trial court heard the interview recording and legal arguments on the motion before verbally denying it and summarizing its findings. (*Id.*, pp. 294–337.) The trial court found Tolliver waived his *Miranda* rights and that the statements already redacted by the State were sufficient to alleviate any concerns. (*Id.*, pp. 335–37.) Three days later, the trial court issued a written order summarizing its findings:

> The court finds the defendant's statement was freely and voluntarily given after a knowing and intelligent waiver of *Miranda* warnings. The court further finds there was sufficient evidence for questioning the defendant apart from the illegally seized television. Although the search resulting in the find of the television was illegal, the State produced evidence that the defendant had been at the victim's home with the victim prior to the theft of the television, that the victim left the home with the defendant there doing work for the victim, that the

[10] Before trial counsel filed the motion, the State already agreed to redact "statements by the defendant or the officer that the television was found as a result of the search of the defendant's bedroom, and statements about the defendant being sorry he took the television." (Doc. 9-1, Ex. 7, p. 281.)

> defendant had been inside the[] victim's house and observed the television inside, and that when the victim returned home a short time later the television was gone. The defendant was also gone and had not completed the work he was doing at the house for the victim. All of this information was part of the interview by the officer.
>
> This court finds the confession at issue was the result of the defendant's voluntary exercise of free will and not the product of the illegal search and seizure. The illegal search was not the sole effective cause of the confession. *See Talley v. State*, 581 So. 2d 635 (Fla. 2d DCA 1991); *Jetmore State*, 275 So. 2d 61 (Fla. 4th DCA 1973); [] *Delap v. State*, 440 So. 2d 1242 (Fla. 1983).

(*Id.*, Ex. 7, p. 282.) On appeal, this issue was raised, fully briefed, and rejected by the appellate court who summarily affirmed the trial court's findings. (*Id.*, Ex. 13, 14, 15, 16).

The trial court did not hold an evidentiary hearing on the motion to suppress, but only because Tolliver filed the motion on the morning of jury selection—after the filing deadline passed—and Tolliver's counsel told the court that an evidentiary hearing was not required. Despite Tolliver's delayed filing, the trial court still heard arguments on the motion and reviewed the evidence before issuing an order explicitly addressing each issue presented. Therefore, Ground Two was also fully and fairly litigated by the trial court. *See Huynh v. King*, 95 F.3d 1052, 1058 (11th Cir. 1996) (citing *Caver*, 577 F.2d at 1192) (review is considered full and fair when the processes are available to the defendant "whether or not the defendant employs those processes").

As the state trial court fully and fairly considered Tolliver's Fourth Amendment claims on direct review, the claims are not cognizable on habeas review. Therefore, Tolliver is not entitled to relief on Grounds One or Two.

**B. Grounds Three, Four, Five, and Six**

In Grounds Three, Four, and Five Tolliver alleges ineffective assistance of his trial counsel related to his motion to suppress. (Doc. 4, pp. 7–11.) In Ground Six Tolliver asserts that the postconviction court erred in denying his Rule 3.850 motion because of the cumulative effect of Grounds Three, Four, and Five. (*Id.*, p. 12.) Respondent argues that Grounds Three and Four were not presented to the state court and thus are procedurally defaulted. (Doc. 9, pp. 19, 22–23.) Tolliver claims he presented each of these Grounds in his Rule 3.850 motion. (Doc. 4, pp. 7–13.)

The arguments asserted in Grounds Three, Four, Five, and Six were raised in Tolliver's Rule 3.850 motion. (Doc. 9-1, Ex. 18.) However, Tolliver only asserted Grounds Five and Six, not Grounds Three and Four, in the appeal of the denial of his Rule 3.850 motion. (*Id.*, Ex. 25.) To satisfy the presentment requirement, a federal habeas petitioner must give the state courts an opportunity to resolve their claims by presenting every issue to the state's highest court. *Mason v. Allen*, 605 F.3d 1114, 1119 (11th Cir. 2010) (citing *O'Sullivan*, 526 U.S. at 845 ("[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the [s]tate's established appellate review process.")); *see also Leonard v. Wainwright*, 601 F.2d 807, 808 (5th Cir. 1979) ("In Florida, exhaustion usually requires not only the filing of a Rule 3.850 motion, but an appeal from its denial."). Because Tolliver did not present Ground Three and Four in the appeal of his Rule 3.850 motion, he did not present each claim in each appropriate state court. Consequently, Grounds Three and Four are defaulted. In addition, Tolliver does not assert cause and prejudice or a fundamental

miscarriage of justice and thus does not allege an excuse for his failure to exhaust these claims.

Therefore, Tolliver is not entitled to relief on Grounds Three and Four; but even if these Grounds were not procedurally defaulted, they would fail on the merits. Although Grounds Five and Six were presented in the state postconviction proceedings, they similarly fail on the merits.

**1. Ground Three**

In Ground Three Tolliver asserts that his trial counsel was ineffective for failing to advise him of his defenses. (Doc. 4, p. 7.) Specifically, Tolliver argues that he could have asserted the "invited entry defense" in the television case and the "grudge motive defense" in the firearms case. (*Id.*) Tolliver asserts that he would not have entered the plea agreement if he knew he had defenses. (*Id.*)

Tolliver asserted these claims in his Rule 3.850 motion. (Doc. 9-1, Ex. 19.) The postconviction court held an evidentiary hearing during which Tolliver and his trial counsel testified. (*Id.*, Ex. 22.) Tolliver testified that his trial counsel did not discuss any defenses with him except the lien defense. (*Id.*, Ex. 23, p. 769.) Conversely, Tolliver's trial counsel testified that she discussed the invited entry and grudge motive defenses with Tolliver but determined that they were weak. (*Id.*, pp. 769–70.) The postconviction court found Tolliver's claims were refuted by trial counsel's credible testimony. (*Id.*) The postconviction court also noted trial counsel asked questions during the suppression hearing that indicated her awareness of, and put into evidence, Tolliver's claim that Smallwood had a grudge against him and may have framed him for the theft. (*Id.*) The postconviction court applied *Strickland* and denied Tolliver's motion. (*Id.*, pp. 767, 769–70.) The

appellate court did not render an opinion on this argument because Tolliver did not assert it in the appeal of the denial of his Rule 3.850 motion. (*See Id.*, Ex. 25.)

Tolliver does not put forth any support for his assertion that his trial counsel did not discuss the invited entry or grudge motive defenses with him other than his own conclusory allegations. (*See* Doc. 4, p. 7.) Consequently, Tolliver cannot rebut, by clear and convincing evidence, the presumption of correctness afforded to the trial court's factual finding that his trial counsel discussed the defenses with him. *See* 28 U.S.C. § 2254(e)(1). As Tolliver's trial counsel advised him of his defenses in both cases, her performance cannot be unreasonable for failing to do so. Further, as Tolliver's trial counsel advised him of the defenses and he still pled guilty, he cannot demonstrate that he was prejudiced. Therefore, Tolliver does not show that the postconviction court's decision involved an unreasonable application of *Strickland*, or that it was based on an unreasonable factual determination.

Tolliver is not entitled to relief on Ground Three.

**2. Ground Four**

In Ground Four Tolliver asserts that his trial counsel was ineffective for failing to call Moore as a witness at his suppression hearing and failing to "properly depose" Adams. (Doc. 4, p. 8–9.) Tolliver argues that Moore was the owner of the residence and would have testified that Adams did not have authority to consent to a search. (*Id.*, p. 9.) Tolliver further argues that if his trial counsel properly deposed Adams there would have been no inconsistencies in his testimony and the State could not impeach him at the evidentiary hearing. (*Id.*)

Tolliver asserted these claims in his Rule 3.850 motion. (Doc. 9-1, Ex. 19.) The postconviction court held an evidentiary hearing during which Moore testified that Adams did not have authority to consent to a search of the residence, but if she was present when the officers arrived, she would have consented. (*Id.*, Ex. 22, 23, p. 771.) The postconviction court found that the record refuted Tolliver's assertion that Moore's testimony would have changed the outcome of the suppression proceedings for two reasons. (*Id.*, Ex. 23, p. 771.) First, the motion to suppress already specifically alleged that Adams did not have authority to consent to the search and Adams testified to the same at the suppression hearing. (*Id.*) Second, despite Adams's lack of actual authority, the trial court still concluded that officers reasonably believed that Adams had authority to consent because whether they "were factually correct in their belief was not the standard by which the issue was properly resolved." (*Id.*) The postconviction court applied *Strickland* and concluded neither prong was satisfied because the failure to call Moore was not deficient and if Moore was called the outcome would have been the same. (*Id.*, pp. 771–72.)

Regarding Adams, the postconviction court found Tolliver's assertion that his counsel was ineffective because he did not question Adams at the deposition "as to how he felt coerced by the officers" unpersuasive. (*Id.*, p. 772.) The postconviction court noted that during Adams's deposition, trial counsel asked Adams about his interactions with officers and Adams gave "absolutely no indication in his responses to suggest that he felt coerced." (*Id.*) The postconviction court also noted that Tolliver did "not allege with any specificity how a 'proper' deposition would have alleviated the impeachment[.]" (*Id.*, p. 773.) The

postconviction court concluded that Tolliver did not "establish any deficiency of trial counsel" regarding Adams's deposition, and thus did not satisfy *Strickland's* deficiency prong. (*Id.*) The postconviction court denied Tolliver's motion. (*Id.*, pp. 770–73.) The appellate court did not render an opinion on this argument because Tolliver did not assert it in the appeal of the denial of his Rule 3.850 motion. (*Id.*, Ex. 25.)

I begin with Tolliver's assertion that his trial counsel should have called Moore at the suppression hearing. Tolliver asserts that Moore would have testified that Adams did not have authority to consent to a search. This argument fails for two reasons. First, both Tolliver and Adams testified at the suppression hearing that Adams did not have authority to consent to the search and the trial court was unpersuaded.

Second, it does not matter that Adams ultimately did not have authority to consent to a search because, as the trial and postconviction courts found, the search was authorized based on Adams's apparent authority. Apparent authority is examined from the officer's point of view and is concerned with whether it was reasonable for officers to believe a third party had the authority to consent, not whether they actually had the authority to consent. *See Illinois v. Rodriguez*, 497 U.S. 177, 188–89 (1990) (citations and quotations omitted) ("[C]onsent to enter must be judged against an objective standard: would the facts available to the officer at the moment . . . warrant a man of reasonable caution in the belief that the consenting party had authority over the premises?"); *Ziegler v. Martin Cty. Sch. Dist.*, 831 F.3d 1309, 1321–22 (11th Cir. 2016) (apparent authority is examined from the point of view of the officer); *United States v. Barber*, 777 F.3d 1303, 1305 (11th

Cir. 2015) (citing *Rodriguez*, 497 U.S. at 188–89) ("A third party has apparent authority to consent to a search if an officer could have reasonably believed the third party had authority over the area searched."); *United States v. Watkins*, 760 F.3d 1271, 1279 (11th Cir. 2014) (citing *Rodriguez*, 497 U.S. at 186–89) ("Valid consent may be granted by a person with actual or apparent authority to give permission to search."). The trial court found that it was reasonable for officers to believe Adams had authority to consent. Any argument that the officers were ultimately factually incorrect in their belief is irrelevant.

As Moore's testimony would have made no difference, Tolliver cannot show his counsel was patently unreasonable for failing to call Moore at the suppression hearing and cannot show that her absence prejudiced him. *See Peoples v. Sec'y, Dep't of Corr.*, No. 8:18-CV-1618-WFJ-AAS, 2023 WL 4947939, at *21 (M.D. Fla. Aug. 3, 2023) (citing *Conklin v. Schofield*, 366 F.3d 1191, 1204 (11th Cir. 2004); *Adams v. Wainwright*, 709 F.2d 1443, 1445 (11th Cir. 1983)) ("Which witnesses to call, and when to call them, is the epitome of a strategic decision[]" not subject to collateral attack unless it was so "patently unreasonable that no competent attorney would have chosen it.").

I now move to Tolliver's assertion that his trial counsel did not "properly depose" Adams. Tolliver does not assert any specific ways in which his trial counsel's deposition was deficient. Tolliver only asserts that if trial counsel properly deposed Adams, then Adams's deposition testimony and suppression hearing testimony would have been consistent. Absent fabricating Adams's testimony or coaching him into saying he was coerced, it is not clear what counsel could have done at Adams's deposition to ensure that his testimony would be

consistent with his future testimony at the suppression hearing. As Tolliver does not specify how his counsel ineffectively deposed Adams, Tolliver cannot show that counsel did so unreasonably or that counsel prejudiced Tolliver's defense. *See Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991) (vague, conclusory, or speculative allegations are insufficient to support claims of ineffective assistance of counsel). Therefore, Tolliver does not show that the state postconviction court's decision involved an unreasonable application of *Strickland*, or that it was based on an unreasonable factual determination.

Tolliver is not entitled to relief on Ground Four.

**3. Ground Five**

In Ground Five Tolliver asserts that his trial counsel was ineffective for failing to present valid arguments at the suppression hearing. (Doc. 4, p. 10.) Specifically, Tolliver contends that his trial counsel should have argued (1) that the officers should have known Adams could not consent to the search because he told them he did not live there and his identification card showed he lived at another address, and (2) the probable cause affidavit was based on "tipsters" that did not exist and thus constituted fraud on the court. (*Id.*, p. 11.)

Tolliver asserted these claims in his Rule 3.850 motion. (Doc. 9-1, Ex. 19.) The postconviction court held an evidentiary hearing on the motion. (*Id.*, Ex. 22.) The postconviction court found that whether Adams's "identification had a different address or not was inconsequential to . . . whether the officers, who knew [] Adams did not live in the home, reasonably believed that he was in a position to authorize their entry." (*Id.*, Ex. 23, p. 773.) The postconviction court also found that "the credibility of the information that caused the officers to knock on []

Moore's door was irrelevant to their subsequent entry into the home." (*Id.*) The postconviction court applied *Strickland* and denied Tolliver's motion concluding that the arguments were cumulative or irrelevant and thus their exclusion from the motion to suppress by counsel was not deficient. (*Id.*)

Tolliver appealed and the appellate court affirmed in a written opinion. (*Id.*, Ex. 24, 25, 28.) The appellate court similarly found that "officers validly conducted the search after relying on" Adams's free and voluntary consent. (*Id.*, Ex. 28, p. 1319.) The postconviction appellate court further found that Tolliver could not show his counsel provided ineffective assistance "by failing to develop the argument that the tip 'was based entirely on misinformation,' 'false,' or 'hearsay' because the tip was irrelevant to the search." (*Id.*, pp. 1319–20.)

I begin with the argument that officers should have known Adams did not have the authority to consent because he did not live at the residence. This argument fails for two reasons. First, contrary to Tolliver's assertion, his trial counsel asserted this argument in his motion to suppress. (*Id.*, Ex. 3, p. 16) ("After it learned that Adams was not the property owner or a resident, no member of the entry team could form a reasonable belief that Adams had common authority over the subject premises."). Trial counsel's performance cannot be unreasonable for failing to assert an argument that she did in fact assert.

Second, whether Adams lived at the residence and whether his identification card reflected another address is irrelevant as third parties can consent to a search. *See United States v. Matlock*, 415 U.S. 164, 171 (1974). Whether officers were ultimately correct in their determination that Adams had the authority as a third party to consent to the search is also irrelevant. *See Rodriguez*,

497 U.S. at 188–89. Officers knew Adams did not live at the residence, but believed he had the authority to consent anyway. The trial court found that the officer's belief was reasonable. Therefore, asserting this argument would not have made a difference and accordingly Tolliver has not shown his trial counsel's performance was unreasonable, or prejudiced his defense, by failing to raise it.

I now move to the probable cause argument. Again, this argument fails for two reasons. First, it is undisputed that the tip was false. All three officers consistently testified during the suppression hearing that they later found out the tip was false. The trial court was aware of this uncontested fact, and it did not affect its analysis when ruling on the motion to suppress.

Second, when the officers received the tip, they drove by Tolliver's residence. The officers did not observe any activity outside the residence, so they knocked on the door. Officers do not need probable cause to drive by a home or knock on the door. *United States v. Taylor*, 458 F.3d 1201, 1204 (11th Cir. 2006) (citations omitted). After the officers knocked on the door and spoke to Adams, Adams gave his consent to search the residence. It does not matter that the tip was false because the search was never justified based on the tip; the search was exempted from the warrant requirement because Adams gave his voluntary and uncoerced consent. The only evidence found in an area not covered by Adams's consent was the VonQualens' television that Sergeant Tempesta found in Tolliver's room and the trial court accordingly suppressed. Tolliver cannot show his counsel's performance in failing to raise this argument was unreasonable or prejudiced the defense because the argument is meritless.

Therefore, Tolliver does not show that the state postconviction court's decision involved an unreasonable application of *Strickland*, or that it was based on an unreasonable factual determination.

Tolliver is not entitled to relief on Ground Five.

**4. Ground Six**

In Ground Six Tolliver asserts that the state court erred in denying Grounds Three, Four, and Five because, if not individually, when taken together they demonstrate ineffective assistance of counsel. (Doc. 4, p. 12.) Respondent argues that there can be no cumulative error because counsel was not ineffective in the ways alleged in Ground Three, Four, and Five. (Doc. 9, p. 35.) Tolliver asserted this claim in his Rule 3.850 motion that the postconviction court denied after an evidentiary hearing. (Doc. 9-1, Ex. 19, 22, 23.) The postconviction court found each ground without merit, and thus found the cumulative error argument without merit. (*Id.*, Ex. 23, p. 774.) Tolliver's trial counsel cannot be ineffective for the cumulative error of Grounds Three, Four, and Five because they are meritless. Therefore, Tolliver is not entitled to relief on Ground Six.

**C. Grounds Seven, Eight, and Nine**

In Grounds Seven, Eight, and Nine Tolliver alleges ineffective assistance of his trial counsel related to his motion to suppress evidence. (Doc. 4, pp. 13–18.) Tolliver concedes that he did not raise these claims in the postconviction proceedings but argues that his failure to present the claims is excused under *Martinez* by his postconviction counsel's ineffectiveness. (*Id.*, pp. 15, 17, 18); *See Martinez v. Ryan*, 566 U.S. 1 (2012). Respondent argues that the claims are procedurally barred because they were not asserted in Tolliver's Rule 3.850

motion, and postconviction counsel cannot be ineffective for failing to raise the arguments because they are meritless. (Doc. 9, pp. 20–21, 24–28.)

Upon review of the record, it appears Ground Seven was raised in Tolliver's Rule 3.850 motion appeal, but the postconviction appellate court denied relief because the claim was not raised in the underlying Rule 3.850 motion. (Doc. 9-1, Ex. 19, 25, 28.) Grounds Eight and Nine were not raised at all. The fact that Ground Seven was raised on appeal of the denial of the Rule 3.850 motion does not mean it was properly present. To do so, a habeas petitioner must present the claim "to the state court in accordance with state procedures." *Shinn v. Ramirez*, 596 U.S. at 371. A petitioner must "give the [s]tate the opportunity to pass upon and correct alleged violations[.]" *Snowden v. Singletary*, 135 F.3d 732, 735 (11th Cir. 1998) (citations omitted). Tolliver did not assert Ground Seven in a procedurally proper manner and the appellate court consequently never reviewed the claim or ruled on its merits.[11] And Tolliver cannot now return to state court to present Ground Seven. Therefore, Ground Seven, like Grounds Eight and Nine, must be saved by an exception to avoid procedural default.

Tolliver asserts that his postconviction counsel's ineffectiveness constitutes cause and prejudice under *Martinez* and excuses his procedural default. (Docs. 4, pp. 15, 17, 18; 17, pp. 20–34.) "While constitutionally ineffective assistance of counsel has been considered cause to excuse a procedural default that occurs at a stage in the proceedings in which the defendant enjoys a Sixth Amendment right

[11] "Appellant argues for the first time on appeal[] . . . (3) that counsel was ineffective for failing to call the owner of the stolen property, the owner's employee, and the deputy who relayed the tip to local police, to testify at the suppression hearing. An issue not raised in a Florida Rule of Criminal Procedure 3.850 motion for postconviction relief may not be asserted for the first time on appeal. *Connor v. State*, 979 So. 2d 852, 866 (Fla. 2007)." (Doc. 9-1, Ex. 28, p. 1320.)

to the effective assistance of counsel, there is no constitutional right to an attorney in state post []conviction proceedings." *Henderson v. Campbell*, 353 F.3d at 892 (citing *Coleman v. Thompson*, 501 U.S. 722, 752 (1991)); 28 U.S.C. § 2254(i) ("The ineffectiveness or incompetence of counsel during Federal or State collateral post []conviction proceedings shall not be a ground for relief in a proceeding arising under [S]ection 2254."). Under *Martinez*, there is an exception to this general rule when the petitioner can show their ineffective assistance of trial counsel claim is a substantial one. *Martinez v. Ryan*, 566 U.S. at 16. To qualify as "substantial" the petitioner must demonstrate that the claim has some merit. *Id.* If the petitioner cannot make this showing, *Coleman* will bar the claim. *Id.*

Each of these Grounds are without merit and are therefore denied as procedurally defaulted.

**1. Ground Seven**

In Ground Seven Tolliver asserts that his trial counsel was ineffective for failing to present Detective King and Gaugh's testimony at the suppression hearing. (Doc. 4, pp. 13–14.) Tolliver argues that Detective King would have testified that he did not have a sworn affidavit from a credible source that would have shown the probable cause affidavit was predicated on fraud. (*Id.*, pp. 14–15.) Tolliver argues that Gaugh would have testified that he was not the credible source of information, and this would have revealed the probable cause affidavit was a fraud. (*Id.*, p. 15.) Taken together the testimony of these two witnesses would have shown there was no probable cause for the search and the evidence would have been suppressed. (*Id.*) Respondent argues that the officers already testified at the suppression hearing that the source did not actually see Tolliver unloading

firearms and consequently the trial court was already aware that the source was not credible. (Doc. 9, p. 24–25.)

As addressed in Ground Five, whether the officers had probable cause was irrelevant to the trial court's analysis. The warrantless search in this case was not excused by probable cause, but instead was excused by Adams's voluntary and uncoerced consent. Therefore, it is irrelevant that the tip was false. Further, as noted by Respondent, the trial court knew the tip was false because all three officers testified at the suppression hearing that they later found out it was false. Thus, Detective King and Gaugh's testimony would have made no difference and counsel's failure to call them was not so "patently unreasonable that no competent attorney would have chosen it." *Peoples*, 2023 WL 4947939, at *21 (quoting *Adams v. Wainwright*, 709 F.2d at 1445). Tolliver does not establish a substantial claim of ineffective assistance of trial counsel and cannot show cause and prejudice under *Martinez*. Therefore, his claim is procedurally barred.

Tolliver is not entitled to relief on Ground Seven.

**2. Ground Eight**

In Ground Eight Tolliver asserts that his trial counsel was ineffective for failing to argue in the motion to suppress that officers did not have the authority to conduct a protective sweep. (Doc. 4, p. 16.) Respondent argues that trial counsel made this argument and the trial court addressed the protective sweep, and thus trial counsel cannot be ineffective for failing to raise the argument. (Doc. 9, pp. 25–26.)

The crux of Tolliver's argument is that the officers conducted a protective sweep without meeting the requirements set out in *Buie* and his trial counsel

should have argued for suppression of the evidence on this basis. (Doc. 17, pp. 26–27); *See Maryland v. Buie*, 494 U.S. 325, 337 (1990). Tolliver also argues that the trial court misapplied *Buie* by finding that the search was authorized based solely on Adams's consent although there was no "articulated justification for the officers to perform a protective sweep[.]" (Doc. 17, p. 30.) Tolliver's reliance on *Buie* is misplaced as its holding is inapplicable to the facts of this case.

A protective sweep is a type of search that is limited in scope and narrowly confined to a cursory, visual, and quick search of the premises. *Buie*, 494 U.S. at 327. The *Buie* Court addressed "what level of justification is required by the Fourth and Fourteenth Amendments before police officers" "may conduct a warrantless protective sweep of" a premises "while effecting the arrest of a suspect in his home pursuant to an arrest warrant[.]" *Id.* at 327. Under *Buie*, protective sweeps are exempted from the warrant requirement when they are conducted "incident to an arrest and [] to protect the safety of police officers or others." *Id.* Officers must have "a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Id.* at 337.

Tolliver reads *Buie* as imposing a requirement that officers meet the protective sweep test even if they have consent. There is no support for Tolliver's contention. In *Buie* officers entered the property to affect an arrest warrant, without consent, and the suspect was barricaded in the basement. *Id.* at 328. Conversely, in the instant case, the officers were not at Tolliver's residence to arrest him via an arrest warrant, Tolliver was not arrested until after the search, and— most importantly— officers had consent to search the property. *Buie* sets the minimum requirements to conduct a protective sweep incident to arrest without a

search warrant or consent, and accordingly is inapplicable to the current case in which the sweep was conducted after obtaining consent. *See United States v. Delancy*, 502 F.3d 1297, 1306–07 (11th Cir. 2007) ("This case does not require us to decide the legality of the protective sweep, however, because, even if we assume that the sweep violated the Fourth Amendment, the evidence found during the subsequent search was admissible as the result of a voluntary consent.").

Similar to the rule in *Buie*, consent is an exception to the warrant requirement when given freely and voluntarily. *See United States v. Vazquez*, 406 F. App'x 430, 432 (11th Cir. 2010) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973)). The scope of the search permitted is determined by the consent given. *See Florida v. Jimeno*, 500 U.S. 248, 251 (1991). Tolliver admits in his reply that Adams gave consent for the protective sweep. (Doc. 17, p. 9.) In addition, the trial court, postconviction court, and postconviction appellate court found that Adams's consent authorized the search in this case. (Doc. 9-1, Ex. 5, 23, 28.) Accordingly, any references to *Buie's* holding in the motion to suppress would have made no difference in the result of the suppression proceedings because the officers had Adams's consent.

In addition, contrary to Tolliver's assertion, his trial counsel did argue that the search was not authorized. In the motion to suppress, trial counsel argued that officers did not have the authority to search the residence, and if they did, they exceeded the permissible scope of their authority by entering the garage and Tolliver's bedroom. (Doc. 9-1, Ex. 3, pp. 14–15.) Setting aside Tolliver's misapplication of *Buie*, the only difference between Ground Eight and the argument asserted by Tolliver's trial counsel in the motion to suppress is the use

of the word "sweep" rather than "search." Whether counsel referred to the officer's actions as a "protective sweep" or a "search" makes no difference, the argument is the same: the officers did not have authority to do it. If the trial court found a search was justified, then it surely would have found a protective sweep—a more limited version of a search—was also justified.

Further, Tolliver argues that "counsel should have attacked the illegality of the protective sweep specifically for the garage[,]" and "the officers conducted more of a full search, rather than a cursory inspection, by lifting the blanket in the garage to reveal the firearms underneath." (Doc. 17, pp. 17, 29–30.) Aside from the fact that trial counsel did argue that the scope of the search exceeded officer's authority, Tolliver's argument also fails to understand the trial court's ruling on his motion to suppress. The trial court found that "Adams gave voluntary and uncoerced consent to the officers to enter the residence and look for the defendant in the common areas of the residence." (Doc. 9-1, Ex. 5, pp. 264–65.) Thus, the trial court found Adams's consent authorized a visual inspection of the common areas that included the garage, essentially a protective sweep. (*Id.*, pp. 266, 269.) The scope did not permit the officers to look under the comforter in the garage for the firearms and did not permit the officers to enter Tolliver's room. (*Id.*, pp. 270–71.) This is the reason the television was excluded, and the firearms would have been excluded too if the trial court had not found that the inevitable discovery doctrine applied. Consequently, even if Tolliver's counsel used the term "sweep" instead of "search" to confine what officers legally could do at the residence, the result would have been the same.

As the argument asserted in Ground Eight is meritless, Tolliver cannot show counsel was ineffective for failing to raise it. Tolliver does not establish a substantial claim of ineffective assistance of trial counsel and cannot show cause and prejudice under *Martinez*. Therefore, his claim is procedurally barred.

Tolliver is not entitled to relief on Ground Eight.

**3. Ground Nine**

In Ground Nine Tolliver asserts that his trial counsel was ineffective for failing to argue that officers had an obligation to ask Adams if he had authority to consent to the search under the reasonable belief standard. (Doc. 4, pp. 17–18.) Respondent asserts that trial counsel argued the issue of Adams's authority to consent and thus cannot be ineffective for failing to raise the argument. (Doc. 9, pp. 26–27.)

Tolliver argues that officers were constitutionally required to inquire further before relying on Adam's consent because the basis for his authority was not clear. (Docs. 4, p. 17; 17, pp. 33–34.) Tolliver cites *Rodriguez* in support of his claim and states that after officers "learned that Adams was not the property owner or a resident, no member of the entry team could form a reasonable belief that Adams had common authority over the subject premises." (Docs. 4, p. 16; 17, p. 33.) Specifically, Tolliver states that the fact that Adams was asleep in the middle of the day at the residence was ambiguous and the address on his identification card was "sufficient to undermine the reasonableness" of the determination that he had authority to consent. (Doc. 17, p. 33.)

Under *Rodriguez*, warrantless entry is allowed based on the consent of a third party if the officers "reasonably believe [the third party] possesses common

authority over the premises," even if the officers are ultimately mistaken in their belief. *Rodriguez*, 497 U.S. at 179, 181, 186. If it would be unreasonable for the officers to believe that the third-party possesses common authority, then the officers must further inquire if the authority actually exists. *Id.* at 188–89. The duty of an officer to make further inquiry is decided on a case-by-case basis and only arises when a reasonable person would doubt the third party's authority. *Id.* The Supreme Court has not directly spoken on whether a particular set of facts requires further inquiry. *See Id.* at 189 (finding that the third party did not have the authority to consent, but remanding the case to determine whether the officer's belief that she did have authority was reasonable in the light of the Court's holding).

Regarding *Strickland's* performance prong, Tolliver's trial counsel did argue that it was unreasonable for officers to believe Adams had common authority over the residence and cited *Rodriguez*. (Doc. 9-1, Ex. 3, p. 16.) Tolliver's trial counsel's performance cannot be unreasonable for failing to raise an argument that she did in fact raise.

Regarding *Strickland's* prejudice prong, the trial court disagreed with trial counsel's argument and found that, based on the circumstances,[12] officers had no reason to think Adams did not have authority to consent. (*Id.*, Ex. 5, p. 265.) The

[12] The trial court summarized the circumstances that formed the basis of its finding: "In this case the [lessee], Ms. Moore, was not at home because she had left the residence to go to work. She left Mr. Adams at the residence. Mr. Adams had spent the night there and slept with Ms. Moore. Mr. Adams was still present at the home when the officers arrived. In fact, they woke him up. He answered the door wearing only shorts, and had to go get dressed after he answered the door. Both Mr. Adams and the defendant admitted Adams was dating Ms. Moore. Mr. Adams told the officers he was her boyfriend. This court finds from the evidence that, from an objective standard, the facts available to the officers at the time 'warranted a man of reasonable caution in the belief that the consenting party had authority over the premises.'" (Doc. 9-1, Ex. 5, p. 265.)

postconviction court further found that "[w]hether or not [] Adams's identification had a different address or not was inconsequential to the resolution of the issue of whether the officers, who knew [] Adams did not live in the home, reasonably believed that he was in a position to authorize their entry." (Doc. 9-1, Ex. 23, p. 773.) The fact that the trial court and postconviction court were presented with these arguments and rejected them refutes Tolliver's contention that asserting the arguments would have changed the outcome of the proceedings.

Tolliver does not establish a substantial claim of ineffective assistance of trial counsel and cannot show cause and prejudice under *Martinez*. Therefore, his claim is procedurally barred.

Tolliver is not entitled to relief on Ground Nine.

## VI. CERTIFICATE OF APPEALABILITY

Tolliver is not entitled to a certificate of appealability (COA). A prisoner seeking a writ of habeas corpus has no absolute entitlement to a COA. 28 U.S.C. § 2253(c)(1). The district court or circuit court must issue a COA. *Id*. To obtain a COA, Tolliver must show that reasonable jurists would debate both (1) the merits of the underlying claims and (2) the procedural issues he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Tolliver has not made the requisite showing. As Tolliver is not entitled to a COA, he is not entitled to appeal in forma pauperis.

The Court therefore **ORDERS** that Tolliver's Amended Petition for Writ of Habeas Corpus, (Doc. 4), is **DENIED**. Tolliver's Motion for Miscellaneous Relief, (Doc. 19), is **GRANTED** to the extent that this order resolves the motion. The

**CLERK** is directed to enter judgment against Tolliver and in Respondent's favor and to **CLOSE** this case.

**ORDERED** in Ocala, Florida, on January 31, 2024.

Kathryn Kimball Mizelle
United States District Judge